

Socio-economic rights and the process of privatising basic municipal services

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1 INTRODUCTION

The socio-economic rights in the Bill of Rights bind all organs of state, including municipalities. These rights may also impose positive obligations. Through the delivery of basic services, municipalities fulfil some of these obligations; indeed, the very purpose of municipalities is to be 'developmental'. Municipalities usually provide these services themselves but they may also use external service providers, including the private sector. National government policy also encourages municipalities to privatise their services and municipalities are increasingly doing so.

Serious concerns have been raised about the success of privatised service delivery in providing basic municipal services on an equitable and affordable basis. Where the provision of basic services gives expression to certain socio-economic rights, it may be asked whether the process of privatising these services undercuts the realisation of these rights. This is a legitimate question that focuses on empirical evidence. The issue of privatisation should also be approached from a normative perspective. By placing the provision of basic municipal services in a human rights paradigm, the question is how the application of socio-economic rights – constituting a binding and justiciable normative framework – can influence and direct the mechanisms of service delivery, including the privatisation of services.

In the first section of the paper, the socio-economic rights obligations of local government are outlined. It is argued that these obligations intersect with local government's constitutional mandate to provide basic municipal services; through the provision of such services municipalities can give effect to these rights. In the second section, the legislative framework in terms of which privatisation may occur is set out. While privatisation is not in or of itself inconsistent with the Constitution, the process and the outcome of privatisation may have significant effects on the realisation of socio-economic rights. It is thus argued in the final section that the process and product of privatising a basic municipal service must comply with the normative framework of socio-economic rights.

2 LOCAL GOVERNMENT'S OBLIGATIONS WITH REGARD TO THE REALISATION OF SOCIO-ECONOMIC RIGHTS

2.1 Socio-economic rights

The principal socio-economic rights that may be pertinent to the constitutional mandate of local government are the following:

- The rights of children to basic nutrition, shelter, basic health care services and social services.¹
- The right to basic education, including adult basic education,²
- The right of access to adequate housing;³
- The right of access to health care services, including reproductive health care;⁴
- The right of access to sufficient food and water;⁵
- The right of access to social security, including appropriate social assistance;
- The right not [to] be refused emergency medical treatment;⁶ and
- The right not [to] be evicted or have a home demolished without an order of court.⁷

The overall thrust of these rights is primarily to assist the poor by protecting and advancing their social and economic interests.⁸ They represent a commitment of the new constitutional order to address apartheid's legacy of poverty and inequality.⁹

The application and scope of these rights can be classified into three categories.¹⁰ A limited number of rights are unqualified, such as the right to basic education and children's rights. The second category qualifies the rights of access to housing, health care, sufficient food and water with reference to reasonable measures, progressive realisation and available resources.¹¹ In the last category fall the rights that impose mainly negative obligations: for example, no one may be evicted from their home or have their home demolished without an order of court.

The socio-economic rights, along with all the other rights in the Bill of Rights, bind the state. In terms of section 7(2) '[t]he state must respect, protect, promote and fulfill the rights in the Bill of Rights'. The concrete measures that municipalities must undertake have been articulated as follows:¹²

1 S 28(1)(c), Constitution.

2 S 29(1), Constitution.

3 S 26(1), Constitution.

4 S 27(1)(a), Constitution.

5 S 27(1)(b), Constitution.

6 S 27(3), Constitution.

7 S 26(3), Constitution.

8 Liebenberg S 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) 6 *Law Democracy and Development* at 160.

9 See *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC) par 8.

10 Liebenberg (fn 8 above) at 163.

11 Ss 26(2) and 27(2), Constitution.

12 Liebenberg (fn 8 above) at 163; De Visser J, Cottle E and Mettler J (2003) 'Realising the right of access to water: Pipe dream or watershed?' (2003) 7 *Law, Democracy and Development* at 28-9.

- 'Respecting' rights entails that the state refrain from interfering with their enjoyment;
- 'Protecting' rights requires that the state must prevent violations by third parties;
- 'Promoting' rights means that the state must encourage their realisation through, among other things, increasing public awareness; and
- 'Fulfilling' rights requires taking positive measures, including appropriate legislative, administrative and budgetary measures.

In interpreting the obligation to fulfil socio-economic rights, qualified with reference to reasonable measures, progressive realisation and available resources, the Constitutional Court has crystallised a number of principles that delineate their reach.¹³

Firstly, in compliance with its duty to 'respect' socio-economic rights, the state must desist from any action that may impair the right of access.¹⁴ Secondly, there is no minimum core obligation that would entail the provision of a commodity. In both the *Grootboom* and *Treatment Action Campaign*¹⁵ judgments the Court rejected arguments that an individual, in whatever dire circumstances, can claim a commodity such as shelter or medical treatment. Thirdly, the Court is willing to review the reasonableness of policies, legislation and other measures giving effect to the duty of fulfilling socio-economic rights. The Court has emphasised that it would give a broad discretion to organs of state in the setting of budget priorities.¹⁶ The reasonableness review itself will be guided by the following criteria:¹⁷

- (a) There must be a comprehensive, coherent and co-ordinated programme to give effect to a right;
- (b) The programme must be capable of facilitating the realisation of the right in the long run;
- (c) The programme must be reasonable in conception and implementation;
- (d) The programme must be able to meet short-, medium- and long-term needs; and
- (e) The programme must be able to provide relief for those in desperate circumstances, although not for individual relief.¹⁸

Fourthly, where there is a regression in the provision of socio-economic rights, special justification must be provided.

¹³ See Liebenberg (fn 8 above).

¹⁴ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) par 33.

¹⁵ *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR (CC).

¹⁶ *Soobramoney* (fn 14 above) at par 29.

¹⁷ See Liebenberg (fn 8 above) at 171. See also Brand D 'Between availability and entitlement: The Constitution, *Grootboom* and the right to food' (2003) 7 *Law, Democracy and Development* 7-10.

¹⁸ This duty has been described by Brand (fn 17 above at 8) as follows: 'on paper, a policy may not leave out of account, and must make at least some provision for those who, for what ever reason, whether temporarily or permanently, find themselves in dire straights regarding access to housing, food, water and health care services'.

While municipalities are, along with the national and provincial governments, bound by the obligations imposed by the socio-economic rights, the obligation to take positive steps is limited by the scope of local government's constitutional competencies.

2.2 Competencies of local government

The competencies of local government are listed in schedules 4B and 5B of the Constitution; municipalities have executive authority and the right to administer the matters listed in these schedules,¹⁹ and may make by-laws for the effective administration of these matters.²⁰ These competencies may be increased through the assignment of additional competencies by national and provincial government. Parliament may assign any of its legislative powers to a municipality²¹ and provincial legislatures have similar powers with regard to municipalities in their provinces.²²

The exercise of any of these competencies lies in the discretion of a municipality; the right to administer, and not the duty to do so, is bestowed on a municipality. The exercise of the discretion is, of course, subject to the other provisions of the Constitution, including the Bill of Rights and the socio-economic rights contained therein.

Obligations may be imposed through the assignment of executive functions to municipalities. Both the national²³ and provincial²⁴ executives may assign the administration of a particular Act to a municipality. Whereas such assignment may entail the obligation to perform a particular function, the assignment is dependent on the agreement of the municipality.

The powers of a municipality are confined to its original powers – those matters listed in Schedules 4B and 5B – and the additional powers in terms of assignments.²⁵ A central principle of intergovernmental relations thus stipulates that spheres of government may not 'assume any power or function except those conferred on them in terms of the Constitution'.²⁶

Although local government is posited to 'play a pivotal role' in the implementation of socio-economic rights,²⁷ a municipality's duties in relation to those obligations are circumscribed by its defined areas of competence.²⁸ The role of municipalities is thus a function of the intersection of municipal competencies and the obligations created by socio-economic rights.

19 S 156(1)(a), Constitution.

20 S 156(2), Constitution.

21 S 44(1)(a)(iii), Constitution.

22 S 104(1)(c), Constitution.

23 S 99, Constitution.

24 S 126, Constitution.

25 See De Visser J 'Powers of local government' (2002) *SA Public Law* 17.

26 S 41(1)(f), Constitution.

27 Pimstone G 'Local Government' in Chaskalson *et al* (eds) (1998) *Constitutional Law of South Africa*, 5A-36 [Revision Service 3].

28 See De Visser, Cottle and Mettler (fn 12 above).

2.3 Intersection of local government competencies and socio-economic rights

The Constitutional Court stated in *Grootboom* that socio-economic rights bind all spheres of government.²⁹ As a general statement that is no doubt correct, but the level and nature of the obligations vary considerably. Some rights fall squarely within a functional area of a municipal competence while in the case of others the application is more nuanced. The right of access to sufficient water, for example, intersects directly with the functional area of 'potable water supply systems'. The right to basic education and access to housing may find only partial application. The fit between socio-economic rights and municipal competencies can best be analysed in terms of the different types of obligation these rights impose.

(a) Respecting socio-economic rights

Local government, along with the other spheres of government, must respect socio-economic rights by refraining from interfering with their enjoyment. For example, in exercising its planning authority a municipality may not make it difficult for community members to exercise their right of access to basic education by failing to zone land for the building of a primary school. The obligation not to evict or demolish a home without an order of court³⁰ also applies to municipalities.³¹

(b) Protecting socio-economic rights

Where it is within the competence of a municipality to prevent violations by third parties of a person's or community's socio-economic rights, it must do so.

(c) Promoting socio-economic rights

Promoting socio-economic rights has been interpreted to mean that the state must encourage their realisation through, among other things, increasing public awareness.³² This obligation applies to rights that fall directly within a municipality's functional areas. It may be argued that it will be competent for a municipality to engage in promotional activities, also of socio-economic rights falling outside its area of competence, provided the activities are linked to the broad constitutional objects of local government of promoting 'social and economic development'.³³ Whereas the right to primary education is not a competence of local government, it should be within the powers of a municipality to encourage the realisation of the right through, for example, petitioning provincial government to build a primary school where available facilities are overcrowded.

29 Par 82.

30 S 26(3), Constitution.

31 See *City of Cape Town v Persons Who are Presently Unlawfully Occupying Erf 1800, Capricorn: Vrygrond Development* 2003 (7) BCLR 878 (C). See further Mettler G 'When are evictions just and equitable' (2003) 5 *Local Government Bulletin* (4).

32 Liebenberg (fn 8 above) at 163.

33 S 152(c), Constitution.

(d) Fulfilling socio-economic rights

A critical question for municipalities is the duty of fulfilling socio-economic rights by taking positive measures, including appropriate legislative, administrative and budgetary measures. In this area the intersection of the nature of the socio-economic right and the particular functional area of a municipality must be ascertained. Two types of intersections can be identified. The first is a direct intersection where the realisation of the right falls four-square within a municipality's functional areas. In the second, the functional area does not cover the right directly, but a municipality nevertheless plays an important contributory or supportive role in its realisation.

- *Direct intersection*

In the first type the nature and scope of a socio-economic right corresponds with a municipality's functional area or areas. The Schedule 4B functional area of 'water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal system' intersects directly with the right of access to sufficient water. It has thus been argued that local government would be responsible for the full spectrum of responsibilities to implement this right.³⁴ This will include the use of water for drinking as well as for cleansing and sanitation. The White Paper on Basic Household Sanitation of 2001 also seeks to make this link. According to the White Paper, the principles that must guide sanitation policy include (a) the recognition of 'basic sanitation as a human right', and (b) that 'local government has the constitutional responsibility to provide sanitation services'.³⁵

Depending on the delineation of a functional area, the obligation to fulfil a particular right may be shared among the different spheres. The Schedule 4B functional area of 'municipal health services' intersects clearly with the right of access to health care services.³⁶ However, the extent of the obligations under this head is tied up with the unclear definition of 'municipal' health services, as health services are also provided by both national and provincial governments.³⁷ The scope and reach of municipal health services must thus be defined in the context of an overall division of responsibilities between the three spheres of government. In the case of household sanitation, the White Paper states, it will at least require municipalities to provide 'environmental health practitioners' who must promote health and hygiene awareness and monitor the health of the communities.³⁸

The fit between a right and a competence is, in the end, also a function of the definition of a particular socio-economic right. While the right to sufficient food, on the face of it, has no direct linkages with any of a

34 De Visser, Cottle and Mettler (fn 12 above) at 29.

35 National Sanitation Task Team 'White Paper on Basic Household Sanitation' (2001) (www.miiu.org.za/publications) at 11-12.

36 S 27(1)(a), Constitution.

37 Health services is a Schedule 4A concurrent functional area.

38 National Sanitation Task Team (fn 35 above) at 21.

municipality's functional areas, defining the right as including access to clean water³⁹ clearly makes it a local government function.

- *Supportive role*

In the second category there is no direct intersection between a socio-economic right and a particular functional area, but the fulfilment of that right is dependent on local government playing a supportive role to other spheres. Because the fulfilment of the right is dependent on more than one sphere of government, co-ordination in accordance with the principles of co-operative government becomes vital.

The right of access to housing is a case in point. Although there is no direct intersection with any municipal functional area,⁴⁰ the Constitutional Court emphasised in *Grootboom* that all spheres of government 'must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions of the Constitution'.⁴¹ This entails that '[e]ach sphere of government must accept responsibility for the implementation of particular parts of the [national housing] programme'.⁴² The right to housing entails more than 'bricks and mortar' and includes 'appropriate services such as the provision of water and the removal of sewage'.⁴³ The part of a national housing programme that a municipality must perform is thus the provision of water and sanitation. Other local functions such as 'cleansing', 'refuse removal' and 'municipal roads' would also be relevant.

The scope of local government's supportive role can be wide and may reach most, if not all socio-economic rights. For example, in fulfilling the right to basic education, the proper functioning of primary and secondary schools is dependent on municipalities providing water, refuse removal and access roads to such schools.

The provision of electricity may be a further example. Although the functional area of 'electricity and gas reticulation' does not correspond to any particular socio-economic right, the full realisation of many rights is dependent on the adequate provision of electricity. The provision of basic education without educational resources such as computers, powered by electricity, is hardly possible. The same applies to health care facilities. More contentious would be the indispensability of electricity in households to give effect to the right to housing and food.

2.4 Developmental local government

The close connection between local government's competencies and the fulfilment of particular socio-economic rights finds expression in the notion

39 Brand (fn 17 above) at 10.

40 It should be noted that the content of the two Schedules is currently under investigation, with the allocation of the housing function as one of the key issues. See Steytler N 'President's Coordinating Council sets agenda for local government' (2002) 4 *Local Government Law Bulletin* 1.

41 Par 82.

42 Par 40.

43 Par 35.

of 'developmental local government'. Section 152 of the Constitution posits as objects of local government, among other things, the promotion of social and economic development and a safe and healthy environment.⁴⁴ Local government's duties thus require a municipality to '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'.⁴⁵ Meeting the 'basic needs of the community' is also the primary object of socio-economic rights.

In the White Paper on Local Government 'developmental local government' is linked to the realisation of socio-economic rights. It defines the term as the commitment of local government 'to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives'.⁴⁶ After referring to the government's obligation to realise the rights of access to adequate housing, health care, education, food, water and social security, and local government's failure in the past to help those with the greatest need, the White Paper describes the object of this sphere of government as follows:

In the future developmental local government must play a central role in representing our communities, protecting our human rights and meeting our basic needs. It must focus its efforts and resources on improving the quality of life of our communities, especially those members and groups within communities that are most often marginalised or excluded, such as women, disabled people and very poor people.⁴⁷

In the legislation giving effect to the mandate of the Constitution and the vision of the White Paper on Local Government, the provision of services to meet the basic needs of the community is a recurring theme. The Municipal Structures Act 117 of 1998 reiterates the duty of a municipality to strive within its capacity to achieve the objects set out in section 152 of the Constitution.⁴⁸ This entails, among other things, that a municipal council must annually review –

- the needs of the community,
- its priorities to meet those needs,
- its organisational and delivery mechanisms for meeting the needs of the community, and
- its overall performance in achieving the objects of section 152.⁴⁹

These broad objectives are further developed in the Municipal Systems Act 32 of 2000. In spelling out the duties of municipalities, there is a clear recognition that municipalities are bound by the socio-economic obligations

44 S 152(2), Constitution.

45 S 153(a), Constitution.

46 DCD 'White Paper on Local Government' (1998) Issued by Minister for Provincial Affairs and Constitutional Development, Pretoria, Department of Constitutional Development at 17.

47 Above at 18.

48 S 19(1).

49 S 19(2).

imposed by the Bill of Rights. First, a municipality has the duty to 'give members of the local community equitable access to the municipal services to which they are entitled'.⁵⁰ While the focus is on 'equitable access', the recognition of an entitlement to a service is bolstered by specific socio-economic rights such as the right of access to water. Second, a municipality has the duty to 'contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24 (environment), 25 (property), 26 (housing), 27 (health care, food, water and social security) and 29 (education) of the Constitution'.⁵¹

The Municipal Systems Act concretises the overall duty to comply with socio-economic rights by positing it as a central concern in municipal planning. A municipality 'must undertake developmentally-orientated planning so as to ensure that it . . . together with other organs of state, contributes to the progressive realisation of the fundamental rights contained in section 24, 25, 26, 27 and 29 of the Constitution'.⁵² Such a plan must include at least the identification of communities which do not have access to basic municipal services.⁵³ Flowing from this obligation, the general duty to provide municipal services instructs the municipality to 'give effect to the Constitution and give priority to the basic needs of the local community . . . [and] ensure that all members of the local community have access to at least the minimum level of basic municipal services'.⁵⁴ This obligation must also be realised in the setting of tariffs. A tariff policy must reflect the principle that 'poor households must have access to at least basic services'.⁵⁵ This can be done by setting tariffs that cover only operating and maintenance costs, 'life line tariffs for low level of use or consumption of services or for basic level of services', or other direct or indirect methods of subsidisation for poor households.⁵⁶

2.5 Basic municipal services

In giving effect to the constitutional mandate of meeting the 'basic needs of the community'⁵⁷ developmental local government entails, as a minimum, the provision of 'basic municipal services'. The Municipal Systems Act defines the concept of 'basic municipal services' as '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'.⁵⁸ The White Paper on Local Government included water, sanitation, local roads, storm water drainage, refuse collection and electricity as 'good basic services'⁵⁹, and treated access to these 'good basic

50 S 4(2)(f).

51 S 4(2)(j).

52 S 23(1).

53 S 26(b).

54 S 73(1).

55 S 74(2)(c).

56 S 74(2)(c).

57 S 153(a), Constitution.

58 S 1.

59 DCI (fn 46 above) at 23.

services' as a constitutional right⁶⁰ without spelling out its nature. Is the concept of a basic municipal service one and the same as the applicable socio-economic rights? Or is there another basis, rooted in the developmental duties of local government, as spelled out in Chapter 7 of the Constitution, that would support an enforceable duty?

It has been argued above that there is a clear intersection between the obligations imposed by certain socio-economic rights and the functions of local government. Where there is such an intersection, whether direct or in a supportive manner, the function becomes an obligation; the municipality must engage in the functional area by providing the relevant service. Many aspects of basic municipal services fall in this intersection, such as the provision of water and sanitation.

Proceeding from a premise of the Constitutional Court's conservative reading of socio-economic rights and obligations, other aspects of basic municipal services such as access to electricity (bar the examples cited above) may not fall within the reach of those rights. However, it may well be argued that these services may flow from a municipality's constitutional mandate to develop the quality of life of its residents. A more secure basis for such a claim would probably be the applicable legislation relating to a particular service.

The distinction with regard to the constitutional basis for the provision of basic municipal services comes sharply to the fore in respect of the free provision of some of these services.

2.6 Government policy on free basic services

At national level, government has sought to meet the basic needs of communities through the policy of free basic services. Announced before the December 2000 municipal elections, the aim of the policy is to ensure that there is at least a basic level of municipal services to all households. In documentation from the Department of Provincial and Local Government, this policy is said to be based on 'a belief in the right of all South Africans to receive at least a common minimum standard of service, and the constitutional duty of all three spheres of government to ensure it'. While local government is charged with the service delivery and implementation role, national government is responsible for providing the financial resources to local government, and the provincial governments must monitor the implementation and provide support if necessary.

The Department of Water Affairs and Forestry adopted the policy principle that six kilolitres per household per month should be provided free as from 1 July 2001. From 1 July 2003, free basic electricity/energy of 5kWh/50kWh per household per month should be provided, prioritising poor households. Next in line in terms of free basic services will be sanitation and refuse removal.

In the policy formulations, there is explicit recognition that the free basic services policy flows from government's socio-economic rights obligations.

60 Above.

The Department of Water Affairs and Forestry puts it plainly: 'We all have the right to a basic water supply. No one must be denied the right even if he or she cannot afford to pay for it'.⁶¹ While the provision of free basic water is sourced from the constitutional right to sufficient water, free basic electricity supply falls under the broader rubric of a 'basic municipal service'.

3 DELIVERY OF BASIC MUNICIPAL SERVICES

Through the delivery of basic municipal services, municipalities fulfil the obligations imposed by some socio-economic rights. The provision of potable water to communities gives effect to the right of access to sufficient water, and providing free basic water services to those who cannot afford it is the concrete fulfilment of that right.

Municipalities have a wide discretion on how to deliver services, including those deemed basic. They may choose to provide the service themselves or engage a service provider external to the municipal administration. In this section, the policy and legislative framework in terms of which the choice is exercised and executed is outlined.

3.1 Policy framework

In the policy framework on municipal service delivery, as contained in the White Paper on Local Government of 1998 and the White Paper on Municipal Partnership of 2000, the general thrust was to give municipalities a broad discretion as to the methods and mechanisms of service delivery. The use of institutions, other than municipalities themselves as service providers was one avenue canvassed in the White Paper on Local Government, the details of which were further explicated in the White Paper on Municipal Service Partnerships. The core principles contained in these policy documents were captured by and large in the Municipal Systems Act of 2000.

The point of departure is that municipalities, due to the ravages of apartheid, face enormous backlogs in providing basic services, including water, sanitation, refuse collection and roads. The central mandate of developmental local government is thus 'to develop service delivery capacity to meet the basic needs of communities'.⁶² Municipalities must thus choose the most appropriate service delivery option that would ensure maximum benefit for their communities. In making the choice, municipalities should be guided by, among others, the principles of accessibility and

61 DWAF 2002, DWAF 'Free Basic Water: Tap into Life' (2002) CD-Rom Department of Water Affairs and Forestry. See also Free Basic Water Implementation Strategy Document, Version 2, July 2002, p 5. This policy was already captured in s 4(3)(c) of the Water Services Act 108 of 1997 which stipulated that a service provider may not deny access to basic water services for non-payment where such a person proves to the satisfaction of the relevant water services authority that he or she is unable to pay for the basic service.

62 DCD (fn 46 above) at 93.

affordability of services.⁶³ Whatever option is chosen, the municipal councils 'remain accountable for ensuring the provision of quality services which are affordable and accessible'.⁶⁴ The options mentioned in the White Paper on Local Government are:

- Using own administration;
- Corporatisation of its administration;
- Public-public partnerships;
- Partnerships with CBOs and NGOs;
- Contracting out services to the private sector;
- Public-private partnership in the form of leases and concessions; and
- Privatisation of services through the transfer of ownership.

With regard to the involvement of the private sector, the use of service contracts is for specialist services. Leases and concessions are for longer periods (20 to 30 years) where the contractors take charge of assets and infrastructure, invest in the infrastructure and, on completion of the contract, transfer the assets back to the municipality. In the case of privatisation (narrowly defined), there is a transfer of ownership of the assets and responsibility for managing the complete service delivery. The White Paper placed no preference on the option to be chosen, arguing that the choice was not between public or private provision, but finding 'the appropriate combination of options which most effectively achieves' a municipality's objectives.⁶⁵ However, the White Paper did not favour the privatisation of core municipal assets. It posited that, in the current circumstances,

the transfer of ownership is not an option for core municipal services, particularly water, electricity and solid waste collection and disposal. Given the central role that these services play in meeting the material, social and economic needs of communities, it is undesirable that ownership of associated infrastructure and assets is removed from the public sphere.⁶⁶

The White Paper on Municipal Service Partnership (MSPs), foreshadowed in the White Paper on Local Government, provides a policy framework for the service options involving service providers external to a municipality. The stated objective of the MSP policy is 'to ensure that MSPs are applied in a manner that supports the constitutional obligations of municipalities and the constitutional rights of communities'.⁶⁷ The policy, it is stated, was not the promotion of the private sector at the expense of the public sector, but to provide municipal councils with greater flexibility in addressing service delivery needs.⁶⁸ The White Paper made it clear that MSPs are not

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 Above.

67 DPLG 'White Paper on Municipal Service Partnerships' Department of Provincial and Local Government, General Notice 1689 of 2000, *Government Gazette* 21/26 vol 418 26 April 2000, par 1.1.

68 Above at par 1.2.

the preferred option for improving service delivery, but they should enjoy 'equal status among a range of possible service delivery options'.⁶⁹

The White Paper provides little in the way of policy preferences and guidelines. In particular, there is no discussion of the complexities that MSPs of basic municipal services may give rise to. It does not follow through on the policy position in the White Paper on Local Government that eschewed the privatisation of basic services.

The broad principles of the two White Papers were captured in the Municipal Systems Act of 2000. This Act, which came into operation on 1 July 2001, sets out the process by which a municipality must determine how it will deliver its services. The prescribed process is set to be further structured by the Municipal Systems Amendment Bill that was adopted by the National Assembly in September 2003. In the sections that follow, the basic elements of the process will be outlined, followed by a discussion of how it applies to the delivery of basic municipal services.

3.2 External service delivery mechanisms

In delivering municipal services, municipalities may choose between an internal or external mechanism.⁷⁰ An internal mechanism refers to service delivery by the municipality's own administration and staff.⁷¹ External mechanisms refer to all other service providers.

The Act distinguishes between five different categories of external mechanisms,⁷² the significance of which is whether or not competitive bidding should be followed. The first category is a municipal entity, a juristic person established and controlled by one or more municipalities.⁷³ The object is the corporatisation of services;⁷⁴ the entity operates on business principles and is accountable to the municipality that established it.⁷⁵ While councillors may not sit on its board of directors,⁷⁶ the council is the only shareholder and thus wholly in control. The second category is another municipality: through a service delivery agreement municipality X becomes the delivery agent of a particular service for municipality Y. The third category groups together all other organs of state including a water services committee,⁷⁷ a licensed service provider registered or recognised in terms of national legislation, and traditional authorities. The fourth category refers to community-based organisations or other non-governmental organisations that are legally competent to enter a service delivery agreement. The last category includes all private sector institutions that are legally competent to operate a business activity. This category allows for the privatisation of municipal services, namely service delivery by private actors for profit.

69 Above at par 2.1.

70 S 76.

71 S 76(a).

72 S 76(b).

73 See definition of municipal entity in s 82(1).

74 See McDonald D and Smith I. 'Privatising Cape Town: Service delivery and policy reforms since 1996' (2002) Occasional Papers Series No 7 *Municipal Services Project*.

75 See s 1 for definition.

76 See Municipal Systems Amendment Bill of 2003.

77 Established in terms of the Water Services Act 108 of 1997.

3.3 Deciding on an appropriate service provider mechanism

The Act prescribes an elaborate and onerous process⁷⁸ which a municipality must follow in deciding whether to use an external provider. This duty applies, arguably, to all municipal services. When the application of this duty first came before the courts, the term 'municipal service', then undefined in the Act, was given a narrow definition: only services for which fees were levied were included.⁷⁹ In response, an amendment to the Structures Act in 2003 now defines a 'municipal service' as any service 'that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community'.⁸⁰ The definition further stipulates that it is irrelevant whether such a service is provided by an internal or external provider or whether fees, charges or tariffs are levied.

The process of externalising a municipal service entails a four-step process. The first step is an initial review of the way the municipality provides a particular service. Second, if the use of an external provider is explored, a further inquiry must be held. Third, if private actors are considered, a competitive bidding process must be embarked upon. Finally, in negotiating a service delivery agreement certain procedural and substantive requirements must be met.

3.3.1 Initial review of service delivery mechanisms

The Act requires a municipality to review the appropriateness of its mechanisms of providing a municipal service if any of a number of circumstances occur. The most important triggers for such a review are the following:⁸¹

- In the case of a service provided by the municipality itself, when the service is to be significantly upgraded, extended or improved, a performance evaluation is required;
- Where a service has been provided by an external mechanism, the review is necessary when a performance evaluation of the service delivery agreement is required, the agreement is nearing its completion, or that service is to be significantly upgraded and such upgrading is not addressed in the agreement;
- When a new municipal service is to be provided;
- When requested by the local community in accordance with the public participation mechanism provided for by the municipality; or
- When the review of the municipality's integrated development plan (IDP) requires a review of the service mechanisms.

78 See Pickering M 'Choosing a service provider: section 78 of the System Act' (2001) 3 *Local Government Law Bulletin* (4).

79 *SAMWU v City of Cape Town* Case No 7262/2001, commented on in De Visser J 'Definition of municipal services: Throwing fire-fighting to the lions?' (2002) 4 *Local Government Law Bulletin* (1) at 9.

80 S 1, inserted by s 35(a) of the Municipal Structures Amendment Act 51 of 2002.

81 S 77.

While the IDP trigger happens on an annual basis, the other triggers occur less predictably.⁸² This initial review will be a prerequisite when a municipality considers externalising a service. In conducting the review the municipality must focus on three areas:⁸³ the municipality as the service provider, general labour issues, and broad social and economic considerations. First, focusing on the municipality as service provider, the costs and benefits to the municipality must be assessed. The costs refer to both direct and indirect costs, with the latter defined to include 'the expected effect on the environment and on human health, well-being and safety'.⁸⁴ The municipality must also assess whether it has the capacity to provide the service in terms of skill, expertise and resources, given its obligation to develop its human resource capacity to perform its functions effectively.⁸⁵ The second line of inquiry is directed at labour issues: what is the likely impact on development, job creation and employment patterns in the municipality? In this regard the views of organised labour must be considered. The third line of inquiry, which is discretionary, deals with the broad economics of service provision: the municipality may take into account 'any developing trends in the sustainable provision of municipal services generally'.⁸⁶ This may include general information on the incidence, effectiveness and economics of privatisation. It is apparent that the lines of inquiry are open-ended and in practice often difficult to apply.⁸⁷

Having conducted this review, the municipality may decide that it is best suited to provide the service.⁸⁸ Such a decision must then be implemented by allocating sufficient human and financial resources necessary to provide a proper service.⁸⁹ However, where it considers the possibility of using an external provider, a further inquiry must be conducted.

In reviewing the process, Pickering argues that the Act shows a clear bias towards the use of internal mechanisms.⁹⁰ A municipality must consider an internal provider first, and only if the internal option is found unsuitable may it explore an external option. The additional procedures, which are onerous and lengthy, are disincentives to proceed along the privatisation route.⁹¹

82 Pickering (fn 78 above) at 6.

83 S 78.

84 S 78(1)(a)(i).

85 S 68.

86 S 78(1)(b).

87 Pickering (fn 78 above) at 6.

88 S 78(2)(a).

89 S 79.

90 Pickering (fn 78 above) at 6.

91 Pickering (fn 78 above) at 6 suggests that the two inquiries should be held simultaneously: 'Unless the internal option clearly fails to meet the Act's criteria it is difficult to see how a municipality could justify a decision to explore external options without first applying its mind as to what these options may be, and whether they hold any advantage over the internal options. From the point of view of rational, scientific enquiry it would make far more sense to explore internal and external options simultaneously using the same set of criteria to ensure a balanced and sensible result'.

3.3.2 Process when considering an external service provider

In exploring the use of an external provider, the focus of the inquiry is on which category of external provider would be the most suitable. To determine this, the municipality must follow lines of inquiry similar to those of the initial review.⁹² First, it must ascertain the views of the local community on the question. To this effect it must give notice to the community of its intention to explore the option of using an external provider. The importance of this requirement was underscored when the High Court was willing to nullify a service agreement because no effective community consultation occurred.⁹³ The second line of inquiry focuses on possible service providers, taking into account 'the direct and indirect costs and benefits associated with the project, including the expected effect of any service delivery mechanism on the environment and on human health, well-being and safety'.⁹⁴ Other considerations in this field are the capacity of prospective providers to deliver the service. The third line of inquiry deals with developmental, economic and labour issues, in which consideration of the views of organised labour is mandatory.

The Municipal Services Amendment Bill of 2003 has further formalised the inquiry by requiring the conduct of a feasibility study focusing on the following issues:

- An indication of the duration of externalising an identified municipal service;
- The projected outcomes of the externalised service;
- An assessment of the extent to which an externalised service will provide value for money, address the needs of the poor, will be affordable for the municipality and residents, and will transfer appropriate technical, operational and financial risk to the provider;
- The projected impact on the municipality's staff, assets and liabilities;
- The projected impact on the municipality's integrated development plan;
- The projected impact of the externalised service on the municipality's budget and income generation; and
- Any other matter that the national government may prescribe.⁹⁵

The requirement of such a feasibility study will structure the consideration process considerably. The study, which the municipality must consider, must deal with the duration, costs and impact of a proposed privatisation decision. When basic municipal services are in issue, the needs of the poor and the affordability of the service will be a critical issue that must be considered.

92 S 78(3).

93 *Nkonkobe v Water Services South Africa* Case No 1277/2001 (unreported), in De Visser J 'Water privatisation contract cancelled' (2002) 4 *Local Government Law Bulletin* (3) at 12.

94 S 78(3)(b)(i).

95 S 12, Systems Amendment Bill 2003.

After the second inquiry, the municipality must make a choice between an internal or external provider. It will be guided in its choice by the general principles relating to the provision of municipal services⁹⁶ which require that municipal services must be:⁹⁷

- Equitable and accessible;
- Provided in a manner that is conducive to prudent, economic, efficient and effective use of available resources, and the improvement of standards of quality over time; and
- Financially and environmentally sustainable.

These guidelines are very general and all manner of considerations could be included. It is at this stage that the cost-benefit analysis between internal and external mechanisms would be appropriate, an issue that should pertinently be canvassed in the proposed feasibility study that the municipality must consider.

If the choice falls on an external provider that is not a private actor, negotiations towards a service agreement with such provider may commence. Where the external provider is a private actor, however, a further step is required: competitive bidding.

3.3.3 *Competitive bidding for private actors*

If the choice falls on an external provider that is a private actor (whether for profit or not), a service delivery agreement may be concluded only after a competitive bidding process prescribed in the Act⁹⁸ and other applicable legislation.⁹⁹ The selection process must be transparent; its design and execution must 'make the municipality accountable to the local community about the progress with selecting a service provider, and the reasons for any decisions in this regard'.¹⁰⁰

3.3.4 *Negotiating a service delivery agreement*

Once a municipality has selected an external provider (whether or not competitive bidding was required), a service delivery agreement with such a party needs to be concluded. This will entail negotiations. In the case of a tender process, the negotiations may not materially affect the integrity of the bidding process.¹⁰¹

When a municipality opts for providing a service through an external provider, the Act's point of departure is that the municipality cannot divest itself of its responsibilities of providing that service to the community. As its relationship with the provider is contractual, the content of the agreement must thus reflect the municipality's continuous responsibility for the proper delivery of that service. The Act provides a framework within which the municipality must negotiate the agreement.

96 S 78(4).

97 S 73(2).

98 Ss 80(1)(b), 83 and 84.

99 Preferential Procurement Policy Framework Act 5 of 2000.

100 S 83(1)(d).

101 S 84.

(a) Framework

Section 81 explicitly provides that 'a municipality remains responsible for ensuring that the service is provided to the local community in terms of the provisions of this Act'.¹⁰² The municipality complies with this responsibility by structuring the agreement along the following principles:

- First, the municipality must 'regulate' the provision of the service by subjecting it to its performance management system.¹⁰³ This requires setting appropriate key performance indicators with regard to the municipality's development priorities and objectives contained in its IDP as well as measurable performance targets.
- Second, it must 'monitor and assess' the implementation of the agreement within the framework of the performance management system.¹⁰⁴ This principle is met by requiring appropriate reporting obligations.
- Third, where the service falls within the municipality's development priorities and objectives as contained in its IDP, the municipality must still comply with its obligations with regard to integrated development planning and performance management.¹⁰⁵ This means that the contract must be made subject to changes resulting from the continuing process of reviewing the IDP.
- Fourth, the municipality controls the setting and adjustment of tariffs which must be done within its own tariff policy.¹⁰⁶ The agreement may provide that the provider adjusts tariffs, but then it must occur within the parameters set by the municipality.¹⁰⁷
- Fifth, in negotiating the agreement the municipality must 'generally exercise its service authority so as to ensure uninterrupted delivery of the service in the best interest of the local community'.¹⁰⁸ In terms of this general principle, all provisions of the agreement must be tested against the objective of providing a service that is uninterrupted and in the best interest of the community.

(b) Discretionary provisions

The Act gives municipalities a wide discretion to negotiate the terms of a municipal service agreement. The terms include the broad planning and operational responsibilities for a service, the provision of subsidies for the poor and the use of the municipality's workforce. Provision must also be made for the continuity of the service and the fate of the service on termination of the agreement. The terms may include the assignment to a service provider of particular responsibilities that the municipality usually exercises.¹⁰⁹ The use of the term 'assignment of responsibilities' suggests

102 S 81(1).

103 Ss 81(1)(a) and 41.

104 S 81(1)(b).

105 S 81(1)(c).

106 S 81(1)(d).

107 S 81(3).

108 S 81(1)(e).

109 S 81(2)(a).

that the municipality divorces itself from those responsibilities. However, this provision forms part of a section asserting that a municipality retains overall responsibility for the rendering of municipal services.¹¹⁰

The 'municipal' responsibilities that may be assigned are –

- developing and implementing a service delivery plan;
- the operational planning, management and provision of a service;
- 'undertaking social and economic development that is directly related to the provision of the service';¹¹¹
- customer management;
- financial management; and
- the collection of service fees for the provider's account.

It should be noted that the assigned responsibilities should be exercised within the municipalities' overall policies. A service delivery plan must fit into the framework of the municipality's development framework. The collection of service fees must be in accordance with the council's tariff policy. The municipality may also determine a financial management framework that will ensure transparency, accountability, reporting and financial control.

Given various national government policies of providing free basic services to the poor, a service delivery agreement may provide that the municipality 'pass on' to the service provider funds for 'the subsidisation of services to the poor'. This must take place through a transparent system subject to performance monitoring and audit.

A municipality may also transfer or second any of its staff members to the service provider subject to the consent of the staff members. Although no mention is made of the transfer of municipal assets, this may be done by a municipality in terms of its general powers of alienating its assets.

(c) Mandatory provisions

The service delivery agreement must include provisions that ensure the continuity of the service if the service provider, for whatever reason, is unable to perform its functions. Furthermore, there must be provisions in terms of which the municipality takes over the service, including all assets, when the agreement expires or is terminated.

(d) Community consultation regarding a service delivery agreement on basic municipal services

Where the service in question is a 'basic service' as defined in the Act, which will include elements of all applicable socio-economic rights, additional community participation is required during this negotiating process. Firstly, before the conclusion of the agreement there must be consultation with the community through an appropriate mechanism and programme.

¹¹⁰ S 81.

¹¹¹ S 81(2)(a)(iii).

This should include viewing of the draft agreement for comment. Secondly, after conclusion of the agreement, it should be disseminated to the community through the media.

The process of community participation in the content of a service agreement is protected. Where the external provider is a private actor (and was thus subject to competitive bidding), the agreement may only be amended after the local community has been consulted. This requires that the community must be given reasonable notice of the intention to amend and the reasons for the amendment, as well as sufficient opportunity to make representations to the municipality.

3.3.5 National and provincial government supervision

The Municipal Systems Act gives a fairly tight framework within which a municipality must decide whether or not it wants to externalise a municipal service. Like all other aspects of municipal government, the exercise of this decision is subject to the general monitoring, support and intervention powers of the national and provincial governments. The Municipal Systems Amendment Bill of 2003 seeks to give national and provincial government a greater, albeit indirect, role in the decision making process.

Firstly, national and provincial government could play a more supportive role in facilitating the decision-making process as well as the outcome. These governments may, in agreement with a municipality, assist in carrying out a feasibility study when considering whether to externalise a municipal service or in preparing service delivery agreements. Because the requirement of a feasibility study will require more expertise and cost even to consider going down the privatisation route (which could place the externalising option beyond the reach of many municipalities), national or provincial government may step in with assistance. Likewise, the detailed requirements for service delivery agreements could place such agreements beyond the means of many municipalities. While there is no obligation to assist, a national government set on a privatisation course could make the necessary technical, human and financial resources available to municipalities.

Secondly, the national Minister is given specific powers to regulate the provision of municipal services, including externalisation of such services.¹¹² The Minister may make regulations or issue guidelines on critical issues raised by privatisation, including:

- Additional matters that must be included in the feasibility study, including the strategic and operational costs and benefits of an external mechanism in terms of a municipality's strategic objectives, an assessment of a municipality's capacity to effectively monitor the external provision of a service and the enforcement of a service delivery agreement;

- Criteria to be taken into account by municipalities when assessing options for the provision of municipal services;
- Measures against malpractices in selecting and appointing service providers, including measures against the stripping of municipal assets;
- Standard draft service delivery agreements; and
- The minimum content and management of service delivery agreements.

As there is a distinct possibility that the overregulation of the process may place the option of externalising services beyond the pale for most municipalities, the Bill cautions the Minister, in exercising this supervisory function, to take into account the capacity of municipalities to comply with the regulations and guidelines. Accordingly, differentiation is possible between different kinds of municipalities according to their capacities.

4 PRIVATISING BASIC MUNICIPAL SERVICES

It has been argued that socio-economic rights underpin some of the basic municipal services that municipalities must provide. When the question of delivery mechanisms for the basic municipal service is considered, it thus takes place within a socio-economic rights framework. The implications are that when a municipality considers using an external provider (including the privatisation of the service), it will be bound by the obligations flowing from the applicable socio-economic rights.

Since the Municipal Systems Act provides a broad framework for service delivery, many of the provisions are open-ended, giving a wide discretion to a municipality. Where a basic municipal service has a socio-economic rights dimension, the discretion is narrowed down and directed towards realisation of that right. In sum, a socio-economic rights analysis of basic municipal services directs municipalities in a particular way when considering and deciding on an appropriate service provider.

4.1 Initial review of service mechanisms

In reviewing the delivery mechanisms of a particular service, the first question must be whether it deals with a basic municipal service. Moreover, is there a socio-economic dimension to the particular service? These questions fall under the broad inquiry into the effect that the service mechanism has on 'human health, well-being and safety'.¹¹³ If such a service is in fulfilment of a socio-economic right, requiring, among other things, its free provision to the destitute, the issue of funding becomes vital. If cross-subsidisation of services is one of the key methods of financing a free basic service, then the appropriateness of providing the service through an internal mechanism becomes apparent. The failure of the private sector has been, after all, to address the core challenge of serving the 'unserved' section of the community.

113 S 78(1)(a)(i). Systems Act.

4.2 Considering an external service provider

The duty to ascertain the views of the community takes on a specific focus where the municipal service to be externalised is a basic one. The socio-economic rights dimension of a basic service would require that the municipality engages with the beneficiaries of that right on the question of how externalising that service may impact on the realisation of the right in question.

This question is also relevant in the second line of inquiry – assessing the different external service delivery options. Is one external service provider better placed than another to give effect to the socio-economic right in question? Is a municipal entity, falling under the control and direction of the municipality, better equipped to provide a service for the ‘unserved’? Is a private company, with access to capital, better placed to provide the necessary infrastructure for a service?

The rights dimension is again paramount when the municipality must decide between an appropriate internal or external provider. The principle that municipal services must be ‘equitable and accessible’ means, among other things, that services must be provided according to need. With socio-economic rights focusing on those who cannot help themselves, the critical question is which service provider can best roll out services to the ‘unserved’ and provide a subsidised service for those who cannot pay.

4.3 Competitive bidding

When competitive bidding must precede the appointment of a private actor as the external provider, the tender process must also be geared towards realisation of the basic municipal service. In the tender specification, the human rights dimension must be outlined and followed up in the bid evaluation criteria. The process is not merely about determining the lowest bid but, as the White Paper on Municipal Service Partnerships states, to ensure ‘the best value for money for residents and other users of the service in the long term’.¹¹⁴ The question is thus which provider can best meet also the socio-economic rights obligations implicit in a basic service.

4.4 Negotiating the contents of a service delivery agreement

The community consultation prior to the conclusion of an agreement externalising a basic municipal service provides an important vehicle for focusing on the socio-economic right dimension of that service. The object of such a consultation process is to examine how the detail of providing a basic municipal service by an external provider may affect the service received by a community. Because a basic municipal service may have a socio-economic rights dimension, the beneficiaries of such a right must specifically be consulted. Where they are receiving some service already, the externalising of the service may not impact negatively on that right.

¹¹⁴ DPLG (fn 57 above) at par 4.6.

The negotiation of an appropriate service delivery agreement is a crucial step through which the municipality must ensure compliance with its own constitutional obligations. It cannot divest itself of any obligation merely by outsourcing a service, let alone a basic municipal service. The municipality's development priorities and objectives, as articulated in its IDP giving effect to socio-economic rights,¹¹⁵ remain intact and must be reflected in the agreement. The municipality's tariff policy, which should include subsidisation of municipal services for the poor, governs the agreement.

The provision that the municipality may pass on funds to the service provider for the subsidisation of services to the poor¹¹⁶ may no longer be discretionary. Where there is a binding duty of assisting the poor through subsidised services, the municipality cannot escape that obligation by outsourcing the service. It remains responsible for giving effect to the positive obligations of a particular socio-economic right; and, where transfers of national funds are earmarked for free basic services, those funds would obviously be passed on to the actual service provider.

5 CONCLUSION

The Constitutional Court is progressively giving more content and teeth to socio-economic rights. Some of the rights intersect with local government's competencies to provide basic municipal services. Increasingly there is recognition that the function of providing basic municipal services takes place within a human rights paradigm. A policy to provide free basic services is no longer in the discretion of the state but in fulfilment of the state's obligation to realise socio-economic rights. At the same time, the human rights paradigm structures the provision of basic municipal services even where the state is no longer the provider of a service. The changing of its role to an 'ensurer' of services rather than a 'provider'¹¹⁷ does not detract from the binding nature of the Constitution's socio-economic rights obligations. While it does not prevent the privatisation of services, it should provide a framework in terms of which the difficult choice of an appropriate service provider can be made. The conscious placing of the service delivery debate within a human rights paradigm may well influence the outcome of the process. Furthermore, where a basic service is privatised, a socio-economic rights approach may limit the negative impact that such service delivery mechanism may have on the rights of communities claiming a decent standard of living.

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115 S 23(1).

116 S 81(2)(b).

117 See McDonald and Smith (fn 74 above).

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