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**#005**

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# Multilevel Government, Municipalities and Food Security

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**Author:**

Jaap de Visser

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DST-NRF  
**Centre of Excellence**  
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# DST-NRF Centre of Excellence in Food Security

## Food Security SA Working Paper Series

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# Multilevel Government, Municipalities and Food Security

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## ABSTRACT

Realising the right to food in South Africa requires more than an increase in food production. Increasing access to food is equally important, so this contribution adopts a 'food systems approach'. It argues that food security is not just a national and/or provincial government concern but that the Constitution demands of municipalities to contribute to realising the right to food. Against the backdrop of a general introduction into the division of responsibilities between national, provincial and local government, it deploys two arguments to make this assertion. The first is located in the jurisprudence of the South African Constitutional Court on socio-economic rights. The second is located in the division of powers between national, provincial and local government. This contribution explores various linkages between a municipality's constitutional powers and food security. Specific emphasis is placed on the municipality's responsibility to regulate trade and markets as well as its responsibility to conduct spatial planning and land use management.

**Key words:** food security, local government, provincial government, multilevel government, food-sensitive planning, right to food, spatial planning, land use management

**Word count:** 11 590

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# 1 INTRODUCTION

South Africa produces sufficient food to feed its people, yet household food insecurity and malnutrition is unacceptably high.<sup>1</sup> It is not uncommon to argue that addressing food insecurity is primarily the responsibility of the national and provincial governments and that local government's role is limited.<sup>2</sup> Food security is often associated with food production and thus with agriculture. Since the Constitution allocates agriculture to the national and provincial governments,<sup>3</sup> local government bears little responsibility, so the argument goes. This paper argues that this is a fundamentally wrong proposition for a number of reasons.

First, food security will not be achieved by ensuring food production alone. South Africa produces enough food yet has unacceptably high food insecurity levels. Food security is as much about access and quality as it is about production. South Africa's food insecurity challenge is inextricably linked to the high levels of poverty and the gaping inequality. This negatively influences people's access to, and ability to make food choices. Most South Africans are simply too poor to make healthy food choices and are thus food insecure. A 2016 survey revealed that that 19.9% of households had run out of money to buy food in the twelve months prior to the survey.<sup>4</sup> This is not addressed by increasing production. Secondly, there are many structural and systemic problems in South Africa's food system that impede food security. For example, the food value chain is one-dimensional: it is dominated by large scale farmers, major agri-processors and big retail stores.<sup>5</sup> Small scale framers and small retailers occupy a very minor position in South Africa's food system. This is despite the fact that diversity in the food value chain is an essential ingredient of a sustainable food system.

The above two arguments alone (there are many more) are sufficient to dispel the notion that addressing food insecurity is somehow an agricultural and therefore primarily national and provincial issue. However, there is a further avenue to rebut the notion that municipalities are not responsible for realising food security and this relates to the interpretation of the right of access to sufficient food.

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<sup>1</sup> Oxfam GB "Hidden Hunger in Southern Africa: The Faces of Hunger and Malnutrition in a Food-Secure Nation" (2014) pp 2-12. See also Johnstone S (2018) *Municipal Planning to Facilitate Access to Food* p 50 (PhD Thesis, forthcoming).

<sup>2</sup> Steytler, N (2009) 'The Decisions in Wary Holdings (Pty) Ltd V Stalwo (Pty) Ltd and Another 2009 (1) Sa 337 (Cc): Be Wary of these Holdings' in *Constitutional Court Review* 2009(2) at p 444.

<sup>3</sup> Sections 44(1) and 104(1) read with Schedule 4, Part A of the Constitution.

<sup>4</sup> Statistics South Africa *Statistical release: community survey 2016* available at [www.statssa.gov.za/?page\\_id=737&id=1](http://www.statssa.gov.za/?page_id=737&id=1) (accessed 24 June 2018).

<sup>5</sup> 60 percent of the formal markets are owned by five retailers and 32 percent is shared by the informal trading sector. See Oxfam 2014, 34; Johnstone (2018).

## 1.1 The right to food and multilevel government

There is a right of access to sufficient food in section 27(1)(b) of the Constitution. The argument that this right must be 'realised' by the national government and that municipalities cannot be held accountable for residents being food insecure may be attractive. It is then argued that food insecurity must be addressed by the national government by increasing food production and by ensuring a social welfare safety net for the most vulnerable. This would then absolve municipalities from any accountability for realising the right of access to sufficient food.

However, the manner in which the Constitutional Court has interpreted the responsibilities of local government in respect of other socio-economic rights runs counter to the above approach. This becomes clear in particular with respect to the right of access to housing.

The Court has established a line of jurisprudence that holds municipalities accountable for aspects of the realisation of the right of access to housing, despite the fact that the Constitution lists 'housing' as a concurrent power of national and provincial governments. The clearest expression of this was in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*.<sup>6</sup> In this case, the City of Johannesburg argued it could not be held accountable for the provision of shelter to a group of residents who were destitute after having been evicted from private land. The City's argument was based, in part, on the fact that the Constitution allocates 'housing' to the national and provincial governments concurrently and it was therefore not a local government function.<sup>7</sup> The Court disagreed and held that the City was indeed accountable for providing shelter to communities that are rendered homeless, essentially because the responsibility to do so emanated from the Bill of Rights.<sup>8</sup> The Constitutional Court's approach in *Blue Moonlight* puts paid to the approach that a municipality is only responsible for realising a right, if it falls squarely within that municipality's listed powers in the Constitution.

It is submitted that this has consequences for the responsibility of local government to realise the right of access to food in section 27(1)(b) of the Constitution. Like municipalities are responsible for critical aspects of the right to housing, despite the fact that the Constitution allocates the function to national and provincial governments, so too are they responsible for critical of the right to food, despite the fact that the Constitution allocates the function

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<sup>6</sup> 2012 (2) BCLR 150 (CC) (*Blue Moonlight*). See De Visser, (2015) 'Enforcement of Socio-Economic Rights against Local Governments in South Africa' in Bosire, C & Gikonyo, W (eds) *Animating Devolution in Kenya* pp 193-28 for a discussion of the Court's jurisprudential trend.

<sup>7</sup> *Blue Moonlight* at para 50.

<sup>8</sup> *Blue Moonlight* at para 67.



to national and provincial governments. The effect of judgments such as *Blue Moonlight* was not that the Constitutional Court shifted the entire burden of realising the right of access to housing to municipalities. However, where the realisation of the right intersected with municipal responsibilities, even where they were assigned by statute, the municipality was responsible. In other words, municipalities are responsible for those parts of the fulfilment of the right to housing that intersect with what it is regularly done by municipalities. It is submitted that the same must then apply to the right of access to food in section 27(1)(b) of the Constitution: municipalities are responsible for those parts of the fulfilment of the right of access to food that intersect with what is regularly done by municipalities.

## **1.2 Research question**

It is thus important to understand more about this intersection between multilevel government and food security, which is what this paper addresses.

The manner in which the Constitution divides power between national, provincial and local government connects subnational governments (i.e. provinces, district municipalities, local municipalities and metropolitan municipalities) to food security in many ways. This paper therefore asks how food security intersects with the division of powers as set out in the Constitution. Given the abovementioned definition of food security, where are the various points of leverage that subnational governments, particularly municipalities have?

Before answering that question, it will set out the broad constitutional architecture for the division of powers. This is done in general terms with some examples of powers that relate to food security. Subsequent to that, a more detailed discussion of specific points of intersection will follow in order to illustrate the argument that subnational governments, and local government in particular, bear important duties to contribute to the realisation of the right of access to food.

## **2 THE CONSTITUTIONAL ARCHITECTURE**

What follows in this section is a short overview of the manner in which the Constitution divides powers across the three spheres of government. It will be shown that the constitutional division of responsibilities, and in particular the manner in which it is practised and financed, makes the national government the epicentre of law and policy making powers. This also applies to the functions that are critical for food security. The Constitution bears all of the hallmarks of a federal state but there are strong unitary elements. At the same time, the Constitutional allocates significant powers to local government.

## 2.1 Schedule 4A: concurrent national/provincial powers

At the centre of the constitutional division of powers is a list of powers (in Schedule 4A of the Constitution) that the Constitution allocates to national and provincial governments concurrently. Both national and provincial governments have the authority to make law on this matters and implement those laws. In the event of a conflict between a national and a provincial law on a concurrent matter, the Constitutional Court ultimately decides which law prevails, using the criteria of section 146 of the Constitution. The list of concurrent powers is extensive and includes matters such as environment, health, housing, welfare services and also agriculture.

**Table 1: Schedule 4A – Concurrent national/provincial powers**

<ul style="list-style-type: none"> <li>• Administration of indigenous forests</li> <li>• Agriculture</li> <li>• Airports other than international and national airports</li> <li>• Animal control and diseases</li> <li>• Casinos, racing, gambling and wagering, excluding lotteries and sports pools</li> <li>• Consumer protection</li> <li>• Cultural matters</li> <li>• Disaster management</li> <li>• Education at all levels, excluding tertiary education</li> <li>• Environment</li> <li>• Health services</li> <li>• Housing</li> <li>• Indigenous law and customary law, subject to Chapter 12 of the Constitution</li> <li>• Industrial promotion</li> <li>• Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence</li> <li>• Media services directly controlled or provided by the provincial government, subject to section 192</li> </ul>	<ul style="list-style-type: none"> <li>• Nature conservation, excluding national parks, national botanical gardens and marine resources</li> <li>• Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence</li> <li>• Pollution control</li> <li>• Population development</li> <li>• Property transfer fees</li> <li>• Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5</li> <li>• Public transport</li> <li>• Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law</li> <li>• Regional planning and development</li> <li>• Road traffic regulation</li> <li>• Soil conservation</li> <li>• Tourism</li> <li>• Trade</li> <li>• Traditional leadership, subject to Chapter 12 of the Constitution</li> <li>• Urban and rural development</li> <li>• Vehicle licensing</li> <li>• Welfare services</li> </ul>
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This means, for example, that both national and provincial governments may regulate agriculture, one of the most critical functions related to food security. However, should a provincial government (1) adopt agriculture legislation that conflicts with national legislation and (2) this conflict is presented to the Constitutional Court, any one of the criteria in section 146(2) or (3) of the Constitution could result in the national law overriding the provincial law.<sup>9</sup> It is not within the scope of this paper to provide a detailed analysis of the content of section 146 of the Constitution. However, it is submitted that this provision does not make it easy for a provincial agriculture law to prevail over a national agriculture law in the case of conflict.<sup>10</sup> First, the criteria in section 146(2) and (3) are many (need for norms and standards, national security, economic unity, protection of common market etc.). Secondly, only one needs to be triggered for the national law to prevail.

In more than two decades since the adoption of the Constitution, not a single case concerning the application of section 146 of the Constitution, has been brought before the Constitutional Court. In other words, there has not been a single province that has asked the Court to declare that its provincial legislation on a Schedule 4 matter trumps national legislation. Similarly, there has also not been a single instance of the national government seeking to have provincial legislation on a Schedule 4 matter set aside. By most accounts, this mechanism has thus had a centralising effect on law and policy making. Both the wording of the Constitution and the manner in which it has been applied, has worked to make the national government the epicentre of law and policy making in these areas.<sup>11</sup>

## 2.2 Schedule 5A: exclusive provincial powers

The Constitution reserves a number of powers for provinces exclusively. These are listed in Schedule 5A of the Constitution. The national government may not make law on those matters unless there are special circumstances that warrant national government's involvement. These circumstances (national security, essential national standards etc.) are set out in section 44((2) of the Constitution. Most of the matters in Schedule 5A of the Constitution are not very significant. It includes matters such as provincial sport, provincial cultural services and veterinary services, matters that can hardly be called considered of fundamental importance to the state. The functions chosen for inclusion in Schedule 5A makes this another centralising feature of the Constitution.<sup>12</sup>

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<sup>9</sup> See Malherbe, R (2008) 'The Constitutional Distribution of Powers' in De Villiers, B *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice* Johannesburg: Konrad Adenauer Stiftung at p 21.

<sup>10</sup> See De Visser, J (2017) 'Concurrent Powers in South Africa' in Steytler, N *Concurrent Powers in Federal Systems* Leiden: Brill Nijhoff p 227.

<sup>11</sup> Malherbe 2008, 47. See also De Visser 2017, 227.

<sup>12</sup> De Visser 2017, 227.

The vast majority of the powers listed there are rather insignificant<sup>13</sup> and mean little for the constellation of powers surrounding food security between national and provincial governments. There are two possible exceptions, namely “abattoirs” and “provincial planning”. The latter is discussed later.

**Table 2: Schedule 5B - exclusive provincial powers**

<ul style="list-style-type: none"> <li>• Abattoirs</li> <li>• Ambulance services</li> <li>• Archives other than national archives</li> <li>• Libraries other than national libraries</li> <li>• Liquor licences</li> <li>• Museums other than national museums</li> <li>• Provincial planning</li> </ul>	<ul style="list-style-type: none"> <li>• Provincial cultural matters</li> <li>• Provincial recreation and amenities</li> <li>• Provincial sport</li> <li>• Provincial roads and traffic</li> <li>• Veterinary services, excluding regulation of the profession</li> </ul>
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### 2.3 Exclusive (residual) national powers

Lastly, the Constitution allocates powers exclusively to national government. Any power that is not mentioned in Schedule 4 or Schedule 5 is the responsibility of the national government. This includes a number of major powers, such as the judiciary, mining and (most parts of) policing. This a further ‘unitary’ feature of the Constitution and there is little doubt that it significantly influences the constellation of powers surrounding food security.<sup>14</sup> For example, the fact that land administration (i.e. rules of land tenure) is a national competency means that neither provinces nor municipalities may make laws regulating the land tenure of rural farmers.

### 2.4 Schedules 4B and 5B: local government

The Constitution also contains specific municipal powers. The powers listed Schedules 4B and 5B of the Constitution are allocated to local government. Municipalities have the exclusive authority to exercise executive and legislative powers with respect to these matters.

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<sup>13</sup> Powell, D (2015) ‘Fudging Federalism’: Devolution and Peace-making in South Africa’s Transition from Apartheid to a Constitutional Democratic State (1990-1996)’ in Steytler, N & Ghai, Y *Kenyan-South African Dialogue on Devolution* Cape Town: Juta at p 51.

<sup>14</sup> De Visser 2017, 224.

**Table 3: Schedule 4B and 5B - local government matters**

<b>Schedule 4, Part B</b>		
<ul style="list-style-type: none"> <li>• Air pollution;</li> <li>• Building regulations;</li> <li>• Child care facilities;</li> <li>• Electricity and gas reticulation;</li> <li>• Firefighting services;</li> <li>• Local tourism;</li> <li>• Municipal airports;</li> <li>• Municipal planning;</li> <li>• Municipal health services;</li> </ul>	<ul style="list-style-type: none"> <li>• Municipal public transport;</li> <li>• Municipal public works;</li> <li>• Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto;</li> </ul>	<ul style="list-style-type: none"> <li>• Stormwater management systems in built-up areas;</li> <li>• Trading regulations; and</li> <li>• Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.</li> </ul>
<b>Schedule 5, Part B</b>		
<ul style="list-style-type: none"> <li>• Beaches and amusement facilities;</li> <li>• Billboards and the display of advertisements in public places;</li> <li>• Cemeteries, funeral parlours and crematoria;</li> <li>• Cleansing;</li> <li>• Control of public nuisances;</li> <li>• Control of undertakings that sell liquor to the public;</li> </ul>	<ul style="list-style-type: none"> <li>• Facilities for the accommodation, care and burial of animals;</li> <li>• Fencing and fences;</li> <li>• Licensing of dogs;</li> <li>• Licensing and control of undertakings that sell food to the public;</li> <li>• Local amenities;</li> <li>• Local sport facilities;</li> <li>• Markets;</li> <li>• Municipal abattoirs;</li> </ul>	<ul style="list-style-type: none"> <li>• Municipal parks and recreation;</li> <li>• Municipal roads;</li> <li>• Noise pollution;</li> <li>• Pounds;</li> <li>• Public places;</li> <li>• Refuse removal, refuse dumps and solid waste disposal;</li> <li>• Street trading;</li> <li>• Street lighting; and</li> <li>• Traffic and parking.</li> </ul>

In principle, national and provincial governments may not exercise those powers. However, these local government matters are part of Schedules 4 and 5 of the Constitution. This means that they are national and provincial functions. They may 'regulate' the municipal exercise of those powers. In other words, they may determine an overall regulatory framework but may not administer or make detailed policy decisions. For example, municipalities decide on rezoning and subdivision (part of "municipal planning", Schedule 4B) but the national and provincial governments may determine the minimum standards that municipalities must comply with when doing so.

There are many powers in the local government list that intersect with food security as will be elaborated on below.

## 2.5 Intergovernmental finances and cooperative governance

The above overview deals with the legal division of powers but it is important to complement it with two further dimensions that impact the reality of multilevel government, namely intergovernmental finance and cooperative governance.

### 2.5.1 Intergovernmental finance

The legal division of powers, as set out above, says little about how organs of state in the three spheres of government are funded. The division of responsibilities, and particularly how the division works out in practice, cannot be understood without reference to the manner in which the three spheres of government are funded.

In reality, the intergovernmental financing system has a strongly centralising effect on the relationship between national and provincial governments. Provinces are almost exclusively funded by the national government in the form of an unconditional grant called the equitable share, augmented by a range of specific conditional grants. Provinces thus raise very little revenue of their own.<sup>15</sup> The detail of this is not the focus of this paper but the upshot is that the intergovernmental financing system discourages legislative innovation by provinces, particularly when the implementation of a new provincial law would require significant funding. For example, no province is likely to pass legislation with 'high cost' experimentation concerning, let's say agricultural subsidies. This is because it simply does not have the revenue model to go outside the strictures of existing national law. This phenomenon applies across the board, i.e. to all nine provinces.<sup>16</sup>

With respect to local government, the effect of the intergovernmental fiscal system varies, depending on the type of municipality. Metropolitan and local municipalities have important revenue raising powers (mainly in the form of property taxation and charging fees for services such as electricity, water, sanitation and sewerage). Metropolitan municipalities are largely self-reliant, raising significant own revenue, complemented by intergovernmental funding in the form of the equitable share and conditional grants. Metropolitan municipalities thus have a revenue model that permits them to pursue their own distinct policy objectives. The same applies to those local municipalities that have a significant urban

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<sup>15</sup> Khumalo, B Dawood, G & Mahabir, J 'South Africa's Intergovernmental Fiscal Relations System' in Steytler, N & Ghai, Y *Kenyan-South African Dialogue on Devolution* Cape Town: Juta at p 208.

<sup>16</sup> De Visser 2017, 229-233.

base.<sup>17</sup> However, local municipalities with no urban base and overwhelmingly indigent populations are much more reliant on intergovernmental funding, sometimes for virtually their entire budget. District municipalities compare well to provinces when it comes their dependence on grant funding: they have little or no revenue-raising powers and thus depend almost exclusively on intergovernmental grant funding.

### 2.5.2 Cooperative governance

Dividing the responsibility to govern among organs of state is more complicated than what can be captured in lists of words. What is more, the words themselves often have no distinctive qualities.<sup>18</sup> For example, the difference between “municipal planning” (Schedule 4B) and “provincial planning” (Schedule 5A) is not clear from the wording. It is the business of many policy and legal experts to agonise over the meaning of the words contained in the Schedules and often it is excruciatingly difficult to define the precise contours of the power contained in a specific word. There will always be overlap and fuzzy edges in the division of powers. This is why the Constitution insists that organs of state in different spheres of government practice ‘cooperative governance’.<sup>19</sup> An entire chapter Three in the Constitution is devoted to the principles of cooperative governance, which speak about the need to share information, consult, collaborate, avoid disputes etc. In the daily reality of governance intergovernmental relations is critical to ensure that the overlap and fuzzy edges in the division of powers do not result in service delivery failures.

## 2.6 Further division between district and local governments

As explained above, the Constitution allocates the powers listed in Schedule 4B and 5B to local government. However, this is not where the discussion pertaining to the division of local government powers ends. There is a further division, namely within local government between the tiers of local government.<sup>20</sup>

Local government comprises three categories, namely metropolitan, district and local municipalities. Metropolitan municipalities (of which there are six) automatically assume the full list of constitutional powers set out in Schedules 4B and 5B so there is no further division necessary there. However, for district and local municipalities, it works differently. A district

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<sup>17</sup> Steytler, N & Ayele, Z (2018) ‘Local Governments in African Federal and Devolved Systems of Government: The Struggle for a Balance between Financial and Fiscal Autonomy and Discipline’ in Valdesalici, A & Palermo, F *Comparing Fiscal Federalism* Leiden: Brill Nijhoff at p 302-304.

<sup>18</sup> Steytler, N & Fesha, Y (2007) ‘Defining provincial and local government powers and functions’ *South African Law Journal* 124: 320.

<sup>19</sup> Ss 40-41 Constitution.

<sup>20</sup> Goodenough, C (2004) *Shaping South Africa: Reflections on the first term of the Municipal Demarcation Board South Africa 1999-2004* Pretoria: Municipal Demarcation Board at p 63.

municipality comprises a number of local municipalities. They govern the same territory so the local government powers must to be divided between them. The mechanism for this is in Chapter Five of the Local Government: Municipal Structures Act.<sup>21</sup> This Chapter divides the powers listed in Schedules 4B and 5B of the Constitution between district and local municipalities. It does this by providing a 'default' list of district powers with the remaining powers being allocated to local municipalities. The division is flexible though, as changes to this 'default' division can be made by provincial and national governments executively.<sup>22</sup>

This division of responsibilities between district and local governments is important for food security. There are a number of 'food security related' functional areas that undergo an important division between district and local municipalities.

Solid waste disposal is an important example. The regulation and management of refuse removal and solid waste disposal sites is important for food security for many reasons, of which two are mentioned here. First, food wastage impacts significantly on food security. Secondly, the waste pickers represent both a challenge and an opportunity in the context of food security.<sup>23</sup> The Municipal Structures Act applies an important division to this function. It expects district municipalities to (1) operate solid waste disposal sites for more than one local municipality, (2) determine a waste disposal strategy and (3) regulate solid waste disposal.<sup>24</sup> While the first element is unsurprising as a way to achieve economies of scale the latter two are striking.

They suggest that local municipalities must implement district-level policy and regulation of waste disposal sites. The next part of the paper examines in more detail the intersection of the powers of local government and food security.

### **3 EXPLORING THE INTERSECTION OF LOCAL GOVERNMENT POWERS AND FOOD SECURITY**

#### **3.1 Indirect linkages**

Given the multidimensional nature of food security, there are many local government competencies that are indirectly linked to the realisation of the right of access to food. Two competencies stand out in this respect. First, it needs little argument that access to safe and healthy food is compromised without access to potable water. The right of access to water

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<sup>21</sup> Act 117 of 1998.

<sup>22</sup> Steytler, N & De Visser J (2007) *Local Government Law of South Africa* Durban: Lexisnexis at p 5-30 ff.

<sup>23</sup> Blaauw PF, Viljoen JMM, Schenck CJ *et al* 'To "spot" and "point": Managing waste pickers' access to landfill waste in the North-West province' (2015) 18.

<sup>24</sup> Except when the MEC for local government adjusts the division and allocates the function to a local municipality, see s 85 Municipal Structures Act.



is guaranteed in the same section 27(1)(b) of the Constitution and municipalities are responsible for water services.<sup>25</sup> The same argument applies to access to electricity, which is essential for cooking and cold storage. Municipalities are responsible for the reticulation of electricity.<sup>26</sup>

Therefore, with regard to both electricity and water, the Constitution not only empowers, but also instructs municipalities to provide these services. Municipalities have the constitutional power to deliver water and electricity services and are compelled through the Bill of Rights to ensure access to basic water and electricity services to everyone. How they do so matters a great deal for the realisation of the right of access to food. It is particularly important how municipalities facilitate access to electricity and water services by extending infrastructure to communities that do not yet have a safe and sustainable source or connection. Furthermore, it is important how municipalities structure their electricity and water tariffs,<sup>27</sup> particularly given the abovementioned reality that food insecurity is inextricably linked to poverty.

### **3.2 The role of municipalities in local food trade**

The first important intersection between food security and local government powers can be observed in the area of local food trade. The Constitution lists three local government competencies here, namely (1) "trading regulations",<sup>28</sup> (2) "markets"<sup>29</sup> and (3) "street trading"<sup>30</sup>. It is not easy to distinguish the three functions from one another. For example, what distinguishes "trading regulations" from "street trading" and what makes regulating "markets" different from regulating "street trading"? Over and above those differences, how do these functions differ from national and provincial functions, such as "trade"? It is argued that, despite the obvious overlap, it is possible to point out distinguishing features of these competences.

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<sup>25</sup> S 156(1), read with Schedule 4, Part B of the Constitution.

<sup>26</sup> S 156(1), read with Schedule 4, Part B of the Constitution.

<sup>27</sup> See s 74 Local Government: Municipal Systems Act 32 of 2000.

<sup>28</sup> Schedule 4, Part B of the Constitution.

<sup>29</sup> Schedule 5, Part B of the Constitution.

<sup>30</sup> Schedule 5, Part B of the Constitution.

### 3.2.1 Trading regulations

Municipalities are responsible for “trading regulations”.<sup>31</sup> Section 84 of the Municipal Structures Act does not mention anything pertaining to “trading regulations”, which means that the function is vested in metropolitan and local municipalities.<sup>32</sup>

Metropolitan and local municipalities may therefore adopt and enforce by-laws containing trading regulations. How is this different from the power to regulate “trade”, which the Constitution allocates to national and provincial governments? It is argued that “trading regulations” must deal with the ‘intra-municipal’ aspects of trade and may not extend to trade, or the impact of trade that extends beyond the municipal boundary.<sup>33</sup> It is suggested that “trading regulations” is best understood as a power to regulate the impact of trade on the local built environment and the local community.

This distinction is not always easy to make but it is perhaps best explained by using the example of business licencing. The national Business Act<sup>34</sup> regulates the granting of business licenses by municipalities. The Act provides that a municipality must grant a business license if certain criteria are met. For example, the business premises must comply with a requirement relating to town planning, safety and health requirements. The municipality may furthermore refuse a license when it is satisfied that the applicant is not a suitable person to carry on the business.<sup>35</sup> So does this national law not go too far in stipulating exactly when a municipality may and may not grant a business license? Does it not encroach on the municipality’s power to regulate and implement “trading regulations”? It is submitted that it does not. Matters such as the “suitability of the applicant” and the invitation for the municipality to enquire into the applicant’s character, any previous convictions and previous conduct are not matters that impact on the local built environment and the local community. They are matters that extend beyond the municipal boundary. They fall within the national government’s interest in regulating “trade”. To demand a certain standard with respect to the integrity of someone who wants to conduct the type of trade referred to in the Act falls within the competence of the national government with regard to “trade”. It is an issue that is best addressed at a national level as the national government would legitimately want to avoid differences in ‘integrity standards’ between provinces or between municipalities and a possible ‘race to the bottom’ with regard to those standards.

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<sup>31</sup> S 156(1), read with Schedule 4, Part B of the Constitution.

<sup>32</sup> Except when the MEC for local government adjusts the division and allocates the function to a local municipality, see s 85 Municipal Structures Act.

<sup>33</sup> See further Steytler, N & De Visser J (2007) *Local Government Law of South Africa* Durban: Lexisnexis at p 5-20 ff.

<sup>34</sup> Act 71 of 1991.

<sup>35</sup> See, for example, De Visser, J ‘Parly has no say in sex shop site’ *IOL* 5 June 2014.

The manner in which municipalities exercise this power will impact on food security, as will be shown below.

### 3.2.2 Markets

Municipalities may regulate and operate “markets”.<sup>36</sup> In its commonly understood meaning, this would refer to the regulation of open air markets, food markets, fresh produce markets etc. It is submitted that the term “market” in Schedule 5B relates to an area, designated or managed by the municipality where stalls are set out for trading, often (but not always) limited to certain days of the week.

With respect to the role of fresh produce markets, Chonco argues convincingly that municipalities must realise the strategic importance of food markets in the food value chain.<sup>37</sup> Fresh produce markets can be managed by, or on behalf of the municipality but they can also be managed by private actors under a license given by the municipality. These fresh produce markets should not be treated as either the informal, or the ‘deli’ exception to the supermarket. Instead, they must be seen as an indispensable part of the food value chain, capable of significantly improving access to healthy food, particularly for lower income communities. Municipalities must use their “markets” or “trading regulations” competencies to regulate trading practices in and around fresh produce markets. They may use their “markets” competence to ensure basic facilities and infrastructure, such as cold storage facilities. A final example is the use by municipalities of their “markets” competence to ensure law and order in and around markets.<sup>38</sup>

The Municipal Structures Act further divides this function between district and local municipalities (see para 2.6 above). Section 84(1)(k) of the Municipal Structures Act singles out one component of this function, namely “the regulation of fresh produce markets (...) serving the area of a major proportion of the municipalities in the district” and allocates it to district municipalities.<sup>39</sup> What is left of the constitutional “markets” function remains the competence of local municipalities. It is suggested that, with respect to food security, this division has two important consequences. The first is that the law expects that those fresh produce markets that attract vendors and consumers from across more than one local municipality, are regulated and managed by metropolitan and district municipalities and not by local municipalities. This seems particularly significant in the context of the need to

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<sup>36</sup> S 156(1) read with Schedule 5, Part B of the Constitution.

<sup>37</sup> Chonco, T (2015) *An analysis of municipal regulation and management of markets as an instrument to facilitate access to food and enhance food security* LLM Thesis, University of the Western Cape at p 88.

<sup>38</sup> Chonco 2015, 87-92.

<sup>39</sup> Except when the MEC for local government adjusts the division and allocates the function to a local municipality, see s 85 Municipal Structures Act.

improve the position of small scale farmers and small retailers in South Africa's food value chain. Any regulatory and local support effort to connect small scale farmers and small retailer to consumers will almost always have an impact that crosses local municipal jurisdictions. The consequence of the Municipal Structures Act is thus that metropolitan and district municipalities, and not local municipalities are expected to play a central part in the effort to use markets to connect small scale farmers and retailers to consumers.

### 3.2.3 Street trading

The last of the three municipal functions that impact on the local food trade is "street trading". Distinguishing "street trading" from "trading regulations" and "markets" is not easy. It is submitted that a "market" refers to an area, designated or managed by the municipality where stalls are set out for trading, often (but not always) limited to certain days of the week. "Street trading" refers to the operation of a small retail business in a regular public space with the permission of the municipality but not in an area designated as a market, combining many similar businesses.

## 3.3 Municipal planning and food security

### 3.3.1 Introduction

"Municipal planning" is one of the most critical local government powers. It is the power of municipalities to plan and manage the use of land, which is commonly referred to as 'town planning'. It is distinct from the power to administer land, i.e. the power to regulate forms of land tenure and ownership.<sup>40</sup> The administration of land is the preserve of national government.<sup>41</sup> The Constitutional Court has determined on multiple occasions that 'town planning' is a municipal function and that national and provincial governments may not interfere with it.<sup>42</sup> They must limit their involvement to regulating frameworks to see to the effective performance by municipalities of this power and may not exercise or remove a municipality's power to conduct spatial planning and land use management. The Spatial Planning and Land Use Management Act<sup>43</sup> (SPLUMA) codifies this division of powers

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<sup>40</sup> Berrisford S (2011) 'Unravelling Apartheid Spatial Planning Legislation in South Africa - A Case Study' *Urban Forum* 22:247-263 at p 254.

<sup>41</sup> See paragraph 2.3 above.

<sup>42</sup> De Visser, J & Poswa, (2018) X 'Municipal Law Making under SPLUMA: A Survey of Fifteen "First Generation" Municipal Planning By-Laws' *PER (forthcoming)*; De Visser, J (2019) 'City Regions in Pursuit of SDG 11: Institutionalising Multilevel Cooperation in Gauteng, South Africa' in Aust, H & Du Plessis, A *The Globalisation of Urban Governance* Routledge 186-207.

<sup>43</sup> Act 16 of 2013 (SPLUMA).

between national, provincial and local government and regulates the exercise of these powers.

“Municipal planning” has two major components. The first is the power of the municipality to adopt a forward looking spatial development plan, the Municipal Spatial Development Framework (MSDF) and possibly other smaller scale spatial development frameworks.<sup>44</sup> The MSDF is a document, containing the spatial development vision for that specific municipal area. It is expected to inform future infrastructure investment and land use decision making. It also integrates spatially relevant policies and plans throughout the municipality and is expected to be an expression of what national and provincial governments are planning in the area.<sup>45</sup> The MSDF is essentially a policy document: it does not grant land use rights. In other words, no individual land owner derives any rights to use his or her land in a particular way, from the MSDF. However, it is certainly not toothless. It has a binding effect on government itself: land use schemes and land use management decisions (see below) must, in principle, be consistent with the MSDF.<sup>46</sup> The municipal power and process with respect to the MSDF is critically important for a municipality’s role in realising food security. An MSDF can be the pivot that connects initiatives and public investment of various government institutions across the three spheres of government to promote food security in the local space.

The second component of the “municipal planning” power is the power to determine permitted land uses in the municipality. The municipality determines what land use is permitted in the municipality. It does so by adopting a land use (or zoning) scheme<sup>47</sup> and by deciding on applications from land owners and developers to change the zoning and therefore amend the permitted land use. Furthermore, it decides on applications to subdivide land parcels, alter land use restrictions that appear in title deeds and consent uses. By doing all of the above, municipalities determine land use rights.<sup>48</sup> As stated above, these decisions must, in principle, be in line with what is set out in the MSDF.

Municipal decision making with respect to the determination and enforcement of land use rights plays an important role in improving food security. Two specific intersections will be discussed next. They concern, firstly, the connection between municipal planning decisions

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<sup>44</sup> S 5(1)(a) and (b) SPLUMA.

<sup>45</sup> Ss 20-21 SPLUMA.

<sup>46</sup> Ss 22 and 24(2)(g) SPLUMA.

<sup>47</sup> S 24 SPLUMA.

<sup>48</sup> See, for example, section 41(2) SPLUMA.

and the productive use of agricultural land and thus food production. Secondly, the concern the connection between municipal planning decision and facilitating access to food.

### 3.3.2 Connecting municipal planning and agricultural land

Municipalities are established throughout South Africa. In other words, there is 'wall-to-wall' local government.<sup>49</sup> This means that all agricultural land is included in a municipality. By using its power to rezone or subdivide, a municipality may change agricultural land into land used for residential, commercial or other non-agricultural purposes. This affects agricultural production and, so it is argued, ultimately affects the country's ability to ensure food security.<sup>50</sup> The Subdivision of Agricultural Land Act<sup>51</sup> (SALA) exists to deal with the threat of the loss of agricultural land due to the conversion of agricultural land into land used for other purposes. It is a critical part of government's legislative architecture to protect agricultural production. It does this by subjecting the subdivision of agricultural land to the approval of the national Minister responsible for Agriculture. In other words, it permits the national Minister to veto municipal planning decisions affecting agricultural land.

The history of SALA is important in order to understand its current application. The Act was adopted long before the introduction of the current local government regime. At the time, agricultural areas were largely excluded from the boundaries of the old local governments and SALA was applied there to control the conversion of agricultural land. After all agricultural areas were absorbed into the new 'wall-to-wall' local government system in the late nineties, Parliament repealed SALA.<sup>52</sup> One of the main arguments for the repeal was that it was too blunt a mechanism and that it purported to use land use regulation to deal with a problem that ought to be handled differently (see below). In 1998, Parliament thus passed the Subdivision of Agricultural Land Repeal Act.<sup>53</sup> However, President Nelson Mandela did not sign the Act into power, ostensibly under pressure of the commercial agricultural sector. It therefore continued to apply. In *Wary Holdings*,<sup>54</sup> its constitutionality was challenged. One of the arguments was that it interfered with the constitutional authority of municipalities to conduct 'municipal planning'. SALA survived the constitutional challenge

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<sup>49</sup> S 151(1) Constitution.

<sup>50</sup> Steytler, N (2009) 'The Decisions in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another 2009 (1) Sa 337 (Cc): Be Wary of these Holdings*' in *Constitutional Court Review 2009(2)* at p 429.

<sup>51</sup> Act 70 of 1970.

<sup>52</sup> See Steytler, N (2009) 'The Decisions in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another 2009 (1) Sa 337 (Cc): Be Wary of these Holdings*' in *Constitutional Court Review 2009(2)* at pp 429-431.

<sup>53</sup> Subdivision of Agricultural Land Repeal Act, 1998.

<sup>54</sup> *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2008 (11) BCLR 1123 (CC)*.

on the basis of complicated, technical arguments pertaining to precise trajectory of the transitional legislation. The argument that it interfered with 'municipal planning' was not fully addressed.<sup>55</sup>

As a result, SALA continues to apply and subject municipal planning decisions on agricultural land to a national veto. There are serious policy considerations in favour of, and against retaining SALA (or a similar mechanism).

The most important argument in favour of retaining SALA or a SALA-type mechanism is that the incentive structure for municipalities fundamentally works against preserving agricultural land. The levying of property rates and the sale of municipal services (such as water, electricity, sanitation and refuse removal) are critical sources of revenue for municipalities. The municipal revenue potential of agricultural land is very little compared to the municipal revenue potential of land used intensively for residential, commercial or industrial purposes. There is thus a clear incentive for municipalities to facilitate the development of agricultural areas into residential, commercial or industrial areas and little, or no incentive for them to retain agricultural land, so the argument goes. As Steytler argues: "Preserving agricultural land for the greater good of the country's food security, is unlikely to feature strongly in the calculations of a council trying to be self-sufficient by increasing its rates revenue base".<sup>56</sup>

Secondly, it can be argued that the assessment of the agricultural potential of a piece of land requires specialised expertise. This expertise is not present in municipalities who are not geared towards regulating agriculture (which is not their function). It is present in provincial and national departments of agriculture.<sup>57</sup>

There are policy arguments against retaining SALA or a SALA-type mechanism too. The purpose of SALA is to 'control the subdivision of agricultural land and, in connection therewith, the use of agricultural land'.<sup>58</sup> The most fundamental policy argument against the Act is that its implementation, if not the text itself, is firmly based on the assumption that

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<sup>55</sup> Except in the dissenting opinion of Justice Yacoob, who held that SALA impermissibly interfered with 'municipal planning'. See Steytler 2009, 439 ff.

<sup>56</sup> Steytler 2009, 444.

<sup>57</sup> Steytler 2009, 444.

<sup>58</sup> See the Long Title of the Subdivision of Agricultural Land Act 70 of 1970.

farm size determines productivity.<sup>59</sup> However, there is by no means consensus among agricultural experts that farm size is a useful proxy for agricultural productivity. In fact, most agricultural experts agree that what constitutes a viable farm unit varies widely across the country, depending on soil conditions, rainfall and, most importantly, the type of agricultural model pursued on that farm.<sup>60</sup> In fact, and this is the second argument against the current model, SALA was introduced and still functions to protect a powerful commercial agricultural industry, comprising of large scale commercial farmers, the vast majority of whom are white. By discouraging the subdivision of agricultural land, the Act has been singled out as a key obstacle to the transformation of the agricultural sector and the entrance of new, black agricultural entrepreneurs. Closely linked to this is the third argument, namely that the ethos, underpinning the Act held back the pace of land restitution and land redistribution. The provisions of the Act itself are not to blame because SALA includes a provision empowering the Minister to exempt land restitution or land redistribution projects from its application. However, this exception was not applied once in two decades of attempts at land reform, thus indicating that the flexibility offered by the Act could not trump the strong ethos underpinning it.

Aside from the above compelling policy considerations against retaining a SALA or SALA-type mechanism, there are legal arguments that cast serious doubt over the constitutionality of SALA. This is despite the fact that it survived a constitutional challenge in 2008 in *Wary Holdings*.

As indicated earlier, municipalities in South Africa enjoy strong constitutional protection of their municipal planning powers. These powers have been confirmed and clarified in a series of seven Constitutional Court judgments namely *Gauteng Development Tribunal, Lagoonbay, Habitat Council, Tronox, Pieterse, Maccsands* and *Chairman of the National Building Regulations Review Board*.<sup>61</sup> These judgments were delivered subsequent to the *Wary Holdings* judgment that saved SALA.

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<sup>59</sup> See Johnstone 2019. See also Moor G 'Subdivision and land use laws hinder land reform and are unconstitutional' (2018) available at <https://www.golegal.co.za/subdivision-land-reform-unconstitutional/> accessed 15 January 2019) and Wandile S 'Perspectives on Farm Sizes' (2018) available at <https://wandileihlobo.com/2018/11/18/perspectives-on-farm-sizes/> (accessed 15 January 2019).

<sup>60</sup> Johnstone 2019.

<sup>61</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* [2008] 2 All SA 298 (W); *Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape & Others* [2013] ZASCA 13 (15 March 2013); *Habitat Council and Another v Provincial Minister of Local Government, Environmental Affairs and Development Planning, Western Cape and Others* [2013] ZAWCHC 112 (14 August 2013); *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC); *Pieterse NO v Lephalale Local Municipality* 2017 (2) BCLR 233 (CC); *Maccsand (Pty) Ltd v City of Cape Town and Others*



The narrative surrounding the protection of local government's municipal planning powers commenced in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*. In this case the City of Johannesburg asked the Constitutional Court to declare parts of the Development Facilitation Act (DFA) unconstitutional. The DFA empowered provincial planning tribunals to take land-use decisions, something that the Constitution reserves for municipalities, so the City argued. The Constitutional Court agreed with the City and declared the DFA unconstitutional. The judgment underscored the central role that municipalities play in land-use management and significantly reduced the scope for provincial interference with municipal powers. It essentially located municipalities at the centre of the land-use management framework. In subsequent years more litigation surrounding municipal planning powers reached the Constitutional Court. In fact, this innocuous and technical part of the Constitution became the subject of six further Constitutional Court judgments, following each other in rapid succession. Without fail, each judgment confirmed the approach taken in *Gauteng Development Tribunal*, namely that national and provincial governments may not usurp the powers of municipalities with respect to "municipal planning". The national government does not trump municipal land-use decisions by issuing mining licences (*Maccsands*). Provincial governments may not subject municipal land-use decisions to a veto, even if the development impacts on an entire region (*Lagoonbay*). Provincial governments may also not subject municipal land-use decisions or building approvals to provincial or national appeals (*Habitat Council, Pieterse, Tronox* and *Chairman of the National Building Regulations Appeal Board*). The seven judgments are summarised below, for ease of reference.

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2012 (4) SA 181 (CC); *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others* 2018 (8) BCLR 881 (CC); 2018 (5) SA 1 (CC).

**Table 4: Constitutional Court judgments on “municipal planning” and “building regulations”**

<b>Judgment</b>	<i>Gauteng Development Tribunal</i> (2010)	<i>Maccsands</i> (2012)	<i>Lagoonbay</i> (2013)	<i>Habitat Council</i> (2014) / <i>Pieterse</i> (2016) / <i>Chairman National Building Regs Council</i> (2018)	<i>Tronox</i> (2015)
<b>Key question</b>	Can province take “town planning” decisions?	Does having a national mining licence make municipal land-use approval unnecessary?	Can province overrule a municipality when the impact of the development straddles the municipal boundary?	Can a provincial or national body be the appeal authority for municipal planning or building regulations decisions?	What if the provincial appeal board is an independent expert body?
<b>ConCourt’s answer</b>	No, the municipality takes town-planning decisions (rezoning and township development)	No, the municipality must still take its own decisions	No, the municipality must still take its own decisions.	No, an appeal from a municipality to a provincial or national body is not constitutional	No, (confirming <i>Habitat Council</i> )

It is submitted that the jurisprudential trend surrounding municipal planning powers could not be clearer. Any national or provincial legislation that removes executive authority from municipalities with respect to their municipal planning powers is unconstitutional. In the same vein, no law may empower a national or provincial body to ‘second-guess’ municipal decision-making with respect to any of its constitutional powers, in the form of vetoes, appeals, or other attempts to override a municipality’s powers. In light of that firm jurisprudential trend, it is submitted that SALA would not survive a constitutional challenge to its ministerial veto powers over municipal land use management decisions.

The policy and constitutional flaws of SALA should not be read to imply that the development of agricultural land must simply be encouraged and that municipal power to change the permitted use of agricultural land must be unfettered. The challenges surrounding the orientation of municipalities towards development and the capacity *lacuna* in local government on agriculture are very real and serious. However, the current regime is not suitable and must be replaced by a more refined regime.

SPLUMA, the new legislative regime for municipal planning, is an important start to that new regime for protecting agricultural land. It contains the limits within which municipalities conduct their spatial planning and land use management. There are at least eight specific provisions in SPLUMA that, in one way or another, instruct municipalities to consider the agricultural potential of land that it is considering to rezoning or subdivide.

1. The Preamble to the Act specifically mentions the right to food in section 27 of the Constitution, signifying that the realisation of the right to food is one of the drivers for the adoption and implementation of SPLUMA.
2. Section 3(d) of SPLUMA includes "the sustainable and efficient use of land" as one of its objects.
3. Section 7(b)(ii) of SPLUMA lists the need to "ensure that special consideration is given to the protection of prime and agricultural land" as one of the principles that municipalities must consider when taking spatial planning or land use management decisions.
4. Section 8(2) of the Act empowers the national Minister to proclaim norms and standards on matters such as "desirable settlement patterns", "rural revitalisation" and "sustainable development".
5. Section 12(1)(n) of the Act stipulates that spatial development framework must "give effect to national legislation and policies on (...) the sustainable utilisation and protection of agricultural land".
6. Section 21(j) of the Act specifies this for municipalities and insists that the MSDF must include "a strategic assessment of the environmental pressures and opportunities within the municipal area, including ... high potential agricultural land".
7. Section 25(1) of the Act demands that municipal land use schemes must have "minimal impact on ... natural resources".
8. Section 52 (1) of the Act empowers the national Minister to decide land development applications "where such an application materially impacts on (...) food security (...) or land use for agriculture". While this provision may sound similar to what is provided in SALA, it differs in two important respects. Firstly, while SALA provides for a veto on a municipal decision, SPLUMA provides for a procedure *alongside* the municipal procedure and resulting in a separate decision. Secondly, while SALA locates the veto power in the

Minister responsible for agriculture, SPLUMA locates this national power in the Minister of Rural Development and Land Reform.

Proponents of SALA may argue that the above provisions do not provide nearly the same protection as the Ministerial veto. However, it is hard to rebut the argument that they provide legal protection of agricultural resources against harmful development in a manner that is far less restrictive to local government's constitutional powers over municipal planning than the Ministerial veto. The powers under section 52 in particular, empower the national government to stop development that is set to harm food security. It is suggested that this has ultimately the same effect as the SALA veto.

In summary, both the policy and constitutional flaws surrounding SALA should prompt government to revisit the manner in which it seeks to exert national control over municipal planning decision pertaining to agricultural land.

### 3.3.3 Connecting municipal planning and access to food

In the preceding sections, it was argued that a municipality has original powers to conduct spatial planning and land use management within its jurisdiction. It must exercise these powers within the framework determined by SPLUMA (and, where applicable further provincial legislation). It was argued that his power is significant and enhances a municipality's ability to influence the availability of food through the protection of agricultural land. This next section argues that, in addition to impacting the availability or production of healthy food, the municipal planning power also impacts the municipality's ability to facilitate access, particularly for disadvantaged communities.

Take, for example, a municipality's power over zoning, i.e. the adoption of a land use (or zoning) scheme and the alteration of existing zonings.<sup>62</sup> Much of South Africa's formal planning landscape for suburbs is characterised by 'single use zones', i.e. the separation of residential, commercial, industrial and other uses. Commercial activity is generally discouraged in residential areas. While this approach serves a peaceful suburban lifestyle, separate from the hustle and bustle of commercial areas, it makes little sense in South Africa's low income and informal areas where residential and informal business activity flows into one another. Residential dwellings are used for commercial use and it is not uncommon for informal retailers to sleep in the places from which they trade. In that context, the dogged insistence on single use zones as the norm, constricts and imposes a heavy regulatory burden

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<sup>62</sup> Ss 24, 28 and 41 SPLUMA.

on informal entrepreneurial activity. Deviation from the single use zoning norm, necessitates applications for departures, consent uses, rezoning and building permits and thus entails (oftentimes expensive) bureaucracy. Ultimately, it pushes small, informal businesses into illegality.<sup>63</sup> SPLUMA expects municipalities to extend land use schemes (or zoning schemes) into informal areas.<sup>64</sup> However, it also instructs them to do so sensibly and incrementally, i.e. with due consideration of effects such as the above.<sup>65</sup> For example, section 24(2)(c) of SPLUMA instructs municipalities to “include provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme”.

Furthermore, SPLUMA envisages the adoption of municipal planning by-laws that deal with the enforcement of land use schemes.<sup>66</sup>

The Constitutional Court has accepted that asymmetrical enforcement of municipal rules, such as municipal tariffs, is permissible if there is an underlying, rational policy that is formally expressed.<sup>67</sup> It can be argued that the extension of zoning rules into low income and informal areas can be accompanied by low intensity enforcement of those zoning rules in order not to chase micro-enterprises into illegality.<sup>68</sup> Small, informal food outlets play a critical role in local food systems.<sup>69</sup> It follows, therefore that a municipality’s efforts to use its zoning powers to regularise (or not) micro-enterprises matters a great deal for local food systems.

Furthermore, the municipality can influence the regulatory and bureaucratic burden that is imposed on informal food traders in low income and informal settlements. SPLUMA recognises the bureaucratic burden that the planning system imposes. It instructs municipalities to identify areas in its MSDF “where incremental approaches to development and regulation will be applicable” and where “shortened land use development procedures

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<sup>63</sup> See Sustainable Livelihoods Foundation *Post-apartheid spatial inequality: obstacles of land use management on township micro-enterprise formalisation* (2017).

<sup>64</sup> Ss 7(a)(iv) SPLUMA and 24(1) SPLUMA.

<sup>65</sup> S 24(2)(a) instructs municipalities “include appropriate categories of land use zoning and regulations for the entire municipal area, including areas not previously subject to a land use scheme”.

<sup>66</sup> See De Visser, J & Poswa, X *Implementing SPLUMA: A Review of Municipal Planning By-Laws* (2017) Cape Town: Dullah Omar Institute ([www.dullahomarinate.org.za](http://www.dullahomarinate.org.za), accessed 26 November 2018).

<sup>67</sup> See *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC).

<sup>68</sup> See, for example, De Visser & Poswa (2017) at p 24 for an example of low intensity enforcement rules in traditional areas of KwaZulu-Natal.

<sup>69</sup> See, for example, Johnstone S (2018) *Municipal Planning to Facilitate Access to Food* p 50 (PhD Thesis, forthcoming).

may be applicable and land use schemes may be so amended".<sup>70</sup> It is argued that municipalities should consider finding ways to ease the regulatory burden on informal food traders in low income and informal settlements. This may relate also to the setting of tariffs for land use applications: the municipality now controls the tariff structure and could consider adopting a progressive tariff structure that encourages informal traders to regularise their building and planning approval. In short, a progressive approach by the municipality to the regulatory burden surrounding planning and building regulations could enable more informal traders to formalise the planning approvals pertaining to their businesses. This adds stability to their operations and increases their chances of accessing capital and overall benefits the accessibility of healthy food particularly in disadvantaged areas.

A third example of a point of leverage for a municipality that may be used to facilitate greater access to healthy food relates to the use of conditions to land use approvals. A municipality that is considering a land use application, such as an application for rezoning, subdivision, consent use etc., has leverage over the applicant. Section 43(1) of SPLUMA provides that an application may be approved subject to such conditions as the municipality prescribes. This leverage can, and should, be used by the municipality to negotiate outcomes that go beyond the narrow interests of the applicant in a land use right. This already happens. It is common for municipalities to impose condition that assist it to recoup the additional bulk expenditure (e.g. a new sewerage plant) required to make the development possible. More progressively, cities are starting to approve inner city commercial housing projects together with conditions that force developers to include low cost housing units into the development.<sup>71</sup> It is argued that municipalities should explore using this leverage to impose conditions that force developers into behaviour that improves the food system, such as facilitating market access for small and informal traders. For example, why not add a condition to the approval of a retail mall development that a certain percentage of the floor space is designated for small, emerging food retailers?

### **3.4 Other municipal competencies and access to food**

There are other municipal powers that can be innovatively used to promote access to food. For example, municipalities have the authority to regulate "Billboards and the display of

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<sup>70</sup> S 21(k) and (l)(ii) SPLUMA.

<sup>71</sup> See Ndifuna Ukwazi "Cape Town Planning Tribunal Imposes First-Ever Affordable Housing Condition on Zerozone Skyscraper" (<https://www.facebook.com/NdifunaUkwazi/posts/cape-town-planning-tribunal-imposes-first-ever-affordable-housing-condition-on-z/1784109608274285/>, accessed 26 November 2018).

advertisements in public places”.<sup>72</sup> Can this power be used to discourage the advertising of unhealthy food, particularly around schools? Can it be used to encourage the advertising of healthy foods? A second example is that municipalities manage “refuse removal, refuse dumps and solid waste disposal”.<sup>73</sup> Can this power be used to creatively include waste pickers in the food and waste recycling chain with the aim of reducing waste, and improving the waste pickers’ well-being, income and thus access to food?<sup>74</sup>

## 4 CONCLUSION

This paper has argued that the realisation of the right of access to food is by no means a duty that is borne exclusively by national and provincial governments. It was argued that the Constitution allocates many functions to local government that offer points of leverage for municipalities to make meaningful contributions to the realisation of the right of access to food.

With respect to enhancing the availability of food, there is a critical set of planning responsibilities that ultimately impact food production. It was argued that the legal framework, aimed at controlling the development of agricultural land is no longer appropriate and unconstitutional. The need to discourage the sacrificing of agricultural potential at the altar of development requires a new approach. This new approach must move away from the focus on farm size as a proxy for productivity and must recognise the enhanced status of local government in the regulation and control of land use.

With respect to enhancing access to healthy and nutritious food, the municipal planning responsibilities are equally important. They offer points of leverage for municipalities to find a better balance between the role of large retailers and local food traders in the market. They may also offer opportunities to reduce the regulatory burden on food traders in low income and informal settlements. There are a number of other municipal competencies that offer opportunities for municipalities to help improve access to healthy and nutritious food. Municipalities can use their power to regulate fresh produce markets to connect small scale farmers and informal traders to consumers. They can use their power to regulate refuse removal to reduce food wastage. They can use their power to regulate Billboard to discourage the promotion of unhealthy foods.

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<sup>72</sup> Schedule 5, Part B Constitution. See also Johnstone (2018) at p 52.

<sup>73</sup> Schedule 5, Part B Constitution.

<sup>74</sup> See Damon L (2018) *Municipal regulation of food and waste pickers on landfill sites in South Africa: what should municipalities (dis)allow?* UWC LLM Thesis (forthcoming); Sodlala N (2018) *What is the role of local government to manage food waste across the food supply chain?* UWC LLM Thesis (forthcoming).

The argument of this paper is not to claim that all of the above suggestions are all equally credible policy proposals. In fact, policy experts may disagree with some of them or have much more refined proposal. The argument of this paper is rather that there are many points where local government powers intersect with what is required to realise the right of access to food. If municipalities use this leverage constructively and progressively, perhaps along the lines of some of the proposals made in this paper, more progress can be made in the quest to ensure access to food for all South Africans.



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