Adding Injury to Insult: Intrusive Laws on Top of a Weak System

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I Introduction

Local governments often encounter difficulties when state functions and powers are devolved to them.[1] Capacity at local level often becomes the Achilles heel of devolution. This is the case in South Africa.[2] The South African national government has undertaken a variety of capacity-building initiatives to address the capacity problems faced in the South African system of local government. A flurry of legal instruments containing capacity-building measures have been passed and more are in the offing. This paper is inspired by the argument raised by Steytler and De Visser about the national government's attempt to legislate systemic problems faced by municipalities out of existence. I consider the overregulation relating, among others, to the professionalisation[3] of, and capacity building at, local government. I argue that the practice of throwing a law at the problem erodes respect for the rule of law, a principle explicitly listed as one of the foundational values of our constitutional democracy,[4] in that many rules make compliance impossible, leading to compliance fatigue and the resultant lawlessness. The multiplicity of laws also threatens to undermine municipalities' constitutionally-entrenched independence and authority over their own affairs.

I begin in Part II by painting a general picture of the current state of local government in South Africa, in order to uncover the rationale for the national government's interventions in local government. In Part III, I look at the initial short term interventions the national government attempted, which did not yield tangible outcomes. In Part IV I show how the overregulation that forms the crux of this paper has its basis in the Constitution and the statutes giving effect thereto. I set out specific instances of duplication, contradiction and overlapping by competing national departments vying for regulatory control of local government. I conclude the Part by considering the implications of overregulation

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[1] BW Honadle 'Theoretical and Practical Issues of Local Government Capacity in an Era of Devolution' (2001) 31 *Journal of Regional Analysis and Policy* 77.

[2] J Seddon & G de Tommaso 'Civil Service Reform and Decentralization' in J Litvack & J Seddon (eds) *Decentralization Briefing Notes* (1999) 39.

[3] In this context, professionalisation relates to the insistence by the national government on qualifications and experiential requirements; adherence to the code of professional ethics; and the insulation of professional independence of senior managers from political meddling.

[4] Constitution s 1.

for municipal autonomy and the rule of law. I end the article with a suggestion for a single set of regulations and improved coordination.

II Background

It has been 22 years since the dawn of democracy in South Africa and 16 years into the implementation of a new and transformed local government system.[5] Indications are that this new system of local government is today in a critical phase.[6] On the one hand, it has not only managed to absorb the pressures and pains of a wholesale transformation (which took place at breath-taking speed) but has also made great strides towards extending service delivery and development to marginalised communities.[7] Local government has emerged from being an institution that was racially configured and only covering urban nodes[8] – resulting in deep structural disparities – to an institution with democratically elected leadership, constitutional status and a developmental philosophy.[9] It now covers the entire landscape of the country and it is working tirelessly to rectify the ravages of apartheid.

On the other hand, as expectations of service delivery at local level have risen, it has become evident that the broader transformation of local government is either imperfect or incomplete.[10] The de-racialisation and democratisation of the local government system were not on their own sufficient to achieve the developmental

[5] The period between 1995 and 1998 saw the amalgamation of racially-defined municipalities into integrated, wall-to-wall municipalities, in terms of the Local Government Transition Act 209 of 1993. This is what Doreen Atkinson refers to as 'first generation issues'. Between 1998 and 2000 the 'second generation issues' were raised as part of the 1998 Local Government White Paper process. These debates attempted to flesh out the meaning of the constitutional provisions on local government. During this phase, over-arching normative questions were addressed, culminating in the key concept of 'developmental local government'. This resulted in the enactment of the Local Government: Municipal Structures Act 117 of 1998 (Municipal Structures Act) and the Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act). The second generation issues were further taken forward in 2000 when municipalities were re-demarcated and elections took place under the re-demarcated municipalities. Unlike the first generation phase, the second generation phase emphasised the overall vision and rationale of local government.

[6] Department of Cooperative Governance and Traditional Affairs *State of Local Government in South Africa: Overview Report - National State of Local Government* (2009), available at https://pmg.org.za/files/docs/091017tas.pdf .

[7] Y Carrim 'Towards a Better Understanding of these Service Delivery Protests' Presentation to the National Council of Provinces (23 April 2010), available at http://www.dta.gov.za/cgta/index.php/speeches/former-deputy-minister-yunus-carrim/271-towards-better-understanding-of-service-delivery-protests-ncop-budget-debate-vote.

[8] V Johnson 'Outsourcing Basic Municipal Services: Policy, Legislation and Contracts' (2004) LLM dissertation, University of the Western Cape, available at http://etd.uwc.ac.za/xmlui/handle/11394/1318 .

[9] Green Paper on Local Government *Government Gazette* 18370, General Notice 1500 (17 October 1997)(Defines the developmental philosophy of local government to entail three inter-related aspects, namely, (a) the powers and functions of local government should be exercised in a way that has a maximum impact on economic growth and social development of communities; (b) as the sphere of government closest to the ground, local government has to integrate or coordinate the activities of other agents – including other spheres of government – within a municipal area; and (c) local government has a unique role to play in terms of building and promoting democracy.)

[10] D Powell 'Imperfect Transition – Local Government Reform in South Africa 1994-2012' in S Booysen (ed) *Local Elections in South Africa: Parties, People, Politics* (2012) 11, 12.

aspirations of government, nor to meet the expectations for municipal services by communities.[11] The consequence is a massive burden on a municipal system that had previously confined its activities to a narrow range of local services.[12] This is all the more so given that between 1993 and 2000, the population of South Africa increased from 37 million to 44 million, while the number of municipalities decreased from over 1000 to 284.[13] In 2006, the number of municipalities decreased further to 283, whilst the population increased to 48 million.[14] Further changes were implemented in 2011, with yet another reduction of municipalities to 278, serving the increased population of 51 million.[15] From 2016, there will be 267 municipalities, while the population has increased to 54 million.[16] This means that some of the new municipalities are geographically much larger than before, more particularly the district municipalities. The magnitude of this mismatch between the number of municipalities and the population they now have to serve was neatly illustrated in 2003 by Doreen Atkinson:

> Xhariep District Municipality in the Southern Free State is the size of Hungary; the Northern Free State District municipality has the same diameter as Belgium; and the Namakwa District Municipality is almost as wide as Kansas.[17]

A comparison of South Africa's current 54 million population with a country like Brazil, which has over 190 million inhabitants, indicates that the average population per municipality in South Africa is 172 thousand people, while Brazil has only 34 thousand people per municipality.[18] The increase in the size of municipalities means that the beneficiaries of the range of services the municipalities now have to offer have also increased substantially, placing a further burden on municipalities. This is compounded by the high number of unfilled

[11] R Cameron *The Democratisation of South African Local Government: A Tale of Three Cities* (1999).

[12] G van der Westhuizen & B Dollery *South African Local Government Efficiency Measurement* (April, 2009) Working Paper, Centre for Local Government, University of New England, available at https://www.une.edu.au/__data/assets/pdf_file/0003/16149/04-2009.pdf.

[13] Statistics South Africa *Community Survey 2007* (2007) 12, available at http://www.statssa.gov.za/publications/P0301/P0301.pdf.

[14] Ibid.

[15] Statistics South Africa *Census 2011* (2012) 14, available at http://www.statssa.gov.za/publications/P03014/P030142011.pdf .

[16] Statistics South Africa *Mid-Year Population Estimates* (2015) 7, available at http://www.statssa.gov.za/publications/P0302/P03022014.pdf.

[17] D Atkinson 'Post-apartheid Local Government Reforms: A Small Town Perspective' (2003) *Occasional Paper, Centre for Development and Enterprise* 2.

[18] J de Visser 'Demarcation and Establishment of Municipalities in South Africa and Brazil: Comparative Notes' conference presentation at the Colloquium on National Minimum Criteria for the Creation, Merger and Dissolution of Municipalities (Brasilia, September 2011), available at http://www.docfoc.com/demarcation-and-establishment-of-municipalities-in-south-africa-and-brazil. Brazil has 5564 municipalities.

posts in some municipalities.[19] The situation is further exacerbated by chronic shortages of revenue streams, particularly in rural municipalities.[20] The shift in size and responsibility has not only required an increase in the services offered, but also added to the pressure on the existing resources as well as on service delivery apparatus. As a result, the incomplete or imperfect transformation of local government has led to failures to rectify the ravages of apartheid.[21]

Citizens are demanding the promises and benefits of democratisation and deracialisation.[22] When these promises are not fulfilled, they become disenchanted and manifest their frustrations with delivery failures through social movement-style protests.[23] Poorer communities mostly use protest actions (often violent) to bring their grievances with municipalities to the attention of government.[24] Wealthier communities, meanwhile, tend to organise themselves into ratepayer associations. Given South Africa's history, this divide is racial.[25]

Against the foregoing background, it becomes clear that the new system of local government is mired, in the main, in a morass of chaos, with a few pockets of excellence mostly in urban areas – the 'top third' discussed in the lead paper.[26] Notwithstanding the enhanced status of local government, the efficiency of municipalities in discharging their service delivery and developmental obligations leaves much to be desired. It is clear that the system is not working as smoothly as it was envisaged. This brought about the need for further steps to be taken ostensibly to perfect the imperfections of transformation or, put differently, to complete it. In what follows, I will look at the response of the national government since it became clear the attempt to transform local government

[19] See Municipal Demarcation Board *State Municipal Capacity Assessment 2010/2011 National Trends in Municipal Capacity* (2012) 38, available at http://led.co.za/sites/default/files/cabinet/orgname-raw/document/2012/state_of_municipal_capacity_assessment_2010_11_national_trends_report.pdf. (Showed that on a provincial level the vacancy rates were highest in provinces with large rural population, such as Limpopo (47.2%), Kwazulu-Natal (39.9%) and the Eastern Cape (36.9%). If we had a skills pool of suitably qualified individuals to fill these vacancies, the increase in size would translate into economies of scale in the sense that there would be a concomitant increase in human resource capacity covering a large area.)

[20] RW Bahl & PJ Smoke (eds) *Restructuring Local Government Finance in Developing Countries: Lessons from South Africa* (2003) 8.

[21] Some of these being the inequalities and poverty occasioned by the skewed patterns of development in the apartheid era.

[22] A McLennan 'Unmasking Delivery: Revealing the Politics' (2007) 7(1) *Progress in Development Studies* 5.

[23] Ibid at 14.

[24] D Powell, M O'Donovan & J de Visser *Civic Protest Barometer 2001-2014* (2015), available at http://mlgi.org.za/talking-good governance/20150219%20Civic%20Protest%20Barometer%20Published% 20%20DP.pdf .

[25] D Powell, J de Visser, A May & P Ntliziywana *The Withholding of Rates and Taxes in Five Municipalities*: *Report of the Community Law Centre for SALGA* (2010), available at http://mlgi.org.za/publications/publications-by-theme/local-government-in-south-africa/withholding-of-rates/Withholding%20of%20rates%2015Nov010.pdf.

[26] See Department of Cooperative Governance and Traditional Affairs *Back to Basics: Serving our Communities Better!* (2014), available at http://www.cogta.gov.za/sites/cogtapub/B2BDOCS/The%20Back%20to%20Basics%20Approach%20Concept%20Document.pdf#search=back%20to%20basics .

is either incomplete or imperfect.[27] The next section reviews, firstly, the *ad hoc* initiatives undertaken by the national government to capacitate municipalities, consistent with its constitutional duty to support local government. Secondly, it considers the legislative interventions by the national government into the human resource practices of municipalities, which also forms part of the broader support effort by the upper spheres of government. The latter is the crux of this article.

III GOVERNMENT'S INITIAL RESPONSE

Pursuant to its constitutional duty to support local government, the national government responded to these persistent challenges by introducing various *ad hoc* initiatives aimed at perfecting the imperfect transition. These attempts were short-term deployment interventions aimed at providing targeted hands-on support and engagement programmes for weaker municipalities with significant capacity gaps. Their aim was to build the necessary capacity needed by local government to perform its mandate.

In the first place, national government introduced Project Consolidate, through which a number of technical experts were deployed to assist selected municipalities to deal with their service delivery bottlenecks and institutional challenges.[28] Second, the Joint Initiative on Priority Skills Acquisition (JIPSA) was introduced. It aimed to create short-term, but sustainable, interventions to the skills problems across all spheres of government. Municipalities were among the intended chief beneficiaries, as they suffered from a dire need of engineering, planning, artisan, technical and project management skills.[29]

Third, the Siyenza Manje Project was launched in 2005, aimed at the deployment of experts or skilled consultants to municipalities to assist with the implementation of infrastructure projects, planning and financial capacity building.[30] Fourth, government initiated the Municipal Finance Management Support Programme. It was aimed at enhancing key financial management capacity in selected municipalities.[31] Fifth, the Local Government Leadership Academy and its Municipal Leadership Development Programme was launched with the aim to accelerate and improve service delivery to communities by enhancing the leadership competencies of elected and appointed officials through structured and tailored leadership skills programmes.[32] Sixth, a Five Year Local Government Strategic Agenda was introduced in 2006, aimed at mainstreaming

[27] Powell (note 10 above) at 12.

[28] E Pieterse & M Van Donk 'Developmental Local Government: Squaring the Circle Between Policy Intent and Practice' in Van Donk et al (eds) *Consolidating Developmental Local government: Lessons from the South African Experience* (2008) 53–54.

[29] Department of Provincial and Local Government *National Capacity Building Framework for Local Government: In support of the Five Year Local Government Strategic Agenda (2008-2011)* (2009) 73, available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/policy/090701capacitybuildingframework.pdf.

[30] Ibid at 74.

[31] Ibid at 72.

[32] Ibid at 73.

all the hands-on support to local government to improve municipal governance, performance and accountability.[33]

In addition to the above, government adopted the Local Government Turn-around Strategy which replaced the Five Year Local Government Strategic Agenda. The main aim of the turn-around strategy was to counteract the root causes of the crises undermining local government.[34] In the last place, government has recently adopted yet another *ad hoc* programme called the Back to Basics strategy aimed at turning around at least two thirds of the country's municipalities over the next two years.[35]

Bar one, these *ad hoc* measures did not manage to produce lasting and tangible outcomes. The last strategy – Back to Basics – is ongoing and its efficacy has not yet been adjudged. The rest of these interventions had a very limited impact in building sustained capacity because they were introduced as 'quick fix' solutions only to fill gaps rather than building the actual capacity. The National Development Plan says, in this regard, that the 'tendency to jump from one quick fix or policy fad to the next' has had the effect of creating 'instability in organisational structures and policy approaches that further strain limited capacity'.[36] The NDP further states that the search for a quick fix has diverted attention from more fundamental priorities, namely, deficit in skills and professionalism that affects all elements of the public service.[37] Instead of building sustained capacity for effective performance, the *ad hoc* initiatives have had perverse outcomes.

This led to the introduction of legislative interventions in human resource practices, which initially promised to provide a lasting solution by, among other things, professionalising municipal administration. However, I argue that due to overreach and a lack of coordination, these legislative measures now threaten to stifle local government and threaten the rule of law.

IV Overregulation

When it became clear that the capacity constraints confronting local government persisted despite the deployment of skilled experts through a variety of *ad hoc* administrative measures discussed above, national government responded by, among others, attempting to professionalise municipal administration through regulation. A suit of parallel and overlapping laws were promulgated by the Department of Cooperative Governance and Traditional Affairs (CoGTA), the National Treasury and, later, the Department of Public Service and Administration (DPSA), to address capacity problems and professionalise

[33] Ibid at 73.

[34] Department of Cooperative Governance and Traditional Affairs *Local government turnaround strategy: Working together, turning the tide in local government* (2009), available at http://www.dta.gov.za/cgta/index.php/2014-04-29-10-00-08/publications-2/771-lgtas-information-booklet-1/file.

[35] S Stone & K Magubane 'Pravin Gordhan Pins Hopes on Back to Basics Strategy' *Business Day* (19 September 2014).

[36] National Planning Commission *National Development Plan: Vision 2030* (2011) 364, available at http://www.gov.za/sites/www.gov.za/files/devplan_2.pdf (NDP).

[37] Ibid.

municipal administrations.[38] This set the scene for tripwires of 'must do' requirements. It is worth setting out the constitutional and statutory basis for the variety of the regulatory interventions by the three departments before delving deeper into those.

A The Legal Basis for Regulation of Local Government

1 *Constitutional Basis*

The constitutional basis for capacity building through regulation is s 155(7) of the Constitution, which provides that '[t]he national … and the provincial government have the legislative and executive authority to see to the effective performance by municipalities of their functions … by *regulating* the exercise by municipalities of their executive authority'.[39] Regulation is a form of supervision by the 'upper' spheres of government that sets the necessary framework within which local government functions can responsibly be exercised.[40] In the *First Certification* judgment, the Constitutional Court held the term 'regulate' to mean 'a broad managing or controlling rather than a direct authorisation function'.[41] In the more recent *Habitat Council* judgment, which is discussed by De Visser and Steytler, the Constitutional Court held that s 155(7) does not entail the usurpation of the power or the performance of the function itself, but permits national and provincial governments to determine norms and guidelines.[42]

Further, s 216(1) of the Constitution provides that national legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing generally recognised accounting practice; uniform expenditure classifications; and uniform treasury norms and standards. Section 216(2), in turn, provides that the national treasury must enforce compliance with the measures established in terms of s 216(1).

It is clear that the Constitution envisages a number of measures to regulate issues related to human resource management. In what follows, I explain that the source of duplications and parallel measures stemming from various government departments is the Constitution itself. Section 155(7) envisages regulations/ guidelines setting parameters within which local government can operate,

[38] Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, *Government Gazette* 29089, General Notice R805 (1 August 2006)(Performance Regulations); Local Government: Municipal Finance Management Act: Municipal Regulations on Minimum Competency, *Government Gazette* 29967, General Notice R493 of 2007 (15 June 2007)(Competency Regulations); Local Government Systems Amendment Act, 2011; and Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers, *Government Gazette* 36223, Government Notice 167 (7 March 2013)(Appointment Regulations).

[39] Emphasis added.

[40] P Ntliziywana 'Insulating Administrative Decision-Making Relating to Individual Staff Appointments from Political Meddling: *Manana v King Sabata Dalindyebo Municipality*' (2012) 129 *South African Law Journal* 49.

[41] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 377.

[42] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others* [2014] ZACC 9, 2014 (4) SA 437 (CC)('*Habitat Council*') at para 22.

whereas s 216 envisages mandatory rules. The following discussion focuses on the national legislation giving effect to the constitutional provisions just discussed.

2 *Statutory Basis*

The Local Government: Municipal Systems Act[43] and the Local Government: Municipal Finance Management Act[44] are the primary pieces of legislation that give effect to the provisions of s 155(7) of the Constitution.[45] They are aimed at seeing to the effective performance by municipalities of their functions by regulating their human resource management, among other matters. They also envisage the promulgation of regulations to give further effect to the regulation of recruitment practices, ethics and discipline.[46]

The Municipal Systems Act contains provisions for human resource management which set forth basic values and principles governing local public administration. It provides that the administration of a municipality must be responsive to the needs of the residents and facilitate a culture of public service and accountability among staff.[47] In fact, municipalities have the duty to provide an accountable government without fear or prejudice.[48] They must also prevent corruption,[49] and ensure an equitable, fair, open and non-discriminatory working environment.[50] The roles and responsibilities of managers and other staff members must also be aligned with the priorities and objectives of the municipality's integrated development plan.[51] The resources must be used in the best interest of the local community and municipal services must be provided to the local community in a financially sustainable way.[52]

In giving effect to the injunction to regulate human resource practices, s 72 read with s 120 of the Municipal Systems Act enjoins the national minister responsible for local government (ie Minister of CoGTA) to make regulations dealing with capacity building within municipal administration.[53] The regulations envisaged by ss 72 and 120 of the Municipal Systems Act were issued in 2006 as the Performance Regulations.[54]

In addition to giving effect to s 155(7) of the Constitution, the MFMA is also the national legislation envisaged in s 216. It prescribes measures to ensure transparency in local government by introducing generally recognised accounting practices; uniform expenditure classifications; and uniform treasury norms

[43] Act 32 of 2000 (Systems Act).
[44] Act 56 of 2003 (MFMA).
[45] However, these are not the only laws emanating from national government regulating local government. There is also the Municipal Structures Act and the Local Government: Municipal Property Rates Act 6 of 2004 (Municipal Property Rates Act).
[46] Systems Act s 120 read with s 72 and MFMA s 168.
[47] Systems Act ss 6(2)(a) and (b) read with ss 51(a) and (b).
[48] Systems Act ss 4(2)(b), 6(2)(b) and 51(b).
[49] Systems Act ss 6(2)(c) and 51(c).
[50] Systems Act s 51(m).
[51] Systems Act s 51(d).
[52] Systems Act ss 4(2)(a) and (d).
[53] Systems Act s 72(1)(d).
[54] Performance Regulations (note 38 above).

and standards. As envisaged by the Constitution, the Act enjoins the National Treasury to enforce compliance with the measures listed above.

As such, it also provides a statutory basis for the regulation of local government recruitment practices in South Africa. It requires officials to meet prescribed competency levels in financial and supply chain management.[55] Section 168 of the MFMA also requires the National Treasury to make regulations or issue guidelines that prescribe financial management competency levels for the municipal administration. The regulations in terms of s 168 of the MFMA have been promulgated as the Competency Regulations.[56] Up next is a discussion of regulations envisaged by ss 72 and 120 of the Municipal Systems Act and by s 168 of the MFMA, which, as will be seen, are a source of overregulation in practice.

B Overregulation in practice

Overregulation began with the promulgation of the suite of laws that were meant to give effect to ss 155(7) and 216(1) of the Constitution, particularly with the aim of regulating human resource practices at local level. Leading the pack were the Municipal Systems Act and the MFMA. On the face of it, these laws are hardly over burdensome; they contain only 120 sections and 30 items in schedules, and 180 sections, respectively. However, a closer look reveals that they each contain a thousand individual provisions, with many 'musts' that oblige municipalities or municipal officials to behave in a prescribed manner in an area that could arguably have been left to their discretion.[57] This count, which, taken alone, would constitute trip wires, excludes the various regulations issued in terms of these Acts. Those additional regulations are the crux of the present discussion to which I now turn.

1 *Performance Regulations*

Empowered by the Municipal Systems Act, the then Department of Provincial and Local Government (now CoGTA) in 2006 responded to the persistent challenges facing local government by introducing the Performance Regulations. Their goal was to monitor local government and, ultimately, improve outcomes and performance.[58] The Performance Regulations subject the employment of a municipal manager and those managers reporting directly to him or her to the signing of an employment contract and performance agreement,[59] with the aim of measuring and evaluating their performance.[60] These regulations employ a carrot and stick approach to ensuring satisfactory performance. In the case of outstanding performance, the officials concerned are rewarded with a performance bonus for a job well done.[61] However, when performance is below

[55] MFMA ss 83, 107 and 119.

[56] Competency Regulations (note 38 above).

[57] N Steytler 'The Strangulation of Local Government (2008) *Tydskrif vir die Suid-Afrikaanse Reg* 518.

[58] The Preamble provides that these regulations seek to set out how the performance of municipal managers will be uniformly directed, monitored and improved.

[59] Performance Regulations reg 4.

[60] Performance Regulations reg 27.

[61] Performance Regulations reg 32(2).

par, the regulations deploy corrective measures to ensure that substandard performance does not recur.[62]

Although the Performance Regulations' main focus is on performance or results, they cursorily regulate recruitment of personnel – ostensibly to ensure that there is no mismatch between performance expectations and the skills employees actually possess.[63] The regulations make it an inherent requirement of the job that municipal managers (and managers directly accountable to them) must have a recognised bachelor degree in a relevant field, five years relevant experience and core managerial and occupational competencies.[64]

2 *Competency Regulations*

Unfortunately, the National Treasury – empowered by the MFMA – saw a gap to introduce its own set of regulations to regulate human resource practices of municipalities. The introduction of these new regulations, the Competency Regulations, was the start of overregulation.

The Competency Regulations were issued in 2007, barely a year after the promulgation of the Performance Regulations. They provide for general and minimum competency levels for financial and supply chain management officials. The focus of these regulations is on the competence of municipalities' staff. The National Treasury has also issued a number of guidelines to give flesh to the competency framework contained in the Competency Regulations. The guidelines apply to financial and supply chain management officials at senior and middle management levels. The competency framework consists of minimum qualifications, work related experience, core managerial competencies and core occupational competencies for financial officials both at senior and middle management levels.[65] As a result, there were two sets of laws regulating human resource practices at local government. In certain instances, it became unclear which competency framework applied. For example, the Performance Regulations required a bachelor degree across the board, while the Competency Regulations differentiated municipalities according to their budget size, requiring higher qualifications for larger municipalities, and lower qualifications for smaller ones.

3 *Municipal Systems Amendment Act*

Not to be outdone by the National Treasury, in 2011 CoGTA convinced Parliament to amend certain provisions of the Municipal Systems Act dealing with the recruitment of staff in the upper echelons of municipal administration. The Local Government: Municipal Systems Amendment Act[66] came into force on 5 July 2011. The provisions were amended to provide for new procedures and competency criteria for appointments, and for the consequences of non-compliant appointments. For example, the amended Act provides that, to be

[62] Performance Regulations reg 32(3).
[63] The competency framework is contained only in reg 38.
[64] Ibid.
[65] Competency Regulations regs 3, 5, 7, 9, 11 and 12.
[66] Act 7 of 2011.

appointed as a municipal manager (or a manager directly accountable to the municipal manager),[67] a person must have specific qualifications and experience which would be set out in regulations or guidelines.[68]

This set the scene for CoGTA to unleash more laws on municipalities. It issued the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers[69] in 2014. This (third) set of regulations replaced a large portion (but not all) of the Performance Regulations. This added a further layer of compliance to local government administration.

The amended Municipal Systems Act provides that appointments made contrary to the competency framework – that is, the Appointment Regulations – are null and void.[70] If a person is appointed contrary to that framework, the MEC must enforce compliance, including applying to court to declare the appointment invalid.[71] If the MEC fails to enforce compliance with the competency framework, the Minister of CoGTA may step in.[72]

As opposed to the competency frameworks contained in the Performance Regulations and Competency Regulations, the amendments to the Municipal Systems Act introduced external enforcement. This means that in the three sets of regulations regulating human resource practices at local government, municipalities might decide to choose the less stringent framework. The mere existence of three different sets of regulations leaves the room open for cherry-picking. Three municipalities might choose three different laws to regulate the same issues.

4 *Appointment Regulations*

The Appointment Regulations contain detailed and prescriptive competence requirements for the appointment of senior managers.[73] The competence requirements are so detailed that they straddle two annexures. Senior managers must have a bachelor's degree in a relevant field (mostly social sciences, public administration or law), five years' experience, advanced knowledge[74] and the competencies set out in Annexure A of the Appointment Regulations.

The Appointment Regulations clearly lower the bar in comparison to the National Treasury's Competency Regulations. For example, the National Treasury uses a differentiated approach relative to a municipality's budget size, with high capacity municipalities having higher qualifications and experience requirements while low capacity municipalities have lower standard requirements. The requirements in the Appointment Regulations (as in the Performance Regulations) are the same across the board – at the low capacity municipality standard – regardless of whether the appointment is made in a high capacity or a

[67] So-called 'section 56 managers'.
[68] Municipal Systems Act s 54A.
[69] *Government Gazette* 37245, Government Notice 21 (17 January 2014)(Appointment Regulations).
[70] Municipal Systems Act s 54A(3).
[71] Municipal Systems Act s 54A(8).
[72] Municipal Systems Act s 54A(9).
[73] Appointment Regulations regs 8 and 9.
[74] Appointment Regulations Annexure B.

low capacity municipality. The only exception is the Chief Financial Officer, whose requirements are the same as those contained in the Competency Regulations.

This presents the real possibility of municipalities cherry-picking the regulations that suit their circumstances at any given time. The lack of uniformity in the application of rules is not conducive to legal certainty. Furthermore, the detailed competence requirements contained in the Appointment Regulations might fail the constitutional test, as will be seen on the discussion of municipal autonomy hereunder, for violating its various provisions relating to municipalities' ability or right to exercise their powers and conduct their internal affairs without any impediments.[75]

5 *Public Administration Management Act (PAMA)*[76]

PAMA was passed into law at the instance of the DPSA, and signed into law on 22 December 2014. PAMA regulates employment in the public administration, specifically looking at transfers and secondments of employees between national, provincial and local spheres.[77] This places DPSA squarely within the triangle of the departments warring for regulatory control of local government[78] – secondments are also dealt with in the Municipal Systems Act[79] and the Appointment Regulations.[80] DPSA collides head-on with CoGTA – there are two regulatory regimes from two national departments on the same subject matter.

C Implications of overregulation for the rule of law

Broadly speaking, the rule of law denotes a system in which the laws are public knowledge, clear in meaning, and applied equally to everyone.[81] In *President of the Republic of South Africa v Hugo* the Constitutional Court stated that the rule of law requires laws to be accessible, clear and general.[82] In *New National Party* the same Court found that the rule of law 'prevents Parliament from acting *arbitrarily* or *capriciously* when making law'.[83] It can be summed thus: the rule of law requires laws to be publicly available, general in their application, clear, prospective and relatively stable.[84]

[75] Constitution ss 151 and 160.
[76] Act 11 of 2014.
[77] PAMA ss 5 and 6.
[78] PAMA s 3.
[79] Municipal Systems Act s 54A(6).
[80] Appointment Regulations reg 20.
[81] T Carothers 'The Rule of Law Revival' (1998) 77(2) *Foreign Affairs* 95.
[82] *President of the Republic of South Africa v Hugo* [1997] ZACC 4, 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 102.
[83] *New National Party v Government of the Republic of South Africa* [1999] ZACC 5, 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 19 (emphasis added).
[84] J Raz 'The Rule of Law and its Virtue' (1977) *Law Quarterly Review* 93, 198ff; BZ Tamanaha *On the Rule of Law: History, Politics, Theory* (2004) 93; P Craig 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework (1997) *Public Law* 467, 469; LL Fuller *The Morality of Law* (1977) 41.

The rule of law rests on two legs: legality and rationality.[85] The principle of legality requires the exercise of power to be within the framework of the law. The exercise of public power is only legitimate where lawful. Public officials may exercise no power or perform no function beyond that conferred upon them by law.[86] Otherwise, the exercise of such power is *ultra vires* and the official exercising it is in breach of the rule of law.[87] An important development of the principle of legality is contained in the Constitutional Court's *SARFU* judgment, where the Court said, 'the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and *must not misconstrue [his or her] powers*'.[88] This applies equally to any other public functionary. This development is important in our context of a plethora of contradictory laws regulating the same subject matter. I argue below that – in light of the complicated and contradictory regulations – a municipality is likely to misconstrue not only its powers, but also the purpose for which those powers were given.

The principle of rationality was developed by the Constitutional Court in *Pharmaceutical Manufacturers*.[89] In a unanimous judgment, Chaskalson P (as he then was) explained rationality as follows:

> It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.[90]

As argued by De Visser and Steytler, the many prescriptive and contradictory requirements contained in the legal framework set out above constitute what Geoff Budlender refers to as 'trip wires'[91] over which a municipality is bound to fall. Municipalities are caught between, on the one hand, delivering services to an already impatient public and, on the other, deciding which laws to apply,

[85] R Krüger 'The South African Constitutional Court and the Rule of Law: The *Masethla* Judgment, A Cause for Concern? (2010) 13(3) *Potchefstroom Electronic Law Journal* 468, 475ff. See *Masethla v President of the Republic of South Africa* [2007] ZACC 20, 2008 (1) SA 566 (CC), 2008 (1) BCLR 1 (CC)(Court was split on whether procedural fairness also constitutes a requirement of the rule of law. Moseneke DCJ, writing for the majority, excluded procedural fairness from the scope and the requirements of the rule of law, while Ngcobo J (as he then was) made it the requirement of the rule of law. In this article, I stick to the two uncontroversial requirements.)

[86] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 59.

[87] J Jowell 'The Rule of Law Today' in J Jowell & D Oliver (eds) *The Changing Constitution* (2000) 20.

[88] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11, 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 148 (emphasis added and footnotes omitted).

[89] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

[90] Ibid at para 85.

[91] G Budlender 'Talk at launch of *Local Government Law of South Africa*' (Cape Town, 29 May 2008) (on file with the authors).

deciphering their meaning and then ticking boxes as a way of complying with a flurry of ever growing legal requirements. This position potentially makes municipalities misconstrue the laws or act arbitrarily or capriciously. This could have a negative impact on the rule of law's legality and rationality requirements. Compliance with the legal rules can become more important than achieving the *object* of the rules.[92] When that happens, there is no longer a rational relationship between the purpose for which the law was passed and its application.

An example of this preference of form over substance is the court challenge to the Nelson Mandela Bay Metropolitan Municipality's decision to appoint Mrs Msengana-Ndlela as the municipal manager. Msengana-Ndlela was the former Director-General of CoGTA and was eminently suitable to run an administration of a large municipality.[93] Despite her qualifications, years of experience and proven capability, the United Democratic Movement challenged her appointment for non-compliance with the Competency Regulations.[94] The one qualification Msengana-Ndlela lacked was that she had not completed the Municipal Finance Management Programme required by the Competency Regulations. The regulations were (ab)used in an attempt to exclude a high calibre individual from the pool of eligible candidates in a manner that defeats the larger objective that the regulations sought to achieve – to professionalise local government by recruiting qualified, experienced and competent personnel.

It could be said that the office-bearers who challenged her appointment misconstrued the purpose for which the law was passed and applied the law arbitrarily or capriciously to exclude precisely the kind of personnel required to achieve excellence.[95] They lost the plot by privileging form over substance. This conduct undermines both the principle of legality (which requires the executive authorities not to misconstrue their powers) and the principle of rationality (which demands a rational connection between the exercise of power and the objectives for which the power was given). Achieving the objective of the rules became of secondary importance.[96] These are the consequences of having so many rules that they cloud the purposes for which the rules were passed in the first place.

The purpose of a particular law could also be misconstrued due to preoccupation with compliance with a flurry of legal requirements. While on its

[92] Steytler (note 57 above).

[93] See P Ntliziywana & J de Visser 'The Unexpected Pitfalls of Professionalising Local Government: Former Local Government Director-General "not qualified" to be City Manager?' *Politicsweb* (28 June 2013), available at http://www.politicsweb.co.za/news-and-analysis/the-unexpected-pitfalls-of-professionalising-local. Mrs Msengana-Ndlela was the Director-General of CoGTA (the national department responsible for overseeing the entire local government system in South Africa) for seven years. She was employed as a senior civil servant in various provincial and national government departments before that. She holds several degrees, including a Bachelor of Commerce, a Bachelor of Education, a Master's degree in Business Leadership and a PhD in Urban Governance, Leadership and Local Economic Development. During her tenure in CoGTA, the department's budget grew from R6 billion to over R24 billion and she achieved seven successive clean audits while managing these funds. She also oversaw a range of major policy and legislative initiatives, including the passing of the Municipal Property Rates Act and the Intergovernmental Relations Framework Act 13 of 2005. Ibid.

[94] Ibid.

[95] Ibid.

[96] Steytler (note 57 above) at 529.

face, compliance constitutes respect for the rule of law, it can lead to compliance fatigue so that municipalities attempting to comply with every requirement act arbitrary or capriciously – the focus becomes compliance, not professionalism or service delivery. This, arguably, violates the rationality principle.

Furthermore, local government legislation is becoming so excessively complex and confusing for non-specialist administrators that it threatens to undermine the basic requirement that laws must be ascertainable and accessible. Complying with a complex and elaborate legal framework carries a considerable price tag that many municipalities cannot afford.[97] For the more capable municipalities it is a bearable burden; for the less-fortunate ones, it becomes an obstacle in the way of governance.[98] Even those municipalities who can afford to comply are forced to expend resources to establish an in-house legal service, or to call on external experts to help them navigate their way through the maze of regulations. Those that cannot afford consultants are left to their own devices to misconstrue their powers. The worst possible consequence of overregulation is when municipalities opt out of lawful governance because compliance is too difficult or costly.[99] In this instance, the weight of the legal obligations have a profoundly disempowering effect on smaller, low resourced municipalities.[100] In that way, overregulation can directly result in the violation of the rule of law. Yet, ironically, non-compliance with over-burdensome regulation can be the rational choice.

The Competency Regulations are particularly amenable to this problem because they are extremely complex. The wording of these regulations present an interpretation headache and there are as many interpretations as there are lawyers. The Msengana-Ndlela debacle, discussed earlier, presents a perfect example of the intricacy of the regulation. For the post of a municipal manager, the regulations require, first, at least a bachelor's degree and a higher diploma in a relevant field. Alternatively, the candidate can get a certificate in municipal financial management by completing the Municipal Finance Management Programme. Second, the regulations require five years' experience at senior management level. Third, the regulations require compliance with the management competencies contained in the Performance Regulations.[101] And fourth, the candidate must demonstrate 'competence in the unit standards related to financial and supply chain management, which can be obtained by completing the Municipal Finance Management Programme' – the same programme referred to in the first requirement. The first three requirements are straight forward and Msengana-Ndlela easily complied with them. However, the last requirement presents interpretation difficulties.

[97] Ibid at 527.
[98] Ibid at 521.
[99] Ibid at 530.
[100] Ibid at 528.
[101] Competency Regulations reg 3.

The difficulty is that it is both an alternative as well as an addition to the higher education qualifications requirement. With regard to the former, if an official does not have a bachelor's degree required by the first requirement, he or she can enrol for the certificate in municipal financial management as an alternative to it.[102] However, with regard to the latter, if an official already possesses a bachelor's degree, he or she must still meet the fourth requirement, which essentially is the certificate in municipal financial management. The proviso with regard to the latter is that if an official already possesses higher educational qualification, he or she must be assessed by accredited training providers to establish the extent to which his or her higher education qualifications and experience offset the 21 unit standards required for the certificate in municipal financial management. It is possible therefore that the assessment of Msengana-Ndlela, with all her qualifications and experience, would reveal that she must still meet one or two of the 21 unit standards or that her qualifications and experience counterbalance the fourth requirement.

This is where a number of municipalities and lawyers, get it wrong.[103] The regulations do not meet the rule of law requirement that the law must be clear and must serve a rational purpose. The correct interpretation is that no matter how many degrees an official may have accumulated or how many years of experience he or she has, the certificate in financial management remains compulsory, unless the assessment of his or her qualifications and experience reveal otherwise. This is how a former Director-General with a PhD was deemed unsuitable to serve as a municipal manager, a position requiring only a bachelor degree.

The second difficulty with the Competency Regulations relates to the actual legal consequences of non-compliance. The appointment date is critical to determine the consequences of non-compliance. There are three categories. First, those officials who were appointed before the Competency Regulations came into effect on 1 July 2007 are safe, as long as they comply with the competency requirements before 30 September 2015.[104]

The second category is officials who were appointed after 1 July 2007, but before 30 September 2015. Their employment contract should stipulate that they must attain the competencies before 30 September 2015.[105] If they do not meet the deadline, they will supposedly be in breach of their employment contracts. However, the Competency Regulations are not clear on what happens if an official does not meet the deadline.[106] They are not automatically dismissed on 30 September 2015 – our labour laws do not allow for that. So, the municipality would have to do something, but what? Must the official be dismissed? Or perhaps demoted? The National Treasury has not explained to municipalities what to

[102] Competency Regulations reg 3.

[103] The South African Local Government Association (SALGA) and the City of Cape Town have commissioned legal opinions on the interpretation of these requirements.

[104] Competency Regulations reg 15 provides that their continued employment would not be affected, provided that they attain the prescribed requirements before the end of the grace period.

[105] Competency Regulations reg 15.

[106] Competency Regulations reg 18(1) simply says that no municipality may employ, after the deadline, a person as a financial or supply chain manager if that person does not meet the competency levels prescribed for the relevant position.

do, except to say that there will not be further extensions and that the process followed by municipal councils, as employers, to enforce these requirements must be consistent with the relevant laws.[107] Again, this legal uncertainty violates the rule of law requirement that a law must be clear in its meaning.

The last category is those officials appointed after 30 September 2015. For those, the consequences of non-compliance are clearer. After the end of the grace period, any appointment in violation of the Competency Regulations will be unlawful and can be challenged in court.[108]

Another key issue emanating from the Competency Regulations that is threatening the rule of law relates to the continuous shifting of deadlines. The Competency Regulations suspended the immediate application of the competency framework to allow the officials who were already employed by municipalities when the Regulations were issued to acquire the prescribed minimum competency levels.[109] These officials were initially given a five-year period of grace within which to acquire all the prescribed competency levels.[110] The deadline for the attainment of the relevant competency levels was 1 January 2013 and has been extended twice to 30 September 2015.[111] After this deadline, the employment of new financial and supply chain management officials who do not meet the minimum competency levels is strictly prohibited.[112]

The practice of putting a target in a law and then softening it a number of times as the deadline approaches threatens the rule of law. It is not conducive for legal certainty. Municipal officials are likely not to take the regulations seriously when they eventually become effective. This will have grave consequences for the principle of legality as it undermines the efficacy of the law. Now that the law has become effective, municipalities are carrying on with their business as usual. They are unlikely to treat the law with the seriousness it requires.

In what follows, I look at the impact of overregulation on municipal autonomy.

D Implications of overregulation for municipal autonomy

As noted earlier, the practice of throwing laws at a problem can also potentially fail the constitutional test for violating its various provisions relating to the municipalities' ability or right to exercise their powers and regulate their internal affairs without any impediments. The relevant provisions that are threatened by this practice are ss 151(4) and 160 of the Constitution. These provisions confer

[107] National Treasury mentioned the Labour Relations Act 66 of 1995, the Municipal Systems Act (as amended), the Performance Regulations, the MFMA, the Competency Regulations and the MFMA Exemption Notice of March 2014 in a joint media statement issued on 30 September with CoGTA, available at http://www.treasury.gov.za/comm_media/press/2015/2015093001%20-%20MinimumCompetencyStatement.pdf.

[108] Competency Regulations reg 18.

[109] Competency Regulations reg 15.

[110] Ibid.

[111] Firstly, in 2012 by MFMA Circular 60 of 20 April 2012 (on file with the author). Later by the Exemption Notice issued on 14 March 2014, available at http://mfma.treasury.gov.za/RegulationsandGazettes/Documents/Gazette%20No.37432,14%20March%202014.pdf .

[112] Competency Regulations reg 18.

autonomy on the municipal council over internal affairs of the municipality[113] and proscribe national and provincial governments from 'comprom[ising] and imped[ing] a municipality's ability or right to exercise its powers or perform its functions'.[114]

I argue that the flurry of laws issued by the national government, with their mandatory and prescriptive requirements, are actually impeding or compromising the municipalities' ability or right to exercise their powers and perform their functions. Instead of expending their energy on delivering the much needed services and in discharging their developmental mandate, municipalities find themselves having to tick boxes and comply with hundreds if not thousands of 'musts' scattered throughout local government legislation. This state of affairs has the potential to erode the autonomy of local government and relegate the local sphere to an implementing agent of other spheres.

In its haste and overzealousness to fix local government, the national government inadvertently created a snare that traps local government instead of creating an enabling environment for local government to discharge its responsibilities. The five sets of secondary legislation[115] from three different departments regulating the human resource practices with respect to senior managers in local government all contain peremptory norms that do not allow for local discretion. Following the Court's finding in *Habitat Council*,[116] the combined effect of these laws is a violation of s 151(4) of the Constitution. These laws encroach on the institutional integrity of local government and compromise the municipalities' ability to exercise their own powers and perform their own functions. The contradictory, overlapping and parallel support and enforcement measures by national government go beyond the permissible limits of regulation in s 155(7) of the Constitution. In the words of the *Habitat Council* Court, they impermissibly intrude on the autonomous sphere of authority accorded to municipalities by the Constitution.[117] From the local government perspective, the combined effect of these attempts constitutes the usurpation of local government's power. Municipalities find themselves hamstrung by national regulation. This is not the broad managing and controlling envisaged by s 155(7) of the Constitution.

As highlighted by De Visser and Steytler, in the context of municipal powers relating to land use planning, the courts have been eager to jealously guard this newly found autonomy of the local sphere. In this context, there are just too many peremptory norms which, if not complied with, and if courts were

[113] Constitution s 160 provides that a Municipal Council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality.

[114] Constitution s 151(4).

[115] Performance Regulations of 2006 from then DPLG; Competency Regulations of 2007 from Treasury; Appointment Regulations of 2014 from CoGTA; Disciplinary Regulations of 2011 from CoGTA; and Financial Misconduct Regulations of 2014 from Treasury. There are also mooted regulations from DPSA.

[116] *Habitat Council* (note 42 above) at para 22.

[117] See also *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd & others* [2013] ZACC 39, 2014 (1) SA 521 (CC), 2014 (2) BCLR 182 (CC) at para 46.

to follow the approach of the minority judgment in *Liebenberg*,[118] could render local administrative decisions vulnerable to procedural challenges with grave consequences for municipal autonomy. Will the courts hold that human resource decisions (appointments, suspensions, dismissals) are invalid purely because one of the 'musts' in the increasingly confusing set of laws has not been complied with?

Take, for example, the following scenario as presented by De Visser elsewhere:

> The Municipal Manager of a small rural municipality needs to address the problem of a manager who is not performing, is possibly incompetent and is accused of mismanaging municipal funds. How many different laws must she consult to address this situation effectively and in accordance with the rule of law? On the issue of competency and performance, there are three laws…. The Municipal Manager may therefore have to consult at least six laws to deal with her problem, excluding internal council protocols and policies. Her efforts to deal with a real problem in line with the rule of law are thus complicated by two Departments seemingly competing for space to regulate local government.[119]

The correct approach to follow is the generous approach adopted by the majority of the Court in *Liebenberg* where it found that an administrative hiccup should not necessarily invalidate the actions of the Municipal Manager in question. The following *dictum* should find particular resonance:

> [A] failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole.[120]

The current scenario may encourage the courts to rewrite the statute book and thus assert the independence of local authority that is being eroded by warring departments.

E Duplication and Overlapping Resulting in Overregulation

The outpouring of laws also causes duplication and overlap. There is a barrage of similar laws regulating the same or similar subject matter. In this section, I dissect the provisions emanating from different statutes and regulations regulating compulsory education requirements and ethics.

1 *Compulsory Education Requirements*

aa Municipal Systems Act and Appointment Regulations

Compulsory educational requirements for employment are already dealt with sufficiently by CoGTA through the Municipal Systems Act (as Amended) and the Appointment Regulations. Section 54A(3) read with s 56(2) of the Municipal Systems Act provides that the appointment of a municipal manager or a manager

[118] *Liebenberg NO and Others v Bergrivier Municipality* [2013] ZACC 16, 2013 (5) SA 246 (CC), 2013 (8) BCLR 863 (CC)('*Liebenberg*').

[119] J De Visser 'Editorial' (2012) 14(3) *Local Government Bulletin*.

[120] *Liebenberg* (note 116 above) at para 26.

reporting directly to the municipal manager is null and void if the person does not have the prescribed skills, expertise, competencies or qualification. Reg 8(1)(b) of the Appointment Regulations, in turn, provides that no person may be appointed as a senior manager unless he or she possesses the relevant competencies, qualifications, experience, and knowledge set out in Annexures A and B to these regulations.[121]

bb Competency Regulations

On the other hand, the National Treasury also deals thoroughly with compulsory education requirements through the Competency Regulations. Regulations 3, 5, 7, 9, 11 and 12 of the Competency Regulations contain a comprehensive list of compulsory education requirements for financial and supply chain management officers. As noted earlier the Competency Regulations create detailed requirements for appointment, depending on the budget size of a municipality. A financial officer is defined as any official exercising 'financial management responsibilities', including the accounting officer, the chief financial officer, a senior manager or any other financial official.[122] Given the breadth of the definition, these regulations appear to apply to all senior managers including, for example, human resource managers who manage huge budgets and therefore exercise financial management responsibilities.

The Appointment Regulations and the Competency Regulations contradict each other. One example is the compulsory requirement under the Competency Regulations for a certificate in municipal financial management discussed earlier. The Appointment Regulations, in turn, say that a certificate of competency in a particular field is *not* a requirement but an added advantage. Municipalities could easily choose the less stringent of the two regulations and render the Competency Regulations redundant.

cc Public Administration Management Act

PAMA contains provisions relating to compulsory educational requirements for employment in public administration which includes local government. Section 13(1) of PAMA provides that:

> [t]he Minister [of DPSA] may, after approval by the Cabinet, direct that the successful completion of specified education, training, examinations or tests is—
> (a) a prerequisite for specified appointments or transfers; and
> (b) compulsory in order to meet development needs of any category of employees.

Subsection (2) provides that, in the case of a directive to be applicable to local government, the Minister of DPSA must consult organised local government and obtain the concurrence of the Minister of CoGTA before seeking the approval of the Cabinet contemplated in subsection (1). This means that there are *more* compulsory education requirements in the offing for local government. If it acts

[121] Annexure B requires a Bachelor degree in public administration/political science/law or equivalent; five years of experience at senior management level; and knowledge in relevant fields for a municipal manager.

[122] Competency Regulations reg 1.

under PAMA, DPSA will be adding nothing new except adding an additional layer of 'musts' to the already strangulated sector. The existing frameworks already contradict each other and leave room for cherry-picking; a third competency framework from DPSA will add an additional, unnecessary layer of compliance.

2 *Ethics*

aa PAMA

On the ethical side, PAMA prohibits employees from conducting business with the state and instructs employees to disclose their financial interests. Failure to do so constitutes misconduct.[123] At a local level, this is dealt with sufficiently in item 5A of the Code of Conduct for Municipal Staff Members contained in schedule 2 to the Municipal Systems Act. This constitutes duplication and an additional 'trip wire'. Section 4(1)(b) of the Code of Conduct for Municipal Staff Members also prohibits a staff member of a municipality from taking a decision on behalf of a municipality in which that staff member or his spouse, partner or business associate, has a direct or indirect personal or private business interest. Section 4(3) further provides that no staff member of a municipality may be a party to or benefit from a contract for the provision of goods or services to any municipality or any municipal entity established by a municipality.[124] As can be seen, PAMA and the Code of Conduct for Municipal Staff Members are pure duplication. Requiring municipalities to comply with different provisions emanating from different sources but addressing the same issues, constitutes adverse overregulation which potentially violates the rule of law.

bb Financial Misconduct Regulations *vis-à-vis* Codes of Conduct

The Financial Misconduct Regulations,[125] published in terms of the MFMA by the National Treasury in 2014, seek to regulate the processes and procedures to be followed by municipalities when dealing with the (alleged) commission of financial misconduct. They apply to all officials and political office bearers within municipalities and municipal entities.

First, a question that needs to be answered honestly relates to how an official (and a political office bearer) could commit financial misconduct without falling foul of the Codes of Conduct for Councillors and Municipal Staff Members? The introduction of the Financial Misconduct Regulations presupposes that one can commit an act of financial misconduct and not fall foul of the Code of Conduct. The Codes of Conduct comprehensively cover instances of financial misconduct. If by committing an act of financial misconduct a councillor or municipal staff member is also committing a breach of the Code of Conduct for Councillors or for Municipal Staff Members, as the case may be, then there was no need for the enactment of these Regulations. All that was required was the beefing up of the

[123] PAMA s 8.

[124] Item 6 of the Code of Conduct for Councillors, schedule 1 of the Municipal Systems Act, contains similar provisions in relation to councillors.

[125] Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, *Government Gazette* 37699, General Notice R430 (30 May 2014).

Codes of Conduct. Their existence only serves as a source of duplication, causes legal uncertainty on which laws to apply and may result in the erosion of the rule of law.

Second, reg 3(1)(a) of the Financial Misconduct Regulations provides that 'any allegation of financial misconduct against the accounting officer, a senior manager or the chief financial officer of a municipality, must be reported to the municipal council of the municipality, the provincial treasury and the national treasury.' This is in direct conflict with item 13 of the Code of Conduct for Municipal Staff Members which requires that a breach of the Code should be reported to a superior officer or the speaker of the council, not the other functionaries mentioned in reg 3(1)(a). This confusion will result in yet another instance of cherry-picking the laws that suit the one reporting the alleged breach. Again, this results in legal uncertainty which ultimately undermines the principle of legality and consequently the rule of law.

Furthermore, certain provisions of the Financial Misconduct Regulations seem to go beyond the term 'regulating' and may be unconstitutional. First, reg 19 provides for intervention by the National and Provincial Treasuries in the event that the municipal council does not take the recommendations of the Disciplinary Board[126] seriously. If that happens, the National and Provincial treasuries *may direct* the council to take the recommended steps. This goes beyond regulation, which was said to be limited to the determination of 'norms and guidelines' in *Habitat Council*.[127] It constitutes a direct authorisation function.

In *Habitat Council*, the Constitutional Court had to decide the contours of the constitutional duty of oversight bestowed on provincial government by s 155(7) of the Constitution. In the context of the concurrent planning functions, the Court held that the province's exercise of appellate powers over municipalities' exercise of their planning functions constituted an impermissible usurpation of the power of local authorities to manage municipal planning.[128] The Court went on to say that the provincial appellate capability intrudes into the autonomous sphere of authority the Constitution accords to municipalities, and fails to recognise the distinctiveness of the municipal sphere.[129] It follows that the power to *direct* councils to do certain things, as reg 19 of the Financial Misconduct Regulations suggests, amounts to an impermissible usurpation of powers conferred on the local sphere of government. It 'encroaches on the geographical, functional or institutional integrity of local government'[130] in the same way that the appellate powers of the province were found to intrude on the autonomous sphere of authority accorded to municipalities.

Second, it is not clear what reg 19 actually means by 'may direct'. What is it that a Provincial Treasury or the National Treasury may direct? Does it mean that they may direct the municipality to investigate the allegation or that they may

[126] A board established in terms of reg 4 to investigate allegations of financial misconduct and to monitor the institution of disciplinary proceedings against an alleged transgressor.

[127] *Habitat Council* (note 42 above).

[128] Ibid at para 13, see also para 22.

[129] Ibid at para 13.

[130] Constitution s 41(1)(g).

do the investigation themselves by designating a person or persons in line with s 106 of the Municipal Systems Act and item 14(4) of the Code of Conduct for Councillors? If 'may direct' means the latter, then this provision is a duplication of the existing law. In any event, the lack of clarity on the purpose of this provision leads to legal uncertainty and thus the violation of the essential requirement of the rule of law that laws must be clear in meaning.

cc Disciplinary Regulations

CoGTA issued the Disciplinary Regulations[131] in 2011, which deal with all forms of misconduct committed by senior managers. Insofar as the senior managers are concerned they, once again, replicate the Financial Misconduct Regulations, the Disciplinary Regulations and the Codes of Conduct for Councillors and Municipal Staff Members. This adds not only to overregulation, but to the perceived competition between CoGTA and the National Treasury which suffocates the local sphere of government.[132] The regulations or guidelines envisaged by PAMA to regulate conduct and levels of ethics expected of public administration officials will add DPSA as the third point of a triangle of competition over local government.

V The Case for a Single Set of Regulations and Improved Coordination

The effect of the multitude of regulations I have discussed is this: At least in the arena of personnel regulation, local government has been reduced to an agent that merely complies with the demands of other spheres of government instead of expending its resources and energy on delivering much needed services to local residents. This manifestly 'intrudes on the autonomous sphere of authority the Constitution accords to municipalities'.[133] And it undermines the rule of law by creating an impenetrable and contradictory set of regulations that often incentivise conduct that is contrary to the purpose the regulations sought to achieve.

For the sake of legal certainty, I suggest that CoGTA and the National Treasury should synchronise efforts and come up with a single, comprehensive set of regulations to replace the overregulation, duplication and overlaps that currently infect local government. The blueprint for this system already exist – the proposals

[131] Local Government: Disciplinary Regulations for Senior Managers, General Notice 344, *Government Gazette* 34213, General Notice 344 (21 April 2011).

[132] SALGA 'Presentation at the 8th National Municipal Managers Forum' (2014), available at http://www.salga.org.za/app/webroot/assets/files/MediaRoomStatements/8th%20National%20Municipal%20Managers%20Forum/1_%20%20SALGA%20CEO%20Presentation.pdf (Suggests that the turf battles and competition between National Treasury, CoGTA and now DPSA are caused by poorly defined roles and responsibilities between national departments. They further suggest that the on-going turf battles between these departments distract from the task of capacitating local government.)

[133] *Habitat Council* (note 42 above) at para 13.

contained in the Draft Green Paper on Cooperative Governance.[134] The first of these proposals relates to the development of a single integrated system of administering municipal legislation based on standardised regulations, guidelines and circulars similar to the system employed by the National Treasury.[135] The second relevant proposal is to establish a 'Standing Interdepartmental Committee of the Department of Cooperative Governance, National Treasury and the Department of Public Service and Administration'.[136] This committee should enable the sharing of knowledge and information to ensure that the respective laws, guidelines and regulations emanating from these departments, especially as they relate to local government, are consistent and coherent.[137] This committee should be established by a Cabinet decision and should report to Cabinet, in order to enforce its formal nature.

The need for this committee, which will enforce cooperation at a horizontal level, is occasioned by the fact that the Intergovernmental Relations Framework Act[138] defines intergovernmental relations and institutional arrangements within government with a focus on the vertical relations between the three spheres.[139] There is an inadequate focus on the horizontal relations between government departments addressing the same issue (local government) within the same sphere (national). That is the biggest contributor to the overregulation, duplication and turf battles decried in this paper. This absence of a horizontal mechanism to regulate inter-departmental relations is proving to be the most difficult challenge in improving capacity and, as a corollary, service delivery in the majority of municipalities.[140]

A further suggestion relates to the establishment of a special Cabinet Committee on provincial and local government whose aim will be to discuss and scrutinise all policy and legislation impacting on sub-national government before they go to Cabinet for decision.[141]

There are many other laudable policy proposals contained in the Draft Green Paper. Government should be encouraged to hasten the development of some of these structures, especially those that seek to facilitate horizontal intergovernmental coordination, as they promise to deal with the perceived competition and turf battles between national departments. These bodies could

[134] Department of Cooperative Governance 'Draft Green Paper on Cooperative Governance' (2011) 32 ('Draft Green Paper').

[135] Ibid at 64. See generally SJ Greÿling *The South African Local Government National Capacity Building Framework of 2011: Critical Future Considerations for 2016* (2015) PhD dissertation, University of Johannesburg.

[136] Draft Green Paper (note 132 above) at 32. See generally LP Malan 'Intergovernmental Relations in South Africa: A Revised Policy Approach to Co-operative Government. (2012) 5(2) *African Journal of Public Affairs* 115.

[137] Malan (note 134 above) at 122.

[138] Act 13 of 2005.

[139] Draft Green Paper (note 132 above) at item 5.

[140] Ibid.

[141] Ibid at 32.

go a long way to aligning the existing laws into a single coherent policy. They would ensure that future policy initiatives are coherent. In addition, by eliminating competition for control over local government, they would hopefully ensure that national and provincial laws do not intrude impermissibly on the autonomous sphere of authority accorded to municipalities.