

# Demarcating provincial and local powers regarding liquor retail

*Jaap de Visser\**

## 1 Introduction

Local government's newly acquired status as a fully-fledged sphere of government with constitutionally protected powers is slowly gaining momentum.

Now that the dust is slowly settling around the demarcation and establishment of local government *institutions*, the demarcation of local government *powers vis-à-vis* other spheres of government is fast becoming a critical area of academic research and intergovernmental dialogue. As they become aware of their constitutional scope, municipalities will start asserting their institutional integrity with powerful metropolitan municipalities taking the lead.

In an earlier article in this journal, the approach to local government powers as set out in the Constitution was outlined.<sup>1</sup> This article takes the matter further and presents a case study on the demarcation of local government powers in one specific area, namely the regulation of the liquor retail industry.

In the *Liquor Bill* judgment of 2000 more clarity was provided about *national* versus *provincial* powers regarding the liquor retail industry.<sup>2</sup> Another important issue is the division between *provincial* and *local* powers. Schedule 5A of the Constitution lists 'Liquor licences' as a provincial competency. Schedule 5B of the Constitution lists 'Control of undertakings that sell liquor to the public' as a local government competency. This apparent overlap in the constitutional regime on provincial and local legislative powers over liquor retail matters raises two demarcation issues. The first demarcation issue is: what is the difference between 'Liquor licences' (a provincial competency) and 'Control of undertakings that sell liquor to the public' (a local government competency)? This question will be dealt with in sections 2 and 3 of this article. The second demarcation issue is: to what

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\*LLB (Utrecht) LLM (UWC). Researcher/lecturer in Public Law, Institute for Constitutional and Administrative Law, Utrecht University (Netherlands). The author wishes to thank the City of Cape Town and the Western Cape Local Government Association (WECLOGA) for making research for this article possible.

<sup>1</sup>De Visser 'Powers of local government' (2002) 17 *SAPR/PL* 223-243.

<sup>2</sup>*Ex parte President of the Republic of South Africa In re: Constitutionality of the Liquor Bill* 2000 1 BCLR 1 (CC); 2000 1 SA 732 (CC).

extent can provinces still exert influence over municipal lawmaking on the 'Control of undertakings that sell liquor to the public'? This issue will be discussed in section 4 of this article. Finally, section 5 addresses some practical consequences of the arguments put forward here.

## 2 Definition of 'liquor licences'

The judgment of the Constitutional Court in the *Liquor Bill* case is instrumental in plumbing a definition of the provincial competency 'Liquor licences'. In line with the Bill before it, the Court divided the industrial chain regarding liquor into (1) manufacturing, (2) wholesale distribution and (3) retail sale.

The new Liquor Act<sup>3</sup> follows the same approach and in section 1 it defines retail sale as 'the sale of liquor for the purpose of consumption'. A retail seller is defined as 'a person who is registered or licensed in terms of applicable provincial legislation to sell liquor, or make liquor available for sale, for the purpose of consumption'.

It is clear from the *Liquor Bill* judgment and from the division put forward in the Liquor Act that the competency 'Liquor licences' is concerned with retail sale.

Cameron AJ, in writing for the Court in the above judgment, accepted the definition of a liquor licence as 'the permission that a competent authority gives to someone to do something with regard to liquor that would otherwise be unlawful' and he described the activity as 'the sale of liquor at specified premises'. According to the Court, the constitutional term 'Liquor licensing' encompasses –

- 1 the grant or refusal of the permission concerned;
- 2 the power to impose conditions pertinent to that permission; and
- 3 the collection of revenue that might arise from or be attached to its grant.<sup>4</sup>

Where provinces are afforded exclusive competency over a particular matter, it is suggested that this matter should be interpreted as one that is most appropriately legislated in the provincial sphere because it requires provincial uniformity. That backdrop is also helpful when trying to locate the borderline with 'Control of undertakings that sell liquor to the public'. It is submitted that the issues that require provincial uniformity in the liquor retail industry centre around three themes, namely (1) a fair, equitable and flourishing liquor retail market, (2) health and basic safety and (3) security and reducing socio-economic costs of alcohol consumption.

A fair, equitable and flourishing liquor retail market includes matters such as protecting free market principles (eg retailers should have no substantial interests in wholesale distributing companies), promoting entry of new participants, stimulating regional and provincial retail industry (eg wine

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<sup>3</sup>Liquor Act 59 of 2003.

<sup>4</sup>Para 56.

industry), rules for the content of advertising, employment issues in the retail industry, promoting business skills of retailers, et cetera.

The issue of health and basic safety and security includes what types of liquor may be sold, suitability of premises, hygiene issues, suitability of the applicant (to prevent unsuitable candidates going ‘shopping’ with different municipalities), et cetera.

Reducing socio-economic costs of alcohol consumption has to do with matters such as addressing alcohol abuse, preventing the sale of liquor to minors, combating drunk driving, preventing the sale of liquor to drunk persons, promoting general social responsibility in the retail industry, et cetera.

It is submitted that the competency ‘Liquor licences’ involves the grant or refusal of the permission to sell liquor, the power to impose conditions pertinent to that permission and the collection of revenue that might arise from or be attached to its grant in so far as it is directed at achieving the objectives that require provincial uniformity as mentioned above.

### 3 Definition of ‘control of undertakings that sell liquor to the public’

A more complex issue is the delimitation of the above provincial competency and the municipal competency ‘Control of undertakings that sell liquor to the public’. The mere fact that the Constitution includes the two competencies in two different lists indicates that, despite the obvious overlap, there is a difference.

#### 3.1 Preliminary considerations

It is submitted that the exercise of delimitation must be informed by the following considerations. First, delimitation of competencies can never be absolute.<sup>5</sup> Overlap is inevitable and the resulting tension must be resolved within the framework of co-operative government. Second, this does not mean that delimitation of competencies is unnecessary. Co-operative government is based on respect for institutional status<sup>6</sup> and on the duty to refrain from assuming powers or functions, except those conferred in terms of the Constitution.<sup>7</sup> A certain degree of clarity on functions and powers is necessary before negotiations to resolve the above tension can be useful. Third, the inquiry whether particular legislation lies outside the competency of a particular sphere depends not only on its form but also on the purpose and effect (‘pith and substance’).<sup>8</sup> It is suggested that this is particularly

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<sup>5</sup>See also paras 47, 55 and 62 of the *Liquor Bill* judgment where the Constitutional Court recognised the same with regard to Sch 4 and 5.

<sup>6</sup>S 41(1)(e) of the Constitution.

<sup>7</sup>S 41(1)(f) of the Constitution.

<sup>8</sup>See para 62 of the *Liquor Bill* judgment. The Constitutional Court discussed the relevance of the ‘purpose and effect’ of legislation in the event of an inquiry into the constitutional competency to enact such legislation.

relevant in relation to local government's constitutional mandate, commonly termed as 'developmental local government'.<sup>9</sup> If the 'purpose and effect' of provincial legislation on a Schedule 5A matter that has a 'local government counterpart' (in Schedule 4B or Schedule 5B) overlaps with this mandate of developmental local government, it goes beyond what is constitutionally permitted. Assisted by these general considerations, the borderline between the two competencies can be identified.

### 3.2 Defining local government's role

The definition of local government's role, as enunciated in the constitutional competency 'Control of undertakings that sell liquor to the public' comprises two elements: (1) the *undertakings* that sell liquor to the public and (2) the *control* of such undertakings.<sup>10</sup> The first element reveals an overlap with the above definition of retail sale of liquor (see section 2 above). These undertakings include bars, taverns, bottle stores, restaurants, grocery stores, micro-breweries and wine estates. The dictionary meaning of the word 'control' refers to 'dominate, command, hold in check, verify, regulate (prices etc)'.<sup>11</sup> What then, is it that the Constitution wants local government to 'control', if it is not the possession of a liquor licence? In view of the fact that the Constitution refers to 'the undertakings' that sell liquor, it is suggested that the control measures must relate to *the act of selling liquor to the public*.<sup>12</sup>

As stated above, the constitutional objects of local government and the notion of developmental local government are relevant to this inquiry. Municipalities must promote social and economic development and they must promote a safe and healthy environment.<sup>13</sup> In other words, the development of communities and the protection of the environment in which they live, are primary concerns for local government.

It is submitted that the Schedule 5B competency sees to the 'public order' effects of liquor outlets. Local government's perspective in regulating the liquor industry is: *the impact that the act of selling liquor has on the community around a liquor outlet*. The composition of the two Schedules, particularly their local government components, bears testimony to this constitutional intention. Competencies such as 'Municipal planning', 'Amusement facilities', 'Control of public nuisances', 'Noise pollution', 'Public places' and 'Traffic and parking' are all aimed at regulating 'public order effects' of a myriad of activities, including the sale of liquor.<sup>14</sup>

<sup>9</sup>Ss 152 and 153 of the Constitution. See *White Paper on Local Government* March 1998 17.

<sup>10</sup>See Steytler 'Submission to the Portfolio Committee on Trade and Industry on the Liquor Bill' 2003 Community Law Centre. Available at [www.communitylawcentre.org.za](http://www.communitylawcentre.org.za) (accessed 28 September 2004).

<sup>11</sup>*The Concise Oxford Dictionary*.

<sup>12</sup>Steytler (n 10).

<sup>13</sup>S 152(1)(c) and (d) of the Constitution.

<sup>14</sup>Sch 4B and Sch 5B of the Constitution.

Support for this can also be found in *Bulk Deals Six v Chairman of the Liquor Board of the Western Cape*.<sup>15</sup> The case was decided under the old Liquor Act<sup>16</sup> but is instructive. The provincial Liquor Board had refused a liquor licence on the basis of its conviction that granting it would not be in the 'public interest',<sup>17</sup> because 'the opening of restaurants that trade extensively during the evenings will have an impact on the surrounding residents'.<sup>18</sup> The Board contended that the Act required it to consider the impact of granting a licence on the residents of the surrounding area.

The Court held that the Board erred in elevating the interests of people living close to the liquor outlet to the 'public interest'.<sup>19</sup> The Board had overemphasised the interests of the residents. The Court made it clear that issues such as traffic noise are dealt with (through, for example, zoning) at local level and that the Board should have considered issues such as free market principles and the nature of the establishment.<sup>20</sup>

This judgment shows that, even under the old Liquor Act of 1989, there is a distinction between *granting liquor licences* and *controlling their effect on public order*. It is submitted that there is no reason why this approach should not be followed when interpreting Schedule 5 of the Constitution. If 'Liquor licences' were to include controlling the 'public order effects' of undertakings that sell liquor, there would be no point for the Constitution in listing the latter as a separate competency where local government is the primary policy formulator.

It is suggested that local government may control undertakings that sell liquor to the public *regardless of whether or not they have a liquor licence*. It goes without saying that selling liquor without a licence is prohibited<sup>21</sup> and local government could be tasked by the province to enforce this (eg through delegation or assignment). However, the Schedule 5, Part B competency does not confer on local government the authority to enforce provincial liquor licence regulations. The corollary of this argument is the following: the mere fact that a liquor outlet is unlicensed does not place it outside the competency of the municipality to control its activities.

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<sup>15</sup>(2001) JOL 8979 (C).

<sup>16</sup>Act 27 of 1989.

<sup>17</sup>S 22(2) of the Act mentions the 'public interest' criterion together with criteria such as the suitability of the premises, the manner in which the business will be carried out if there is a church or school in the vicinity (or if the outlet is in a residential area) and the 'good character' of the applicant.

<sup>18</sup>Para 6.5.

<sup>19</sup>Para 9.4.

<sup>20</sup>Para 10.2: '... it is doubtful whether the Board was entitled to have regard to the possible traffic noise as a ground for refusing the licence. The shopping centre is a commercial reality and in terms of the zoning applicable to the land on which it has been built, a restaurant business may be conducted in it. Why residents who chose to acquire their properties near to the business area which had been zoned for business as long ago as 1973 should in effect be able to prevent a restaurant business from being operated on a centre on the speculative grounds that its patrons will be responsible for traffic noise is not clear'.

<sup>21</sup>The Liquor Act does not include a general prohibition. Provincial governments will have to include it in their legislation.

### 3.3 What are 'public order effects'?

What are the 'public order effects' that the Constitution wants local government to control? It is submitted that they involve first, the question *where* liquor should be sold to the public and secondly, *when* liquor should be sold to the public.

Municipalities decide *where* liquor may be sold mainly through the zoning of properties for such a purpose. Local government, as the institutional *locus* of community interests, can articulate the interests of residents and is best placed to have regard to the issues that the Court in *Bulk Deals Six* correctly excluded from the realm of the province's decision. These are issues such as traffic noise, other noise pollution, development of the area, social considerations pertaining to the community concerned, children's safety, vicinity of places of worship, old age homes and child care facilities, and in particular communities' views on these matters.

Municipalities also decide *when* liquor may be sold. In other words, municipalities decide the opening hours of liquor outlets and decide on which days liquor may be sold. In this regard, it is contended that the current practice where provincial Liquor Boards prescribe in a liquor licence when the licensee can sell liquor lies outside the provincial competency 'Liquor licences'. The extent to which this practice could be permitted in terms of the provincial competency to regulate 'Control of undertakings that sell liquor to the public' in terms of section 155 of the Constitution, is part of the second demarcation issue and will therefore be discussed below.

## 4 Provincial competency to regulate municipal lawmaking

### 4.1 Preliminary considerations

Local government's competency to legislate on the control of liquor outlets is not exclusive to local government. The provincial government may also legislate on these matters, albeit only 'to the extent set out for provinces in sections 155(6)(a) and 155(7)'.<sup>22</sup>

This means that the provincial government has two areas of competency with regard to the liquor industry. The first area is the *full*<sup>23</sup> competency on liquor licences (as defined above). The second is the *limited* competency to legislate on the control of liquor outlets by local government. The two should be clearly distinguished. There is a danger that provincial legislation on matters pertaining to the control of liquor outlets may be too easily sanctioned on the basis of its competency regarding 'Liquor licences'. Because its competency regarding 'Liquor licences' is an unconstrained competency, this approach would result in a breach of local government's institutional integrity.

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<sup>22</sup>Sch 5B of the Constitution (the heading).

<sup>23</sup>Barring national intervention in terms of s 44(2) of the Constitution.

## 4.2 Sources of provincial power in local government matters

As stated above, there are two provisions in the Constitution that provide a basis for provincial lawmaking on local government matters. Section 155(6)(a) confers the power on provincial governments to –

... by legislative or other measures (...) provide for the monitoring and support of local government in the province.

Section 155(7) states that provincial governments –

... have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

The Constitution instructs local government to strive towards promoting development in its area of jurisdiction. It is suggested that this instruction necessitates an interpretation of local government powers that recognises the need for sufficient municipal discretion in regulating Schedule 5B matters such as control on liquor outlets. If local government is to live up to the constitutional promise of ‘developmental local government’ it must be allowed to govern at its own initiative, as stipulated by section 151(3) of the Constitution, without undue interference from central and/or provincial governments. At the same time, the imperative of coherent governance requires provincial oversight and regulation.

### 4.2.1 Provincial power to monitor

It is suggested that the provincial power to *monitor, laid down in* section 155(6)(a) may entail legislative measures aimed at establishing a monitoring framework.

The Constitutional Court has held that the word ‘monitor’ in section 155(6) does not represent a substantial power in itself, certainly not a power to control [local government] affairs, but has reference to other, broader powers of supervision and control.<sup>24</sup>

According to the Court, the power to monitor should not be interpreted as –  
... bestowing additional or residual powers of provincial intrusion on the domain of local government, beyond perhaps the power to measure or test at intervals its compliance with national and provincial legislative directives or with the Constitution itself. What the [Constitution] seeks hereby to realise is a structure for [local government] that, on the one hand, reveals a concern for the autonomy and integrity of [local government] and prescribes a hands-off relationship between [local government] and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor [local government] functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy.<sup>25</sup>

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<sup>24</sup>*Certification of the Constitution of the RSA, 1996, In re: Ex parte Chairperson of the Constitutional Assembly, 1996* 10 BCLR 1253 (CC); 1996 4 SA 774 (CC) para 372.

<sup>25</sup>Para 373.

In sum, the power to monitor does not provide a provincial government with powers regarding the control of liquor outlets *that are additional to the powers of local government*. It may be used only as a means to obtain information from local government on the exercise of its powers to control liquor outlets and as a means to prescribe ways and procedures to provide information. This information may then be used in the context of provincial support and provincial supervision of local government.<sup>26</sup>

#### 4.2.2 Provincial power to support

According to the Court, the powers to *support* local government

...can be employed by provincial governments to strengthen existing [local government] structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions.<sup>27</sup>

The Court terms the power to support in conjunction with other powers ‘substantial’ and states that ‘they facilitate a measure of provincial government control over the manner in which municipalities administer’ Schedule 5, Part B matters.<sup>28</sup>

Despite the fact that the power to support is substantial, it is clear that it comes into play only in the event of (threatening) decline or degeneration of local government performance. In the absence of a need to address or prevent such degeneration or decline, the power to support cannot be construed as providing the provincial government with any say in the content of municipal law on the control of liquor outlets.

#### 4.2.3 Provincial power to regulate

The powers to regulate conferred on the provincial government by section 155(7) are significant, albeit also limited. The Constitutional Court labels section 155(7) a ‘substantial constraint’.<sup>29</sup> The power is circumscribed by the context of seeing to the ‘effective performance by municipalities of their functions’ and by the term ‘regulating’. The term ‘seeing to’ connotes a certain distance. The term ‘regulating’ in the context of section 155(7) was held by the Constitutional Court to connote ‘a broad managing or controlling rather than direct authorisation function’.<sup>30</sup>

It is suggested that the provincial power to regulate Schedule 5B matters does provide the province with a say in the content of municipal law on the control of liquor outlets. However, this provincial say is limited to setting a

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<sup>26</sup>See also ss 154(1) and 139 of the Constitution.

<sup>27</sup>(N 24) para 371.

<sup>28</sup>Para 371.

<sup>29</sup>Para 366. In *Independent Electoral Commission v Langeberg Municipality* 2001 9 BCLR 883 (CC); 2001 3 SA 925 (CC) para 25 the Constitutional Court states that national legislative authority is ‘limited’ on account of s 155(7). The same applies to provincial legislative authority.

<sup>30</sup>(N 24) para 377.

framework. It is not open to provincial governments to regulate the detail of municipal law on the control of liquor outlets. The framework must be understood as setting the outer boundaries, providing minimum standards while leaving intact a substantial degree of municipal discretion to make policy decisions on the issue for the locality.

In sum, sections 155(6)(a) and 155(7) confer on the provincial government the power to provide a framework within which local government is to exercise its powers to control liquor outlets. These powers do not extend to the detail of municipal law on control of liquor outlets. They permit the provincial government to set standards and establish minimum requirements and provide the provincial government with the power to legislate monitoring procedures.

## 5 Some practical examples

What does the regime that was discussed above mean for the current development of policy and practice in the area of liquor retail? The final section of this article provides practical examples of the application of this scheme for dividing powers and functions on liquor retail matters between provincial and local government. Particular reference will be made to recent policy developments in the Western Cape, which provide a useful illustration of some of the issues that elicit debate.

### 5.1 *Opening hours*

Earlier, the suggestion was made that the constitutional division of powers implies that a provincial determination of the opening hours of a particular liquor outlet is not in keeping with the Constitution. It is a local government function to control the times when a particular undertaking sells liquor. However, section 155(6)(a) and 155(7) of the Constitution allows provincial government to determine the framework within which local government exercises this power. This could include categories, linked to maximum hours of trade, other general principles for opening hours, monitoring procedures, and so on. A case could be made out for the provincial government setting a provincial standard for days on which liquor outlets are open (eg pertaining to Sundays and public holidays). Provincial government could prescribe monitoring procedures, such as municipal reports on the number of inspections conducted, fines handed out, criteria used for enforcement, and so on.

### 5.2 *Interface between provincial and municipal legislation*

If the Constitution affords the two spheres of government distinct areas of legislation, how do the two regulatory schemes interact in a particular instance? Is the provincial act of issuing a licence subject to the provisions of by-laws adopted in terms of Schedule 4B or Schedule 5B? For example, to what extent is the issuing of a liquor licence subject to municipal town

planning legislation or building regulations? Town planning and building regulations are Schedule 4B competencies. Municipalities administer their own town planning schemes and building regulations within the parameters set by the provincial government. In order to answer this question adequately, a distinction must be made between two possible scenarios.

The first scenario would be where the province issues a licence on the basis of considerations and subject to conditions that fall *within the realm of a Schedule 4B function or a Schedule 5B function*. For example, a liquor licence is issued to a particular entrepreneur and this licence stipulates that liquor may be sold at a particular outlet from 10 am until 11 pm. This provincial decision falls outside of the competency 'Liquor licences' (as defined in section 2 above). It also falls outside of the provincial competency in terms of section 155(6)(a) or 155(7) (as defined in section 3 above). These two provisions permit the province to regulate 'the exercise *by municipalities of their executive authority*' over Schedule 5B matters.<sup>31</sup> Section 155(6)(a) and 155(7) does not permit the province to replace the municipal exercise of these functions with its own decision. This would militate against the intention of the Constitution to reserve the regulation of 'public order' effects of liquor sales for municipalities. What would be the purpose of affording local government a competency if the issue can be completely determined by the province? The province acts in contravention of the Constitutional division of powers between provincial and local government. The act of issuing a licence will be invalid because it is based on legislation that is unconstitutional.

The second scenario would be where the province issues a licence on the basis of considerations and subject to conditions that fall *within the realm of 'Liquor licences'* (as defined in section 2 above) but the licence holder fails to comply with by-laws adopted in terms of Schedule 4B or Schedule 5B. For example, a licence has been issued but the premises from which the licence will be operated does not comply with provisions in a municipal by-law pertaining to issues such as land use planning, permit schemes, trading hours of liquor outlets, permits to exceed noise levels, and so on. Another example: a provincial liquor licence is issued but the municipal by-law stipulates that liquor sales in that area after 6 pm require a municipal permit. This scenario should be treated differently. The onus is on the entrepreneur to ensure that the necessary permits are obtained and municipal laws adhered to. The act of issuing a provincial licence itself is not dependent on whether or not the applicant also complies with other regulations. This is the applicant's responsibility. After the liquor licence has been issued, the provincial government can no longer enforce the general prohibition of selling liquor without a licence because the applicant does have one. However, the municipal government can still enforce its own by-laws and regulations. In other words, the licence is indeed subject to the provisions of the municipal by-law to the

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<sup>31</sup>Emphasis added.

extent that the entrepreneur cannot commence with the activities before these municipal laws have been complied with.

The need for coherent administration requires that provincial government and local government attempt to integrate their respective application procedures as far as possible. However, this cooperation should be premised on cognisance of, and respect for, the distinct areas of governance that the Constitution has allocated to the two spheres of government.

### 5.3 Examples of provincial policy

It seems that provincial departments are having difficulties appreciating the new constitutional dispensation and its consequences for provincial and local government powers. An analysis of the recently promulgated *Proposed Liquor Policy for the Western Cape*<sup>32</sup> reveals a view of local government powers which, according to the author, is at odds with the Constitution.

First, the policy seems to follow the correct course when it says that ‘liquor trading days and hours in an area of jurisdiction of a municipality will not be imposed by the provincial liquor legislation’.<sup>33</sup> However, it continues by stating that provincial legislation will authorise *appointed* municipalities to set liquor trading days and hours by by-law.<sup>34</sup> It is suggested that it should be apparent from the Constitutional regime as outlined above that the Constitution *has already authorised all municipalities to set liquor trading days and hours*. The provincial government may regulate the exercise of this function within the limits of section 155(6)(a) and 155(7). The provincial government exceeds these constitutional constraints as soon as it prevents municipalities from exercising their constitutional competency by not ‘appointing’ them.

Second, municipal by-laws that set the liquor trading days and hours are ‘subject to the approval process by the Minister responsible for economic development’.<sup>35</sup> From the above scheme it follows that it is not open for the provincial government to require provincial approval of municipal by-laws. These by-laws are enacted within a competency that the Constitution has reserved for local government, namely ‘Control of undertakings that sell liquor to the public’. It is submitted that section 155(6)(a) and 155(7) does not permit this kind of ‘regulation’ of a local government competency either. Other proposals that the *Provincial Liquor Policy* makes, such as the Minister setting closed days and maximum hours of trade regulation, are permissible.<sup>36</sup> However, *approval* entails a (possible) review of the by-law on all aspects. According to the Constitutional Court, municipal councils are legislative

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<sup>32</sup>Draft approved by the Provincial Minister of Finance and Economic Development. Hereafter, *Provincial Liquor Policy*.

<sup>33</sup>*Id* 77.

<sup>34</sup>*Ibid*.

<sup>35</sup>*Ibid*.

<sup>36</sup>*Id* 148.

assemblies in their own right<sup>37</sup> and their legislative products are in no way less protected against provincial (dis)approval than provincial acts are against national (dis)approval.

Third, the Provincial Liquor Policy states that the provincial Liquor Board will have the right to impose restricted trading hours *despite of the municipal by-law* 'should the location or circumstances warrant this'.<sup>38</sup> If this were to become law, it would go outside the parameters of the Constitution. There would be no point in a constitutional competency to legislate on a particular topic, if that legislation can be ignored in a provincial procedure.

Fourth, according to the *Provincial Liquor Policy*, the Western Cape government intends to require from municipalities that they submit by-laws relating to municipal liquor trading functions for approval to the Minister for Economic Development.<sup>39</sup> However, any requirement to submit by-laws to provincial organs for reasons other than the sharing of information or publication in the *Provincial Gazette* is unconstitutional.

Another proposal that does not bode well for local government is one that makes provision for the approval of a licence when the land use requirements are not met. The policy asserts that, under certain conditions, the outlet 'will be deemed to meet the land use planning requirements set by the municipality for the premises'.<sup>40</sup> It is submitted that this proposal goes beyond what is constitutionally permitted. Municipal planning is a local government competency. To allow provincial government to unilaterally make the decision as to whether or not municipal planning requirements are ('deemed to be') met, is not in keeping with the constitutional division of powers and functions. The precedent in other provincial legislation, referred to by the *Provincial Liquor Policy*, does little to mend this constitutional disjuncture. On the contrary, the multitude of precedents in national and provincial statutes that ignore local government's place in the Constitution is precisely the problem. A 'deeming provision' such as the one proposed in the Western Cape Liquor Policy does not prevent the relevant municipality from continuing to enforce its own land use planning rules *vis-à-vis* the retailer, despite any certificate or permit to the contrary, issued by the Liquor Board.

## 6 Conclusion

In this article it was argued that the Constitution instructs provincial and local government to arrive at an approach where provincial government is

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<sup>37</sup>*Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC); 1999 1 SA 374 (CC) para 26.

<sup>38</sup>78; see also *Provincial Liquor Policy* (n 32) 150.

<sup>39</sup>The Policy substantiates this requirement by making reference to 'the requirements prescribed for by-laws as contained in the Municipal Structures Act 32 of 2000' (205). However, neither the Municipal Systems Act 32 of 2000 nor the Municipal Structures Act 117 of 1998 contains requirements or procedures for submitting by-laws to the provincial executive.

<sup>40</sup>20.

responsible, through liquor licensing, for regulating the liquor retail market in general, securing health and basic safety as well as reducing socio-economic costs of alcohol use – while local government’s developmental mandate requires municipalities to regulate the ‘public order’ effects of liquor sales (subject to provincial standards). The latter boils down to determining *when* and *where* liquor may be sold. The division of responsibilities between provincial and national government cannot be absolute, and problems arising from the inevitable overlap need to be solved within the framework of co-operative government. Examples taken from the *Western Cape Provincial Liquor Policy* reveal that the changes in the constitutional design of local government are not being appreciated fully by policy makers in this area. In order for the policy to pass constitutional muster, it needs revision in the areas where it encroaches on local government’s institutional integrity.