

Intrusion into the autonomy of South African local government: Advancing the minority judgment in the *Merafong City* case

Oliver Fuo

LLM LLD

Associate Professor: Faculty of Law, North West University

OPSOMMING

Ingrype in die autonomie van Suid-Afrikaanse plaaslike regerings: Die aanvoer van die minderheidsbeslissing in die *Merafong City*-saak

Teen die agtergrond van die aard en wese van die Suid-Afrikaanse plaaslike regering wat na 1996 tot stand gekom het, is die saak van *Merafong City Local Municipality v AngloGold Ashanti Ltd* [2016] ZACC 35 een van die mees onlangse sake betreffende die inbreukmakende geaardheid van nasionale regulering van munisipale bevoegdhede. Een van die belangrikste aangeleenthede in hierdie saak was die vraag tot watter mate appèl na 'n Minister moontlik is wanneer 'n munisipaliteit 'n besluit neem rondom heffings vir die verskaffing van waterdienste (vir huishoudelike en industriële gebruik). Hierdie artikel handel met die minderheidsuitspraak van Regter Jafta in die Grondwetlike Hof en ondersteun die regter se interpretasie wat stel dat dit ongrondwetlik is vir die nasionale regering om as appèllogaam in te tree in soverre dit 'n munisipaliteit se uitoefening van 'n oorspronklike bevoegdheid aangaan. Die artikel maak spesifiek melding van die moontlike wysiging van artikel 8 van die Wet op Waterdienste 108 van 1997 ten einde die genoemde ongrondwetlikheid aan te spreek.

1 Introduction

The post-apartheid constitutional dispensation heralded fundamental institutional reforms that transformed the structures of government in South Africa. The Constitution of the Republic of South Africa, 1996 established three spheres of government – national, provincial and local spheres¹ – with far-reaching changes at the local government level.² The changes at the local sphere are clearly evident from *inter alia* the

- 1 See s 40(1) of the Constitution of the Republic of South Africa, 1996 outlining the government's setup.
- 2 For details on the nature of local government reform in post-apartheid South Africa, see *City of Cape Town v Robertson* 2005 2 SA 323 (CC) pars 58-60; Fuo *Local Government's Role in the Pursuit of the Transformative Constitutional Mandate of Social Justice in South Africa* (LLD thesis NWU 2014) 78-177; Steytler & De Visser *Local Government Law of South Africa* (2014) 1-3 to 1-31 and 5-5 to 5-14.

enhanced status and autonomy of local government as well as its expanded developmental mandate.³

Unlike in the past, local government now has a developmental mandate that transcends service delivery.⁴ Local government must: provide democratic and accountable government; promote public consultation in local government matters; promote socio-economic development; promote a safe and healthy environment; provide services to communities in a sustainable manner; and contribute, together with the other spheres of government, towards realising a variety of rights entrenched in the Bill of Rights.⁵ Nevertheless, the provision of municipal services such as water, electricity and sanitation remains the most important function of local government and the central mandate of municipalities is to develop service delivery capacity in order to meet the basic needs of all inhabitants of South Africa.⁶

Apart from its general constitutional protection, the status and autonomy of local government is enhanced by a number of fundamental characteristics etched in the Constitution. Firstly, the local sphere of government, constituted by about 257 municipalities of different categories⁷ that cover the entire geographic space of the country is recognised as a distinct sphere of government and its leaders are democratically elected for a specified period.⁸ Secondly, municipalities now have self-governing legislative and executive authority vested in democratically elected municipal councils.⁹ Municipalities have the right to govern, on their own initiative, the local government affairs of their

3 See ss 40, 41 and ch 7 of the Constitution; *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 pars 35-38; *Cape Town v Robertson supra* n 2 at *Cape Town v Robertson supra* n 2 at pars 58-60; Steytler & De Visser *supra* n 3 at 1-26 to 1-27; Fuo (LLD thesis) *supra* n 3 at 109-117.

4 Fuo (LLD thesis) *supra* n 3 at 82-84; Steytler & De Visser *supra* n 3 at 1-26 to 1-27.

5 This flows from a joint reading of ss 152 and 153 of the Constitution and the obligations emanating from the Bill of Rights. See Fuo (LLD thesis) *supra* n 3 at 109-117.

6 *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC) par 34.

7 The Local Government: Municipal Structures Act 117 of 1998 creates three categories of municipalities – Category A (metropolitan municipalities), Category B (local municipalities) and Category C (district municipalities). District and local municipalities share powers and functions and s 84 of the Structures Act outlines the division of powers and functions between them. On the contrary, metropolitan municipalities have exclusive executive and legislative powers and functions over local government matters. See Du Plessis & Nel 'An Introduction' in Du Plessis (ed) *Environmental Law and Local Government Law in South Africa* (2015) 25.

8 See s 40(1) of the Constitution; ss 22-24 of the Local Government: Municipal Structures Act 117 of 1998; De Visser *Developmental Local Government: A Case Study* (2005) 87; Du Plessis & Nel *supra* n 8 at 24-25.

9 See ss 151(2)-(3) of the Constitution; Du Plessis & Nel *supra* n 8 at 24; *Cape Town v Robertson supra* n 2 at pars 55-60

communities.¹⁰ Their original powers and functions outlined in the Constitution include the powers to administer the local government matters listed in Schedules 4B and 5B as well as the powers to impose property rates and surcharges for municipal services.¹¹

The elevated status and autonomy of post-apartheid local government has been strongly asserted by the Constitutional Court in several cases. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,¹² the Court held that the constitutional status of local government is materially different to what it was when parliament was supreme and that municipalities are constitutionally entitled to certain powers, including the powers to make by-laws and impose rates.¹³ In the *City of Cape Town v Robertson*, the Court castigated the view that in the absence of empowering legislation, a municipality has no power to act.¹⁴ It held that such an approach to the powers, duties and status of local government was a relic of the pre-1994 order and was no longer permissible in the new democratic constitutional order. The Court indicated that the Constitution has moved away from the past where municipalities were creatures of statute and enjoyed only delegated or subordinate legislative powers derived exclusively from ordinances or acts of parliament – where municipal regulations or by-laws that went beyond powers conferred expressly or impliedly by superior legislation were *ultra vires* and invalid.¹⁵ In the new constitutional dispensation, local government can no longer be considered as ‘mere local authorities entrusted to provincial councils to administer’.¹⁶

Despite its elevated status, local government’s autonomy is not absolute. All three spheres of government are interrelated and interdependent. Their ‘interdependence’ signifies the supervision of municipalities by other spheres of government. National and provincial

10 See s 151(3) of the Constitution; s 4(1)(a)-(b) of the Local Government: Municipal Systems Act 32 of 2000.

11 See ss 229(1)(a), 156(1)(a) and (2) of the Constitution, together with Schedules 4B and 5B. See Du Plessis & Nel *supra* n 8 at 24. The above provisions are not the only source of local government’s powers and functions. See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 BCLR 150 (CC) pars 21-29; Fuo ‘Role of Courts in Interpreting Local Government’s Environmental Powers in South Africa’ 2015 *Commonwealth Journal of Local Governance (CJLG)* 20-26.

12 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458.

13 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* at par 38.

14 *Cape Town v Robertson supra* n 2 at para 53.

15 See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* at pars 35-38; *Cape Town v Robertson supra* n 2 at pars 54-60.

16 See *Cape Town v Robertson supra* n 2 at pars 53-54.

governments are authorised to supervise the extent to which municipalities execute their powers and functions.¹⁷ On the other hand, their 'interrelated' nature talks to the duty imposed on all spheres of government to co-operate with one another in order to promote the welfare objectives of the entire country.¹⁸ The exercise of municipal powers and functions is subject to the Constitution and generally to national and provincial legislation that are constitutionally compliant.¹⁹ However, national and provincial government are barred from compromising or impeding the ability or right of municipalities to exercise their powers or perform their functions²⁰ and the three spheres of government must work together in equal partnership within the parameters of the principles of cooperative government.²¹

Notwithstanding the constitutional protection, the exact reach of local government's newly established self-governing powers is often misconceived, doubted and contested by functionaries in other spheres of government, business and members of the public, for example. *Merafong City Local Municipality v AngloGold Ashanti Ltd*²² is the most recent case illustrating this trend. This case revolved on two issues: whether it was constitutionally permissible for a municipal council decision setting surcharges for water services provision (for domestic and industrial use) to be subjected to appeal to a Minister; and secondly, whether the remedy of a collateral challenge was available to an organ of state seeking to challenge an administrative decision adopted by a public authority. This article discusses the minority judgment of the Constitutional Court written by justice Jafta, in relation to the first issue above. In line with the minority judgment, this article argues that it is unconstitutional to subject the powers of a municipality to impose surcharges on water services to the executive in another sphere of government because this unreasonably intrudes on and usurps the right and ability of the local sphere of government to fully exercise its original (and assigned legislative) powers and functions. The overall intention is to further advance the thinking in the minority judgment with a view to developing suggestions to cure the legal defect in section 8 of the WSA.

17 See ss 100 and 139 of the Constitution; *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR CC par 56; Steytler & De Visser *supra* n 3 at 15-5 to 15-57.

18 De Visser 'Developmental Local Government in South Africa: Institutional Fault Lines' 2009 *Commonwealth Journal of Local Governance (CJLG)* 13-14; Fuo (LLD thesis) *supra* n 3 at 88-89.

19 See s 151(3) of the Constitution; *Cape Town v Robertson supra* n 2 at par 60; Fuo 2015 *CJLG* 20-23.

20 See 151(4) of the Constitution; Steytler & De Visser *supra* n 3 at 1-26 to 1-27.

21 See s 41 of the Constitution; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (LLD thesis NWU 2008) 431; Du Plessis 'Legal Mechanism for Cooperative Governance in South Africa: Successes and Failures' 2008 *SAPL* 87-110.

22 2016 ZACC 35.

In order to achieve the above objective, the discussion that follows is structured into three main parts. To provide a contextual background for discussing the minority judgment, the first part elaborates on the nature of the mandate of municipalities to provide water services with more emphasis on industrial water and the concomitant power to impose surcharges for the provision of water services. The second part provides an overview of the facts, decision and *ratio decidendi* of the minority judgment in the *Merafong City* case. The last part analyses the minority judgment and offers some suggestions on the way forward.

2 Water Services Mandate and Power to Impose Surcharges

2 1 The Mandate of Municipalities to Provide Potable and Industrial Water

Municipalities have original constitutional powers and are directly responsible for the provision of water services, limited to potable water supply.²³ In terms of section 156(1)(a) of the Constitution, a municipality has executive authority in respect of, and has the right to administer, the local government matters listed in Schedules 4B and 5B. The provision of water services, limited to potable water supply systems appears in Schedule 4B. In terms of section 156(2) of the Constitution, a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer. A joint reading of the above subsections shows that municipalities have executive and legislative authority over the provision of water services, limited to potable water supply systems. They can adopt and implement by-laws to the extent that it is necessary for the effective administration of water services provision. This is consistent with the right of municipalities to self-govern the local government affairs of their communities.²⁴

However, national and provincial government have powers to regulate local government's provision of water services. This flows from the provisions of section 155(6)(a) and (7) of the Constitution. Section 155(6)(a) of the Constitution compels provincial governments to monitor and support municipalities through legislative and other measures. On

23 S 156(1)(a) read with Schedule 4B of the Constitution. See Steytler & De Visser *supra* n 3 at 5-5. For details on the substantive obligation of municipalities to provide access to water to communities, see regs 3, 4 and 5 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water in GN R509 of GG 22355 of 2001-06-08; *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC). The obligation of municipalities stems from s 27(1)(b) and 27(2) of the Constitution read together with ss 3 and 11 of the Water Services Act 108 of 1997 (WSA).

24 See s 151(2) and (3) of the Constitution; Steytler & De Visser 'Local Government' in Woolman & Bishop (eds) *Constitutional Law of South Africa* (2014) 22-49.

the other hand, section 155(7) of the Constitution gives national and provincial governments legislative and executive authority to regulate the exercise of the executive powers of municipalities in order to ensure that municipalities effectively perform their functions in respect of matters listed in Schedules 4B and 5B of the Constitution. In addition, section 151(3) of the Constitution makes the exercise of municipal executive and legislative powers regarding local government matters subject to national and provincial legislation. However, section 151(4) of the Constitution dictates that the powers of national and provincial governments must be exercised in a manner that does not ‘compromise or impede a municipality’s ability or right to exercise its powers or perform its functions’.

There are several implications that flow from the constitutional protection of local government’s original powers over water services provision as defined in Schedule 4B and the authority accorded to national and provincial governments to regulate the powers of municipalities. The most profound implication of the original constitutional powers of local government is that they cannot be removed by legislation except through an amendment of the Constitution.²⁵ Bronstein points out that the powers of municipalities vis-à-vis matters listed in Schedules 4B and 5B means that neither national nor provincial government entities ‘may exercise executive authority over, or administer these local government matters, since this will intrude on the executive authority reserved to the municipalities’ by section 156(1)(a) of the Constitution.²⁶ This means that, everything being equal, the national or provincial executive cannot exercise the executive/administrative powers of municipalities to provide potable water services, for example. Any national or provincial legislation which purports to confer executive authority for the administration of water services, limited to potable water supply systems, to a national or provincial organ of state would be beyond the legislative competence of the enacting legislature and therefore invalid.²⁷ Such action can also be considered a violation of section 41(1)(g) of the Constitution which in this context will seek to ensure that the regulation powers of national and provincial governments are not used in a manner that undermines the local sphere of government and preventing it from effectively performing its function.²⁸ In *City of Johannesburg v Gauteng Development Tribunal*, the Constitutional Court observed that national and provincial spheres cannot use their regulating powers in order to give themselves, by way

25 See Steytler & De Visser *supra* n 3 at 12-19; Fuo 2015 C/ILG 20-26; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* at par 37.

26 See Bronstein ‘Legislative Competence’ in Woolman & Bishop (eds) *Constitutional Law of South Africa* (2014) 15-6.

27 See Woolman & Roux ‘Cooperative Government’ in Woolman & Bishop (eds) *Constitutional Law of South Africa* (2014) 14-17.

28 See Bronstein *supra* n 26 at 15-6.

of legislation, the power to exercise executive municipal functions or the right to administer municipal affairs.²⁹ The regulating powers of national and provincial government should be used to ensure that municipalities effectively perform their water services function. Regulation in the context of the Constitution implies a general managing and controlling role rather than a direct authorising function.³⁰ The jurisprudence of the Constitutional Court makes it clear that regulate under section 155(7) of the Constitution means:

... creating norms and guidelines for the exercise of a power or the performance of a function. It does not mean the usurpation of the power or the performance of the function itself. This is because the power of regulation is afforded to national and provincial government in order 'to see to the effective performance by municipalities of their functions'.³¹

It follows from the above that the power to regulate municipalities should be used to set minimum requirements, essential standards and monitoring procedures applicable across the country.³²

While the provision of potable water is a municipal mandate emanating directly from the Constitution, the discussion below shows that the provision of industrial water is an assigned municipal function. Although the Constitution makes it possible for national and provincial legislative competences to be assigned to local government generally or to specific municipalities, it is beyond the scope of this article to discuss the relevant provisions in detail.³³ However, it is worth noting that in terms of section 156(1)(b) of the Constitution, a municipality has executive authority and has the right to administer any matter assigned to it by national and provincial legislation. This gives the relevant municipalities the right to legislate over that function within their jurisdictions. The extent to which a municipality can legislate over an assigned function will largely depend on the nature of the assignment as spelt out in the assigning legislation.³⁴ Furthermore, national or provincial legislation can also transfer an executive power/obligation to municipalities.³⁵ Although this type of assignment does not transfer general legislative authority over the functional area, a municipality can adopt and implement by-laws that seek to ensure the effective administration of the assigned area.³⁶ In both cases where legislative and

29 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* at pars 59 and 68.

30 See Steytler & De Visser *supra* n 24 at 22-52.

31 *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (5) BCLR 591 (CC), par 22, Steytler & De Visser *supra* n 24 at 22-52.

32 See Steytler & De Visser *supra* n 24 at 22-52.

33 For a detailed discussion, see: Steytler & De Visser *supra* n 3 at 5-41 to 5-50; Steytler & De Visser *supra* n 24 at 22-58 to 22-63; Fuo 2015 *CJLG* 24-26.

34 See Steytler & De Visser *supra* n 24 at 22-49 to 22-50.

35 See Steytler & De Visser *supra* n 3 at 5-43.

36 *Ibid.*

executive powers are assigned, relevant municipalities are empowered to exercise assigned powers for as long as the assigning Act is still in force.³⁷

Steytler and De Visser argue that the requirement that national and provincial governments should not compromise or impede the right or ability of a municipality to exercise its powers or perform its functions also applies to assigned powers.³⁸ Therefore, the authority of national and provincial government to set parameters on assigned powers is not without limits. For example, they argue that the assignment of power that is made subject to unnecessarily restrictive or burdensome criteria, conditions or monitoring requirements would fall short of the standard demanded by section 151(4) of the Constitution.³⁹ In the context of assignment, they argue that imposing conditions such as prior approval of municipal decisions or power to override municipal decisions by an assigning agent will contravene section 151(4) of the Constitution.⁴⁰ According to the authors, assignment is supposed to lead to a complete transfer of the function by national or provincial government, including the final decision-making powers in individual matters.⁴¹

Water management, including the bulk supply of water from dams and rivers, and the management of the resource, is a national competency, as a matter not allocated under either Schedule 4 or Schedule 5 of the Constitution.⁴² This competency provides the National Department of Water with oversight over all role-players in the water-sector, including bulk water supply providers, municipal water service providers, and all the users of water, including industrial users.⁴³ Therefore, in accordance with its powers to look after water in the national interests, the national government has given municipalities the authority to oversee industrial water supply, in terms of section 7 of the WSA, primarily for practical reasons. Due to the wall-to-wall nature of municipalities, this implies that the function of municipalities over industrial water use now extends to all industrial users.

The WSA makes it compulsory for all water users within the jurisdiction of a municipality to only use water services from a water services provider nominated by that municipality.⁴⁴ The Act provides that a person who, at its commencement, was using water services from a source other than one nominated by the relevant water services authority (municipality), may continue to do so – (a) for a period of 60 days after the relevant water services authority has requested the person

37 *Ibid.*

38 See Steytler & De Visser *supra* n 24 at 22-50.

39 *Ibid.*

40 *Idem* at 22-59.

41 *Ibid.*

42 See generally s 3 of the National Water Act 36 of 1998 (NWA). See also See Bronstein *supra* n 26 at 15-1 and 15-9.

43 See s 3(1)-(3) of the NWA.

44 See s 6(1) of the WSA.

to apply for approval; and (b) if the person complies with the request within the 60 days period, until (i) the application for approval is granted, after which the conditions for the approval will apply; or (ii) the expiry of a reasonable period determined by the water services authority, if the application for approval is refused.⁴⁵

Section 7 of the WSA prohibits any person from obtaining water for industrial use from any source other than the distribution system of a water services provider nominated by the water services authority having jurisdiction in the area in question, and this must also be approved by that water services authority.⁴⁶ In terms of the WSA, a water services authority is defined as any municipality responsible for ensuring access to water services. It is important to note that, a person who, at the coming into effect of the WSA, obtained water for industrial use from a source requiring the approval of a municipality may continue to do so – for a period of 60 days after the relevant municipality has requested the person to apply for approval; if the person complies with the request for application from the municipality within a 60 day period, continue to do so until the application is granted, after which the conditions of the approval will apply; or at the expiry of a reasonable period determined by the municipality, if the application for renewal is refused.⁴⁷

The WSA provides that where the approval of a municipality is required in terms of sections 6 and 7 outlined above, that municipality should not unreasonably withhold the approval and that, it may grant approval subject to reasonable conditions.⁴⁸ Section 8(3) outlines a number of factors which should be taken into account by municipal authorities in arriving at reasonable decisions following applications for industrial water use or other uses.⁴⁹ Furthermore, the WSA makes it possible for dissatisfied applicants to appeal against unfavourable municipal decisions or inaction to the Minister of Water and Sanitation who has the powers to ‘confirm, vary or overturn’ any decision of a municipality.⁵⁰ The validity of the Minister’s appellate jurisdiction runs contrary to the requirements for assignment discussed in the paragraphs above. However, this is discussed below in detail.

45 See s 6(2)(a)-(b) of the WSA.

46 See s 7(1) of the WSA.

47 See s 7(3)(a)-(b) of the WSA.

48 See s 8(1)(a)-(b) of the WSA.

49 These include: the cost of providing; the practicability of providing; the quality of provision; the reliability of providing; the financial, technological and managerial advisability of providing; the economic and financial efficiency of providing; and the socio-economic and conservation benefits that may be achieved by providing, the water services in question; and any other relevant factor. See s 8(3)(a)-(b) of the WSA.

50 Section 8 of the WSA on approvals and appeal provides that: ‘... (4) A person who has made an application in terms of section 6 or 7 may appeal to the Minister against any decision, including any condition imposed, by the water services authority in respect of the application. (5) An appellant under subsection (4) must note an appeal by lodging a written notice of

Municipalities are obliged to make by-laws which contain conditions for the provision of water services and these must provide for the determination and structure of tariffs.⁵¹ Such by-laws must be consistent with norms and standards in respect of tariffs for water services which the Minister of Water and Sanitation, in agreement with the Minister of Finance, must prescribe, from time to time.⁵² The Minister of Water and Sanitation also has powers to prescribe from time to time, compulsory national standards for the provision of water services.⁵³

2 2 Municipal Powers to Impose Surcharges on Services Provided

The power of local government to impose surcharges for municipal services⁵⁴ emanates directly from the Constitution. According to section 229(1) of the Constitution, a municipality may impose surcharges on fees for services provided by or on behalf of the municipality.⁵⁵ This means that municipalities have original powers to impose surcharges on fees for municipal services provided either by themselves or duly nominated water services providers.⁵⁶ These powers are 'original' because they are entrenched in the Constitution.⁵⁷ The direct implication of such powers is that, just like the local government powers entrenched in section 156(1)(a) of the Constitution, they cannot be removed or amended by national legislation – they can only be removed or amended through an

appeal with – (a) the Minister and (b) the person against whose decision the appeal is made, within 21 days of the appellant becoming aware of the decision. (6) A person who has made an application in terms of section 6 or 7 may appeal to the Minister if the water services authority in question fails to take a decision on the application within a reasonable time. (7) An appeal under subsection (6) – (a) must be conducted as if the application had been refused; and (b) must be noted by lodging a written notice of appeal to the Minister and the water services authority in question. (8) A relevant province may intervene as a party in an appeal under subsection (4) or (6). (9) The Minister may on appeal confirm, vary or overturn any decision of the water services authority concerned. (10) The Minister may prescribe the procedure for conducting an appeal under this section.'

51 See s 21(1)(d) of the WSA.

52 See s 10 of the WSA. To this effect, see Norms and Standards in respect of Tariffs for Water Services in GN R652 in GG 22472 of 2001-07-20.

53 See Regulations Relating to Compulsory National Standards and Measures to Conserve Water in GN R509 in GG 22355 of 2001-06-08.

54 In terms of s 1 of the Municipal Fiscal Powers and Functions Act 12 of 2007 (MFPF), a municipal service means any of the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution; and any function assigned to a municipality in accordance with sections 9 and 10 of the Local Government: Municipal Systems Act 32 of 2000, identified by the Minister by notice in the Gazette. This definition is wider than that used in the Systems Act. See s 1 of the Systems Act.

55 See s 229(1) dealing with the fiscal powers of municipalities.

56 See *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 2 BCLR 150 (CC) pars 61, 64 and 73; *Rates Action Group v City of Cape Town* 2007 1 All SA 233 (SCA) pars 1-20; *Joseph v City of Johannesburg* at pars 51 and 55; *Cape Town v Robertson supra* n 2 at pars 61-71.

57 See *Steytler & De Visser supra* n 3 at 5-6; *Steytler & De Visser supra* n 24 at 22-85.

amendment of the Constitution. However, it is important to note that the right of municipalities to impose surcharges on fees for services provided by or on behalf of a municipality can be limited in terms of national economic policies,⁵⁸ for example, and can be regulated by national legislation.⁵⁹

Although there are several laws confirming the fiscal powers of municipalities,⁶⁰ the Municipal Fiscal Powers and Functions (MFPF) Act 12 of 2007 regulates the power of municipalities to impose surcharges on fees for services provided under section 229(1)(a) of the Constitution. The objects of the Act are to: promote predictability, certainty and transparency in respect of municipal fiscal powers and functions; ensure that municipal fiscal powers and functions are exercised in a manner that will not materially and unreasonably prejudice national economic policies, economic activities across municipal boundaries or the national mobility of goods, services, capital or labour; effectively oversee the exercise of municipal fiscal powers and functions; and provide for an appropriate division of fiscal powers and functions where two municipalities have the same fiscal powers and functions.⁶¹

The above objects of the MFPF Act are applicable to municipal surcharges.⁶² According to the MFPF Act, a 'municipal surcharge' in terms of section 229(1)(a) of the Constitution is a charge in excess of the municipal base tariff that a municipality may impose on fees for a municipal service provided by or on behalf of a municipality.⁶³ On the other hand, the MFPF Act defines a base tariff as the fees necessary to cover the actual cost associated with rendering a municipal service and this includes: bulk purchasing costs in respect of water and electricity reticulation services, and other municipal services; overhead, operation and maintenance costs; capital costs; and a reasonable rate of return, if authorised by a regulator or the Minister responsible for that municipal service.⁶⁴

Chapter 3 of the MFPF Act deals exclusively with municipal surcharges. The Act accords the Minister of Finance the power to prescribe compulsory national norms and standards for imposing municipal surcharges, which may include, *inter alia*, maximum

58 S 229 (2) of the Constitution. For a discussion of this provision, see *Rates Action Group v City of Cape Town* 2007 1 All SA 233 (SCA) par 10; *Cape Town v Robertson supra* n 2 at par 62.

59 See s 229(2)(b) of the Constitution.

60 These include: Local Government: Municipal Finance Management Act 53 of 2003; the Local Government: Municipal Property Rates Act No 6 of 2004; and the Systems Act.

61 See s 2(a)-(d) of the MFPF Act.

62 See s 3 of the MFPF Act.

63 See 'Definitions and interpretation' in s 1(1) of the MFPF Act.

64 See 'Definitions and interpretation' in s 1(1) of the MFPF Act. For a discussion of the difference between a surcharge and a 'reasonable rate of return' and the significance of the latter, see Steytler & De Visser *supra* n 3 at 12-20.

municipal surcharges that may be imposed by municipalities.⁶⁵ Such norms and standards may express the maximum surcharge that may be imposed as a ratio of the municipal base tariff, a percentage of the municipal base tariff or a Rand value of the municipal base tariff; and provide bands or ranges within which municipal surcharges may be imposed.⁶⁶ In addition, the compulsory norms and standards may differentiate between different kinds of municipalities; types of municipal services; levels of municipal services; categories of users, debtors and customers; consumption levels; and geographical areas.⁶⁷ Compulsory norms and standards may also determine the basis upon and intervals at which municipalities may increase surcharges; and determine matters that must be assessed and considered by municipalities in imposing municipal surcharges.⁶⁸ Each municipality is obliged, when imposing a surcharge on fees for services provided by it or on its behalf, to comply with any norms and standards prescribed by the Minister.⁶⁹ This means that, in the absence of nationally prescribed norms and standards, municipalities have significant discretion in determining municipal surcharges. In addition to this discretion, municipalities can be exempted by the Minister from strictly complying with prescribed norms and standards where it is practically impossible to ensure strict compliance.⁷⁰ A ministerial exemption can apply to municipalities generally or be limited in its application to a particular municipality or kind of municipality, which may be defined in relation to several criteria.⁷¹

Details relating to the manner in which municipal surcharges are levied and how a resolution to that effect must be made known are outlined in section 75A of the Systems Act.⁷² Municipal surcharges are supposed to be levied by resolution passed by the municipal council with a supporting vote by the majority of its members⁷³ and this function cannot be delegated by a municipal council.⁷⁴ The exercise of this power is akin to the powers generally reserved for legislative bodies to raise taxes⁷⁵ and constitutes a legislative act which is only subject to the principle of legality.⁷⁶ In other words, a resolution of a municipal council to levy surcharges for a municipal service should only be reviewable in a court of law on the basis of the principle of legality or directly by the

65 S 8(1) of the MFPF Act.

66 See s 8(2)(a)(i)-(ii) of the MFPF Act.

67 See s 8(2)(b)(i)-(vi) of the MFPF Act.

68 See s 8(2)(c)-(d) of the MFPF Act.

69 See s 9(1)(a) of the MFPF Act.

70 See s 9(1)(b) of the MFPF Act.

71 See s 9(1)(c)(i)-(ii) of the MFPF Act.

72 S 9(2) of the MFPF Act read with s 75A of the Systems Act.

73 See s 75A(2) of the Systems Act.

74 See s 160(2)(c) of the Constitution. See Steytler & De Visser *supra* n 24 at 22-86.

75 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* at par 44.

76 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* at pars 41-46; Steytler & De Visser *supra* n 24 at 22-86.

electorate through the ballot box during local government elections. Municipalities must annually, as part of their budget preparation process, review any municipal surcharges.⁷⁷

The constitutional and legislative framework discussed above shows that the original constitutional power of municipalities to impose surcharges for municipal services can be regulated by national legislation and by ministerial norms and standards. However, regulation should not exceed the bounds of section 151(4) of the Constitution. The regulating role of national government means that it should, through legislation and ministerial regulations, create norms and standards, minimum requirements and guidelines for the exercise of municipal fiscal powers or the performance of the municipal function of levying surcharges for municipal services.⁷⁸ Steytler and De Visser observe that the MFPP Act does not provide a regulatory framework for municipalities but instead provides a framework which can be used by the Minister of Finance to prescribe compulsory norms and standards for imposing surcharges which can include maximum charges but not determine the actual amount.⁷⁹ Ministerial norms and standards can also prescribe the matters that a municipality must consider when imposing surcharges.⁸⁰ In brief, the need for limited/minimal national regulation in relation to how municipalities exercise their legislative powers to levy surcharges is underscored. The legal validity of by-laws when they collide with national norms that seek to regulate the powers of municipalities to impose surcharges for municipal services should be assessed taking into consideration the nature of regulation discussed above.⁸¹

3 Merafong City Local Municipality Case: Facts, Decision and *Ratio Decidendi*

3 1 Facts

AngloGold operates mines within the jurisdiction of Merafong City Local Municipality. It uses water for its mining operations and also supplies same for household use to its employees living on the mines. Until 2004, the water used by AngloGold was supplied directly by Rand Water which

77 See s 9(3) of the MFPP Act.

78 Steytler & De Visser *supra* n 3 at 5-24(12); Steytler & De Visser *supra* n 24 at 22-89.

79 Steytler & De Visser *supra* n 3 at 12-21 to 12-22; Steytler & De Visser *supra* n 24 at 22-100.

80 Steytler & De Visser *supra* n 3 at 12-22.

81 S 156(3) of the Constitution provides that: 'Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid ...'. See Steytler & De Visser *supra* n 3 at 5-27.

was responsible for maintenance of the water delivery infrastructure. AngloGold and Rand Water had written water supply agreements.⁸²

In view of the changes heralded by the WSA – designating municipalities as water services authorities,⁸³ Merafong City sent a written notice to mining companies operating within its area jurisdiction on 11 February 2004 to indicate that it had been accorded the powers and functions of a water services authority. The City requested the mining companies to apply for approval for the supply of water for industrial use as required by section 7 of the WSA. On 31 May 2004, the City informed the mining companies in writing that new water tariffs would come into operation on 1 July 2004.⁸⁴ In response to the call by the City, AngloGold sought their approval in terms of section 7 of the WSA to ‘continue obtaining water from Rand Water for its mining operations and associated domestic applications at the tariffs set by, and under the conditions imposed by Rand Water’.⁸⁵

Merafong City announced new tariffs in May 2004 that were far higher than those of Rand Water. However, because the City could not provide water services on its own, it appointed Rand Water to continue to provide these services and collect payment from consumers. After deducting its share, Rand Water paid the balance/surcharge added by the City into the latter’s coffers. The surcharge was imposed as a new source of income that will enable the Municipality meet its service delivery obligations to the community and contribute towards its financial sustainability.⁸⁶

AngloGold appealed to the Minister of Water Affairs and Forestry (as it then was) against the new tariffs. It complained that the new tariff imposed by the Municipality was much higher than those under Rand Water and that this cost it an extra half a million rand per month even though the City did not assume any responsibility in relation to water services provision.⁸⁷ AngloGold argued *inter alia* that the City did not add any value to water services provision and failed to take into consideration its role as a water services provider – for its employees.

Purporting to act under her powers in terms of section 8(9) of the WSA, the Minister upheld AngloGold’s appeal on July 18 2005 when she made her ruling. She overturned the Municipality’s decision to levy surcharges on water for industrial use for a number of reasons. The Minister found that the tariff increase of 62% was unreasonable because

82 *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at par 3.

83 *Idem* at par 4.

84 *Idem* at pars 4-5.

85 *Idem* at par 6.

86 *Idem* at par 7.

87 For details, see *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at par 8.

Merafong City did not add value to the services provided by Rand Water to AngloGold.⁸⁸ She held the view that since water used for industrial purposes was not defined in the WSA as a municipal service, the City could only levy surcharges on the portion of water that AngloGold was using for domestic purposes.⁸⁹ She expressed doubts as to whether the mines were given reasonable opportunities for engagement before the tariffs were imposed. Based on her findings, she directed Merafong City, AngloGold and Rand Water to negotiate a reasonable tariff on the portion of water used for domestic applications.⁹⁰

In 2005, the City obtained a legal opinion to the effect that the Minister's decision was 'void in law'. Emboldened by the legal opinion, the City continued to collect the tariff and surcharges from AngloGold although under the threat of discontinuing water supply. Attempts to negotiate a mutually acceptable agreement were unsuccessful largely because the Municipality remained adamant that the Minister's decision was unlawful.⁹¹ The City tried unsuccessfully over a five year period to get the Minister's response to the legal opinion – she remained elusive.

In view of the above, AngloGold launched proceedings in the High Court in 2011 to force Merafong City to comply with the Minister's ruling. Merafong City counter-applied for a declaratory order to the effect that: it had exclusive executive authority to set, adopt and implement tariffs, including surcharges, on the provision of water services in its jurisdiction; section 8 of the WSA did not give the Minister authority to interfere with tariffs set and implemented by it for water services provided in its jurisdiction. In the alternative, the City of Merafong sought an order striking down section 8(9) of the WSA upon which the Minister's appeal decision was made as unconstitutional and invalid.⁹²

AngloGold was successful in the High Court which dismissed the counter-application of Merafong City. The Court found that AngloGold had validly applied to the City under the WSA and that the Act conferred the Minister with appellate powers which she had exercised. In addition, the High Court found that even if the decision of the Minister was impugnable, it was binding on the Municipality until set aside through judicial review. On this basis, the Court ordered the City to comply with the Minister's ruling.⁹³

On appeal, the Supreme Court of Appeal (SCA) endorsed the findings of the High Court.⁹⁴ It held that without setting aside the Minister's ruling through the courts, the City breached the principle of legality by choosing to disregard it. The SCA held that the approach adopted by the City to

88 *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at par 9.

89 *Idem* at par 9.

90 *Idem* at par 9.

91 *Idem* at pars 10-12.

92 *Idem* at par 13.

93 *Idem* at pars 13-15.

94 *Idem* at pars 14-15.

disregard the Minister's ruling on the basis that it was unlawful amounted to a collateral challenge to the validity of an administrative action, a remedy which was not available to an organ of state against another organ of state.⁹⁵ The SCA held that, in accordance with established jurisprudence, the remedy of collateral challenge to the validity of administrative action is only available to an individual threatened by a public authority with coercive action.⁹⁶

In the Constitutional Court, the main question was whether SCA and the High Court were right to enforce the Minister's ruling.⁹⁷ The Constitutional Court had to decide on two issues: whether the High Court and SCA correctly applied the jurisprudence relating to the remedy of collateral challenge;⁹⁸ and whether the Minister's ruling of 18 July 2005 was lawful/constitutionally compliant.⁹⁹ In relation to the second issue, Merafong City was of the view that the Minister's decision was unlawful because it intruded on an area of exclusive constitutional competence bestowed on municipalities by section 156(1) of the Constitution.¹⁰⁰ In other words, the City argued that the provision in terms of which the Minister claims to have taken the decision is inconsistent with the Constitution and therefore invalid.

3 2 Decision and *Ratio Decidendi*

The important issue for purposes of this article relates to the lawfulness of the Minister's ruling of 18 July 2005.¹⁰¹ This issue was largely ignored by the majority judgment on the pretext that the City did not persist with the argument. While the majority judgment remitted this issue to the High Court for a decision, it was addressed in the minority judgment.¹⁰² What follows is an outline of the finding in the minority judgment on this issue as well as the *ratio decidendi* for the position adopted.

95 *Idem* at par 15.

96 *Idem* at par 15.

97 *Idem* at par 22.

98 This is the main issue addressed in the majority judgment written by Justice Cameron. However, this is not the focus of this case note.

99 This issue was largely ignored by the majority judgment on the pretext that the City did not persist with the argument. The majority judgment remitted this issue to the High Court for a decision. See *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at pars 16 and 84. However, it was addressed in the dissenting judgment because this issue was at the heart of the dispute between relevant parties. See *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at pars 86-87.

100 *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at par 2.

101 In relation to the first issue, which is not relevant for this article, the majority judgment upheld the view of the High Court and SCA to the effect that an invalid administrative act that exist is binding and enforceable until it has been set aside by way of judicial review. For a detailed exposition of the Court's position and rationale, see pars 26-83. Justice Jafta disagreed with the approach adopted by the majority. See *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at pars 88-152.

102 See *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at pars 16, 84, 86-87.

Justice Jafta held that section 8(9) of the WSA impermissibly empowers the Minister to exercise an exclusive municipal power which was inconsistent with the Constitution.¹⁰³ The learned Justice held that the reasoning of the Minister was based on a flawed understanding of the law and that the conclusion reached by the High Court overlooked the principle of separation of powers that applies among the spheres of government.¹⁰⁴ Justice Jafta established that although the Constitution limits municipal competence on water services to potable water supply systems, the WSA empowers municipalities to supply water for industrial use by making it compulsory for industries to procure water only from a municipality duly designated under the Act as a water services authority or its nominee.¹⁰⁵ He observed that the WSA also regulates the power of municipalities to approve the supply of water for both domestic and industrial purposes by requiring *inter alia* that a water services authority may not unreasonably withhold applications for approval and may grant approval subject to reasonable conditions.¹⁰⁶

In relation to the Minister's findings and ruling, Justice Jafta expressed the view that they were based on a complete misconception of the law under which she considered the appeal from AngloGold. Justice Jafta held that the Minister completely overlooked the fiscal powers conferred on municipalities by section 229(1) of the Constitution which expressly declares that a municipality is entitled to levy a surcharge on services provided by it and also those that are provided by a third party on its behalf. In addition, Justice Jafta established that section 7 of the WSA equally authorises the Municipality to nominate a water services provider where the supply of water for industrial use cannot be done by itself.¹⁰⁷ Based on these provisions, he established that the Minister therefore misunderstood the law by holding the view that even where water for industrial use is supplied by the Municipality, it may not levy a surcharge for the service because that service is not defined as a municipal service in the WSA. He held that section 229 authorises municipalities to levy a surcharge on services provided by it or on its behalf, regardless of whether there is value added or not.¹⁰⁸ He observed that section 229 of the Constitution prescribes conditions that apply to the exercise of municipal fiscal powers and functions and empowers Parliament to enact legislation that regulates how municipalities exercise their fiscal powers.¹⁰⁹ He reiterated that municipal fiscal powers fall within the exclusive domain of municipalities and may only be exercised by them subject to conditions listed in section 229 of the Constitution.¹¹⁰

103 *Idem* at pars 177-178.

104 *Idem* at pars 162 and 171.

105 *Idem* at par 157.

106 *Idem* at par 157.

107 *Idem* at par 162.

108 *Idem* at pars 155 and 163.

109 *Idem* at par 156.

110 *Idem* at par 173.

After the above clarification, the learned Justice proceeded to dismantle the finding of the High Court that the Minister had exercised power duly conferred on her by legislation when she reached her decision and ruling – legislation which purports to confer the Minister the power to regulate the exercise of the executive power of municipalities for water provision for domestic use.¹¹¹ Justice Jafta held that the fundamental weakness of the Court’s conclusion lies in the fact that it overlooked the principle of separation of powers that applies amongst the three spheres of government and the jurisprudence established by the Constitutional Court to the effect that municipalities enjoy exclusive powers in relation to competences allocated by the Constitution.¹¹² He re-echoed the view that national and provincial spheres of government are barred from arrogating to themselves the power to exercise municipal competences by simply passing legislation authorising the exercise of municipal powers.¹¹³ The learned justice held that the impugned provision empowering the minister to intrude into the area of competence of the City and overturn a decision taken pursuant to the exercise of the City’s municipal fiscal powers was unconstitutional.¹¹⁴

Based on the above findings, he declared section 8 of the WSA invalid to the extent of the inconsistency and expressed the view that the High Court should have upheld the City’s constitutional challenge.¹¹⁵

4 A Discussion of the Minority Judgment and Proposals on the Way Forward

The findings of the minority judgment can be summarised as follows: the Minister’s appellate powers in terms of section 8 of the WSA fall foul of section 151(4) of the Constitution in that they are unnecessarily intrusive and impede on: the right and ability of municipalities to exercise their original water services function; the right of municipalities to exercise their original powers to levy surcharges for water services; and the ability of municipalities to perform their assigned legislative function to provide water for industrial use and the concomitant powers to levy surcharges for providing that assigned service. It is submitted that although Justice Jafta neither referred to important legislation such as the MFPF Act nor any secondary source of law addressing the issue they grappled with, the above findings are tenable. They are consistent with both the applicable legal framework and the jurisprudence emanating from a string of Constitutional Court cases.

111 For details, see *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at pars 167-171.

112 *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at par 171.

113 *Idem* at par 171.

114 *Idem* at par 172.

115 *Idem* at pars 172, 177-178.

It has been established that the right of municipalities to impose surcharges for municipal services stems from their original fiscal powers entrenched in section 229(1) of the Constitution and that these powers are akin to taxation powers in that, a municipality needs not provide the service itself – it can outsource the provision of the service to an external party but still collect the surcharge.¹¹⁶ The Constitution does not prescribe that a surcharge can only be levied when a municipality has added value to the service delivered. In addition, although the provision of industrial water is an assigned legislative function, municipalities generally have powers to impose a surcharge on this service because the broad definition of a municipal service in section 1 of the MFPP Act shows that municipalities have powers to impose surcharges for services that are listed in Schedule 4B and 5B as well as those assigned to them in terms of legislation. Justice Jafta was correct in finding that a municipality cannot be expected to provide a service and then be prevented from imposing surcharges for the same service. In addition, it is important to note that the assigning legislation does not forbid municipalities from imposing surcharges for the provision of industrial water. Municipalities can only be prevented from levying a surcharge on an assigned function if the legislation assigning the function excludes the levying of the surcharge.¹¹⁷ Where the assigning legislation is silent on this matter, a municipality has the discretion to use its broad fiscal powers. The assignment of a power without ensuring that resources are available to perform the function effectively is contrary to section 151(4) of the Constitution.¹¹⁸ The same applies to any assignment which requires that municipal decisions should receive prior approval from other spheres of government or which gives national and provincial government authority to override decisions taken by municipal councils.¹¹⁹

Furthermore, it has been established that the constitutional powers of local government to provide potable water and impose surcharges on municipal services are original powers that cannot be removed by legislation except through an amendment of the Constitution. Justice Jafta was correct to point out that the Constitution forbids national and provincial spheres of government from appropriating to themselves the power to exercise municipal competences by merely enacting legislation that authorises them to exercise municipal powers.¹²⁰ Such an approach is contrary to the prescriptions of sections 41(g) and 151(4) of the Constitution.¹²¹ The power of the Minister in terms of section 8(9) of the WSA to vary or overturn the decisions of elected municipal councils – decisions that are not administrative in character – pertaining to

116 See Steytler & De Visser *supra* n 3 at 12-20.

117 *Idem* at 12-21.

118 See discussion in 2.1 and 2.2 above.

119 See discussion in 2.2 above.

120 *Merafong City Local Municipality v AngloGold Ashanti Ltd supra* n 22 at par 171.

121 See discussion in 2.1 and 2.2 above.

municipal surcharges and the provision of potable water constitute an overt intrusion into their constitutionally defined areas of competence. It is important to note that the appellate powers of the Minister under section 8(9) of the WSA relate to approvals for general use of water and approvals for industrial use of water. Even in relation to the provision of water for industrial use, it has been indicated above that assignments are supposed to be a complete transfer of a specific function, and this includes the final decision-making power in individual matters.¹²² In this regard, even though industrial water provision is an assigned function, it is a violation of section 151(4) of the Constitution for the Minister to be able to override a municipal decision on this matter.¹²³ Decisions adopted by deliberative bodies such as municipal councils can only be reviewed on the basis of legality or reasonableness.¹²⁴

However, it is acknowledged that the original powers of municipalities to impose surcharges on municipal services and the powers to provide water services are not absolute in the sense that they can be regulated by legislation and ministerial directives to the extent permissible by the Constitution.¹²⁵ It has been argued that regulation means creating norms and standards, minimum and maximum requirements and guidelines on how municipalities can effectively exercise their original powers in their executive and legislative decision-making processes.¹²⁶ Such norms and standards, guidelines and minimum requirements should be generally applicable in order to ensure predictability, certainty and consistency in governance. National (and provincial) regulation should not seek to produce predetermined outcomes but provide frameworks that can be objectively used by municipalities.¹²⁷ While this approach is reflected in the MFPPF Act which leaves municipalities with sufficient discretion in imposing municipal surcharges,¹²⁸ the same cannot be said of the WSA in terms of the powers of municipalities to grant authorisation for general water use or industrial use. Despite the criteria provided in section 8(3) of the WSA to enable municipalities to arrive reasonable decisions when applications for the use of industrial water are considered, the Act goes further to subject those decisions to the approval of the Minister of Water and Sanitation through appeals. It is argued that the Minister's appeal powers go beyond regulation and amounts to an arrogation of both the original and assigned legislative powers of municipalities regarding the provision of water services. Regulation can only take place within limits permissible under the Constitution. National legislation or ministerial

122 See discussion in 2.1 above.

123 See Steytler & De Visser *supra* n 24 at 22-59.

124 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* at pars 45-46.

125 See 2.1 and 2.2 above and s 229(1)(b) of the Constitution.

126 See 2.1 and 2.2 above.

127 See 2.1 and 2.2 above.

128 See Steytler & De Visser *supra* n 3 at 12-12; Steytler & De Visser *supra* n 24 at 22-100

regulations that run contrary to sections 151(4) and 41(1)(g) of the Constitution are invalid.¹²⁹

Finding section 8(9) of the WSA unconstitutional in the minority judgment is in line with the jurisprudence of the Constitutional Court in the area of planning law – where the Court has consistently declared unlawful attempts to subject municipal planning decisions to appeal at the provincial level on the ground that this intrudes into an original area of competence of local government listed in Schedule 4B. In *Minister of Local Government, Environmental Affairs and Development Planning Western Cape v Habitat Council*,¹³⁰ the Court for example declared section 44 of Land Use Planning Ordinance 15 of 1985 (LUPO) which allowed persons aggrieved by municipal land-use decisions to appeal to the Western Cape provincial government, with powers to overturn and replace such decisions, unconstitutional and invalid because provincial appellate capability impermissibly usurped the power of local authorities to manage ‘municipal planning’; intrudes on the autonomous sphere of authority the Constitution accords to municipalities; and fails to recognise the distinctiveness of the municipal sphere.¹³¹ In *Tronox Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal*,¹³² the Court considered the constitutional validity of section 45 of the KwaZulu-Natal Planning and Development Act 6 of 2008 (PDA) which provided for aggrieved persons to appeal municipal planning decisions to the provincial Planning and Development Appeal Tribunal. Despite attempts in the PDA to ensure the independence and impartiality of the Planning and Development Appeal Tribunal,¹³³ the Court held that section 45 impermissibly interferes with local government’s exclusive constitutional power over municipal planning.¹³⁴ The Court rejected the argument that the establishment of the Appeal Tribunal and the provision of an internal appeal does not involve the exercise of a provincial function or power. The Court held that the Appeal Tribunal was established by provincial legislation and that the legislation subjects municipalities to an appeal process without their consent and irrespective of whether municipalities considered it appropriate or not.¹³⁵ The Court held that irrespective of the independence of the Appeal Tribunal – staffed by experts and not provincial officials, the fact that municipalities are subjected to an appeal process by the Province intrudes on their autonomous power. The Court held that the province’s involvement in the appointment of persons to the Appeal Tribunal and its administrative influence exacerbates the intrusion.¹³⁶ The Court also

129 See Steytler & De Visser *supra* n 3 at 5-28; Bronstein *supra* n 26 at 15-16.

130 *Minister of Local Government, Environmental Affairs and Development Planning Western Cape v Habitat Council* 2014 4 SA 437 (CC).

131 *Idem* at pars 13-15.

132 *Tronox Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal* 2016 ZACC 1.

133 *Idem* at par 17.

134 *Idem* at par 27.

135 *Ibid.*

136 *Idem* at par 28.

held that the provincial appeal mechanism dilutes and erodes the exclusive competence and original power of municipalities.¹³⁷ Section 45 of the PDA was declared unconstitutional and invalid.

A cogent principle distilled from the jurisprudence of the Court emanating from the cases in the area of planning law is that a decision taken by a municipality pursuant to powers protected in its exclusive area of constitutional competence cannot be subjected to appeal to a functionary or entity operating within the national or provincial sphere of government. This also means that legislation, executive policies or regulations cannot subject such decisions to appeal at the national or provincial level. Doing so would violate the constitutional vision of autonomous spheres of government which dictates that national and provincial spheres of government not be entitled to usurp the exclusive constitutional powers and functions of municipalities, barring exceptional circumstances.¹³⁸

In view of the above, it is argued that it is not only section 8(9) of the WSA which must be repealed, but the other subsections that are dependent on or directly linked to that provision. These include: the right of dissatisfied applicants to appeal to the Minister in section 8(4); the procedure to be followed in case of an appeal in section 8(5); the ground of appeal based on unreasonable delays in the processing of an application in section 8(6); the presumption and process to be followed where an appeal is based on the ground of unreasonable delays in processing an application in section 8(8); and the powers of the Minister to prescribe the procedure for conducting an appeal in section 8(10). If these sub-sections are repealed, it will be more tenable for an amendment to section 8 to make provision for a dissatisfied applicant to approach courts to review municipal decisions where they believe there was non-compliance with the requirements for reasonableness in section 8(3)(a) of the WSA. Where some of the factors listed in section 8(3) are vague, for example, the regulating role of the Minister could be utilised to develop guidelines to supplement conditions imposed by section 8(3) of the Act that must be taken into consideration by municipalities. While appeal against arbitrary local government action should lie with the courts, the importance of cooperative governance in ensuring that municipalities effectively exercise their powers and perform their functions cannot be underestimated. After all, the three spheres of government are interrelated and interdependent and must all work together to improve the welfare of all South Africans.

137 *Idem* at par 29.

138 *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 1 SA 521 (CC) par 46.