

WHO MAKES THE LAWS?

DIVIDING LEGISLATIVE POWER BETWEEN PROVINCIAL AND LOCAL GOVERNMENT

As from the day of the forthcoming local government elections, local government's legislative and executive powers are going to be squarely based on the Constitution. Section 156 of the Constitution affords local government authority over the matters listed in Schedule 4B and Schedule 5B to the Constitution as well as over any other matter assigned to it by national or provincial legislation. Further, Schedule 4A or Schedule 5A matters can be assigned to a particular municipality by agreement between that municipality and national or provincial government. In sum, local government derives legislative powers from -

- the competencies, listed in Schedule 4B and Schedule 5B; and
- the assignment of the administration of any other matter to municipalities.

An issue, that increasingly plagues the minds of many lawyers and local government practitioners deals with the division of legislative and executive power of local government on Schedule 4B and 5B matters, relative to the other two spheres of government. This problem has two equally important angles to it, one of which will be touched on in this article.

Powers of other spheres

Firstly, provincial and national government also have regulatory and intervention powers related to Schedule 4B and 5B matters (on the basis of ss 155 and 44 of the Constitution). This discussion about the powers of other spheres on the local government matters of Schedule 4B and 5B will not be discussed in this article.

Overlap with other functional areas

Secondly, there is overlap between certain matters in Part B of the Schedules, which belong to local government and matters listed in Part A of the Schedules, which belong to national and provincial government. For example, Schedule 5A allocates the authority over 'Provincial Roads' and 'Provincial traffic' to provinces. How do these competencies relate to the local government competencies of 'Municipal Roads' and 'Traffic and parking' of Schedule 5B respectively? Similarly, Schedule 4A accords provincial

and national government concurrent powers over 'Public transport' while Schedule 4B lists 'Municipal public transport' as a local government function. The question that arises is how to distinguish between these competencies and how to determine the cut-off points between provincial, national and local competencies on the same functional areas? This article highlights this debate with respect to these three examples and proposes possible solutions to the problem.

Municipal roads / Provincial roads

Firstly, the functional area 'roads' in general seems to deal with the functions and powers, that are normally related to the management of roads, including -

- making, constructing, reconstructing, altering and maintaining roads;
- opening, closing or deviating roads;
- entrance and exit to roads;
- law enforcement relating to roads;
- signposts, warning signs, resting places, fencing;
- claiming damages when a road has been damaged;
- stormwater drainage, distance indicators, signposts, warning signs, resting/parking places etc.

Presently, the division of powers and functions between provincial and local government with regard to roads is mainly regulated in provincial ordinances. These ordinances stand to be repealed come the final phase of local government transformation. In most ordinances, the width of the road is key to the classification of a public road. However, its appearance is not the only relevant consideration. Public roads have been classified in a particular way on the basis of their expected use (eg. linkage between growth points) together with sufficient documentation with regard to

the (future) development of the relevant areas. The picture that emerges from these ordinances is one whereby the discretion of provincial government plays an important role in the division of powers and functions between local government and provincial government with regard to roads. Further, a myriad of agencies and delegations exist, whereby local authorities are afforded powers over public roads or are assisted by provincial government in the management of public streets.

New dispensation

Key to the new local government dispensation is the principle of 'wall-to-wall' local government. Consequently, every road in the country will fall within a municipal area. Key to the new dispensation is also the constitutionally protected status of local government. Therefore, the criteria used by provincial governments for the classification of roads as provincial or local will have to be in line with the distinction made in the Constitution between 'Provincial roads' and 'Municipal roads'. The criteria used at present deal mainly with the width of the road. The usage, purpose, status, appearance etc. are criteria that usually

flow from the width of the road. Instructive are also the criteria that are used in the Local Government Transition Act (LGTA) to divide the powers between metropolitan councils and metropolitan local councils with regard to roads. In terms of the LGTA (Item 7 of Schedule 2), metropolitan councils are responsible for '[T]he construction and maintenance of arterial roads that transcend more than one metropolitan local council boundary, including -

- roads with significant traffic volumes;
- roads forming major public transport corridors;
- roads used extensively by traffic from outside the metropolitan local council within which such roads are situated;
- roads in respect of which access and egress have been limited in accordance with a law;

...how to determine the cut-off points between provincial, national and local competencies on the same functional areas?

- roads of a major nature linking significant urban growth points or potential growth points; (...) but excluding national roads, toll roads, provincial freeways and provincial arterial roads.’

Provincial legislation can provide for a classification procedure, provided that it accords with the new dispensation. The power for provinces to classify roads exists in terms of the provincial power to regulate on Schedule 5B matters. It has to be borne in mind that a provincial classification is certainly not the beginning and the end of the division of powers. The classification would have to reflect the new constitutional scheme of division of powers and functions and can be challenged if it is in conflict with the Constitution.

Distinguishing ‘Provincial roads’ from ‘Municipal roads’

What criteria can be applied to distinguish a ‘Provincial road’ from a ‘Municipal road’? Firstly, the word ‘municipal’ must be understood to apply to all Categories of municipalities. In a metropolitan area, the ‘competitors’ are the province and the metropolitan municipality (Category A). In areas outside the metros, the ‘competitors’ are the province on the one side and the district (Category C) and local (Category B) municipalities on the other side. A further division is then made between district and local municipalities.

A municipal competency deals with intra-municipal activities and concerns only. It excludes activities with an ‘extra-municipal’ dimension. An example of an ‘extra-municipal’ dimension is a road that links two separate municipalities. The primary criteria is the purpose of the road. If the purpose of the road is to link two or more municipalities, there is an extra-municipal dimension to the road and it must be regarded as provincial. Within the ‘purpose’ criteria, various aspects are important. For example, the usage of the road is important: if the road primarily serves the inhabitants of one municipality it is a ‘municipal road’. Roads that begin and end within a municipality are ‘municipal roads’. Logically, the scope of ‘municipal roads’ has increased, following the demarcation of municipal boundaries by the Municipal Demarcation Board. The width of the road – the main benchmark to classify roads in terms of current legislation – can be useful, but is not decisive; a road with a ‘lesser’ appearance can still have critical linkage and usage functions

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between municipalities. And a wide road that has no extra-municipal dimension or purpose is still a ‘municipal road’.

In sum, the distinction that is proposed is the following: ‘municipal roads’ are roads that have a ‘municipal’ purpose in that they primarily serve the inhabitants of the municipality and do not have a linkage function between municipalities. Conversely, ‘provincial roads’ are roads that have an ‘extra-municipal dimension’ in that they form major linkages between two or more municipalities.

Public transport / Municipal public transport

The term ‘public transport’ seems to be limited to public transport over land. Public transport over water is covered by another Schedule 4B competency, namely “Pontoons, ferries, jetties, piers and harbours...”. Public transport in the air is regulated by national and international aviation regulations. Presently, railway

services are conducted in terms of national legislation. However, in terms of the new dispensation, provincial and municipal governments can regulate on certain types of railway services, subject to ‘supervisory’ powers of national government (in terms of section 44(2)). For example, certain forms of ‘light commuter rail’ such as subways, trams and other intra-municipal railway services can be regulated at local government level. In conclusion, these two competencies therefore seem to refer to

public transport over roads and rails only.

Current distinction

In terms of the current legislative dispensation on public transport, the thrust of which is regulated in the Road Transportation Act 74 of 1977 and the Urban Transport Act 78 of 1977, there does not seem to be a clear distinction between provincial and municipal public transport matters. No specific legislative powers with regard to public transport matters exist for local government outside the metropolitan areas, where metropolitan municipalities have certain powers and functions under the LGTA and the Urban Transport Act. However, these powers are limited in that they are subject to provincial approval or intervention.

New dispensation

In the new dispensation, a distinction will have to be made between provincial and municipal transport. The current legislative framework for transport matters encroaches on the competency of local government to deal with municipal transport matters. Apart from the fact that it only applies to very limited situations, the powers given in terms of the Urban Transport Act are not ‘real powers’. They do not accord with the status of local government in the Constitution and its legislative and executive authority.

Distinguishing ‘Provincial public transport’ from ‘Municipal public transport’

It is submitted that the same principle as above should guide the distinction between the provincial and municipal competency regarding public transport. A municipal competency deals with intra-municipal activities and concerns only. It excludes those activities with an extra-municipal dimension. ‘Municipal public transport’ deals with public transport over roads which commence within the boundary of a municipal area and terminate within the boundary of the same municipal area. An example of that is public transport provided by city buses. Public transport that transcends municipal boundaries does not deal with intra-municipal activities and requires to be addressed on provincial or national level. However, this does not mean that local governments have no authority whatsoever on public transport that transcends their boundary, but starts or ends within their boundaries. An example is the establishment of taxi ranks and bus ranks and the issuing of permits and making of regulations therefor. Taxi and bus ranks, whether for intra-municipal or long distance purpose could in any event be regulated on the basis of the municipal competency to deal with traffic matters (Schedule 5B).

‘Provincial ... traffic’ / ‘Traffic and parking’

In the discussion about these two overlapping competencies in Schedule 5A and 5B respectively, a third competency comes into play. Schedule 4A also mentions ‘Road traffic regulation’ as an area over which provincial and national government have concurrent authority. How should one interpret the fact that ‘Provincial...traffic’ and ‘Traffic and parking’ appear in Schedule 5, whereas Schedule 4 already mentions ‘Road traffic

regulation'? The two sets of competencies seem to deal with different matters. 'Road traffic regulation' deals with the making of rules regarding traffic on public roads. It deals with the rules of the road, general rules for speed limits, rules regarding accidents, accident reporting, reckless driving, driving under influence, legal procedures, drivers' licences etc.

A possible interpretation of the fact that the two competencies on traffic in Schedule 5 do not contain the word 'regulation' is that they do not deal with the making of rules on road traffic as such. In other words, they do not deal with the regulation of the substance of road traffic, which is, amongst other things, the issues mentioned above. In determining what the competencies on traffic in Schedule 5 do entail, the LGTA is instructive (Schedules 2 and 2A of the LGTA). In terms of the LGTA, metropolitan councils have authority over the functional area 'Traffic Matters' which is further described as:

- The co-ordination and determination of policy for traffic matters which affect more than one metropolitan council.
- The provision and control of road traffic engineering which affects more than one metropolitan local council.
- Traffic law enforcement, if so requested by the metropolitan local council concerned.

The metropolitan local councils' authority over 'Traffic Matters' contains the following:

- Traffic law enforcement.
- The testing of vehicles and drivers.
- Matters pertaining to road safety.

It is submitted that 'Provincial...traffic' in Schedule 5A and 'Traffic...' in 5B deal with issues that are related to facilitation, implementation and enforcement of the road traffic rules (that are based on the Schedule 4A competency). The two competencies include matters such as:

- determination of policy on traffic matters, such as the promotion of road safety and combatting road congestion;
- road traffic engineering;
- traffic law enforcement; and
- vehicle and driver testing.

Parking

One specific aspect of road traffic, namely parking, has been allocated to local government in Schedule 5B. That means that local government has the authority to make rules with regard to parking in its area of jurisdiction. These rules can deal with matters such as:

- the determination of parking areas, loading zones etc;

- rules regarding parking areas, loading zones etc;
- the determination and collection of parking fees; and
- rules regarding parking meters / parking attendants.

Distinguishing 'Provincial... traffic' from 'Traffic...'

What is then the content of the local government competency 'Traffic..' as opposed to the provincial competency 'Provincial...traffic'? As discussed earlier, both competencies relate to the facilitation, implementation and enforcement of the road traffic rules and policies, that exist on the basis of Schedule 4A. Many of the general rules, alluded to in connection with the other functional areas above apply. Municipal traffic deals with traffic matters which are most appropriately dealt with on a municipal level. In other words, with traffic matters that are intra-municipal and do not require regulation on provincial level. Examples are:

- rules regarding pedestrians;
- rules regarding use of sidewalks;
- general road safety rules (road behaviour, road obstruction);
- rules on the use of roads for purposes other than traffic;
- rules regarding animals / uncommon vehicles / vehicles drawn by animals on the road; and
- rules regarding processions (regulations, permits).

Conclusion

A major challenge lies ahead for local government practitioners to start defining the legislative roles of provincial and local government. The LGTA, coupled with the transitional arrangement in the Constitution and assisted by an 'understanding' judiciary, shields the current legislative dispensation from attacks based on its inconsistency with the institutional integrity of local government. However, come the election date, local government's legislative powers will be squarely based on the Constitution and more clarity will be needed on the issues addressed above.

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