

Legislative Regulation of the Developmental Functions of Traditional Leadership – In Conflict or Cohesion with Municipal Councils?

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“My role is to unite people, and resolve disputes. People come to me when they have problems. I do not try to manage everything in the area. The problem with the introduction of [elected] councillors is that they do not know what they are supposed to do. They do not have the necessary training to undertake their duties, they are inexperienced and nobody informs them of what they are supposed to do. Everybody knows what the chief is supposed to do. Chiefs are well established. There are no big problems between the tribal authority and the local councillor. Higher-up politicians have caused this conflict by not clarifying our roles, and now the conflict between the two has been turned into a political matter.”¹

– Chief Mdutshane of Xopozo –

1 INTRODUCTION

In his State of the Nation address in 2009² President Jacob Zuma presented his 5-year programme of priorities of the democratic government to the country. These priorities included fighting poverty, job creation and improving life standards, at all levels of government. However, at local level municipal councils soon complained about the unco-ordinated implementation of socio-economic programmes. A common complaint was that national and provincial government entities implemented their programmes in local areas without knowledge and input of municipalities, thereby weakening the delivery of services in a fragmented system.³ In rural areas traditional authorities complained about the perceived limitation by municipal councils of the powers of traditional leaders who were previously primarily responsible for the administration and development of their respective areas. For example, interviews conducted with

¹ Ntshona & Lahiff 2003 *Sustainable Livelihoods in Southern Africa Research Paper 5* (2003) 10-11.

² <http://www.gov.za/speeches> (last accessed 28-01-2014).

³ Former Minister Sicelo Shiceka of the Department of Co-operative Governance and Traditional Affairs “Debate on the State of the Nation” Address to Parliament June 2009. <http://www.cogta.gov.za/speeches> (last accessed 28-01-2014).

traditional leaders in the Limpopo Province⁴ revealed their perceptions of “impotence” and “marginalisation” under the new democratic system. The general view amongst many of the traditional leaders was that their role and powers were reduced in many respects, even in crime prevention.⁵

In response, government undertook to “[place] the institution of traditional leadership at the centre of rural development.”⁶ This objective was seen as integral to government’s understanding of creating an interactive government, with traditional leadership having to play a greater role in fighting poverty and, together with local government, promoting development in rural communities.⁷ The concept of “developmental local government” was first introduced by the White Paper on Local Government⁸ as “[l]ocal government committed 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.”

The policy to involve traditional leadership in local development was confirmed by former Deputy Minister Yunus Carrim of the Department of Co-operative Governance and Traditional Affairs,⁹ which suggested that additional powers would be given to traditional leaders when it comes to service delivery and development in rural areas. In his speech at the Traditional Councils, Local Government and Rural Local Governance

⁴ Research conducted by Tshehla “Here to stay: Traditional leaders’ role in justice and crime prevention” March 2005 *SA Crime Quarterly* no 11 15 between March and August 2004.

⁵ Tshehla 2005 *SA Crime Quarterly* no 11 15 at 17.

⁶ Former Minister Sicelo Shiceka of the Department of Co-operative Governance and Traditional Affairs, “Debate on the State of the Nation” Address delivered to Parliament June 2009. <http://www.cogta.gov.za/speeches> (last accessed 28-01-2014).

⁷ Department of Traditional Affairs Report on the Assessment of the State of Governance within the Area of Traditional Affairs (2012) 4. <http://www.dta.gov.za/index.php/publications> (last accessed 11-03-2014).

⁸ (1998) 23. <http://www.gov.za/documents> (last accessed 28-01-2014).

⁹ The Department of Local Government and Traditional Affairs was established in April 2010. The establishment of the Department of Traditional Affairs as a separate department underlines the importance of the critical role traditional leadership institutions play in the lives of people, especially in rural areas. The main role of the Department is to assist the institution of traditional Leadership to act as a strategic partner of government in the development of communities. Thus, the Department has committed itself to promote and strengthen collaboration between municipal councils and traditional leaders at local level for development and purposes of service delivery. <http://www.info.gov.za/aboutgovt/tradlead.htm> (last accessed 28-01-2014).

Summit¹⁰ the former Deputy Minister reiterated that traditional councils are meant to contribute to the system of co-operative governance and should, through national and provincial legislation, be allocated roles in, amongst others, the following areas: land administration, agriculture, health and welfare, arts and culture, tourism and management of natural resources. Thus traditional leadership institutions were considered to play an integral part in achieving developmental objectives. This is particularly the case in so far as these objectives relate to government's Rural Development Strategy.¹¹ The strategic objective of the Comprehensive Rural Development Programme (CRD), monitored by the Department of Rural Development and Land Reform, in terms of the Strategy, is to facilitate integrated development and social cohesion through participatory approaches in partnership with all sectors of society.¹²

Seen against this background, the article aims to put in perspective the developmental functions of traditional leadership at local level in South Africa. This will be done by:

- (a) an exposition of the various pieces of legislation regulating the developmental functions of traditional leadership vis-à-vis municipal councils; and
- (b) where applicable, an illustration of the legislative imperatives in the Eastern Cape Province as an example of the implementation of the relevant legislation.

The implementation of laws in this province was chosen for brief discussion for the following reasons: Firstly, the Province is one of the poorest in the country,¹³ with a dire need for local and provincial socio-economic development.¹⁴ Moreover, in 1976 and

¹⁰ Held in eThekweni 5 May 2010. <http://www.cogta.gov.za/speeches> (last accessed 28-01-2014).

¹¹ <http://www.info.gov.za/aboutgov/tradlead.htm> (last accessed 28-01-2014).

¹² This is to be achieved by contributing to the redistribution of 30% of the country's agricultural land, improving food security of the rural poor, creating business opportunities, decongesting and rehabilitating over-crowded former homeland areas and expanding opportunities for rural women, youth, the elderly and people with disabilities. Department of Rural Development and Land Reform *South Africa Yearbook 2012-2013* 488-489. <http://www.gcis.gov.za/sites/www.gcis.gov.za/files> (last accessed 28-01-2014).

¹³ According to the Statistics South Africa Census 2011 Statistics Release the Eastern Cape Province has the second lowest average annual household income by province, only to be followed by the Limpopo Province. <http://statssa.gov.za/publications> (last accessed 28-01-2014).

¹⁴ In the rural Eastern Cape Province there is a need for socio-economic development in, amongst others: housing, water services, road repair and maintenance, health services, land use planning, forest management, the supply of electricity, employment, poverty alleviation and soil erosion projects. Ntshona & Lahiff *Sustainable Livelihoods in Southern Africa Research Paper* 5 2, 4, 5, 14, 22 and

1981 respectively, two independent Black states, the Transkei and Ciskei, were established in the Eastern Cape during the apartheid years as examples of the Government's policy of separate development and territories. After the first democratic elections in South Africa in 1994, these inadequately developed "states" were re-incorporated into the Eastern Cape Province, thus placing an additional need for development on the relevant authorities. Finally, the province is culturally rich, with five royal houses and their subjects, ruled over by kings.¹⁵ Principal traditional leaders in these "kingdoms" potentially exert strong political influence on government for development in the province.

The assumptions utilised for the discussion which inform the requirements for a democratic local government that functions well and promotes development, are the following:¹⁶

- Substantial financial resources are devolved from higher levels of government to local authorities.
- Substantial powers are devolved from higher levels of government to local authorities.
- Government administration is accountable to elected representatives and elected representatives are accountable to voters.

2 SOUTH AFRICA'S INTERGOVERNMENTAL SYSTEM

In the South African context, an intergovernmental system relates to the interaction of the different spheres of government as defined in Chapter 3 of the Constitution of the Republic of South Africa, 1996. In terms of section 40(1) government is constituted as national, provincial and local spheres of government. Some of the characteristics of the multi-tiered system are discussed below.

Peires "Traditional leaders in purgatory local government in Tsolo, Qumbu and Port St Johns, 1990-2000" 2000 59(1) *African Studies* 97 at 105 and 107.

¹⁵ In terms of s 28(8), read with s 2A of the Traditional Leadership and Governance Framework Act 41 of 2003, the following kingships are recognised in the Eastern Cape Province: AbaThembu, AmaXhosa and AmaMpondo. In terms of s 28(9) of the Act the following deemed kingships are recognised, which recognition will lapse on the death of the incumbent king: AmaRharhabe and AmaMpondo of Nyandeni. See Government Notice 1027 5 November 2010.

¹⁶ Ntshona & Lahiff *Sustainable Livelihoods in Southern Africa Research Paper 5 7*.

The Constitution assigns public functions to the three spheres of government as either concurrent or exclusive.¹⁷ Part A of Schedule 4 of the Constitution lists the functional areas of concurrent national and provincial legislative competence, which include administration of indigenous forests, agriculture, animal control and diseases, cultural matters, disaster management, environment, health services, housing, indigenous law and customary law, nature conservation, soil conservation, tourism, traditional leadership, rural development and social welfare services.¹⁸ All local government functions are concurrent.¹⁹ Therefore, either national or provincial government may monitor and regulate how municipal councils exercise their functions.²⁰ These functions included in Schedule 4 are air pollution, local tourism, municipal planning, municipal health services and water and sanitation services, and in Schedule 5, facilities for the burial of animals, fencing and fences, municipal roads, pounds, refuse removal, refuse dumps and solid waste disposal. Moreover, national and provincial governments may delegate or devolve functions listed in Part A of Schedules 4 and 5 to local government if the matter could most effectively be administered locally and if the municipality has the capacity to administer it.²¹ The municipality may then issue and administer by-laws relating to the delegated competence.²² Local economic development is not mentioned as a separate function. However, when considering the functions listed, it seems implied that local government has a key function in creating an environment conducive to economic development, by providing quality services and the infrastructure needed for such development.²³ Provinces have exclusive legislative competence over the functions listed in Part A of Schedule 5 of the Constitution, for example, provincial cultural matters, provincial roads and provincial planning.

¹⁷ See Scheepers *et al* “Constitutional provisions on the role of traditional leaders and elected local councilors at rural level” 1998 *Obiter* 61 at 64-66 for a discussion of Schedules 4 and 5 in relation to local governance.

¹⁸ Listing those areas which can be related to (rural) developmental functions.

¹⁹ Part B of Schedules 4 and 5 of the Constitution of the Republic of South Africa, 1996.

²⁰ <http://www.treasury.gov.za/publications/igfr/2011> (last accessed 21-02-2014).

²¹ S 156(1), read with s 155(3) of the Constitution of the Republic of South Africa, 1996.

²² S 156(4) of the Constitution of the Republic of South Africa, 1996.

²³ Department of Provincial and Local Government National Framework for Local Economic Development (LED) in South Africa 2006-2011 9.

Governance is co-operative, thereby obliging the three spheres of government to co-operate and negotiate political and budgeting matters between them.²⁴

Section 40(1) of the Constitution defines the respective spheres of government as distinctive, interdependent and interrelated. By distinctiveness is meant that one sphere of government is distinguishable from the other in its powers to make laws and execute them. Thus each sphere has distinctive legislative and executive competencies.²⁵ The interdependence between the spheres of government is contained in a co-relationship in which a particular sphere has the responsibility of both the empowerment and supervision of the dependent sphere. To illustrate, the provincial and local spheres of government respectively depend on the national and provincial spheres for the fulfilment of their functions, whereas the national and provincial spheres have a duty to monitor, and under circumstances, intervene in the fulfilment of their functions by the provincial and local spheres respectively.²⁶ By inter-relatedness of the spheres of government is meant that spheres have to co-operate with one another in mutual trust and good faith, for the greater good of the country as a whole.²⁷

There is a significant decentralisation of powers and functions amongst the respective spheres of government.²⁸ Thus each of the provinces has its own legislature, executive committees and administrative structures. Moreover, each municipality comprises political and administrative structures.²⁹

Municipalities are categorised according to whether they are metropolitan, district wide or local structures.³⁰

From the above, it is clear that the institution of traditional leadership, although operating at national, provincial and local levels,³¹ does not constitute a separate level of

²⁴ www.treasury.gov.za/publications/igfr/2001 (last accessed 21-02-2014).

²⁵ <http://www.cogta.gov.za/subwebsites/idpmanual> (last accessed 21-02-2014).

²⁶ <http://www.cogta.gov.za/subwebsites/idpmanual> (last accessed 21-02-2014).

²⁷ <http://www.cogta.gov.za/subwebsites/idpmanual> (last accessed 21-02-2014).

²⁸ www.treasury.gov.za/publications/igfr/2001 (last accessed 21-02-2014).

²⁹ www.treasury.gov.za/publications/igfr/2001 (last accessed 21-02-2014).

³⁰ www.treasury.gov.za/publications/igfr/2001 (last accessed 21-02-2014).

government. However, the advent of constitutionalism in South Africa in 1994³² impacted on the recognition of the institution of traditional leadership at all three government levels.³³ Previously the status of traditional leadership was governed by what was considered apartheid legislation³⁴ and self-framed custom. This enabled autocratic traditional leaders to do as they wished in their own administrative areas.³⁵ This is evidenced by the case of *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa*³⁶ where traditional leaders “sold” land in the environmentally protected coastal zone on the Wild Coast of South Africa at the nominal price of R200 and a bottle of brandy.

Traditionally, traditional leaders were considered the custodians of custom. However, under the successive colonial and apartheid government regimes they became the conduit for governmental development services as there was no direct provision for infrastructure in black rural areas. This resulted in traditional leaders assuming a role of facilitating development in their respective areas.³⁷ However, consequent to the White Paper on Local Government,³⁸ the Local Government: Municipal Structures Act³⁹ introduced the concept of the consultative role of traditional leaders. Unfortunately, the position of traditional leaders was vaguely drafted, with the continuing uncertainty regarding traditional leaders’ actual developmental role. The Traditional Leadership and Governance Framework Act⁴⁰ purported to address this in validating the role played by

³¹ See s 212 of the Constitution of the Republic of South Africa, 1996 and s 16 of the Traditional Leadership and Governance Framework Act 41 of 2003 for the establishment of National and Provincial Houses of Traditional Leaders, and s 17 of the Traditional Leadership Governance Framework Act 41 of 2003 for the establishment of Local Houses of Traditional Leaders.

³² With the promulgation of the Constitution of the Republic of South Africa Act 200 of 1993.

³³ In terms of Chapter 11 of the Constitution of the Republic of South Africa Act 200 of 1993, now regulated by Chapter 12, ss 211 and 212 of the Constitution of the Republic of South Africa, 1996.

³⁴ For example, the now repealed Black Administration Act 38 of 1927 and Black Authorities Act 68 of 1951. See Bennett *Customary Law in South Africa* (2004) 110 and Olivier “Traditional Leadership and Institutions” in Joubert (founding editor) *LAWSA* 2nd ed vol 32 (2009) par 14.

³⁵ Now defined as traditional communities in terms of s 2(2)(a) of the Traditional Leadership and Governance Framework Act 41 of 2003.

³⁶ 1996 3 SA 1095 (Tks).

³⁷ White Paper on Traditional Leadership and Governance (2003) par 3 1.

³⁸ (1998).

³⁹ Act 117 of 1998.

⁴⁰ Act 41 of 2003.

traditional councils. The Constitution itself also contains various provisions impacting on the role and functions of traditional leadership as well as municipalities,⁴¹ the functions of the two institutions differing in some respects, but overlapping in others.⁴² The Constitution also makes provision for legislation for the establishment of a National and Provincial Houses of Traditional Leaders.⁴³

3 CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

The role of traditional leaders has been described as one of the most delicate issues to be dealt with by the government.⁴⁴ The reasons are threefold: Firstly, traditional leaders have considerable political power (not necessarily supportive of the ruling party) and secondly, tribal land was encroached upon by the constitutional provision that the local sphere of government consists of municipalities, which in terms of section 151(1) of the Constitution had to be established for the whole of the territory of the Republic of South Africa.⁴⁵ Lastly, vast numbers of people live in rural areas and are subject to traditional authorities. In 2011 there were 829 senior traditional leaders who were leading more than 830 traditional councils located across eight provinces.⁴⁶ Thus the drafters of the Constitution as well as the former Department of Provincial and Local Government had to pay special attention to the accommodation of traditional leadership in the post-1994 constitutional dispensation.

3.1 Recognition of traditional leadership

Section 211(1) of the Constitution recognises the institution, status and role of traditional leadership, according to customary law, and subject to the Constitution. A traditional

⁴¹ S 151 of the Constitution of the Republic of South Africa, 1996.

⁴² Scheepers *et al* 1998 *Obiter* 61 at 62.

⁴³ S 212 of the Constitution of the Republic of South Africa, 1996.

⁴⁴ Bekker 2003 *Anthropology Southern Africa* 128.

⁴⁵ Bekker 2003 *Anthropology Southern Africa* 128 and Scheepers *et al* 1998 *Obiter* 61 at 62.

⁴⁶ The Western Cape Province does not have recognised traditional leadership. Department of Traditional Affairs Report on the Assessment of the State of Governance within the Area of Traditional Affairs (2012) 12.

<http://www.dta.gov.za/index.php/publications> (last accessed 11-03-2014). These numbers can fluctuate because of continuous changes due to the establishment or disestablishment of traditional councils, deaths and recognition by traditional leaders by relevant MEC's. Moreover, these numbers do not include the leadership of the Koi-San. S 5 of the Traditional Affairs Bill 2013 Government Notice 947 20 September 2013 proposes the recognition of Khoi-San leadership. A discussion of the Bill falls outside the scope of this article.

authority that observes a system of customary law may function subject to any applicable legislation and customs, which include amendments to, or repeal of, that legislation or those customs.⁴⁷ In this regard the opinion has been expressed that the relationship between state and traditional leadership is one of superiority – the Constitution seems to underpin this by providing that a traditional authority operates *subject* to legislation and custom, and not *according* to applicable legislation and custom.⁴⁸ Moreover, a traditional authority *may* function, and not *must* function as determined by the relevant provision.⁴⁹ It creates the impression that “traditional leadership must operate in its own cocoon and simply make sure that it aligns with the broader legislation.”⁵⁰ Seen from this perspective, the provision was never directed at positioning traditional leadership in relation to government.⁵¹ Some nine years after this limited constitutional recognition, the Traditional Leadership and Governance Framework Act was promulgated, recognising traditional leadership in various formats.⁵²

3.2 Functions of traditional leadership

The Constitution does not expressly define the functions of traditional leadership. The role of traditional leaders is defined in broad terms.⁵³ Section 212(1) determines that “[n]ational legislation *may* provide for a role for traditional leadership as an institution at local level on matters affecting local communities.”⁵⁴ It is obvious that matters relating to custom and customary law affect local communities. Moreover, matters relating to local development inevitably affect the same. The question is whether the Constitution attributes developmental functions to traditional leadership. The answer is that it does not. Where the Constitution allocates a function to a sphere of government, that sphere

⁴⁷ S 211(2) of the Constitution of the Republic of South Africa, 1996.

⁴⁸ Sithole & Mbele *HSRC Research Paper: Fifteen Year Review on Traditional Leadership* (2008) 32. My emphasis.

⁴⁹ My emphasis.

⁵⁰ Sithole & Mbele *HSRC Research Paper: Fifteen Year Review on Traditional Leadership* 32.

⁵¹ Sithole & Mbele *HSRC Research Paper: Fifteen Year Review on Traditional Leadership* 32.

⁵² Par 6 below.

⁵³ Sithole & Mbele *HSRC Research Paper: Fifteen Year Review on Traditional Leadership* 33. Moreover, the Constitution does not recognise the role of traditional leadership sufficiently as integrated and demanding of the mutual co-operation of various governmental departments and other sectors.

⁵⁴ My emphasis.

has jurisdiction over that function and cannot perform that function or exercise the power concurrently with the institution of traditional leadership.⁵⁵

3.3 Traditional leadership as a functional area on national and provincial levels

In terms of Part A of Schedule 4 of the Constitution, subject to Chapter 12,⁵⁶ traditional leadership is a functional area of concurrent national and provincial legislative competence. However, in the case of traditional leadership Parliament is entitled to pass legislation with the co-operation of the National Assembly as well as the National Council of Provinces only.⁵⁷

Closely related to the institution of traditional leadership, cultural matters, indigenous and customary law and rural development are all similarly positioned under Part A of Schedule 4. This positioning has several implications: In essence it means that both at a national and provincial level legislation may be passed regulating the abovementioned functional areas, including traditional leadership, as spheres of government may allocate certain functions where this is provided for in law.⁵⁸ Subject to clear guidelines for national legislative supremacy, provincial legislation will prevail in respect of Schedule 4 concurrent national and provincial competence.⁵⁹

Of grave concern for traditional leaders is “[t]he actual effect of the 1996 constitutional scheme ... to [have taken] away from traditional leadership and institutions the vast majority of powers and functions that were allocated to them in the past (in terms of pre-1994 legislation).”⁶⁰ Furthermore, taking into account the provisions of the Local Government: Municipal Structures Act,⁶¹ it seems apparent that the former governmental

⁵⁵ White Paper on Traditional Leadership and Governance (2003) par 3.1.

⁵⁶ Subject to Chapter 12 of the Constitution, which, *inter alia*, recognises the role, status and institution of traditional leadership.

⁵⁷ In terms of s 76, read with s 44 of the Constitution of the Republic of South Africa, 1996. This seems to grant the institution of traditional leadership protection against arbitrary abolition or major modification by the law-makers.

⁵⁸ White Paper on Traditional Leadership and Governance (2003) par 3.1.

⁵⁹ Ss 146(2), (3) and (5) of the Constitution of the Republic of South Africa, 1996.

⁶⁰ Olivier in Joubert *LAWSA* (2009) par 19.

⁶¹ Par 4 below.

functions⁶² of traditional leadership are now vested in elected local councillors on behalf of government.⁶³

3.4 Responsibilities of local government

Section 152(1) of the Constitution envisages a local government system which can provide democratic and accountable government for local communities, ensure service delivery to communities in a sustainable manner, promote social and economic development, promote a safe and healthy living environment and encourage the participation of communities in the affairs of local government. Section 152(2) directs municipalities to use their available resources to realise the objects within their administrative and financial capacities.⁶⁴

Section 153 of the Constitution describes municipal developmental duties as prioritising and promoting the delivery of basic services to communities in relation to local administration, planning and budgeting. Moreover, municipalities are directed to participate in national and provincial development programmes. Local government is, however, not directly responsible for creating employment opportunities. It must take steps to ensure an economic and social environment conducive for the creation of jobs in its particular locality,⁶⁵ thereby setting a platform for the engagement of stakeholders in implementing various strategies and programmes.⁶⁶

⁶² Under colonial and apartheid rule.

⁶³ Olivier in Joubert *LAWSA* (2009) par 19 and Ntshona & Lahiff *Sustainable Livelihoods in Southern Africa Research Paper 5* 11. Peires 2000 *African Studies* 107 indicates that many traditional leaders felt they had become irrelevant: “Before 1994, they had been the essential channels of communication between government and the communities on the ground. All government communications and individual grants, as well as community projects, had passed through their hands. No outsider could even enter their area, let alone hold public meetings In the new South Africa, however, even the most competent and respected of the chiefs was sidelined and by-passed, sitting empty-handed and helpless on the margins of government while the all-important delivery was concentrated in the hands of the ... councillors.”

⁶⁴ <http://www.treasury.gov.za/publications/igfr/2011> (last accessed 21-02-2014).

⁶⁵ White Paper on Local Government (1998) section B par 1.

⁶⁶ Department of Provincial and Local Government National Framework for Local Economic Development (LED) in South Africa 2006-2011 9. The Framework serves as a strategic implementation approach guiding municipalities, provincial and national government, state-owned enterprises and communities with the objective to improve local economic development.

Current development programmes of the Department of Local Government and Traditional Affairs include the Local Economic Development Programme (LED) and the Community Work Programme (CWP). LED is a comprehensive programme, intended to maximise the economic potential of all municipalities and to promote macro-economic growth by means of sustainable local economic growth and job creation.⁶⁷ CWP is directed at restoring dignity through work opportunities by providing community work for unemployed participants of working age.⁶⁸

Section 156 sets out the powers and functions of municipalities as the right to administer the matters listed in Part B of Schedules 4 and 5 of the Constitution or matters assigned to it by national or provincial legislation, the prerogative to make and administer by-laws for the effective administration of these matters and the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective exercise of its functions.⁶⁹

The Provincial Government of the Eastern Cape Province has committed itself to the implementation of the LED programme. In its information booklet on LED⁷⁰ the Department of Economic Development and Environmental Affairs sets out the priorities of its LED Unit as fostering opportunities for economic development to create innovative and sustainable local economic development opportunities and identifying and creating opportunities to expand the economy in terms of new sources of jobs and economic activities for local communities. It has the duty to promote the identification of projects, ensure payment of funds to municipalities to enable them to implement these projects, to assist the municipalities in implementation, to monitor and evaluate the impact of the projects within the communities and to make recommendations for future implementation.⁷¹ This is possible only with the co-operation of various entities.⁷²

⁶⁷ <http://www.cogta.gov.za/led> (last accessed 21-02-2014). For a detailed discussion of the LED programme, see <http://www.led.co.za> (last accessed 03-03-2014).

⁶⁸ <http://www.cogta.gov.za/cwp> (last accessed 21-02-2014).

⁶⁹ See par 2 above for a brief discussion of the allocation of public functions between the three spheres of government.

⁷⁰ <http://www.dedea.go.za> (last accessed 03-03-2014).

⁷¹ Department of Economic Development and Environmental Affairs *Local Economic Development Information Booklet 5*. <http://www.dedea.go.za> (last accessed 03-03-2014).

In the financial year 2012/13 the Eastern Cape Provincial Department of Local Government and Traditional Affairs received a budget allocation of R7.4 million for municipal LED strategy development, execution of LED anchor projects in three municipalities and seeking the participation of various partners towards a co-ordinated programme of action.⁷³ The Department also participates in the Community Work Programme (CWP) in order to create an employment safety net for the poor. In its Budget Vote 2012/13 financial year it committed itself to establishing 342 employment opportunities in sixteen municipalities by the end of the next financial year.⁷⁴

4 LOCAL GOVERNMENT: MUNICIPAL STRUCTURES ACT

The functions of traditional leadership seem to have been eroded by the provisions of the Local Government: Municipal Structures Act through the establishment of the wall-to-wall municipalities in South Africa, including traditional areas.⁷⁵ The White Paper on Local Government⁷⁶ proposed what it called an innovative institutional arrangement which, on the one hand, combines the natural capacities of both traditional and elected local government to advance the development of rural areas and communities, and, on the other, is constitutional. The co-operative model proposed provides a constructive role for traditional leadership at local level in the governance and development of rural communities.⁷⁷

Section 81 of the Local Government: Municipal Structures Act consequently provides for the participation of traditional leaders in municipal councils. The MEC for local government in a province, in accordance with Schedule 6 and by notice in the *Provincial Gazette*, identifies the traditional leaders who in terms of section 81(1) may participate in

⁷² The Department of Economic Development and Environmental Affairs, Department of Local Government and Traditional Affairs, Department of Agriculture, the Office of the Premier and the Provincial Treasury.

⁷³ Speech of MEC Mlibo Qhoboshiane of the Eastern Cape Province Local Government and Traditional Affairs Provincial Budget Vote 2012/13 28 March 2012.

⁷⁴ Speech of MEC Mlibo Qhoboshiane of the Eastern Cape Province Local Government and Traditional Affairs Provincial Budget Vote 2012/13 28 March 2012.

⁷⁵ Bekker 2003 *Anthropology Southern Africa* 128.

⁷⁶ (1998) Section D par 4.

⁷⁷ Scheepers *et al* 1998 *Obiter* 61 at 85.

the proceedings of a municipal council. Initially only a 10 per cent participatory role was granted to these traditional leaders.⁷⁸ Currently the number of traditional leaders that may participate in the proceedings of a municipal council may not exceed 20 per cent of the total number of councillors in that council, but if the council has fewer than 10 councillors, only one traditional leader may so participate. Note that mere participatory status is afforded to traditional leaders, not membership. Consequently they have no voting rights. However, because the respective sections in the Constitution and the Local Government: Municipal Structures Act seemed to have been intended to define the competence of local authorities, it can be argued that they do not have the effect of overriding the powers enjoyed by traditional leadership under custom and customary law.⁷⁹ A vaguely defined role for traditional leaders is not necessarily prejudicial to the institution. The opinion has been expressed that the undefined customary role of traditional leaders is more cross-cutting than a role narrowly defined by legislation. According to Sithole and Mbele “[i]t is possible that there is a disjuncture between the government’s sectoral approach and the manner in which traditional leadership structures around being holistic within locali[s]ed boundaries.”⁸⁰

Despite the statutory authority of local authorities, in traditional communities there is a myriad of reasons why local councillors remain rather unpopular.⁸¹ An important reason is that delivery of services to the traditional communities after 1994 has not met the high expectations which accompanied the elections. Secondly, budgetary constraints at provincial and local levels resulted in the non-fulfilment of certain development programmes. Moreover, many new programmes set incomprehensible requirements such as “business plans” for often poorly educated members of traditional communities. This inevitably stifles development projects by the people themselves. Unemployment remains a problem, and often local councillors are blamed for shortcomings for which they are not responsible. In some areas rural people do not understand the democratic

⁷⁸ Bekker 2003 *Anthropology Southern Africa* 128.

⁷⁹ Bennett *Customary Law in South Africa* 133.

⁸⁰ Sithole & Mbele *HSRC Research Paper: Fifteen Year Review on Traditional Leadership* 25.

⁸¹ Peires 2000 *African Studies* 109-110 in respect of local government in Tsolo, Qumbu and Port St Johns in the Eastern Cape Province.

election process and consequently do not comprehend how specific individuals, often not known to them, became councillors.⁸²

Councillors, on the other hand, opine that the chiefs continue to cling to the undemocratic old order where the chiefs did what they pleased. From this perception it is clear that traditional leaders and local councillors do not always view their functions as complementary. They would rather compete with each other for the acceptance and/or loyalty of their communities.⁸³ The tension between the traditional leadership and elected local government could, amongst other reasons, probably be ascribed to the perceived inadequately defined role and functions of the traditional institutions, as well as the hereditary nature of traditional leadership. Moreover, some consider traditional leadership as a remnant of the policy of apartheid. Hence the institution is perceived as “undemocratic, unaccountable [and] autocratic.”⁸⁴

The Act purports to involve traditional leadership in the affairs of municipal councils in two respects. Firstly, after consultation with the Provincial House of Traditional Leaders in a particular province the MEC for local government may by notice regulate the participation of traditional leaders in the proceedings of a municipal council and prescribe a role for traditional leaders in the affairs of a municipality.⁸⁵ Secondly, before a municipal council takes a decision on any matter directly affecting the area of a traditional authority, the council must give the leader of that authority the opportunity to express a view on that matter. Traditional leadership is thus afforded a participatory role.

In its Report on the Assessment of the State of Governance within the Area of Traditional Affairs of 2011 the Department of Traditional Affairs revealed that in the Eastern Cape Province the participation of traditional leaders in municipal councils differs from one municipality to another. In areas where there is participation it seems not to have been regulated by section 81 of the Local Government: Municipal Structures Act. Traditional

⁸² Peires 2000 *African Studies* 109.

⁸³ Peires 2000 *African Studies* 110.

⁸⁴ Ntshona & Lahiff *Sustainable Livelihoods in Southern Africa Research Paper* 5 9.

⁸⁵ See also Bennett *Customary Law in South Africa* 132-133.

leaders do seem to participate in IDP processes, but participation in the development and review of IDPs seemed to require improvement.⁸⁶

The Department of Local Government and Traditional Affairs of the Eastern Cape Province published its Guidelines/Framework for Participation of Traditional Leaders in Municipal Councils in 2011.⁸⁷ The purpose of the guidelines/framework is described as, *inter alia*, to provide a framework for and strengthen working relations between municipal councils and traditional councils and to facilitate full participation in all planning processes of municipalities. This is to ensure good governance and service delivery in traditional communities.⁸⁸ Statistics show that at 30 January 2014 participation occurred in 22 local, one metropolitan and five district municipalities in the Eastern Cape Province.⁸⁹

The Guidelines/Framework confirms the status of traditional leaders participating in municipal councils as a right to attend and participate in any meetings of the municipal council concerned. Participation includes the entitlement to “participate in debate, submit motions, make proposals and ask questions.”⁹⁰ However, it neither includes *ex officio* membership of the municipal council, nor an entitlement to vote.⁹¹ Although a traditional leader may become a member of a municipal committee, he/she shall not become a councillor.⁹² Finally, a traditional leader has the right to address the municipal council on matters affecting the traditional community.⁹³

⁸⁶ Department of Traditional Affairs Report on the Assessment of the State of Governance within the Area of Traditional Affairs (2012) 31. <http://www.dta.gov.za/index.php/publications> (last accessed 11-03-2014).

⁸⁷ Eastern Cape Province Department of Local Government and Traditional Affairs Provincial Notice no 42 19 October 2011.

⁸⁸ Including IDPs, budgeting and spatial development. See par 4 of the Guidelines/Framework for Participation of Traditional Leaders in Municipal Councils.

⁸⁹ Written information received from the Eastern Cape Provincial Government Office of the General Manager: Traditional Governance and Finance, Mr Happy Kwetana, 30 January 2014.

⁹⁰ Par 7.1 of the Guidelines/Framework for Participation of Traditional Leaders in Municipal Councils.

⁹¹ Par 7.3 of the Guidelines/Framework for Participation of Traditional Leaders in Municipal Councils.

⁹² Para 7.4 and 7.7 of the Guidelines/Framework for Participation of Traditional Leaders in Municipal Councils.

⁹³ Par 7.8 of the Guidelines/Framework for Participation of Traditional Leaders in Municipal Councils.

The relationship between a municipal council and traditional leader participating in the proceedings of a municipal council must give effect to the principles of co-operative governance, thereby fostering sound working relations, supporting one another in the fulfilment of their respective functions.⁹⁴ Of particular importance in this process is the development of a communication strategy and protocol for information-sharing, co-ordination and consultation purposes.⁹⁵ A traditional leader may, for example, agree with municipal councillors to meet from time to time at the Great Place, which in terms of custom is usually the venue for meetings.⁹⁶ This will be illustrative of the required mutual respect and good faith between a traditional leader and municipal councillor.

In 2014 in the Eastern Cape Province the successful participation of traditional leaders in municipal councils is described as “meaningful participation as ideas/inputs of traditional leaders are incorporated in municipal programmes.”⁹⁷ Moreover, issues of conflict regarding development land in rural areas have been minimised through participation.⁹⁸

Negative issues that detract from participation relate to the following:⁹⁹ Firstly, some traditional leaders perceive that they do not have an impact on the deliberations of municipal councils. As a result they feel marginalised. Secondly, political conflicts within municipal councils do not allow for meaningful participation. Thirdly, issues of travelling to meetings and out of pocket expenses have been thorny as there seems to be differential treatment thereof between municipalities.

The Guidelines/Framework for Participation of Traditional Leaders in Municipal Councils subjects traditional leaders participating in municipal councils to a code of

⁹⁴ Para 9.2.1 and 9.2.2 of the Guidelines/Framework for Participation of Traditional Leaders in Municipal Councils. See par 2 above for a brief discussion of co-operative governance.

⁹⁵ Par 9.2.3 of the Guidelines/Framework for Participation of Traditional Leaders in Municipal Councils.

⁹⁶ However, par 10.2.3 of the Guidelines/Framework for Participation of Traditional Leaders in Municipal Councils provides that meetings shall be held at the seat of the municipality.

⁹⁷ Written information received from the Eastern Cape Provincial Government Office of the General Manager: Traditional Governance and Finance, Mr Happy Kwetana, 30 January 2014.

⁹⁸ Written information received from the Eastern Cape Provincial Government Office of the General Manager: Traditional Governance and Finance, Mr Happy Kwetana, 30 January 2014.

⁹⁹ Written information received from the Eastern Cape Provincial Government Office of the General Manager: Traditional Governance and Finance, Mr Happy Kwetana, 30 January 2014.

conduct.¹⁰⁰ Moreover, when participating in the proceedings of a municipal council a traditional leader is subject to the appropriate provisions of the code of conduct set out in Schedule 1 of the Local Government: Municipal Systems Act, which will be considered next.

5 LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT

There is a need to monitor the participation of both municipal councillors and traditional leadership in local government as they are regarded as public office bearers. It must be ensured that there are codes of conduct and mechanisms to monitor compliance with applicable legislation regulating their participation.¹⁰¹ In Schedule 1 the Local Government: Municipal Systems Act contains fourteen detailed provisions in the code of conduct for municipal councillors. As is evident from the Local Government: Municipal Structures Act, traditional leaders who hold participatory status in municipal councils are subject to the code. For the purpose of this article, only sections particularly relevant to traditional leaders will be stated briefly, the first of which is the expected general conduct of councillors which reads that: A councillor must (a) perform the functions of office in good faith, honestly and a transparent manner and (b) at all times act in the best interests of the municipality and in such a way that the credibility and integrity of the municipality are not compromised.¹⁰²

In terms of provision eleven a councillor may not, except as provided by law (a) interfere in the management or administration of any department of the municipal council unless mandated by council, (b) obstruct or attempt to obstruct the implementation of any decision of the council or a committee by an employee of the council or (c) encourage or participate in any conduct which would cause or contribute to maladministration in the council.

From the above selected provisions it is apparent that for traditional leaders municipal allegiance supersedes their role as traditional leaders representing their respective

¹⁰⁰ Par 12 of the Guidelines/Framework for Participation of Traditional Leaders in Municipal Councils.

¹⁰¹ Sithole & Mbele *HSRC Research Paper: Fifteen Year Review on Traditional Leadership* 30.

¹⁰² Schedule 1 Provisions 2(a) and (b) of the Local Government: Municipal Systems Act 32 of 2000.

traditional communities. In the case of conflict between municipal decisions and mandates by traditional authorities, the former will take preference. Of particular importance is the provision that traditional leaders may not jeopardise the administration of municipal councils by, for example, obstructing the implementation of decisions by municipal councils. Municipal council decisions may potentially conflict with the practices of traditional authorities, hence creating a conflict of interests for traditional leaders.

The Code of Conduct for Traditional Leaders Participating in Municipal Councils in the Eastern Cape Province similarly makes it clear that a traditional leader participating in a municipal council must at all times act in the best interests of the municipality.¹⁰³

6 TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT

The Traditional Leadership and Governance Framework Act makes provision for different levels of traditional leadership¹⁰⁴ and the establishment and recognition of kingship or queenship councils,¹⁰⁵ traditional councils,¹⁰⁶ principal traditional councils¹⁰⁷ and traditional sub-councils.¹⁰⁸ It also expressly identifies the functions of kingship or queenship councils,¹⁰⁹ traditional councils,¹¹⁰ principal traditional councils¹¹¹ and traditional sub-councils.¹¹² Moreover, the Act enables provinces to draft their own policies and legislation in the context of traditional leadership and makes provision for

¹⁰³ And thus not in the best interests of his/her traditional community. See par 12.2(b) of the Guidelines/Framework for Participation of Traditional Leaders in Municipal Councils.

¹⁰⁴ Kingship or queenship, principal traditional leadership, senior traditional leadership and headmanship. S 8 of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁰⁵ S 3A of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁰⁶ In terms of s 3 of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁰⁷ S 3B of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁰⁸ S 4B of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁰⁹ S 4A of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹¹⁰ S 4 of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹¹¹ S 4C of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹¹² S 4B of the Traditional Leadership and Governance Framework Act 41 of 2003.

the establishment of Local Houses of Traditional Leaders,¹¹³ alongside the National and respective Provincial Houses.¹¹⁴

In so far as the functions of kingship or queenship councils and principal traditional councils and of traditional councils and sub-traditional councils correspond, these will be considered concurrently.

6.1 Functions of kingship or queenship councils

For the purposes of this discussion, the functions of assistance, support and guidance to traditional leaders and traditional councils in the performance of their functions, are relevant. Moreover, kingship or queenship councils are required to advise traditional councils falling under the authority of the respective king or queen.¹¹⁵

6.2 Functions of traditional councils

A traditional community is considered the largest administrative unit within which authority is exercised. The Premier of a province may recognise a traditional community in accordance with applicable provincial legislation. A community is under obligation to establish a traditional council in accordance with provincial legislation and in compliance of a specific constitution, representative of both traditional leaders and members of the community.¹¹⁶

In section 4(1) of the Act twelve distinctive functions of traditional councils are listed, of which six require of councils to facilitate, contribute towards, participate in and promote development in one form or another.¹¹⁷ Two functions are inherent to the institution of traditional leadership, relating to the councils' function as custodians of custom. Most of the remaining functions are directed at supporting municipalities and other government organs, such as recommending to government appropriate means of development and

¹¹³ S 17 of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹¹⁴ S 16 of the Traditional Leadership and Governance Framework Act 41 of 2003. See Du Plessis & Scheepers 2000 3(1) *Potchefstroom Electronic Law Review* 1-22 for a detailed discussion of the respective Houses of Traditional Leadership.

¹¹⁵ S 4A of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹¹⁶ Ss 2 and 3 of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹¹⁷ Rautenbach, Bekker & Goolam *Introduction to Legal Pluralism in South Africa* 3^d ed (2010) 161.

service delivery, facilitating the involvement of the traditional community in the development or amendment of the IDPs of the municipality in which the community resides, itself participating in development programmes, and promoting the ideals of co-operative governance, integrated development planning, sustainable development and service delivery.

Section 9(1) of the Eastern Cape Traditional Leadership and Governance Act¹¹⁸ is a copy of section 4(1) of the Traditional Leadership and Governance Framework Act in so far as it defines the functions of traditional councils in the Eastern Cape Province *verbatim*. The concepts of development, development programmes, integrated development planning, sustainable development and IDPs are central to the functions of traditional councils, linked to the interests of the community and connected to the municipality in whose area the community resides.

6.3 Functions of traditional leaders

The functions and duties of traditional leaders have traditionally primarily been imposed by custom and customary law, as well as by legislation drafted at either national, provincial or local governance levels.¹¹⁹ This is confirmed by section 19 of the Act. In section 20 fourteen functional areas are listed in respect of which national or provincial government/s may provide a role and functions to traditional leaders and/or traditional councils. From a developmental perspective, the following functional areas are, amongst others, of particular significance: Land administration, agriculture, health, welfare services, economic development, disaster management and management of natural resources.

Of these functions, agriculture, disaster management, health services, management of natural resources,¹²⁰ welfare services and economic development¹²¹ are all functional

¹¹⁸ Act 4 of 2005.

¹¹⁹ Olivier in Joubert *LAWSA* (2009) par 39.

¹²⁰ Listed as “nature conservation” in Part A of Schedule 4 of the Constitution of the Republic of South Africa, 1996.

¹²¹ Listed as “rural planning and development” and “urban and rural development” in Part A of Schedule 4 of the Constitution of the Republic of South Africa, 1996.

areas of concurrent national and provincial legislative competence in terms of Part A of Schedule 4 of the Constitution of the Republic of South Africa, 1996. Traditional leadership itself constitutes such an area. It means that on the one hand both the national and provincial spheres of government can legislate on the matters listed above and on the other hand, section 20 of the Traditional Leadership and Governance Framework Act enables national and provincial government/s to provide traditional leadership a role and function/s in the same areas. It thus enables the “delegation” or devolution by legislation of some developmental functions to traditional leadership institutions.

Section 24(7) of the Eastern Cape Traditional Leadership and Governance Act¹²² imposes a number of functions on traditional leaders, which include the promotion of socio-economic development, service delivery and the social well-being and welfare of the community. Moreover, a traditional leader performs functions provided for by custom and customary law, the Traditional Leadership and Governance Framework Act and other applicable legislation.¹²³ Additional functions may be assigned in terms of the functional areas contained in section 20 of the Traditional Leadership and Governance Framework Act, as listed above. One of these areas is economic development.

Scheepers *et al* opine that local government is derived from a eurocentric paradigm and views customary life as if it is compartmentalised.¹²⁴ Municipal councillors often deal with party political and socio-economic aspects of the life of the people who elected them to manage affairs at local government level.¹²⁵ The authors view traditional leadership as a different kind of leadership, which embraces a much wider leadership role directed primarily at addressing other aspects of their communities. They are generally not the leaders responsible for integrated planning, water quality and managing solid waste, but the custodians of values and customs of the community they serve.¹²⁶

¹²² Act 4 of 2005.

¹²³ S 24(5) of the Eastern Cape Traditional Leadership and Governance Act 4 of 2005.

¹²⁴ Scheepers *et al* “Constitutional provisions on the role of traditional leaders and elected local councillors at rural level” 1998 *Obiter* 61 at 93.

¹²⁵ Scheepers *et al* 1998 *Obiter* 61 at 91.

¹²⁶ Scheepers *et al* 1998 *Obiter* 61 at 91. See also Ntshona & Lahiff 2003 *Sustainable Livelihoods in Southern Africa Research Paper* 5 31.

In this paradigm it might be unfamiliar for traditional leadership to exercise typical local government functions, as envisaged to be delegated to them by national or provincial legislation in respect of the functional areas defined in both the Constitution and the Traditional Leadership Governance Framework Act.

Scheepers *et al* thus propose a governance structure at local level that involves an equal partnership, promoting inclusiveness, as embraced in afrocentric thinking. This paradigm calls for both elected councillors and traditional leaders to become involved in various aspects of problems of development and demands that all are custodians of the well-being of the community they serve.¹²⁷

6.4 Interaction between traditional leadership institutions and municipal councils

Section 5(1) of the Traditional Leadership and Governance Framework Act compels both national government, as well as provincial governments, to promote partnerships between (a) district municipalities and kingship or queenship councils, as well as principal traditional councils and (b) local municipalities and traditional councils, through legislative and other¹²⁸ measures. Such partnerships must be based on principles of mutual respect and recognition of the status of the respective role players, and be guided and based on co-operative governance.¹²⁹ Note that the promotion of partnerships in terms of section 5(1) is compulsory and binds the respective parties to them accordingly.

Section 5(3) of the Act provides for the optional conclusion of service delivery agreements between traditional councils and municipalities. Moreover, the Local Government: Municipal Systems Act entitles a municipality to provide municipal services by entering into a service agreement with other entities, such as a traditional

¹²⁷ Scheepers *et al* 1998 *Obiter* 61 at 93.

¹²⁸ For example, administrative means.

¹²⁹ Par 2 above.

council.¹³⁰ The conclusion of such agreements gives effect to the principle of co-operative governance.¹³¹

It is submitted that in cases of an overlap of functions or conflict between a municipal and traditional council as to the means, timing or contents of the service to be delivered, co-operation between the two entities by means of a service delivery agreement seems appropriate. Scheepers *et al* point out that the overlapping of the areas of function and mandate of the various leaders operating at local government level does not necessarily stifle development. The authors suggest that “[i]t is in this area of overlap that through a process of synergy and combining the strengths available in the partnership, the best results can be achieved.”¹³² It is not clear how the synergy will be achieved.

There are various methods in which traditional councils and municipalities can act in co-operation as envisaged by the Act. These include and may require the following:

- Sharing of resources,¹³³ for example, office space.
- Regular contact between traditional councils/leaders and municipal officials¹³⁴ and councillors. In this case a framework for the reimbursement for travelling costs of traditional leaders is essential. Moreover, it should be uniformly applicable in respect of all municipalities within which traditional leaders participate.
- The identification of community development needs in rural areas¹³⁵ by traditional leaders or their representatives, like ward heads, as well as active councillors who have already introduced themselves to the community and are familiar with the socio-economic conditions of their respective constituencies.

¹³⁰ S 76 of the Local Government: Municipal Systems Act 32 of 2000.

¹³¹ Par 2 above.

¹³² Scheepers *et al* 1998 *Obiter* 61 at 93.

¹³³ Former Deputy Minister Carrim of the Department of Co-operative and Traditional Affairs in his speech at the Traditional Councils, Local Government and Rural Local Governance Summit, eThekweni 5 May 2010. See <http://www.cogta.gov.za/speeches> (last accessed 28-01-2014).

¹³⁴ Former Deputy Minister Carrim of the Department of Co-operative Governance and Traditional Affairs in his speech at the Traditional Councils, Local Government and Rural Local Governance Summit, eThekweni 5 May 2010. See <http://www.cogta.gov.za/speeches> (last accessed 28-01-2014).

¹³⁵ Former Deputy Minister Carrim of the Department of Co-operative Governance and Traditional Affairs in his speech at the Traditional Councils, Local Government and Rural Local Governance Summit, eThekweni 5 May 2010. See <http://www.cogta.gov.za/speeches> (last accessed 28-01-2014).

- Participation and review of progress by traditional leadership and the community in IDPs at local government level.¹³⁶
- Constant sharing of information on matters of mutual interest,¹³⁷ both at official meetings and traditional *imbizos*. Information to the community can be channeled through the traditional council in that area. Moreover, the Provincial and Local Houses of Traditional Leaders, where established, serve as convenient conduits of information to traditional councils. The Eastern Cape Province has an arrangement that the Provincial House of Traditional Leaders, by means of its Outreach Programme, reports quarterly to ten regions on activities undertaken and also to obtain new mandates from traditional councils.¹³⁸
- The involvement of traditional councils or representatives of traditional councils in the budgeting process.¹³⁹
- The intensification of capacity-building programmes for traditional leaders¹⁴⁰ and municipal councillors. In fact, in the Eastern Cape Province the Guidelines/Framework for Participation by Traditional Leaders in Municipal Councils¹⁴¹ provides that “[t]he Department and Municipalities shall support and strengthen the capacity of traditional leaders participating in municipal councils by providing skills development programmes and any other support deemed reasonable to make their participation effective.” Section 16 of the Eastern Cape Traditional Leadership and Governance Act¹⁴² makes specific provision for the

¹³⁶ Former Deputy Minister Carrim of the Department of Co-operative Governance and Traditional Affairs in his speech at the Traditional Councils, Local Government and Rural Local Governance Summit, eThekweni 5 May 2010. See <http://www.cogta.gov.za/speeches> (last accessed 28-01-2014).

¹³⁷ Former Deputy Minister Carrim of the Department of Co-operative Governance and Traditional Affairs in his speech at the Traditional Councils, Local Government and Rural Local Governance Summit, eThekweni 5 May 2010. See <http://www.cogta.gov.za/speeches> (last accessed 28-01-2014).

¹³⁸ Department of Traditional Affairs Report on the Assessment of the State of Governance within the Area of Traditional Affairs (2012) 32. <http://www.dta.gov.za/index.php/publications> (last accessed 11-03-2014).

¹³⁹ Former Deputy Minister Carrim of the Department of Co-operative Governance and Traditional Affairs in his speech at the Traditional Councils, Local Government and Rural Local Governance Summit, eThekweni 5 May 2010. <http://www.cogta.gov.za/speeches> (last accessed 28-01-2014).

¹⁴⁰ In the 2012/13 financial year the Department of Local Government and Traditional Affairs of the Eastern Cape Province spent R15 million for policy and legislative development, rural development and most importantly, traditional leadership capacitation programmes. See MEC Mlibo Qhoboshiane of the Eastern Cape Province Local Government and Traditional Affairs Provincial Budget Vote 2012/13 28 March 2012.

¹⁴¹ Par 11 of the Guidelines/Framework for Participation by Traditional Leaders in Municipal Councils.

¹⁴² Act 4 of 2005.

capacity development for traditional councils in that within a period of six months from the date of recognition, the Department has to assess the training needs of the members of the council, provide or cause to provide training to the members of the council, and monitor and evaluate the work of the councils.

In the 2012/2013 Annual Report of the Department of Local Government and Traditional Affairs the Director-General of the Department of Traditional Affairs¹⁴³ expressed his concern over unregulated partnerships established between traditional leadership and various stakeholders.¹⁴⁴ In the absence of a (legislative) framework to guide the establishment of these partnerships, the Department developed a Partnership Framework to be implemented in all provinces in 2014. It is obvious that section 5(1) partnerships and section 5(3) service delivery agreements are not applicable to traditional leadership and stakeholders other than the various municipal councils. A separate Partnership Framework is thus to be welcomed.

Section 15(1) of the Eastern Cape Traditional Leadership and Governance Act¹⁴⁵ enables traditional councils to enter into partnership agreements with municipalities in order to give effect to the provisions of the Act. Moreover, a traditional council may enter into a service delivery agreement with a municipality in accordance with the Local Government: Municipal Systems Act and other applicable legislation.¹⁴⁶ Such legislation may, of course, be the Traditional Leadership and Governance Framework Act.¹⁴⁷ In the Eastern Cape Province there are currently¹⁴⁸ no formal partnerships in the format of agreements or Memoranda of Understanding (MoU) between traditional and municipal councils.¹⁴⁹ However, there is a pilot partnership, with the MoU pending, between the Departments of Home Affairs and Local Government and Traditional Affairs with ten traditional councils involved. The traditional councils are responsible for the

¹⁴³ Prof MC Nwaila.

¹⁴⁴ <http://www.cogta.zov.za/reports> (last accessed 21-02-2014).

¹⁴⁵ Act 4 of 2005.

¹⁴⁶ S 15(3) of the Traditional Leadership and Governance Act, 2005 (Eastern Cape) Act 4 of 2005.

¹⁴⁷ Act 41 of 2003.

¹⁴⁸ At 30 January 2014.

¹⁴⁹ MEC Mlibo Qhoboshiane of the Eastern Cape Province Local Government and Traditional Affairs Provincial Budget Vote 2012/13 28 March 2012.

compilation of registers for births, late registration of births, deaths, population numbers, immigrant numbers and customary marriage concluded in the respective areas. In terms of the partnership the Department of Home Affairs uses the registers to verify their databases of the areas. Thereby the Department of Local Government and Traditional Affairs assists communities by bringing services to the traditional councils, which are more accessible and closer to the communities.¹⁵⁰

6.5 Houses of Traditional Leaders

There are three categories of Houses of Traditional Leaders in accordance with the respective levels of government, namely the National House of Traditional Leaders, Provincial Houses of Traditional Leaders and Local Houses of Traditional Leaders. Both the Constitution and the Traditional Leadership and Governance Framework Act provide for the optional establishment of the former two entities,¹⁵¹ the establishment having in fact taken place. The applicable legislation will be considered elsewhere.¹⁵²

The institution of Local Houses of Traditional Leaders is a novelty in terms of the Traditional Leadership and Governance Framework Act. A Local House must be established for the area of jurisdiction of a district or metropolitan municipality where more than one traditional council exists in that municipal area.¹⁵³ The functions of a Local House of Traditional Leaders include rendering advice to district or metropolitan municipalities in matters pertaining to custom, customary law, traditional leadership and traditional communities within the municipal area concerned, the development of planning frameworks that impact on traditional communities and the development of municipal by-laws that impact on traditional communities.¹⁵⁴ Local Houses participate in local development programmes, as well as in local initiatives aimed at monitoring and evaluating government programmes in rural communities.¹⁵⁵

¹⁵⁰ Written information received from the Eastern Cape Provincial Government Office of the General Manager: Traditional Governance and Finance, Mr Happy Kwetana, 30 January 2014.

¹⁵¹ S 16 of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁵² Par 7 below.

¹⁵³ S 17(1)(a) of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁵⁴ S 17(3)(a) of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁵⁵ S 17(3)(b) of the Traditional Leadership and Governance Framework Act 41 of 2003.

The rationale for the establishment of Local Houses of Traditional Leaders seems to be the promotion of co-operation between traditional leaders and municipal councillors, complementing traditional leaders' participatory role in local government and even between traditional leaders *inter se*. Moreover, the functions of the House are focused on the well-being of traditional communities, as well as the participation in development programmes. In this respect the statutory structures bring government to the people and fulfil the legislative imperatives *re* the enactment of legislation in recognition of the institution of traditional leadership.¹⁵⁶

In the Eastern Cape Province there are currently¹⁵⁷ no operational Local Houses of Traditional Leaders. In terms of section 17 of the Traditional Leadership and Governance Framework Act a Local House must be established in accordance with applicable provincial legislation. The Eastern Cape Traditional Leadership and Governance Act¹⁵⁸ does not make provision for the establishment of Local Houses of Traditional Leaders. However, the Province of the Eastern Cape Department of Local Government and Traditional Affairs is in the process of amending the provincial legislation to, *inter alia*, make provision for the establishment and operationalisation of Local Houses of Traditional Leaders.¹⁵⁹

6.6 Code of conduct for traditional leaders

The code of conduct contained in a Schedule to the Traditional Leadership and Governance Framework Act, listing twelve provisions of expected conduct, is binding on every traditional leader. Similarly, traditional councils are bound by six provisions of the execution of duties in an efficient manner.¹⁶⁰ It is noteworthy that both a traditional leader's and his/her council's functions to promote development in various guises, are not explicitly mentioned in the code of conduct. In so far as it is expected of traditional leaders and councils to act in the best interests of the traditional communities they serve,

¹⁵⁶ In terms of s 212 of the Constitution of the Republic of South Africa, 1996.

¹⁵⁷ At 30 January 2014.

¹⁵⁸ Act 4 of 2005.

¹⁵⁹ Written information received from the Eastern Cape Provincial Government Office of the General Manager: Traditional Governance and Finance, Mr Happy Kwetana, 30 January 2014.

¹⁶⁰ Olivier in Joubert *LAWSA* (2009) par 43.

one can probably assume that they have to promote development in the area and for the communities involved.

Schedule 1 of the Eastern Cape Traditional Leadership and Governance Act¹⁶¹ contains codes of conduct for both traditional leaders and traditional councils. Of particular importance is the conduct of a traditional leader to act in the best interests of the traditional community served.¹⁶² However, the Code of Conduct for Traditional Leaders Participating in Municipal Councils in the Eastern Cape Province makes it clear that a traditional leader participating in municipal councils must at all times act in the best interests of the municipality.¹⁶³ These provisions are contradictory and need to be reconciled.

7 NATIONAL HOUSE OF TRADITIONAL LEADERS ACT

The National House was established in 1997 by the National House of Traditional Leaders Act.¹⁶⁴ The Act was repealed in 2010 and replaced by the National House of Traditional Leaders Act.¹⁶⁵ Section 11 of the Act defines the powers and duties of the House. The first set of powers and duties relates to its co-operative powers and duties towards the provincial houses of traditional leaders, the most relevant for the purposes of the current discussion, the duty to promote socio-economic development and service delivery.¹⁶⁶ Its second set of powers and duties relates to the role of the House towards the national government. The following powers and duties are voluntary in nature:¹⁶⁷ It may advise and make recommendations relating to, for example, the role of traditional leaders, investigate and make available information on, amongst others, traditional leadership and traditional communities, participate in national and international programmes geared towards the development of rural communities and participate in national initiatives meant to monitor and review government programmes in rural

¹⁶¹ Act 4 of 2005.

¹⁶² S 1(g) of Schedule 1 of the Eastern Cape Traditional Leadership and Governance Act 4 of 2005.

¹⁶³ And thus not in the best interests of the traditional community. Par 12.2(b) of the Guidelines/Framework for Participation of Traditional Leaders in Municipal Councils.

¹⁶⁴ Act 10 of 1997.

¹⁶⁵ Act 22 of 2009.

¹⁶⁶ S 11(1)(a)(vi) of the National House of Traditional Leaders Act 22 of 2009.

¹⁶⁷ S 11(2) of the National House of Traditional Leaders Act 22 of 2009.

communities. Its capacity to investigate and make information available on, for example, traditional communities, may at national level inform decisions involving economic development on local governmental level. Certain powers and duties of the House are obligatory.¹⁶⁸ It must, for example, be consulted on national government development programmes that affect traditional communities, such as the LED and CRD programmes. Moreover, it must form co-operative relations and partnerships with national government in relation to development and service delivery.

8 COMMENTS

With various pieces of legislation impacting on the role, functions and duties of traditional leaders and their councils, it is clear that government is indeed concerned about the plight of the institution of traditional leadership and their communities vis-à-vis the establishment of wall-to-wall municipalities throughout South Africa. Whereas the Constitution contains briefly phrased provisions regarding the role of traditional leadership, other pieces of legislation, in particular the Traditional Leadership and Governance Framework Act, contain more defined functions for traditional councils (but not for traditional leaders). Both the Constitution and the Traditional Leadership and Governance Framework Act make provision for the promulgation of legislation respectively regulating the institution of traditional leadership and the functional areas of competence of traditional leaders, including economic development in the case of the latter. Other statutes, like the Local Government: Municipal Systems Act and the Local Government: Municipal Structures Act, applicable to municipalities and municipal councils, also impact on the role and functions of traditional leadership vis-à-vis the former entities by providing for a participatory role for traditional leaders in the councils.

Some synchronisation and simplification seem necessary in so far as the functions of traditional leadership are defined in various pieces of legislation, and in so far as they overlap. In this regard the interaction between the traditional leaders participating in municipal councils by nomination by the provincial MEC, representing traditional councils, and the traditional leaders represented in the Local Houses of Traditional

¹⁶⁸ S 11(2) of the National House of Traditional Leaders Act 22 of 2009.

Leaders requires clarification. Moreover, the functions of traditional leaders and municipal councillors also seem to overlap. As noted by Scheepers *et al*, overlap of functions is not necessarily detrimental to the promotion of development by local government. In a co-operative model of governance the rural “afrocentric wisdom” of traditional leadership complements the technical scientific advantages of “eurocentric experience” in local government. However, for this model to function successfully, an attitude of respect, integrity and honour within the ranks of traditional leaders and local councillors is required. It is impossible to institutionalise the required attitude. Moreover, in this model it is imperative that participants become skillful in the legal and policy framework process defining the parameters of their leadership roles,¹⁶⁹ implying the implementation of training programmes for all participants.

Tshehla is of the opinion that the Traditional Leadership and Governance Framework Act provides a context within which both local municipalities and traditional leaders can operate, since the Act recognises the roles of both institutions. In this respect, firstly, partnerships between local municipalities and traditional councils are of great importance.¹⁷⁰ Moreover, traditional and municipal councils may conclude service delivery agreements, clarifying specific needs and logistics. This could be done through joint initiatives that identify priority areas in local service delivery. Secondly, both traditional leaders and elected councillors should acknowledge their mutual dependence in the rural areas and that tensions between the two institutions might negatively impact on service delivery.¹⁷¹ This necessitates the attendance of municipal meetings by traditional leaders where they are in a position to raise matters concerning the needs of their communities for much needed socio-economic development, delivered by known and trusted agencies.

It is submitted that the above-mentioned legislation does not go far enough to accommodate traditional leadership in local level governance. The establishment of wall-to-wall municipalities throughout the Republic inevitably extended the legislative

¹⁶⁹ Scheepers *et al* 1998 *Obiter* 61 at 94.

¹⁷⁰ Tshehla March 2005 *SA Crime Quarterly* 16.

¹⁷¹ Tshehla March 2005 *SA Crime Quarterly* 18.

competence of local government into rural areas that were previously subject to the rule of traditional leadership. In terms of section 4(1)(a) of the Local Government: Municipal Structures Act the council of a municipality has the right to govern *on its own initiative*¹⁷² the local government affairs of the local community concerned. Moreover, the council must within its financial and administrative capacity, promote and undertake development in the municipality.¹⁷³ As elected structure, the local council has legislative and executive powers in the area where traditional authorities had been the primary authority exercising jurisdiction over the people in the rural area concerned.¹⁷⁴ The participation in local government of traditional leadership, as closest to the rural community, now depends upon their identification by the MEC for local government in a province.¹⁷⁵ To ensure co-operative governance, compulsory attendance of and participation in municipal meetings by traditional leaders should be a priority.

In their research paper on rural development, institutional change and livelihoods in the Mdudwa village in the Eastern Cape, Ntshona and Lahiff point out that the so-called “modern” or “technocratic” system of government represented by local municipalities cannot hope to replace the long-standing system of local governance by traditional leadership. According to them “the challenge facing rural local government is to find ways in which the resources and authority can be combined with the system of village governance in ways that build on the best elements of each.”¹⁷⁶ However, the legislature found it appropriate to bestow upon traditional leaders a mere consultative participatory role in rural local governance which does not create an equal partnership where the “best elements” of each can be maximised. Traditional leaders may only advise, participate in discussions, be informed and consulted. They have very limited effective power.¹⁷⁷ They have no voting rights. The only influence traditional leaders have in their own areas in the case of development lies in a co-operative relationship with local councils only if legislation provides for partnerships or where service delivery agreements have been

¹⁷² My emphasis.

¹⁷³ S 4(2)(g) of the Local Government: Municipal Structures Act 32 of 2000.

¹⁷⁴ Scheepers *et al* 1998 *Obiter* 61 at 87.

¹⁷⁵ In accordance with Schedule 6 and by notice in the *Provincial Gazette*. S 81(1) of the Local Government: Municipal Structures Act 117 of 1998.

¹⁷⁶ Ntshona & Lahiff 2003 *Sustainable Livelihoods in Southern Africa Research Paper 5* 34-35.

¹⁷⁷ Scheepers *et al* 1998 *Obiter* 61 at 87.

concluded. From the information provided on the position in the Eastern Cape Province it is clear that such partnerships are lacking. Thus provincial legislation has to be put in place to give effect to section 5¹⁷⁸ partnerships and to ensure representation by the rural community in their own development.

Former Deputy Minister Carrim points out that the relationship between traditional and municipal councillors can contribute to good local governance, but on certain conditions only:¹⁷⁹ Firstly, relations between traditional and municipal councils will improve only if relations between the institution of traditional leadership as a whole and government in general improve. However, better relations cannot be enforced by legislation. Secondly, and supplementing the afore-mentioned, the relations between traditional councils and municipalities cannot be separated from the broader challenges of the relationship between the institution of traditional leadership and local government – and these challenges need to be addressed.¹⁸⁰ Both municipalities and traditional leadership need to respect their respective status and roles. This is one of the principles of the code of conduct for both traditional leadership and municipal councillors, as dealt with before.¹⁸¹ Thirdly, and more crucially, they have to be better informed about the policies and legislation that define their respective roles and relationships. In the fourth place, they need to understand and appreciate the potential of mutually beneficial relationships. If municipalities and traditional councils develop effective relationships, service delivery and development can be significantly advanced in rural areas, where the biggest challenges lie. Both municipalities and traditional councils need to reach out to each

¹⁷⁸ Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁷⁹ Not necessarily regulated by law. See speech entitled “Forging ties between traditional councils and local government” delivered at the Traditional Councils, Local Government and Rural Local Governance Summit, eThekweni 5 May 2010.

¹⁸⁰ See, for example, par 4 above for the respective perceptions of traditional leaders and municipal councillors *re* each other. The position of traditional leadership might be improved by granting them voting rights in a municipal council. From councillors’ perspective, the compulsory attendance and participation by traditional leaders in municipal meetings and training in municipal policy and legislation, might improve relations.

¹⁸¹ Par 4 above.

other. According to Carrim, it is for municipalities to be more active in trying to secure an effective relationship,¹⁸² probably because they have the resources to do so.

As has been noted above, traditional leaders participating in municipal councils do not have voting rights. Carrim points out that traditional leaders are generally opposed to participate without the right to vote. They complain that theirs is token participation.¹⁸³ This position needs to be revisited by government. Carrim identifies different views on how to deal with the issue. Firstly, some argue that if Local Houses of Traditional Leaders in each local municipality are established and operate effectively, and if municipalities take traditional councils seriously, there is no need for traditional leaders to participate in municipal councils. However, this option is not viable as long as Local Houses of Traditional Leaders are not operational country-wide. It has already been established that there is currently no provincial legislation in the Eastern Cape Province which enables the establishment of Local Houses of Traditional Leaders in the province. Secondly, others recommend that traditional leaders should be given the right to vote in municipal councils. As the institution of traditional leadership is no longer hereditary,¹⁸⁴ there should not be objection to traditional leaders obtaining voting rights. For this representation to be effective, voting rights are essential. Thirdly, yet another viewpoint seems to prefer the current situation¹⁸⁵ where a participatory role is maintained.

Of particular concern for the representation of traditional communities in municipal councils is the statutory provision that traditional leaders who participate in local councils are obliged to seek the best interests of the municipality, and by implication, not those of the traditional communities concerned. Legislation on the functions of traditional leaders

¹⁸² In his speech entitled “Forging ties between traditional councils and local government” delivered at the Traditional Councils, Local Government and Rural Local Governance Summit, eThekweni 5 May 2010.

¹⁸³ Former Deputy Minister Carrim of the Department of Co-operative Governance and Traditional Affairs in his speech at the Traditional Councils, Local Government and Rural Local Governance Summit, eThekweni 5 May 2010. <http://www.cogta.gov.za/speeches> (last accessed 28-01-2014).

¹⁸⁴ S 10A(1) of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁸⁵ Former Deputy Minister Carrim of the Department of Co-operative Governance and Traditional Affairs in his speech at the Traditional Councils, Local Government and Rural Local Governance Summit, eThekweni 5 May 2010. <http://www.cogta.gov.za/speeches> (last accessed 28-01-2014).

demands of traditional leaderships to promote the best interests of the community.¹⁸⁶ These potentially conflicting provisions need to be revisited and synchronised.

9 CONCLUSION

Five years after the current government's initiative to fight poverty, create jobs and improve life standards, at all levels of government,¹⁸⁷ it bears repeating that there is a dire need for the socio-economic development in South Africa's rural areas. Whereas this is primarily the role of government at national, provincial and local levels, the active involvement of the institution of traditional leadership is imperative. Legislation dealing with the developmental functions of traditional leadership is varied and various structures¹⁸⁸ are involved with the discharge thereof. The interaction between these various structures seems not only complex and overlapping, but also merely consultative in many respects. The loose terms of "assisting", "supporting", "facilitating", "recommending", "participating" and "promoting"¹⁸⁹ need to be systematised into functional institutional mechanisms to maximise the contribution of traditional leadership to development in local governance. This is necessitated by the principle of co-operative governance, in order to promote cohesion and prevent conflict between traditional leadership and municipal councils.

¹⁸⁶ The code of conduct as contained in the Schedule to the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁸⁷ Par 1 above.

¹⁸⁸ For example, traditional councils, the National, Provincial and Local Houses of Traditional Leaders.

¹⁸⁹ The functions of traditional councils in terms of s 4(1) of the Traditional Leadership and Governance Framework Act 41 of 2003.