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When law struggles to deliver: Reflections on service delivery law reform in South Africa, 1996–2024

Significance:

This contribution reflects on service delivery law reform in post-apartheid South Africa, focusing on the expectations that were cemented in law for local government. This reflection is offered in the context of the current widespread service delivery challenges and the absence of consequence management in local government. We comment on the possible reasons why the legal framework struggles to deliver on the original policy vision of 'developmental local government' which was envisaged in the late 1990s to deliver fair, sustainable and equal future access to services of a high quality.

Introduction

In line with the principle of subsidiarity[1], it usually happens that the law or legal processes put municipalities (local authorities) in charge of waste, water, electricity and other services. Although we see widespread private sector provision of basic services in a diffused system of local governance[2], it is unsurprising that the United Nations Sustainable Development Goals explicitly require local governments to ensure access for all to adequate, safe and affordable housing and basic services (SDG 11.1)[3]. In a similar vein, the United Nations New Urban Agenda envisages cities and local governments that provide universal access to safe and affordable drinking water and sanitation, as well as equal access to quality services such as infrastructure, energy, and transportation (13(a) NUA).[4]

South Africa has world-class legislation. After the adoption of the *Constitution of the Republic of South Africa*, 1996 (the Constitution), a remarkable process of law and policy reform followed. This is particularly true for the law on issues that were the subject of, or cause for, neglect for as long as apartheid stayed intact. The constitutional status of local government changed significantly after 1996. We reflect here on service delivery law reform over the past 30 odd years, focusing on the expectations that were cemented in law. This reflection is done in the context of the current widespread service delivery challenges and absent consequence management.[5] We take a step back to comment on the possible reasons for the legal framework struggling to deliver. We also use this opportunity to reminisce the original policy vision of 'developmental local government' and what was envisaged in the late 1990s for fair, sustainable and equal future access to services of a high quality.

The constitutional dream: Adequate services for all

The Bill of Rights in chapter 2 of the Constitution, read with the extensive constitutional provisions on cooperative government (chapter 3) and a local government dispensation characterised by autonomy and extensive authority, confirms a constitutional dream of sufficient basic and other services for all. In other words, the Constitution promises people rights in relation to adequate housing, access to water, and work and living environments not harmful to human health or well-being. These rights translate into duties of inter alia municipalities, as further informed by the objects of local government which include, for example, the provision of services to communities on a sustainable basis, promoting socio-economic development, protecting the environment, and providing democratic and accountable governance.

In a striking judgement some years ago (*Joseph and Others v City of Johannesburg and Others*)[6], the court went as far as using existing constitutional and legislative provisions that oblige local government to provide basic services to community residents to establish a "public law right" to receive electricity. The court held that although City Power had a contract with the landholder of Ennerdale Mansions, a flat of 44 blocks, it could not terminate electricity to the residents without complying with the procedural requirements of the right to administrative justice. The Court held that the termination of electricity supply to Ennerdale Mansions was unlawful and that residents were at least entitled to a pre-termination notice that would have given them an opportunity to make representations and find suitable solutions to the problem. The Court reasoned that the Constitution and legislation established a "special cluster of relationships" between municipalities and their residents, concretised by the bundle of public responsibilities that municipalities owe their residents in terms of the Constitution and legislation.

The spirit of the Constitution and the much larger transformative project it hopes to deliver suggest that sustained delivery of services has a big role to fulfil. The dream embodied in our Constitution is for people to live lives marked by human dignity, equality and respect for life. It is for this important reason that we grasp the consequences of failing service delivery. It has a direct bearing on human health, well-being, dignity, equality and may even put lives and ecosystems at risk.[7] In the bigger scheme of things, failing services also pose direct risks for the integrity and health of a still maturing democracy. Ordinary people lose faith in democratic processes and in representative leaders and agents of the state when the most basic of their needs remain unmet.[8] When service delivery protests erupt, one is often confronted with claims about unresponsiveness and lack of accountability among political leaders and authorities.[9] These sentiments fly in the face of the Constitution which explicitly commands that all constitutional obligations must be performed diligently (section 237).

It would be deceiving not to mention the flip side of this constitutional dream. The Bill of Rights repeatedly refers to 'everyone', which means that few people, regardless of their legal status, would be excluded from the entitlements in the Constitution. An exception is the political rights reserved for citizens, such as the right to vote or establish a political party. The inclusive constitutional protection understandably creates an inviting

environment – also for people beyond South Africa's borders. While we do not attempt to deliberate this point, it should be mentioned that services must be delivered to all and that in a country with exceedingly high rates of unemployment, urbanisation and upwards population growth trends, this understandably creates resource-related and other governance challenges.[10] By the same token, local government is not solely responsible for service delivery (or its failure). The democratic constitutional dispensation ushered in a government consisting of three spheres (national, provincial and local) and many line functionaries – all of which are expected to cooperate and collaborate (chapter 3 of the Constitution). This constitutional command to work together is now being put to the test with the Government of National Unity that came about after the 2024 national elections.

The policy vision: Local government for service delivery and more

A white paper setting out the policy direction for a specific issue runs the risk of becoming redundant and insignificant when an enforceable law on the topic comes about. We argue that an immensely meaningful vision for local government was captured in the 1998 White Paper on Local Government.[11] However, between the adoption of a suite of local government legislation and extensive judicial interpretation of local government powers and functions, much of the original conceptualisation of 'developmental local government' went missing – not only in the general narrative about service delivery and the duties of municipalities, but also, in the deeper understanding of what sustainable and equitable service delivery, firstly, should be and, secondly, may achieve in a country such as South Africa which aspires to be a healthy and thriving democracy.

The White Paper made it clear that, after apartheid, local government would have an extremely important role to fulfil. It declared local government as a key development agent tasked with much more than mere service delivery. Yet, service delivery was explained in the White Paper as to command dedication to the eradication of service delivery backlogs and the provision of services to all, in line with principles such as quality, accessibility, accountability, sustainability and value-for-money (White Paper 1998, Section F). One of the shortcomings of the White Paper is that it could not anticipate how poverty would deepen over time with a knock-on effect on the revenue raising of municipalities and the socio-economic conditions in which people would continue to live for decades longer. Some years later, the White Paper's overarching vision for service delivery would inform what became the statutory definition of basic municipal services, namely: "a service that is necessary to ensure an acceptable and reasonable quality of life, and if not provided, would endanger public health or safety or the environment" (section 1 of the *Local Government: Municipal Systems Act 32 of 2000*).

Many policies on development and local governance followed the White Paper, but perhaps the most insightful for present purposes is the Integrated Urban Development Framework of 2016 (IUDF).[12] This Framework reminds us that "despite significant service delivery and development gains since 1994, apartheid spatial patterns have largely not been reversed" and that, in a more forward-looking fashion, the provision of municipal services must now focus on "connected, resource-efficient public services, such as efficient energy, waste and water systems, street lighting, technology, and smart grids"[12].

The national policies on local government speak of an awareness of the importance and vast scope of its service delivery duty. This duty may, however, not be isolated from various other challenges, including the ongoing state of spatial disparity and injustice as well as the impacts of climate change and energy poverty, among other pressures. The persisting spatial inequalities across urban South Africa are a cause of great concern from environmental sustainability and service delivery accessibility perspectives.[13]

Statutory law turned on its head: Developments between 1996 and 2024

Local government operates in a highly regulated space and the impact of this for service delivery and good local governance has been lamented before.[14] South Africa has seen a flurry of local government legislation being rolled out from the year 1998 onwards, and today a suite of legislation applies to the structure, powers and daily functioning of municipalities. From a service delivery perspective, virtually all these laws find application, ranging from the *Local Government: Municipal Systems Act 32 of 2000* to the *Local Government: Municipal Finance Management Act 56 of 2003* and the *Local Government: Municipal Structures Act 117 of 1998*. These Acts are, however, only a drop in the ocean of statutes that direct the way in which municipal services should be provided in South Africa. Some of the other laws of direct relevance include the *National Environmental Management: Waste Act 59 of 2008*, the *Water Services Act 108 of 1997*, the *Spatial Planning and Land-Use Management Act 16 of 2013* and the *National Environmental Management: Air Quality Act 39 of 2004*. There are plenty more. Besides new laws, some apartheid-era legislation, which is often incompatible with the new constitutional scheme, still applies to municipalities in the building sector, for example.

Some of the legally relevant problem(s)

Despite (or perhaps because of) a strong law and policy framework for local government, legally relevant problems around service delivery persist. We briefly look into a few of these.

Although the legal framework for the newly proposed District Development Model (DDM) is emerging[15], the autonomy of municipalities[16] means that, although they are expected to participate in this developmental model, they cannot be forced to be part of it. In 2019, President Ramaphosa launched the DDM model as a potential panacea to local government's service delivery woes. The aim was to improve integration in planning and budgeting across the spheres of government through 44 district municipalities and eight metros. The DDM aspires to ensure that there is one plan and one budget that addresses the development priorities for each metro and district municipality in the country. The regulations of 14 May 2024 provide an intergovernmental and operational guide for the coordination of municipal intergovernmental development priorities in the context of the DDM, through established intergovernmental forums. The DDM model is still in its early years of implementation, and it is difficult to predict the eventual success of this model. Besides, given the strong constitutional autonomy of municipalities, the DDM model is voluntary, and municipalities cannot be coerced into it. It further does not affect the current legal distribution of powers between spheres of government or between district and local municipalities. Without a significant increase in fiscal allocation from national government, coupled with deployment of appropriately skilled persons, the DDM model may not make any significant difference, like many of the local government support programmes that came before it. An alternative approach could be for the Municipal Demarcation Board to conduct research to assess the viability of collapsing the 257 municipalities along the geographical boundaries of the current DDM model. This may radically reduce the number of municipalities that may use their autonomy to reject participation in the DDM and facilitate redistribution of existing expertise within new municipal boundaries. Potential concerns about the large size of municipalities along the DDM geographical boundaries are still applicable to the current DDM model.

Another major problem which has been regularly raised is the current model of local government finance. Despite their fiscal autonomy (sections 229 and 230A of the Constitution), most municipalities heavily rely on the national transfers, the Local Government Equitable Share (LGES) grant, which is guaranteed in terms of section 216 of the Constitution and given effect to discharge through the annual *Division of Revenue Act*. Weak revenue generation due to lack of viable tax bases and poor debt recovery hamper the financial viability of municipalities. There have been calls to government to revisit the LGES formula after its third and last revision in 2012/2013 to strengthen the fiscal viability of municipalities.[17] Given the scope of services that municipalities are expected to provide, and the decaying state of municipal infrastructure, national government needs to seriously consider this call for increased fiscal allocation to municipalities. Without this, many communities will remain in limbo.

Despite the legal framework to promote good financial governance in municipalities, significant amounts of money are lost through mismanagement and corruption.[18] Fiscal mismanagement as well as

limited skills and capacity in finance persist.[19] This situation has seen municipalities continue to return millions of unspent funds to National Treasury every year. In addition, corrupt procurement practices lead to wasted expenditure that could be used to deliver services. Attempts to recoup lost funds through judicial intervention have not been very successful for diverse reasons. Often, municipal officials approach courts to review and set aside corrupt procurement contracts when the implementation of projects has neared completion (*Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Ltd*)[20], and the law is not clear on what percentage of the profits can be recovered from contractors that were part of the corruption. While contractors are generally allowed to keep profits earned from corrupt procurement deals once they have performed their tasks, courts have indicated a willingness to scrutinise excessive profits (see *Black Sash Trust v Minister of Social Development*[21]; *RAiN Chartered Accountants Incorporated v South African Social Security Agency*[22]; *Siyangena Technologies (Pty) Ltd v PRASA*[23]; *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd*[24].

Lastly, many municipalities across the country suffer severe shortages of critical (and scarce) skills.[25] The national government (e.g. the Department of Water and Sanitation) at times imports foreign engineers to service waste and water treatment plants.[26] This approach has been described as "bizarre" given that South Africa has qualified technical individuals and engineers who struggle to find employment.[26] Although the *Employment Equity Act 55 of 1998* (EEA) serves well-intentioned equity objectives (section 2 of EEA), there appears to be a need to relax rigid adherence to affirmative action targets set in terms of the Act where there are severe shortages of skills needed by municipalities. The position adopted by government has driven some with critical skills to open consultancies that milk municipalities by excessively charging for their services, often on basic matters that municipalities ought to easily handle.[19,2419] Instead of importing engineers and other expertise, the government should consider relaxing employment equity targets in municipalities where there is need for critical skills. Dogmatic adherence to affirmative action targets in critical skills sectors will continue to negatively impact service delivery and the lives of South Africans spread across formal and informal living environments.

Courts speaking out

The judiciary indirectly guards over the state of service delivery in South Africa. High Courts, the Supreme Court of Appeal and the Constitutional Court in South Africa are uniquely positioned to ensure constitutional compliance by municipalities (see chapter 8 of the Constitution). They are obliged to declare municipal law or conduct (action) invalid to the extent that it is inconsistent with the Constitution and have wide remedial powers to make any order that is just and equitable (section 172 of the Constitution). It is against the backdrop of this watchdog role that courts have been regularly approached by communities and community organisations disgruntled with the failure of municipalities to discharge their service delivery duties. In certain cases[20,24,27-31], courts have repeatedly expressed frustration with the failure of municipalities to manage and maintain critical municipal infrastructure, provide basic services to communities in a sustainable manner, stop the deliberate pollution of rivers with untreated sewage, meaningfully facilitate community involvement in local governance, prudently manage their fiscal affairs, the self-serving nature of some municipal officials, municipal disrespect of the rule of law and court orders, and the lack of sufficient coordination and cooperation between municipalities and other spheres of government. In response to these failures, and in line with their wide remedial constitutional powers, courts have used structural interdicts to supervise municipalities in order to ensure that they comply with their orders, ordered the imprisonment of municipal managers for failure to comply with court orders, ordered provincial and national government to intervene in failing municipalities, nullified parts of procurement contracts which enabled service providers to make excessive profit at the disadvantage of rate payers, and enabled a community-based organisation to take over and manage water works and sewerage infrastructure in places such as Koster and Swartruggens in the North West Province. Often, some court orders, including structural interdicts, do not lead to timely and/or full compliance with municipal duties. This points to the limits of judicial power to effect transformative change in the municipal service delivery domain.

Although this approach of the courts has often attracted criticism for violating the separation of powers doctrine, they have exercised remedial powers expressly conferred by the Constitution to ensure municipal legal compliance in instances of abysmal local government failures. Outside of courtrooms, the level of despondency has often forced community residents and taxpayer associations to illegally take over collapsing municipal infrastructure and provide municipal services such as road infrastructure to restore their towns.[27] These acts may be seen as manifestations of civil disobedience and cannot be condoned, whilst they display a desperate attempt among ordinary citizens to ensure *some* access to *some* basic services for *some* people in the short term.

Conclusion

South Africa has world-class legislation. So what then should we make of a situation in which the law struggles to deliver? What does it suggest for South Africa that our remarkable legal framework, embedded in the Constitution, but fails to deliver on the inherent and explicit promise of adequate service delivery? Various interdisciplinary and multidisciplinary research projects would be required to explore all aspects of this complicated question, as it has layers reaching into politics, economics, finance, public and private governance, as well as education, investment and the impacts of global environmental change.

At a minimum, it should be questioned whether we are faced with a legal design error spanning the period 1996 to 2024, or whether the law has been putting too much emphasis on state responsibility *vis-à-vis* that of other actors, such as industry and the financial sector. We should also ask whether some areas of the law – e.g. municipal finance management law, environmental law or law aimed at redress in the labour sector – stifle progress with service delivery because of stringent procurement and other statutory requirements and administrative procedures. The dynamic nature of 'the law' in these areas also poses a serious challenge to municipalities. Before municipalities adapt to a (new) law, changes are already anticipated, which constantly changes the goalpost. One example is the recent *Climate Change Act 22 of 2024* which requires of metropolitan and district municipalities to "undertake a climate change needs and response assessment" to be followed by a municipal "climate change response implementation plan" (chapter 3 of the Act). These instruments will no doubt have an impact on service delivery considering the exposure of municipal infrastructure to climate impacts.

By the same token, we should ask if non-compliance with the law is addressed with the necessary vigour given the desperate need for improved service delivery in a constitutional democracy with *three* autonomous, but interrelated, government spheres sharing the immense responsibility of cooperating towards and delivering long-term development and prosperity. The ability of service delivery law to deliver depends on the understanding that, if one sphere of government fails, the entire government fails. This rings more true than ever in the recently constituted Government of National Unity. Fair, sustainable and equal access to services of a high quality in a country composed of a population of now more than 63 million people, requires the utmost dedication of every single political office bearer, administrator and government official in each of the relevant departments spread across the national, provincial and local spheres of government.

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Declarations

We have no competing interests to declare. We declare no AI or LLM use. Both authors read and approved the final manuscript.

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