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Confronting the state of local government: the 2013 Constitutional Court decisions

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I Introduction

In September 2014 the then Minister of Cooperative Governance and Traditional Affairs, Pravin Gordhan, divided municipalities into three groups: a third of the municipalities was carrying out their tasks adequately, a third was just managing, and the last third was 'frankly dysfunctional' because of poor governance, inadequate financial management, and poor accountability mechanisms.[1] What this analysis starkly illustrates is that local government cannot be seen as a uniform institution, operating in the same manner, facing the same challenges. Most, but not all metropolitan municipalities are highly functional and the same applies to the so-called 'secondary cities'. Then there are highly dysfunctional rural municipalities but also rural municipalities that perform well. Yet a uniform system of law applies to them all.

Within the context of a both performing and failing local state, the Constitutional Court had to confront some key issues about local governance during 2013. First, in Lagoonbay[2] the Court had to respond to the claim for the empowerment of municipalities with respect to planning responsibilities. Second, in Liebenberg NO v Bergrivier Municipality[3] and eThekwini Municipality v Ingonyama Trust[4] the Court had to entertain challenges with regard to the municipal power to levy and collect property rates and the quest for financial sustainability. Third, in Brittania Beach v Saldanha Bay Municipality[5] and Rademan v Moqhaka Municipality[6] the Court was confronted by efforts of residents to hold their municipalities to account. In Rademan the municipality could fairly be described as 'frankly dysfunctional'. We will argue that the Constitutional Court was more than willing to assert the municipal domain of governance. Further, the Court was willing to condone less than perfect rule-compliant tax collection, thereby accommodating – to some extent – weak municipal administrations. Finally, the Court skirted around the problem of

[1] Department of Cooperative Governance and Traditional Affairs *Back to Basics: Serving our Communities Better!* (2014), available at http://www.cogta.gov.za/summit2014/wp-content/uploads/2014/10/LG-Back-to-Basics-Approach-Document.pdf ('*Back to Basics*').
[2] *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* [2013] ZACC 39, 2014 (1) SA 521 (CC), 2014 (2) BCLR 182 (CC)('*Lagoonbay*').
[3] *Liebenberg NO and Others v Bergrivier Municipality* [2013] ZACC 16, 2013 (5) SA 246 (CC), 2013 (8) BCLR 863 (CC)('*Liebenberg*').
[4] *eThekwini Municipality v Ingonyama Trust* [2013] ZACC 7, 2014 (3) SA 240 (CC), 2013 (5) BCLR 497 (CC)('*Ingonyama Trust*').
[5] *Britannia Beach Estate (Pty) Ltd and Others v Saldanha Bay Municipality* [2013] ZACC 30, 2013 (11) BCLR 1217 (CC)('*Brittania Beach*').
[6] *Rademan v Moqhaka Local Municipality and Others* [2013] ZACC 11, 2013 (4) SA 225 (CC), 2013 (7) BCLR 791 (CC)('*Rademan*').

dysfunctionality and the legal remedies that desperate residents lack who cannot hold their municipalities to account.

II context

The establishment of the new local government regime in December 2000 has not resulted in meeting the goals of 'developmental local government', as articulated in the 1998 White Paper on Local Government.[7] Some of the outcomes of developmental local government were identified as the provision of household infrastructure and services and the creation of liveable, integrated cities, towns and rural areas.[8]

By 2009 many, but not all, local governments were showing clear signs of distress and some of outright dysfunctionality. Outward manifestations of this state of affairs included: the ever increasing civil society protests against poor service delivery in both urban and rural areas;[9] the withholding of rates in some rural municipalities;[10] the rising number of provincial interventions in terms of s 139 of the Constitution;[11] the issuing of disclaimers, adverse and qualified audit reports by the Auditor-General for the majority of municipalities because of their poor financial management;[12] and a plethora of court cases and reports on maladministration, corruption and fraud in the procurement of goods and services.

The poor state of health of local government was widely acknowledged from both inside and outside of government. In 2009 the Department of Cooperative Government and Traditional Affairs conducted an assessment of each of the 283 municipalities in the nine provinces with the aim of identifying the root causes for poor performance, distress or dysfunctionality in municipalities.[13] The resultant Report stated that:

[p]rovincial assessments exposed that causal reasons for distress in municipal governance pointed to:

a) tensions between the political and administrative interface;
b) poor ability of many councillors to deal with the demands of local government;
c) insufficient separation of powers between political parties and municipal councils;
d) lack of clear separation between the legislative and executive; [sic]
e) inadequate accountability measures and support systems and resources for local
f) democracy; and

[7] White Paper on Local Government, *Government Gazette* 18739, General Notice 423 (13 March 1998).
[8] Ibid at 22.
[9] D Powell, M O'Donovan & J de Visser *Civic Protest Barometer* (2015), available at http://dullahomarinstitute.org.za/our-focus/mlgi/civic-protests-barometer-2007-2014/at_download/file.
[10] D Powell, J de Visser, A May & P Ntliziywana 'The Withholding of Rates and Taxes in Five Municipalities' (2010) 12(4) *Local Government Bulletin* 9.
[11] D Powell, M O'Donovan, Z Ayele & T Chigwata *Municipal Audit Consistency Barometer* (2013), available at http://dullahomarinstitute.org.za/our-focus/mlgi/municipal-audit-consistency-barometer/at_ download/file.
[12] D Powell, M O'Donovan, Z Ayele & T Chigwata *Operation Clean Audit 2014 – What Went Wrong And Why?* (2013), available at http://dullahomarinstitute.org.za/our-focus/mlgi/operation-clean-audit-2014.
[13] Department of Cooperative Governance and Traditional Affairs *State of Local Government in South Africa: Overview Report - National State of Local Government* (2009)('*State of Local Government Report*') available at http://www.gov.za/sites/www.gov.za/files/state-local-gov-rpt1.pdf.

g) poor compliance with the legislative and regulatory frameworks for municipalities.[14]

The Report also identified the three main causes that prompted provincial inter- ventions in municipalities in terms of s 139 of the Constitution in the extreme cases where a municipality could not or did not fulfil its executive obligations:[15]

The most common failures that have triggered s 139 provincial interventions fall into three broad categories:

1. **Governance**: Political infighting, conflict between senior management and councillors and human resource management issues.
2. **Financial**: Inadequate revenue collection, ineffective financial systems, fraud, misuse of municipal assets and funds.
3. **Service delivery**: Breach of sections 152 and 153 of the Constitution which outline service delivery obligations of municipalities.

The important references for the purpose of this article are to 'inadequate accountability measures and support systems and resources for local democracy' and to the 'inadequate revenue collection, ineffective financial systems, fraud, misuse of municipal assets and funds'. On the one hand, municipalities collect too little revenue. On the other hand they too often squander what they have in the absence of adequate accountability measures.

Five years later, as noted above, the assessment of local government by the new Minister Pravin Gordhan was no better. In a policy document, titled Back to Basics: Serving our Communities Better!, the Minister divided the 278 municipalities between the top third municipalities that have 'got the basics right and are performing their functions at least adequately' (mainly the metros and secondary cities), the middle third that are 'fairly functional' (rural towns), and the bottom third (mostly rural areas) that are 'frankly dysfunctional'.[16] Among the ailments of the bottom third are:

endemic corruption, and poor financial management leading to continuous negative audit outcomes. There is a poor record of service delivery, and functions such as fixing potholes, collecting refuse, maintaining public places or fixing street lights are not performed. While most of the necessary resources to render the functions or maintain the systems are available, the basic mechanisms to perform these functions are often not in place. It is in these municipalities that we are failing our people dramatically, and where we need to be intervening urgently in order to correct the decay in the system.[17]

[14] Ibid at 10.
[15] Ibid at 19.
[16] *Back to Basics* (note 1 above) at 4.
[17] Ibid at 4–5.

A further concern identified was the viability of certain municipalities: 'The low rate of collection of revenue continues to undermine the ability of municipalities to deliver services to communities.'[18] Over the past decade and a half, the response of the national government to these challenges has been two-fold: first, a persistent drive to continuously tighten the legislative framework for municipalities, and second, a series of support programmes. The first strategy is based on the vain belief that systemic problems can be legislated out of existence, whereas, in fact, the more regulation was poured over local government, the greater the lawlessness that ensued.[19] The second response, namely large scale support programmes, such as 'Project Consolidate' and 'Siyenza Manje' could resolve immediate problems but not systemic ones. Provinces, bearing the responsibility of monitoring, supporting, and if need be intervening in failed municipalities,[20] were often incapable of doing so effectively.[21]

The state of local government that the Constitutional Court confronts is thus comprised of: municipalities, large and small, that are performing well and can do more; most municipalities that are financially vulnerable as they must collect the bulk of their revenue; and dysfunctional municipalities which are not accountable to the residents they serve.

III empowering Local government to control the local space

The first judgment, Lagoonbay, falls in the first category, namely a dispute about local government's constitutional powers and the Court's role in strengthening local government by protecting these powers. It is part of a series of four Constitutional Court judgments dealing with the delineation of municipal powers over land use planning. In terms of the Constitution 'municipal planning' is a municipal competence,[22] a matter over which the national and provincial governments have only limited regulatory powers in terms of s 155(7).[23] It is useful to provide a brief overview of the other three cases because this 'quartet' of judgments, of which Lagoonbay is part, signals a firm and consistent trend on municipal powers.

The first judgment in the series was handed down in 2010 when the Court struck down parts of the Development Facilitation Act.[24] The City of Johannesburg had taken issue with provincial tribunals rezoning land and deciding on the establishment of townships/subdivision of land in its jurisdiction. It argued that these powers fell within its constitutional competency for 'municipal planning' and that provinces could not usurp those powers. In Gauteng Development Tribunal, the Court agreed and struck down those parts of the DFA that established and empowered the provincial tribunals to rezone land and decide on

[18] Ibid at 5.
[19] N Steytler 'The Strangulation of Local Government' (2008) *Journal of South African Law* 518.
[20] See N Steytler & J de Visser *Local Government Law of South Africa* (2013) Chapter 15.
[21] *State of Local Government Report* (note 13 above) at 17.
[22] Constitution ss 156(1) and (2) read with Schedule 4B.
[23] On the ambit of the national and provincial governments' regulatory powers, see Steytler & De Visser (note 20 above) at 24(11) – 24(13).
[24] Act 67 of 1995 (DFA).

the establishment of townships/subdivision of erven.[25] This was a victory for municipal autonomy and cast doubt over the strong role hitherto played by provinces in land use planning matters. Many provinces, the Western Cape included, saw their powers to discourage inappropriate development and encourage appropriate development diminishing.

The second judgment, Maccsand,[26] was handed down in 2012 and built on the precedent set by Gauteng Development Tribunal. The question was whether the fact that a mining company had obtained a mining license obviated the need for it to obtain municipal land use approvals in terms of the Western Cape's Land Use Planning Ordinance.[27] The mining company, supported by the national Minister of Minerals and Energy argued that the granting of a mining license trumps municipal authority over 'municipal planning': otherwise national government's exclusive authority over mining would be usurped by the municipality. The Court dismissed this approach with the simple argument that 'LUPO regulates the use of land and not mining'.[28] Maccsand was an important marker in the development of a better understanding of the division of powers between spheres of government. The fact that a particular activity, regulated by local government, attracts the legislative attention of further spheres of government is not constitutionally problematic.

In Lagoonbay, the province pursued its case from a different angle (and achieved partial success). The dispute revolved around a development in the jurisdiction of George Municipality. The development included two golf courses, a hotel, a private park and a gated residential community. It was, by all accounts, controversial and its impact stretched beyond the boundaries of George. The case revolves around various planning instruments, the detail of which is not discussed here. But the crux is this: on the basis of certain provisions of LUPO, the MEC had reserved for herself the right to approve the rezoning and subdivision that were necessary to make the development happen. The argument was that 'the location and impact of the proposed development constitutes "Regional and Provincial Planning"', not 'municipal planning'.[29] The municipality approved the subsequent application for rezoning and subdivision but also referred the matter to the MEC. The MEC refused the application. That decision was challenged by the developer who wanted the Court to declare that the municipality's approval was sufficient to proceed with the development. The developer argued, on the basis of Gauteng Development Tribunal that only municipalities may decide on rezoning and subdivision. They furthermore argued, with reference to CDA Boerdery (Edms) Bpk and Others v The Nelson Mandela Metropolitan Municipality and Others,[30] that the sections of LUPO relied upon by the MEC were impliedly repealed with the coming into operation of the Constitution.

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[25] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11, 2010 (6) SA 182 (CC), 2010 (9) BCLR 859 (CC)('*Gauteng Development Tribunal*').
[26] *Maccsand (Pty) Ltd v City of Cape Town and Others* [2012] ZACC 7, 2012 (4) SA 181 (CC), 2012 (7) BCLR 690 (CC)('*Maccsand*').
[27] 15 of 1985 (LUPO).
[28] *Maccsand* (note 26 above) at para 47.
[29] *Lagoonbay* (note 2 above) at para 4. 'Regional planning and development' is a Schedule 4A functional area, while 'provincial planning' is an exclusive Schedule 5A functional area.
[30] *CDA Boerdery (Edms) Bpk en Andere v Nelson Mandela Metropolitan Municipality* [2007] ZASCA 1, 2007 (4) SA 276 (SCA).

In response, the MEC accepted that, in a large majority of cases, municipalities must consider land use applications as their impact is limited to the geographical area of the municipality. However, he argued that there is a category of planning decisions which have an impact beyond the area of a single municipality and that therefore fall within the ambit of 'provincial planning' and/or 'regional planning and development' as contained in Part A of Schedules 4 and 5 of the Constitution. The MEC's argument was accepted in the Western Cape High Court.[31] On appeal, the Supreme Court of Appeal disagreed and held that the rezoning was a matter for the municipality, not the provincial government. It based this on an understanding of zoning schemes as an instrument 'to determine use rights and to provide for control over use rights and over the utilisation of the land in the area of jurisdiction of a local authority'.[32]

The scene was thus set for a constitutional argument on the reach of the municipality's constitutional authority with regard to 'municipal planning' and provincial powers with regard to the same functional area. However, the constitutional argument fell flat as the developer – Lagoonbay – did not attack the provisions of LUPO the MEC relied upon. Instead, it argued that these sections had been 'impliedly repealed' by s 8 of the Local Government: Municipal Systems Act[33] and s 83(1) of the Local Government: Municipal Structures Act[34] because these provisions no longer empower provinces to rezone and subdivide. The Constitutional Court did not accept this argument because these Acts do little more than restate the Constitution. They do not provide for any alternative for the intricate and critically important scheme set forth by LUPO and there is no neatly identifiable provision that can be removed to address the unconstitutionality.

Because the MEC's actions were based on unchallenged provisions of LUPO the Court was thus forced to limit its enquiry to the question as to whether the MEC acted ultra vires LUPO.[35] In essence, the judgment emphasises the rule of law. A validly enacted provincial law remains valid until set aside by the Constitutional Court. Decisions taken in terms of those laws are valid, no matter how incompatible they may be with the Constitution. This is different only if the decision itself is ultra vires the empowering law.

However, the Court did confess that it was tempted to follow the Supreme Court of Appeal in setting aside the MEC's conduct.[36] It even elaborated, in five neat points, what its argument would have been (had it succumbed to that temptation). First, national and provincial spheres are, in principle, not entitled to usurp the functions of local government. Secondly, the constitutional vision of autonomous spheres of government must be preserved. Thirdly, while the Constitution confers planning responsibilities on each of the spheres of government, those are different planning responsibilities, based on 'what

[31] *Lagoonbay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* [2011] ZAWCHC 327, [2011] 4 All SA 270 (WCC).
[32] *Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape & Others* [2013] ZASCA 13 at para 8.
[33] Act 32 of 2000.
[34] Act 117 of 1998.
[35] *Lagoonbay* (note 2 above) at para 45.
[36] Ibid at para 46.

is appropriate to each sphere'. Fourthly, '"planning" in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships'. Lastly, the provincial competence for 'urban and rural development' is not wide enough to include powers that form part of 'municipal planning'.[37] These factors led the Court to the compelling (but inconsequential) conclusion that 'there is therefore a strong case for concluding that, under the Constitution, the Provincial Minister was not competent to refuse the rezoning and subdivision applications'.[38]

Number four of the quartet of Constitutional Court judgments on municipal powers in land use planning was decided in 2014 but deserves consideration as it is the judgment in which the Court could complete the reasoning which it was forced to abandon in Lagoonbay. Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others[39] dealt with the constitutionality of s 44 of LUPO, which provided that persons aggrieved by a land use control decision taken by a municipality, may appeal to the Premier who considers the appeal and may replace the municipal decision with his or her own decision regardless of the nature or scale of the development. The Court held that s 44 was unconstitutional: 'The provincial appellate capability impermissibly usurps the power of local authorities to manage "municipal planning", intrudes on the autonomous sphere of authority the Constitution accords to municipalities, and fails to recognise the distinctiveness of the municipal sphere.'[40]

The MEC had urged the Constitutional Court to retain the provincial appeal authority in cases where the development has an impact beyond the municipality's boundary. The MEC's first argument was that without the provincial executive's 'surveillance', the provincial government would be powerless to stop big decisions with extra-municipal effects. The Court, with reference to Maccsands, did not accept this argument. No matter how big the development, provinces must use powers of their own to stop the undesirable ones instead of relying on a power to reverse municipal decisions.[41]

The second argument was that s 155(7) of the Constitution permits the provincial government to exercise oversight over municipalities and thus permits provinces to hear appeals against municipal decisions. The Constitutional Court disagreed. It held that s 155(7) does not permit the usurpation of the power or the performance of the function itself, but allows the provincial government to determine norms and guidelines. Thirdly, the MEC argued that the appeal power enables the provincial government to protect provincial interests as otherwise 'parochial municipal interests will triumph'.[42] To this, the Court responded tersely by stating that the Constitution intends for those 'parochial interests' to prevail in subdivision and zoning decisions 'subject only to the oversight and support role

[37] Ibid.
[38] Ibid.
[39] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* [2014] ZACC 9, 2014 (4) SA 437 (CC), 2014 (5) BCLR 591 (CC)('*Habitat Council*').
[40] Ibid at para 13 (footnotes omitted).
[41] Ibid at paras 20–22.
[42] Ibid at para 23.

of national and provincial government, and to the planning powers vested in them'.[43] Section 44 of LUPO was thus declared unconstitutional in its entirety.

The quartet of Constitutional Court decisions, with Lagoonbay as the awkward middle one, establishes a firm and consistent trend on municipal powers, most eloquently expressed in the Court's five-point confession in Lagoonbay. Turning the attention back to the overall theme of this article – the Court being confronted with both assertive, capable local governments as well as with dysfunctional ones – it is telling that in all of these cases, the charge against national and provincial government's tight-fisted approach was led by municipalities in the top third of Minister Gordhan's categorisation. In three of the four cases, a metropolitan municipality asserted its authority and in Lagoonbay the authority of a secondary city, namely George Municipality, was vindicated.

The consequence of the quartet of cases is that all municipalities, still under the yoke of provincial ordinances or old order national legislation, are given expansive scope in the field of planning. It is also a further indicator that the Court is generous in its interpretation of local powers. The result is that both highly functional urban municipalities, facilitating large developments, and dysfunctional rural municipalities benefit from the Court's approach. Put differently, the mere fact that dysfunctional municipalities may not be able to exercise such 'increased' powers effectively or efficiently is no bar for empowering the able and the willing.

Having increased powers is one thing; having the financial resources to exercise those powers productively is another. Moreover, if the exercise of powers is transmogrified in public obligations to provide basic services, the powers to levy and collect property rates are crucial.

IV extracting revenue

Local governments find themselves in a precarious financial position. They are reliant on raising their own revenue for the bulk of their expenditure. For the 2013/14 financial year they collectively raised 73 per cent of their revenue, the rest coming from transfers in the form of an equitable share and conditional grants.[44] This figure, of course, masks the great disparities between local governments. The eight metropolitan municipalities raised 83 per cent of their revenue, while the 70 most rural municipalities were reliant on transfers for 73 per cent of their revenue.[45] This disparity is the result of the differing economic contexts in which the municipalities apply their power to impose property rates and charge user fees for water and electricity, their main revenue sources.

The strength of local government autonomy, and ostensibly the pillar of its democratic accountability, is the fact that the majority of municipalities raise and collect the bulk of

[43] Ibid.
[44] National Treasury *Budget Review 2014* (2014) 100, available at http://www.treasury.gov.za/documents/national%20budget/2014/review/FullReview.pdf.
[45] Ibid.

their own income. This creates a special relationship with their ratepayers and customers. However, collecting revenue has not been easy. Aggregate municipal consumer debts were R98 billion as at 30 September 2014.[46] As noted, the failure to collect sufficient revenue threatens the sustainability of many municipalities. It is this backdrop that makes Liebenberg and Ingonyama Trust particularly important. Both judgments deal with the imposition of property taxes, a key source of income for local government. Prior to the ushering in of the new local government dispensation in 2000, rural land owners were not required to pay property rates. The introduction of wall-to-wall municipalities placed the entire country under local democracy, and, one has to hasten to say, all land owners under the obligation to pay property taxes. Two groups of rural land owners had previously fallen outside the reach of property rates – private agricultural land and communal land, the one historically white and wealthy, the other black and impoverished.

A Empowering Municipalities to Collect Rates

In Liebenberg,[47] land owning farmers in the rich wheat farming district of the Swartland protested against having to pay property rates when they were first introduced by the Bergrivier Municipality in 2001. They refused to pay for the following eight years. This was a case of ratepayers that could pay, but did not want to in the context of a reasonably performing municipality,[48] against which no complaints about the quality of services or governance were levelled.

As both the Constitution and the local government legislation empowered municipalities to levy rates on all properties, the disgruntled farmers' legal focus was limited to procedural challenges – the levying of property rates was irregularly done, first in terms of the Local Government Transition Act,[49] the Local Government: Municipal Finance Management Act,[50] and then the Local Government: Municipal Property Rates Act.[51] Of course, the farmers (or rather their lawyers) had a field day. The laws are replete with detailed rules to municipalities on how to levy rates, how to be participatory as much as possible. These detailed rules are termed by Geoff Budlender as 'trip wires';[52] a municipality is bound to trip up on one or other of the requirements in the relevant legislation.

The farmers complained, among others matters, about the following:

[46] National Treasury *Local Government Revenue and Expenditure: First Quarter Local Government - Section 71 Report for the period: 1 July 2014 – 30 September 2014* (5 December 2014) 2, available at http://www.treasury.gov.za/comm_media/press/2015/2015061501%20-%20Press%20Release%20S71.pdf.
[47] *Liebenberg* (note 3 above).
[48] For example, in its report over the 2012–2014 financial year, the Auditor-General's finding with respect to Bergrivier was 'unqualified with findings'. This indicates that the financial statements contain no material misstatements and is a good indicator that the Municipality is reasonably well-governed. The Auditor-General pointed out that the municipality had improved on its performance compared to the previous financial year. Auditor-General *General Report on the Audit Outcomes of Local Government 2012-13 – Western Cape* (2013) 143.
[49] Act 209 of 1993 (LGTA).
[50] Act 56 of 2003 (MFMA).
[51] Act 4 of 2004 (Rates Act).
[52] G Budlender 'Presentation at launch of *Local Government Law of South Africa*' (Cape Town, 29 May 2008) (on file with the authors).

a) During the 2002/3 financial year, the Municipality failed to publicly give notice of its rates resolution as required by s 10G(7)(d)(ii) of the LGTA;
b) For the 2004/5 to 2008/9 financial years the municipality did not display a notice stating the 'general purport' of the rates resolution, including the rebate for farmers (as required by s 10G(7)(c)(ii) of the LGTA;
c) For the 2005/6 to 2008/9 financial years, the notice published on the rates resolution omitted to state that objections could be lodged within 14 days as required by s 10G(7)(c)(iv) of the LGTA, but not required by the MFMA;
d) For the 2006/7 to 2008/9 financial years, the rates resolution was not published in the Provincial Gazette as required by s 14(2) of the Rates Act.

In the end, the issues were (a) which rules applied; and (b) how the courts should deal with non-compliance of the specific applicable rules. On both scores the majority opinion of the Court, penned by Mhlantla AJ, came out strongly in favour of the Municipality, interpreting the law purposively to give local government maximum leverage over unwilling ratepayers.

1 Which Rules Applied?

The LGTA, by its very transitional nature, was the most accommodating for municipalities. During the transitional phase; it imposed the least demanding publication requirements on municipalities. The Rates Act, giving effect to s 229(2)(b) of the Constitution, is more demanding, setting specific requirements for public notification and participation. The first issue to be decided was whether s 10G(7) of the LGTA, which was repealed by s 179 of the MFMA, but kept alive as a transitional provision, was finally extinguished by the enactment of the Rates Act, or only when this Act's transitional provisions lapsed on 30 June 2011.

On this score the Court split. A plain reading of s 179 of the MFMA would have meant that the enactment of the Rates Act finally meant the death knell of s 10G(7) (and success for the farmers), while a broad construction, which would not strain the text too far, would keep s 10G(7) of the LGTA alive (and the municipality in business). The latter route was chosen, because Mhlantla AJ held that the purpose of the Rates Act should not only be ascertained from its own provisions, but also from 'the broader context within which it was passed and the relationship between the various statutory enactments that have sought to restructure local government'.[53] The Municipality could thus rely on the LGTA to excuse its failure to publish the rates resolution in the Provincial Gazette as required by s 14(2) of the Rates Act. Even where the LGTA imposed a burden, such as that the published notice must state that objections could be lodged within 14 days of the publication, the Municipality could rely on the MFMA, which had no such requirement.[54] The import is clear; an interpretation that empowers municipalities to levy rates should be preferred above one that impedes municipalities, at least in the transitional phase.

[53] *Liebenberg* (note 3 above) at para 39.
[54] Ibid at para 73.

The background to this is that the LGTA was the legislated outcome of the multiparty negotiations on the future of local government in post-apartheid South Africa. It regulated the complicated transformation of the fragmented and illegitimate system of Apartheid local government into a system that aligns with the new constitutional order. Importantly, it sought to do so without major disruption to existing systems and services. The Court emphasises that the LGTA had a specific purpose, namely to afford local government time to develop new rating systems. The Court, while lightly annoyed with the poorly worded transitional provisions, thus displayed understanding with regard to the complexity of the local government transformation and protected local government's revenue stream as an essential platform from which to exercise a developmental mandate.

2 Impact of Non-compliance with the Rules?

The second battery of arguments, launched by the farmers, was essentially a series of procedural flaws on the basis of which they sought to have the imposition of property rates set aside. The Court considered these arguments against the backdrop of a general approach to assessing a municipality's compliance with statutory prescripts, namely:

[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.[55]

Even when the less demanding rules of the LGTA applied, the failure to apply them scrupulously did not necessarily invalidate the imposition of rates. Writing for the majority Mhlantla AJ first quoted, with approval, the Court's earlier holding in African Christian Democratic Party v Electoral Commission, that 'the question is whether the steps taken by the local authority are effective when measured against the object of the Legislature, which is ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular'.[56] With reference to a matter where property rates was in issue, she quoted with approval the following SCA dictum: 'To nullify the revenue stream of a local authority merely because of an administrative hiccup appears to me to be so drastic a result that it is unlikely that the Legislature could have intended it'.[57]

Consequently, the fact that the Municipality failed to publicly give notice of its rates resolution as required by s 10G(7)(d)(ii) of the LGTA, was not material. The Municipality went through a public participation process and was responsive thereto, and these measures were 'substantially effective in achieving the objects of s 10G(7) in particular and the legislative scheme as a whole'.[58] The complaint that the public notice stating the 'general purport' of the rates resolution, did not including the rebate for farmers (as required by s

[55] Ibid at para 26.
[56] *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1, 2006(3) SA 305 (CC), 2006 (5) BCLR 579 (CC) at para 25.
[57] *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association* [2012] ZASCA 128, [2011] 2 All SA 46 (SCA) at para 14, quoted in *Liebenberg* (note 3 above) at para 24.
[58] *Liebenberg* (note 3 above) at para 61.

10G(7)(c)(ii) of the LGTA) was also dismissed, as the notice said that details of the resolution were available for inspection.[59]

The motivation for this very accommodating approach to local government need not be a question for speculation as the Court provided it in clear terms in the final two paragraphs of the judgment: municipalities are largely self-reliant and those who can pay should do so. Mhlantla AJ referred to the early Constitutional Court decision in Pretoria City Council v Walker, in which Langa DP wrote that '[a] culture of self-help in which people refuse to pay for services they have received is not acceptable'.[60] She then continued:

Effective cooperation between citizens and government at local level is a foundational building block of our democracy. The State must of course uphold the rule of law and ensure its obligations are discharged. But, at the same time the culture of non-payment for municipal services has, as this Court has said before, "no place in a constitutional State in which the rights of all persons are guaranteed and all have access to the courts to protect their rights."[61]

The Liebenberg judgment is thus a further example of the Court coming down on the side of local government, helping it not to stumble over the 'tripwires' designed by a zealous national government and used by farmers reluctant to pay local government taxes.

While the outcome is surely correct – not every hiccup should invalidate a revenue raising measure – it does raise questions of legal certainty and the faithful adherence to the principle of legality. Khampepe J in her minority judgment gave a stirring defence of the principle:

Where the State purports to extract taxes from its citizens – conduct that goes to the very heart of the social contract between government and its people – that extraction must be done in a lawful manner. Where a local authority purports to impose rates, that imposition must be done in accordance with the constraints that Parliament has imposed. If we are to give cognisance to the fact that the Constitution now empowers municipalities to exercise original legislative powers, we must also accept that municipal authorities may no longer adopt an informal approach to the exercise of their powers.[62]

One cannot but agree with her sentiment that 'the principle of legality [lies] at the heart of our modern constitutional dispensation'.[63] The problem remains, however, that of over-prescription by the legislature.[64] Every 'must' – and there are hundreds of them scattered throughout the suite of local government legislation – cannot render local administrative decisions vulnerable to procedural challenges with potentially grave consequences for municipalities. In its eagerness to ensure the correct and desirable process, the legislator

[59] Ibid at para 67.
[60] *City Council of Pretoria v Walker* [1998] ZACC 1,1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*') at para 93.
[61] *Liebenberg* (note 3 above) at para 80, quoting *Walker* (note 60 above) at para 92.
[62] *Liebenberg* (note 3 above) at para 164.
[63] Ibid at para 165.
[64] See Steytler (note 19 above).

has often overreached its aim. The courts, not wanting to see dire financial consequences for the municipality will on a case by case basis 'rewrite' the statute book for what is reasonable in a particular set of circumstances.

As noted above, sustainable financial resources lie at the heart of a well- functioning municipality that delivers services. In the transition phase of local government, municipalities – particularly in rural areas where the skills base is uneven – have struggled to find their way through the thicket of the evolving financial legislation that has increased in density. In Liebenberg the Court accommodated municipalities by applying a soft approach to regulatory compliance, an approach from which struggling municipalities would derive the most benefit. However, it is on this very point that the Court split. It will always be a difficult path to tread between, on the one side, protecting municipalities from getting routinely tripped up, and, on the other side, weakening adherence to the rule of law. The majority's approach of requiring substantial compliance with the policy purpose of the legislative requirements is appropriate; it is doubtful whether the skills capacity of a municipality to comply with the requirements should be a relevant factor at all.

B (Retrospective) rating of communal land

There are, however, limits to the Court's willingness to accommodate municipalities' need to spread the tax net as wide as possible. In Ingonyama Trust[65] the Court dealt with a complainant from the other end of the spectrum from that of private landowners, namely the owners of communal land in KwaZulu-Natal.

These areas fell outside the formal structures of local governance during the apartheid era. The local government transformation, culminating in 2000 when a 'wall-to-wall' system of local government was established, brought this category of land under the jurisdiction of municipalities' rates regimes.

In Ingonyama Trust, the metropolitan municipality approached the High Court in 2009 for a declaratory order that the communal land held in trust by the Ingonyama Trust, which fell within the boundaries of the municipality, was rateable land as from May 1996, when the first election of transitional councils were held, until June 2005 when the Rates Act came into force. The Rates Act also repealed the Rating of State Property Act,[66] which exempted state land from rates. The question was whether the Rating Act applied to the land held by the Ingonyama Trust from 1996 to June 2005. The High Court held that it did not, making the trust land subject to rates, a decision that was reversed by the Supreme Court of Appeal.[67]

In refusing the Municipality leave to appeal because there were no prospects for success, the Constitutional Court confirmed the SCA decision that the land held by the Trust

[65] *Ingonyama Trust* (note 4 above).
[66] Act 79 of 1984.
[67] *Ingonyama Trust v Ethekwini Municipality* [2012] ZASCA 104, 2013 (1) SA 564 (SCA).

was state property within the meaning of the Act and the Constitution and thus exempt from property taxes. In refusing leave, the Court also said that 'it would not ordinarily be in the interests of justice for a municipality to be allowed to levy rates on immovable property, dating back eight to 17 years, without any explanation for its failure to do so within the relevant financial years'.[68] In passing the Court laid down a general principle against the retrospective levying of rates: 'An underlying principle regarding the levying of rates is that they must be levied within the financial year in respect of which the rates are charged.'[69] Jafta J advanced the following reasons for this rule. Firstly, a property owner would find it difficult to dispute the valuation of the rated property, years after the event. Secondly, as an increase in rates is bound up in the municipal budget, and the need for public notification and participation, the retrospective levying of rates would circumvent such processes.[70] One could further add the reason for notification of the rates resolution, namely, ratepayers must be informed in advance about their rates liability so that they can manage their financial affairs accordingly.

This decision does not fly in the face of the Court's general supportive approach of strengthening and protecting municipal revenue raising powers. The Court will, however, not tolerate egregious transgressions of basic legal precepts such as the rule against retrospectivity.

V extracting accountability for expenditure

From a democratic theory perspective, the link between taxes and democracy was forged at the Boston Tea Party on 16 December 1773 with the demand: 'No taxation without representation'. It is fundamentally unfair to pay taxes with no control over expenditure decisions on the tax revenue so raised. Thus a fundamental notion of democratic governance was established. The raising and spending of revenue is the prerogative of the elected government. The Constitutional Court, in the celebrated case of Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others,[71] held that the adoption of a municipal budget and revenue-raising measure is a legislative act and thus not subject to administrative review.

This logic also establishes a fundamental democratic accountability relationship between the elected representatives and the electorate. Where an elected government extracts hard-earned money from its citizens, the latter has every incentive to hold the elected government accountable for the purpose and manner in which the taxpayers' money is spent. Dissatisfaction about expenditure decision should, theoretically at least, lead to the withdrawal of the political mandate of the elected government at the next election. However, the five yearly disapproval rating is insufficient in modern democracies; a continuous engagement in decision making has become part and parcel of the modern concept of participatory democracy. As noted above, the Constitutional Court has confirmed that this

[68] *Ingonyama Trust* (note 4 above) at para 41.
[69] Ibid.
[70] Ibid at paras 41–42.
[71] *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 paras 44 and 46.

principle underpins the Constitution and informs local governance. The Local Government: Municipal Systems Act requires residents' participation in the key decisions of the municipal council, the MFMA demands participation in the budgeting process, and the Rates Act in the levying of rates, all statutory provision that have been given effect to by the courts.[72] The requirements of consultation with residents have not resulted on the whole in a satisfied citizenry, as evidenced by numerous cases where residents claim that municipalities did not act in a transparent or accountable manner. In 2013, the Constitutional Court was confronted with two such cases where it had to carefully assess whether the municipalities' conduct could withstand constitutional scrutiny.

A Constitutional Duty to Account?

In Brittania Beach v Saldanha Bay Municipality[73] a group of developers unsuccessfully tried to employ the principle of accountability to extract an account from the municipality in respect of certain sums they alleged were overpaid. They failed, not because the Court did not accept democratic accountability but rather because they leapfrogged the applicable statutory instruments to extract accountability and instead wanted to rely directly on constitutional principles. The payments were capital contributions, levied as conditions to land use approvals. By the time the issue reached the Constitutional Court, the better part of the dispute had been resolved by the Supreme Court of Appeal's ruling that the capital contributions were validly imposed.[74] The developers still argued, however, that the Supreme Court of Appeal overlooked the fact that a constitutional duty to account rests on the municipality on the basis of s 195 of the Constitution, containing the basic values and principles of public administration.

However, the Constitutional Court held that these do not give rise to independent rights and that the Constitution, statutes, and court proceedings provide specific rights and remedies that could have been pursued. Since the claim for a duty to account was not located within any statutory framework, it failed. The outcome may have been different, had the claim been based on a specific statutory remedy, such as a request for access to information in terms of the Promotion of Access to Information Act[75] or a claim based on the provisions of the Municipal Systems Act. There is a clear echo of Lagoonbay, where the Court refused to leapfrog LUPO despite its dubious constitutional status. Constitutional arguments that overlook the existence of relevant and applicable statutory instruments are unlikely to face a generous Constitutional Court.

The Court also held that a duty to account does not arise as a result of a fiduciary relationship between citizens and the municipality. The fiduciary relationship, so the Court reasoned, 'is a far cry from democratic accountability'.[76] This is important in the context of

[72] See *South African Property Owners Association v City of Johannesburg Metropolitan Municipality and Others* [2012] ZASCA 157, 2013 (1) SA 420 (SCA), 2013 (1) BCLR 87 (SCA)('*SA Property Owners Association*') at para 32.
[73] *Brittania Beach* (note 5 above).
[74] *Saldanha Bay Municipality v Britannia Beach Estate (Pty) Ltd* [2012] ZASCA 206.
[75] Act 2 of 2000 (PAIA).
[76] *Brittania Breach* (note 5 above) at para 18.

Rademan (discussed below), another judgment where the rules of contract were invoked to resolve disagreement between the municipality and its residents.

On the face of it, the Court merely applied the general rule that litigants must first resort to the specific rules, in this case to foster accountability, before seeking support in the Constitution. The question that Rademan indirectly posed was much more profound: what are the remedies when the usual rules of ensuring accountability and proper government fail, and the municipality fails to meet its basic mandate of general service delivery, as one third of (dysfunctional) municipalities routinely do?

B What is the Remedy when Local Government Fails?

Unresponsive or dysfunctional municipalities have evoked two sorts of protests, each coming from the polar sides of South Africa's class and race divide. In the townships – occupied almost exclusively by black people – 'service delivery protests' by the impoverished have increased over the years both in numbers and violence.[77] The majority of protests occurred in the better performing top third of municipalities – mainly in the metros.[78] However, a substantial number occurred in the dysfunctional third. Significantly, protest action has had no link with political choices. High levels of service delivery protests did not translate into any significant shifts in political support. This has been explained by the fact that protests focus on service delivery matters, while elections are still conducted along the politics of identity.[79]

On the other side of the race and class divide have been protests by mainly white ratepayers associations in the form of withholding property rates payments. A 2010 study of five municipalities found that there were genuine service delivery problems that prompted the withholding of rates and that these grievances were attributed to real or perceived incapacity, maladministration and corruption in the municipality.[80] These views were shored up by the Auditor-General's reports that revealed actual problems in financial management. Although the financial impact of the withholding was limited (less than R10 million was withheld nation-wide with half of that located in three municipalities), the political impact was substantial as it played into historical divisions and racial stereotypes.

The constitutionality of this form of protest action eventually reached the Constitutional Court in Rademan v Moqhaka Municipality.[81] Moqhaka Municipality, one of the five municipalities in the abovementioned study, should by all measures be a viable and effective municipality; with Kroonstad it has a large agricultural town at its core and a productive agricultural sector in the surrounding areas. Yet, on governance indicators it has done very poorly. It has collected eight successive disclaimers over the past years, that is, the Auditor-General could not conduct an audit of its financial statements in order to express

[77] Powell, O'Donovan & De Visser (note 9 above).
[78] Ibid at 5.
[79] S Booysen 'With the Ballot and the Brick: The Politics of Attaining Service Delivery' (2007) 7(1) *Progress in Development Studies* 21.
[80] Powell, De Visser, May & Ntliziywana (note 10 above).
[81] *Rademan* (note 6 above).

an opinion.[82] Such was the state of a deeply troubled governance situation. For example, during the 2011-2012 financial year, R52 million of the Municipality's expenditure was unauthorised, R111 million was irregular expenditure and R13 million was fruitless and wasteful expenditure. The Auditor-General issued a disclaimer and attributed the problems to three reasons: (1) key positions being vacant or key officials lacking competencies; (2) lack of consequences for poor performance; and (3) slow response by politicians in addressing root causes.[83] In 2012-2013, the Municipality made little progress, causing the Auditor-General to comment that the Municipality is 'stagnating'.[84]

Ms Rademan decided to withhold the payment of rates because, euphemistically put, 'she was unhappy about what she regarded as poor or inefficient service delivery by the Municipality'.[85] She continued, however, to pay her electricity account, a strategy followed by other members of the Moqhaka Ratepayers and Residents' Association. The Municipality in response proceeded, after notification, to cut off her electricity supply, which prompted Rademan to turn to the courts for its restoration. Before the Kroonstad Magistrate's Court she argued: (a) the disconnection should be preceded by a court order; (b) she was not in arrears with her electricity account; and (c) not one of the conditions allowing disconnection in terms of the Electricity Regulation Act[86] was present. Her success in obtaining a court order for the restoration of the electricity supply was short-lived as the Free State High Court upheld the Municipality's appeal. Rademan pursued the matter further in Bloemfontein, but the Supreme Court of Appeal was not moved.[87] It affirmed that no prior court order is required by the Municipal Systems Act for a disconnection. The court's pragmatic answer was that such a requirement would be both 'unrealistic and untenable'.[88] Given the extent of service delivery protests and demonstration across the country, and ratepayers withholding rates, the court observed that it would be impractical to approach a court before every termination of a service. Also, the Municipal Systems Act made provision in s 102 for the consolidation of accounts, meaning that a customer could not pick and choose which account to pay and which not. The court did not address the third argument – whether s 21(5) of the Electricity Regulation Act governed the matter. What is clear from the litigation is that none of the arguments addressed the core issue: could the withholding of taxes be a legitimate remedy for poor service delivery?

Rademan was thus the test case for this form of protest. Although Rademan's delay in lodging an appeal against the Supreme Court of Appeal decision was 'excessive' and the reason proffered for it 'less than satisfactory', the Constitutional Court condoned the late application.[89] The main reason for doing so was the consent of the Municipality; it did so because of the matter

[82] Auditor General *General Report on the Audit Outcomes of Local Government 2012-13 – Free State* (2013) 58 ('*Audit Outcomes Report Free State*').
[83] Auditor-General *Consolidated General Report on the Local Government Audit Outcomes 2011-12* (2013) 205, available at https://www.agsa.co.za/Portals/0/MFMA2011-12Extracts/MFMA_2011-12_consolidated_reports/AGSA_MFMA_CONSOLIDATED_REPORT_2011_12.pdf .
[84] *Audit Outcomes Report Free State* (note 82 above) at 59.
[85] *Rademan* (note 6 above) at para 4.
[86] Act 4 of 2006 s 21(5).
[87] *Rademan v Moqhaka Municipality and Others* [2011] ZASCA 244, 2012 (2) SA 387 (SCA)('*Rademan SCA*').
[88] Ibid at para 16. The matter was not raised before the Constitutional Court in *Rademan*.
[89] *Rademan* (note 6 above) at para 3.

was 'of great importance and interest to local government authorities throughout the country on which they need certainty' which only the Constitutional Court could provide.[90]

When Rademan was argued before the Constitutional Court only two arguments were raised. First, the electricity supply could not be cut off as she was not in arrears on the payment of her electricity account. The second was that the municipality's power to cut off electricity supply was circumscribed by s 21(5) of the Electricity Regulation Act. On the first the Court held that s 102 of the Municipal Systems Act, as supplemented by the municipality's by-law, gave the municipality the power to consolidate the accounts of a consumer. The effect of such a consolidation is that if only part of the account is paid, the consumer is in breach of his or her obligation to pay and enforcement measures can be applied. On the second ground the Court confirmed the decisions of the courts a quo. Section 21(5)(c) of the Electricity Regulation Act allows the termination of the supply of electricity if the consumer contravened the conditions of payment set by the municipality, including the consolidation of accounts and the termination of services in the event of being in arrears.[91] Froneman J argued, in our view correctly, that the Electricity Regulation Act was not applicable to the case at all as it deals with the supply of electricity and not with the payment of rates.[92] The matter should be resolved in terms of the Municipal Systems Act and the municipality's by-laws.

The Court's resolution of these issues did not break new ground. The issue of electricity (and even water) disconnections has been litigated extensively over the years.[93] The legal edifice of extracting payments of rates and other charges through the threat of electricity disconnection has been made watertight. Section 102 of the Municipal Systems Act allows for the consolidation of accounts. The provisions of s 102(2) of that Act, dealing with the suspension of payment due to a dispute, applies only when actual amounts due are contested. Municipalities must, however, enact by-laws to operationalise this power. The details of the Moqhaka Municipality's by-laws and agreement with electricity consumers attest to the concerted effort to make sure that any attempt of escaping the payment of rates is thwarted.

The legal skirmishes about the application of the Municipal Systems Act or the Electricity Regulation Act and municipal by-laws and agreements were merely diversionary legal strategies and issues. The real issue, also aired before the Court, was the vexed question as to what is 'the remedy of a resident or ratepayer … where the municipality demands payment for a service or for services in circumstances where the municipality has not provided the service or services'.[94] The municipality's short answer was that a dissatisfied consumer must approach a court for a declaratory order that the service or services be rendered. Zondi J was of the view that Rademan's case was not that 'the Municipality claimed payment for services that it had not rendered. Indeed, in the present matter it has not

[90] Ibid.
[91] Ibid at para 29.
[92] Ibid at para 49.
[93] Steytler & De Visser (note 20 above) at 13-72 – 13-75.
[94] *Rademan* (note 6 above) at para 41.

been proved that the Municipality was claiming payment for services that had been rendered poorly or inefficiently'.[95] This view is rather surprising because it was indeed Rademan's case in the Magistrate's Court that she was withholding rates because of poor services.[96] However, Zondo J rose to the hypothetical challenge as follows:

[W]here a municipality claims payment from a resident or ratepayer for services, it is only entitled to payment for services that it has rendered. By the same token, where a municipality claims from a resident, customer or ratepayer payment for services, the resident, customer or ratepayer is only obliged to pay the municipality for services that have been rendered. There is no obligation on a resident, customer or ratepayer to pay the municipality for a service that has not been rendered. Accordingly, where, for example, a municipality included into an account for services an item for electricity when in fact no electricity has been connected to the particular property and, therefore no electricity has been supplied, the customer is entitled to take the stance that he or she will pay the total bill less the amount claimed for electricity supply[97]

The example of electricity supply is not very helpful: no one disagrees that if no electricity is delivered, no payment obligation follows. It is a contractual relationship between a customer and a municipality for a 'trading service', that is, an individualised and measurable service. The real question is if general, non-individualised services are not delivered, or poorly delivered, could the rates that are meant to pay for such services, be withheld? Can the above dictum be used to also affirm a more general social contract?

The Court refers to three specific categories of persons who may become liable for payments: residents, customers and ratepayers. Each of these categories of payers relates to one or other of a municipality's revenue sources: trading services, rates and other regulatory payments such as licensing fees, penalties and the like. In the category 'customers' fall persons receiving individualised accounts for measurable services such as electricity, water, sanitation and waste removal. The category 'residents' probably refers to charges paid by individuals such as licensing fees. The reference to 'ratepayers' then deals with those services that the entire community benefits from, such as the maintenance of roads, stormwater systems, and street lighting, services which are usually funded by rates revenue.

Although taxes are defined as payment of moneys not in return for any definite service, in the case of a municipality the link between property rates and generalised services is all too visible; they are used to finance the non-trading services, including road maintenance, street lighting, and cleaning. As the Minister of Cooperative Governance and Traditional Affairs noted, it is the potholes in the roads, the uncollected garbage, the streetlights that do not work,[98] that indicate that the rates are not appropriately used. The

[95] Ibid at para 42.
[96] Ibid at para 6.
[97] Ibid at para 42.
[98] *Back to Basics* (note 1 above) at 4-5.

question is whether Zondo J has opened the door slightly by introducing the principle of 'no services no rates'?

Implicit in the dictum is that where ratepayers can show that they are not receiving such community services, or if they are rendered 'poorly of inefficiently', there is no duty to pay rates. Of course, as the Court emphasised, no or poor service delivery must be clearly proved. The strong message that the Court implicitly delivered was that the duty to pay rates is not an absolute obligation, irrespective of whether or not any or poor services are delivered in return. The Court thus did not take up the municipality's suggestion that the appropriate remedy for a municipality's failure to provide services is to approach a court for a declaratory order. Instead the Court asserted the basic principle of contract. In the case of a trading service, the normal rules of contract apply. In the case of ratepayers, the imperative of the social contract governs: no rates without services.

However, such an argument runs counter to a long line of decisions condemning 'self-help' measures. When the matter first came to the Constitutional Court in 1998, it involved residents from white suburbs in Pretoria withholding payments because of complaints about unfair discrimination in debt collection measures. Langa DP was forthright: withholding payments was a practice that had 'no place in a constitutional state in which the rights of all persons are guaranteed and all have access to the courts to protect their rights'.[99] He continued:

Local government is an important tier of public administration as any. It has to continue functioning for the common good; it however cannot do so efficiently and effectively if every person who has a grievance about the conduct of a public official or a government structure were to take the law into their own hands or resort to self-help by withholding payment for services rendered. That conduct carries with it the potential for chaos and anarchy and can therefore not be appropriate. The kind of society envisaged in the Constitution implies also the exercise of responsibility towards the systems and structures of society. A culture of self-help in which people refuse to pay for services they have received is not acceptable. It is pre-eminently for the courts to grant appropriate relief against any public official, institution or government when there are grievances. It is not for the disgruntled individual to decide what the appropriate relief should be and to combine with others or take it upon himself or herself to punish the government structure by withholding payment which is due.[100]

Similar sentiments were expressed by the Constitutional Court in Liebenberg.[101] The chaos that may follow on self-help in the form of withholding rates is undeniable. The question, however, remains: what are the remedies for desperate residents and ratepayers facing dysfunctional municipalities? In this regard the Rademan Court skirted the issue. It did not provide any set of principles or guidance, as it did in Lagoonbay where the key matter

[99] *Walker* (note 60 above) at para 92.
[100] Ibid at para 93.
[101] *Liebenberg* (note 3 above).

was also not squarely before them, on how the Court may come to the assistance of residents at the end of their tether.

So the question remains: what are the legal options? Could the provincial or national government be compelled to intervene on behalf of the residents? In terms of s 139 of the Constitution the provincial executive may intervene in a municipality when the latter cannot or does not perform its executive obligations. This is a discretionary power which places no obligation on the provincial executive.[102] In numerous cases, where it is undisputable that executive obligations are not fulfilled, provincial executives have not assumed responsibilities for those obligations despite the fact that they are 'necessary to maintain essential national standards or meet established minimum standards for the rendering of a service'.[103] It must be arguable that circumstances of dysfunctionality should transform this power into an obligation. The very constitutional object of local government is 'to ensure the provision of services to communities in a sustainable manner'.[104]

Both the national and provincial government are also under a constitutional obligation to 'support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their functions'.[105] While this is a lesser measure than the intervention in terms of s 139 of the Constitution, it nevertheless requires measures to be taken. Furthermore, these measures are not only legislative. Would a court be willing to give an order to that effect?

What is to be done when the national and provincial governments fail to act? The Constitutional Court has recognised in Joseph the rights of residents to basic municipal services and was willing to enforce it against a municipality.[106] Residents should be able to argue that the right to basic municipal services includes the filling of potholes in roads, the cleaning of public spaces, and the fixing of street lights. They could further argue that they have a right to the provision of 'accountable government',[107] including having auditable financial statements which enable the Auditor-General to find out whether or not residents' taxes and paid fees were misspent or stolen. If self-help is not an option, a court should be willing to impose a structural interdict compelling a dysfunctional municipality to report on progress made with clearly set targets for better administration.

vi conclusion

The state of local government presents particular challenges for the Constitutional Court. It is a state institution that, at the one end of the spectrum, constitutes effective government in the majority of metropolitan municipalities and secondary cities, playing a crucial role in the economic development and well-being of the country and addressing poverty. At the

[102] *MEC for Local Government, Mpumalanga v IMATU* [2001] ZASCA 99, 2002 (1) SA 76 (SCA).
[103] Constitution s 139(1)(b)(i).
[104] Constitution s 152(1)(b).
[105] Constitution s 154(1).
[106] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30, 2010 (4) SA 55 (CC), 2010 (3) BCLR 212 (CC). See also Steytler & De Visser (note 20 above) at 17–6.
[107] Constitution s 152(1)(a).

other end there are dysfunctional municipalities, operating outside the law having abandoned their basic service duties to their residents. For all the municipalities, whether from the top or bottom third, to perform their constitutionally enshrined developmental mandate they must (a) have the appropriate powers; (b) have access to sustainable financial resources; and (c) do so in a partnership of accountability with the communities they serve.

The Court responded to the first two challenges in a forthright manner, while with respect to the third the outcome is not clear. First, the Court has been supportive of the incremental extension of local government powers over the local space. In Lagoonbay (followed up by Habitat Council in 2014) the Court continued its line of holdings, correctly asserting the powers of local government against provinces in the field of the built environment.

Second, the Court has gone out of its way to ensure the sustainability of municipalities by asserting their access to their limited revenue resources. In Liebenberg the majority of the Court did so in two ways: first, it gave the most generous interpretation of the legal framework by rescuing the LGTA from oblivion, and giving the municipality the more municipal-friendly set of rules for collecting property rates. Second, it went soft on compliance requirements. Following a line of judgments dealing with similar situations, it did not require close compliance with legal framework. All that is required is substantial compliance. This approach is of particular significance for municipalities with weak administrations that are struggling to govern within a plethora of prescriptive rules. For the dissenting judges, this accommodating approach came at too high a cost, that of legality both in keeping the LGTA alive and being soft on compliance. We disagree with the dissent that the costs are too high. Although legal certainty is important, some sensible way must be found through the thicket of overregulation.

It should be added that the Court was not overzealous in arming municipalities with every conceivable tax-extractive device. In Ingonyama Trust it was not willing to empower the eThekwini Metropolitan Municipality to levy property rates retrospectively.

Third, the Court did not come out strongly in favour of the third element; the partnership of accountability of the municipality with its residents. In Britannia Beach the applicants failed to exact accountability (obtaining access to information), not because the Court rejected the notion of democratic accountability, which is enshrined in the Constitution, but because the applicants leapfrogged the applicable statutory instruments in their attempt. Using the statutory instruments may have brought joy to the developers.

When a complaining ratepayer, Ms Rademan, followed the statutory instruments route to hold the wayward municipality to account for its failure to provide services, she also failed. The simple reason was that the statutory instruments at her disposal could provide no remedy for her problem – the municipality's failure to provide basic services because of deep systemic problems resulting in a dysfunctional municipality. Although the

issue was not pertinently argued, the Court did not provide any guidance on how the intractable problem of dysfunctionality is to be approached. In the absence of any statutory remedies, the only route to success is to go directly to the Constitution and seek to enforce the right to basic municipal services. Although the Court may have hinted that self-help is a possibility when services are not forthcoming, it is unlikely that avenue will find ultimate judicial sanction. The only other option is, relying directly on the Constitution, to fashion judicial remedies that may protect residents governed by dysfunctional municipalities.