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"The arrival of democracy marked the dawn of a new era of Constitutionalism in which the Bill of Rights will play a pivotal part in the development of our democracy. It binds all levels of government. Local government in its daily interaction with communities will bear the responsibility for the creation of a human rights culture at local level [where] we will be translating human rights into a living reality."

- Nelson Mandela  
President of the Republic of  
South Africa (1994-1999)

## **THE ROLE OF LOCAL GOVERNMENT IN PROMOTING, IMPLEMENTING AND REALISING HUMAN RIGHTS AT GRASSROOTS LEVEL IN SOUTH AFRICA\***

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"... we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability"

*Per Constitutional Court Judgement:*

**In Re: Certification of the Constitution of the Republic of South Africa 1996 BCLR 1253(CC) at para 78**

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**"Respect for the rule of law is crucial for a defensible and durable civilisation.. Whatever be the parameters of any meaningful debate on the meaning of the rule of law and its relevance and application in modern society, it is clearly premised on certain fundamental foundations."**

Among these is the proposition that all law be certain in meaning, that it must bind equally the rich and the poor, the powerful and the impotent; that those that transgress its prescriptions must be accountable before independent courts graced by men and women of learning and integrity and independent of extraneous pressures; that those victimized by transgressions of the law must be entitled to the full protection of such courts; **that the fundamental human rights which every citizen in a country is entitled to exercise inhere in him in consequence of his humanity and are therefore inalienable; that no government- however powerful be its military arsenal, however awesome its police power and indeed even however popular be its actual or perceived support among the populace at any given time in its history- dare be permitted to invade such fundamental rights- however humble, however impotent, be the victim of such transgression; that the courts will fiercely protect such a citizen against the invasion of his rights; that the law has a sovereignty and a life beyond the life of the rulers in a country who come and go; that no person is permitted to take or to remove what he considers to be his through his unilateral act of volition in any dispute with one another, save through the intervention of the law fairly but vigorously applied through the courts; that law must be rational and just ; and ultimately that civilisation itself is imperiled when these fundamental values are not vigorously defended by the rulers in any country."**<sup>1</sup>

"We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or adequate health services. **These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.** For as long as these conditions continue to exist that aspiration will have a hallow ring."<sup>2</sup>

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<sup>1</sup> Per Mahomed P in *AG and Another v Swissborough Diamond Mines and Others* [1998] 1 Law Reports of the Commonwealth 1 at pp8-9, (1997) Butterworths Human Rights Reports 383 (Les CA) in SALJ (117) 2000 part 1 p 68 Juta & Co Ltd W. Cape

<sup>2</sup> Per Chaskalson P In *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (4) BCLR 1696 (CC) at para 8

## Introduction

The challenges posed by the Bill of Rights in South Africa for local government is a fascinating subject because great emphasis is now placed on developmental local government as an catalyst to effect service delivery and fundamental changes at grassroots level. This fascination stems from the fact that the Final Constitution (Act 108 of 1996) <sup>3</sup> obliges the state (in s 231 and s232) to give effect to the principles of international law when passing laws, which are binding, on the nation state. It is for this reason that local government, being a sphere of government in its own right<sup>4</sup>, is constitutionally obliged to give effect to the principles of the Right to Development as codified by the United Nations Organization.

The right to development is an inalienable human right - a people centered right. The individual is both the subject and beneficiary of the development process. As such, the state has an obligation to advance the human development of its nationals. The Covenant on Economic, Social and Cultural Rights links the right to development to an adequate standard of living and to the continuous improving of living conditions. The Declaration on the Right to Development supports and promotes the idea of linking development and individual rights and the idea that it is the responsibility of government to ensure that human rights are advanced and protected.<sup>5</sup>

With the introduction constitutional democracy in South Africa today, the very fabric of South African life is governed by the Bill of Rights. As a result of this, the nature of local government in South Africa has drastically changed in a society that has now become rights based. In 1996, the first democratically elected President of the Republic of South Africa, Mr. Nelson Mandela observed:

*"Local government in the past has traditionally been at the coal face of apartheid, immersed into practices of upholding influx control and residential segregation. These were the foundation of residential apartheid and forced removals"*

*"The arrival of democracy marked the dawn of a new era of Constitutionalism in which the Bill of Rights will play a pivotal part in the development of our democracy. It binds all levels of government Local government in its own right"*



Given that it is a sphere of government closest to the people, local government is constitutionally obliged to play a developmental role in delivering basic services with dignity and equality and realize its objectives within the framework of a constitutionally entrenched Bill of Rights. This principle must be analyzed against the background of a turbulent and tragic history in this country, which created tremendous disparities, by the legacy of an apartheid society that legislated for inequalities in all walks of life. This (apartheid) system entrenched supremacy of parliament which flagrantly flouted with and disregarded the rule of law, robbed people of their dignity and denied them the enjoyment of the most basic fundamental human rights and freedoms.

When President Nelson Mandela was sworn into office on the 10 May 1994, he cogently reflected on the past and pledged the new fledgling democracy to respect the rule of law, uphold fundamental human rights for all and furthermore, he committed the new South Africa to respect and uphold the Constitution as the supreme law of the land.

In his State of the Nation address, he said

*Today all of us do, by our presence, here... confer glory and hope to newborn liberty. Out of the experience of an extraordinary disaster that lasted to long, must be born a society of which all humanity will be proud.*

*"We, who were outlaws not so long ago, have today... come to take possession with the people of our country of what is, after all, a common victory for justice, for peace, for human dignity.*

*We have at last achieved our political emancipation. We pledge ourselves to liberate all of our people from the continuing bondage of poverty, deprivation, suffering, gender and other discrimination.*

**NEVER, NEVER AND NEVER AGAIN SHALL IT BE THAT THIS BEAUTIFUL LAND WILL AGAIN EXPERIENCE THE OPPRESSION OF ONE BY ANOTHER"  
THE SUN SHALL NEVER SET ON SO GLORIOUS A HUMAN ACHIEVEMENT.**

**"Let freedom reign. GOD BLESS AFRICA!"<sup>7</sup>**

These profound words extracted from the autobiography of Mr. Nelson Mandela, the first President of a non-racial democratic South Africa, in his seminal work,

"THE LONG WALK TO FREEDOM," set the tone for a service delivery program placing tremendous challenges and benchmarks for all spheres of government and organs of state, to uphold the rule of law and provide a better life for all with dignity and respect for fundamental human rights.

Since the time that Prof. S.B.O. Gutto published his important book 'A PRACTICAL GUIDE TO HUMAN RIGHTS IN LOCAL GOVERNMENT' in 1996, where important challenging debates on human rights discourses for local government were still being academically debated and contextualised, profound jurisprudential pronouncements emanated from the Constitutional Court that began to shed light on the new role of developmental local government in a constitutional democracy within the framework of the bill of rights. The Constitutional Court finally put into perspective how the bill of rights will impact on local government as a service delivery institution [see the Fedsure case later on]. By so doing, the judiciary has played a leading role in translating many human rights debates and discourses and added tremendous value to the creation of a culture of human rights in a Constitutional democracy in South Africa.

As far back as 1992, Devenish<sup>8</sup> in his closing analysis on the new role of the South African judiciary and the Bill of Rights in a constitutional democracy succinctly placed these challenging debates in context:

*"The constitutional doctrine of parliamentary sovereignty, the jurisprudence of positivism, and the political hegemony of Afrikaner Nationalism have greatly influenced the methodology and theory of interpretation in South Africa. Steyn's advocacy of the subjective or intention theory on interpretation facilitated a sympathetic interpretation of apartheid and draconian legislation. He endeavored, with a passionate fervour, to resurrect the letter of Roman -Dutch law and virtually ignored its ethos of natural - law jurisprudence".*

*The demise of the apartheid state and the emergence of a new political and legal order involving a negotiated and legitimate constitution with an entrenched justiciable Bill of Rights must of necessity influence the process and theory of interpretation[].*

*The courts will be able, in the new constitutional and political dispensation..(to) exercise their powers to test and validate legislation. In order to do this all statute law will have to be interpreted to be compatible with the letter and spirit of the constitution. This means that a value- coherent theory of interpretation should become increasingly prevalent. In effect, the introduction of a justiciable bill of rights is likely to herald a new methodology and theory of interpretation of statutes [].*

*The rise of Afrikaner hegemony and the apartheid state was to influence the nature of the underlying jurisprudence of the South African judiciary and its interpretative methodology. A fairly libertarian approach to interpretation by such judges as Innes CJ in DADOO and DETODY and Schreiner JA in Jaga v Donges was to be replaced with a much more authoritarian and technical approach by the judicial high priests of the new order, such as Steyn CJ and Rabie CJ. Steyn's approach was essentially technical and he returned to the letter of Roman - Dutch law[] the underlying values and the jurisprudence of Roman-Dutch law are considered far more important than its details[]*



*American, Canadian, and Australian scholarship and law can assist us in the process of legal transition that will be required by the advent of and operation of a bill of rights and a liberal democratic constitution. A comparative element is going to become increasingly important for the future development of the subject. Moreover, lawyers will have to take notice of the scholarship relating to hermeneutics with regard to interpretation of statutory law.*

*The eclipse of Afrikaner Nationalism and the prospect of a genuine liberal democratic order has therefore precipitated the emergence of a new methodology and theory of interpretation, with greater emphasis on jurisprudence and less on the technical aspects of interpretation. The Rabie court has given way to the Corbett court. Rabie CJ was known to be unsympathetic to the concept and practice of a bill of rights. Thus he commented that with regard to United States and its bill of rights 'it proved to be a bit of shambles, The United States represents freedom gone mad.'*

*In contrast, Corbett CJ is known to be favorably disposed to a bill of rights. The appointment to the bench of human -rights exponents such as Mahomed J (who was later on appointed as Chief Justice to the Supreme Court of Appeal) is also likely to contribute to a new image and role for the South African judiciary, its underlying ideology, and its methodology and theory of interpretation....*

*As judges such as Mahomed J take their place on the bench, the nature of the interpretative process should inevitably change and reflect a rights culture, operative within the new constitutional dispensation.*

*It is inevitable that a new jurisprudence with a natural - law element is going to replace the primitive positivism, which has proved so hostile to a rights culture, individual liberty, and civilised values in South Africa. The interpretation of statutes in a post - apartheid South Africa should involve a new jurisprudence favourable to individual liberty. This should apply not only the interpretation the bill of rights but also to the interpretation of all other legislation.*

*This is the experience in regard to Namibia where the process of judicial review and its consequences are under way because of the Namibian Constitution with its entrenched bill of rights. This has also been the Canadian experience since according to MacDonald, the Charter has a "spill-over" upon the interpretation of legislation that falls short of being of a constitutional nature."<sup>9</sup>*

It is therefore my submission that any major analysis on the subject of local government and its interrelationship with the Bill of Rights must, of necessity, be seen holistically in context of a painful history which South Africa, as a nation emerged from, in 1994.

It is against this background that I wish present my thesis in the hope that my contribution on this topic, will go a long way in enabling all aspirant local government practitioners and public administrators to understand and assist in promoting a better understanding of the role of fundamental human rights and freedoms and its interaction with local government in contributing towards making a better life for all, a reality.



## CHAPTER 1

### Fundamental Rights and Freedoms in Perspective

The Role of Local Government in promoting, implementing and realising human rights at grassroots level in South Africa must be analyzed by unpacking the essence of the Constitution as the supreme law of the land entrenching a bill of rights and respect for the rule of law.<sup>10</sup> The Constitution recognizes the imbalances of the past<sup>11</sup> and promises to create a just society founded on human dignity, equality and freedom.<sup>12</sup>

As early as 1995, the Constitutional Court, (as a vanguard and protector of fundamental rights and freedoms), was at pains to eloquently pronounce in elegant and elaborate language, the role of human rights entrenched in the new democracy in South Africa.

In S v Makwanyane 1995 (6) BCLR 665 (CC), the Constitutional Court analyzed in detail the whole concept of the role of the constitutional state and contextualised the whole right to life debate, thereby outlawing the death penalty as being unconstitutional.

Mr. Justice Mahomed, then the Deputy President of the Constitutional Court,<sup>14</sup> gave a detailed exposition of the need for the entrenchment of a Bill of Rights in South Africa specifically referring to the past. Although the learned judge was articulating human rights principles in the Interim Constitution,<sup>15</sup> they apply equally to the principles of the fundamental human rights and freedoms in the Final Constitution.<sup>16</sup> It is therefore my submission that what the learned Judge said in this case, is very pertinent to human rights and democratic local governance in this context. He stated

*"All constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future."*

<sup>10</sup> The Constitution of the Republic of South Africa Act 108 of 1996: s 1(c)

<sup>11</sup> Ibid: The Preamble

<sup>12</sup> Ibid: s 1(a)

<sup>13</sup> S v Makwanyane 1995 (6) BCLR 665 (CC).

<sup>14</sup> Ibid: p.758 para 262 A to J, et seq.

<sup>15</sup> [Interim] Constitution of Republic of South Africa Act 200 of 1993



*In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution[]*

The contrast between the past, which it repudiates, and the future, which it seeks to commit the nation, is stark and dramatic. The past institutionalised and legitimised racism. The Constitution expresses in its preamble the need for a "new order" in which there is equality between ... people of all races."

Chapter 3 of the Constitution extends the contrast, in every relevant area of endeavour (subject only to the obvious limitations.). The past was redolent with statutes, which assaulted the human dignity of persons on the grounds of race and colour alone,

Section 10 (Interim Constitution), constitutionally protects that dignity. The past accepted, permitted, discrimination perpetuated and institutionalised pervasive and manifestly unjust discrimination against women and persons of colour; the Preamble, section 8 and the postamble (Interim Constitution) seek to articulate an ethos which not only rejects its rationale but unmistakably, recognises the clear justification for the reversal of the accumulated legacy of such discrimination.

The past permitted detention without trial: section 11 (1) prohibits it. The past permitted degrading treatment of persons; section 11(2) renders it unconstitutional. The past arbitrarily repressed the freedom of expression, assembly, association and movement; sections 15, 16, 17 and 18 accord to these freedoms the status of "fundamental rights". The past limited the right to vote to a minority; section 21 extends it to every citizen. The past arbitrarily denied to citizens on the grounds of race and colour, the right to hold and acquire property: section 26 expressly secures it.

Such a jurisprudential past created what the Post-amble to the [Interim] Constitution recognises [South Africa] as a society characterised by strife, conflict, untold suffering and injustice'. What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting:

*"[To a ] future founded on the recognition of human rights, democracy and peaceful*

*co-existence and development opportunities for all South Africans, irrespective of race, colour, class, belief or sex".*

The post-amble to the Constitution gives expression to the new ethos of the nation by a commitment to 'open a new chapter in the history of our country 'by lamenting the transgressions of 'human rights' and 'humanitarian principles' in the past, and articulating a: A need for understanding, but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation. (At para 263 I-J) The need for "ubuntu" expresses the ethos of an instinctive capacity for the enjoyment of love towards our fellow men and women; the joy and fulfilment in recognizing their innate humanity; the reciprocity that this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by" <sup>17</sup>

Furthermore the importance of the matter of De Lille highlights the point that the new role of the judiciary which will hold no punches back to champion the cause of civil liberties in South Africa. De Lille's case observed the late Mr. Justice Gerald Gordon "The South African Constitution enjoys pre-eminence throughout the world". He compared our new Constitution with those of the United Kingdom and the United States, and concluded as follows:

'It is seen that in at least the matter of the power of the courts South Africa holds, as compared with the two great countries of the West, a pre-eminent position. In proof of this the De Lille case is a juristic locus classicus.' <sup>18</sup>

These important laudable judicial pronouncements confirmed the role of the judiciary in a post apartheid South Africa, constitutionally mandated to dispense with justice 'without fear, favour or prejudice' by championing and upholding the cause of civil liberties and thus creating a vibrant forum to unleash the discourses on the human rights debate in South Africa thus challenging the nascent constitutional democratic nation to give teeth to new found freedoms and liberties.

On Human Rights day - 21 March 1995, Mr. Colin Matjila , Chairperson ,Executive Committee, Greater Johannesburg Metropolitan Council on the anniversary of the Commemoration of the 1961 Sharpeville Massacre said:

*'A major challenge facing the infant democracy in South Africa today is that of transformation of our society. Transformation as well as the culture imposed through decades of apartheid.'*

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<sup>17</sup> S v Makwanyane 1995 (6) BCLR 665 (CC).

<sup>18</sup> Gauntlet Jeremy SC 1999 [SALJ] Vol 116 Part I, pp 143 etseq (Tribute to the late Mr Justice Gerald Gordon)

Political freedom will be meaningless unless accompanied by social and economic development. The new era of Human Rights demand of local government to review and overhaul the way in which it interacts with its employees and the community both at a political and administrative level. Practical steps need to be taken to translate human rights into reality and contribute meaningfully to transformation of our society and the creation of a human rights culture.

The driving force, which will inspire transformation, is our new Constitution and Bill of Rights. The need for transformation is captured in the words of the Preamble to our Constitution.

It holds that      "We the people of South Africa  
Recognise the injustice of our past.  
Honour those who suffered for and freedom in our land  
Believe that South Africa belongs to all who live in it, united in  
our diversity, therefore  
Adopt this Constitution as the Supreme law of the Republic so  
as to Heal the division of the past and establish a society,  
based on democratic values, social justice and fundamental  
human rights"

Paramount however to this transformation process is the knowledge of our human rights and accompanying acknowledgment that with rights come responsibilities."<sup>19</sup>

With the introduction of democracy in South Africa on the 27 April 1994, the framers of the Constitution recognized local government

- to be absolutely necessary to implement an effective service delivery program
- and at the same time to be a very important role-player in enhancing democracy in entrenching the promotion and protection of fundamental human rights and freedoms at grassroots level.

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Colin Matjila: Our Bill of Rights-your Rights- Your Wings Human Rights Information Centre, Greater Johannesburg Metropolitan Council, 21 March 1995.

- This is one of the reasons that local government was constitutionally elevated in the Final Constitution (Act 108 of 1996) to a sphere of government with its own rights and responsibilities alongside national and provincial government.<sup>20</sup> Thus any interpretation of the Constitution must be read holistically and therefore the chapter on the Bill of Rights must not be interpreted in isolation from the rest of the Constitution. It is also clear that as far as human rights matters are concerned, local government has all the constitutional obligations of the state,<sup>21</sup> within its area of competence, and which are to be found in
- Chapters 7 (local government),<sup>22</sup>
- Chapters 3 (co-operative governance)<sup>23</sup>
- As well as chapter 10 (public administration),<sup>24</sup> read together with sections 1(a) of the Constitution<sup>25</sup> with the other entrenched and justiciable provisions of the Bill of Rights [Chapter 2], inter alia, s7 (1) and s7 (2)) respectively.<sup>26</sup>

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20 The Constitution of the Republic of South Africa Act, 108 of 1996  
 21 Ibid:  
 22 Ibid:  
 23 Ibid:  
 24 Ibid:  
 25 Ibid:  
 26 Ibid:

## CHAPTER 2

- a) The history of Local Government in South Africa
- b) Developmental Local Government in a Constitutional democracy in South Africa
- c) The history of Local Government in South Africa
- d) Development Local Government in a Constitutional Democracy

The history of local government in South Africa must be seen in

"The broad context..., which... can perhaps be described as a world movement towards democracy which has been going on for centuries now. In the South African context, the development of local government, quite clearly has its own history and it is important to understand this history and how local government came about.

In the past, apartheid entrenched racial discrimination, disenfranchised the majority and enforced a rigid system of economic and social segregation. Under that regime, local government simply did what the provinces asked it to do. No more no less.

It is well known that the struggle between the representatives of the majority and the minority in this country was about power. At the heart of the negotiations for democracy in 1991 was the notion that power belonged to the people ... So in 1991, the crucial issue was how power was to be transferred from the minorities to the majority ... It was in this quest for security that two things happened. Both these matters have resulted in a benefit to local government in the final analysis.

The first thing that happened was that the majorities conceded to Constitutionalism [where] there will be a Constitution which will be supreme and everybody - minorities, majorities, different spheres of government- will have rights in terms of the Constitution [and] now local government has acquired rights in terms of the Constitution, and if we do everything correctly, that settlement is going to work for the benefit of the majority of the people in our country.<sup>27</sup>

Gone are the days when "all laws made by local government were tested not in terms of a Constitution, but rather in terms the statute by which it was established. So that what one did was looked at the four corners of the Provincial Statute or the National statute and determined whether or not local government had power ... Now local government quite clearly derives its powers from the Constitution itself."<sup>28</sup>

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<sup>27</sup> Yacoob Z (1998): Local Government and the Constitution of the RSA: Completing the Circle of Democracy. Butterworths pp. 27 et seq  
<sup>28</sup> Ibid: p28

Flowing from this analysis, it can now be understood why South Africa's past has been aptly described as a society "deeply divided by strife and conflict and untold suffering"<sup>29</sup>, badly in need of an entrenched Bill of Rights [see later on the Constitutional

Court's judgment in the *FEDSURE* case].

Against this background, it is interesting to note that in a remarkably short period, the country's political leaders negotiated largely a peaceful transition from a minority-controlled regime to a wholly democratic constitutional dispensation. This commitment to a democratic transition found expression in the Interim Constitution.

The Interim Constitution however only had to function as a bridge towards a Final Constitution, which was adopted by the Constitutional Assembly on May 8, 1996 and signed into law, by the President of the first democratic South Africa, Mr. Nelson Mandela, on December 10, 1996 at Sharpeville. In short, the 1996 constitutional order ushered a new dawn for government, in which national, provincial and local government each occupied a distinctive sphere with its own rights and duties.

Therefore the starting point for any analysis of the role of Local Government in implementing and promoting the Bill of Rights at grassroots level, must be the Constitution itself, because the rule of law in South Africa is to be found within the four corners of the Constitution. In this regard, reference will be made both to the Interim Constitution (Act 200 of 1993) as well as the Final Constitution (Act 108 of 1996). One must bear the point in mind however, that under the Interim Constitution, local government was still the domain of Provincial government. The Final Constitution elevated local government to a sphere of government with its own rights and obligations.

#### **Under the Interim Constitution (Act 200 of 1993)<sup>30</sup>**

In this regard, Chapter 10 of the (Interim) Constitution of the Republic of South Africa Act, 200 of 1993 specifically provided for Local Government. It provided for the institution of local government for residents of areas demarcated by a law of competent authority. Section 75 empowered a competent authority to determine the powers and structures of local government. Schedule 6 of the Interim Constitution conferred legislative competence for local government upon provinces.

Further section 174 (3) provided for the autonomy of local government and within limits, it was entitled to regulate its own affairs.

<sup>29</sup>

<sup>30</sup> The (Final) Constitution of the Republic of South Africa Act, 108 of 1996: The Preamble  
The (Interim) Constitution of the Republic of South Africa Act, 200 of 1993, Chapter 10



Section 174 (4) provided for no encroachment upon the powers, functions and structures of local government either by Parliament or Provincial legislatures so as to compromise the fundamental status purpose and character of local government. A further safeguard was provided for in section 174(5) requiring the publication for comment of proposed Parliamentary or Provincial Legislature encroachments that materially affected the status, powers and functions of local government.

**Under the Final Constitution (Act 108 of 1996) <sup>31</sup>**

This process to democracy further unfolded when the (Final) Constitution of the Republic of South Africa Act 108 of 1996, was adopted by the Constitutional Assembly on the 8<sup>th</sup> May 1996, which constitutionally entrenched local government in terms of chapter 7, as a sphere of government with its own rights and obligations. By the time the Final Constitution was signed into law on the 10<sup>th</sup> December 1996, a framework for the structure of local government together with appropriate fiscal powers and functions

were clearly spelt out, and formal legislative procedures outlined.

Glenda Fick<sup>32</sup> contextualises the new local government in South Africa as follows:

*"South Africa's interim Constitution did not address local government and its transition in any detail.*

*Instead s 245 of the interim Constitution stated that local government was to be regulated and restructured according to the Local Government Transition Act 209 of 1993, which came into effect on 2 February 1994. The Act identifies three phases of local government restructuring. During the first or pre-interim phase, negotiating forums were established to appoint temporary councils to carry out local government responsibilities.*

*The next phase or interim phase commenced from the date of the first local government elections of local government structures in 1995 and 1996. The third phase to be regulated by new legislation (such as Local Government: Municipal Demarcations Act 27 of 1998 and Local Government: Municipal Structures Act 117 of 1998), has yet to be started. It is worth noting that although the transition of local government commenced before that national and provincial government, the process of its transition has been protracted and complex. The Transformation process is yet to be completed.*

*An intensive 18 - month period of consultation and research resulted in a White Paper on Local Government in March 1998. Two pieces of legislation emerged from the White Paper process, namely Local Government: Municipal Demarcation Act 27 of 1998 and the Local Government: Municipal Structures Act 117 of 1998, laying the foundation of democratic local government in South Africa in the future.*

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- 31 The (Final) Constitution of the Republic of South Africa Act, 108 of 1996
- 32 1998 Annual Survey of South African Law. Juta & Co under the chapter CONSTITUTIONAL LAW by Adv. Glenda Fick<sup>32</sup> at pp 5 et seq.

*This principle was clearly spelt out in*

*Member of the Executive Council for Development Planning and Local Government in the Provincial Government of Gauteng v Democratic Party 1998 (4) SA 1157 (CC),*

*Yacoob J referred to s 241 of the Constitution which contemplates a new constitutional order. He stated that "[t]he apparent plan is to ensure that the "new order" contemplated for local government by the Constitution does not come into effect piecemeal but is brought into operation as a comprehensive constitutional package."*

Section 151(1) of the Constitution states that a sphere of local government "must be established for the whole of the territory of the Republic." The idea of a sphere of government represents a move away from a hierarchical understanding of the spheres of government, to one that is more inter-relational and inter-dependent. This principle governing the relations between spheres of government are articulated in the chapter on co-operative government (chap 3) in the Constitution.

But, these principles must not be understood to undermine the autonomous role municipalities must play in exercising their constitutional powers and performing their functions. They have a right to govern, on their own initiative, the local government affairs of their communities (s 151(3)).

The objects of local government are set out in s 152 of the Constitution... They include the provision of democratic, accountable government for local communities, the provision of services to communities in a sustainable manner, the promotion of social and economic development, the promotion of a safe and healthy environment, and the encouragement of the involvement of communities and community organizations in the matters of local government. Traditionally, local government is understood to be government 'closest to the people' and is associated with the delivery of services such as water, electricity, sewerage and waste disposal, municipal roads and passenger transport services. The fulfillment of the above objectives together with the delivery of services poses a difficult challenge for municipalities across South Africa.

This is so since it is at a local government level that the gross disparities in South African society along racial lines in the townships and suburbs often became most obvious. A crucial aspect of the challenge faced by all municipalities is to ensure that, with limited financial and human resources, they address these disparities in infrastructure and provide service delivery by effecting social and economic development. Like all other organs of state, they are all bound by the Bill of Rights (s 8 of the Constitution). In line with the objects to be achieved by local government structures, the rights in sections 24 and 27 of the Constitution become immediately relevant"<sup>33</sup>

#### d) Development Local Government in a Constitutional Democracy<sup>34</sup>

The constitutional entrenchment of democratic governance is one of the cornerstones of local government. The history of South African local government clearly shows that the institution suffered from an incurable lack of legitimacy due to, among others, a lack of democratic representation of the people as a whole...<sup>35</sup>

[T]he first object of local government is 'to provide democratic and accountable government for local communities' (-s 152(1)(a)). One of the objects of local government in s152(1)(e), namely, 'to encourage the involvement of communities and community organizations in the matters of local governments' providing a number of methods for facilitating protecting and promoting community participation in chapter 7:

First, "no by-law, in terms of s 160(4)(b), may be passed by a municipal council unless the proposed by-law is published for comment."<sup>36</sup>

Second, in terms of s 160(7),<sup>37</sup> "a municipal council must conduct its business in an open manner, or may close its sittings, or those of its committees, only when it is reasonable to do so, having regard to the nature of the business being transacted."

Third, in terms of s 162(3),<sup>38</sup> municipal by-laws 'must be accessible to the public.' Representation and participation by the local community would be the vehicle through which democratic governance is to be realized. An electoral system of proportional representation seeks to have a broad variety of political opinion represented in councils. Such a system must ensure that the total number of members elected from each party reflects the total proportion of the votes recorded for those parties (s 157(3)).

Chapter 3 of the Constitution provides for the principle of co-operative governance<sup>39</sup> "In the Republic, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated."

Section s 40 (1)<sup>40</sup> provide: - In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

<sup>34</sup> Mettler, Johan: The Legislative Powers of Local Government. Research Paper - Friederick Ebert Stiftung Foundation. Democracy Project. Community Law Centre. UWC 1998

<sup>35</sup> Ibid

<sup>36</sup> The (Final) Constitution of the Republic of South Africa Act 108 of 1996. Chapter 7 ss152 (1)(a), (e) & s160(4)(b)

<sup>37</sup> Ibid

<sup>38</sup> Ibid

<sup>39</sup> Ibid

Section 40 (2):-All spheres of Government must observe and adhere to the principles in this chapter and must conduct their activities within the parameters that the Chapter provides.<sup>41</sup> It is accordingly submitted that when the Constitution makes mention of 'the state', local government would fall into this category. Therefore any reference to "the state" in the Constitution means the state in all its manifestations that include national, provincial and local government.

The chapter on co-operative governance creates a mechanism for local government to function within its own right, and yet co-operate with other spheres of Government. Chapter 3<sup>42</sup> has therefore enhanced the status of local government and protected its powers in a number of provisions.

Furthermore, in terms of s 151 (3), a municipality "has a right to govern in its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in chapter 7 of the Constitution." <sup>43</sup>

In terms of section 151 (4), the status accorded to local government, obliges national and provincial government "not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

In terms of s156 (1)(a) read together with Parts B of schedules 4 and 5, executive and legislative powers and authority are conferred on local government, to provide a number of services including gas reticulation tourism, planning, public transport, public works, water and sanitation services, road, health, trading regulations and amenities. In addition, "a municipality has the right to administer particular matters that fall within the concurrent or exclusive competence of the provincial governments." <sup>44</sup>

The legislative authority of local government is spelt out in the Constitution in Part B of Schedules 4 and 5. In respect of these matters, a municipal council has, legislative, executive and administrative powers including their limitations are all fully set out in (s 156(1)).<sup>45</sup>

41 Ibid  
42 Ibid  
43 Ibid  
44 Ibid  
45 Ibid

Nico Steytler analyzing the legislative powers of local government in the

*Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), said that the Constitutional Court in confirming the new Constitutional status of local government held that

'a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognized in the Constitution itself.' A critical consequence of this enhanced status, the Court pointed out, is that 'the enactment of legislation by an elected local council acting in accordance with the Constitution is, in the ordinary sense of the word, a legislative and not an administrative act'.<sup>46</sup>

This signifies an important change to the constitutional and legal framework in which local government structures exercising lawmaking powers. Their legislative acts cannot be reviewed in terms of common law principles of administrative law and everyone's right to just administrative action in terms of section 33 of the Constitution. *Fedsure* also makes clear, however, that local government legislatures will be subject to important constitutional 'controls'.<sup>47</sup>

As an organ of state local government has an obligation to protect and promote, and progressively realize, the fundamental rights spelt out in chapter 2 of the Constitution, conform to the principles of legality and adhere to the provision of chapter 7 of the Constitution, which deals specifically with the powers and functions of local

Government...<sup>48</sup>

A local authority exercising lawmaking functions must act within the powers lawfully conferred upon it by the Constitution, or by laws of a competent authority. In *Fedsure*, the Court emphasized that a local authority that acts in contravention of its empowering statutes will be acting unconstitutionally.

Pending the next local government election that must be held before 30 January 2001, municipalities' powers are set out in the LGTA - **Local Government Transition Act 209 of 1993** (as amended from time to time). In terms of the Act, a council must act within the powers conferred upon it i.e. by the proclamation issued in terms of section 10 D of the LGTA, establishing the Council; and any law (s 10 D (1) (a) and (b)) of the LGTA).<sup>49</sup>

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<sup>46</sup> Nico Steytler Local Government Project-Community law Centre, UWC, vol 1 no:4, Dec1999

<sup>47</sup> Ibid

<sup>48</sup> Ibid



The Council may, furthermore, exercise any power 'concerning a matter which is reasonably necessary or which is incidental to the effective exercise of its powers and performance of its duties (s 10 D (1)(c) of the LGTA).'<sup>50</sup>

Furthermore, the issue of concurrent jurisdiction with other spheres of government to legislate in concurrent functional areas is also addressed providing the necessary overriding mechanisms in the event of a conflict of validly enacted laws between the three spheres of government:

- (a) *'If the matter would most effectively be administered locally'; and*
- (b) *'The municipality has the capacity to administer it' (-s 156(4))*

In sum, the elevation of local government to a fully fledged sphere of government under the final Constitution in 1996, on the same footing as other spheres of government, gave it the legitimacy to effectively govern as a government closest to the people acting as the authentic voice of the people.<sup>51</sup>

The 1996 Constitution (Act 108 of 1996), makes Constitution the supreme law of the Republic. Any law that is inconsistent with it is invalid (s 2). The Bill of Rights<sup>52</sup> forms the cornerstone of democracy, enshrining 'the rights of all South Africans and affirming the values of dignity, equality and freedom.'<sup>53</sup> The state is obliged to respect, protect, promote and fulfill the rights contained in the Bill of Rights.<sup>54</sup> Furthermore the Bill of Rights applies to all law, all branches of government and all organs of state.<sup>55</sup> Provision is made for a three sphere system of government comprising national, provincial and local which are distinctive, interdependent and interrelated. The principles of cooperative governance underpins intergovernmental relations.<sup>56</sup> It is interesting to note that for the first time in the history of South Africa, local government is elevated to a sphere of government in its own right. Previously, and even under Interim Constitution, (Act 200 of 1993), local government was a provincial function.

50

Ibid

51

Ibid

52

The Final Constitution of the Republic of South Africa Act 108 of 1996

53

Ibid s 7(1)

54

Ibid s 7(2)

55

Ibid s 8(1)

56

Ibid s 40(1)

- Section 41 states,<sup>57</sup> inter-alia, that all spheres of government must respect the constitutional status, institutions, powers and functions of government in these spheres
- not assume any powers or functions except those conferred on them in terms of the Constitution
- 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
- cooperate with one another in mutual trust and good faith
- void legal proceedings against one another.

In a nutshell, the most important changes to the Rule of Law which have been brought about by the (Interim and Final) Constitution, can be characterized as follows:

- The shift from a system of Parliamentary sovereignty to the rule of Law or Constitutional Supremacy.
- Chaskalson P in Executive Council, Western Cape Legislature, & Others v President of the Republic of South Africa & Others 1995 (4) SA 877 (CC) 'The new Constitution establishes a fundamentally different order to that which previously existed. Parliament can no longer claim supreme power subject to limitations by the Constitution; it is subject in all respects to the provisions of the Constitution and has only the powers vested in it by the Constitution expressly or by necessary implication.'<sup>58</sup>
- The creation of a democratic system of government (National, Provincial and Local) based on openness, accountability, equality and adult universal suffrage on the basis of one person one vote in a non racist non sexist society.<sup>59</sup>
- The separation of powers between the legislative, executive and judiciary.
- The enjoyment of fundamental Human Rights for all.<sup>60</sup>

Today, section 164<sup>61</sup> further provides that any residual matter regarding local government not dealt with in the constitution may be prescribed by national or provincial legislation within the framework of national legislation. The implementation of the Constitution at every level as well as at a co-operative level, ensures that democracy is established everywhere in South Africa.

It is against this background, one can safely conclude that the (Final) Constitution created a most advanced local government in the world, which can rightfully play a major role in providing local services, promoting economic and social development and promoting democracy.<sup>62</sup>

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58 Henderson AJA.1998 SALJ vol.115 part 2 p351 The Curative Powers of the Constitution  
59 The Final Constitution of the Republic of South Africa Act 108 of 1996  
60 Ibid (s 1)  
61 Ibid (Chapter 7)  
62 CAMERON R: Democratisation of Local Government in South Africa. Ch7 pp 225 et seq

In the words of Mark Swilling:

"[D]emocratic local governance in our towns and cities will develop if accountable and democratically managed local governments are developed that, in partnership with well managed formations in civil society who are committed to the principles of trust in reciprocity in the promotion and defense of citizen's interests, have the capacity to formulate and implement policies that deal effectively and efficiently with urban development problems."<sup>63</sup>

This is reinforced by Halfani and Stren at p.37, who concluded that:

"The example of a democratic and re-energized South Africa, the economic powerhouse of the continent, suggests new possibilities for a more effective and inclusive approach to municipal policy making. With international assistance, decentralized urban management arrangements are being put in place that may be able more directly to respond to the needs of the low income majority..."<sup>64</sup>

As Mr. Justice Langa D P said, "What our Constitution says, what our legislatures do, and what our courts write are vitally important. But the reality of freedom in our daily lives is shown by the attitude and the policies of people toward each other in the very block or township where we live. There we will find the real measure of a living bill of rights" (Quote from a passage of William O Douglas: A Living Bill of Rights.)<sup>65</sup>

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<sup>63</sup> Mark Swilling: Building Democratic Local Urban Governance in Southern Africa: A Review of Key Trends ch.9 p 127. Patricia I. Mc Carney Cities and Governance, New Directions in Latin America, Asia and Africa. Centre for Urban and Community Studies University of Toronto, Canada 1996

<sup>64</sup> Halfani and Stren p.37 THE CITIES OF SUB-SAHARAN AFRICA: FROM DEPENDENCY TO MARGINALITY: CENTRE FOR URBAN and COMMUNITY STUDIES, UNIVERSITY OF TORONTO. A paper given to the writer by Prof. Richard Stren in 1998 in Toronto, Canada

65 Langa P 1999 SALJ Vol 116 Part 1 Juta & Co p 157

## CHAPTER 3

### Objects of Local Government

The objects of local government and the application of basic human rights are spelt out respectively in chapter 7-(s 152, s 153) and chapter 2 of the Constitution (Act 108 of 1996). It is absolutely necessary to understand that chapter 7 mandates a democratic lawmaking process.<sup>66</sup>

The objects of local government in terms of section 152<sup>67</sup> are:

- to provide democratic and accountable government for local communities
- to ensure the provision of services to communities in a sustainable manner
- to promote social and economic development
- to promote a safe and healthy environment
- to encourage the involvement of communities and community organizations in the matters of local government

Section 153 outlines the developmental nature of local government<sup>68</sup> which are to

- a) Structure and manage its administration, and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community, and participate in national and provincial development programs.
- b) Councils' decisions in passing by-laws require 'a supporting vote of a majority of its members' - s160 (3) read with s 160(2) (a).
- c) a Municipal Council cannot pass a by-law unless all the members of the Council have been given reasonable notice- s160 (4) (a).

66

Steytler: A Council =s Legislative Powers: Local Government Project, Community Law Centre. UWC -Dec 1999; Local Government Bulletin

67

Chapter 7 of the Constitution of the Republic of South Africa Act 108 of 1996

68

Ibid

Participation in Council's proceedings must take place in 'a manner that all parties and interests reflected within the Council to be fairly reflected and is consistent with democracy' (s 160 (8)).

Community participation is an important element of the lawmaking process. A municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted - s160 (7).

- 1) A by - law cannot be passed unless it is first published for comment- s160 (4) (b).
- 2) Municipal by-laws must be accessible to the public -s 160(3) and cannot be enforced until they have been published in the official gazette of the relevant province- s 160(1).<sup>69</sup>

It is within this framework that one needs to study the impact of the Bill of Rights on local government, as local government is closest to the people, it is best placed to deliver services to the people efficiently and ensure the enhancement of democracy. The corollary is also true of the position of a failure of local government to fulfill an obligation in the Bill of Rights will found a claim in the Bill of Rights itself. An example is where local government fails to prioritize resources for houses could result in a claim under s 26 read together with ss 152 and 153, either from a person or a class of persons in a community whose rights have been adversely affected by such an adverse decision of a municipality. (See *Grootboom* case later on)

[For this reason alone]..., local government is in a better position to realize 'the Bill of Rights than any other sphere of government. Since all the other spheres of government are too far removed from the people in that all they can do is making laws in the hope that they will be carried out.' <sup>70</sup>

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<sup>69</sup> Ibid

<sup>70</sup> Yacoob Z 1998 Local Government and the Constitution of the RSA: Completing the Circle of Democracy. Butterworths. p 30



## Municipal Obligations and the Bill of Rights.

Before I address the issue rights in the Bill of Rights that I wish to examine in the context of democratic local governance, I want to turn to a very important aspect governing the responsibility of public administrators (local governors included) towards members of the public who are the beneficiaries of service delivery. Clive Plaskett<sup>71</sup> writes in The South African Law Journal 2000 (117) p 153

"Protecting the Public Purse: Appropriate relief and Cost Orders against officials" which in my submission, captures the very essence of the role of public administrators in a rights based constitutional democratic order: *He states:*

*"The Constitution of the Republic of South Africa Act 108 of 1996 contains four sets of provisions of relevance... that relate to how officials should do their jobs and the limits on and control of their powers.*

First, s1 contains a set of founding values for the democratic order created by the Constitution. Section 1, lists as founding values, constitutional supremacy and the rule of law. Section 1(d) speaks of 'accountability, responsiveness and openness' as aims of the multi-party system of democratic government' created by the Constitution.

Section 2 provides that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

Secondly, s 195(1) lists what are termed basic values and principles governing public administration. Among these basic values and principles are the following:

s 195 (1) (a), a high standard of professional ethics must be promoted and maintained';

s 195 (1) ( b), efficient, economic and effective use of resources must be promoted'; and, in s 195 (1) (d) public administrators must provide services 'impartially, fairly, equitably and without bias'.

These values and principles plus the remaining six in s 195(1), apply to the 'administration in every sphere of government', 'organ of state' and 'public enterprises' (s 195 (2)).

Section 237 adds to the obligations created by s 195(1). It provides: 'All constitutional obligations must be performed diligently and without delay.'

Thirdly, the judiciary is given an enhanced status and extended jurisdiction, particularly in respect of the protection of individuals against the infringement of their constitutional rights ... ' In terms of s 172(1) (a), any court of competent jurisdiction ' must declare that any law or conduct that is inconsistent with the

Constitution is invalid to the extent of its inconsistency.'

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<sup>71</sup> Plaskett Clive, 2000 SALJ 117 pp 153 Juta & Co "Protecting the Public Purse. Appropriate Relief and cost orders against officials."

Fourthly, the Bill of Rights-Chapter 2 of the Constitution- provides for a set of substantive limits on the exercise of power by the state in all its manifestations, (S 8 (1)) and private persons and entities in certain circumstances (s8 (2)). Section 7(2) places an obligation on the state 'to respect, protect, promote and fulfill the rights in the Bill of Rights'. The Bill of Rights contains a set of civil and political rights, such as the right to

Equality (s 9), human dignity (s10), life (s11) and freedom and security of person (s12). It also contains a range of social and economic rights, such as the right of access to housing (s26) and the right to health services, sufficient food and water and social security, including social assistance (s 27). Thirdly, it contains extensive environmental rights (s24). In addition to these three-generation rights, it also contains two unusual rights. They are access to the right to information (s32) and a right to just administrative action, made up of rights to lawful, reasonable and procedurally fair administrative action, and a right to reasons for administrative decisions (s33 (1) and (2)). These two rights are intended to specifically to lend lustre to the values of accountability, responsiveness and openness...

Finally s 38 sets out who has standing to 'approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened', providing too that, in these circumstances, the court may grant appropriate relief, including a declaration of rights<sup>172</sup>.

The Constitutional Court in

**President of the Republic of South Africa v South African Rugby Union 1999 (10) BCLR 1059 (CC) 1115 B-D (para 133),**

described the position of public administration under the Constitution thus:

Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration, which respects fundamental rights and is accountable to a broader public.

The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations, which amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs. These were implemented by a bureaucracy that was hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.<sup>172</sup>

72 Ibid

Today, these principles are also spelt out in the **Batho Pele Principle of Service Delivery**<sup>73</sup> (PEOPLE FIRST) that guarantees all citizens a right to services with respect, dignity and equality. South Africa has also captured these principles in the Nation's Coat of Arms. These principles recognize the need to promote meaningful dialogue between the government and the people, since meaningful dialogue occurs in a context.

The BATHO PELE principles therefore aim at capturing the experiences of ordinary people and formulate policies and development programs that are people centered. The onus is on government to develop systems and structures to facilitate effective communication with all stakeholders.

It provides for:

- **Consultation** - people have a right to be consulted about the level and quality of services.
- **Service standards**- People must be made aware of the level and quality of services.
- **Access**- people should have equal access to services
- **Courtesy**- people should be treated with courtesy and respect.
- **Information**- people should have access to full information concerning services that they are entitled to.
- **Transparency**- people should be informed on how local governments are run (costs and who does what)
- **Redress**- people must receive apologies and explanations for any lack of delivery and / or non-adherence to service standards.
- **Value for money**- services should be delivered efficiently and economically.

This point was further highlighted in a recent matter of

**The South Peninsula Municipality v Evans (case no: A 703/98 9-5-2000 CPD)**<sup>74</sup>

The question the court had to decide was whether the audi alteram partem rule applied where a local authority took a decision adverse to the interest of the applicant under the Environment Conservation Act 73 of 1989.

The court concluded that the local authority was bound to give such persons a proper hearing and ought to have provided applicants with notice. The court went further and dismissed the appeal of the local authority where they had not given such proper notice nor afforded the applicant an opportunity to be heard and in

<sup>73</sup>

Spelt out the Batho Pele Principle as enshrined in the Nation's (SA) Coat of Arms

<sup>74</sup>

The South Peninsula Municipality v Evans (case no: A 703/98 9-5-2000 CPD)

Mjeni v The Minister of Health and Welfare: Eastern Cape Province<sup>75</sup>  
(case no 824/96 6-4-2000) Tkd (Where an application was brought against the respondent (state) for contempt)

Held - s 165 constitutes an important and fundamental duty on the state and

- a deliberate disobedience amounts to a breach of a constitutional duty. Further held not to be in the interest of justice, in terms of s173 of the Constitution, to place officials above the law.

It follows that the provisions of the Constitution<sup>76</sup> namely:

- s 1: South Africa is one sovereign, democratic state founded on the following values, human dignity, the achievement of equality and the advancement of human rights and freedom<sup>77</sup>
- s 7(1): The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirm democratic values of human dignity, equality and freedom.<sup>78</sup>
- s 7 (2): The state must respect, protect, promote and fulfill the rights in the Bill of Rights.

As local government constitutes the state at a local level, it has to progressively realize<sup>79</sup> and cements these rights. Failure to do so will not only render the Constitution meaningless. But it could result in local government facing litigation (see Grootboom Case later on).

It is therefore my submission that here is clearly a legal obligation on the shoulders of local government to uphold democracy and ensure that democracy triumphs. Therefore, local government's role in translating the realization of specific rights such as :

- equality (s 9 (3)) ,<sup>80</sup>
- access to land (s 25 (5)),<sup>81</sup>
- access to adequate housing (s 26 (2)),<sup>82</sup>
- access to adequate healthcare, food, water and social security (s 27(2)),<sup>83</sup>
- access to basic adult education (s 29(1))<sup>84</sup>
- and access to information held by the state( s 32(2))<sup>85</sup>

must be carefully examined within the framework of the Bill of Rights and its impact on local government in terms of the objects of developmental local government, especially when making new by-laws, amending or repealing existing by-laws and even when enforcing by- laws.

<sup>73</sup> Spelt out the Batho Pele Principle as enshrined in the Nation =s (SA) Coat of Arms

<sup>74</sup> The South Peninsula Municipality v Evans (case no: A 703/98 9-5-2000 CPD)

<sup>75</sup> Mjeni v The Minister of Health and Welfare: Eastern Cape Province (case no 824/96 6-4-2000)Tkd

76 The Constitution of the Republic of South Africa Act 108 of 1996  
 77 Ibid 78 Ibid 79 Ibid 80 Ibid 81 Ibid 82 Ibid 83 Ibid 84 Ibid 85 Ibid

Section 8 (1)<sup>86</sup> of the Constitution provides that the Bill of Rights applies to all law, and binds the legislature, the judiciary and all organs of state. The effect is that a municipality, as an organ of state, when making by- laws, is subject to compliance with the provisions of the Bill of Rights. Therefore, all administrative actions and the passing of by-laws must be in line with the principles entrenched in the Bill of Rights:  
s 9: Equality<sup>87</sup>

s 9(1) guarantees the equal protection and equal benefit of the law. Equality is a holistic concept.

It is therefore necessary for local government to ensure that equality is brought about at every level and ensure that measures are taken ensure that people previously disadvantaged are no longer disadvantaged - s9(2)<sup>88</sup>. Already thus far, local government has been challenged on four different occasions in Beukes<sup>89</sup> ; Walker<sup>90</sup> ; Prut<sup>91</sup> and Fedsure<sup>92</sup> cases on the interpretation of this principle relating differential charging and cross subsidization, on the basis of equality before the law and equal protection and benefit of the law had been violated. Equality is defined to include full and equal enjoyment of all rights and freedoms. Three of the four cases were decided in favour of the municipalities.

*Cameron J in BEUKES pp. 480 - 2 held that differential charges had an indirect racial impact but the question remained whether this differential treatment could be justified. Holding that the inconsistent application of the law was not in itself discrimination, the court found that that the rationale forwarded for a flat rate in former black townships Y provided an acceptable economic and social justification for differential treatment. The differences complained of did not amount to racial discrimination or more broadly , unfair discrimination, being warranted by dissimilar historical, social and economic circumstances.*

Finally, the principles laid down by the Constitutional Court, in the Fedsure case<sup>93</sup>, having noted what was said in Beukes, pronounced on the matter in clear and unambiguous language that any discussion on municipal equality jurisprudence in South Africa, must take judicial notice of disparities and backlogs in development created by the legacy of apartheid. Therefore any commitment to formal equality will exacerbate inequality. To give expression to the values, which underscore the right, people have to be treated differently. The Constitutional Court itself went one step further to develop a rich jurisprudence on the subject.

86 Ibid 87 Ibid 88 Ibid

89 Beukes v Krugersdorp Transitional Local Council & Another, 1996 (3) SA 467(W)

90 Walker v Stadsraad van Pretoria, 1997 (3) BCLR 416(T)

91 Municipality of the City of Port Elizabeth v Prut N O & Others, 1997 (6) BCLR 828(SE)

- 92     *Fedsure Life Assurance LTD & Others v Greater Johannesburg Metropolitan Council and Others*, 1997 (5) BCLR 657(W)
- 93     *Ibid*



In the famous case of *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 (1) SA 374 (CC)<sup>94</sup>

The Constitutional Court succinctly placed the entire debate of local government within context and laid the solid foundations by squarely placing the transformation of local government in South Africa in perspective with specific reference to its role in the past by recognizing the imbalances and inequalities prevalent in South African society.

For the purpose of this paper, it is important to make a detailed reference to the judgment of the Court, in particular the judgments of Chaskalson P, and Kriegler J.

The facts of the case were as follows:

The applicants attacked a property rating mechanism, which was held to have been designed to generate a surplus in two Johannesburg transitional metropolitan sub-structures to fund the deficit of the other two sub-structures and the Johannesburg Metropolitan Council itself. The power to claim a contribution from sub-structures was sourced in a provision of a Premier's Proclamation which provided that the contribution could be claimed on an equitable basis.

Chaskalson P, took judicial notice of the state of affairs in South Africa at a local government level and said:

*"[para 2-4] It may be helpful at the outset to sketch the political and legal context ...[of]..The transformation of South African society rooted in discrimination and disparity to a constitutional democracy founded upon freedom, dignity and equality posed and continues to pose, particular profound challenges at local government level. It is here that the acute imbalances in personal wealth, physical infrastructure and the provisions of services were patent. The 13 local government bodies, which formerly exercised powers and duties within ...South Africa's largest and most developed urban areas, were of two sorts. Those in historically "white areas" were characterized by developed infrastructure, thriving business districts, and valuable ratable property. Those in the so-called Black, Coloured and Indian areas, by contrast, were plagued by underdevelopment, poor service and vastly inferior rates bases.*

*The Interim Constitution [Act 209 of 1993] which came into force on 27 April 1994, sought to break this state of affairs by establishing a new framework for local government in South Africa. It did not prescribe the specific manner in which this transformation was to occur. Instead, it stipulated in s 245 that the complex restructuring of local government should take place accordance with the Local Government Transition Act 200 of 1993 -the LGTA.*

*The LGTA contemplates that the transformation of local government will take place in three distinct stages. During the pre-interim phase, negotiating forums were established and charged with appointing temporary councils to discharge local government responsibilities. This period extended from the commencement of the LGTA on 2 February 1994 until the first democratic local government election (on 1 November 1995). The Interim phase commenced on the date of such elections and witnessed the introduction of a series of transitional local government structures. The third phase, to be initiated and regulated by legislation, is yet to come into effect []"*

Kriegler J<sup>95</sup> expanded this thesis even further. He stated: at para 121-129 et seq.  
*"... [T]he impact of the apartheid system is particularly evident in the area of local government. Nowhere is the contrast in existential reality more starkly than in the residential areas of the cities, towns and villages of South Africa... more specifically, we are concerned with the consequences, primarily socio-economic but ultimately political, of vastly inferior living conditions imposed on the majority of residents merely by reason of skin colour.*

*The Apartheid city, although fragmented along racial lines, integrated an urban logic that systematically favored white urban areas at the cost of black urban areas and peri-urban areas. The results are stark and absurd: sprawling black townships with hardly a tree in sight, flanked by vanguards of informal settlements and guarded by towering floodlights, out of stone throw reach. Even if only a short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streelit suburbs and parks, and running water and convenient electrical amenities Y we find white suburbia .How did it happen? Quite simply, the economic relationship between white and black (African, Coloured and Indian) halves of the city was similar to a colonial relationship of exploitation and unequal exchange.*

*The genius lay in the system of apartheid zoning: major commercial and industrial areas were located in the white areas, and fell within the jurisdiction of white local authorities. Not only did this impose a cost burden on those who had to commute the distance to and from these centres of economic activity, but the bulk tax base was located in the white city. Black people came and went and worked and spent, leaving behind their labour and money. Despite racial segregation..., [t]his exploitative logic held the apartheid city together as a single interdependent system.*

*The transformation of local government that we are experiencing today preceded and in part anticipated even the constitutional negotiations:*

*The form and function of the apartheid city was resisted and challenged in numerous ways during the 1980s. While one - off demonstrations, stayaways, strikes and collective violent crowd actions against specific targets were commonplace; it was*

*sustained by mass action that tended to have a more decisive effect. Consumer and rent boycotts were mounted by communities across the country.*

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Ibid

Although success depended on the strength of the grassroots organizations and the capabilities of the leadership, these localized collective actions created stalemates that neither the targets of these actions (white shopkeepers and black local authorities) nor the social movements behind them, could tolerate for very long. The targets were deprived of money, and the constituencies of the social movement were deprived of services. So - called local level negotiations had broken out across the length and breadth of the country. Inevitably, the parties involved were representatives of the various local government structures, business, municipal service providers, civic associations and resident organizations, political parties, trade unions and numerous community organizations. These interactions resulted in the creation of the local negotiating forum Y[B]y 1992-93 the national negotiations realized that a national framework was needed to guide the local government transition via the local forums. The result was the establishment of the National Local Negotiating Forum [NLGNF] in early 1993... [Which] very rapidly negotiated a framework for guiding local government transition. This was eventually enacted as the Local Government Transition Act (Act 209 of 1993) in late 1993.

The act provided for the transformation of local forums into statutory forums with prescribed structures and procedures. The local forums were then mandated to negotiate locally appropriate solutions consistent with the principles of non-racialism, democracy, accountability and one tax base. Their first task was to appoint new local government structures.

In metropolitan areas a two level system was provided for, namely, a transitional metropolitan Councils, (TMC s) for the whole metropolitan area, underpinned by metropolitan substructures.

It is clear that the socio - economic and political dynamics in metropolitan areas during the decade preceding the adoption of the LGTA and the dawning of the new constitutional era in South Africa, not only played a pivotal role in breaking the political deadlock that had loomed ever larger but gave impetus to and informed the thinking underlying the LGTA and chapter 10 of the Interim Constitution. The singular difficulties and challenges of restructuring the basic structure of urban existence were and still are infinitely complex and appropriate responses will require decades of endeavor.

This complex restructuring had, of course, to begin in the context of, and in a manner which complies with the reconstruction and development program (RDP) of South African society, mandated and required by the Interim Constitution as a whole, and the duties imposed by that Constitution to local government structures in particular by chapter 10, the constitutional charter for local government in South Africa, prescribed in

*s 174 (1) that*

*A [l] ocal government shall be established for the residents demarcated by law of a competent authority."*

*In terms of s 174(2) provision could be made for categories of metropolitan urban and rural local government with differentiated powers, functions, and structures whilst*

*s 174 (3) demanded that A[a] local government shall be autonomous and within the limits prescribed by or under law, shall be entitled to regulate its affairs, and*

s 174 (4) expressly prohibits Parliament and Provincial Legislatures from encroaching on the powers, functions and structures of local government, A to such an extent as to compromise its fundamental status, purpose and character of local government." Thus for the first time in our history, provision was made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions<sup>96</sup>

Furthermore, as municipalities have the power to make by-laws. An obligation is placed on municipalities to treat everyone equal before the law and afford everyone equal benefit of the law. In this regard, the interpretation of the equality jurisprudence of municipalities as outlined earlier on in this paper in the Fedsure matter must be taken into account. In this context, the notion 'equitable' means substantive fairness that is not synonymous with formalistic equality.

'Those who suffer social and economic deprivation wrought by historical and systemic group-based discrimination, have to be differently advanced.'<sup>97</sup>

In this regard,

- s 9(2)- Affirmative action provision 'places a positive obligation on the state and people's expectations of the state. Positive steps must be taken through legislative and other means to protect and advance persons or categories of persons disadvantaged by unfair discrimination in the past. It is submitted that this provision endorses remedial measures designed to protect, advance persons, or categories of persons, previously disadvantaged by unfair discrimination.'<sup>98</sup>

It is a constitutional imperative to facilitate the achievement of substantive equality and not merely formal legal equality alone.

- s 9 (3): The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth<sup>99</sup>

96

Ibid

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The President of the Republic of South Africa v Hugo, 1997 (6) BCLR 707(CC) para 112 p 775 and Brink v Kitshoff NO, 1996 (4) SA 197(CC) para 33 at p 214

98

The Constitution of the Republic of South Africa Act 108 of 1996

99

Ibid. See also the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 in this regard.



Professor SBO Gutto is of the view, that, as far as the equality provision (in the Constitution) is concerned, this is a composite right that is realizable in full, only to the extent that all other socio economic rights, civil and political, are respected, protected and promoted.<sup>100</sup>

As Meyerson contends<sup>101</sup> "[w]hen we regard citizens as equal and free, we affirm that there are no natural or pre-ordained hierarchies of power, and that there are therefore no persons to whom anyone is naturally subordinate. @

• Human dignity (s 10) and The Right to Life (s 11)<sup>102</sup>

This right has been adequately addressed earlier on in the context of a rights based constitutional democracy and the rights that flow from it. For the sake of completeness, I will state what the different judges of the Constitutional Court in S v Makwanyane 1995 BCLR 665 (CC)<sup>103</sup> at para 58, Chaskalson P said-

*A Under our constitutional order the right to human dignity is specifically guaranteed .It can only be limited by legislation which passes the stringent test of being A necessary ". The weight given to human dignity Y is wholly consistent with the values of our Constitution and the new order established by it."*

Again at p. 725 et seq, the learned justice (Ackermann J) said-

*" The right to life and dignity are the most important of all human rights and the source of all other personal rights in chapter 3 (i.e. The Bill of Rights). By committing ourselves to a society founded on recognition of human rights we are required to value these two rights above all others and this must be demonstrated by the state in everything it does."*

Didcott J p.740 at para 190-

*"South Africa has experienced too much savagery. The wanton killing must stop before it makes a mockery of the civilized, human and compassionate society to which the nation aspires and has constitutionally pledged itself. And the state must set the example by demonstrating the priceless value it places on the lives of all its subjects, even the worst"*

<sup>100</sup> Gutto SBO: Access to Water Carriers Obligations - The Star 7 February 1997 and "Introduction" in a Practical Guide to Human Rights in Local Government, 1996, above at xiii - xiv

<sup>101</sup> As Nicholas Smith writes (in a book review which appears in the 1998 SALJ. vol.115 pp790 et seq) of Meyerson's book: Rights Limited, Freedom of Expression, Religion and the South African Constitution: Juta & Co. Ltd. Cape Town, 1997, 'Meyerson focuses her attention on the phrase "open and democratic society based on human dignity, equality and freedom" because she thinks that it is not merely ornamental: it describes the essence of a state that takes rights seriously. She argues that 'Dignity', 'equality', and 'freedom', means something different in the limitations provisions, to what they mean when used to express specific rights to dignity, equality and freedom protected in the Bill of Rights'. Equality and freedom cohere in this way: '[w]hen we regard citizens as equal and free, we affirm that there are no natural or pre-ordained hierarchies of power, and that there are therefore no persons to whom anyone is naturally subordinate.'

<sup>102</sup> The Final Constitution of the Republic of South Africa Act 108 of 1996

<sup>103</sup> S v Makwanyane, 1995 BCLR 665(CC)

- **s 16 Freedom of Expression**<sup>104</sup>  
This right must be carefully analyzed in the context of whether or not 'whistle blowers' may or may not be gagged. This right is critical to a healthy democracy and therefore the principles of a multi-party democracy will prevail to prevent a council from gagging its councilors who hold a different view subject to limitations imposed by the Constitution itself. In this context hate speech is not constitutionally protected.
- **s 22 Freedom of Trade, Occupation and Profession**<sup>105</sup>  
Questions confronting local government are, right of the informal traders to trade in the central business districts in competition with established businesses in a locality. The issuing of business licenses as well as the various Town planning and land development schemes must be reviewed for conformity within the framework of developmental local government and the Bill of Rights.
- **s 23 Labour Relations**<sup>106</sup>  
This right has been extensively developed under the Labour Relations Act No. 66 of 1995 and the Basic Conditions of Services Act of 1997; The Employment Equity Act of 1998 as well as The Skills Development Act. It is therefore submitted that an applicant with the required skills for the job, who is a HIV/AIDS victim, seeking employment in the market cannot be discriminated against. If the applicant is discriminated against, it would prima facie be an unfair labour practice.
- **s 24: Environment**<sup>107</sup>  
A municipalities' environmental obligations flow from the provisions of s 24 read together with ss 152(1)(c) and (d) and s153<sup>108</sup> of the Constitution. S 24 affords everyone the right to a non-harmful environment and to have the environment protected through reasonable legislative and other measures that prevent pollution and eco- degradation, promote conservation and secure sustainable development and use of natural resources, while promoting justifiable economic and social development. Local government s' constitutional power to administer the listed scheduled environment matters are extensive but rendered unclear by a functional overlap and duplication between the three spheres of government with no coherent integrated strategy to address issues.



<sup>105</sup> Ibid

<sup>106</sup> Ibid

<sup>107</sup> Ibid

<sup>108</sup> Ibid

The Court placed heavy emphasis on the need for co-operative, coordinated planning by different authorities in the different spheres of government in the matter of

*Van Huysteen and others NNO v Minister of Environment Affairs and Tourism and Others 1996 (1) SA 283 (C)*

Central to any analysis on environment issues and local government is the Environment Conservation Act read with the various Township Planning Schemes, Ordinances and by-laws. Currently the whole environment debate was discussed in the White Paper for a National Environmental Management System.

S 24 speaks directly of a primary obligation of local government to promote a healthy and safe environment. The White Paper on the National Environmental Management System provided a proper framework for an integrated holistic developmental approach to environmental issues at local government level, clearly devolving environmental powers to provincial and local authorities in the promotion and protection of the environment through the concept of co-operative governance as prescribed by the Constitution.

The National Environment Management Act 107 of 1998 seeks to give effect to the environment management policy set out in the White Paper. It emphasizes that government is the custodian of all natural resources. This is an enabling Act that defines environment management principles and the process, and outlines the role of government and the legal framework for further law reform. All planning and management must be environmentally sustainable within the framework of this legislation.<sup>109</sup>

Given the expansive nature of this right to an environment, greater responsibilities will place on local government to protect and promote the environment.<sup>110</sup>

<sup>109</sup>

Scheepers, Theo (2000) Law and Development in South Africa. Juta & Co pp 79-80

**SOCIO - ECONOMIC RIGHTS:**

**THE RIGHT TO LIVE A DIGNIFIED LIFE CAN NEVER BE ATTAINED UNLESS ALL BASIC NECESSITIES OF LIFE - WORK, FOOD, HOUSING, HEALTHCARE, EDUCATION AND CULTURE - ARE ADEQUATELY AND EQUITABLY AVAILABLE TO EVERYBODY<sup>111</sup>**

In terms of section one (1) of the (final) Constitution (Act 108 of 1996), it is very clear that South Africa is one unitary state. The three spheres of government, national, provincial and local, all constitute one South African state in international law. The Constitution furthermore in ss231- 233, provides that when interpreting any legislation, (including the Constitution itself), preference must be given to an interpretation that is consistent with international law.

s 233:-When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Section 233 of the South African Constitution obliges the state to give heed to international law when interpreting domestic law.<sup>112</sup>

Hereunder is a list of some of the socio economic rights captured in international instruments.

**The International Covenant on Economic, Social and Cultural Rights in <sup>113</sup>**

Article 9: Right to social security

Article 11: Right to adequate standard of living, including adequate food, clothing and housing and continuous improvement of living conditions

Article 12: Right to health

**The African Charter on Human and Peoples Rights: <sup>114</sup>**

Article 16: Right to the best attainable state of physical and mental health

**and the Universal Declaration of Human Rights<sup>115</sup>**

Article 22: Right to social security

Article 25: Right to a standard of living adequate for health and well - being including food, clothing, housing and medical care.

<sup>111</sup> UN Centre for Human Rights Fact sheet no:16 The Committee on Economic, Social and Cultural Rights (1996)

<sup>112</sup> The Final Constitution of the Republic of South Africa Act 108 of 1996

<sup>113</sup> Van Wyk, Dugard, Et al (1994): Rights and Constitutionalism. The new South African Legal Orders. Juta & Co pp 171-177

- 114 Arusa Mahin Karim (1998) Human Rights Protection: The African Regional System p23 et seq (Nipilar Publication)  
 115 Van Wyk, Dugard. Et al (1994): Rights and Constitutionalism. The new South African Legal Orders. Juta & Co pp 172

Mr. Justice I. Mahomed, C J, said:

*"... The... danger, which might impair in critical areas the capacity of our country to effectively realize its articulated constitutional vision, and its need to build a nation on legitimate foundations, is the horrendous socioeconomic legacy we have inherited from our long and painful preconstitutional past. The Constitution has eloquently repudiated in ringing terms the racist foundations upon which the past was premised, but it cannot itself regulate or reverse the cruel consequences of that past, which manifest themselves in massive disparities in the socioeconomic conditions of different communities. Can we effectively and meaningfully build a new united nation, when the condition of one part of that nation is, as a result of this legacy, manifestly and indefensibly so different from the condition of the other part of what must constitutionally, aspirationally and politically be the same nation? The one single inescapable reality which dominates the socioeconomic landscape of our country is an all-pervasive state of inequality.*

*Inequality in living standards within a nation is, of course not unique to South Africa. It is in some measure, tolerated in other countries without seriously imperiling their claim to build sustainable and healthy nations. What is so special about the legacy of our inequalities is the cumulative effect of four fundamentals: First, the sheer extent of the disparities involved; second, the fact that the disparities coincide substantially, albeit not exactly, with the race and colour of the class concerned; third, the class most disadvantaged in the comparison is substantially the majority one; and fourth, the legacy which we inherited was deliberately and systematically protected and nurtured by enforceable and enforced laws through a sustained period of our history.*

*The disparities are quite dramatic in every area. According to the United Nations Population Fund (1998), the infant mortality rate among blacks is six times the rate for whites. Life expectancy at birth is nine years higher for whites than for blacks. Unemployment among blacks was estimated at 41.1 percent in 1994, compared with 6.5 percent for whites. On average, blacks earned only 13 percent of the income earned by whites. The result is that South Africa has one of the most skewed income distribution profiles in the world, with a GINI coefficient of 0.65.*

*This pervasive and continuing legacy of racial inequality is capable of seriously impairing the fulfilment of our vision to build a single and united South Africa which is morally just, politically stable and economically vigorous. It is therefore a legacy which therefore needs urgently to be addressed and reversed..."* <sup>116</sup>

The socio- economic imbalances of the past represent major challenges for all South Africans. For there to be any meaningful change to the lives of, formerly exploited and oppressed South Africans, these inherent socio- economic imbalances have to be effectively addressed. Failure to do so could have serious negative implications for the new fledgling democracy in trying to develop a culture for the respect of human rights in South Africa.

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<sup>116</sup> Mr. Justice I. Mahomed, Chief Justice of The Supreme Court of Appeal 1999 (SALJ) vol 116 @ 856 . Juta & Co. Ltd 1999 in his acceptance  
of The Honorary Degree of Doctor of Laws conferred on him by the University of Cape Town on the 25<sup>th</sup> June 1999

The aspiration of the people of South Africa as reflected in the preamble of the Constitution 'to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights',<sup>117</sup> will therefore only be fully realized once this (socio - economic) struggle has been won.

However in view of the long history of oppression and exploitation in South Africa and the resultant socio-economic imbalances, the struggle for the realization of socio - economic rights will not be easily attained and will certainly not be won overnight. Concrete programs of action will have to be put in place and monitored for progress.

(See later on: the role of the South African Human Rights Commission in terms of s 184(3) of the Constitution)

It is clear that the socio-economic rights entrenched in the Constitution is to be translated by national government to provide the national framework within which these rights can be attained by adopting legislative and policy frameworks and devolve powers and responsibilities to municipalities, to drive processes to achieve and realize these rights.

"What is required of local government is to create conditions to enable citizens to access or realize these rights. The reasonable measures expected by the Constitution include legislative enactments (by-laws) as well as budgetary enactments, construction and maintenance of services and systems of delivery. Obviously, those who are to consume or benefit from these state measures are expected to put in resources and energy to complement what the state would be doing- in other words, there are rights and obligations arising from those rights which the individual or community must meet..."<sup>118</sup>

- **s 25 Property**<sup>119</sup>

s 25 (5): The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

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- 117 The Final Constitution of the Republic of South Africa Act 108 of 1996  
118 SBO GUTTO\_ A Practical Guide to Human Rights in Local Government- 1996 above at xiii-xiv  
119 The Final Constitution of the Republic of South Africa Act 108 of 1996

This right is qualified by the availability of state resources. In this regard, through a framework of national legislation, under the auspices of

" **The Restitution of Land Act 22 of 1994**," the state took positive steps to provide person/s or communities security of tenure

(through restitution where possible , or through other forms of redress) to all those who were dispossessed of such tenure by virtue of the Land Act 27 of 1913 and a host of other past racially discriminatory laws.<sup>120</sup>

Furthermore, no provision of the property section may impede the state from taking legislative and other measures to achieve land water and related reform, in order to redress of past discrimination subject to the limitations provided for in s 36. The issue of property rights in land and water in South Africa is sensitive, as the rights of a vast majority of the population have been adversely affected by previous discriminatory practices. The end result will be that local government will be the vehicle to drive national initiatives although s 25 of the Constitution is silent on the whole question of the redistributive objectives of developmental local government relating to property. However it is clear that such national initiatives (e. g Extension of Security Act, ESTA) as well as other property rights aimed at security of tenure will inevitably disturb existing property rights.

- **s 26 Housing**<sup>121</sup>

s 26 (1): Everyone has the right to adequate housing.

s 26 (2):the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

Here the availability of resources confines the obligation, but local government can be held accountable by the South African Human Rights Commission, if it does not prioritize the housing backlog (or for that matter, any other socio economic right entrenched in the Bill of Rights) in its budget. This could result in an action for damages from either aggrieved persons or communities.

Community participation in the decision making process is to become compulsory and all budgets will have to comply with the principles of integrated development and land development objectives that must reflect inputs and needs of communities at all times. Given that South Africa has a justiciable Bill of Rights, and thus any failure of a council adhere to these principles, could result in a potential lawsuit. The Constitutional Court in **Grootboom's case** recently confirmed this. (See later on)

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<sup>120</sup> The Restitution of Land Act 22 of 1994,

<sup>121</sup> The Final Constitution of the Republic of South Africa Act 108 of 1996



Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)<sup>122</sup> raised the question whether punitive damages may be awarded for violation of the provisions of the Bill of Rights entrenched in Chapter 2 of the Republic of South Africa Act 108 of 1996.

S v Ntuli 1996 (1) SA 1207 (CC),<sup>123</sup> further highlights this point. Here an organ of state was given time-frames to organize itself and implement an order of court, which it failed to comply with; and when nothing materialized, the Constitutional Court decided not to grant a further extension of time to remedy the defect, and declared the conduct of the organ of state unconstitutional.

"Progressive realization" is an on going process aimed at addressing the imbalances of the past, which imbalances are noted in the preamble of the Constitution. Here local government will play a key role in addressing housing issues, whilst at the same time, national government will drive national initiatives to address land reform and restitution programs. This is aimed at giving effect to the social and economic rights contained in The International Covenant on Economic, Social and Cultural Rights which covers the right to work, social security, family protection, food, shelter, health and education.

In Grootboom and Others v Oostenberg Municipality, Cape Metropolitan Council, Premier of the Province of the Western Cape, National Housing Board and the Government of the Republic of South Africa Case No. 6826/99<sup>124</sup>

The applicants relied on international human rights law to interpret the scope of the relevant socio-economic rights in the South African Bill of Rights. Counsel in this matter particularly referred to in the International Covenant on Economic, Social and Cultural Rights (1966), the General Comments issued by the Committee on Economic, Social and Cultural Rights under this Covenant as well as the Convention on the Rights of the Child (1998).

This case was an important test case on the scope of the positive duties imposed on the relevant organs of State by the socio-economic rights in the Constitution. The facts were as follows:

Ms. Irene Grootboom was one of a number of persons who were evicted from private land in the Oostenberg Municipality where they had settled informally. Because of their eviction, their building materials had been destroyed and they were left with no place where they could settle with some degree of certainty. They ended up squatting in appalling conditions on the periphery of the Wallacedene Sports Ground.

<sup>122</sup> Fose v Min of Safety's Security, 1997(3) SA 786(CC)

<sup>123</sup> S v Ntuli 1996 (1) SA 1207 (CC)

<sup>124</sup> In Grootboom and Others v Oostenberg Municipality, Cape Metropolitan Council, Premier of the Province of the Western Cape, National Housing Board and the Government of the Republic of South Africa Case No. 6826/99)

An urgent application was launched in the Cape High Court for an order, directing one or more of the respondents to provide basic shelter for the applicants and their children, pending them obtaining permanent accommodation ... The Court ordered temporary relief in the matter, requiring the respondents to accommodate the applicants' children free of charge in the Wallacedene Community Hall.<sup>125</sup> (At present this matter is being taken to the Constitutional Court-Sunday Times Report 10 -9-2000. The Constitutional Court held that the state is constitutionally obliged to meet its obligations - Mail and Guardian, 6 October 2000).

s 26(3): No one may be evicted from their homes nor can their homes be demolished without a court order after considering all the relevant facts. Clearly, no legislation can permit arbitrary eviction. To do so, would be unconstitutional.

*In Venessa Ross v South Peninsula Municipality(1999) CPD 3 September 1999 (Case A741/1998)*<sup>126</sup>

The Municipality sought an eviction order against Mrs. Ross and her children from a flat that she had been leasing from the Municipality since early 1997. In their summons, the Municipality made three simple allegations:

- 1) It was the owner of the property
- 2) Mrs. Ross was in occupation of the property, and that she and all the people living with her were in illegal occupation there as there was no agreement that entitled her to occupy the property.

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Sandra Liebenberg (Socio Economic Rights Project, Community Law Centre, UWC Local Government Bulletin, Dec 1999), argues that 'this case represents a major test case on the scope of the Constitutional rights of access to housing (s 26(1) and (2) and the right of every child to shelter (s 28(1) (c)).' The major issue to be determined is whether municipalities, provincial government or the national government have a constitutional obligation to ensure that people in the applicants' position have at least temporary shelter, pending the taking of longer term measures to ensure the progressive realization of their right of access to housing. Applicant's counsel argued that this represented the minimum core duty imposed on the state by section 26 of the Constitution, and is also the unqualified right of every child in terms of section 28 (1) (c) of the Constitution. The respondents argued that minimum core duty could not be read into section 26 of the Constitution. They also argued that the Child Care Amendment Act 96 of 1996 gave effect to the right of every child to shelter..

'Shelter' in this context means the temporary care of children in especially difficult circumstances, and does not extend to the provision of temporary accommodation for homeless families such as those in the applicants' position.'

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*Venessa Ross v South Peninsula Municipality(1999) CPD 3 September 1999 (Case A741/1998)* also see Raylene Keightley (2000) SALJ Vol 117 Part 1 at pp 26 et seq



Mrs. Ross noted an exception to the summons on the basis that it did not disclose a cause of action under the Constitution ...in terms of s 26(3)...the magistrate dismissed the exception, as the municipality's form of pleading was in accordance with established common law principles.. The owner of the property is entitled to possession of the property. In an ejectment application, it is therefore sufficient for the owner simply to allege ownership of the property in question and that the respondent is in unlawful occupation. Mrs. Ross appealed.

The main issue on appeal was whether section 26(3) of the Constitution has altered these established common-law principles. In other words, has the Constitution now placed the onus on an owner of land to inform the Court of all the relevant circumstances justifying an eviction of a person in possession of the owner's property if it is the occupier's home? ... The Court held that it was beyond question that the incidence of the onus could be affected by a Constitutional requirement. Experience and fairness would determine where the onus should be placed.

`Section 26(3) of the Constitution prescribes that an eviction order can only be made by an order of Court. This means that an eviction order cannot be issued by, for example, a clerk of the magistrate's court or the Registrar of the High Court in an application for default judgment. Only the presiding officer can issue such an order and then only, after considering all the relevant circumstances.<sup>127</sup>

Where the defendant does not indicate that he or she wants to defend the matter and the plaintiff seeks judgment by default, the defendant would not have the opportunity to place the facts that he or she considers relevant before the court. The plaintiff would still have the burden of alleging and proving `the relevant circumstances' that would justify the court in granting an eviction order.

However, less evidence would be required from a plaintiff in relation to knowledge, which is mainly within the knowledge of the defendant... What constitutes relevant circumstances in an eviction context ... some guidance could be obtained from the provisions sections 4(6) and 4(7) of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 Act? Of particular relevance was the legislature's concern that the rights of the elderly, children and disabled persons and households headed by women should be protected in an eviction context.

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<sup>127</sup> Sandra Liebenberg (Socio Economic Rights Project, Community Law Centre, UWC Local Government Bulletin, Dec 1999)

[Sandra Liebenberg<sup>128</sup> argued that] the Ross case highlights how socio economic rights can alter the established common law and provide greater protection to vulnerable and disadvantaged groups. She further submits that in Ross's case, the court could also have referred to General Comment No.7 (1997) adopted by the UN Committee on Economic and Social and Cultural Rights during its 16<sup>th</sup> session. This general comment elaborates on aspects of the right to adequate housing protected in Article 11 of the International Covenant on Economic, Social, and Cultural rights. This important human Rights Treaty has been signed but not ratified, by South Africa. The General Comment deals specifically with the considerations that are relevant to forced evictions, and also highlights the need to provide special protection to disadvantaged and vulnerable groups.'

Liebenberg's further assessment of the Ross matter is that

'it affirms s26(3) of the Constitution has fundamentally changed the common law of evictions. It is no longer sufficient for an owner of property in an eviction application to allege that persons who are occupying property as their home are in illegal possession. The owner plaintiff must allege and prove 'relevant circumstances' that would entitle it to an eviction order ... 26(3) thus appears to confer a broader equitable discretion on a court in a context where people are being evicted from their homes. This potentially shifts the balance of power between landlords and tenants, by providing greater protection in to tenants against unfair, arbitrary evictions. The Ross case highlights how socio-economic rights can alter established common law and provide greater protection to vulnerable and disadvantaged groups.'

- s27 Healthcare, food, water, and social security<sup>129</sup>

s 27 (1):everyone has the right to have access to-

- a) health care services, including reproductive health care;
- b) sufficient food and water; and
- 3) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

s 27 (2):The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

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128 Ibid

129 The Final Constitution of the Republic of South Africa Act 108 of 1996

- In Soobramoney v Minister of Health, KwaZulu-Natal 1997 (4) BCLR 1696 (CC) at para 8

Chaskalson P said:

*"We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hallow ring..." 130*

Section 27 must be read with Schedule 4 and 5<sup>131</sup> of the Constitution where an obligation is placed on local government to deliver services and administer these rights. Again the state is compelled to take reasonable legislative steps within its available resources to progressively achieve these rights.

The provision of services is central to the role of municipalities to provide services within its resources/ budgetary constraints, as services must be rendered in a sustainable manner. Local government must therefore develop support infrastructure, provide adequate management and maintenance and mobilize communities to participate in service programs requiring from communities equitable contribution.

Two main pieces of legislation are pertinent to the role of municipalities and its constitutional obligation related to water use. The Water Services Act 108 of 1997 gives effect to the right of access from the municipalities to render water supply and sanitation services, in its area of jurisdiction. In this regard, joint ventures can be undertaken by municipalities to supply water and sanitation services effectively and efficiently. A water service authority (municipality) can in its by-laws make provision to appoint and register a water service intermediary to assist with the water supply and sanitation in its area

The National Water Services Act 36 of 1998 introduces a totally new water management and water dispensation in South Africa in order to give effect to the right to water as a constitutional obligation. Water is regarded as a national and natural resource belonging to all South Africans which has to be managed in a sustainable manner with a view to protect the quality of water in the interest of present and future users of water. The Act introduces integrated management principles in respect of all water resources and the delegation of management functions to regional and catchment level to ensure that everyone enjoys their right to use water.<sup>132</sup>

<sup>130</sup> In Soobramoney v Minister of Health, KwaZulu-Natal 1997 (4) BCLR 1696 (CC) at para 8

<sup>131</sup> The Final Constitution of the Republic of South Africa Act 108 of 1996

132 Scheepers, Theo (2000) *Law and Development in South Africa*. Juta & Co p 85

It must be noted that ' water is indispensable to the environment, to life, to human dignity, security and health. It is the responsibility of the local authority to supply water and to ensure that it is done in a non - discriminatory manner with the corresponding duty of the water consumer to pay for the water supplied and consumed. What is of critical importance here to the theory of democracy and human rights is the inseparable link between rights and responsibilities or duties. Human rights go with social responsibilities. The responsibility of the local authority is to supply water and to ensure that this is done in a non-discriminatory manner. Where there are genuine difficulties that prevent the consumer from paying timeously for the water used, the local authority must devise practical strategies and ways of dealing with such special cases. This is how a culture of human rights can be nurtured.<sup>133</sup>

- s 28 Rights of the Child<sup>134</sup> ( and the Rights of Women in terms of -CEDAW Convention<sup>135</sup>)

In terms of its international obligations, South Africa has, by ratifying two international conventions, namely The Convention on the Rights of the Child (CRC-ratified on 16 June 1995), which recognizes inter alia, the right to of every child to benefit from social security; and further, in terms of The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) signed by South Africa on 29 January 1993 and ratified by South Africa on 13 September 1995, which inter alia, also guarantees the right to women to benefit from social security programs.

CEDAW expresses its concern that women particularly rural women in situation of poverty have the least access to food, health, training and employment. CEDAW encourages States Parties to encourage the provision of social services to enable parents to combine family obligations with work responsibilities, in particular, through promoting child-care facilities and to accede to women equality with men before the law. Poverty is most frequently found in single -parent households headed by women ...

<sup>133</sup> S B O Gutto. Local Government and the Bill of Rights - A panel discussion. A paper presented at a Conference on Local Government. Bloemfontein - 1997

<sup>134</sup> Chapter 2. The Final Constitution of the Republic of South Africa Act 108 of 1996

<sup>135</sup> De Villiers, Dugard et al (1994). Rights and Constitutionalism: International Human Rights. Juta & Co. Pp 179 et seq

With regard to CEDAW, the state has already taken practical steps to protect and promote the rights of women and children. The state has established the Commission on Gender Equality (CGE) as well as the Office of the Status of Women (OSW) in the Office of the Deputy President to ensure gender equality. The state has even embarked on national programs of action, which integrated various government departments in their efforts to promote and protect the rights of women. Both the CRC and CEDAW lay down standards that all spheres of government must meet which will be monitored and reported to parliament by the South African Human Rights Commission annually in terms of s184 (3) of the Constitution.

Furthermore a country report will be filed by South Africa every five years with the Committee on the Rights of the Child and the Committee on the Elimination of All Forms of Discrimination against Women respectively, established under the auspices of the Committee on Economic, Social and Cultural Rights in order to assess whether South Africa has complied with its international obligations.

Section 28 (1)(c) of the Constitution, recognizes that the child has the right to basic nutrition basic healthcare and social services, as well as the right to a basic education(s 29)(1) (a)).<sup>136</sup>

Local government is tasked with the responsibilities in terms of Part B, schedule 4 to provide child care facilities. It is also interesting to note that the state has since the inception of the new democratic order, introduced the children's feeding scheme and allowed free medical health care for children under the age of six and pregnant mothers too.

As child poverty is widespread in South Africa, there are challenges facing the state to find mechanisms, and assume some degree of financial control and responsibility for all dependent spouses and children, to restructure the social support system by increasing the degree of state involvement in the procedure of maintenance enforcement ...

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<sup>136</sup> Chapter 2. The Final Constitution of the Republic of South Africa Act 108 of 1996

'The ravages of the HIV/AIDS epidemic in South Africa is most certainly going to call for further intervention from government to provide for grants and services ...particularly on the issue of AIDS orphans which will require the whole question of social welfare to be reviewed to provide poor households with financial assistance to provide for children orphaned by HIV/ AIDS, many of whom have been absorbed into extended family structure or the communities Y The Constitution enunciates the rights of children as entitlements that are necessary to provide basic subsistence needs of children. These rights have been worded in a precise restrictive way, by referring to 'basic' nutrition and healthcare services and secondly, by restricting the right holders to children. Whenever a challenge is brought, the court may have to determine whether the level of service delivery meets the basic needs. If they do not, the court may have to order the state to comply with its constitutional obligation.'<sup>137</sup>

### **s 32 Access to Information**<sup>138</sup>

s 32 (1): Everyone has the right of access to -

- any information held by the state
- any information that is held by another person and that is required for the exercise or protection of any rights.

s 32 (2): National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

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<sup>137</sup> Clarke, Brigitte (2000) SALJ Vol 117 pp 353 et seq. The Duty of the State to support Children in need.  
<sup>138</sup> Chapter 2. The Final Constitution of the Republic of South Africa Act 108 of 1996



s 32(2) of the Constitution read with item 23(1) of Schedule 6 thereto requires the enactment of national legislation to give effect to this right within three years of the commencement of the Constitution, that is before 4 February 2000. In accordance with this requirement, Parliament passed, The Promotion of Access to Information Act No. 2 of 2000.<sup>139</sup>

Item 23 (2) of Schedule 6 to the Constitution<sup>140</sup> provides that until such legislation is enacted section 32(1) must be regarded to read as follows:

'(1) every person has the right to access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.'

The right of access to information referred in s 32(1), being part of the Bill of Rights, may only be limited in accordance with the limitations provisions contained in s 36.

<sup>139</sup> In terms of The Promotion of Access to Information Act No. 2 of 2000, the objects of the Act are to give effect to

- The right referred to in s 32(1) (a) and s 32(1) (b) of the Constitution
- subject to justifiable limitations including but not limited to, limitations aimed at the reasonable protection of privacy; commercial confidentiality, and effective, efficient and good governance, and in a manner which balances that right with any other rights including the rights in the Bill of Rights
- to give effect to the constitutional obligation of the state in the promotion of human rights culture by including public bodies in the definitions of "requester" allowing them access to information from private bodies upon the compliance with the four requirements of the Act, including an additional obligation for certain public bodies in certain instances to act in the public interest;
- to establish voluntary and mandatory mechanisms or procedures to give effect to, in a manner which enables persons to obtain records of public bodies as swiftly, inexpensively and as reasonably as possible; and
- generally to promote transparency, accountability and effective governance of all public and private bodies by including, but not limited to, empowering and educating everyone
- to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies
- to understand the functions and operation of public bodies and
- to effectively scrutinise, and participate in decision making by public bodies that affect their rights

<sup>140</sup> The Final Constitution of the Republic of South Africa Act 108 of 1996



Closely related to this right is the right to privacy in the context of transparency and access to information. This vexed question keeps on coming up in the context of the role of a public figure, like a councillor who is very unlikely to get constitutional protection for keeping a secret or >private= information such as those relating to his /her financial position.<sup>141</sup>

### • s33 Just Administrative Action <sup>142</sup>

In terms of s 33 (1) and s 33 (2) everyone:

- has the right to administrative action that is lawful, reasonable and procedurally fair; and
- whose rights have been adversely affected by administrative action has a right to be given written reasons.

Again s 33(3) requires that national legislation must be enacted to give effect to the rights set out in section 33(1) and (2) and must provide for additional matters specified in s 33 (3) (a), (b) and (c) which include, amongst others that provision be made for the review of administrative action by a court or where appropriate, an independent and impartial tribunal and the imposition of a duty on the state to give effect to the rights s 33(1) and s 33(2). In terms of item 23 (1) of schedule 6 of the Constitution, such legislation must be enacted A within three years of the date when the new Constitution took effect, i.e. February 2000.<sup>143</sup> Item 23(2) of this schedule provides for a default position, namely that s33 (3) of the Constitution shall lapse if the legislation concerned is not enacted within three years of the date of commencement of the new Constitution.

<sup>141</sup> S B O Gutto. Local Government and the Bill of Rights - A panel discussion. A paper presented at a Conference on Local Government. Bloemfontein - 1997

<sup>142</sup> Chapter 2. The Final Constitution of the Republic of South Africa Act 108 of 1996

<sup>143</sup> In this regard Parliament enacted

The Promotion of Administrative Justice Act No. 3 of 2000

This Act has 11 sections. It is important to provide a brief synopsis of the impact of these sections.

Administrative action is given a wide definition.

Administrative action by natural and juristic persons contemplated in s 8 (2) of the Constitution and exercising a public power or performing a public function is specifically included. Other important features of

- Section 1 is the wide definition given to 'decision' and provision is made for a review jurisdiction in a magistrates' court. Excluded from the provisions of this act are the listed executive functions of the National Executive, Provincial Executive and of Municipal Councils.
- Section 2 imposes a duty on all administrators to give effect to the rights to just administrative action in s33 (1) and (2) of the Constitution and provides for a review of such actions by the courts and independent and impartial tribunals.
- Sections 3 and 4 require administrative actions to be procedurally fair and sets out core requirements, which apply to administrative acts affecting individuals and public respectively. However, additional requirement may apply in appropriate cases. In mandatory situations there is a point of departure in exceptional situations, To the extent that it is necessary.

Footnote 143 Continued

- Section 5 contains provisions relating to the furnishing of reasons for administrative action. A general obligation is placed on an administrator to furnish reasons in writing when requested. Provision is also made for the enforcement of the obligations to furnish reasons. Failure to furnish reasons in the absence of proof to the contrary is presumed to be taken without good reason. The factors to be taken into account when determining whether a departure is reasonable or justifiable is contained in s 5(4).
- Section 6 specifies the grounds for review of an administrative action, established at common law and adapted in the light of recent formulations in South Africa. These grounds are set out below:  
A court or tribunal has the power to judicially review an administrative action if: -
  - b) The administrator who took it -
    - 1) was not authorized to do so by the empowering provision
    - 2) acted under a delegation of power which was not authorized by the empowering provision; or
    - 3) was biased or reasonably suspected of bias;
      - a) a mandatory and material procedure or condition prescribed by the empowering provision was not complied with;
      - b) the action was procedurally unfair
      - c) the action was materially influenced by an error of law
      - d) the action was taken
    - e) for a reason not authorized by the empowering provision for an ulterior purpose or motive
      - 1) because irrelevant considerations were taken into account relevant considerations were not considered;
      - 2) because of the unauthorized or unwarranted dictates of another person or body;
      - 3) in bad faith; or
      - 4) arbitrarily or capriciously
    - f) the action itself -
      - 1) contravenes a law or is not authorized by the empowering provision; or
      - 2) is not rationally connected to-
        - a) the purpose for which it was taken
        - b) the purpose of the empowering provision
        - c) the information before the administrator
        - d) the reasons given for it by the administrator;
    - g) the action consist of a failure to take a decision
    - h) the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable could have so exercised the power or performed the function; or
    - i) the action is otherwise unconstitutional or unlawful
- Section 7 sets out the procedure for review. The order that the court or tribunal can grant in proceedings for judicial review are set out section 8.

- Section 39 (2)<sup>144</sup>, of the Constitution provides that when interpreting any legislation (including By-laws) every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

A municipality must always strive within its financial and administrative capacity, to achieve the objects of local government and the relevant basic human rights. Section 7(2) of the Constitution requires the state to respect, protect, promote and fulfill the rights in the Bill of Rights. When considering the adoption of by-laws, a municipal council will be under the constitutional obligation to having regard to the protection, promotion and fulfillment of the rights in the Bill of Rights.

- s 29 Education.<sup>145</sup>  
S 29 (1) everyone has the right -  
to a basic education, including adult basic education; and  
to further education, which the state, through reasonable measures, must make progressively available and accessible.

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Footnote 143 Continued

- Section 9 makes provision for the variation of time periods specified in the statute.
- Section 10 empowers the minister of Justice and Constitutional Development to make regulations relating to various matters necessary or convenient to be prescribed in order achieve the objects of the Act, including the establishment, duties and powers of an advisory council to monitor the application of the Act and to advise the said minister on amongst other things improvements aimed at ensuring that administrative action conform with the right to administrative justice and any steps which may lead to the achievement of the objects of the Act.
- Section 11 provides for the short title and commencement of the Act which will be a date fixed by the President by proclamation in the gazette.

The aim of the Act is ensure that all public officials, in a rights based society as envisaged in the Constitution, must understand and realize that their administrative actions must conform with the spirit of the Act and the Constitution too. The aim of the act is to promote democracy in policy formulation in local government, as well as cement the relation between local government and the people it serves.

Furthermore, procedural fairness is also very essential for the promotion, protection and respect for human rights and freedoms. In this connection municipalities have various tribunals and courts within its jurisdiction and may in terms of s180 of the Constitution be required facilitate greater community and other forms of public participation. Hence the need for a proper legislative framework required to regulate these rights.

<sup>144</sup> Chapter 2. The Final Constitution of the Republic of South Africa Act 108 of 1996

<sup>145</sup> Ibid

Local government has control of public libraries under schedule 5 Part B as a service provider of public amenities. Given the huge education disparities and backlogs created by apartheid, questions that need to be asked what sort of books the library is going to have in order to give effect and recognition to the Bill of Rights in order to service the needs of the communities. Outreach programs will have to effect to create a conducive environment that progressively promotes the culture of learning by entering into partnerships with schools to help children (whose parents are unemployed) with access to learning material.

#### **The Role of the South African Human Rights Commission in monitoring Socio-Economic Rights <sup>146</sup>**

Central to the concretisation of socio-economic rights is the role of the South African Human Rights Commission whose constitutional duty it is to annually investigate from the state what steps it has taken to progressively realize the rights in the Bill of Rights. It will then compile a report to Parliament. This report will measure the performance of the state and determine whether it has met with its constitutional mandate. After every five years, a country report will be prepared and presented to the Economic and Social Committee (ECOSOC) of the United Nations, which will determine whether South Africa has met with its international obligations under the United Nations Charter.

In this regard The Vienna Declaration and Program of Action<sup>147</sup> adopted by the World Conference on Human Rights ( Vienna, 25June 1993) held

"The World conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular their advisory capacity to the competent authorities, their roles in remedying human rights violations, in their dissemination of human rights information, and education in human rights..."

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<sup>146</sup> s 184 the Final Constitution of the Republic of South Africa Act 108 of 1996

<sup>147</sup> Vienna Declarations and Program of Action. World Conference on Human Rights. 25 June 1993.

It is clear that the Constitution makes provision for socio-economic rights concerning a host of rights entrenched in the Bill of Rights. Rights such as

- environment<sup>148</sup>
- land<sup>149</sup>
- housing and shelter<sup>150</sup>
- healthcare, food and water<sup>151</sup>
- social security and education.<sup>152</sup>

These rights apply to all law in South Africa and bind the legislature, the executive, the judiciary and all organs of state. The state<sup>153</sup> is required to respect, protect and promote and fulfill all the rights.<sup>154</sup> These rights in the Bill of Rights bind both juristic and natural persons.<sup>155</sup>

In order for these rights to be realized, the Constitution created a monitoring system in the form of The South African Human Rights Commission to systematically analyse how each and every socio-economic right in the Bill of Rights have been protected, promoted and fulfilled by the state.<sup>156</sup> The judiciary too, spearheaded by the Constitutional Court, plays a significant and important role to ensure the realization and enjoyment of socio-economic rights.<sup>157</sup>

I now turn to the role of the South African Human Rights Commission, constitutionally mandated to monitor the progress of the state in translating socio-economic rights into realities.

As far as the promotion and protection of socio economic rights are concerned, the Commission has powers to investigate and to report on the observance of these rights; take steps to secure appropriate redress where they have been violated; conduct research on their promotion and protection and educate the public and the state about these rights.

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<sup>148</sup> Chapter 2. The Final Constitution of the Republic of South Africa Act 108 of 1996

<sup>149</sup> Ibid <sup>150</sup> Ibid <sup>151</sup> Ibid <sup>152</sup> Ibid <sup>153</sup> Ibid <sup>154</sup> Ibid <sup>155</sup> Ibid

<sup>156</sup> S 184. The Final Constitution of the Republic of South Africa Act 108 of 1996

<sup>157</sup> The Constitutional Court in

In Re: Certification of the Constitution of the Republic of South Africa 1996 BCLR 1253(CC) at para 78 held

"... we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio economic rights will almost inevitably give rise to such implications does not seem to us to be a bar

to their justiciability."

For the sake of completeness, I now turn to the actual manner in which the Commission undertakes its investigations. I submit that this exercise is necessary as, thus far, organs of state have very little experience and expertise in reporting on socio economic rights.

Firstly, the Commission develops questionnaires termed 'Protocols'<sup>158</sup> which are designed to provide a set of questions and guidelines which would effectively assist and guide the relevant organs of state in fulfilling their constitutional obligations.

Thereafter, the Commission would request minimum information, mainly baseline in nature, on measures taken in realizing socio- economic rights.<sup>159</sup>

The Commission is also obliged by the Constitution to request every year, information on the measures taken by the relevant organs of state on the realization of rights in the Bill of Rights pertaining to housing, healthcare, food, water, social security, education and the environment.' The Commission's report is then submitted to Parliament annually. After every five years, a country report is then prepared for submission to the United Nations Economic, Social and Cultural Committee as part of South Africa's international obligations in progressively realizing socio economic rights.

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<sup>158</sup> This information was extracted verbatim from a preliminary report prepared by the research department of the South African Human Rights Commission on 27 August 1998.

<sup>159</sup> With reference to the Protocols itself; they are divided into nine sections:

- **Section one** reflects past overview requiring information on past policies legislation and past practices on the realization of socio economic rights.
- **Section two** requires information on each relevant department=s understanding of its respective constitutional obligation regarding the realization of socio economic rights
- **Section three** is mainly an information gathering exercise pertaining to the socio economic rights and the nature of the information collected
- **Section four** required relevant departments to identify groups identified as vulnerable and which groups were in need of special attention as far a s socio economic rights were concerned.
- **Sections five, six and seven** deal with the obligation of the state to protect promote and fulfill socio economic rights. These sections required information on legislative, budgetary and other measures adopted by respective departments in realizing socio economic rights.
- **section eight** deals with future measures , legislative budgetary and otherwise that the departments have planned in order to realize socio economic rights.
- **Section nine** deals with general information on the realization of socio economic rights that the respective state organs



might be having in their possession, but has not been solicited for by the above sections. An explanatory memorandum, providing notes and additional information to help organs of state in responding to the Commission's Protocols attached to each protocol sent to respective state organs.

The full realization of the socio-economic rights imperatives in the Bill of Rights is necessary for any successful implementation of service delivery at local government level. It is my submission that successful service delivery depends on giving teeth to these rights. Fundamental to any analysis of every right in the bill of rights is an understanding of the provisions of section 36 of the Bill of Rights that limits all rights in the Bill of Rights.

Section 36<sup>160</sup> of The Constitution of the Republic of South Africa Act 108 of 1996, provides:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- a) the nature of the right;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the nature of the limitation and its purpose; and
- e) less restrictive means to achieve the purpose

In 1994, South Africa by adopting the finest rights based Constitution in the world, committed itself to progressively get rid of imbalances and backlogs created by apartheid. In so doing, it established a society based on social justice and fundamental human rights with sufficient safeguards to effectively address the legacy of apartheid.<sup>161</sup>

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Footnote 159 continued

These Protocols are based on the seven socio-economic rights that the Commission has to monitor in terms of s184 (3) of the Constitution. These rights with regard to

- housing
- healthcare
- food
- water
- social security
- education and the
- environment

A protocol is also directed to the Department of Finance in view of the importance of the Department in the Constitutional scheme of things.

160

Chapter 2. The Final Constitution of the Republic of South Africa Act 108 of 1996

161

Langa P in 1999 SALJ Vol 116 Part 1. Juta & Co, pp 153 et seq

Mr Justice Langa P said "We have a Constitution with the Bill of Rights that is the envy of the civilised world. It is however for the people of South Africa to make it a living document ... If we are inspired by the belief, that 'liberty lies in the heart of men and women; when it dies there no Constitution, no law, no court can save it, then we will not fail to ensure that those values which are the foundation of our constitutional order are given life...."

We will consider it our responsibility to enhance the culture of rights by practising them and getting involved in the reconstruction, upliftment and development of society to eradicate the disparities of the past. Our commitment to the ideals in the Constitution will be evident in the way we respect and promote the rights of others."

Clearly any failure or non fulfilment of these rights (subject to the limitations as set out in s 36 above), is a breach of the rule of law exposing the state to potential litigation (see the *Grootboom* case)

## CONCLUSION

Gideon Pimstone aptly summarized the position regarding the enforcement of the rights in the Bill of Rights and the obligations of the state. He wrote:

"...economic and social rights are different in many respects from 'civil and political rights, but their differences do not preclude adjudication'. There is an abundance of constitutional features underlining this point. The preamble itself indicates that the constitution is a vehicle for improving the quality of life of all citizens. The supremacy clause (s 2) thereafter trumpets its paramountcy in a formulation that is both a negative definitional component (conduct inconsistent with the Constitution is invalid) and a positive one (obligation imposed by the Constitution must be fulfilled). The wording of s7(2) is also pivotal. It calls on the state to "respect, protect and promote and fulfill" the rights in the Bill of Rights. The use of the word 'fulfill' is not accidental. It is a call to action, one that reverberates through the social and economic rights contained in the Bill of Rights. Section 167(4) (e) includes within the jurisdictional powers of the Constitutional Court, the power to "decide that parliament or the president has failed to fulfill a constitutional obligation."

Moreover s 184(3) of the Constitution requires the (South African) Human Rights Commission to annually collect information from organs of state on what measures they have taken to realize housing, healthcare, food, water, social security, education and environment rights. This indicate the degree of priority afforded such rights and is entirely consistent with adjudication in regard to their fulfillment. These features, together with supporting extra-Bill of Rights fulfilling state obligations in the context of these considerations, by having recourse to the **Limburg Principles**, a set of principles that expand on the means of social and economic rights

"But what is the relevance ...on the enforceability of economic and social rights to local government? Local government, as any other sphere, is bound to give effect to the rights contained in the Bill of Rights. What has been outlined is the mechanism whereby those rights are to be fulfilled and the possible sanction for non-fulfillment. Local government structures are required to be alive to the content of these rights and the relationship between these rights and to social and economic obligations situated outside the Bill of Rights. The legal challenges they will face will undoubtedly come from persons seeking satisfaction of rights through the Bill of Rights or institutions of government seeking the fulfillment of extra - Bill of Rights obligations

"Local government must be cognisant of its constitutional entitlements, where such spheres neglect to capacitate it so as to comply with social and economic obligations."<sup>162</sup>

Therefor, it is important for all local government practitioners to fully understand and appreciate that the Bill of Rights represents a bridge between South Africa's past, of suffering and injustice, and the future of democracy and peaceful co-existence based on respect for dignity, equality and freedom. The scope of its application is very wide. It binds national, provincial and local government including all citizens and non citizen's alike.

<sup>162</sup> Gideon Pimstone. (1998) The Constitutional Basis of Local Government in South Africa. Research paper: Konrad Adenauer Stiftung

Foundation. Johannesburg

The greatest challenge facing local government is the creation of a human rights culture. Looking at the three spheres of government, it is clear that as it is closest to the people, local government is the most appropriate sphere of government to translate these human rights into realities.

Without realizing these rights, they would mean little more than noble concepts. Local government not only needs to provide access to these rights, it also has to protect and promote them, provide education about these rights and implement them through policies. It is indeed the responsibility of local government to devise such mechanisms that will translate these rights into realities in a practical way.

Such concretisation will contribute to the successful broader transformation process in our society. It is therefore on the shoulders of Local government to become proactive and to :

- contribute meaningfully to the achievement of equality in service delivery
- provide equality in the employment opportunities
- provide equality in employment practices
- introduce local governance
- enable and facilitate easy access to information
- continuously sensitize workers of rights and obligations

ensure at all times local government legislation conforms with the Bill of Rights and the Constitution.<sup>163</sup>

The translation of the Bill of Rights into practical application remains an enormous task facing local government for:

**Without Rights there cannot be freedom**

**Without freedom there cannot be development**

**Without development, there cannot be transformation<sup>164</sup>**

<sup>163</sup> Ameerma et al (21 March 1997). Councillors Pocket Guide to Local Government. Human Rights Information Centre. Greater Johannesburg Metropolitan Council.

<sup>164</sup> Ibid

## BIBLIOGRAPHY

1. The Constitution of the Republic of South Africa Act 108 of 1996.
2. Chaskalson et al: (1999 as updated) : Constitutional Law of South Africa. Juta & Co.Ltd
3. Devenish G.E.(1992): Interpretation of Statutes. Juta & Co.
4. Cachalia et Al (1994) : Fundamental rights in the New Constitution.Juta & Co.
5. Van Wyk ; Dugard; De Villiers; Davis(1994):  
Rights and Constitutionalism: The New South African Legal Order. Juta & Co.
6. Davis, D. (1999): Democracy and Deliberation. Juta & Co.
7. Scheepers, Theo (2000): A Practical guide to Law and Development in South Africa.  
An introduction to the law applicable to development and development management in South Africa. Juta & Co.
8. Gutto, SBO(1996): A Practical Guide to Human Rights in Local Government. Your Rights -Your Wings. Butterworths.
9. Khoza, Vusi F.( Copy editor) (1998): Completing the Circle of Democracy: Local Government and the Constitution of the Republic of South Africa - (Adv. Zac Yacoob). Butterworths
10. Meyer , Johan (1998): Local Government law-1997. Butterworths
11. Meyer, Johan (1978): Local government Law . vol. 1, General Principles. Butterworths.
12. Jaichand ,Vinodh (1997): Restitution of Land Rights. A Workbook . Lex Patria.
13. Hofmeister, Wilhelm and Scholz, Ingo (Ed) (1997):  
Traditional and Contemporary focus on Local Participation and Self Government in Africa.  
Konrad Adenauer Stiftung. Johannesburg . South Africa.



14. Sabine, George H. (1961): *A History of Political Theory*.  
George G. Harrap & Co. London. Holt, Rinehart and Winston, Inc.
15. Mc Carney . Patricia L. ed (1996):
  - a) *The Changing Nature of Local Government in Development Countries*.
  - b) *Cities and Governance. " New Directions in Latin America, Africa and Asia."*
  - c) *Municipal Government- Developing Countries*  
Centre for Urban and Community Studies. University of Toronto Press Inc.  
Canada
16. Reddy P.S. Ed (1995): *Perspectives on Local Government Management and Development in Africa*.  
Department of Public Administration , UDW, Durban R.S.A.
17. Ismail , N; Bayat S; and Meyer I. Ed.(1997): *Local Government Management*.  
International Publishing Co.(South Africa) (Pty) Ltd.
18. Cloete , Fanie (1995): *Local Government Transformation in South Africa*.  
J L van schaik Publishers. Pretoria . South Africa.
20. Suttner, R and Cronin, J (1986) : *30 Years of the Freedom Charter*. Ravan Press. Johannesburg . South Africa.
21. O' Meara, Dan (1983):  
*Volks- Kapitalisme: Class and Ideology in the development of Afrikaner Nationalism.1934-1948*.  
Ravan Press (Pty) Ltd. Johannesburg.
22. Posel Deborah (1997):  
*Oxford Studies in African Affairs. The Making of Apartheid. 1948-1961. Conflict and Compromise*.  
Clarendon Press: Oxford University Press ( Southern Africa). Oxford
23. Bozzoli, Belinda Ed (1983):  
*Towns and Countryside in the Transvaal. Capitalist Penetration and Popular Response*.  
Ravan Press (Pty) Ltd. Johannesburg.
24. Ismail , N and Mpaisha CJJ (1997):  
*The Final Constitution of South Africa: Local Government Provisions and*

their Implications.

Konrad Adenauer Stiftung . Johannesburg.

25. Zybrands , Werner (1995) :  
A Perspective on Local Government in the new South Africa.  
Published for ABSA Bank . Johannesburg.
26. Rautenbach and Malherbe ( 1996): Constitutional law . Second edition.  
Butterworths. Durban
27. Mastenbroek R and Steytler N ( November ,1997):  
Local Government and Development. A new Constitutional Enterprise.  
Law,Development and Democracy.
28. King, Desmond and Stoker, Gary (Ed) ( 1996):  
Rethinking local democracy. Economic and Social research Council.:  
Government beyond the Centre. Macmillan Press, Limited.
29. Office of the United Nations High Commissioner for Human Rights. Geneva  
(1997):  
A compilation of International Instruments. Volumes 1 & 2  
United Nations publication. New York and Geneva.
30. Stren , Richard (Ed): (1994)  
a) Urbanization- Research in Developing Countries (vol 1)  
b) Urban research in the Developing world ( Swilling Mark : Towards an  
Urban Research Agenda for Southern Africa pp 283- 374.vol. 2 : Africa-  
1994 edition; Latin America - 1994 edition)
31. Stren , Richard and Bell ,Judith K ( ed) (1995)  
Urban research in the Developing World vol 4: Perspectives on the City.  
Centre for Urban and Community Studies. University of Toronto Press. Inc.  
Canada.
32. Dr. Mulemfo Mukanda M.(2000)  
Thabo Mbeki and the African Renaissance: The emergence of a new African  
leadership: Actua Press (Pty) Ltd NBD. Western Cape.
33. Mandela , Nelson(1996): Autobiography :Long Walk to Freedom.

MacDonald Purnell (Pty) Ltd. Randburg. South Africa.

34. Nelson, Don (1994): South Africa ( 1990-1994): The Miracle of a Freed Nation.  
National Book Printers: CAPE Town .
35. Coetzee, Janks & Graaf, Johann (1996): Reconstruction, Development and People.  
International Thomas Publishers( Southern Africa) (Pty) Ltd.
36. Lodge, Tom (1983): Black Politics in South Africa since 1945.  
Ravan Press (Pty) Ltd. Longman Group Ltd
37. Rationalization of laws for the Northern Province: draft Municipalities Act - COLA 1999.
38. Local Government Transition Act 209 of 1993.
39. The Interim Constitution of the Republic of South Africa Act 200 of 1993.
40. The National Action Plan for the Promotion and Protection of Human Rights. December 1998. Republic of South Africa.
41. Madzhie K R (1996): The aftermath of racial segregation in South Africa. The case of Louis Trichardt, urban region.  
M A Thesis presented to the University of Miami, USA.

ARTICLES; JOURNALS; MAGAZINES; CONFERENCE PAPERS:

42. Wilmot, James & Levy, Moira ed (1998)  
Pulse. Passages in Democracy Building: Assessing South Africa's transition.  
IDASA. Cape Town
43. Barbeton, Conrad; Blake, Michael & Kotze, Hermien Ed (1998)  
Creating action space. The challenge of poverty and democracy in South Africa. IDASA. Cape Town
44. Seth, Ntai (Oct. 1994) - edited Papers  
Focus on Rural Government.

Conference on Local Government. Centre for Human and Peoples' Rights.

45. Motshekga, M: Ameerma M S & Dawson, A (1996)  
You and Your Councillor. A Quarterly magazine on Municipal Government.  
Nipam Publishers C.C. 50 Tonetti Road, Midrand, Gauteng
46. Ameerma et al (21 March 1997):  
Councillor's Pocketguide (to Local Government). Optimising the delivery system.  
Published by the Greater Johannesburg Metropolitan Council for the Human Rights Information Centre.
47. The White Paper on local Government (1998)  
Issued by the Ministry of Provincial Affairs and Constitutional Development.  
Www.Local govt.co.za
48. Verlooren van Themaat Centre for Public Studies. UNISA: A collection of papers (30 August 1995)  
South Africa in Transition: Local Government: The Demands, The Law, The Realities
49. Annual Survey of South African Law (1997 & 1998). University of the Witwatersrand. Johannesburg.  
Juta & Co
50. Gutto S B O; Pretorius L & Nkeli J (1997) Local Government and the Bill of Rights. Local government Conference - hosted by Freeloga in Bloemfontein. South Africa
51. Govender, K (1997)  
Certification of the Amended Text of the Constitution of the Republic of South Africa. The Human Rights and Constitutional Law Journal of Southern Africa, Vol 14 February 1997.
52. Cameron, Robert (1995):  
The history of devolution of powers to local authorities in South Africa - The shifting sands of state control.  
Local Government studies 21 (no. 3: 396-417). Frank Cass Journals: Journal offprint.

Frank Cass. London. UK

53. Cameron, Robert (1996)

The democratisation of South African Local Government.

Local government Studies 22 (no. 1: 19-39) Springs 1996. Frank Cass Journals. Frank Cass London, UK

54. Cameron, Robert (1997)

South Africa's Final Constitution: The elevation of local government.

Conference paper read at the International Association of Schools and Institutes of Administration.

8-11 July 1997. Quebec City. Canada.

55. Steytler N and De Villiers J (April 1998) at p 7

The Constitutional Court affirms the status of local government in

Fedsure Life Assurance Ltd v The Greater Johannesburg Metropolitan Council 1998 (12) BCLR 1458 CC

Local government Project. Community Law Centre, Local Government Law Bulletin (vol 1 No. 1) UWC

56. Liebenberg, Sandra (1999)

An analysis of the Grootboom and Ross cases and its implication for Local Government.

Socio-economic rights project. Community Law Centre. Local Government Law Bulletin. UWC

57. Henderson, Andrew J H 1998 SALJ Vol 115 Part 1. Juta & Co @ pp 215 et seq.

Putting section 1 to work: Some preliminary thoughts on the first of the founding provisions of the new Constitution.

58. Henderson, Andrew J H (1998) SALJ Vol 115 Part 1. Juta & Co @ p 346 et seq

The Curative powers of the Constitution: Constitutionality and the ultra vires doctrine in the justification and explanation of judicial review of Administrative action.

59. Henderson, Andrew J H (1998) SALJ Vol 115 Part 4. Juta & Co. @ p634 et

seq

The meaning of "administrative action".

60. Butler, Andrew S (1999) SALJ Vol 116 Part 1. Juta & Co. @ p 77 et seq  
Private litigation and constitutional rights under sections 8 and 9 of the 1996 Constitution - Assistance from Ireland.
61. The Hon. Mr Justice Pius Langa (1999) SALJ Vol 116 Part 1. Juta & Co. p 153  
The Challenge of Change.  
Address delivered by the Honorable Justice Pius Langa, Deputy President of the Constitutional Court on the occasion of his installation as Chancellor of the University of Natal on 28 October 1998.
62. The Hon. Mr Justice I Mahomed (1999) SALJ Vol 116 Part 4. Juta & Co. p 853  
Address by Mr Justice I Mahomed, Chief Justice of the Supreme Court of Appeal, on accepting the Honorary Degree of Doctor of Laws at the University of Cape Town on 25 June 1999.
63. Mettler, Johan (1997)  
The Legislative Powers of Local Government. Research Paper - Democracy Project. UWC
64. Pimstone, Gideon (1998)  
The Constitutional Basis of Local Government in South Africa.  
Research Paper. Konrad Adenauer Stiftung Foundation
65. Keightley, Raylene (2000) SALJ Vol 117 Part 1 p 26 et seq. Juta & Co  
"When a home becomes a castle: A Constitutional Defence against Common Law Proceedings:  
Ross v South Peninsula Municipality.
66. Clarke, Brigitte (2000) SALJ Vol 117 Part 2 pp 353 et seq. Juta & Co  
The duty of the State to Support Children in Need.

*"Socio-economic rights are expressly included in the Bill of Rights, they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights and the courts are constitutionally bound to ensure that they are protected and fulfilled..."*

*Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing."*

**- per Yacoob J in the Constitutional Court judgement of Government of the Republic of South Africa v Grootboom and others.**



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