

Local Government Empowerment and Collaborative Approaches in the Electricity Sector: A Constitutional Analysis

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Online ISSN
1727-3781

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Date Submitted

14 September 2023

Date Revised

22 February 2024

Date Accepted

22 February 2024

Date Published

7 May 2024

Editor Adv Sikandar Kola

Journal Editor

Prof C Rautenbach

How to cite this contribution

Ngcobo MT "Local Government Empowerment and Collaborative Approaches in the Electricity Sector: A Constitutional Analysis" *PER / PELJ* 2024(27) - DOI <http://dx.doi.org/10.17159/1727-3781/2024/v27i0a16855>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2024/v27i0a16855>

Abstract

This article explores the constitutional provisions and legislative aspects governing the role of local governments in generating and distributing electricity in South Africa. It encompasses the constitutional framework, which grants municipalities specific powers and responsibilities, highlighting the significance of these "original powers" derived directly from the *Constitution*. The article emphasises the need for intergovernmental cooperation at national, provincial, and local government levels to effectively address the complexities of electricity provision, taking into account related services such as water, sanitation, and environmental rights. The article further assesses recent amendments to the *Electricity Regulation Act* 4 of 2006, which grant municipalities greater involvement in electricity generation and procurement from independent power producers. While these amendments are seen as positive, the article highlights the need for financial resources and technical capacity building to empower municipalities to undertake these new responsibilities effectively. Ultimately, it emphasises the critical role of local governments in ensuring a sustainable and reliable supply of electricity for their communities while calling for comprehensive support from higher government levels to realise this goal.

Keywords

Local government; electricity; multilevel government; decentralisation; municipalities.

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1 Introduction

Our constitutional framework provides local government with specific powers and responsibilities. These powers are sometimes overlapping with other levels of government. This article examines the constitutional provisions governing local government's functions in generating and distributing electricity. It begins with examining the constitutional and legislative aspects pertaining to electricity provision. Subsequently, it analyses intergovernmental relationships following the constitutional mandate for all three government sectors to collaborate effectively. This analysis seeks to assess the degree to which these government levels are expected to cooperate, particularly in the context of the electricity sector. Furthermore, the article investigates the implications of amendments to the *Electricity Regulations Act 4 of 2006*. These amendments grant municipalities the authority to generate or procure electricity from independent power producers.

2 Local government powers and functions

Local governments are no longer implementers of national and provincial legislation. They now have the right "to govern, on [their] own initiative, the local government affairs of [their] community, subject to national and provincial legislation, as provided for in the Constitution".¹ It is submitted that municipalities now have greater powers and responsibilities than in the past. One of the functions that municipalities are charged with is the sustainable provision of "service" to the community – the principle of developmental local government.² The *Constitution* contains no definition of "services". The *Constitution* does, however, confer on local government executive authority over matters listed in schedules 4B and 5B of the *Constitution* or any matter assigned to it by national or provincial legislation.³

The powers allocated to local government by the *Constitution* are known as original powers. This is because they are derived directly from the *Constitution*, the country's supreme law. These original powers are significant because the *Constitution* safeguards them. Since they are derived directly from the *Constitution*, they cannot be removed or amended by any statute or level of government. The only way to do so is by a

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¹ Section 151 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*)

² Section 152(1)(b) of the *Constitution*.

³ Section 156(1)(a)-(b) of the *Constitution*

constitutional amendment. Such an amendment requires super-majorities in both houses of parliament, which makes it hard to undertake. The significance of local government powers was further emphasised by Moseneke J in the Constitutional Court case of *City of Cape Town v Robertson*, where it was held as follows:

A municipality under the Constitution is not a mere creature of [a] statute otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys "original" and constitutionally entrenched powers, functions, rights, and duties that may be qualified or constrained by law and only to the extent that the Constitution permits.⁴

From the above, one can deduce that national and provincial governments no longer hold power exclusively. Power is thus now devolved into all the spheres of government, which, in this case, includes local government. Local government enjoys some autonomy in exercising its powers subject to any restrictions imposed by law. The crucial words echoed by Moseneke J in the above case is that municipal conduct performed absent authorising legislation does not necessarily invalidate that conduct.⁵ Municipalities derive their powers from the *Constitution* or the legislation of competent authority or its laws.⁶ This can be done through an act of assignment. Section 44(1)(a)(iii) of the *Constitution* empowers the national government to assign any of its legislative powers to any legislative body of the other sphere/s of government. The exception is that the national government cannot assign powers to amend the *Constitution*. As will be seen later, the relevant authority can assign the power relating to electricity generation to local government.

Since municipalities are empowered with executive and legislative powers over the matters listed in schedules 4B and 5B, it is submitted that they are empowered to administer by-laws that regulate any of the issues. An example of such would be a by-law dealing with matters relating to street lighting. Street lighting is a municipal competence listed in schedule 5B.

The Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Ltd* held that in the context of housing, section 156 and schedules 4B and 5B of the *Constitution* are not the only source of local government powers.⁷ The other source of power is the one mentioned above by Moseneke. Local governments can source some of their powers from national legislation.⁸ The Minister responsible for the

⁴ *City of Cape Town v Robertson* 2005 2 SA 323 (CC) para 60 (hereafter *Robertson*).

⁵ *Robertson* para 60.

⁶ *Robertson* para 60.

⁷ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Ltd* 2012 2 SA 104 (CC) (hereafter *Blue Moonlight*) paras 21-29 and 46-67. See also Fuo 2015 CJLG 21.

⁸ An example of this is the *Local Government: Municipal Systems Act* 32 of 2000 (hereafter *Municipal Systems Act*).

relevant function may allocate the powers relating to that function to local government. The courts have long emphasised the importance of local government and its autonomy. An example of this would be the *Robertson* case, where the Court dismissed the view that in the absence of empowering legislation, "a municipality has no power to act".⁹ The Court held that "an approach to powers, duties, and status of local government is a relic of our pre-1994 past and no longer permissible in a setting underpinned by constitutional supremacy".¹⁰ The Court went on to say that the *Constitution* has moved away from the past system of parliamentary sovereignty, where

municipalities were creatures of statute and enjoyed only delegated or subordinate legislative powers derived exclusively from ordinances or Acts of Parliament – and any municipal regulations or by-laws that went beyond the powers conferred, expressly or impliedly, by the enabling superior legislation, were *ultra vires* and invalid.¹¹

Since the change in the status of local government, it is still bound by the laws of the "superior spheres", but only to the extent that such laws are within their constitutional mandate. The important thing is that the powers are derived directly from the *Constitution*.

Local government may also derive powers through an assignment. An assignment is the secondary source of power for local government.¹² Assignment entails the transfer of authority to local government over a function or competence that falls outside of its schedule 4B and 5B functional areas.¹³ Importantly, the *Constitution* provides for the principle of subsidiarity, even though it does not explicitly mention it. Subsidiarity entails governance taking place as close as possible to the citizens. Section 156(4) of the *Constitution* provides as follows:

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

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

It is submitted that the above provision mandates the national and provincial spheres of government to transfer functions to local government if local

⁹ *Robertson* para 53.

¹⁰ *Robertson* para 53. Local government was previously divided or different between certain racial groups, and they had different powers and functions. Municipalities governing the white areas had better powers and functions than black local authorities.

¹¹ *Robertson* para 53.

¹² Steytler and De Visser *Local Government Law* 5-8.

¹³ Community Law Centre 2007 <https://dullahomarinstitute.org.za/multilevel-govt/publications/de-visser-and-may-determining-appropriate-powers.pdf> 7.

government would effectively administer them and if local government can carry out such administration. The functional areas which can be transferred to local government are only those found in part A of schedule 4 and part A of schedule 5.

It is submitted further that municipalities are not restricted to functional areas listed in schedules 4B and 5B. This issue was dealt with by the KwaZulu-Natal High Court in 2013 when it had to determine the ambit and scope of the functional areas listed in the schedules in the matter of *Le Sueur v eThekweni Municipality*.¹⁴ The applicant in this matter, Le Sueur, instituted proceedings against the respondent, eThekweni Municipality, challenging the amendments that eThekweni Municipality introduced to the eThekweni Town Planning Scheme. Among the measures introduced by the municipality to its town management scheme was the Durban Municipality Open Space System (D-MOSS) as a type of land use zone. D-MOSS aims to preserve the city's ecological diversity and enhance the living environment. To achieve this, D-MOSS aimed to create a system of open spaces of land and water that consist of areas of high biodiversity in eThekweni. The problem which D-MOSS faced was that it lacked the legislative authority of a town planning scheme, thus posing enforcement challenges. As a countermeasure, the municipality passed a resolution in 2010 which integrated D-MOSS into the town planning scheme. The significance of such an act was that it prevented residents from undertaking any development on their properties without first obtaining permission from the municipality. From this, the applicant, Le Sueur, a businessman and property developer, instituted proceedings in the High Court challenging the amendments to the town planning scheme.

The relief sought by the applicant was that the amendments to the town planning scheme be declared unconstitutional and set aside.¹⁵ Thus, the Court was tasked with deciding whether the Municipality had the authority to legislate on environmental matters as it did when it amended its town planning scheme in terms of the Constitution or any other law of general application.¹⁶

The argument advanced by the applicant was that the municipality acted *ultra vires* when it amended the town planning scheme and created environmental law. The applicant contended that the municipality lacked the authority to include matters related to the protection of the environment in its town planning scheme. In terms of the *Constitution*, "the environment" falls within the exclusive legislative competence of national and provincial

¹⁴ *Le Sueur v EtheKwini Municipality* (9714/11) [2013] ZAKZPHC 6 (30 January 2013) (hereafter *Le Sueur*).

¹⁵ *Le Sueur* para 1.

¹⁶ *Le Sueur* para 3.

governments.¹⁷ *Le Sueur* thus contended that legislative power regarding the "environment" rested exclusively on national and provincial spheres of government. The applicant argued that the national, provincial, and local spheres of government all had different and distinct functions.¹⁸ The applicant thus argued that the municipality's legislative authority only covered matters listed in schedules 4B and 5B, notwithstanding section 152 read with section 156(1) of the *Constitution*, which identifies the promotion of a "safe and healthy environment" as one of the objects of local government; the "environment" does not fall within any of these ambits.¹⁹

The Court referred to section 156(5), which provides that "a Municipality has the right to exercise any power concerning a matter reasonably necessary for or incidental to, the effective performance of its functions". The Court held that even though the matters relating to the environment are in terms of the *Constitution* under national and provincial government competence, such matters are better dealt with by local governments in the form of municipalities who are in "the best position to know, understand, and deal with issues involving the environment at the local level".²⁰ The constitutional drafters never intended to allocate legislative powers "among the three spheres of government in a hermetically sealed, distinct and watertight compartment".²¹ The Court agreed with the respondent and held that section 40(1) of the *Constitution* requires all spheres of government to respect and uphold the principles of cooperative government.²² The Court held that "environment" is one of those matters that fall within all three spheres of government and thus has not been included in the narrow schedules 4B and 5B.²³ The Court held that the listing in schedules 4B and 5B of the *Constitution* should not be interpreted in the narrowest sense.²⁴ The Court went on to rule that municipalities are authorised to "regulate" environmental matters to protect the environment at the local level of government.²⁵

The *Le Sueur* case is significant to this study because it reaffirms the view that municipalities are not limited to the matters listed in schedules 4B and 5B of the *Constitution*. They are, however, not allowed to do as they please; each sphere ought to follow the constitutional provisions. As a sphere of government in South Africa, local government has a constitutional duty to uphold the Bill of Rights and section 24 of the *Constitution*; likewise, other

¹⁷ *Le Sueur* para 16

¹⁸ *Le Sueur* para 16

¹⁹ *Le Sueur* para 16

²⁰ *Le Sueur* para 20.

²¹ *Le Sueur* para 20.

²² *Le Sueur* para 20.

²³ *Le Sueur* para 20.

²⁴ *Le Sueur* para 20.

²⁵ *Le Sueur* para 40.

spheres have these duties. All spheres of government are constitutionally obligated to follow and uphold the Bill of Rights and section 24 provisions. Any failure on their part would trigger liability.

It is worth noting that some matters listed in schedules 4B and 5B of the *Constitution* overlap, and for them to be properly dealt with, they might require using other constitutional powers not necessarily contained in schedules 4B and 5B.

In the case of this study, local government is empowered to deal with "electricity and gas reticulation". However, the electricity issue cannot be examined independently without exploring the constitutional rights to services such as water and sanitation and the environmental rights in section 24 of the *Constitution*. It is against this background that the researcher argues that electricity is a matter that involves all three spheres of government and requires them to work co-operatively for the realisation of the same objectives of local government and the developmental duties of local government. That said, the three spheres of government should engage one another for better ways to achieve a common goal – ensuring that the community and everyone in the country can enjoy their constitutional rights.

3 The role of local government in the provision of electricity

Municipalities have the discretion to exercise the powers afforded to them by section 156(1) of the *Constitution* regarding the functional areas listed in schedules 4B and 5B. Undoubtedly, electricity and gas reticulation are functional areas upon which local government has executive authority. This is because "electricity and gas reticulation" is listed in schedule 4B, which makes it one of the local government competence areas. The *Constitution* does not have a definition for reticulation, and the definition found in the *Electricity Regulation Act* is inconclusive. Reticulation is the "trading or distribution of electricity and includes services associated therewith".²⁶ "Distribution" is "the conveyance of electricity through a distribution power system excluding trading".²⁷ The Act defines a "distribution power system" as "a power system that operates at or below 132kV".²⁸ An easier and clearer definition of reticulation is then sought from other sources. Merriam-Webster defines reticulation as "to divide, mark, or construct to form a network".²⁹ Such a definition is still inconclusive, and a further definition has

²⁶ Section 1, "reticulation", *Electricity Regulation Act* 4 of 2006 (hereafter *Electricity Regulation Act*).

²⁷ Section 1, "distribution", *Electricity Regulation Act*.

²⁸ Section 1, "distribution power system", *Electricity Regulation Act*.

²⁹ Merriam-Webster Dictionary date unknown <https://www.merriam-webster.com/dictionary/reticulate>.

been sought. The *Electricity Safety Act* of New South Wales defines electricity reticulation as:

The provision of all conductors and other infrastructure and metering equipment necessary to allow the delivery of electricity from the point of connection of a distribution network service provider's asset to sources of electricity supply, to the point of connection of the provider's assets to the assets of an electricity consumer or of an electricity supply authority.³⁰

From the above definitions, we can deduce that "reticulation" refers to the distribution side of electricity and the processes involved and does not include electricity generation.

One question that arises from this is whether municipalities have a legal duty to provide basic electricity services. The *Local Government: Municipal Systems Act* 32 of 2000 places a general duty on local government to ensure people have access to "at least the minimum level of basic municipal services".³¹ The definition of "basic municipal services" is "a municipal 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".³² This then leads to the next question of whether the provision of electricity falls within the ambits of "basic municipal services". In 2005, the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality* held that "municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty".³³ The Court did not go into further details as to how this right to access electricity was created. The Court merely referred to public duty. In the case of *Joseph v City of Johannesburg*, the Court explicitly recognised the right to electricity and the duty of the municipalities to provide the same. The Court in *Joseph* held that "electricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society".³⁴ The Court held as follows:

The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public services provider.³⁵

The Court contended that such obligations to provide basic municipal services are sourced from both the *Constitution* and legislation. Skweyiya J held that section 152 of the *Constitution*, which sets out the objects of local

³⁰ Section 4(1) of the *Electricity Safety Act*, 1945 of New South Wales.

³¹ Section 73(1)(c) of the *Municipal Systems Act*.

³² Section 1 of the *Municipal Systems Act*.

³³ *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 38.

³⁴ *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC) (hereafter *Joseph*) para 34.

³⁵ *Joseph* para 33.

government, "creates an overarching set of constitutional obligations that are to be achieved following section 152(2)".³⁶ These objectives of local government, according to the Court, are further found in the developmental duties of local government under section 153.

It is clear from above that the municipalities must provide electricity as part of basic municipal services; such a duty has created a corresponding right on the part of individual persons. That right, however, still needs to be developed. As it stands, the right creates more questions that are yet to be answered by the courts.

The Constitutional Court in *Joseph* held that the provisions of the *Constitution* in sections 152 and 153, section 4(2) of the *Municipal Systems Act*, and the *Housing Act* 107 of 1997, when all read together, "impose constitutional and statutory obligations on local government to provide basic municipal services, which include electricity".³⁷ The Court held that the applicants in the case are "entitled to receive such services".³⁸ The Court held as follows:

These rights and obligations have their basis in public law. Although, in contrast to water, there is no specific provision in respect of electricity in the *Constitution*, electricity is an important basic municipal service [that] local government is ordinarily obliged to provide. The respondents are certainly subject to the duty to provide it.³⁹

Most recently, the Supreme Court of Appeal has held that electricity "is a component of basic services that municipalities are constitutionally and statutorily obliged to provide to the residents".⁴⁰

4 What role, if any, does the local government have in generating electricity?

4.1 Constitution

The *Electricity Regulation Act* defines the generation of electricity as "the production of electricity by any means".⁴¹ This definition covers the generation of electricity from all sources of energy, which may include renewable sources and fossil fuels. The issue of electricity generation is widely debated and remains a grey area. This is because the *Constitution* only grants electricity and gas reticulation powers to local government and is silent on the issue of electricity generation – which one must interpret as

³⁶ *Joseph* para 36.

³⁷ *Joseph* para 39.

³⁸ *Joseph* para 39.

³⁹ *Joseph* para 39.

⁴⁰ *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism; Thaba Chweu Local Municipality v Sabie Chamber of Commerce and Tourism* 2021 3 SA 47 (SCA) para 13.

⁴¹ Section 1, "Generation", *Electricity Regulation Act*.

a residual power. All residual powers are under the national government's competence.

In South Africa, the *Electricity Regulation Act* 4 of 2006 regulates the electricity operation, generation and distribution facilities, electricity import and export, and electricity trading. The National Energy Regulator of South Africa (NERSA), established by section 3 of the *Energy Regulation Act*, is the custodian and enforcer of the regulatory framework provided for in the *Electricity Regulation Act*.⁴² Any municipality or independent power producer that wants to operate, generate, or distribute electricity will have to apply to NERSA for a license to do so. In terms of the *Electricity Regulation Act*, no person may, without a permit issued by NERSA, operate any generation, transmission, or distribution facility, import or export any electricity, or be involved in trading. The Electricity Regulations Amendments empower NERSA to grant licenses to parties/entities other than the national government to generate electricity. Du Plessis summarises the process as follows:

A municipality or independent power producer, as an operator, generator, or distributor of electricity, will have to apply to NERSA for a license in terms of section 10 of the Electricity Regulation Act. In the application, the municipality will include, among other things, a description of the application and its horizontal and vertical relationships to others involved in the generation, transmission, and distribution of electricity. It will also have to supply documentary evidence of its administrative, financial and technical ability to generate electricity, and must include a description of the customers and tariff structure as well as its "plans and the ability to comply with applicable labour, health, safety, and environmental legislation, subordinate legislation, and such other requirements as may be applicable and proof of compliance with any integrated resource plan (IRP).⁴³

While municipalities have a protected constitutional competence in electricity reticulation, in so far as generation is concerned, municipalities are at the mercy of legislation by the national government. As explained above, municipalities can also apply directly to NERSA for a license to generate electricity. Municipalities have no original power to generate electricity (the *Constitution* does not provide such powers to local government); however, municipalities can have such power through an act of assignment or via section 156(5) of the *Constitution*.

In terms of section 156(5) of the *Constitution*, "a Municipality has the right to exercise any power concerning a matter reasonably necessary for or incidental to, the effective performance of its functions". This provision gives municipalities a right to exercise this power rather than be at the mercy of the national or provincial government's assignment of power. This is normally referred to as incidental powers. Steytler and De Visser correctly

⁴² Section 3 of the *Electricity Regulation Act*.

⁴³ Du Plessis *Environmental Law* 24-7.

argue that section 156(5) does not confer new powers on local government. It does, however, confer on a municipality the power to take action to improve the efficient management of its current functional areas.⁴⁴ In the case of electricity, municipalities generating their own electricity will improve the efficient management of electricity reticulation and the efficiency of providing basic services. Municipalities are closest to the people; they know how much power generation is needed for the entire municipality. They can better plan electricity generation mechanisms through by-laws.

And just as the Court in *Le Sueur* held that matters related to the environment in terms of the *Constitution* are said to be a primary concern of the national and provincial spheres of government, municipalities are better positioned to deal with them. In the case of electricity generation, local government is best positioned to know, understand and deal with matters involving energy generation and distribution at the local level. The reason is that local government has the municipal planning function and can introduce renewable energy sources into the grid using by-laws. An example is municipal by-laws requiring all commercial buildings to have solar panels. Municipalities can better plan and manage energy generation; this would allow them to curtail costs and generate more revenue from electricity sales as well.

The Court in *Le Sueur* held that the

environment is an ideal example of an area of legislative and executive authority or power which had to reside in all three levels of Government and, therefore, could not be inserted in Parts B of Schedules 4 and 5 and was instead inserted in Part A of Schedule 4.⁴⁵

The same thing could be said about electricity generation. As the Court held in the *Blue Moonlight* case, the powers of local government in cases involving socio-economic rights (in this case, the right to housing) go beyond the confines of schedules 4B and 5B.⁴⁶ The right to housing works hand in hand with the right to electricity. As per the Court in *Joseph*, section 9(1)(a)(iii) of the *Housing Act* "imposes a specific obligation on municipalities to provide basic municipal services, including electricity".⁴⁷

As mentioned earlier, there are other ways municipalities may get the power to generate electricity, which are discussed below.

4.2 Legislative

In terms of section 44(1)(a)(iii) of the *Constitution*, municipalities can be assigned functions and powers currently not under their functional area

⁴⁴ See Steytler and De Visser *Local Government Law* 5-6.

⁴⁵ *Le Sueur* para 20.

⁴⁶ *Blue Moonlight* paras 20-28, 42-67.

⁴⁷ *Joseph* para 39.

under schedules 4B and 5B. The *Constitution* in section 44 provides *inter alia* as follows:

1. The national legislative authority as vested in Parliament
 - (a) confers on the National Assembly the power
 - ...
 - (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government...

In terms of section 156(1)(b) of the *Constitution*, national or provincial legislatures may assign matters to local government by legislation. This is known as the general assignment of legislative and executive powers. This means that through national legislation, the national government may assign a matter falling outside schedules 4B and 5B to the entire local government sphere. An example of this would be national legislation assigning electricity generation matters to the entire local government sphere. Likewise, a provincial legislature may do the same and assign a matter/s to the entire local government under their province. There are, however, requirements and procedures that must be followed before and after the assignment.

Sections 99 and 126 of the *Constitution* provide a different kind of assignment that allows national and provincial ministers to assign executive powers to specific municipal councils. The difference between this one and the previous assignments is that it only concerns executive powers, not legislative ones. Through an agreement with the municipality, electricity generation may also be assigned this way to specific municipalities.

From the above, it has been established that electricity generation is not a municipal competence in terms of schedules 4B and 5B of the *Constitution*. The national legislative authority can assign such powers to municipalities. This act of assignment may only apply to one municipality or all municipalities. A practical example is that the national legislature may elect to assign any of its legislative or executive powers to the City of Cape Town only as long as it has followed the mandatory consultation processes. This form of legislative assignment will remain in place until the legislation empowering the assignment is repealed.

One of the legislative assignments can be found in section 84(1) of the *Local Government: Municipal Structures Act 117 of 1998*,⁴⁸ which provides *inter alia* as follows:

⁴⁸ *Local Government: Municipal Structures Act 117 of 1998* (hereafter *Municipal Structures Act*).

(1) A district municipality has the following functions and powers—

...

- (c) Bulk supply of electricity, which includes for such supply, the transmission, distribution, and, where applicable, the generation of electricity.⁴⁹

The above essentially allows district municipalities to supply bulk electricity to local government under their competence and may generate its electricity if it elects to do so. The important thing to note is that this assignment is only applicable to district municipalities. However, after consulting the cabinet member responsible for electricity, the national Minister may authorise a local municipality to perform a function or exercise a power mentioned in section 84(1)(c) – bulk supply of electricity, transmission, and generation of electricity.⁵⁰

Other municipalities, like the metros, must take a different route. Should they want to exercise the electricity generation power allocated to district municipalities, local municipalities may do so if the Minister allows it in terms of section 84(3)(a).⁵¹ Since metropolitan municipalities cannot use section 84 of the *Municipal Structures Act*, they can follow the *Electricity Regulations Act* and apply to NERSA for a license to generate their renewable energy. The important thing to note here is that the approval of the application for a license to generate electricity does not amount to an executive assignment in terms of section 99 of the *Constitution*.⁵² This is because it is not the Minister that grants the license to generate electricity to municipalities, but rather NERSA. The Minister is thus not assigning any power to municipalities through an Act of Parliament. NERSA being responsible for the granting of licenses means that there is no agreement between the municipality and the Minister. As Steytler and De Visser aver,

This licensing process is akin to a delegation referred to in section 238(a) of the Constitution; an executive organ of state in any sphere of government (NERSA) delegates a power or function (electricity generation) to another executive organ of state (the municipal council).⁵³

⁴⁹ Section 84(1)(c) of the *Municipal Structures Act*.

⁵⁰ Section 84(3)(a) of the *Municipal Structures Act*.

⁵¹ Section 84(3)(a) of the *Municipal Structures Act*.

⁵² Section 99 of the *Constitution* provides as follows: "A Cabinet member may assign any power or function that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. An assignment—
 (a) must be in terms of an agreement between the relevant Cabinet member and the Executive Council member or Municipal Council;
 (b) must be consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed; and
 (c) takes effect upon proclamation by the President."

⁵³ Steytler and De Visser *Local Government Law* 2018 issue, 17-15.

4.3 Intergovernmental relations

The *Constitution* creates three spheres of government that are independent/autonomous. With that said, it requires the three spheres to work together. This is important in electricity generation, as all spheres of government may assist each other to achieve green energy goals. Support may be through financial grants, technical skills, and other forms. Since electricity generation has been under the monopoly of the national government through Eskom, some technical skills can be transferred to local governments intending to generate electricity.

The *Constitution* echoes the values of intergovernmental relations found in chapter 3 of the *Constitution*. Sections 40 and 41 of the *Constitution* deal with the importance of "cooperative government" between the respective "spheres" of government. It lays down the principles of cooperative government and provides that one government is made up of national, provincial, and local spheres of government.

The *Constitution* further uses the term "sphere" instead of "level" to show that all spheres are equal and that there is no hierarchy whereby one sphere is greater than the other. However, the provincial and national governments have supervisory powers over local government. However, this does not mean that they can assume the powers and functions of local government. The *Constitution* provides that the three spheres are distinctive, interdependent, and interrelated.⁵⁴ This differs from how the South African government was structured: as one level of government with all the powers. The distinctiveness of each sphere can be attributed to the autonomy of each sphere; the national government has powers to make laws via national legislation and can make nationwide policies as white papers, the provincial sphere of government can make laws governing each province by way of provincial laws, and local government can make by-laws which regulate each independent municipality.⁵⁵ These different powers for each sphere make the three government spheres distinctive.

Section 41(1) provides *inter alia* that all three spheres of government must look after the well-being of the citizens of South Africa and must cooperate by assisting, supporting, and consulting with each other on things of common interest.⁵⁶ This place a duty on all three spheres to work together to secure the Republic's and the people's well-being. In the present case, one might then argue that the courts have raised the importance of service delivery – all three spheres of government must work together to ensure that services, like electricity, are sustainably provided to communities.

⁵⁴ Section 40(1) of the *Constitution*.

⁵⁵ Section 43 of the *Constitution*.

⁵⁶ Section 41(1)(b) and (h) of the *Constitution*.

The system of cooperative governance, in terms of the *Constitution*, requires all three spheres of government to work together rather than compete.⁵⁷ The spheres should work in a unified system, collaborating and assisting one another. The *Constitution* allocates powers and functions to all three spheres; some competencies overlap, and some are concurrent. This, on its own, shows that the constitutional drafters wanted the three spheres of government to cooperate in executing those functions. For instance, at local government level, municipalities have powers and functions in schedules 4B and 5B, which are their sole competence. However, the *Constitution* has entrusted the national and provincial governments with supervising and assisting municipalities in executing their powers. As earlier argued, the *Constitution* also allows the other spheres to allocate powers and functions to local government if local government is better positioned to execute such functions. This is a perfect example of co-operating.

In the case of electricity generation, the national government has allowed local government to generate or procure electricity, provided they follow all the requirements.⁵⁸ While local government is better equipped to handle electricity generation, this sphere of government still requires some support from the other spheres of government.

5 Amendment in terms of the *Electricity Regulation Act*

5.1 Amendments

On 16 October 2020, the Minister of Energy, Mr Gwede Mantashe, gazetted the amendments to the regulations issued in terms of the *Electricity Regulations Act*. The amendments were done in terms of section 35(4) of the *Electricity Regulations Act*. The amendments extend the procurement of new renewables, cogeneration, baseload, mid-merit, peak load, energy storage, and cross-border generation capacity to organs of State "active in the energy sector" and include municipalities as active players in the energy sector.⁵⁹ The important amendment to the regulations relevant to this paper is the amendment to regulation 5. Regulation 5 provides as follows:

A municipality as an organ of state may apply to the Minister to procure or buy new generation capacity in accordance with the Integrated Resource Plan and such municipality must-

- (a) conduct and submit a feasibility study as contemplated in sub-regulation (2), where it intends to deliver the new generation capacity

⁵⁷ Section 41(1)(h) of the *Constitution*.

⁵⁸ A detailed analysis of this is done below.

⁵⁹ Creamer 2020 <https://www.engineeringnews.co.za/article/electricity-regulations-amended-to-allow-municipalities-to-develop-or-buy-power-2020-10-16>. See also Regulation 2 of the Regulations issued in terms of the *Electricity Regulations Act*, as amended in 2020.

project through an internal mechanism as contemplated in section 76(a) of the *Municipal Systems Act*:

- (b) submit proof that it has complied with the provisions of section 120 of the *Municipal Finance Management Act* and the *Municipal Public-Private Partnership Regulations* published by Government Notice No R. 309 in Government Gazette No. 27431 of 1 April 2005, where it intends to deliver the new generation capacity project through an external mechanism as contemplated in section 76 (b) of the *Municipal Systems Act*; and
- (c) submit proof that the application is aligned with its Integrated Development Plan.⁶⁰

The draft amendments to the regulations were gazetted in May 2020 for the public's comment, and they included an express requirement that municipalities intending to carry out the powers contained in the amended regulations needed sound financial standing. However, as noted above, the amended regulations, gazetted in October 2020, did away with that requirement. Instead, the amended regulations provide that municipalities may apply to the Minister to establish new generation capacity through an internal mechanism in section 76(a) of the *Municipal Systems Act*.⁶¹ Section 76(a) of the *Municipal Systems Act* provides that a municipality may provide a service through an internal mechanism,

which may be a department or administrative unit within its administration; any business unit devised by the municipality. Provided it operates within the municipality's administration and under the control of the council in accordance with operational and performance criteria determined by the council or any other component of its administration.⁶²

This means that a municipality is providing one of its services internally without outsourcing an independent third party to provide such services. There are many ways in which municipalities may carry out this function internally:

- (i) The municipality can produce electricity through wind and solar farms.
- (ii) The municipality can involve the community in the energy mix by using by-laws that direct property developers to install solar panels on the buildings within the municipality. This will ensure that the residual energy not used by the property is transferred back into the municipal energy grid.

These mechanisms and others not mentioned here can be implemented into municipal planning.

⁶⁰ Amendment to Regulation 5 of the Regulations issued in terms of the *Electricity Regulation Act*.

⁶¹ Regulation 5(2) of the Amendments to the Regulations issued in terms of the *Electricity Regulations Act*.

⁶² Section 76(a) of the *Municipal Systems Act*.

Suppose the municipality intends to deliver a new generation capacity through an external mechanism. In that case, the regulations require a municipality to comply with the provisions of section 120 of the *Local Government: Municipal Finance Management Act 56 of 2003*. Section 120 empowers municipalities to enter public-private partnerships. Section 120(1) of the *Municipal Finance Management Act* provides as follows:

- (1) A municipality may enter into a public-private partnership agreement, but only if the municipality can demonstrate that the agreement will-
 - (a) provide value for money to the municipality;
 - (b) be affordable for the municipality; and
 - (c) transfer appropriate technical, operational, and financial risk to the private party.⁶³

The regulations issued in terms of the *Municipal Finance Management Act* governing public-private partnerships provide a detailed definition of the public-private partnership. Public-private partnership means:

a commercial transaction between a municipality and a private party in terms of which the private party –

- (a) performs a municipal function for or on behalf of a municipality, or acquires the management or use of [the] municipal property for its own commercial purposes, or performs both a municipal function for or on behalf of a municipality and acquires the management or use of [the] municipal property for its own commercial purposes;
- (b) assumes substantial financial, technical, and operational risks in connection with –
 - (i) the performance of the municipal function;
 - (ii) the management or use of the municipal property; or
 - (iii) both; and
- (c) receives a benefit from performing the municipal function, from utilizing the municipal property, or from both, by way of –
 - (i) consideration to be paid or given by the municipality or a municipal entity under the sole or shared control of the municipality;
 - (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or
 - (iii) a combination of subparagraphs (i) and (ii).⁶⁴

⁶³ Section 120 of the *Local Government: Municipal Finance Management Act 56 of 2003*.

⁶⁴ "Public-Private-Partnership", Regulation 1, "Definitions" of the *Local Government: Municipal Finance Management Act 2003 Municipal Public-Private Partnership Regulations*.

From the above, we can deduce that a public-private partnership is a commercial agreement that benefits both a municipality and a private service provider. One other requirement that the municipality has to comply with, which is not explicitly found in the amended regulations issued in terms of the *Electricity Regulations Act*, is that a municipality that intends to enter into a public-private partnership to create new generation capacity must comply with section 78 of the *Municipal Systems Act*. Section 78 requires municipalities to conduct a feasibility study. This requirement is also applicable to municipalities that wish to introduce new generational capacity through an internal mechanism.

5.1.1 Feasibility study

Regarding the *Municipal Systems Act*, municipalities must conduct feasibility studies when deciding whether to use an internal or external mechanism.⁶⁵ The feasibility study must include the following matters:

- (a) clear identification of the service in question;
- (b) the number of years the service is likely to be outsourced;
- (c) projected outputs;
- (d) an assessment of how the outsourcing will provide value for money;
- (e) how it will address the needs of the poor;
- (f) how it will be affordable;
- (g) how it will transfer appropriate technical, operational, and financial risk; and
- (h) an assessment of the impact on staff, assets, integrated development plan, and budgets.

This requirement is essential because it prevents municipalities from making rash decisions without first assessing viability and risks. This is important in the generation of electricity as well since the amendments allow municipalities to either generate electricity through an internal mechanism or procure from independent power producers through an external mechanism. Feasibility studies will allow municipalities to assess whether they can undertake this process and the risks involved. This is also important in the case of struggling municipalities as it will guide them to make appropriate decisions that are not rash and don't contribute any value.

⁶⁵ Section 78(3)(c) of the *Systems Act*.

5.2 Shortcomings

The amendments issued in terms of the *Electricity Regulations Act* are positive steps toward the three spheres of government working together and allowing local government to have the power to generate electricity. Both the national and provincial spheres could provide support to local government. The amendments on their own are not enough. They give powers to municipalities yet offer no support from the national or provincial spheres of government.

5.2.1 Financial resources

There is a need to provide a financial mechanism that supports renewable electricity generation technologies in South Africa.⁶⁶ The Regulations do not support municipalities who plan on undertaking the functions and powers afforded to them to procure or produce renewable energy. Municipalities will require financial support to undertake renewable energy projects regarding the amended regulations in order to provide a reliable source of energy, thereby reducing or ending the current load-shedding and getting that energy from clean sources. The Auditor-General has said that almost half of the country's municipalities are under financial strain and are likely to get worse.⁶⁷

The financial position of just over a quarter of the 257 municipalities in the country is so dire that there is significant doubt that they will be able to continue meeting their obligations in the near future.⁶⁸ Some scholars argue that some causes of financial distress are beyond municipalities' control but are within the power of Parliament. Unfunded mandates cause such distress, for example, functions that a municipality is required to perform but for which adequate revenue instruments are not provided.⁶⁹

At other times, economic shifts challenge a formerly sustainable municipality, for example, when the leading employer in a mining town shuts down. This is a transitional challenge, for which external assistance may be necessary until revenues and expenditure can be brought into alignment.⁷⁰ Some financial problems are internal to a municipality itself. These include a lack of proper financial management, such as under-collection of revenues or uncontrolled expenditure, and political dysfunction, such as that

⁶⁶ Musango and Brent 2011 *EER* 130.

⁶⁷ Covary 2021 <https://theconversation.com/same-old-funding-model-cant-keep-south-african-cities-going-or-serve-residents-165182>.

⁶⁸ Ensor 2021 <https://www.businesslive.co.za/bd/national/2021-06-30-auditor-general-appalled-by-the-state-of-municipal-finances/>.

⁶⁹ Glasser and Wright 2020 *LDD* 417.

⁷⁰ Glasser and Wright 2020 *LDD* 417.

demonstrated in the City of Tshwane and Nelson Mandela Bay in 2019-2020.⁷¹

In terms of the latest Auditor-General's report, an assessment of the financial health of 230 municipalities and 18 municipal entities based on their financial statements showed increasing indicators of a collapse in local government finances and continued deterioration since the previous administration's term.⁷² It is worth noting, however, that lack of capacity which leads to poor management has also been mentioned as one of the drivers of municipal financial distress.⁷³ The researcher argues that if municipalities were to undertake the functions afforded by regulation 5, most of them would be in financial distress or would not be able to fulfil their financial mandate. With the allocation of powers under regulation 5, the government should be affording willing municipalities some form of financial support. Support can take the form of conditional funding transfers. The *Constitution* makes provision for conditional and unconditional funding transfers from the national sphere of government to other spheres.⁷⁴ South Africa's *Constitution* allocates three revenue sources to municipalities to fulfil their mandate: property taxes; surpluses generated from services; and funding transfers from the national government.⁷⁵

5.2.2 Critical skills training and support

Trained manpower capable of developing and manufacturing renewable energy technologies is a prerequisite for its successful deployment.⁷⁶ The availability of competent local government officials who can demonstrate performance managerial leadership and accountability in terms of local government's mandate is critical to realising strategic local government objectives.⁷⁷ As it stands, the local sphere of government lacks personnel with the necessary skills in renewable energy. Municipalities have never undertaken any functions relating to renewable energy production. The Regulations do not provide technical and skills assistance to qualifying and willing municipalities. The South African government has put much emphasis on job creation in developing renewable energy.⁷⁸ While the need for creating jobs is recognised, the manpower resources, as well as skills of

⁷¹ Glasser and Wright 2020 *LDD* 417.

⁷² Auditor-General South Africa 2022 <https://www.agsa.co.za/Portals/0/Reports/MFMA/2020-21/MFMA%20GR%202020-21%20General%20Report%20interactive.pdf?ver=2022-06-15-090741-193%2020>.

⁷³ Glasser and Wright 2020 *LDD* 417.

⁷⁴ Section 227 of the *Constitution*.

⁷⁵ Covary 2021 <https://theconversation.com/same-old-funding-model-cant-keep-south-african-cities-going-or-serve-residents-165182>. See also s 229 of the *Constitution*.

⁷⁶ Musango and Brent 2011 *EER* 129.

⁷⁷ Draii and Oshoniyi 2013 *AJPA* 868.

⁷⁸ Musango and Brent 2011 *EER* 130.

management and use of technology and equipment, are still limited.⁷⁹ It is thus necessary to clearly outline how the supply of skilled and technical manpower will be achieved.⁸⁰ Municipalities require technical assistance addressing knowledge gaps, specific challenges, decision-making considerations, planning, and project implementation strategies related to transitioning from coal-based energy to a renewable energy mix. The availability of requisite skills, both technical as well as administrative, will lead to improved performance in meeting developmental goals.⁸¹ A scarcity of skills afflicts the South African government, negatively impacting the productivity of the economy and the ability to meet developmental needs.⁸² This is where the importance of section 78 comes in. A feasibility study will identify the skills necessary to carry out functions and allow the government to source such skills. Erasmus and Breier argue that the prevalence of scarce skills can be found in all spheres of government where positions remain vacant for prolonged periods, chiefly because there is a deficit of qualified and experienced talent, either because such individuals are unavailable or do not meet the stipulated employment criteria.⁸³ The national sphere of government has the power to facilitate technical skills training nationally so that local government can benefit from the same.

The national sphere of government can create technical skills policies and frameworks that could allow local spheres of government, in the worst-case scenario, to source talent from abroad. The researcher argues that the Regulations should have provided support to the local sphere of government. The Regulations further make no provision for capacity interventions. Capacity building, skills development, and technology transfer require government support as this will also be needed for the development of generation plants and manufacturing industries to provide the necessary inputs.⁸⁴ As it stands, there is no provision for such in the amended regulations, and no policy offers support to local government institutions that wish to undertake renewable energy generation projects.

6 Conclusion

Local government is the sphere of government that is closest to the people. It has been allocated powers and functional areas in terms of the *Constitution* and through different statutes. Municipalities have duties imposed on them by the *Constitution* and various other laws. The most important duty is service delivery. Municipalities must deliver basic services

⁷⁹ Musango and Brent 2011 *EER* 130.

⁸⁰ Musango and Brent 2011 *EER* 130.

⁸¹ Draii and Oshoniyi 2013 *AJPA* 868.

⁸² Draii and Oshoniyi 2013 *AJPA* 869.

⁸³ Erasmus and Breier *Skills Shortages* 3.

⁸⁴ Musango and Brent 2011 *EER* 130.

to communities in a sustainable manner. Basic services include water and electricity. The state entity, Eskom's, failure to provide electricity also affects municipalities as they fail in their duty to provide electricity to communities. Electricity is essential for many other things; municipalities require electricity for water purification and distribution, and without it, they could not fulfil their duty of providing basic services. The continual supply of electricity is crucial for municipalities to fulfil their constitutional duties. It thus makes sense for municipalities to be able to generate their own electricity. This also allows municipalities not to have to rely on the failing Eskom. It was argued earlier that municipalities can be sued for failure to deliver basic services. Municipalities would have little recourse against Eskom and cannot use Eskom as a defence.

As argued earlier, electricity generation is not included in the *Constitution* as a municipal competence. Municipalities that wish to generate their own electricity or purchase electricity from independent power producers can do so in terms of the amended regulations issued in terms of the *Electricity Regulation Act*. It has been argued, however, that such amendments are not enough. Municipalities need more support to undertake the functions provided in the amendments; one way of such support is funding. Other spheres of government should cooperate with local government to ensure that they are better equipped to undertake the functions of electricity generation or buying from independent power producers.

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List of Abbreviations

AJPA	African Journal of Public Affairs
CJLG	Commonwealth Journal on Local Governance
D-MOSS	Durban Municipality Open Space System
EER	Energy and Environment Research
LDD	Law, Democracy and Development
NERSA	National Energy Regulator of South Africa