

# Current judicial trends pertaining to devolution and assignment of powers to local government

## Introduction

Aristotle believed that it was essential for human welfare to encourage the flourishing of incommensurable values and that local autonomy was a means of achieving this (for a discussion on judicial review of local government powers see Alder 2001 PL 721). Aristotle further believed that each of the smaller communities that together make up the *polis*, such as families, villages, etc, should have autonomy appropriate to its functions (Alder 2001 PL 721). This participatory function would facilitate the education of participants and councillors, act as a check on the central executive, result in the harnessing of local knowledge and ultimately contribute to the efficient delivery of local services. It would further prevent any single group from dominating the community.

Within the South African context, it would be unrealistic to assess whether these goals have been fully realised given the recent birth of our constitutional dispensation. However, what is clear is that the drafters of the 1996 Constitution and Parliament have clearly recognised the importance of local government and consequently created the necessary infrastructure for the promotion of local autonomy.

## Current judicial trends as gleaned from the cases

Under the Constitution, South Africa is 'one, sovereign, democratic state' (s 1 of the 1996 Constitution). The Constitution does not define the *nature* of the State, and more particularly, whether it is a unitary or a federal state. However, in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 10 BCLR 1289 (CC) para 7 the Constitutional Court pointed out that, in addition to establishing a constitutional state based on respect for human rights, the provisions of the interim Constitution make it clear that South Africa is a decentralised state with three tiers of government on national, provincial and local levels. These characteristics of the South African state were embodied in Constitutional Principle XVI read with CP XX11, XX1V and XXV1, and enacted in the 1996 Constitution.

At the functional level, the Constitution clearly demarcates concurrent national and provincial legislative competences (Sch 4) and exclusive provincial legislative competences (Sch 5). In each case, legislative competences pertaining to local government matters are included, for concurrent legislative competences, in Schedule 4, Part B, and, for exclusive legislative competences, in Schedule 5, Part B.

Judicial trends pertaining to the devolution and assignment of powers and functions to local government must be gleaned from the decisions of the South African courts since the coming into operation of the 1994 interim Constitution and the ensuing 1996 final Constitution. Judicial precedent prior to 1994 would be of little assistance, since the previous constitutional dispensation differed fundamentally from the present state of affairs. It is envisaged that the only judicial precedents which could have any relevance for the new dispensation, would be court decisions on the nature and extent of ancillary powers of provincial legislatures and local government.

It must be immediately stated that, since 1994, there were no court cases which dealt explicitly with matters of devolution and assignment of powers to local governments. Having said this, it must also be confirmed that there were some very important judicial pronouncements on matters pertaining to local government which clearly indicate certain trends the courts will no doubt follow should some definite cases on such devolution and assignment occur (see the observations by Sachs J in *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) at 297 para 101). An examination of these trends will not concentrate primarily on the specific legal issues involved, but rather on the underlying and abiding attitude of the courts *vis-à-vis* local government. Four trends can be discerned:

(i) *A clear acknowledgment of the fact that local government is not only a cornerstone in our system of government, but also constitutes an important vehicle to bring development to the people*

In all our cases since 1994, whether they deal with the restructuring of local government, provincial and national powers *vis-a-vis* local government, etc, there is a golden thread, namely, an acknowledgement and appreciation of the eminent place local governments occupy in the structure of government, especially as regards the delivery of services and development. For example, in *Executive Council of the Western Cape v Minister for the Provincial Affairs and Constitutional Development of the RSA* 1999 12 BCLR 1360 (CC) 1377 para 44, the Constitutional Court stated:

Local government is the closest government can get to the people. That is where the delivery must be seen to be taking place. The challenge facing the government at local level is profound.

In the *Walker* case the Constitutional Court reaffirmed:

Local government is as important a tier of public administration as any.

In a later decision, the Constitutional Court reiterated:

The transformation of South Africa from a society deeply rooted in discrimination and disparity to a constitutional democracy founded upon freedom, dignity and equality posed, and continues to pose, particularly profound challenges at local level. It is here that the acute imbalances in personal wealth, physical infrastructure and the provision of services were and often are most patent.

Further in the same decision, it is stated:

We are all in agreement that it is the legitimate aim and function of local government to eliminate disparities and disadvantages that are the consequences of the policies of the past and to ensure, as rapidly as possible, the upgrading of services in the previously disadvantaged areas that equal services will be provided to all residents. (*Fedsure Life Assurance Ltd v Greater Johannesburg Metropolitan Council* 1998 12 1458 (CC) 1464 para 2 and 1488 para 80)

The reason why it is important to stress this underlying attitude of the courts *vis-à-vis* local government, is obvious. It gives evidence of the fact that should cases on local government powers and functions come before the court, there is every reason to believe that the courts will adopt a purposive approach and, instead of interpreting these powers and functions narrowly, will adopt an interpretation which will ensure that the goals of social security, economic advancement, etc are well served. Stated shortly, there is every reason to believe that the courts, in accordance with their manifested approach, will endeavour to give as much scope as possible to local government powers and functions.

(ii) *In judging the restructuring and evolution of local governments, the courts adopted a flexible and pragmatic approach*

Most of the cases since 1994 which dealt with local government matters, concerned the scope and application of the Local Government Transition Act, 1994, and the Local Government Municipal Structures Act 117 of 1998. In all these cases, a clear trend can be discerned, namely a profound understanding of the difficulties involved in transforming a deeply divided segment of government into a coherent governmental system, and also the need to establish local government structures which will be of benefit to the whole country and its people. In essence, what these Acts achieved, was to lay the foundations for representative democracy in the local sphere of government in the whole of the country.

The courts, instead of adopting a narrow and more legalistic approach, constantly interpreted these Acts in such a manner that the process of restructuring local government and the installation of new local government structures are not frustrated. Instead a flexible and programmatic approach was adopted. In *Uitvoerende Raad van die Wes-Kaapse Wetgewer v President van die Republiek van*

*Suid-Afrika* 1995 9 BCLR 1251 (C) 1253, the court acknowledged the fact that orderly transition to restructured local government was of paramount importance to lead to trouble-free local elections. In recognition of the fact that the restructuring of local government is currently in a state of *continous metamorphosis*, court cases decided after 1995 have reiterated that the process of restructuring of urban existence will no doubt be an extremely difficult and infinitely challenging one given the existence of racially based unrepresented local government bodies and disparities in wealth and available resources in the rural and urban areas (see *ANC v Minister of Local Government and Housing* 1997 3 BCLR 295 (N) 301B-C; *ANC v Minister of Local Government and Housing, Kwazulu-Natal* 1998 4 BCLR (CC) 403 para 4; *Fedsure Life Assurance Ltd v Greater JHB Transitional Metropolitan Council* 1998 12 1458 (CC) 1501 para 125; and *Member of the Executive Council for Local Government and Development Planning, Western Cape v Paarl Poultry Enterprise CC t/a Rosendal Poultry Farm* 2002 3 SA 1 15 para 22).

The reason why it is necessary to point to this trend in judicial pronouncements on local government, is the fact that the courts, in adjudicating the devolution and the assignment of powers and functions to local government, will no doubt adopt a flexible, pragmatic approach and judge such devolution according to particular circumstances and needs. In plain language, it is clear from this trend in judicial reasoning that the courts, and especially the Constitutional Court, are set on the idea of supporting the establishment of viable and successful local government.

(iii) *Local government under the new Constitution is afforded greater autonomy at the expense of both Parliament and the provincial legislatures*

In the *Certification Judgment* 1996 10 BCLR 1253 (CC), the Constitutional Court pointed out that the source of national and provincial legislative powers in relation to local government is to be found in section 55. The Court, at the same time, was convinced that that section places a substantial constraint upon the general provisions of the Constitution regarding the legislative authority of Parliament and the legislative authority of the provinces (see s 43(b) and s 104(1)(b) of the Constitution in this regard).

In a subsequent decision, the court reiterated this view and stressed the fact that powers of the municipalities must be respected by the national and provincial governments which may not use their powers to ‘compromise or impede a municipality’s ability or right to exercise its powers and or perform its functions’ (see *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the Republic of South Africa; Executive Council of KwaZulu-Natal v President of the Republic of South Africa* 1999 12 BCLR 1360 (CC) 1373 para 29 and s 151(4) of the Constitution).

In addition, there is a duty on national and provincial governments by ‘legislative and other means’ to support and strengthen the capacity of the

municipalities to manage their own affairs. Furthermore, there is an obligation under section 41(1)(g) of the Constitution on all spheres of government to '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'. Section 155(6) of the Constitution enjoins provincial governments to provide for the monitoring and support of local governments in their provinces and to promote the development of local government capacities to enable municipalities to perform their functions and manage their own affairs.

Judicial trends in recognising an increased level of autonomy of local governments *vis-à-vis* the national and provincial governments, although closely related to and indeed a part of the other trends which are indicated in this paper, has to be emphasised. Should a controversy arise between national and/or provincial measures on the one side and local government measures on the other side, it is not to say that the courts will automatically opt for the local government measures. The court's decision will ultimately depend on the provisions of the Constitution. It does mean, however, that in arriving at a solution, the courts will certainly endeavour to give as much cognisance to local government autonomy as possible.

#### (iv) *Recognition of local government autonomy*

It is reasonable to say that the most significant trend in judicial findings in relation to local government powers and functions over the past years, concerns the recognition of local government autonomy. All the other trends indicated above, are intrinsically connected and derive their inspiration from this dominating trend.

In *Fedsure supra* 1477 para 38, the Constitutional Court ruled:

The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to the administrators appointed by the central government. This is no longer the position. Local governments have a place in the constitutional order, have to be established by a competent authority, and are entitled to certain powers, including the powers to make by-laws and impose rates.

In *Uthukela District Municipality v President of the RSA* 2002 5 BCLR 479 (N) 485G-H and 487D-H the court pronounced:

It will be noted that the expression 'local sphere of government' used in section 239 echoes use of a similar term introduced in section 40(1) and also referred in section 151(1) of the Constitution. This terminology is suggestive of an equality as between the national, provincial and local governmental structures, as opposed to the more traditional hierarchical levels of power and importance.

After an examination of a number of constitutional provisions, for instance, section 156, 230 and 227(3), the Court concluded that the 'clear intention is that

local government structures should not be penalised for showing industry and initiative in revenue gathering'. (See *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development* 1999 11 BCLR 1229 (C) at 1255 para 115 for a discussion of the conventional approach adopted by a court.)

Recognition of local government autonomy within a defined and constitutionally protected order, has important consequences. First and foremost, it means that the very existence of local governments with their powers and functions as enumerated in Schedules 4 and 5, can only be changed by constitutional amendment. The effect of the Constitution, in constituting a higher legal order within which all organs of state find their predetermined places, has the effect of breaking down old hierarchies and to position national, provincial and local governments on a horizontal plane under the overall supremacy of the Constitution. Seen in this light, the wording of section 40(1) makes eminent sense: 'In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated'.

Local government autonomy as entrenched in the Constitution and confirmed in the above judicial pronouncements, has important practical consequences:

- First, it makes the mechanisms and prescriptions of the Constitution as regards co-operative government of the utmost importance (ch 3). The importance of chapter 3 is self-evident, since in their constitutional position of equal status, spheres of government have the obligation to consult each other and to co-operate.
- Second, local authority autonomy explains why local governments in terms of section 156(5) of the Constitution, has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. By this section, constitutional authorisation is given to local governments to exercise ancillary powers to perform their functions. Ancillary powers emanate from the fact that local government powers, as contained in the Constitution, constitute original powers, and in accordance with a long line of court decisions in the past, these original power allow the repository to assume all those additional powers which are necessary and incidental to the exercise of such powers.
- Third, local government autonomy also explains the embodiment of the principle of subsidiarity contained in section 156(4) of the Constitution which reads:

The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if –

  - (a) that matter would most effectively be administered locally, and
  - (b) the municipality has the capacity to administer it.

## Conclusion

Judicial trends during the recent years manifest a clear understanding on the

part of the courts of the important role local government fulfill not only in establishing a democratic foundation for the whole country, but also in performing most important developmental tasks.

Courts are not law-makers. they have the task to interpret and apply the laws of the country. On the other hand, it has long been recognised in legal and jurisprudential theory that the courts do not play an entirely passive role when interpreting and applying the law. Their decisions often give direction and new meaning to existing legal norms and principles. More specifically, under section 39(2) of the 1996 Constitution, every court, tribunal or forum, when interpreting any legislation and when developing the common law or customary law, must promote the spirit, purport and objects of the Bill of Rights.

Courts, on their own, cannot assign additional functions and powers to local authorities. Should it become necessary to expand matters pertaining to local governments, Parliament, through constitutional amendment, will have to change Schedule 4 and 5. On the other hand, given the judicial trends explained above, it is reasonable to presume that the courts, in deciding on the scope and nature of ancillary powers and functions of local government, will not adopt a narrow or literal approach, but judge these powers and functions in the light of the developmental needs of the communities which are served by these local governments. This does not mean, of course, that in adopting such a lenient, more purposive approach in the case of local government matters, the courts will ignore or go against the express provisions of the Constitution or other laws.

*Simla Budhu*  
*University of South Africa*  
*Marinus Wiechers*  
*Emeritus professor, University of South Africa*