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A research paper submitted in partial fulfilment of the requirements for award of the degree
LLM in the Faculty of Law, University of the Western Cape

An analysis of municipal regulation and management of markets as an instrument to facilitate
access to food and enhance food security



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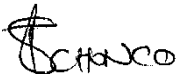
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DECLARATION

I, Thabile Lucia Makhosazane Chonco, do hereby declare that *An analysis of municipal regulation and management of markets as an instrument to facilitate access to food and enhance food security* is my original work and has not been submitted for any degree or examination in any other university or institution of higher learning. While I have relied on numerous sources and materials to develop the main argument presented in the thesis, all the materials and sources used have been duly and properly acknowledged.

Signed... 

Date 17/12/2015

Supervisor: Professor Jaap de Visser

Signature.....

Date.....



DEDICATION

This dissertation is dedicated to all the strong and beautiful women in my life. My mother Nomusa Chonco, Mrs Sibongile Rikhotso, my aunt Thoko Nyoka and my sisters Tinstwalo Mashaba and Nonkululeko Sefolo. Your love, words of encouragement and wisdom have sustained me thus far - God reflects himself through you guys. And not forgetting Samkelo Spambo for his unwavering support.



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ABBREVIATIONS AND/OR ACRONYMS

AFSUN	African Food Security Urban Network
APA Act	Agricultural Produce Agents Act
APAC	Agricultural Produce Agents Council
CASP	Comprehensive Agricultural Support Programme
CBD	Central Business District
DAFF	Department of Agriculture, Forestry and Fisheries
DFSC	District Food Security Committees
EBT	Electronic Benefit Transfer
FAO	Food and Agriculture Organisation
HSRC	Human Science and Research Council
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Integrated Development Plan
IFSS	Integrated Food Security Strategy
IGRFA	Intergovernmental Relations Framework Act
INP	Integrated Nutrition Programme
LFSAG	Local Food Security Action Groups
MAFISA	Micro Agricultural Finance Initiative of South Africa
MEC	Member of Executive Council
MIC	Ministerial Interim Committee

MDB	Municipal Demarcation Board
NAMC	National Agricultural Marketing Council
NCU	National Coordinating Unit
NDA	National Development Agency
NDP	National Development Plan
NFPMs	National Fresh Produce Markets
NGOs	Non-Governmental Organisations
NPOs	Non-Profit Organisations
PFSF	Provincial Food Security Forums
PPP	Public-Private-Partnership
SALGA	South African Local Government Association
SDF	Spatial Development Framework
SPLUMA	Spatial Planning and Land Use Management Act
UN	United Nations



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CHAPTER ONE INTRODUCTION

I. PROBLEM STATEMENT

The ‘right to have access to sufficient food’ is enumerated in the Constitution of the Republic of South Africa and by virtue of this constitutional recognition and protection; it is a right that is of paramount importance.¹ The right to food is not only recognised in South Africa, but it is also a right recognised universally as evidenced in the United Nations Declaration of Human Rights 1948 which provides that:

‘Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstance beyond his control.’²

The Human Science and Research Council³ reported that ‘South Africa is unlikely to appear in the “high risk” category in any international rating of food security’.⁴ This was also echoed by the Department of Agriculture, Forestry and Fisheries,⁵ together with the Food and Agriculture Organisation,⁶ which reported that South Africa is said to be a food secure country.⁷

Despite this encomium given to South Africa’s national food secure status, as well as the constitutional endorsement and protection of the right to food, the reality is that communities are starving and South Africa faces an issue that is prevalent in many countries.⁸ The Constitution

¹ Section 27(1)(b) of The Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution).

² Article 25(1) of the United Nations Declaration of Human Rights (1948).

³ Hereafter referred to as HSRC.

⁴ HSRC *Food Security in South Africa: Key policy issues for the medium term* Position paper (2004); see also Kock J *The Food Security Policy Context in South Africa* (2011) 1 (International Policy Centre for Inclusive Growth, UN Development Programme) available at <http://www.ipc-undp.org/pub/IPCCountryStudy21.pdf> (accessed 20 May 2015).

⁵ Hereafter referred to as DAFF.

⁶ Hereafter referred to as FAO.

⁷ Du Toit DC et al *Food Security* DAFF (2011); see also *Integrated Food Security Strategy* (2002) 20.

⁸ On the African continent alone, approximately 240 million out of 925 million people live in food insecure conditions – see FAO *Undernourishment around the world* (2010) available at <http://www.fao.org/docrep/013/i1683e/i1683e02.pdf> (accessed 27 May 2015); see also Stats SA (2011) indicated that 13.4 per cent households experience hunger, whereas 11.4 per cent are vulnerable to hunger in South Africa;

acknowledges that the right to food must be addressed and qualifies the obligatory nature of the right when it envisages that: ‘the state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right’.⁹ The above provision obliges all three spheres of government - national, provincial and local – to work towards the realisation of the right to food.

National government has engaged in a number of initiatives on the issue of food (in)security and has even gone as far as drafting strategies and programmes such as the Integrated Nutrition Programme (INP) of 1995;¹⁰ the Comprehensive Agricultural Support Programme (CASP) of 2005;¹¹ the Micro Agricultural Finance Initiative of South Africa (MAFISA) of 2006¹² and the Integrated Food Security Strategy (2002).¹³ The extent to which the national government has gone to implement these programmes is, however, unknown. There has been limited feedback on the progress and impact of the programmes, if any progress or impact has been made. Fourteen plus million people in South Africa remain food insecure and the realisation of the national government’s commitment to the Sustainable Development Goals¹⁴ - Goal one - to half hunger and poverty by 2015 is taking place at a dawdling pace.

As it stands, the availability of food is overshadowed by escalating food prices and low income households’ access to food is then hampered due to their inability to afford the highly priced food. A National Development Agency¹⁵ policy paper highlights that ‘achieving food security requires sufficient quantities of appropriate foods to be consistently available, that individuals have adequate incomes or other resources that enable them to purchase or barter for food and access to health and sanitation services be recognised’.¹⁶ We do not have difficulties with food

see also the Food and Nutrition Security Implementation Plan (2014) 8; see also General Household Survey (GHS) 2011.

⁹ Section 27(2) of the Constitution, 1996.

¹⁰ The site <http://www.doh.gov.za/programmes/nutrition.html> has more information on the INP.

¹¹ The site <http://www.nda.agric.za/docs/CASP/casp.htm> has more information on the CASP.

¹² The site http://www.nda.agric.za/docs/mafisa_credit_policy_revised.pdf for more information on the MAFISA.

¹³ Hereafter referred to as IFSS.

¹⁴ Stats SA *Sustainable Development Goals – Goal One: Eradicating Extreme Poverty and Hunger* (2013) (Pretoria; South Africa).

¹⁵ Hereafter referred to as NDA.

¹⁶ Chitiga-Mabugu M et al *Government’s role in improving food security in South Africa*, Policy Paper NDA (2013) 3 available at <http://www.nda.org.za/docs/Policy%20Paper%20-%20Government%20role%20in%20improving%20food%20security%20in%20South%20Africa.pdf> (accessed 15 May 2015).

production per se, although the drought currently faced in the country poses threats to food production, we have difficulties of getting food to those who need it. Conventional wisdom has it that the area of responsibility for food security lies with the national government.¹⁷ However, due to its remoteness to communities, national government cannot take cognisance of the specific needs of communities, as different communities experience different circumstances regarding access to food. This leaves a gap for national government to integrate local government in its programmes. After all, the proximity of local government to the community enables it to deal with the specific needs of its community much better than national government would.

Local government does not have a clearly defined policy mandate to address food (in)security. Some municipalities contribute to food security through special mayoral ward projects¹⁸ or community-based empowerment programmes, rather than following the system of the national policy frameworks governing food security.

II. SIGNIFICANCE OF THE PROBLEM

There is a need to strengthen laws and policies to enhance food security. There is a general notion that this role should be played by national and provincial government. It is therefore significant to raise the question of whether or not local government has a mandate setting out its role regarding the issue of food security. Further, if such a mandate exists, how must local government utilise its mandate to facilitate access to food? Should the issue around the enhancement of food security not be addressed, the scope for local government to actively play a role will not be realised and this will hinder the developmental objectives of local government.

As much as local government is reluctant to take full advantage of its legislative and executive competency, some municipalities have utilised their authority when it comes to fresh produce markets. However, local governments' management of fresh produce markets has been of a poor

¹⁷ See Steyn JG *Food Security in South Africa: Perceptions of the Role of Local Government*, IDASA (2011) 4 available at <http://led.co.za/documents/food-security-in-south-africa-perceptions-of-the-role-of-local-government> (accessed 21 May 2015) – where a member of the Gauteng Provincial Legislature (MPL) expressed his concerns and iterated that 'it is unfair to expect local government to fill this void as it (food security) is not part of its mandate'.

¹⁸ For example the Drakenstein Local Municipality hosts a large number of mayoral ward projects focused on soup kitchens, the establishment of community gardens and food vouchers, see IDP.

standard, leading to problems such as escalated levels of wastage taking place at the markets.¹⁹ As such, the manner in which local governments currently regulate their markets offers little prospects of enhancing food security. If local government does not step up to the plate to resolve the issue of food security, not only will the confusion over its mandate remain unsolved but the realisation of the right to food will be compromised.

III. RESEARCH QUESTION

Based on the research problem set out above, this paper seeks to answer the following question: how can municipalities manage and regulate markets in a manner that facilitates access to food and contributes to the enhancement of food security?

In attempting to answer this question, the paper will also address the following questions: what does the term ‘food security’ mean? What does ‘access to food’ mean? What does the ‘right to food’ mean? What are the powers and functions of local government? What are the limits, problems or risks attached to the exercise of these powers? What constitutes ‘markets’ or ‘fresh produce markets’ in this case? What is the scope of local government’s legislative and executive competence regarding food ‘markets’, as enumerated in Part B of Schedule 5 of the Constitution? And, how can municipalities utilise food markets as a means to facilitate access to food and address the issue of food security?

This paper will focus primarily on fresh produce markets, as opposed to other markets or ‘markets’ in their entirety. This limitation is based on the argument that fresh produce markets are more relevant for the role of local government in facilitating access to food because they provide a platform for the sale and purchase of fresh produce, which is important for nutritional purposes.

IV. ARGUMENT

The argument presented in this thesis centres around the facilitation of access to food, by local government, through the regulation and management of markets.

¹⁹ Problems of wastage at fresh produce markets are preventing the enhancement of food security. See Wild S ‘Want food security? Stop the rot’ *Mail and Guardian* 17 May 2013 available at <http://mg.co.za/article/2013-05-17-00-want-food-security-stop-the-rot> (accessed 28 May 2015) where Opara U comments that ‘when food is lost, the money and resources that go into making it are lost too’.

The paper will address the problem by examining the concepts of ‘food security’ and ‘access to food’ in the South African context, as well as in the international context. In examining the above concepts, the paper will also include the right to food. The paper will further look at how South Africa has responded to the issue of food security through its national food security policies.

The paper will look at how local food markets are utilised internationally to facilitate access to food and thereafter, examine how food markets should be utilised to facilitate access to food in South Africa. Thereafter, an examination of the powers and functions of local government as entrenched in the Constitution will be provided, as well as the implications of such powers, the limitations and the problems attached to the exercise of local government powers.

Lastly, the paper looks at local government’s competence regarding food ‘markets’ in Schedule 5B of the Constitution, as well as the other competencies related to food/food security. Although local government has the scope to address the issue of food security by exercising its legislative and executive authority over the competence ‘markets’ as per Schedule 5B of the Constitution, this study does not focus solely on the management and regulation of ‘markets’. The study extends and includes related competencies such as trade regulations, the licensing and control of undertakings that sell food to the public, municipal abattoirs, street trading and municipal health service,²⁰ and shows how the links between these competencies provide local government with the opportunity to contribute to the enhancement of food security.

V. LITERATURE REVIEW

An abundance of research and literature is available on food security both globally and in South Africa. The issue of food security was first mentioned in the build-up to the 1974 World Food Conference.²¹ Attention has been focused on mechanisms to eradicate food insecurity world-wide. Flowing from the above, the literature reviewed focused on food security in South Africa. Anderson²² argues that ‘household access to food depends on how food markets and distribution

²⁰ See Part B of Schedule 4 and Schedule 5 of the Constitution on the listed functional areas of local government competence.

²¹ FAO *Trade Reforms and Food Security: Conceptualising the Linkages* (2003).

²² Anderson SA (ed) *Core indicators of nutritional status for difficult-to-sample populations* (1990) (Journal of Nutrition; Bethesda, Maryland) 120 available at <http://www.envirosecurity.org/actionguide/view.php?r=330&m=publications> (accessed 22 May 2015).

systems function'. His argument focuses on the aspects of the entire food system, ranging from the utility of both macro and micro markets, to different streams of distribution. Aliber,²³ as well as Van der Berg²⁴ argue that there are distributional and accessibility problems that need to be understood in addressing food security. They present their arguments on the notion that, ideally poverty and food insecurity would be better addressed by expanding employment opportunities as a means to improve or create household incomes. Drawing from this, their arguments deduce that social security equals food security and that the social welfare grants provided to the elderly and children play an important role in improving household food security.

The HSRC²⁵ focuses on the role of civil society organisations and their participation in improving household food security in South Africa. The report also speaks of the national government's role in combating food insecurity through food security policy led by the Department of Agriculture, Forestry and Fisheries and also argues that the coordination of a national response to food security within the DAFF limits the possibility of a multi-dimensional approach emerging. It further argues that to be able to follow a holistic approach to food security, engagement and coordination with multiple stakeholders and ministries is required. The report does not look at local government and its mandate relating to food security, nor does it look at measures local government can undertake to enhance food security.

There is minimal literature available on local government and food security. A study conducted by IDASA²⁶ examined the role local government might play in advancing food security, with its focus centred on access to food for people living with HIV/Aids. The study touches on the confusion over local government's mandate regarding the issue of food security, it also deduces views over national government's ineffective use of resources to address food security among

²³ Aliber M *Exploring statistics South Africa's national household surveys as sources of information about household level food security* (2009) Vol 48, No 4 (Agrekon) available at <http://ageconsearch.umn.edu/bitstream/58213/2/3.%20Aliber.pdf> (accessed 22 May 2015).

²⁴ Van der Berg S *Fiscal incidence of social spending in South Africa* (2006) (University of Stellenbosch, Cape Town, South Africa) available at <http://www.treasury.gov.za/publications/other/Fiscal%20Incidence%20Study/Report%20on%20fiscal%20incidence%20in%202006.pdf> (accessed 22 May 2015).

²⁵ HSRC *Food Security Study Report*, Final Report (2013) available at <http://www.hsrc.ac.za/%2Fen%2Fresearch-data%2Fktree-doc%2F13815&ei=ij5oVcOelsil7AaSzoGoCw&usq=AFQjCNFy6iZyHlOQPIE52hZn9hCMCnlyDw&bvm=bv.93990622,d.ZGU> (accessed 15 May 2015).

²⁶ Steyn JG (2011).

people living with HIV, proposes for coordination between the spheres of government to address the food security and argues that fiscal incapacity of local governments hampers the exercise of their mandates regarding food security.

There is limited material available on fresh produce markets. More so, limited research has been conducted on markets and their link to food security. The African Food Security Urban Network (AFSUN) research report²⁷ highlights that households (with a focus on households in Msunduzi Local Municipality in the KwaZulu Natal province) do not source food through urban agriculture or inter-household food transfers. The norm has become the purchasing of food. The report compares the expansion and utility of supermarkets to the fresh produce markets in Msunduzi Local Municipality. The report argues that fresh produce markets are not used entirely for the purchase of food because they are located in isolation from the Central Business District (CBD), they are not in close proximity to public transport routes and there are power struggles regarding the ability to negotiate lower prices with selling agents.²⁸

Chikazunga and Deall²⁹ outline the formation of National Fresh Produce Markets (NFPMs), which comprise of privately owned markets not controlled through by-laws, as well as those owned by municipalities. The authors argue that the large majority of fresh produce markets in South Africa are managed and owned by municipalities who lack the knowledge to guide the businesses forward. The authors' arguments centre on the improvement of macro-economic factors such as transportation systems, technological advancements and the increased ease of market access to direct players and smallholder farmers. The paper highlights the links between fresh produce markets and the informal trading sector, which ultimately avails fresh produce to consumers. The authors do not address the role and direction that fresh produce markets should take to enhance food security.

Thus far, no research has been conducted examining the link between food security, local government and fresh produce markets. As such, the significance of this research paper lies in the fact that it will examine the link between food security, local government and fresh produce

²⁷ Caesar M et al *The State of Food Insecurity in Msunduzi Municipality, South Africa*, AFSUN Urban Food Security Series No 16, (2013) 23 available at http://www.afsun.org/wp-content/uploads/2013/09/AFSUN_16.pdf (accessed 14 May 2015).

²⁸ Caesar M et al (2013) 25.

²⁹ Chikazunga D & Deall S *The Role of Fresh Produce Markets in South Africa*, Southern Africa Policy Brief 4 (2008) 2 at para 1 available at <http://pubs.iied.org/G03310.html> (accessed 21 May 2015).

markets, as a means to fill the knowledge gap with regard to the confusion of local government's mandate and the utility of such mandate to address the issue of food security.

VI. CHAPTER OUTLINE

This research paper is divided into five chapters, including this introductory chapter. Chapter two discusses the concept of food security, incorporating the right to food. Furthermore, there is an outline of three national government policies/strategies employed to address the issue of food security and an examination of local food markets in general and with South Africa as the focal point.

Chapter three looks at local government, its constitutional objectives and developmental objectives and its constitutionally entrenched powers in Schedule 4B and 5B of the Constitution. The consequences of concurrency/functional overlap and strategies used to manage it are provided, as well as a discussion of the division of power between the two tiers of local government.

Chapter four provides the assessment of local government's exercise of power in relation to 'markets', with a focus on the power to administer and legislate over 'markets'. An examination of the competencies related to 'markets' is provided, as well as an example of a municipal by-law regulating a fresh produce market, the national laws regulating 'markets' and lastly, a presentation of the discussion that took place at a roundtable on local government and food security.

Chapter five presents the findings of the research paper, summarises chapter two and three and provides recommendations relating to the facilitation of access to food through the management of markets.

VII. RESEARCH METHODOLOGY

The research paper will be carried out using a desktop research methodology. As such, the research will be qualitative. The data used in this research paper will be gathered from policy papers, legislation, reports, journal articles, research papers, newspaper articles, statistical data, books and treaties and international resolutions. The majority of the data is available in

electronic format. Chapter two will also feature comparative examples of local food markets in Canada, Austria and the USA.

The information used in section 7 of chapter four, as well as in various other sections of chapter four, was largely derived from discussions that took place at the roundtable held by the Dullah Omar Institute on ‘exploring the link between developmental local government and food security through improved regulation and management of fresh produce markets’.

VIII. DEFINING CONCEPTS

Defining food security is difficult as several different working definitions of food security currently exist. Reutlinger and Knapp³⁰ defined food security as ‘a condition in which the probability of a country’s citizens falling below a minimal level of food consumption is low’. UNICEF (1990) defined food security as ‘the assurance of food to meet needs throughout every season of the year’.³¹ The World Health Organisation (WHO) defines food security as the state when ‘all people at all times have both physical and economic access to enough food for an active, healthy life’.³² The South African Government defines food security as ‘the physical, social and economic access to sufficient, safe and nutritious food by all South Africans at all times to meet their dietary and food preferences for an active and healthy life’.³³ However, for the purposes of this paper, I will use the widely accepted definition provided at the World Food Summit by the Food and Agriculture Organisation, which states that:

‘Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.’³⁴

The concept of food security comprises of three main themes; first is the element of food availability, defined as ‘the availability of sufficient quantities of food of appropriate quality,

³⁰ Reutlinger S & Knapp K *Food security in food deficit countries* (1980) World Bank Staff Working Paper No 393, (World Bank, Washington DC).

³¹ United Nations Children’s Fund (UNICEF) (1990) available at <http://www.unicefusa.org/mission/survival/nutrition> (accessed 03 February 2016).

³² The World Health Organisation (WHO) available at <http://www.who.int/trade/glossary/story028/en/> (accessed 03 February 2015).

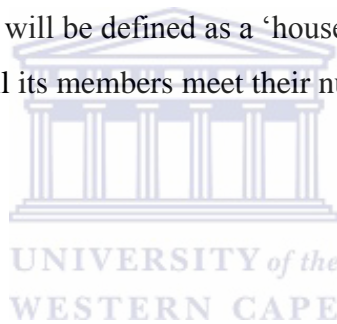
³³ See National Department of Agriculture (NDA) *The Integrated Food Security Strategy (IFSS)* (2002) 15.

³⁴ FAO *World Food Summit* (1996) available at <http://www.fao.org/wfs/> (accessed 20 May 2015).

supplied through domestic production or imports'.³⁵ Second is the element of food accessibility, defined as 'the ability of the nation and its households to acquire sufficient food on a sustainable basis'.³⁶ And third is the element of food utility, which is said to be the 'utilisation of food through adequate diet, clean water, sanitation and health care to reach a state of nutritional well-being where all physiological needs are met'.³⁷ These elements are inter-related; however, as evidenced by South Africa's case, they are also distinct as availability of food does not necessarily mean access to food.³⁸

Different definitions have also been provided by different municipalities for the term 'markets'.³⁹ For purposes of this paper, 'markets' will be defined as any building or premises under the ownership and control of a municipality upon or in which the business of a market is conducted in accordance with the provisions of the said municipality's by-laws.

'Access' for purposes of this paper will be defined as a 'household's ability to acquire enough food of sufficient quality to have all its members meet their nutritional requirements and lead productive lives'.⁴⁰



³⁵ See FAO *Food Security Policy Brief, Issue 2 (2006) 1* available at <http://www.fao.org/forestry/13128-0e6f36f27e0091055bec28ebe830f46b3.pdf> (accessed 20 May 2015); see also Kock J *The Food Security Policy Context in South Africa Country Study Number 21 (2011) 5*, where availability is defined as: 'effective or continuous supply of food at both national and household level'.

³⁶ FAO *Food Security Policy Brief (2006)1*.

³⁷ FAO *Food Security Policy Brief (2006) 1*; see also Ruben R *Improving Food Security: A systematic review of the impact of interventions in agricultural production, value chains, market regulation and land security (2011) 15* para 2 (IOB Study) available at <http://www.oecd.org/derec/49558328.pdf> (accessed 06 July 2015).

³⁸ See Maunder N & Wiggins S *Food security in Southern Africa: Changing the trend? Review of lessons learnt on recent responses to chronic and transitory hunger and vulnerability (2007) Natural Resource Perspective no. 106 (London: Overseas Development Institute) - who argue that food availability is necessary, but not sufficient for access and access is necessary but not sufficient for utilisation.*

³⁹ See Durban National Fresh Produce Market By-laws available at <http://www1.durban.gov.za/durban/government/bylaws/durban-national-fresh-produce-market-bylaws> (accessed 21 May 2015).

⁴⁰ Labadarios D et al *Food security in South Africa: a review of national surveys (2011) available at http://www.who.int/bulletin/volume/89/12/11-089243/en/#R6* (accessed on the 22 May 2015).

CHAPTER TWO

FOOD SECURITY, RIGHT TO FOOD AND THE NATIONAL STRATEGIC FRAMEWORK

1. INTRODUCTION

This chapter discusses the concept of food security, together with the ‘right to food’ and the ‘right to have access to food’, as the latter right is envisaged in the Constitution of the Republic of South Africa. The chapter then provides an outline, the roles in enhancing food security and critique of the Integrated Food Security Strategy, the National Policy on Food and Nutrition Security, and the Food Security Policy. The chapter will also look at local food markets. And in conclusion, the chapter will focus on comparative examples of local food markets in the international context and thereafter, local food markets in the South African context.

2. THE CONCEPTS OF FOOD SECURITY, ACCESS TO FOOD AND RIGHT TO FOOD

2.1 The concept of food security

The issue of food security, in South Africa, comprises of two dimensions: the first issue is that of national food security, which seeks to increase and maintain South Africa’s ability to meet its national food needs. Secondly, there is the issue of poverty caused by inadequate food supplies, which results in household food insecurity, minimal existence of purchasing power, poor nutrition and inadequate access to food.¹

In an attempt to address the issues of national food security and household food security, mentioned above, the national government favours an approach centred on increasing production in the country. The ‘increased production theory’ is founded on the notion that increasing the amount of food available will enhance consumers' procurement of food and guarantee food security. Agriculture plays an important role in placing food on the tables of low income households. The term ‘agriculture’ also refers/speaks to self-production, also known as subsistence farming, that low-income households engage in to provide food for themselves.

¹ Drimie S & Ziervogel G *Food Insecurity in South Africa: Monitoring and managing the realities of integration local information and experience into policy and practice* (2006) VARIP Case study, South Africa available at <http://www.ipc-undp.org/publications/27360> (accessed 19 June 2015).

Commentators have argued that a production focused perspective should not be the sole solution for food security, at both national and household level,² as it overlooks factors such as the inaccessibility of the available food due to, for example ‘purchasing power’ dynamics and food price increases.³

2.2 Understanding ‘access to food’

As mentioned above, food security comprises of three main elements, with ‘access to food’ being one of the elements. Understanding the concept of ‘access to food’ is important for two reasons: first, ‘access to food’ is important because the driver of food security is not only availability but also access.⁴ Secondly, food is a necessity for all households and in order for households to be able to access food; it is the responsibility of the government to plan the markets, distribution systems and economic activities around the facilitation of access to food for its people.⁵ The importance of ‘access to food’ will be evident in the later part of this chapter, where (fresh produce) markets will be explored as an avenue to facilitate access to food.

The term ‘access to food’ can be read to mean the ability of households to secure food through subsistence production, purchasing it or from sources such as grants and donations. For purposes of this paper, access shall be defined as ‘a household’s ability to acquire enough food of sufficient quality to have all its members meet their nutritional requirements and lead productive lives’.⁶

² Drimie S & Ruysenaar S *The Integrated Food Security Strategy of South Africa: An Institutional Analysis* (2010) 318 (Agrekon; Agricultural Economics Research, Policy and Practice in Southern Africa) available at http://www.researchgate.net/publication/239788987_The_Integrated_Food_Security_Strategy_of_South_Africa_An_institutional_analysis (accessed 19 June 2015).

³ See Drimie S & Ruysenaar S *The Integrated Food Security Strategy of South Africa: An Institutional Analysis* (2010) 325.

⁴ See Battersby J ‘Urban food insecurity in Cape Town, South Africa: An alternative approach to food access’ (2011) 545 *Development Southern Africa* Vol 28, No. 4 available at https://www.academia.edu/916367/Urban_food_insecurity_in_Cape_Town_South_Africa_An_alternative_approach_to_food_access (accessed 19 June 2015).

⁵ See Caldwell W et al *Planning and Food Security within the Commonwealth: Discussion paper*, CAP (2011) 13 (accessed 06 July 2015); see also HSRC *Food Security in South Africa: Key policy issues for the medium term*, Position Paper (2004) 4 available at <http://www.hsrc.ac.za/Fen%2Fresearch-data%2Ftree-doc%2F1199&ei=QidoVfH9D8XV7QaTI4OgBA&usq=AFQiCNHLvbtmmvbwFqv8GkQM9uOiiLcFEQ&bvm=bv.93990622.d.ZGU> (accessed 20 May 2015).

⁶ Labadarios D et al *Food security in South Africa: a review of national surveys* (2011) 2, citing Webb P et al *Measuring household food insecurity: Why its so important and yet so difficult to do* (2006) 136 *Journal of Nutrition* 1404S-1408S available at <http://jn.nutrition.org/content/136/5/1404S.long> (accessed 06 July 2015).

Caldwell suggests that one of the options available to achieve the goal of accessible food for all households is to improve networks of distribution.⁷ Access to food also goes hand-in-hand with income availability.⁸ As argued by Battersby, ‘access is typically viewed as being directly related to income’.⁹ The inability of individuals to generate a stable income hinders the prospects of (household) food security. Access to food at a household level typically depends on how food markets and distribution systems function, rather than agricultural production.

2.3 What does the right to food mean?

This part discusses the right to food, as a right not only recognised in South Africa but also internationally. The importance of discussing the right is due to the fact that it is the foundation on which the right to access to food lies and thus strengthens one’s entitlement to access food.

Section 27 of the Constitution provides that ‘everyone has the right to have access to sufficient food and water’.¹⁰ The section further states that ‘the state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of these rights’.¹¹ The consequence of these two subsections is two-fold: first, the right to food is an entitlement and as such, it cannot be taken away, nor interfered with and the state has to ensure that none of its measures result in people being deprived of their right to food.¹² And secondly, the State is obliged to draft/compile and enforce appropriate laws as a means to create a conducive environment where its citizens can exercise their right of access to food.

The right to food is not only recognised in South Africa but also internationally through various treaties, resolutions and by international institutions such as the United Nations. The second UN Special Rapporteur on the Right to Food defines the right to food as:

⁷ Caldwell W et al *Planning and Food Security within the Commonwealth: Discussion paper*, CAP (2011) 13.

⁸ Van der Merwe C *Key Challenges for Ensuring Food Security in South Africa’s Inner Cities* (2011) Policy Brief Number 36 available at <http://www.ai.org.za/wp-content/uploads/downloads/2011/11/No-36.-Key-Challenges-for-Ensuring-Food-Security-in-South-Africas-Inner-Cities.pdf> (accessed 29 May 2015).

⁹ Battersby J ‘Urban food insecurity in Cape Town, South Africa: An alternative approach to food access’ (2011) 545; see also Van Zyl J & Kirsten J *Food Security in South Africa* (1992) 180 (Agrekon, Vol 31, No 4) available at http://repository.up.ac.za/bitstream/handle/2263/2873/VanZyl_Food;jsessionid=58EEC5D3658D10286EDABD857CD78953?sequence=1 (accessed 29 May 2015).

¹⁰ Section 27(1)(b) of the Constitution, 1996.

¹¹ Section 27(2) of the Constitution, 1996.

¹² See Knuth L & Vidar M *Constitutional and Legal Protection of the Right to Food around the World* (2011) 7 (FAO) available at <http://www.fao.org/docrep/016/ap554e/ap554e.pdf> (accessed 17 June 2015).

'the right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to qualitatively and quantitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life'.¹³

Treaties and international resolutions such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966,¹⁴ the Universal Declaration of Human Rights 1948¹⁵ and the Convention on the Rights of the Child 1989¹⁶ also recognise the right to food.¹⁷ In the African context, the African Charter on Human and People's Rights 1981 implicitly recognises the right to food as forming part of the rights to life, health and development.¹⁸

To date, there are no records of a case pertaining to the right to food and/or food security being brought before a South African court. However, international case law can be of assistance in understanding the right to food. *People's Union for Civil Liberties v Union of India and Others*¹⁹ and *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v the Government of Nigeria*,²⁰ serve as examples where the right to food was recognised as part of the right to life and further, obliged the government to protect the right. What these two cases show is that the right to food is attached to other human rights, such as the right to life and by virtue of this, the right to food can be implicitly read and protected through the right to life.

¹³ UN Special Rapporteur on the Right to Food available at <http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx> (accessed 06 July 2015); see also Ziegler J *Preliminary report of the Special Rapporteur of the UN Commission on Human Rights on the Right to Food*, UN Doc A/56/210 (2001) para 22.

¹⁴ Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> (accessed 06 July 2015).

¹⁵ Available at <http://www.un.org/en/documents/udhr/index.shtml#a30> (accessed 06 July 2015).

¹⁶ Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (accessed 06 July 2015).

¹⁷ See Kock J *The Food Security Policy Context in South Africa Country Study Number 21* (2011) 12, where he argues that Article 2.1 of the ICESCR can be read to fully acknowledge the human right to food and furthermore, that full realisation of the right implies that a citizen whose right to food is violated through an omission to respect the right, must be able to bring charges against the state and obtain remedy from the courts.

¹⁸ Article 4, 16 and 22 of the African Charter on Human and People's Rights 1981.

¹⁹ SC 2001 Writ Petition (Civil No. 196 of 2001), case summary available at <https://www.escri-net.org/docs/i/401033> (accessed 06 July 2015) - the court granted interim orders which led to the improved implementation of governmental food programmes and greater entitlement to the benefits of the programmes; see also *Kishen Pattnayak and Another v State of Orissa* AIR 1989 SC 677. Article 21 of the Constitution of the Nation of India, 2012 states that 'No person shall be deprived of his right or personal liberty except according to procedure established by law'.

²⁰ Communication No. 155/96, 2001 AHRLR 60, case summary available at <https://www.escri-net.org/docs/i/404115> (accessed 06 July 2015) - the court found that the government of Nigeria had violated the right to food by failing to prevent pollution of the environment by oil companies and by allowing the military personnel to destroy crops in the Ogoni community.

Equally, the state should refrain from violating human rights that are linked to the right to food and the state should also prevent other parties from interfering with those human rights.

In closing, a look at the abovementioned shows that food security is a complex matter. The definition of food security includes availability, accessibility and utility of food as important elements that should be addressed collectively. However, what is evident from the discussion in subsection 2.1 above is that there is an over-emphasis on the element of availability. The exclusive emphasis placed on availability, through the need to increase production, will not guarantee the access and utility of food. In order to address the element of utility, what would need to be enhanced as well is access to food.

Section 7 of the Constitution states that ‘the state must respect, protect, promote and fulfil the rights in the Bill of Rights’.²¹ This provision may be read to affirm the obligation on the state to progressively realise the right to food. This obligation to progressively realise the right to food, as well as to respect, protect, promote and fulfil the right to food requires national, provincial and local government to act. In the South African instance, local government can fill the gap pertaining to access to food as it exercises competencies over the licensing and control of undertakings that sell food to the public, markets, abattoirs, trading regulations and street trading.²² Local government’s competencies could be utilised to balance the ‘increased production’ bias with ‘access to food’. This would require a more defined role for local government to be carved; such a role will be examined in the following chapter. But first, the next section of this chapter will look at the national policy and strategic framework, which is under the leadership of the Department of Agriculture, Forestry and Fisheries and what the framework says about food security.

3. NATIONAL POLICY AND STRATEGIC FRAMEWORK

In a bid to address the issue of food security in South Africa, the government has embarked on a number of initiatives, including programmes aimed at curbing food insecurity, as well as the drafting of policy and strategic framework on food security. This section provides an outline of the national policy and strategic framework, briefly setting out three of the most important

²¹ Section 7(2) of the Constitution.

²² See Part B of Schedules 4 and 5 of the Constitution.

national government's policy responses to the issue of food insecurity. The section further sets out some of the main critiques of the policy and strategic framework, and briefly speaks of the contestation over the division of powers in the national policy and strategic framework. The policies outlined are the Integrated Food Security Strategy (IFSS), the National Policy on Food and Nutrition Security and the Food Security Policy.

3.1 The Integrated Food Security Strategy (IFSS) (2002)

The national government has coordinated the IFSS into a wide-ranging programme that aims to involve all three spheres of government. The strategy was adopted by the Minister of Agriculture, Forestry and Fisheries in 2002. The IFSS aims to facilitate various food security programmes, headed by different ministries, for a holistic response to food insecurity.²³ The strategy further aims to utilise interventions in a manner that ensures 'that the target population(s) gain access to productive resources, or that they gain access to income and job opportunities to enhance their power to purchase food, or that the target population is empowered to have nutritious and safe food, or alternatively that the state provides relief measures that may be short to medium term and are sustainable'.²⁴ The strategy's end goal is to eradicate malnutrition, hunger and food insecurity by 2015, an end goal that was in line with Goal One of the Sustainable Development Goals.²⁵

In South Africa, the IFSS lists food security as part of agricultural development and as such, food security primarily rests with the Department of Agriculture, Forestry and Fisheries at national level and the provincial Departments of Agriculture. The Department of Agriculture, as chair of the social cluster Director-Generals responsible for the IFSS, is tasked with the duty to establish a food security unit to manage food security activities within national and provincial government.²⁶ According to the strategy, the social sector cluster departments will support the

²³ See National Department of Agriculture (2002), which sets out the reasons for the formulation of the IFSS.

²⁴ See IFSS (2002).

²⁵ See South African Human Rights Commission *Concept Paper on the Strategic Focus Area: Right to Food* (2013) available at <http://www.sahrc.org.za/home/21/files/Concept%20Paper%20on%20the%20Right%20to%20Food%2018072013%20%282%29.pdf> (accessed 17 June 2015). The Millennium Development Goals have been overtaken by the Sustainable Development Goals - see <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> for a list of the goals.

²⁶ IFSS (2002) 9.

IFSS by initiating and/or continuing programmes that seek to advance food security.²⁷ The issues that will be tackled by the programmes include land reform, food production, procurement and marketing of food products, human resource management, education and training, processing, storage and transportation of food, ailments related to malnutrition and hunger and access to food legislation, to name a few.²⁸

The IFSS proposes the following organisational structures: the Minister of Agriculture will chair the social and economic clusters and this team will provide political direction through policy decisions and progress reports to the President and the Parliament of the Republic of South Africa on food security targets.²⁹ The National Coordinating Unit (NCU) will provide technical support and coordinate both the activities of the IFSS, as well as the national programme managers, who will oversee specific programmes. Provincial Food Security Forums (PFSF) will be formed in all the nine provinces and they will comprise of stakeholders from government, civil society and the private sector. Their role will be to prioritise projects and distribute funds for the programmes.³⁰ District Food Security Committees (DFSC) will be in place to identify food insecure areas within the district. It is, however, unclear whether the strategy refers to ‘district municipalities’ when speaking of ‘the district’ and whether these District Food Security Committees will be set up in all the district municipalities in the country. The committees will compile and recommend projects, and also monitor the outcome and effects of the projects on food security. Lastly, Local Food Security Action Groups (LFSAG) will comprise of local government officers, churches and local NGOs. Their task will focus on identifying and quantifying vulnerable and insecure households, as well as to take note of issues and suggestions brought forth by households and individuals in their communities.³¹

3.2 Food Security Policy (2012)

²⁷ This cluster comprises of the Departments of Health, Public Works, Social Development, Education, Transport, Housing, Land Affairs, Local Government, and Science and Technology to name a few; see IFSS (2002) 7 for the rest of the list.

²⁸ See IFSS (2002) 8-9 for more issues to be addressed.

²⁹ IFSS (2002) 34.

³⁰ IFSS (2002) 35.

³¹ IFSS (2002) 36.

The Food Security Policy lists the improvement of ‘South Africa’s adequacy and stability of access to safe and nutritious food at national and household level’³² as its strategic goal. The policy is based on a number of guiding principles, such as the principle that speaks to government’s role in ensuring a food secure country by creating a conducive environment, where communities are empowered to produce food, exercise control over the utility of their produce and are socio-economically empowered to steer their own development. The Policy places an emphasis on food distribution to the hungry and destitute members of communities.³³ The Policy recommends a food distribution approach in the form of cash, vouchers or food parcels, in accordance with the Social Assistance Act.³⁴ In the case where vouchers or food parcels are used, once procured the food is then provided to the food insecure through community feeding scheme initiatives. These initiatives are aimed at feeding the malnourished, the food insecure, as well as people who are unable to obtain food due to circumstances beyond their control.

The policy places emphasis on agricultural production and enunciates this by pressing on the point that the agricultural sector is a vital sector for the realisation of food security.³⁵ The policy also calls for the formulation of a long term agricultural production plan that outlines state support to farmers, state support to the agricultural industry and champions for the establishment of rigorous labour interventions.

The policy recognises that land use in urban and semi-urban areas is under the administration and management of municipalities and as such, land zoning schemes of each municipal area are planned and approved by the municipalities. In light of the aforementioned acknowledgement, the policy proposes that local government should also participate in the (national) food security programmes. While taking this into account, the policy further proposes that the South African Local Government Association (SALGA), as a representative body for organised government, takes steps to ensure that every municipal spatial development plan provides land allotted for agricultural production. It is commendable that the policy recognises the role of local government and further, proposes that local government plays an active and strong part in enhancing food security. The proposal, however, misunderstands the role of SALGA. The

³² Food Security Policy (2012) 12.

³³ See Food Security Policy (2012) 28.

³⁴ Act 13 of 2004.

³⁵ Food Security Policy (2012) 23.

drafters of the Food Security Policy fail to understand that SALGA is not a body that instructs municipalities on what to do; instead it is an association of organised local government that advocates on behalf of municipalities. In light of the aforementioned, the policy could have proposed for national and provincial government to play a supportive role and assist municipalities with the drafting of policies that relate to municipal land use, if and when assistance is needed.³⁶

3.3 The National Policy on Food and Nutrition Security (2013)

The National Policy on Food and Nutrition Security defines food security as ‘access to and control over the physical, social and economic means to ensure sufficient, safe and nutritious food at all times, for all South Africans, in order to meet the dietary requirements for a healthy life’.³⁷ The Policy sets out a framework aimed at fulfilling the constitutional imperative of the right to food, and serves as a guide to national, provincial and local government in pursuing food security at every level.³⁸

The Policy on Food and Nutrition Security provides three reasons to motivate the drafting of the National Policy on Food and Nutrition Security. The first reason is to articulate a common definition of food and nutrition security; the second reason is to provide an overarching guiding framework to maximise co-operation between the different strategies and programmes of government and civil society, and the third reason is to create a platform to understand the parameters and boundaries of South Africa’s international obligations.³⁹

The policy is informed by the objectives set out in the National Development Plan (NDP): Vision 2030,⁴⁰ which providently enunciates that to enhance food security, there needs to be expansion in the use of irrigation, security of land tenure and the promotion of nutrition education.⁴¹

³⁶ Caldwell W et al *Planning and Food Security within the Commonwealth: Discussion paper*, CAP (2011) 16.

³⁷ National Food and Nutrition Security Policy (2013) 8, the same definition for food security is used in the Food Security Policy (2012).

³⁸ The National Policy on Food and Nutrition Security (2013) 5.

³⁹ See the National Policy on Food and Nutrition Security (2013) 3-4.

⁴⁰ The National Development Plan: Vision 2030 (2011).

⁴¹ The National Development Plan: Vision 2030 (2011) 210-212, see also 15, 16, 124, 196-198.

The National Policy on Food and Nutrition Security, like the IFSS, also has a bias towards production. The policy is centred on the availability and utility of productive land, securing and repairing altered land patterns, providing the platform for increased food production and distribution, and increasing access to production inputs.

3.4 Critique of the national policy and strategic framework

This section will set out six grounds of critique that stem from the discussion on the national policy and strategic framework, already outlined above.

First, the National Policy on Food and Nutrition Security, as well as the Food Security Policy do not contain a plausible vision for a nourishing food system, nor do they offer innovative, rigorous measures different to current policies. The policies take cognisance of the issue of food security; however, they do not align their proposed interventions and programming with their policy objectives. The policies regurgitate the IFSS, offering very little change in the approach to food security.⁴²

Second, the IFSS, the National Policy on Food and Nutrition Security and the Food Security Policy all emphasise that food security is a multidimensional issue encompassing factors such as inaccessibility, utilisation of food, availability and affordability of food and therefore, multidimensional approaches addressing these factors are required to address the issue. Having taken cognisance of this, the next step ought to be the government's avoidance of a single approach in its bid to attain food security. Under the leadership of the Department of Agricultural, Forestry and Fisheries, however, the policy and strategic framework is largely based on a food production rationale. Authors argue that the use of this rationale has the effect of limiting the approach of realising food security. Authors have also argued that the bias towards production suppresses the intention of an integrated approach to food security and this is further supported by a lack of engagement by and with other departments.⁴³

⁴² Moyo B argues that the Policy was drafted under a veil of secrecy, with minimal consultation with stakeholders, Non-Governmental Organisations and civil society organisations (CSOs) - see Moyo B 'South Africa's new Food and Nutrition Policy fails to address constitutional right to food' 27 February 2015 available at <http://sacsis.org.za/site/article/2296> (accessed 27 May 2015).

⁴³ See Drimie S & Ruysenaar S *The Integrated Food Security Strategy of South Africa: An Institutional Analysis* (2010) 325.

Third, commentators have argued that there is a mismatch between the institutional response mechanisms set out in the strategy and whether these responses fit the difficulties of food security faced nationally.⁴⁴ The policy and strategic framework does not provide for, recognise and support the formulation of clear programmes, which set out clear objectives and mechanism to achieve these objectives. Furthermore, departmental units are not coordinated in a manner that allows programmes to be streamlined accordingly. It has been argued that this mismatch hindered the proper implementation of the strategy.⁴⁵ This is to say the composition of committees and units at the different levels of government, as well as their proposed roles, will not adequately respond to food insecurity on the local level. For example, the IFSS proposed for the formation of Local Food Security Action Groups comprising of local government officers inter alia. The strategy does not mention how local government (officers), in the proposed role, will be capacitated to monitor and respond to food security. Furthermore, it is unclear whether this initiative was ever implemented and if it was, it is unclear whether the initiative had any impact. And the involvement of multi-sectoral forums, comprising of the government, NGOs, NPOs, civil society and private sector stakeholders to support the interventions set out to achieve food security has not been prioritised.

Fourth, the policies and strategy fail to take into account the fact that large food retailers are now dominant players in the South African agricultural and food system.⁴⁶ Large retail chains are expanding into peri-urban and rural areas, which include former homelands and townships, previously referred to as non-traditional areas for retail chains. These large franchise stores are replacing green grocers, informal wet markets and fresh produce markets.⁴⁷ In 2007 the National Agricultural Marketing Council tasked its section 7 committee to investigate the state of National

⁴⁴ Drimie S & Ruysenaar S *The Integrated Food Security Strategy of South Africa: An Institutional Analysis* (2010) 318.

⁴⁵ Drimie S & Ruysenaar S *The Integrated Food Security Strategy of South Africa: An Institutional Analysis* (2010).

⁴⁶ Karaan M & Kirsten J *A programme to mainstream black farmers into supply chains: An emphasis on fresh produce*, Southern Africa Policy Brief 6 (2008) 2 available at <http://pubs.iied.org/pdfs/G03312.pdf> (accessed 10 August 2015).

⁴⁷ See Chikazunga D et al *Patterns of restructuring food markets in South Africa: The case of fresh produce supply chains* (2007) 2 available at <http://ageconsearch.umn.edu/bitstream/51995/2/Chikazunqa.pdf> (accessed 10 August 2015), who argue that 'most retail chains have restructured their procurement strategies from decentralised procurement through the traditional wholesale markets to centralised procurement systems through own distribution centres'.

Fresh Produce Markets.⁴⁸ In their report on the investigation, the Section 7 committee had warned that South Africa was expected to follow the trend of permitting supermarkets to expand into areas traditionally served by small businesses and the informal sector. The Section 7 committee also recommended that ‘the government take measures to protect small farmers from the potential negative consequences of the trend’.⁴⁹

Fifth, commentators argue that food distribution, which is the provisioning of food, by the government, to points of demand at the right time and place, is missing from the strategy.⁵⁰ The framework gives very little regard to the role that local government can play in facilitating access to food through, for instance, spatial planning and distribution of markets. The policy and strategic framework also fails to recognise the role of (fresh produce) markets in determining and facilitating access to food, as well as the involvement of local government in this regard. The policies do not address the structure of food markets, household income and expenditure patterns/trends relating to food, as factors to consider when looking at food security, more particularly access to food.

And finally, the strategy and policies pay insufficient attention to the role that local government can potentially play regarding food security. The inter-governmental structures and engagements proposed, as set out in the strategy and policies, to address food security do not provide local government with a strong role to play. The role proposed, in the policy and strategic framework, for local government is one of a data capturing and information-sharing institution that will provide the national and provincial government with information on the problems faced by local communities. Authors have critiqued this limitation, arguing that the recurring assumption found across the policies is that the proposed interventions would work effectively and smoothly without articulating a strong role for local government.⁵¹

3.5 Constitutional powers and functions, and overlapping competencies

⁴⁸ The Marketing of Agricultural Products Act 47 of 1996 empowers the National Agricultural Marketing Council (NAMC) to appoint a Section 7 committee that can investigate and advise the council on any matter that the council may entrust to it. This is in accordance with section 7 of the Marketing of Agricultural Products Act.

⁴⁹ The National Agricultural Marketing Council *Section 7 Investigation: National Fresh Produce Markets* (2007) 17 available at <http://www.nda.agric.za/docs/AMCP/Section7investigNFPM.pdf> (accessed 12 May 2015).

⁵⁰ See Drimie S & Ruysenaar S *The Integrated Food Security Strategy of South Africa: An Institutional Analysis* (2010) 320.

⁵¹ See Drimie S & Ruysenaar S *The Integrated Food Security Strategy of South Africa: An Institutional Analysis* (2010).

What can be seen from the previous section is that food security is largely regarded as an ‘agricultural’ matter, with ‘agriculture’ being a national competence (albeit shared with provinces). Therefore, national government assumes majority of the responsibility in regards to matters concerning and incidental to agriculture and food security.

All the three spheres of governments’ powers and functions are constitutionally entrenched and protected. While this may be so, difficulties when determining which sphere is ultimately responsible in cases of overlap remain problematic. For example, the provincial and local spheres exercise competence over provincial planning and municipal planning,⁵² as well as trade and trading regulations respectively.⁵³ In regards to the national and provincial spheres, both spheres may exercise legislative competence over the functional area of agriculture.⁵⁴

It is argued that the problem is not what to decentralise, as the Constitution already sets out each spheres’ competencies. The problem is rather how to determine which sphere of government is suited to address a function in cases of overlapping competencies. In light of this, a more elaborate discussion of overlapping competencies will be provided in subsection 5.1 of chapter three.

In regards to the institutional responses presented in the national strategic and policy framework, the involvement of local government only goes as far as using the sphere for the identification and quantification of the grievances of the food insecure. Furthermore, the division of powers and functions in the Constitution presents instances of overlapping competencies, which will compromise food security if not managed properly.

4. LOCAL GOVERNMENT AND FOOD SECURITY

The section will provide comparative examples of local government and food security, with the aim of determining the potential role of local government in addressing food insecurity in general. The section below provides three reasons that make local governments well-suited to contribute to food security.

⁵² See Schedule 5 Part A where the provincial government has competence over ‘provincial planning’ and Part B where the local government has competence over ‘municipal planning’.

⁵³ See schedule Part A where both national and provincial government may exercise competence over ‘trade’ and Part B where local government exercises competence over ‘trading regulations’.

⁵⁴ See Schedule 4 Part A where ‘agriculture’ is a national and provincial government competence.

First, local governments often regulate and control/manage the built environment. An argument by Montague provides that ‘through the exercise of its planning powers, local government has the ability to influence land use, business mix within communities and the built environment through zoning in relation to food suppliers/food outlets, agricultural purposes and zoning in relation to walking/cycle access to food outlets’.⁵⁵ Furthermore, authors argue that food system activities take up a large amount of both urban and semi-urban land and as such, land planners, transportation planners and environmental planners inter alia, play a role in food access through their work.⁵⁶

Ringstrom and Born point out that to improve access to food, the built environment in which our communities develop and operate needs to be changed.⁵⁷ The authority to regulate the built environment empowers local government to ensure that small scale healthy food retail is zoned appropriately to enable access to healthy food. In this regard, Ringstrom and Born state that in Washington DC some ‘convenience markets are zoned in ways that inhibit the sale of fresh food’.⁵⁸ It was therefore suggested that definitions should be set for Small Food Markets, based on the percentage of retail space they devoted to fresh produce to enable these markets to sell fresh food.⁵⁹ The power to regulate and control the built environment also empowers local government to designate food retail as an allowable activity in all or most zones. For example, in Baltimore the local authority has decided to designate corner stores as allowable activities near neighbourhoods and has also included additional requirements for corner stores to stock and sell healthy foods. The local authority has also undertaken to ‘create ‘floating’ zones, in the neighbourhood planning processes, for healthy food retail in prior areas.’⁶⁰ Local

⁵⁵ Montague M *Local Government and Food Security: An Evidence Review – What we know about what works and what might work* (2011) 3 available at [http://docs.health.vic.gov.au/docs/doc/C4032606D09CF219CA257A0900008EC3/\\$FILE/Food%20Security%20_NW_MR_Local%20Government_Literature%20Review%20Final%202011_10_17.pdf](http://docs.health.vic.gov.au/docs/doc/C4032606D09CF219CA257A0900008EC3/$FILE/Food%20Security%20_NW_MR_Local%20Government_Literature%20Review%20Final%202011_10_17.pdf) (accessed 25 May 2015).

⁵⁶ See Ringstrom E & Born B *Food Access Policy and Planning Guide* (2011) 6 (Department of Urban Design and Planning; University of Washington) available at <http://www.nyc.gov/html/ddc/downloads/pdf/ActiveDesignWebinar/King%20County%20Food%20Access%20Guide.pdf> (accessed 17 June 2015).

⁵⁷ Ringstrom E & Born B *Food Access Policy and Planning Guide* (2011) 5.

⁵⁸ Ringstrom E & Born B *Access Policy and Planning Guide* (2011) 16.

⁵⁹ See Public Health Law and Policy *Policy approaches to healthy corner stores* (2010) [Webinar] available at <http://www.phlpnet.org/phlp/webinar-archive> (accessed 19 June 2015).

⁶⁰ Centre for Child and Community Health Research *Zoning for a healthy Baltimore: A health impact assessment of the transform Baltimore comprehensive zoning code rewrite* (2010) (Johns Hopkins University) available at <http://www.hopkinsbayview.org/pediatrics/files/ZoningforaHealthyBaltimoreHIA.pdf> (accessed 19 June 2015).

government/municipalities, as the custodians of the built environment, are crucial to improve access to food. Therefore, local government needs to strengthen the connection between the built environment and access to food.

Secondly, local governments often engage in localised strategic planning. Ringstrom and Born provide that municipalities have a potential role to play in food security by raising awareness of and the commitment to healthy food access issues in their communities. Municipalities can do this by passing healthy food resolutions that can encourage commitment from a municipality to support food and health policies that affect its residents.⁶¹ By attempting to increase access to food through strategic planning, local governments could also create benefits that go beyond the public's health, which include 'offering economic development opportunities for small business owners and creating more liveable neighbourhoods'.⁶²

According to Ringstrom and Born, local governments have the power to pass ordinances that establish committees to analyse and improve local food systems. Such committees work with city officials to increase access to healthy food and they also bring municipal departments together to coordinate strategies.⁶³ Municipalities can also monitor the balance of healthy to less healthy food stores within their boundaries. These assessments can also be included in the municipal comprehensive plans, together with objectives either to prevent the number of unhealthy food stores from rising, to decrease unhealthy food stores within a community or to increase healthy food stores in a community.⁶⁴ Ringstrom and Born support the proposal to include food access and health goals into municipal comprehensive plans,⁶⁵ which would help ensure that access to food goals link with and cut across many municipal functions and departments.⁶⁶

Thirdly, local governments often exercise specific powers that may impact on markets and trading. Local government can use local laws to influence food access. To support this

⁶¹ Ringstrom E & Born B *Food Access Policy and Planning Guide* (2011) 12.

⁶² See Ringstrom E & Born B *Food Access Policy and Planning Guide* (2011) 5.

⁶³ Ringstrom E & Born B *Food Access Policy and Planning Guide* (2011) 12.

⁶⁴ See California Centre for Public Health Advocacy *Searching for healthy food: The food landscape in California cities and counties* (2007) available at <http://www.publichealthadvocacy.org/RFEI/expandedmethods.pdf> (accessed 19 June 2015).

⁶⁵ Municipal comprehensive plans, in the case of South Africa, would be the Integrated Development Plans of municipalities.

⁶⁶ Ringstrom E & Born B *Food Access Policy and Planning Guide* (2011) 12.

contention, Montague provides that ‘local government usually reports that it has limited powers to influence the mix of food retail; however, it may be possible to use council by-laws to modify the size and location of the signage that advertises specific types of food outlets’.⁶⁷ For example, municipalities have the authority to define and establish markets as an approved land use, as well as the authority to determine where trading can and cannot take place and the permitted trading hours in a particular community. The aforementioned would enable communities to access more food and at various times of the day, if the municipality sets flexible trading times. Local government also has the power to permit markets and trading on city-owned property, at no cost or minimal cost.⁶⁸ This exercise of power ties back to the first point mentioned in this section, that local government has the power to regulate the built environment.

5. A LOOK AT LOCAL FOOD MARKETS

The importance of local food markets lies in the fact that they assist in bringing fresh fruit and vegetables directly to the communities. Local fresh produce markets can serve as an outlet where farming households sell their produce and earn an income to buy food. Furthermore, fresh produce markets can supply produce to informal traders or ‘hawkers’, who then sell the produce in the cities and townships, which results in the sale of affordable and cheaper fresh produce to consumers. The links between fresh produce markets and the informal trading sector are very essential, as they ultimately avail fresh produce to consumers.⁶⁹ Fresh produce markets also assist in re-circulating money back into the local economy⁷⁰ and building local economies by, providing local producers with opportunities to sell their produce directly to consumers and underserved communities. Local food markets are therefore at the centre of addressing issues of food insecurity, as they are often situated in close proximity to communities and areas frequented by many people.

⁶⁷ Montague M *Local Government and Food Security: An Evidence Review – What we know about what works and what might work* (2011) 13.

⁶⁸ See Ringstrom E & Born B *Food Access Policy and Planning Guide* (2011) 21.

⁶⁹ Chikazunga D & Deall S *The Role of Fresh Produce Markets in South Africa* Southern Africa Policy Brief 4 (2008) 6 para 4.

⁷⁰ Wooten H & Ackerman A *From the Ground Up: Land Use Policies to Protect and Promote Farmers’ Markets* (2013) 7 available at http://changelabsolutions.org/sites/default/files/From_the_Ground_Up-Farmers_Markets_FINAL_20130415.pdf (accessed 10 August 2015).

It is worth noting that access to food does not only speak to accessing the available food, but also accessing the right type of foods that carry nutritional value and suit people's dietary preferences to lead healthy lives. It is arguable that fresh produce markets are one of the preferred 'institutions' to utilise to address the issue of food insecurity. This argument stems from the fact that fresh produce markets provide an avenue for the sale of fresh produce, which is important for consumption due to its nutritional value. A study conducted in 1999 showed that 'consumption of fresh vegetables continues to increase and this was mainly due to increased consumption by low-income consumers, urbanisation and the availability of fresh produce through expanding informal channels'.⁷¹ Fresh produce markets play a part in the increased consumption of fresh produce as they facilitate the flow of produce from the producer to the buyer, which ultimately gets to the end consumer.⁷²

South Africa's food market comprises of two features: the first feature is (that) of a sophisticated and developed food marketing system. This system is dominated by a small number of retail groups, who distribute food through various supermarkets located in South Africa's major cities and towns. The second feature is of an informal food marketing system that distributes food through hawkers, street vendors, general dealers, street corner stalls and spaza shops in vicinities like former homelands and townships, where supermarkets are absent or have not yet been established.⁷³ Karaan and Kirsten argue that with sixty percent of food retail sales belonging to large retail chains, the result of this was that 'food and agricultural systems had to industrialise'.⁷⁴ As was discussed earlier in section 3.4 of this chapter, the consequence of this industrialisation saw the dominance of large retailers, large food and agribusiness companies in the South African agricultural system. The intrusion displaced the informal markets, vegetable shops, green grocers and fresh produce markets.⁷⁵

⁷¹ National Agricultural Marketing Council *Fresh Produce Marketing in South Africa*, Report 2 (2000) 37.

⁷² In the words of the market manager at the Johannesburg produce market: 'the bags of oranges being touted to you by an informal trader at the robots/traffic lights in Joburg were probably on the tree more recently than those in your big supermarket' – see Joburg Market available at <http://www.joburgmarket.co.za/> (accessed 10 August 2015).

⁷³ Louw A *Improved small scale farmer access to fresh produce agri-food markets in South Africa* Policy Brief 3 (2008) 2 available at <http://pubs.iied.org/pdfs/G03309.pdf> (accessed 10 August 2015).

⁷⁴ Karaan M & Kirsten J *A programme to mainstream black farmers into supply chains: An emphasis on fresh produce* Policy Brief 6 (2008) 2 at para 1.

⁷⁵ Louw A *Improved small scale farmer access to fresh produce agri-food markets in South Africa* Policy Brief 3 (2008) 3; see also chapter 2 subsection 3.4 of this paper.

5.1 Comparative examples of local food markets

The section below will look at examples of local food markets and the processes they follow to promote access and consumption of local foods. The examples will assist in determining whether the features of international local food markets are similar or different to those of South Africa's local food markets.

Local food markets differ across countries and regions, which is understandable as the reasons and circumstances surrounding the creation of markets also differ from country to country. In countries such as Canada, Austria and the United States of America, momentum has risen around local food markets and how these can be utilised to address food insecurity, more so around the issue of access to food. In Canada for example, the formation of temporary farmers markets has been highly advocated for and the regional municipality of Waterloo has gone as far as to draft food policies that support the establishment of temporary farmers' markets.⁷⁶ And in Austria, for example, the Viennese markets, including the farmer's markets, have been established to promote local availability of food.⁷⁷ The markets in Vienna are dispersed around local neighbourhoods that support small local farmers.

Favoured for their close proximity to communities, their ability to provide cheaper and healthier fresh produce, as well as their ability to foster community relations, local food markets are growing larger across local communities in the aforementioned countries. The comparative examples set out, therefore, serve as examples with features that may be useful to the situation in South Africa and its local food markets.

In the United States of America, a local food movement comprising of farmer's markets, Community Supported Agriculture farms (CSAs) and farm-to-school programmes, has received widespread interest from the local community.⁷⁸ The movement comprises of people interested in obtaining locally produced food or alternatively, producing their own food. One of the reasons

⁷⁶ Long K *Planning for Food-friendly Municipalities in Waterloo Region* (2013) 8 available at <http://chd.region.waterloo.on.ca/en/researchResourcesPublications/resources/FoodFriendlyMunicipalities.pdf> (accessed 12 May 2015).

⁷⁷ Klimek M et al *Merging Ethics and Economies: Modernising Values in Viennese Farmer's Markets* (2014) 3 (Istanbul, Turkey) available at http://orqprints.org/24364/1/24364_MM.pdf (accessed 06 July 2015)

⁷⁸ See the Local Food Systems Reading Room available at <http://www.nationalaglawcenter.org/readingrooms/localfood> (accessed 29 May 2015).

given to justify the need for local food markets is that the length of time between the harvestation on the farms to the time the produce reaches the consumer is by-passed, as consumers have direct access to their food.⁷⁹ This has the benefit of also saving transportation costs and these savings can then be used to purchase more food. By-passing the lengthy harvestation period is also beneficial as the produce sold to the consumers is of a good quality and has high nutritional value.

The establishment of farmers markets, as opposed to supermarkets and grocery stores, is favoured in the United States because farmers markets are deemed to be less complicated, expensive and time-consuming to establish and run. Ancillary to this, farmers markets are favoured because they ‘quickly serve the immediate food access needs of underserved neighbourhoods’.⁸⁰

In an attempt to enhance local food access, the city of Washington DC has made proposals for the establishment of farmers markets as an approved land use, to increase stability, increase location options for farmers markets and reduce permitting requirements.⁸¹ To this effect, the city of Washington DC has set out to identify appropriate land sites, such as city parkland, public plazas and street closures, in a bid to allow farmers markets to operate on city-owned property.⁸²

Local food development in the United States has also resulted in the formation of municipal food policy councils. Local governments often decide to form food policy councils in response to a pressing issue or need,⁸³ the outcome is that some food policy councils form part of government,

⁷⁹ See Coit M *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement* (2008) 5 *Journal of Food Law and Policy* (National Agricultural Centre) available at <http://www.NationalAgLawCenter.org> (accessed 29 May 2015).

⁸⁰ Harvard Law School Food Law and Policy Clinic *Good Laws, Good Food: Putting local food policy to work for our communities* (2012) 64 available at http://www.law.harvard.edu/academics/clinical/lsc/documents/FINAL_LOCAL_TOOLKIT2.pdf (accessed 12 May 2015); see also Ringstrom E & Born B *Food Access Policy and Planning Guide* (2011) 21, which states that farmers markets, unlike grocery developments, ‘are a more immediate way to increase food access in a neighbourhood’.

⁸¹ Ringstrom E & Born B *Food Access Policy and Planning Guide* (2011) 22.

⁸² See Institute for Agriculture and Trade Policy A ‘how-to-go’ guide for hosting mini farmers’ markets in Minneapolis (2009) available at http://www.iatp.org/files/258_2_103489.pdf (accessed 17 June 2015), for an example on San Francisco that has an ordinance that requires the Recreation and Park Department to work with the Commissioner for Agriculture to identify suitable market sites on public property.

⁸³ See Sustainable Food Center *Access Denied* (undated) available at http://www.main.org/sfc/access_denied/index.html (accessed 29 May 2015); see also Boron S *Food Policy Councils: Practice and Possibility* (undated) available at <http://hungercenter.wpengine.netdna-cdn.com/wp->

while others are non-profit and do not form part of government. Their membership usually comprises of farmers, food processors, wholesalers, distributors, grocers, anti-hunger advocates, scholars, community leaders and concerned citizens. These food policy councils then serve as advisory bodies to the state and local governments, non-profit organisations, subsections of government and other entities. Food policy councils are advocating for policy changes to enhance access to farmers markets by, for example, encouraging the use and acceptance of food benefit programmes at markets. The alternate of the aforementioned, as advocated for by the councils, is for farmers markets to offer financial incentives to low-income consumers who purchase produce at the markets.⁸⁴ To ensure that people of all incomes have access to farmers markets, farmers markets have partnered with municipalities to streamline the acceptance of social welfare cards or Electronic Benefit Transfer (EBT) cards for purchases made at the markets. Cities/municipalities provide legal assistance through zoning codes, technical assistance, support and funding for the required technology to allow the use of social welfare grant cards at farmers markets.⁸⁵

The examples of local food markets set out above are interesting examples that may contribute to the understanding of local food markets and why they seem to be favoured. Local governments feature in initiatives that include, but are not limited to, the establishment of farmers' markets, the formation of food policy councils to focus solely on issues of food and the increased use of social welfare to purchase food at markets. Local governments' engagement in these initiatives serves to promote, support and increase the availability and accessibility of nutritious foods for their communities.

5.2 Local food markets in the South African context

[content/uploads/2011/07/Food-Policy-Councils-Borron.pdf](#) (accessed 29 May 2015), McRae R Food Policy Councils (2002) Presented at Community Food Security Coalition Conference, Seattle WA.

⁸⁴ For examples see Farmers Market Coalition *Real Food, Real Choice: Connecting SNAP Recipients with Farmers Markets* available at <http://farmersmarketcoalition.org/real-food-real-choice> (accessed 24 July 2015) and Maryland Hunger Solutions *Accepting Federal Nutrition Assistance Benefits at Farmers Markets in Maryland* (2013) available at <http://www.mdhungersolutions.org/farmersmarkets/index.shtm> (accessed 24 July 2015).

⁸⁵ For example, in San Francisco, the city requires farmers markets to accept Electronic Benefits Transfer (EBT) for food stamps and Women, Infant and Children (WIC) benefits. See Public Health Law and Policy *Establishing land use protection for farmers' markets* (2009) available at http://www.nplanonline.org/sites/phlpnet.org/files/Establishing_Land_Use_Protections_for_Farmers_Markets_FINAL_WEB_20091203.pdf (accessed 17 June 2015).

While the local authorities in countries such as Canada, Austria and the United States of America have centred their advocacy of access to food through the establishment of farmers' markets, food policy councils and the increased use of social welfare at farmers' markets, the case in South Africa is somewhat different. In South Africa, fresh produce markets are an avenue used for the sale of fresh produce. At fresh produce markets, market owners (municipalities) and market agents receive a commission, from producers, for the services provided to producers by the markets. These services entail the trading of fresh produce by market agents, who are given floor space in fresh produce markets. These agents then sell produce to buyers, for a commission, on behalf of the farmers.

In South Africa, a portion of the marketing, as well as the sale of fresh agricultural produce is done through National Fresh Produce Markets (NFPMS).⁸⁶ A fresh produce market is a business set up at a fixed location, operating under fixed times and provides an environment for the trading of fresh produce to take place between agents, who act on behalf of farmers, and buyers, who act on their own accord or on behalf of the end consumers of fresh produce. There are four important role players involved in the trading practices that take place on the market premises and they include the farmer, the market agent, the market authority and the buyers. The farmer/producer is responsible for agricultural production and must ensure that there is fresh produce available for delivery to the market, in a bid to have it sold for a source of income. The farmer also appoints a market agent to act as his representative at the market and to sell his produce on his behalf. The market agent acts on behalf of his principal, the farmer. He/she is responsible for receiving fresh produce sent from the farmer to the market, ensuring the produce is stored safely and thereafter marketing and selling the fresh produce to the various buyers on the market.⁸⁷ The agent must deposit the income derived from the sales into a trust account, which is accessed by his/her principal. In return for performing this service, the agent is paid a percentage of the selling price (commission). The market authority is responsible for ensuring that the agents operating on the market observe the rules of the market and any applicable by-laws. As mentioned in section 7.1 of chapter four, the market authority is accountable to the municipal council for the way the market is run. As such, the market authority ensures that there

⁸⁶ Hereafter referred to as NFPMS; see the National Agricultural Marketing Council *Fresh Produce Marketing in South Africa*, Report 2 (2000) 9-10 for a list of the NFPMS, 23 in total.

⁸⁷ See Venter PM 'Understanding Fresh Produce Markets in South Africa' (2000) 3:7-13 for a detailed description of a market agent and his functions.

are enough facilities and equipment for use on the market, ensures that there is security, that the market is kept clean and that the processing and payment systems work effectively. The buyers frequent the market to purchase the best quality produce at a reasonable price. The buyers that frequent the market include wholesalers, retailers, informal traders, food processors and those in hospitality. The buyers represent all the sectors that deal with food and have platforms to reach consumers and provide access to food.⁸⁸

The NFPMs are state assets and act as South Africa's main fruit and vegetable distribution channel(s), as the country's producers send tons of fresh produce to NFPMs each year to be sold to thousands of market buyers.⁸⁹ The Fresh Produce Markets are referred to as 'national' because as state owned assets they fulfil a national interest as a marketing channel that plays an important role by providing a service to a number of parties such as low-income consumers, consumers at large, producers, the informal sector and other stakeholders,⁹⁰ as well as responding to food security concerns.⁹¹ The fresh produce markets provide opportunities for large scale, commercialised producers and smallholder farmers to trade equally.⁹² Before 1992, the Commission for Fresh Produce Markets Act 82 of 1970 regulated the fresh produce markets, until it was repealed by the Agricultural Produce Agents Act⁹³ in 1992 and the agricultural sector, as well as the NFPMs were deregulated.⁹⁴ This was a critical policy shift, which resulted in an open sector where retailers were permitted to purchase produce straight from the producer, opposed to the purchasing from the market before 1992. With the deregulation of NFPMs after 1992, the result has been a decline in the use of fresh produce markets as a means for producers to sell their produce. This decline (in the use of fresh produce markets) has been caused by a shifting of supermarkets, wholesalers and buyers from procuring produce at fresh produce markets to directly procuring produce from farmers.⁹⁵

5.3 Challenges faced by fresh produce markets

⁸⁸ Venter PM 'Understanding Fresh Produce Markets in South Africa' (2000) 2:7.

⁸⁹ The National Agricultural Marketing Council *Fresh Produce Marketing in South Africa*, Report 2(2000) 26.

⁹⁰ The National Agricultural Marketing Council *Section 7 Investigation: National Fresh Produce Markets* (2007) 6.

⁹¹ Report of the Ministerial Interim Committee on the Restructuring of Fresh Produce Markets in South Africa (2009) 8 available at http://www.nda.agric.za/docs/AMCP/RMIC_RFMSA.pdf (accessed 12 May 2015).

⁹² Chikazunga D & Deall S *The Role of Fresh Produce Markets in South Africa* Southern Africa Policy Brief 4 (2008) 2 at para 4.

⁹³ Act 12 of 1992.

⁹⁴ See also chapter 4 subsection 7.2 on the results of the deregulation of the agricultural sector.

⁹⁵ The National Agricultural Marketing Council *Fresh Produce Marketing in South Africa*, Report 2 (2000) 16.

Fresh produce markets face a number of challenges. Some of these challenges are set out below, and they should be considered before one looks at the potential role fresh produce markets could play regarding access to food.

First, a report by a Ministerial Interim Committee (MIC) highlighted that NFPMs were ‘finding it difficult to grow their operations and respond to the challenges of a deregulated agricultural sector’.⁹⁶ This is due to the fact that deregulation opened up the market and allowed new entrants in the fresh produce value chain. James provides that such openings are good for competition, however, the presence of unregulated competition results in less income for the markets. Wholesalers, for example, undercut the market system by procuring produce straight from the farmers. This practice disrupts the commission system that markets function on and the market in turn cannot derive its five percent commission when there are no or little sales.⁹⁷

Secondly, fresh produce markets are not used frequently for the purchase of food because they are located in isolation from communities, in isolation from Central Business Districts (CBDs), and they are not in close proximity to public transport routes. Simply put, fresh produce markets are often inadequately located.

Thirdly, there are power struggles regarding the ability to negotiate lower prices with selling agents.⁹⁸ For example, according to Caesar, individual buyers at the Msunduzi (Pietermaritzburg) Fresh Produce Market are unable to negotiate lower prices with selling agents because they are only prepared to grant discounts for bulk buying.⁹⁹ This affects the informal traders’ ability to procure produce from the produce market. For example, the Cape Town market estimates that informal traders make up about 60 percent of the buyers of fresh produce.¹⁰⁰ In turn, the informal traders resort to buying their produce from wholesalers. The effect of such on a fresh produce market is that the sales revenue gathered at the end of a trading day would be lesser than projected, as the selling agents would generate a smaller source of income from the little produce

⁹⁶ Report of the Ministerial Interim Committee on the Restructuring of Fresh Produce Markets in South Africa (2009) 8, NFPMs were deregulated in 1996//97.

⁹⁷ Comment by James Billy (Cape Town market) at the Roundtable on ‘exploring the link between developmental local government and food security through improved regulation and management of fresh produce markets’ (hereafter referred to as the Roundtable on Local Government and Food Security) (11 November 2015).

⁹⁸ Caesar M et al *The State of Food Insecurity in Msunduzi Municipality, South Africa* (2013) 25.

⁹⁹ Caesar M et al *The State of Food Insecurity in Msunduzi Municipality, South Africa* (2013) 25.

¹⁰⁰ Information provided by James Billy (Cape Town Market) at the Roundtable on Local Government and Food Security (11 November 2015).

sold. Should selling agents fail to accept the selling prices proposed by informal traders, it results in a loss of a large portion of income. At the end of the day, the market will deduct its five percent commission on the sales made on the market, however, the commission derived will be on a smaller amount due to the loss suffered as a result of 60 percent of the market's buyers using alternative means to procure fresh produce.¹⁰¹

Fourthly, fresh produce markets are also losing market shares to supermarkets, processors and specialised wholesalers, who now procure their produce directly from producers.¹⁰² Dominating retailers such as Pick and Pay, Shoprite, SPAR and Woolworths, procure their fruits and vegetables from a few preferred producers, they appendage their supplies with produce from the fresh produce markets and thereafter distribute this procured fresh produce within and from the supermarkets' distribution centres.¹⁰³ The result of the concentration of distribution centres is the enabling of 'supermarkets to encroach into areas traditionally occupied by the informal market'.¹⁰⁴

Fifthly, municipalities are not motivated to participate in matters pertaining to their markets, especially those matters relating to the adoption of by-laws. The reluctance to explore legislation to its full extent stems from the financial implications attached to the exercise of legislative power. What also contributes to this lack of motivation is the fact that politicians and management officials at municipalities are focused mainly on other municipal functions, such as delivery of basic services.

Sixthly, municipalities are not motivated to investigate matters pertaining to the separation of ownership and management of fresh produce markets. This lack of interest is cause for concern as a municipality's ability to exercise powers relating to a fresh produce market is influenced by the management and ownership model a municipality opts to use, which ultimately influences how a fresh produce market functions. In its report, the Ministerial Interim Committee presents a

¹⁰¹ Information to support example derived from the National Agricultural Marketing Council *Johannesburg Fresh Produce Market*, Report 1 (1998).

¹⁰² Chikazunga D et al *Patterns of restructuring food markets in South Africa: The case of fresh produce supply chains* (2007) 1.

¹⁰³ See Louw A *Improved small scale farmer access to fresh produce agri-food markets in South Africa* Policy Brief 3 (2008) 3 at para 3.

¹⁰⁴ See Chikazunga D et al *Patterns of restructuring food markets in South Africa: The case of fresh produce supply chains* (2007) 2.

table outlining the guiding principles for NFPMs ownership and management models.¹⁰⁵ A majority of the NFPMs have supported the separate ownership and management model, which allows a municipality to opt for ownership of a market to vest in the municipality, while management of that market is vested in an independent legal entity.¹⁰⁶ For example, the Cape Town market operates on municipal owned premises belonging to the City of Cape Town. As such, the premises, infrastructure and facilities on the market belong to the municipality and fall under the functional area of municipal public works. The business of the market, however, is owned and managed by a private business. For NFPMs to sufficiently support food security, the following models/options were suggested as better suited models for adoption: the Local Authority, Department or Business unit, a National entity or a Municipal entity/corporate body.¹⁰⁷ There is a set of guiding principles provided by the Committee to assist in determining the best ownership and management model(s) and how they extend/speak to local government's constitutionally entrenched powers, functions and mandates, as set out in the next chapter.¹⁰⁸ These guiding principles encompass the developmental objectives mandated to local government, elements of good governance exercised by local government and elements of executive authority relevant to local government. Following on this guide, the Committee recommended that ownership and management of NFPMs be separate and further proposed that the municipal entity/corporate body was the best suited model to adopt should a municipality set out to achieve all the aforementioned guiding principles.¹⁰⁹

6. CONCLUSION

This chapter has briefly outlined the concept of food security and the focus area in this regard was on the 'right to food, as well as 'access to food' being an important element of food security.

¹⁰⁵ Report of the Ministerial Interim Committee on Restructuring of Fresh Produce Markets in South Africa (2009) 15.

¹⁰⁶ The National Agricultural Marketing Council *Section 7 Investigation: National Fresh Produce Markets* (2007) 21.

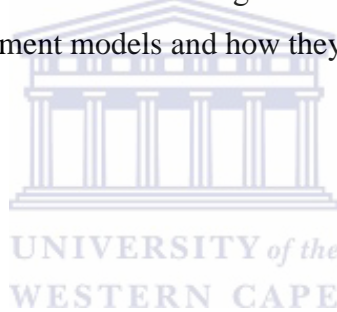
¹⁰⁷ Report of the Ministerial Interim Committee on the Restructuring of Fresh Produce Markets in South Africa (2009) 15.

¹⁰⁸ Report of the Ministerial Interim Committee on the Restructuring of Fresh Produce Markets in South Africa (2009) 15; the guiding principles include poverty alleviation, facilitation of economic activity, transparency, capacity building, food safety, food security, transformation, decision making process, market access and accountability.

¹⁰⁹ Report of the Ministerial Interim Committee on the Restructuring of Fresh Produce Markets in South Africa (2009) 14; see also the National Agricultural Marketing Council *Section 7 Investigation: National Fresh Produce Markets* (2007) 31 for an explanation of municipal entity/corporate model.

In addressing the right to food, the chapter looked at the constitutional protection of the right, as well as the obligation on the government to take measures to progressively realise the right to food. Flowing from this, the chapter set out the policy and strategic framework provided by the national government, how the framework is biased towards production as a solution and how institutional approaches have not progressively realised the right to food, as many households remain food insecure. In providing a critique of the policy and strategic framework, the chapter argued against the notion of increased production being the sole answer to food insecurity.

The chapter shows that South Africa's local food markets, as an avenue for the sale of fresh produce, have a potential role to play in addressing the issues associated with food security. However, their potential role is limited by the challenges they face due to deregulation of the agricultural sector, the failure to foster relations and assist informal traders who play an important role in facilitating access to food and local government's lack of interest to inform itself of the ownership and management models and how they affect its exercise of power, *inter alia*.



CHAPTER THREE

LOCAL GOVERNMENT POWERS AND FUNCTIONS

1. INTRODUCTION

As per the Constitution, the legislative and executive authority of the state is dispersed between the three spheres of government, namely national, provincial and local government.¹ The national food security policy and strategic framework, outlined in the previous chapter,² is organised by government departments dealing predominantly with agriculture. The capturing of food security through ‘agriculture’ (also) speaks to the bias towards production and the increased production theory mentioned in subsection 2.1 and 2.3 of chapter two. This has left a question mark on whether local government has a role to play regarding food security because local government does not exercise competence over ‘agriculture’. And if local government does have a role to play, what should that role be? It is precisely this failure to recognise the potential role that local government can play in facilitating access to food, and also to address the issue of food security, which chapter three centres around. As such, the chapter will discuss the powers and functions of local government.

The chapter outlines the constitutional objects and developmental objectives of local government and thereafter focuses on the authority local government exercises over Schedule 4B and 5B matters. The overlapping competencies and their consequences will also be addressed, together with the discussion on the division of local government powers between district and local municipalities. Metropolitan municipalities are not included in the discussion because they have the power to exercise authority over all the local government matters set out in Part B of Schedule 4 and 5 of the Constitution.³ Taking into account the previous chapter of the paper, this chapter argues that through the regulation and administration of ‘markets’, which is a constitutionally entrenched power of local government, local government can explore measures to facilitate access to food and contribute to curbing food insecurity.

¹ See sections 40(1) and 43 of the Constitution.

² The Integrated Food Security Strategy (2002), the Food Security Policy (2012) and the National Policy on Food and Nutrition Security (2013).

³ Section 155(1)(a) of the Constitution.

2. HISTORICAL BACKGROUND OF LOCAL GOVERNMENT

Following on from the introduction and context outlined above, it is important to provide a brief historical background of local government pre-1994 to better understand how local government came to exercise the constitutional powers it holds today.

Prior to the 1994 democratic elections and the final Constitution of 1996, the South African government was centralised. Most administrative and legislative authority lay in the national government. The four provincial councils/governments⁴ were placed in charge of the development, maintenance and control of municipal councils, which were structures/formations of local government.⁵ The Union of South Africa Act of 1909⁶ established and empowered the provincial councils ‘to pass legislation governing local government in their respective provinces’.⁷ The result of this was that all four provinces adopted provincial ordinances on local government,⁸ which in turn resulted in a local government system that had no uniformity and local government and municipal councils were racially segregated. The racial segregation resulted in inequalities in services and service delivery. Whilst the ‘white’ areas had developed infrastructure, business districts, rateable property and received municipal services of a high standard; in contrast, the ‘non-white’ areas were underdeveloped, has an inferior rates bases and received poor services.⁹

Authors state that at the time local government had the power to adopt by-laws, however, the ‘by-laws were subordinate delegated legislation which were fully reviewable by the courts’.¹⁰

⁴ The four provincial governments in existence pre-1994 were the Transvaal, the Orange Free State, Natal and Cape province.

⁵ Ismail N & Mphaisha C *The Final Constitution in South Africa: Local Government Provisions and their Implications* (1997) Occasional Paper (Konrad Adenauer Stiftung: Johannesburg).

⁶ 9 Edw c 9. Act 9 of 1909.

⁷ See Steytler N & De Visser J *Local Government Law of South Africa* (2014) 1: 4.

⁸ In the Cape Province – Ordinance 10 of 1912, Municipal Ordinance 19 of 1951 and Municipal Ordinance 20 of 1974; the Orange Free State – Local Government Ordinance 4 of 1913, Local Government Consolidated Ordinance 6 of 1948 and Local Government Ordinance 8 of 1962; the Transvaal – Ordinance 9 of 1912 and Local Government Ordinance 17 of 1939; the Natal – Municipal Ordinance 11 of 1918, Local Government Ordinance 21 of 1942 and Ordinance 25 of 1974.

⁹ See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC) para 2 (Hereafter referred to as Fedsure).

¹⁰ See Steytler N & De Visser J *LGLSA* (2014) 1: 8, originally referenced from Baxter L *Administrative Law* (1984) 151.

Local government structures were subordinate creatures of statute, deriving their powers from national and provincial government, thus ‘serving as the latter’s administrative arm’.¹¹

With the final Constitution came a significant change in the status of local government. There was the constitutional recognition of local government as a sphere of government,¹² together with an entire chapter where local government is established as a distinctive sphere of government,¹³ as well as the recognition of its executive and legislative authority.¹⁴ Local government went from being merely an administrative arm of national and provincial government, to being an equal partner in governance.¹⁵

3. CONSTITUTIONAL OBJECTS AND DEVELOPMENTAL OBJECTIVES OF LOCAL GOVERNMENT

The Constitution enhances the status of local government, by not only asserting local government’s powers, but also protecting them in a number of its provisions. The Constitution envisages that a municipality ‘has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution’.¹⁶ The Constitution further provides objects and developmental objectives that local government must enhance and abide by.¹⁷ The objects set out in the Constitution for local government are ‘to provide democratic and accountable government for local communities; to ensure the provision of services to communities in a sustainable manner; to promote social and economic development; to promote a safe and healthy environment; and to encourage the involvement of communities and community organisations in the matter of local government.’¹⁸

¹¹ Steytler N & De Visser J *LGLSA* (2014) 1: 8; see also *CDA Boerdery (Edms) Bpk and Others v the Nelson Mandela Metropolitan Municipality and Others* 2007 (4) SA 276 (SCA) at para 33.

¹² Section 40(1) of the Constitution, see also section 151(3) for local government’s right to exercise self-government; see also Steytler N ‘The powers of local government in decentralised systems of government’ (2003) 2, *Local Government Working Paper Series No. 2* where he states that ‘the extensive protection of local self-government in the South African Constitution of 1996 was the result of both democratic and developmental objectives’.

¹³ Chapter 7 of the Constitution, 1996.

¹⁴ Section 156(a) of the Constitution.

¹⁵ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC) at para 26.

¹⁶ Section 151(3) of the Constitution. See also section 4 of the Systems Act.

¹⁷ Sections 152 and 153 of the Constitution.

¹⁸ Section 152(1) of the Constitution; see also section 153 of the Constitution.

The development focus of local government has extended beyond mere service delivery, and now includes, as its objects, the broader social and economic development of the community.¹⁹ This means that local government must create the right conditions for development to take place. This is also echoed in the *White Paper on Local Government*,²⁰ which is premised on the notion of developmental local government. The *White Paper on Local Government* defines developmental local government as ‘local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives’.²¹

In terms of the White Paper, developmental local government consists of four characteristics namely:²²

1. Maximising social development and economic growth, which requires the powers and functions of local government to be exercised in a manner that has an impact on social development and economic growth of communities.
2. Integrating and coordinating, which requires local government to coordinate and integrate its developmental activities with those of national and provincial departments, trade unions, community groups and the private sector.
3. Democratising development, empowering and redistributing, this requires local government to promote community participation with citizens when designing and determining the delivery of municipal programmes.
4. Leading and learning, requires local government to find ways to sustain its economies, build societies, as well as trust and support between individuals and stakeholders.

Through this, local government must work towards local solutions for sustainability.

In order to carry out the vision of local government as set out in the White Paper on local government, municipalities must integrate the vision into their Integrated Development Plan (IDP) and strive to achieve the four characteristics of developmental local government.

¹⁹ Section 152 of the Constitution.

²⁰ *White Paper on Local Government* 1998.

²¹ *White Paper* 1998: 17.

²² See the *White Paper* 1998: 23-26 for the characteristics.

The Systems Act states that a municipality must undertake developmentally-orientated planning to ensure that it strives to achieve the objects of local government mentioned above.²³ This developmentally-orientated planning is takes the form of an IDP. In South Africa, municipalities may prioritise food security in their Integrated Development Plans. An IDP is an ‘inclusive and strategic plan setting out the development of a municipality which –

- (a) links, integrates and co-ordinates plans and takes into account proposals for the development of the municipality;
- (b) aligns the resources and capacity of the municipality with the implementation of the plan;
- (c) forms the policy framework and general basis on which annual budgets must be based;
- (d) complies with the provisions of this Chapter; and
- (e) is compatible with national and provincial development plans and planning requirements on the municipality in terms of legislation.²⁴

An IDP is drafted and adopted by a municipal council²⁵ and through an IDP a municipality embarks on the developmental duties of local government provided in section 153, as well as to contribute to the progressive realisation of the rights to property, housing, health care, food and water, all enshrined in the Constitution.²⁶

An IDP is the South African version of a comprehensive plan, spoken of by Ringstrom and Born in section 4 of the previous chapter. In South Africa, for example, a municipality may plan the built environment through its IDP. The municipality would need to set out a spatial development framework, which should include guidelines for a land use management system.²⁷ The spatial development framework in turn would address the spatial distribution of land and designate areas in the municipality for purposes related to food security and urban food production.

²³ Section 23(1)(a) of the Systems Act.

²⁴ Section 25(1) of the Local Government Municipal Systems Act 32 of 2000 (hereafter referred to as the Systems Act); see also section 26 of the Systems Act which speaks about the core components of IDPs.

²⁵ See section 28 of the Systems Act.

²⁶ See section 23(1) of the Systems Act.

²⁷ Section 26(e) of the Systems Act.

It is argued that the competencies of local government should reflect the constitutional vision of developmental local government.²⁸ In this regard, developmental local government works towards the improvement of the social and economic status of its communities; works to build its communities and plans processes that prioritise the needs of its community members. Local government should therefore plan for, regulate and manage its ‘markets’ with the objective of not only ensuring food security, but doing so to ultimately improve the social status and lives of its constituencies.

4. CONSTITUTIONAL POWERS AND FUNCTIONS OF LOCAL GOVERNMENT

This section will look at the powers and functions of local government in relation to the matters listed in Part B of Schedule 4 and 5 of the Constitution. The section further discusses the issues surrounding the absence of definitions for the functional areas in the aforementioned schedules, the results of concurrency and definitional/functional overlaps, and how it relates to food security. The strategies used to clarify the aforementioned will also be discussed.

4.1 Powers and functions of local government over the functional areas enumerated in Part B of Schedules 4 and 5

The importance of this discussion stems from the overall discussion in this paper on food security and local government’s role in addressing food insecurity issues. The assessment of local government’s powers will assist in determining local government’s implicit role in regard to food security.

Section 156(1)(a) of the Constitution states that a municipality has authority over, as well as the right to administer the local government matters listed in Schedule 4B and 5B of the Constitution. These are also known as ‘original’ powers and functions, as they stem from the Constitution itself and as such, constitute the primary source of power for local government.²⁹ The Constitution further entrusts local government with the legislative power to ‘make and administer by-laws for the effective administration of the matters which it has a right to

²⁸ See Steytler N & De Visser J *LGLSA* (2014) 5: 20.

²⁹ See *City of Cape Town v Robertson* 2005 (3) BCLR 199 (CC) at para 60.

administer'.³⁰ Therefore, in relation to the matters in Part B of the aforementioned schedules, local government may exercise legislative, executive and administrative powers.

Apart from local government's authority to administer the powers and functions enumerated in Part B of Schedule 4 and 5 of the Constitution, local government may also exercise other/additional powers provided in the Constitution.³¹ These powers are a secondary source of power for local government. As such, a municipality has executive authority in respect of, and has the right to administer any other matter that is assigned to it by either national or provincial government/legislation.³²

Local government's power to legislate was attested to in the case of *Fedsure Life Assurance and Others v Greater Johannesburg Transitional Metropolitan Council and Others*, where the Constitutional Court provided that the making of laws by municipalities was not the exercise of delegated powers but rather the result of a deliberative legislative assembly exercising a constitutionally entrenched power.³³

A problem often faced regarding the functional areas set out in the schedules is that the Constitution offers no detailed definitions for the functions. As such, may be uncertainties as to the meanings of the competencies relating to food security, such as 'trade', trading regulations', street trading', 'markets', 'agriculture', 'abattoirs' and 'municipal abattoirs'. For example, 'trade' is listed as a Schedule 4A function and as such, both national and provincial government are responsible for the performance of this function. Theoretically, both the national and provincial government may pass legislation and take decisions pertaining to 'trade' and in cases of conflicting national and provincial law, section 146 of the Constitution must be used to resolve the conflict. The uncertainty over 'trade', however, arises from the interpretation of how both national and provincial government exercise their power in practice. What is evident is that national government tends to dominate in the matters listed under Schedule 4A of the

³⁰ Section 156(2) of the Constitution.

³¹ See section 156(5) of the Constitution.

³² Section 156(1)(b) of the Constitution; see sections 44(1)(a)(iii), 104(1)(c) and 99 of the Constitution - the assignment of legislative and executive powers can either be general or assigned to a specific municipality. Section 156(4) of the Constitution obliged national and provincial government to assign a Schedule 4A or 5A matter if the matter would be better administered at local level and the municipality has the necessary capacity to administer that matter.

³³ *Fedsure* at para 26, 34, 38 and 42.

Constitution. With respect to ‘trade’, it is therefore arguable that the legislation on ‘trade’ is largely derived from the national government, with provinces left to act as implementing agents.³⁴

Furthermore, while it is arguable that there is a link between the functional areas of ‘trade’, ‘trading regulations’ and ‘street trading’, it is difficult to tell the difference(s) between these three functional areas. ‘Trade’ is a concurrent competence for national and provincial government as per Schedule 4A of the Constitution, while ‘trading regulations’ and ‘street trading’ are local government competencies with the former being a Schedule 4B competence and the latter a Schedule 5B competence.

There is uncertainty relating to the functional areas of ‘abattoirs’ and ‘municipal abattoirs’. The only difference between the two is that the latter function is a local government competence and only speaks to municipal abattoirs, whilst the former extends to all other abattoirs. Another example is the uncertainty relating to the function of ‘agriculture’, which is a national and provincial government concurrent competence as per Schedule 4A of the Constitution. Whilst this may be so, the concurrency over ‘agriculture’ seems to have a centralising effect, as provincial government is pitted against the stronger national government when exercising power over the agricultural function. In turn, the national government utilises agricultural interventions as a solution to addressing the issues of food insecurity and the provinces are reduced to implementers of national government’s agricultural legislation and interventions. Two arguments can be deduced to explain national government’s dominance over the ‘agriculture’ function. First, the provinces’ reluctance to use the space afforded by the Constitution may have led to the national government dominating the agriculture competence. Secondly, national government’s dominance may be as a result of being ahead of the provincial government and passing agricultural legislation that engages provinces as implementers of the legislation, before the provinces can occupy themselves with drafting legislation for the agriculture function.³⁵

The examples set out above show that the uncertainty of the functional definitions of the competencies, as well as the uncertainty regarding the sphere that is empowered to exercise

³⁴ De Visser J ‘Concurrency in South Africa’ in Steytler N (ed) *Concurrency: Meaning and Making* (forthcoming) 7 (Brill/Nijhoff: Leiden).

³⁵ De Visser J ‘Concurrency in South Africa’ in Steytler N (ed) *Concurrency: Meaning and Making* (forthcoming) 8.

authority has the potential to hinder the enhancement of food security. This point links back to what was mentioned in section 3 of chapter two in regards to the national policy and strategic framework for food security. The framework fails to address the uncertainties referred to in this section and further, fails to address the uncertainties relating to the institutional arrangements necessary to enhance food security.

There are a number of consequences attached to this uncertainties caused by overlap, which ultimately affects citizen's access to services and in the context of food security, the consequences may affect citizen's access to food. Concurrency itself does not necessarily produce negative results. If concurrency is unmanaged, however, it has the potential to produce negative effects. Steytler and Fessha provide the following examples as consequences of unmanaged concurrency: first, confusion regarding the mandates and responsibilities of provincial and local government, as well as poor communication in a case where both spheres provide a service in a participatory manner can result in the delivery of ineffective/poor services to communities. In regards to food security, for example, 'trading regulations' and 'street trading' are relevant competencies. Both competencies are provided by local government in a participatory manner as they are interrelated, with 'trading regulations' extending to all forms of trading that take place within a municipality, whilst 'street trading' refers to informal trading that takes place in or from public places within a municipality. If, however, there is poor communication regarding the interrelation and performance of the competencies, poor service could take place and that has the potential to hinder trading and access to food. Secondly, where two spheres of government are responsible for a particular functional area, duplication of services can take place and result in a waste of resources. 'Agriculture', for example, is a concurrent competence for both national and provincial government. In an instance where a provincial government was to legislate over 'agriculture' with a piece of legislation that does not offer anything new and replicates national legislation already in place, this would be a waste of resources and funds as it would be a duplication of a law for a function that is already covered by national government. Thirdly, uncertainty regarding mandates and responsibilities may result in municipalities ending up with unfunded mandates. Such a situation leaves municipalities with the responsibility/burden of rendering a service without the necessary funds to do so. For example, the uncertainty of the meanings of 'abattoirs' and 'municipal abattoirs' might result in a situation where a municipality ends up bearing the responsible for an abattoir that does not fall

under its authority without the funds to render the service. The unavailability of funds might result in the effective operation and closure of the abattoir, which in turn has the potential to hinder physical access to food (meat). And finally, the worst case scenario would be where no service delivery takes place at all because one sphere of government blames another sphere for failing to deliver. Such a situation often leads to a lack of accountability from the sphere(s) responsible for a particular function, as blame can be easily shifted from one sphere of government to the other.³⁶

To alleviate the abovementioned consequences of concurrency and definitional overlaps of functional areas, there are four strategies that may be employed namely, judicial interpretation, statutory definitions, negotiated definitions and administrative definitions.

The first strategy that may be employed is that of judicial interpretation. In this instance the courts, specifically the Constitutional Court, may be approached to determine the meanings of Schedule 4 and 5 functional areas. The Constitutional Court has opted to apply the ‘functional approach’ to come up with answers to the problems of interpreting functional areas.³⁷ As such, the functional approach allows the court to interpret a functional area in a manner that enables the three spheres of government to discharge their responsibilities effectively and successfully.³⁸ Cases worth mentioning are the municipal planning cases determined by the Constitutional Court between the years 2010-2014.³⁹ Authors state that the decisions were ‘a victory for local

³⁶ Steytler N & Fessha Y *Defining provincial and local government powers and functions: The management of concurrency* (2007) 9-10.

³⁷ See *Ex Parte President of the Republic of South Africa: In re: Constitutionality of the Liquor Bill 2000* (BCLR) 1 (CC), where the court stated that the drafters of the Constitution have allocated powers to each sphere of government based on a ‘functional vision of what was appropriate to each sphere’.

³⁸ See *Ex parte Western Cape Provincial Government and Others: In re: DVB Behuising (Pty) Limited v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC) para 17. For more on the ‘functional approach’, see also Bronstein V ‘Cooperative government, devolution of powers and subsidiarity: The South African perspective’ in Konrad Adenauer Stiftung *Subnational Constitutional Governance* (2004) 5-10 (Konrad Adenauer Stiftung: Johannesburg).

³⁹ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 85 (CC); *Maccsand (Pty) Ltd v City of Cape Town* 2010 4 SA 181 (CC); *Minister for Mineral Resources v Swartland Municipality* [2010] ZACC 8 (12 April 2012); *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoon Bay Lifestyle Estate (Pty) Ltd and Others* 2014 (2) BCLR 182 (CC); *Minister of Local Government, Environmental Affairs and Development, 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 (5) BCLR 591 (CC); *MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province In re: Minister for Mineral Resources and Swartland Municipality and Other and Maccsand (Pty) Ltd and The City of Cape Town and Others* [2012] ZACC 10 (29 May 2012).

government as they cast doubt over the strong role played by provinces in land use planning matters’;⁴⁰ they developed a better understanding of the division of powers between the three spheres of government;⁴¹ they challenged functional overlaps relating to functions that encapsulate ‘planning’⁴² and they affirm local government’s exercise of authority over all matters relating to ‘municipal planning’.⁴³ These cases are not only relevant for clarifying local government’s authority over matters pertaining to ‘municipal planning’ but they are also relevant to food security because a lot of the functional areas provided in Schedule 4 and 5 of the Constitution cannot be performed without land being set aside for the performance of the functions. For example, without land being apportioned for agriculture, agricultural activity cannot take place. When production does not take place, not only will there be no food available but there will also be increased inaccessibility to food for citizens and increased food insecurity. Another example relates to markets, trade and street trading. As alluded to in section 4 of the previous chapter, as custodians of the built environment, local government plays an important role in planning. Without land apportioned for the aforementioned functions, there are no places for markets to operate from and no trading, whether formal or informal, can take place without pieces of land being apportioned for trading purposes.

In respect to the second strategy, the various legislatures have the ability to define the ambit/reach of the functional areas enumerated in Schedule 4 and 5 of the Constitution by providing statutory definitions. According to Steytler and Fessha, national and provincial governments’ ability to provide definitions stems from their regulatory function set out in section 155(7) of the Constitution.⁴⁴ In the case of local government, municipalities may define the boundaries of their functional areas through the passing of by-laws. For example, the Johannesburg Metropolitan Municipality vested with the power to legislate over the local government matters set out in Schedule 4B and 5B of the Constitution, drafted a by-law for the

⁴⁰ De Visser J & Steytler N ‘Confronting the State of Local Government: The 2013 Constitutional Court Decisions’ in *2015 Constitutional Court Review* (forthcoming) 5.

⁴¹ De Visser J & Steytler N ‘Confronting the State of Local Government: The 2013 Constitutional Court Decisions’ in *2015 Constitutional Court Review* (forthcoming) 5.

⁴² De Visser J & Steytler N ‘Confronting the State of Local Government: The 2013 Constitutional Court Decisions’ in *2015 Constitutional Court Review* (forthcoming) 6-7.

⁴³ De Visser J & Steytler N ‘Confronting the State of Local Government: The 2013 Constitutional Court Decisions’ in *2015 Constitutional Court Review* (forthcoming) 8.

⁴⁴ Steytler N & Fessha Y *Defining provincial and local government powers and functions: The management of concurrency* (2007) 15.

functional area of ‘markets’ listed as a Schedule 5B function. The by-law defines ‘market’ as ‘any area under the control of the Council set aside for conducting thereon sales of produce in accordance with the provision of these by-laws, and includes all lands, buildings, railway sidings, marshalling yards, platform and other property within the said area, used either wholly or partially, directly or indirectly for the purpose of conducting the market’.⁴⁵ The regulatory function of national and provincial government will be addressed further in the next section.

The third strategy that may be used is to engage in negotiated definitions. The Constitution provides principles of cooperative government and intergovernmental relations, which require all three spheres of government to cooperate ‘in mutual trust and good faith by co-ordinating their actions and legislation with one another’.⁴⁶ It is through this constitutional principle of cooperative government that negotiated definitions can be agreed upon by (national), provincial and local government. To give effect to the constitutional principle mentioned above, the spheres of government may use the Intergovernmental Relations Framework Act⁴⁷ when engaging in negotiated definitions. Negotiated definitions would require the spheres of government to use the various mechanisms set out in the IGRFA to meet, discuss and agree on definitions for the functional areas in Schedules 4 and 5 of the Constitution that would enable the spheres to work in an integrated way and exercise their functions effectively. There is no specific agreement of a food security related competence that can be used as an example. However, if there was to be an agreement concluded between provincial and local government on a negotiated definition for the functional areas of ‘abattoirs’ and ‘municipal abattoirs’, it would entail the two spheres of government agreeing on what the two functions mean, the exercise of power over the functions, how the two functions relate to one another, clearly define the scope and differences of the two functions and also determine the measures that provincial government can use to deal with problems experienced by local government in delivering/performing the service ‘municipal abattoirs’. The agreement would lead to better coordination between provincial and local government on initiatives that seek to use abattoirs to enhance food security, assist in creating capacity to implement food security programmes and enhance service delivery; which in this case would be to assist in enhancing access to affordable, safe and healthy meat.

⁴⁵ Johannesburg Municipality: Market By-laws 12 April 1978 (Administrator’s Notice 520).

⁴⁶ Section 41(1)(h)(iv) of the Constitution.

⁴⁷ Act 13 of 2005 (Hereafter referred to as IGRFA).

The fourth strategy refers to the use of administrative definitions. This strategy may be used in an attempt to provide a uniform approach to competencies. In its bid to provide a comprehensive approach to local government competencies, the MDB compiled a report with a set of definitions of the powers and functions of local government, enumerated in Part B of Schedules 4 and 5 of the Constitution.⁴⁸ The MDB provides definitions for local government functions relevant for food security purposes. Although administrative definitions assist by providing clarity, they do not carry any legal effect; they are not binding on any sphere of government and are therefore regarded as mere guidelines.

4.1.1 Division of Schedule 4B and 5B powers between district and local governments

While the Constitution only provides local government with a comprehensive list of functional areas to exercise powers and functions over, the Local Government: Municipal Structures Act⁴⁹ divides the functional areas enumerated in Schedules 4B and 5B of the Constitution between district and local municipalities. The focus in this section will be on division between district and local municipalities because metropolitan municipalities have the competency to exercise power over all the functional areas enumerated in Schedules 4B and 5B of the Constitution.

To start off, section 83(1) of the Structures Act is the general provision that affirms local government's powers as stated in section 156 of the Constitution. Section 84(1) of the Structures Act, thereafter, sets out a lengthy list of powers and functions belonging to district municipalities. The meaning of some of these powers will be provided in section 3 of next chapter as related competencies to 'markets'. Flowing from this, section 84(2) of the Structures Act then provides that a local municipality has the powers and functions set out in section 83(1). However, all the functions provided in section 84(1) of the Structures Act are excluded from the ambit of a local municipality's functions. This means that a local municipality may administer all the functions and powers provided in Schedules 4B and 5B of the Constitution, excluding those functions specifically provided in section 84(1) of the Structures Act.

The list of powers and functions of a district municipality provided in the Structures Act is, however, not cast in stone. First, section 84(3)(a) of the Structures Act empowers the Minister to

⁴⁸ See Municipal Demarcation Board (2003).

⁴⁹ Local Government: Municipal Structures Act 117 of 1998 (Hereafter referred to as Structures Act).

authorise a local municipality to perform a function ordinarily performed by a district municipality, in terms of section 84(1) of the Structures Act.⁵⁰ Joseph refers to this as a shift of functions between district and local municipalities through ‘the process of authorisation’.⁵¹ There is, however, a limitation on the functions that can be transferred as section 84(3)(a) of the Structures Act only permits the transfer of four functions of a district municipality and they are potable water supply system, bulk supply of electricity, domestic waste-water and sewage disposal systems and/or municipal health services.⁵² Whilst these functions might be relevant for food security, the scope of this section does not include an examination of the relevance and as such, the functions are mentioned in a general manner. Secondly, the MEC for local government in a province may adjust the division of powers and functions between a district and a local municipality, as set out in Section 84(1) or (2) of the Structures Act, by allocating a function vested in a local municipality to a district municipality; or a function vested in a district municipality to a local municipality.⁵³ There is a limitation in the latter case, however, as the adjustment excludes seven district municipality functions set out in section 84(1) of the Structures Act.⁵⁴ Joseph refers to this shift of functions between the two-tiers of local government as ‘the process of adjustment’.⁵⁵

The division of local government powers between district and local municipalities, set out in the Structures Act, provide some clarity regarding the exercise of power. However, what is also evident is that there are still problems associated with the exercise of local government power. The problems may be caused by the fact that some local municipalities continue to exercise functions inherited from the previous dispensation, which should ordinarily be performed by district municipalities. Another reason could be that the exceptions, in the Structures Act, which allow the shifting of powers between the two-tiers of local government also create uncertainty as

⁵⁰ Section 84(3)(a) of the Structures Act further provides that the Minister may only transfer a district municipality function to a local municipality after consulting the MEC for local government in the province and the Cabinet member responsible for the function to be transferred.

⁵¹ Joseph AW ‘Prospects for the reform of district municipalities: The scope for manoeuvre’ (2012) 24 (unpublished MPhil thesis, University of the Western Cape); originally referenced from Atkinson et al *The Role of District Municipalities: Final Report* (2003) 14 (Hologram Project: HSRC and Eden District Municipality) available at <http://www.hsrc.ac.za/Document-457.phtml>.

⁵² Section 84(1)(b), (c), (d) and/or (i) of the Structures Act.

⁵³ Section 85(1) of the Structures Act.

⁵⁴ See section 85(1)(b) of the Structures Act.

⁵⁵ Joseph AW ‘Prospects for the reform of district municipalities: The scope for manoeuvre’ (2012) 24.

to which tier can exercise power over a function, especially when funds need to be allocated to enable performance of a particular function.⁵⁶

4.1.2 Limitations on Schedule 4B and 5B powers of local government

Local government's exercise of power is not without limitations. Generally, national and provincial government may only limit local government's exercise of its original powers through regulatory measures. This means that national and provincial governments are permitted to set frameworks, which local government must adhere to when exercising its legislative powers. The national and provincial government regulatory power, in terms of section 155(6) and (7) of the Constitution extends to executive municipal powers because the two spheres may regulate the executive municipal powers. However, the national and provincial governments are not permitted to assume municipal executive powers by means of section 155(6) and (7) of the Constitution. The section 155(6) and (7) powers are strictly for regulatory purposes. The regulatory frameworks must respect local government's autonomy⁵⁷ and should not extend to the core of local government matters.⁵⁸

Regarding the local government functions listed in Schedule 4B of the Constitution, the national and provincial governments have the legislative and executive authority to ensure that municipalities perform their functions effectively and this can be done by regulating the exercise by municipalities of their executive authority.⁵⁹ Regarding the local government functions listed in Schedule 5B of the Constitution, the provincial government has the authority to ensure that municipalities perform their functions effectively and this takes place through regulating the exercise by municipalities of their executive authority.⁶⁰ National government, however, may intervene in Schedule 5B matters if the criteria provided in section 44(2) of the Constitution are

⁵⁶ See Steytler N 'District municipalities: Giving effect to shared authority in local government' (2009) 239; see also Mlokoti V 'Are District Municipalities Still Relevant?' (2007) 9(2) *Local Government Law Bulletin* 9.

⁵⁷ See section 151(4) of the Constitution.

⁵⁸ See *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Developmental Planning, Western Cape v City of Cape Town and Others* 2014 (5) BCLR 591 (CC) at para 22 – the Constitutional Court stated that the constitutional framework powers in sections 155(6) and (7) permit the national and provincial governments to create 'norms and guidelines' for the exercise of a power or the performance of a local government function.

⁵⁹ Section 155(7) of the Constitution.

⁶⁰ Sections 155(6)(a) and 155(7) of the Constitution.

met.⁶¹ This is due to the fact that Schedule 5B matters fall within the exclusive regulatory powers of provincial government, while the matters in Schedule 4B of the Constitution are subject to ‘concurrent’ legislative powers of both national and provincial government.

Provinces are also empowered to exercise supervisory powers over local government functions enumerated in Schedule 4B and 5B of the Constitution. Provinces are further empowered to monitor and support local government to ensure that it stays within the legislative framework when exercising its powers.⁶² Provincial and national government are further empowered to intervene in the executive functions of local government, if and when it is necessary to do so.⁶³ The power to intervene is derived from section 139 of the Constitution, which lists provisos that trigger when an intervention may/must take place.⁶⁴ Provincial government does not have the leeway to intervene in any manner it sees fit as the section also set out the steps that should be followed when an intervention takes place.

5. CONCLUSION

The discussions in the chapter regarding the constitutional objects and developmental objectives of local government, as provided in the Constitution, show the importance of the developmental objectives in the realisation of the right to food. The developmental focus of local government has extended beyond service delivery, and now includes the broader social and economic development of communities. What can be deduced is that the developmental mandate links with the discussions set out in chapter two of the paper, which include the right to food and local government’s obligation to progressively realise the right to have access to food, in an attempt to create a conducive environment where citizen’s access to food is improved and food security is

⁶¹ Section 44(2) provides that ‘Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary –

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.’

⁶² Section 155(6)(a) of the Constitution; see also Steytler N ‘District municipalities: Giving effect to shared authority in local government’ (2009) 240.

⁶³ Section 139(7) permits national government to intervene in the executive affairs of local government only if provincial government cannot adequately perform the functions stated in subsections (4) and (5) of the section.

⁶⁴ See sections 139(1), (4) and (5) of the Constitution.

enhanced. Any power exercised by local government as a measure to realise the right to food should be guided by the objects and developmental objectives of local government.

In regard to local government and food security, the exercise of power over the functional areas listed in Schedule 4B and 5B generally, as well as the food security related functional areas, is, however, not as smooth as one would like it to be. First, the absence of definitions for the functional areas relevant for food security results in definitional overlaps, causing confusion as to which sphere of government has competence to exercise power and ultimately has the potential to hinder access to food and increase the food insecurity of citizens. There are strategies that may be used to alleviate the negative consequences of unmanaged concurrency. Secondly, the division of local government's powers in the Structures Act is not without its problems and this will be elaborated on in the next chapter. Thirdly, there are limitations to local government's exercise of powers, resulting from national and provincial governments' ability to monitor and provide regulatory framework that local government must abide by when performing its functions.

Although local government's autonomy is subjected to monitoring by national and local government, there is still scope for local government to exercise its power and functions in a manner that enables it to explore initiatives that contribute to the development of its communities.

CHAPTER FOUR

ASSESSMENT OF LOCAL GOVERNMENT'S EXERCISE OF POWER IN RELATION TO 'MARKETS'

1. INTRODUCTION

As a distinctive and autonomous sphere of government, local government has the power to exercise authority over the local government matters listed in Schedule 4B and 5B of the Constitution. As set out in the previous chapter, the exercise of local government's powers includes taking decisions, administering and passing legislation to effectively perform the functions entrusted upon it. The chapter will look at local government's powers regarding the functional area of 'markets' in Schedule 5B of the Constitution, focusing on the power to administer and legislate over 'markets'. This is followed by an examination of related competencies regarding 'markets'; as well as the problems and risks attached to local government's power to administer and legislate over 'markets'. The chapter then provides an example of a municipal by-law that regulates a fresh produce market. This will be followed by an outline of the Agricultural Produce Agents Act and the Agricultural Product Standards Act currently in place to regulate 'markets'. The chapter will thereafter sketch a picture of some of the practices taking place in relation to local government's exercise of power over fresh produce markets. The practices include the exercise of power in regards to infrastructure and facilities, trends in the ownership and management models, the presence of other role players and their roles in the fresh produce market sector, and the legislative framework regulating fresh produce markets.

2. POWERS AND FUNCTIONS OF LOCAL GOVERNMENT IN RELATION TO 'MARKETS' IN SCHEDULE 5B

Schedule 5B of the Constitution lists 'markets' as a local government competence. It is worth mentioning that the competency over 'markets' is not limited only to local and district municipalities. Metropolitan municipalities also equally exercise competency over 'markets'. Section 84(1) of the Structures Act thereafter sets out specific functions that must be exercised

by a district municipality and one of the functions specifically provided to a district municipality is ‘the ‘establishment, conduct and control of fresh produce markets serving the area of a major proportion of the municipalities in the district’.¹ A district municipality is therefore empowered to administer and enforce by-laws for the establishment, operation, management, conduct and control of fresh produce markets within its area. The effect of the aforementioned allocation to a local municipality is that a local municipality may exercise functions and powers over all other ‘markets’ excluding fresh produce markets.² In its report, the MDB provides two definitions for the functional area of ‘markets’, the first definition relates to ‘fresh produce markets’ and the second definition relates to ‘markets’ in general.³ A ‘fresh produce market’ is thus defined as ‘the establishment, operation, management, conduct, regulation and control of markets restricted to the selling of fresh products, vegetables, fruit, flowers, fish and meat’.⁴ Whereas a ‘market’ is defined as ‘the establishment, operation, management, conduct, regulation and/or control of markets other than fresh produce markets including market permits, location, time, conduct, inter alia’.⁵ What can be deduced from the above is that the term ‘markets’ in Schedule 5B of the Constitution is inclusive of fresh produce markets and section 84(1)(k) of the Structures Act merely takes fresh produce markets and allocated them to district municipalities.

As mentioned in the previous chapter, the division of powers in section 84(1) of Structures Act is not cast in stone. As such, a district municipality’s exercise of power over fresh produce markets may be subject to the exceptions set out in section 85(1)(b) and (2) of the Structures Act. The importance of these exceptions is that the shifting of powers between district and local municipalities allows for more variation in terms of the functions that can be performed by the two tiers of local government. For example, there may be cases where a district municipality has the capacity to set policy and take strategic responsibility regarding fresh produce markets, but

¹ Section 84(1)(k) of the Structures Act.

² Section 84(2) of the Structures Act.

³ Municipal Demarcation Board (2003) 69: the report further states that in relation to a district municipality, the definitions also mean the establishment, conduct and control of fresh produce markets serving the area of a major proportion of the municipalities in the district; and in relation to a local municipality, it is the establishment, conduct and control of fresh produce markets serving the local municipality area only.

⁴ See also the Agricultural Produce Agencies Bill (2013) proposed by DAFF: ‘fresh produce markets’ is defined as ‘the area of land set aside for conducting thereon the sale of fresh produce and other miscellaneous products and include any building or structure thereon used wholly or partially, directly or indirectly, for the purpose of conducting activities relating to the sale of such produce’.

⁵ Municipal Demarcation Board (2003) 68.

may not be capacitated to manage the operational functions of that fresh produce market.⁶ The shifting of powers provided in section 85(2)(b) of the Structures Act would then allow the MEC (and district municipality) to agree on transferring the entire function of a fresh produce market to a local municipality instead. This gives expression to the asymmetrical division of powers, where the powers of a local municipality within a district municipality ‘need not all be the same’.⁷

Local government’s power to administer and pass by-laws for the establishment, management and control of ‘markets’ cannot be exercised in isolation from the other related competencies set out in Part B of Schedules 4 and 5. An examination of these related competencies is provided in the next section.

3. ‘MARKETS’ AND RELATED COMPETENCIES IN PART B OF SCHEDULES 4 AND 5

Ancillary to local government’s competency to regulate and manage ‘markets’, there are other related competencies that impact the manner in which local government exercises authority in regard to ‘markets’. These related competencies, as set out in Part B of Schedules 4 and 5, are municipal planning, municipal health services, municipal public works, trading regulations, water and sanitation, licensing and control of undertakings that sell food to the public, local amenities and street trading. The exercise of power over these related competencies must also be guided by the developmental objects of local government, which are to ensure that services are provided to communities in a sustainable manner,⁸ that social and economic development is promoted,⁹ and a safe and healthy environment is promoted.¹⁰

3.1 ‘Municipal planning’ and ‘markets’

⁶ See Josephs AW ‘Prospects for the reform of district municipalities: The scope for manoeuvre’ (2012) 18, for a comment on the MDB’s proposal for the separation of the service authority function from the service provider function. Originally referenced from Steytler N & Baatjies R *Redefining the Role and Application of District Municipalities* (2007) 69 available at <http://www.mlqi.org.za/publications/publications-by-theme/local-government-in-south-africa/cooperative-government/Redefining%20the%20role%20and%20application%20of%20district%20municipalities%20-2007.pdf/view> (accessed 17 November 2015).

⁷ Steytler N *District municipalities: Giving effect to shared authority in local government* (2009) 229.

⁸ Section 152(1)(b) of the Constitution.

⁹ Section 152(1)(c) of the Constitution.

¹⁰ Section 152(1)(d) of the Constitution.

There is probably not a single functional area in the Constitution that can be carried out without land'.¹¹ Through an Integrated Development Plan (IDP) and a Spatial Development Framework (SDF), a municipality may engage in forward planning by providing mechanisms for making decisions regarding land development, land use and spatial planning, as well as setting out 'the objectives that reflect the desired spatial form of the municipality, as well as strategies to achieve those objectives'.¹² The strategies must indicate the nature and location of development in the municipality.¹³ To give effect to the aforementioned, a municipality must actually manage its land use by translating the forward planning set out in the IDP and SDF into zoning regulations and this can be done through town planning. These powers of local government over 'municipal planning' were affirmed in the cases of *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*;¹⁴ *Maccsand (Pty) Ltd v City of Cape Town*;¹⁵ and *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others*.¹⁶ Therefore, municipalities must refer to and use the Spatial Planning and Land Use Management Act¹⁷ when making decisions that relate to land use. Section 84(1) of the Structures Act does not mention 'municipal planning' as a district municipality function; therefore local municipalities are responsible for municipal planning as per section 84(2) of the Structures Act. Section 84(1) of the Structures Act does, however, state that a district municipality has powers and functions over integrated development planning for the district municipality, including a framework for IDPs of all the local municipalities within the district.¹⁸

Municipal planning impacts a municipality's role regarding 'markets' because once a municipality has made the decision to establish a market and has engaged in forward planning through its IDP, the municipality would be required to provide guidelines, through its SDF for land use, management and development for the establishment of that market. A municipality's

¹¹ See *Wary Holdings v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) at para 128.

¹² Municipalities must engage in integrated development planning as set out in the Systems Act; see also *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) at para 31, where the court held that 'planning' refers to the control and regulation of land, and the prefix 'municipal' confines it to municipal affairs.

¹³ *Wary Holdings* at para 136.

¹⁴ 2010 6 SA 182 (CC).

¹⁵ 2012 4 SA 181 (CC).

¹⁶ 2014 BCLR 591 (CC).

¹⁷ Act 16 of 2013 (hereafter referred to as SPLUMA).

¹⁸ Section 84(1)(a) of the Structures Act; a district municipality may be able to exercise power over the municipal planning function through an authorisation set out in the aforementioned provision.

SDF must do the following: first, it must interpret and show the spatial development vision the municipality has for a market and the municipality's competent authority. Second, the SDF must be informed by a long-term spatial development vision plan for the market. Third, the SDF must guide planning and development decisions, taken in regards to the market, across all sectors of government. As mentioned in subsection 5.2 of chapter two, national fresh produce markets are regarded as national/state assets and therefore it understandable why planning decisions would need to be guided across all governmental sectors. Fourth, the SDF must provide clear and accessible information to all sectors and provide directions for investment into the proposed market. Fifth, previously disadvantaged areas, traditional areas, slums, inter alia must be included in the SDF and their integration into the spatial, economic and social objectives of the municipality must also be addressed. This requirement links with the discussion set out in section 4 of chapter three on local government's developmental objectives and how they should guide local government's exercise of power over Schedule 4B and 5B functions. Sixth, the SDF must provide direction for strategic developments and infrastructure investment for the proposed market.¹⁹ Seventh, direct participation in the SDF process, as well as the outcomes of substantial public engagements regarding the establishment of a market must be considered and incorporated into the SDF. This means that the SDF must be put together with public input; particularly input from persons directly affected by the establishment of a fresh produce market such as informal traders and farmers, to name a few. Eighth, the SDF must outline specific arrangements for prioritising and implementing public and private infrastructural and land development investment in the market, which would be identified as a priority in the SDF.²⁰

Once the SDF is agreed upon by a municipality and its citizens, a municipality must adopt a land use scheme that gives effect to and is consistent with the SDF. The land use scheme determines the use and development of land in a municipal area and it does so to promote economic growth, social inclusion and minimal impact on public health, the environment and natural resources.²¹ In regard to the establishment of a market, the land use scheme would include scheme regulations setting out the procedures linked to the use and development of, for example, land zoned for

¹⁹ See sections 12(1)(a), (b), (d), (g), (h), (k) and (o) of SPLUMA. See also section 21 of SPLUMA.

²⁰ Section 12(6) of SPLUMA.

²¹ Section 25(1) of SPLUMA.

‘markets’.²² Thereafter, land may only be used for the purposes permitted by a land use scheme or a town planning scheme, if a land use scheme has not been adopted.²³

The abovementioned processes undertaken in municipal planning show the significance of determining locations, transportation systems, investment, infrastructure, expansion and development opportunities, consulting with and giving consideration to the needs of communities and how these factors must be given due consideration before a market is established within a municipality. The importance of these factors lies in the fact that they can contribute to the success (or failure) of a market.

3.2 ‘Municipal health services’ and ‘markets’

As alluded to in subsection 5.1 of the previous chapter, the use of statutory definitions is one of the strategies that may be used by the various legislatures when faced with problems regarding definitional or functional overlaps. ‘Municipal health services’ is an example of how a statutory definition can be used to provide clarity of a functional area provided in Schedule 4 and 5 of the Constitution. In this instance, a local government functional area was given a national definition set out in national legislation. The definition of ‘municipal health services’ is set out in the National Health Act,²⁴ and it reads as follows:

‘Municipal health means:

- (a) water quality monitoring;
- (b) food control;
- (c) waste management;
- (d) control premises;
- (e) communicable disease control;
- (f) vector control;
- (g) environmental pollution control;
- (h) disposal of the dead;

²² Section 2(a) of SPLUMA.

²³ See section 26(2) of SPLUMA.

²⁴ Act 61 of 2003.

(i) chemical safety, but excludes port health, malaria control and control of hazardous substances.²⁵

The first three elements of the national definition are linked to ‘markets’, as municipalities should provide water and sanitation on market premises, more so water that is of good drinking quality and utility on the fresh produce at the market. Secondly, food control relates to the standard and quality of produce sold, which speaks to the nutritional and health value of the produce sold to consumers. The Agricultural Product Standards Act²⁶ is a national law that deals with the control and promotion of specific product quality standards for the local market, as well as export purposes. The Act empowers the Minister of Agriculture to authorise an executive member to perform inspections on premises that perform acts relating to food. There seems to be conflicting provisions in the two national laws, as the National Health Act includes in the definition of ‘municipal health service’, the exercise of power over food control. This means that local government may exercise power in regard to food control, within its jurisdiction. The Agricultural Product Standards Act, on the other hand, gives the power to control food quality standards to national government. What is apparent from the above is that it is unclear whether food control is a national or local government power. Lastly, waste management speaks to the disposal of produce that is not sold due to various reasons such as expiry, loss of freshness or few purchases being made resulting in the disposal of older produce in order to accommodate new and fresher produce. The dumping of unsold produce may lead to health hazards.²⁷ In terms of section 84(1)(i) of the Structures Act, a district municipality may exercise powers and functions regarding municipal health services. The Minister may, however, authorise a local municipality to perform the function instead, after consultations with the MEC and Cabinet member responsible for municipal health services.²⁸ When regulating ‘markets’, municipalities should consider addressing the aforementioned issues, promote a healthy environment at their markets and ensure that the market authorities and role players at the markets adhere to the health regulations and standards.

3.3 ‘Municipal public works’ and ‘markets’

²⁵ Section 1 of the National Health Act.

²⁶ Act 119 of 1990.

²⁷ For an example, see Caesar M et al *The State of Food Insecurity in Msunduzi Municipality, South Africa* (2013) on the impacts of dumping fresh produce.

²⁸ Section 84(3)(a) of the Structures Act.

‘Municipal public works’ refers to local government’s construction and maintenance of public infrastructure and facilities. Municipal public works is a related competence to ‘markets’ as markets need premises, infrastructure and facilities to operate from and local government can therefore provide premises, infrastructure and facilities where markets can be established and where they can operate. As mentioned in subsection 5.3 of chapter two, the Cape Town market operates in the aforementioned manner. Section 84(1)(n) of the Municipal Structures Act provides that a district municipality has powers and functions over municipal public works relating to the functions such as fresh produce markets, municipal health services, municipal airports and portable water supply systems, to name a few.²⁹ Municipalities can further assist in the maintenance of the infrastructure and equipment provided for and used on the markets.

3.4 ‘Trading regulations’ and ‘markets’

According to the MDB definition, ‘trade regulations’ means ‘the regulation of any area facility and/or activity related to the trading of goods and services within the municipal area not already being regulated by national and provincial legislation’.³⁰ Although local government’s regulation of fair trade practices on markets overlaps with national government’s constitutional mandate relating to ‘trade’, the definition provided above suggests that local government may perform the function ‘trading regulations’ and regulate an activity related to the trading of goods or services within a municipality, only if that activity is not already regulated by national or provincial legislation. In other words, if national or provincial law exists and regulates an activity within a municipality, that activity cannot be a municipal issue that falls under municipal regulations. This is incorrect. If one were to use the ‘bottom up interpretation’ to determine the scope of local government’s power, the result would be that any trading that takes place within a municipality would fall under ‘trading regulations’ and as such, maybe regulated by local government. National and provincial government would only be able to regulate trading in municipalities if is not already regulated by local government, meaning that all other trading not regulated by local government would fall under the competency of ‘trade’. Therefore, the MDB definition is incorrect because it is not national or provincial legislation that determines the scope of municipal competency. It is the Constitution itself that determines the scope of local

²⁹ Section 84(1)(a)-(m) of the Structures Act.

³⁰ Municipal Demarcation Board (2003) 35.

government's competencies. As such, if the national or provincial legislation regulating 'trade' encroaches on 'trading regulations', the national legislation must be declared invalid. It is important to note that 'markets' empowers local government to regulate all markets, not just fresh produce markets. Therefore, in the aforementioned case, local government would have the power to determine the manner in which trade/trading takes place in all markets. On the basis of its power to deal with trading regulations, local government would be able to determine the operating days and times of markets; the conduct permitted and prohibited at a market, would regulate fair trade practices on markets, would require or subject markets to comply with industry guidelines and would have the power to subject markets to inspections, to ensure that there is compliance with the guidelines.

3.5 'Water and Sanitation' and 'markets'

The MDB defines the functional area of 'water and sanitation' as 'the establishment or procurement, where appropriate, operation, management and regulation of a potable water supply system, including the services, infrastructure required for the regulation of water conservation, purification, reticulation and distribution...'.³¹ This means that local government has the power to operate and deliver water services, as well as adequate sanitation to communities and local businesses. The recipients are in return, required to pay for the services. This also includes providing free basic water and sanitation services to the poor. In terms of section 84(1) of Structures Act, a district municipality may exercise powers over potable water supply systems, domestic waste-water and sewage disposal system, and domestic waste disposal sites.³² The functional area of 'water and sanitation' is a related competence to 'markets' because good quality water and adequate sanitation is vital for both the functions and operations carried out on the markets (use of water on fresh produce, also relates to health standards), as well as for use by the staff and the consumers that frequent the markets. The exercise of power over the function of water and sanitation also provides municipalities with the platform to support, encourage and facilitate fresh produce markets, by entering into special pricing/payment arrangements for fresh produce markets receiving water supplies.

3.6 'Control of public nuisances' and 'markets'

³¹ Municipal Demarcation Board (2003) 37.

³² Section 84(1)(b), (d) and (e) of the Structures Act.

According to the MDB definitions, the ‘control of public nuisances’ is defined as ‘the regulation, control and monitoring of any activity, condition or thing that may adversely affect a person or a community’.³³ This further requires the promulgation of by-laws on public nuisances relating to health, public order and environment. In this case, ‘markets’ are regarded as public spaces and as such, the ‘control of public nuisances’ is a related competence because the municipality has the power to ensure that the activities of the market do not cause a nuisance to the surrounding communities, and that the markets operate in an orderly manner. For example, controlling public nuisances could entail the municipality deploying the municipal law enforcement unit to patrol the market and ensure that orderly conduct is maintained. The Mangaung Fresh Produce By-law sets out a good example of a municipality using legislation to control public nuisances. The by-law has a provision that lists behaviour that is considered to be a nuisance and as such, is prohibited on the market premises.³⁴

3.7 ‘Licensing and control of undertakings that sell food to the public’ and ‘markets’

The MDB defines the ‘licensing and control of undertakings that sell food to the public’ as ‘ensuring the quality and the maintenance of food safety and hygiene related environmental standards through regulation, an issuance of a certificate of acceptability and monitoring of any place that renders in the course of any commercial transaction the supply/handling of food intended for human consumption’.³⁵ Regarding the licensing and control of undertaking that sell food, a municipality may take decisions to ensure that its market(s) offer and maintain a safe and hygienic environment for the trading of fresh produce. A municipality may also monitor, evaluate and ensure the adherence of food safety standards on the market. The exercise of this power would overlap with local government’s exercise of supervisory power, as per the municipal health services function; as well as national government’s exercise of power, as per the Agricultural Product Standards Act.³⁶ As mentioned in subsection 3.2 of this chapter, as per the definition of municipal health services set out in the National Health Act, local government

³³ Municipal Demarcation Board (2003) 51.

³⁴ Section 5 of the Mangaung Fresh Produce Market By-law (hereafter referred to as the Mangaung By-law). Section 84(1) of the Structures Act does not specify the ‘control of public nuisances’ as a district municipality competence. Therefore, as per section 84(2) of the Structures Act, a local municipality may exercise powers over the said function.

³⁵ Municipal Demarcation Board (2003) 62.

³⁶ Act 119 of 1990.

has the power to control food standards and ensure adherence to the standards within the area of its jurisdiction. However, in practice, the conflicting nature of the two national laws has resulted in local government not exercising power in regard to food control. Furthermore, in the event of a municipality exercising its power to license and control undertakings that sell food, a municipality will have the power to pass a by-law and stipulate in it the conditions that must be fulfilled by undertakings that sell food to the public, in order for these undertakings to obtain trading permits.

3.8 ‘Street trading’ and ‘markets’

‘Street trading’, which is also known as informal trading, may be defined as ‘the control, regulation and monitoring of the selling of goods and services along a public pavement, road reserve and other public places’.³⁷ As provided in chapter two,³⁸ the informal sector procures a majority of its produce at fresh produce markets and thereafter, sells this procured produce through informal channels. The informal sector features as a middle man between fresh produce markets and consumers. ‘Street trading’ is a related competence to ‘markets’ because the relationship between the two functions determines the flow of produce from markets to street traders, and finally to the end users. The manner in which a municipality regulates the informal trading sector also plays an important part in the flow of food from the markets to the end user. For example, if a municipal informal trading by-law empowers a municipality to charge informal traders an excessive amount for the rental/use of municipal property, informal traders may be forced to increase the price of the produce they sell to mitigate the costs for rental space, or may procure low quality produce in lesser quantities. This in turn would affect a (poor) community’s access to food as they may not be able to afford the price increase imposed by the informal trader, or in the latter case, consumers will settle for food with less nutritional value.

4. THE RISKS OR PROBLEMS ASSOCIATED WITH THE EXERCISE OF POWER PERTAINING TO ‘MARKETS’

The local government matters in Schedule 4B and 5B of the Constitution are powers, not instructions. Therefore, a municipality has the power to decide whether or not it wants to

³⁷ Municipal Demarcation Board (2003) 89.

³⁸ See section 5 of chapter two.

perform a functional competence. The section below will look at some of the risks and/or problems that municipalities face, or are likely to face when exercising, or attempting to exercise authority over ‘markets’.

Commentators argue that there a number of reasons why municipalities are sceptical to explore the potential and extent of their legislative mandates.³⁹ One of these reasons is that municipalities are constrained by financial issues. This is because when deciding to exercise its power to pass by-laws to regulate ‘markets’, a municipality will also have to set aside the financial resources required to make sure that the regulation and implementation of the by-laws takes place. Failure to have the necessary funds places a municipality at risk of carrying an unfunded mandate.

A municipality’s ability to exercise power over the functional area of ‘markets’ may also be affected by capacity constraints. These constraints may include insufficient or incompetent staff, inability to provide for ‘markets’ in the municipal operating budget (due to a shortage of funds) and the inability to provide infrastructure and equipment to/for ‘markets’ inter alia. The lack of institutional capacity inhibits local government from fully regulating the function over markets; it also hinders local government’s ability to craft by-laws that suit the local context and community.

Lastly, the uncertainty regarding the functions of the two tiers of local government often results in duplication of services, wastage of resources, unfunded mandates and one tier taking on the responsibilities of another tier of local government. The possibility of these problems emanating might discourage a municipality from fully exercising its powers.

5. AN EXAMPLE OF A FRESH PRODUCE MARKET MUNICIPAL BY-LAW

As mentioned above, municipalities are hesitant to explore the extent of their law-making powers for a number of reasons. However, some municipalities have produced municipal by-laws to regulate the fresh produce markets within their boundaries/jurisdiction. For example, the metropolitan municipalities of Mangaung, Ethekwini and Johannesburg currently have by-laws

³⁹ See De Visser J & May A ‘The Functions and Powers of South Africa’s Provinces and Municipalities’ in Ghai Y & Steytler N (eds) *Devolution in Kenya and South Africa* (forthcoming) 166 (Juta: Cape Town).

in place to regulate fresh produce markets. This section will briefly look at how the Mangaung municipal by-law regulates the Mangaung fresh produce market.⁴⁰

First, the preamble states that the by-law is in place to provide for the regulation and management of activities on and in respect of the municipal fresh produce market. The control and supervision of the market vests in the General Manager and the market trading hours are determined by the municipal council.⁴¹

Secondly, the by-law lists behaviour that is not permitted on the markets' premises.⁴² Subsection 3.6 above briefly mentioned the 'control of public nuisances' as a local government competence and what it meant according to the MDB definitions. Most of the actions set out in section 5 of the by-law could be regarded as public nuisances and as such, by regulating prohibited behaviour on the market, the Mangaung municipality also exercises power in terms of its competence to control public nuisances. The by-law provides for the exoneration of the municipality for an error or description, shortage or excess in quantity or lack of quality in respect of any article sold on the market.⁴³ Complaints in the aforementioned instances would have to be directed to the Agricultural Produce Agents Council (APAC) in terms of the Agricultural Produce Agents Act.⁴⁴ The by-law provides for the process to be followed by an agent when he or she receives produce on the market from his or her principal,⁴⁵ and also sets out the procedure followed before sale of produce.⁴⁶

Thirdly, the by-law sets out various other aspects relating to the marketing of produce. For example the cleanliness of the premises,⁴⁷ which falls under the function of municipal health service, more specifically the elements of 'food control' and 'waste management', discussed in the definition of municipal health services in subsection 3.2 of this chapter. The cleanliness of a market, as well as the mechanisms used to manage the dumping of expired or unsold produce

⁴⁰ Most of the by-laws regulating fresh produce markets have similar provisions. Therefore, it is likely that the provisions discussed in this section are replicated in many other fresh produce market by-laws.

⁴¹ Sections 3 and 4 of the Mangaung By-law.

⁴² Section 5 of the Mangaung By-law.

⁴³ Section 10 of the Mangaung By-law.

⁴⁴ See sections 13(1)(b); (3); 14 and 24 of the Agricultural Produce Agents Act 12 of 1992 (hereafter referred to as the APA Act). The contents of the Act will be set out below in subsection 6.1.

⁴⁵ See sections 13 - 22 of the Mangaung By-law.

⁴⁶ See sections 26 - 37 of the Mangaung By-law.

⁴⁷ Section 23 of the Mangaung By-law.

have an impact on the quality of produce sold at the market (for health purposes). The by-law provides for payment of rent or a fee to occupy/trade on the premises,⁴⁸ permits for fresh produce agents and any other matters incidental to agents,⁴⁹ the use of the sales floor,⁵⁰ the use of storage and ripening facilities,⁵¹ and the use of vehicles.⁵²

Fourthly, pertaining to purchases made by the buyers, the by-law provides for the use of the prepayment system, cash purchases and the granting of credit by the General Manager of the market.⁵³ Section 58 of the by-law provides that the provisions of the Systems Act apply to any buyer who fails to pay for the purchases taken on credit. In terms of the Systems Act, a municipality must collect all money that is due to it and must also adopt, maintain and implement a credit control and debt collection policy that complies with the Systems Act.⁵⁴ The municipality is empowered to pass a by-law to give effect, implement and enforce its credit control and debt collection policy.⁵⁵ These are the provisions that section 58 of the Mangaung by-law refers to. The by-law further states that the municipality will take steps to recover the amount owed to it.⁵⁶

Fifthly, in a case where an agent neglects to take all reasonable steps to sell produce at the ruling market price or fails to take all reasonable measures to prevent produce from deteriorating, the by-law empowers the market authority to notify the vendor and issue a note in favour of the vendor, which states that his produce was sold at the same price as other produce similar to his. The agent is then obliged to pay the vendor an amount determined by the market authority and he may not derive any commission from this amount.⁵⁷ This action goes beyond the regulation of the market as a facility because it extends to the regulation of trading behaviour in the market.

⁴⁸ Section 24 of the Mangaung By-law.

⁴⁹ Sections 68, 69, 73 - 77 and 79 of the Mangaung By-law.

⁵⁰ Section 71 of the Mangaung By-law.

⁵¹ Section 81 of the Mangaung By-law.

⁵² Section 86 of the Mangaung By-laws.

⁵³ See sections 55 and 57 of the Mangaung By-law.

⁵⁴ Section 96 of the Systems Act.

⁵⁵ Section 98(1) of the Systems Act.

⁵⁶ See also sections 59 and 63 of the Mangaung By-law.

⁵⁷ Section 62 of the Mangaung By-law.

Mangaung is mandated by the competency ‘trading regulations’ to regulate the trading behaviour on its market.⁵⁸

Lastly, the by-law prohibits wholesalers and their representatives from trading in the municipal fresh produce market without the authorisation of the General Manager.

The Mangaung by-law regulates a number of activities taking place in the market. However, there are some gaps and questions that could be considered. First, regardless of the council having leeway to determine trading hours, the by-law should provide the actual trading times for potential buyers to be able to access correct information on trading times. Secondly, the municipality absolves itself in cases where an error is made during the sale of produce. However, the by-law does not state that in the event of errors taking place and loss being suffered by a buyer, a complaint can be laid with the APAC. Again this speaks to the buyer’s access to market related information. Thirdly, the provision empowering the market authority to inform a vendor when his agent fails take steps to sell produce or to prevent the damage of produce, and thereafter obliging the agent to pay his/her vendor is good in that it offers protection to a vendor. However, who is a vendor? Is he the farmer? Is he someone who works for the farmer? The definition provided in the by-law is vague. Lastly, whilst the by-law prohibits wholesalers from trading in the market without authorisation from the market authority, no mention is made of another municipal regulation that regulates or would regulate wholesalers in the event of the market authority refusing to allow them into the market’s premises. Furthermore, no mention is made of a regulation that applies to micro markets that are trading around or in close proximity to the market. As will be seen in section 7 of this chapter, the presence of wholesalers and retailers within and around fresh produce markets is viewed by some as a serious issue, as it affects the functioning of the market and its ability to facilitate access to food.⁵⁹

With regard to the granting of credit to buyers at a market, the action seems to be voluntary, based on a market authority’s discretion. There were a number of recommendations made in favour of terminating the granting of credit to buyers in the reports on fresh produce markets.⁶⁰ It was believed that the system, operated by agents at that time, was open to abuse as agents did not

⁵⁸ See subsection 3.4 above for the brief discussion on ‘trading regulations’.

⁵⁹ This issue was discussed at the Roundtable on Local Government and Food Security, as will be shown below.

⁶⁰ National Agricultural Marketing Council *Johannesburg Fresh Produce Market Report 1* (1998) and the National Agricultural Marketing Council *Fresh Produce Marketing in South Africa, Report 2* (2000).

disclosure the provision of credit to their principals.⁶¹ In the NAMC Report 1, when given the opportunity to respond to the abovementioned recommendation, the market authorities were in favour of the provision of credit and argued that providing credit increased turnover⁶² and that there was a need to provide credit in order to retain certain buyers.⁶³ It is arguable that the aforementioned reasons could have encouraged the Mangaung municipality's decision to include the granting of credit to buyers by the market authority in their fresh produce by-law. Whatever other reasons the municipality might have had, it is encouraging seeing local government exercise its powers, taking bold decisions and exploring the extent of its powers.

6. THE NATIONAL LEGISLATIVE FRAMEWORK FOR THE REGULATION OF 'MARKETS'

The example of the Mangaung by-law provided a glimpse of local government's regulation of a market. The discussion below crosses over to the national legislation and examines how it regulates 'markets'. There are several pieces of legislation that regulate the various functions taking place on fresh produce markets. The legislation includes the Foodstuffs, Cosmetics and Disinfectants Act,⁶⁴ the Agricultural Produce Agents Act, the Agricultural Produce Agents Amendment Act,⁶⁵ the Marketing of Agricultural Products Act⁶⁶ and the Agricultural Product Standards Act. There is also the Agricultural Produce Marketing Agencies Bill (2013) and the Agricultural Produce Agencies Bill (2013), which are recently proposed Bills for the regulation of various functions on fresh produce markets. The aforementioned pieces of legislation do not regulate 'markets' per se, however, they do contain provisions that extend to the operations as well as the role players found on markets. For purposes of this section of the chapter, only an outline of the Agricultural Produce Agents Act and the Agricultural Product Standards Act will be given. The outline will only include the provisions which may be regarded as important and may be relevant to the functional area of 'markets'.

6.1 Agricultural Produce Agents Act

⁶¹ See National Agricultural Marketing Council *Johannesburg Fresh Produce Market Report 1* (1998) 25 and 43; National Agricultural Marketing Council *Fresh Produce Marketing in South Africa*, Report 2 (2000) 7.

⁶² National Agricultural Marketing Council *Johannesburg Fresh Produce Market Report 1* (1998) 26.

⁶³ The National Agricultural Marketing Council *Section 7 Investigation: National Fresh Produce Markets* (2007) 50.

⁶⁴ Act 54 of 1972.

⁶⁵ Act 47 of 2003.

⁶⁶ Act 47 of 1996.

The preamble of the Agricultural Produce Agents Act states that the Act provides for the establishment of the Agricultural Produce Agents Council (APAC) and fidelity fund for agricultural produce agents, as well as the control of certain activities of agricultural produce agents.

The APAC's responsibility is to regulate the operation of fresh produce agents and ensure that the rules and terms of the Act are observed.⁶⁷ The Act further provides for the funding of the APAC, which is obtained from the monies paid by agents towards application fees to be agents and the fidelity fund.⁶⁸ The establishment of a fidelity fund and the issuing of a fidelity certificate is also stipulated in the Act. The Act prohibits anyone from acting as an agent if he or she is not the holder of a fidelity fund certificate,⁶⁹ and sets out the requirements for agents to have a trust account in which all proceeds of sales have to be paid to the producer/principal.⁷⁰

The Act empowers the APAC to hold inquiries, reprimand, impose conditions and restrictions and to withdraw a fidelity fund certificate of an agent.⁷¹

The Act sets out the code of conduct on how a fresh produce agent is supposed to behave in order to protect his principal, which is the producer/farmer. The Act, however, does not regulate the place where the agent conducts the sale of fresh produce from. This statement is in line with what was mentioned in the earlier part of this section – the APA Act, together with the other Acts discussed in this section, does not regulate markets per se. The APA Act regulates the agents operating on the premises of the market, their conduct on the market, and their relations with their principal (the farmers), inter alia. Therefore, this regulatory gap in the Act provides local government with the opportunity to regulate the places where agents conduct the sale of fresh produce through municipal by-laws. This could also allow local government to exercise its trading regulations competence and provide regulations setting out the conduct to be followed at places where agents and buyers engage in the trading of fresh produce.

The Act relates to agents operating in other venues too and not only markets. This would suggest that if a fresh produce vendor operates on a street pavement as an agent; his or her actions would

⁶⁷ See section 9 of the APA Act.

⁶⁸ Section 11(1) of the APA Act.

⁶⁹ Section 16(1) and (2) of the APA Act.

⁷⁰ Section 19(1) of the APA Act. See also section 20(1) of the APA Act.

⁷¹ See sections 24, 25, 26 and 27 of the APA Act.

be subject to the Act and the APAC.⁷² What can be deduced from this is that the regulation of markets is separate from the regulation of agents, although in practice the actual operating conditions on a market impact the implementation of the APA Act.

6.2 Agricultural Product Standards Act

The Agricultural Product Standards Act is in place to ‘provide for control over the sale and export of certain agricultural products, control over the sale of certain imported agricultural products; and control over other related products’. Commentators state that in terms of this Act, ‘standards may be prescribed in accordance with which produce has to be sold’.⁷³ Section 3 of the Act permits the Minister of Agriculture to prohibit the sale of a prescribed product if the product is not sold according to the prescribed class or grade; if the product does not comply with the prescribed standards regarding quality, class or grade; if the requirements regarding packing, marketing and labelling of a product are not complied with or if a product contains a prohibited substance, to name a few.⁷⁴

Important to note in this regard is section 3(b) of the Act, which permits the Minister to apply the prohibitions in section 3(a) selectively. In this regard, the Minister may choose to apply the prohibitions only to a prescribed category of persons or in a prescribed area; he may exclude a prescribed category of persons or a prescribed area; or may determine that a prohibition only applies under prescribed circumstances that the Minister deems necessary.

Section 3A of the Act provides for the inspection, grading and sampling of quality control and it allows the executive officer to enter the premises of an agricultural industry in which any product, substance or article regulated in the Act is produced, prepared, graded, packed, marked, stored, or sold. The executive officer is further empowered to inspect or test (or direct the owner to inspect or test) the quality of any product; inspect whether the packaging and marking requirements have been adhered to; or direct the owner or person in charge of the premises to do so. The executive officer may also inspect or test the quality of a product or article used or suspected to be used in connection with the production, preparation, grading, keeping or sale of a

⁷² National Agricultural Marketing Council *Johannesburg Fresh Produce Market Report 1* (1998) 22.

⁷³ National Agricultural Marketing Council *Johannesburg Fresh Produce Market, Report 1* (1998) 53.

⁷⁴ Section 3(a)(i)–(iii) of the Agricultural Product Standards Act.

particular product; and request the owner to produce documentation that provides for the administration of the Act to be inspected, to name a few.⁷⁵

The Act also prohibits the use of false or misleading descriptions as to the nature, quality, class or grade, origin, substance or place of production of products.⁷⁶

Although municipalities have the power to legislate over ‘markets’, as per section 156(2) of the Constitution, the exercise of their legislative power will have to adhere to the regulatory framework provided in the national legislation⁷⁷ and if it fails to do, the legislation passed may need to be amended or may be declared invalid. The legislative framework mentioned above may place potential limitations on local government’s ability to exercise powers and functions over ‘markets’. First, what is evident from the discussion on the Agricultural Product Standards Act is that there are linkages between the provisions of the Act dealing with the quality control of food and the local government competencies relating to markets such as, municipal health services and licensing and control of undertakings that sell food to the public.⁷⁸ In regard to the definition of municipal health services, as mentioned in subsection 3.2 of this chapter, ‘food control’ forms part of the definition and as such, local government has the constitutional authority to perform the function. In regard to the function of licensing and control of undertakings that sell food to the public, the definition by the MDB, which provided in subsection 3.6 of this chapter, suggests that local government has the constitutional authority to ensure the quality and maintenance of food safety standards in any place that supplies or handles food within a municipality. Local government may exercise this power by providing regulations. However, the Agricultural Product Standards Act then authorises the Minister of Agriculture to appoint an executive officer to perform quality control on food (fresh produce). As mentioned in subsection 5.1 of chapter three, the two instances provided above create confusion over competencies. There are overlaps between national and local government regarding the performance of the food control/quality control function. These overlaps create confusion regarding the exercise of power over food control; whether it a function exercised by national or local government and the extent to which each sphere may perform the function.

⁷⁵ Section 3A(1)(b)–(f) of the Agricultural Product Standards Act.

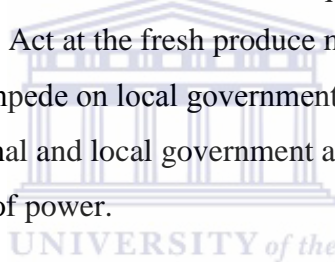
⁷⁶ Section 6 of the Agricultural Product Standards Act.

⁷⁷ Section 155(7) of the Constitution.

⁷⁸ Schedule 4B and 5B of the Constitution.

Secondly, the Agricultural Product Standards Act requires fresh produce at markets to be sold in line with the standards provided in the Act. The Minister of Agriculture is empowered to prohibit the sale of produce if it does not comply with the class or grade, packing, marking and labelling requirements. Although adhering to these requirements may strain a municipality's exercise of powers and functions over a market, as a municipality would have to constantly incur costs to keep up with the standards required by the Act; a municipality must nonetheless adhere to the regulatory framework provided in the national legislation as it ensure the effective performance of the local government function.

Thirdly, the Agricultural Product Standards Act also permits an executive officer, under the instructions of the Minister of Agriculture, to enter the premises of a market and inspect, test or cause an inspection or test to be effected on the produce or any substances found on the premises. The Act further permits the executive officer to request the inspection of documents relating to the administration of the Act at the fresh produce market at any time. Although this interference does not necessarily impede on local government's right to self-government, it does present overlap between national and local government and the potential for tension and uncertainty regarding the exercise of power.



7. WHAT IS HAPPENING IN PRACTICE REGARDING LOCAL GOVERNMENT'S REGULATION AND MANAGEMENT OF FRESH PRODUCE MARKETS?

What 'ought to be' taking place and what 'is' currently taking place are two different things when it comes to the regulation of fresh produce markets. This section will discuss the challenges experienced in the regulation and management of fresh produce markets, with specific regard to the Cape Town market (Epping). The discussions presented here are aimed at providing insight into the practices of local government and its role in relation to the functional area of markets.

A large portion of the information presented in this section of the paper was derived from discussions captured at a roundtable on local government and food security, as alluded to in the methodology section of chapter one, rather than evaluative documents. The discussions at the roundtable described ways in which local government inhibits access to food, how local

government interacts with the Cape Town Market, how local government can remove barriers to enable access to food, what mechanisms local government could employ to assist fresh produce markets to enhance food security, what other roles local government should be playing in that regard and other initiatives that can be employed to enable access to food.

The following section will be divided into three parts: the first part will focus on the practices and problems relating to the infrastructure and facilities of markets; secondly the presence of other players in the value chain and the problems associated with this and lastly, the trends in the ownership and management models of markets.

7.1 Infrastructure and facility problems

Market authorities are accountable to a particular municipal council for the manner in which a fresh produce market is run.⁷⁹ In particular, market authorities are responsible for ensuring that the rules of the market and the by-laws, if any by-laws are in place, that relate to the market are observed. Some of the services that the market authorities perform include ensuring that there are sufficient physical facilities (for example buildings and roadways) for the market to operate effectively and making sure there is security and protection of assets and persons on the market. Market authorities also ensure that there are hygienic storage facilities, such as cold storage and ripening facilities that are used to start the natural ripening process of fruits such as bananas, avocados, mango and citrus fruits and create longer shelf life for the produce.⁸⁰ Market authorities also make sure there are cashiering facilities, extended cash payment systems (credit) if applicable to a particular market, electronic sales processing system; compilation of sales statistics and they take care of the promotion and advertising of the market.⁸¹

Almost 16 years ago, the NAMC in its report on the Johannesburg fresh produce market raised concerns about the state of the Johannesburg fresh produce market and fresh produce markets in general. The concerns raised by the NAMC are still prevalent today and they relate to the market infrastructure and facilities; the subsequent deterioration of the markets' infrastructure in general

⁷⁹ The Agricultural Produce Agencies Bill defines 'market authority' as the duly appointed management team or individual responsible for the management of the market on behalf of the market owner.

⁸⁰ See Thompson J 'Ripening facilities', Biological and Agricultural Engineering (UC Davis) available at <http://postharvest.ucdavis.edu> (accessed 16 September 2015).

⁸¹ National Agricultural Marketing Council *Johannesburg Fresh Produce Market*, Report 1 (1998) 20.

and a lack of reinvestment in the up keeping of the markets.⁸² The NAMC's concern was that market revenues were not available for the maintenance of market facilities, that insufficient of the revenues generated by fresh produce markets' five percent commission were being reinvested in the markets' facilities. This was due to the fact that the market authorities required a municipal council's consent to access a market's revenue to address the deterioration of a market's premises.⁸³ It has been suggested that the aforementioned took place because the market does not form part of the core business of local government.⁸⁴ The question that one must ask in this case is then, how can markets not form part of local government's core business when the Constitution clearly enumerates the function as a local government competence? Venter also argued that due to the changing priorities of local government, the funds generated on the fresh produce markets are often diverted into other areas of the community and not enough is spent on keeping the markets properly maintained. Venter further argued that the diversion of funds and results of neglect would be felt and sooner or later producers and buyers would use alternative methods to procure and distribute produce.⁸⁵ What Venter had argued in 2000 has indeed happened, as wholesalers and retailers have infiltrated the agricultural sector and operate as an alternative platform for the procurement of fresh produce, as will be shown in the next section. Commentators pointed out that cities do not realise the value that fresh produce markets have and that as significant assets, fresh produce markets need to be maintained, upgraded and looked after, irrespective of the ownership and management model used.⁸⁶

There is a tendency for bureaucratic and financial problems within a municipality to hamper the proficient management, operation and enhancement of a market, despite a market having good financial standing.⁸⁷ For example, Philippi Market was the Western Cape's provincial and local governments' attempt to provide a space for the emergence of a fresh produce market, although

⁸² National Agricultural Marketing Council *Johannesburg Fresh Produce Market*, Report 1 (1998) 18.

⁸³ National Agricultural Marketing Council *Johannesburg Fresh Produce Market*, Report 1 (1998) 28.

⁸⁴ Comment by Allie Omar (Cape Town market) at the Roundtable on 'exploring the links between developmental local government and food security through the improved regulation and management of fresh produce markets' (11 November 2015) (hereafter referred to as the Roundtable on Local Government and Food Security).

⁸⁵ Venter PM 'Understanding Fresh Produce Markets in South Africa' (2000) 3:16.

⁸⁶ James Billy (Cape Town market) at the Roundtable on Local Government and Food Security (11 November 2015).

⁸⁷ Comment by Josephs Hilary (City of Cape Town) at the Roundtable on Local Government and Food Security (11 November 2015).

it failed. The market did not function the way it was hoped it would, despite a lot of money and time having been invested into it.⁸⁸

7.2 Presence of other players in the agricultural value chain; the roles they play and the legislative framework applicable to them

When one takes the time to consider each of the role players discussed in subsection 5.2 of chapter two who are found on a fresh produce market, both individually and in the way they interrelate, it becomes evident that should any one of the role players become weak, there is a possibility of the market failing to operate efficiently.

The deregulation of the agricultural sector, as well as the repeal of the Commission for Fresh Produce Markets Act 82 of 1970 in 1992 resulted in fresh produce being sold through various channels, as opposed to pre-1992 when it was sold strictly through fresh produce markets.⁸⁹ The deregulation has set the path for role players such as wholesalers (for example Fruit and Veg City) and retailers (for example Woolworths) to grow at an alarming rate and it is argued that this growth is to the detriment of the producers and buyers of fresh produce.⁹⁰

Wholesalers are one of the biggest categories of buyers on the Cape Town market. Some wholesalers are based on the market premises and some have established themselves around the market. The wholesalers based on the market make their money from buying in bulk and selling to retailers and hawkers in smaller quantities.⁹¹ The wholesalers procure their produce through two methods, namely the procurement of produce from the fresh produce market or directly from the producers/farmers. Some commentators suggest that the latter method of procurement undercuts the market system as it bypasses the commission selling system (from producer to agent on market to the buyer) and in turn hinders the market's ability to receive a higher commission from the sales.⁹² It was argued that the legislation currently in place only regulates

⁸⁸ See City of Cape Town 'City takes food gardening to a new level' (15 October 2015) for some of the new developments taking place at Philippi regarding food security, since the failure of Philippi Market available at <http://www.capetown.gov.za/en/Pages/SearchNewsArchive.aspx> (accessed 13 November 2015).

⁸⁹ See Venter PM 'Understanding Fresh Produce Markets in South Africa' (2000) 1:8-9; see also subsection 5.2 of chapter two above, for a discussion on the deregulation of the agricultural sector.

⁹⁰ James Billy (Cape Town market) at the Roundtable on Local Government and Food Security (11 November 2015).

⁹¹ National Agricultural Marketing Council *Johannesburg Fresh Produce Market*, Report 1 (1998) 21.

⁹² Comment made by James Billy & Allie Omar (Cape Town market) at the Roundtable on Local Government and Food Security (11 November 2015).

the fresh produce markets, despite the presence of other players, such as wholesalers and ‘parasitical businesses’, in and around the market. There are more players in the sector; however, the municipal by-laws do not regulate these new players in the same manner. Worth noting in this regard is the point provided by the NAMC that ‘if the markets are opened up to other role players, the by-laws will have to be amended.’⁹³

One of the questions raised pertaining to the existence of other food businesses around the Cape Town market was that if the Constitution empowers local government to exercise power over ‘markets’ and the Structures Act divides the power to establish, operate and manage fresh produce markets between the district and local municipalities,⁹⁴ how then are micro-markets opening up close to the market without the municipality taking note?⁹⁵ It was suggested that the aforementioned happens because the micro-markets are not municipal businesses.⁹⁶ This results in an unfair advantage as these micro-markets operate without being regulated in the same manner as the Cape Town market. Ancillary to the point set out above, it has been suggested that local government could draft by-laws that regulate the businesses opening and operating around markets, because these businesses do not adhere to the same rules as the market.⁹⁷ For example, the market agents trading on a market do so on a commission basis, as per the Agricultural Produce Agents Act. The competitors operating close to the Cape Town market operate on a commission base but they are not subjected to the Act. Furthermore, it has been suggested that rather than having by-laws that protect the market by prohibiting other businesses from trading within five kilometres of the market, every player in the agricultural sector should fall under that same rule and scrutiny provided in the Agricultural Produce Agents Act.

Informal traders play an important part in the movement of fresh produce from the market to the end consumer.⁹⁸ Informal traders have access to a large number of consumers, most of whom are poor, marginalised and usually consume low quality foods due economic problems, social problems and being uninformed of food nutrition. A commentator provided that whilst it is true

⁹³ National Agricultural Marketing Council *Fresh Produce Marketing in South Africa*, Report 2 (2000) 52.

⁹⁴ See section 84(1)(k) and 85(1)(b) of the Structures Act.

⁹⁵ Question asked by Haysom Gareth (African Food Security Urban Network) at the Roundtable on Local Government and Food Security (11 November 2015).

⁹⁶ James Billy (Cape Town market) at the Roundtable on Local Government and Food Security (11 November 2015).

⁹⁷ James Billy & Allie Omar (Cape Town market) at the Roundtable on Local Government and Food Security (11 November 2015).

⁹⁸ National Agricultural Marketing Council *Fresh Produce Marketing in South Africa*, Report 2 (2000) 28.

that the poor consume low quality food, what usually happens at the Cape Town market is that the poor and marginalised request higher quality of fresh produce. This contradicts the expectation that they would settle for any quality of produce. The poor consumer's need for high quality produce is understandable, as it stems from the fact that the poor often do not have the facilities to keep the produce fresh for longer periods of time. In light of this, it was suggested that in order to facilitate access to fresh produce, assistance should also be provided to informal traders. This is because informal traders are the people who are getting food out to the majority of the population, especially poor and marginalised populations.⁹⁹

According to commentators, whilst there may be a provision in the Agricultural Produce Agents Act that provides that a farmer must be paid within five days of his produce being sold on the market, a farmer has no other protection beyond this provision in a case where payment is not effected on time.¹⁰⁰ The absence of protection for farmers has a potential to affect food security because if the farmer is not paid in time, the operations on a farm cannot continue, the farm could close down and this affects production. Furthermore, the buyer cannot procure any produce due to limited or non-availability of produce and in turn, the end consumers struggle to access fresh produce. In light of the aforementioned, a commentator has argued that if there is an Act that cannot or will not regulate all the role players in the agricultural food chain, then it is duty of local authorities to provide by-laws that fill the regulatory gaps.¹⁰¹

7.3 Trends in the ownership and management models of markets

The issues around the ownership and management of markets have been brought up in a number documents and discussions.¹⁰² As mentioned in chapter one,¹⁰³ municipalities' lack of engagement with the ownership and management models and how they apply to the market make it questionable whether local government can enhance food security through its management of markets. A number of the commentators were of the view that the ownership and management of

⁹⁹ Comment by James Billy (Cape Town market) at Roundtable on Local Government and Food Security (11 November 2015).

¹⁰⁰ However, should there be a problem with the produce bought by a buyer; there are mechanisms available to protect the buyer such as the Consumer Protection Act 68 of 2008.

¹⁰¹ Comment made by James Billy (Cape Town market) at the Roundtable on Local Government and Food Security (11 November 2015).

¹⁰² See subsection 5.3 of chapter two above.

¹⁰³ See 'significance of the problem' under chapter one.

markets should be separated. The NAMC has suggested that the fresh produce industry should rather let facilities from the local authority and operate the market on the industry's own accord.¹⁰⁴ The NAMC also supported the called for the separation of the management and ownership of markets and further, proposed that arrangements should be made to allow for the reinvestment of the market's financial surplus without first seeking consent from the municipality. This proposal was backed by the argument that 'local government structures, especially those under severe financial pressure, are not suited to the efficient management of such a business'.¹⁰⁵

Furthermore, the commentators stated that there is beginning to be a move towards privatising fresh produce markets seen nationally, through the creation of 'Public-Private-Partnerships' (PPPs). The result of this move is that the property on which a market operates always belongs to a municipality; however, the person or parties who operate the market change.¹⁰⁶

The creation of PPPs brings in the need to follow the Public-Private-Partnership regulations. The Local Government: Municipal Finance Management Act¹⁰⁷ provides conditions and processes that a municipality must satisfy for it to be permitted to enter into a PPP agreement. The conditions listed include demonstrating that the PPP agreement will provide value for money for the municipality; that the municipality will afford the PPP; that the municipality will be able to transfer technical, operational and financial risk to the private party;¹⁰⁸ complying with chapter 8 of Systems Act if the PPP involves the provision of a municipal service;¹⁰⁹ and engaging in the compilation of a feasibility study before concluding the PPP.¹¹⁰

It goes without mention that PPPs are not only complex, but also time consuming and expensive to initiate. Authors provide that section 120 of the MFMA has made outsourcing the provision of a municipal service more complicated as it further regulates a municipality's intention to use a

¹⁰⁴ National Agricultural Marketing Council *Fresh Produce Marketing in South Africa*, Report 2 (2000) 22.

¹⁰⁵ Agricultural Marketing Council *Johannesburg Fresh Produce Market*, Report 1 (1998) 41.

¹⁰⁶ James Billy (Cape Town market) at the Roundtable on Local Government and Food Security (11 November 2015).

¹⁰⁷ Act 56 of 23 (Hereafter referred to as the MFMA).

¹⁰⁸ Section 120(1) of the MFMA.

¹⁰⁹ Section 120(3) of the MFMA.

¹¹⁰ Section 120(4) of the MFMA; see also section 120(6) of the MFMA.

private party to deliver a municipal service.¹¹¹ Municipalities should therefore consider the implications and cost of outsourcing a municipal service before instituting a PPP agreement. Municipalities should not follow trends and blindly enter into PPP agreements without being well informed of the implications of such an act. As it stands, municipalities need to educate themselves about the different models and thereafter take informed decisions, guided by their constitutional mandate of service delivery and developmental government.

8. CONCLUSION

The chapter has noted local government's authority over the function of 'markets', which is not only provided in the Constitution but also stated in the Structures Act. The absence of definitions in the Constitution makes it difficult to understand how the exercise of power works in cases of definitional/functional overlap. Whilst guidance may be sought in the MDB definitions, the definitions given to the terms 'markets' and 'fresh produce market' still fail to capture what exactly the two functions are.

Local government's exercise of power over 'markets' cannot take place in isolation of the related competencies set out above in section 3 above. The linkages between the related competencies present opportunities, such as the scope for local government to exercise power over 'trading regulations' as a means to regulate the trading activities within its boundaries; for local government to enter into payment agreements with markets for the use of water and to regulate prohibited activities in market by-laws.¹¹² The related competencies also present complications, such as the complex processes followed when planning for the establishment of markets and the functional overlaps between national and local government in the exercise of power.¹¹³ These opportunities and complications are often associated with risks and problems that hinder local government from exploring the full extent of its powers.

The national legislative framework for the regulation of markets does not deal with fresh produce markets per se. This 'gap' in the national framework leaves room for municipalities to utilise their legislative competence, to start exploring their own initiatives and to regulate their markets as they see fit.

¹¹¹ Steytler N & De Visser J LGLSA (2014) 9: 35.

¹¹² See subsections 3.4, 3.5 and 3.6 of chapter four.

¹¹³ See subsections 3.1, 3.2 and 3.7 of chapter four.

With regard to the example of a fresh produce market by-law, it is encouraging to see Manguang municipality using its legislative powers and moulding its market to suit its community and surroundings. The provisions in the by-law cover ground regarding conduct on the market, agents, sales, facilities and the provision of credit to buyers.

The chapter noted the discussion of challenges raised, with regard to the Cape Town market, which gave insight into the practice of local government exercise of power over markets. In light of the argument presented in this paper, that through regulation and management of fresh produce markets, local government may be able to facilitate access to food and enhance food security, it was disappointing to note that local government would not be in a position to take on such a role any time soon. The findings show that market infrastructure and insufficient market facilities hamper the efficient functioning of fresh produce markets; the revenue generated from markets is often being used to provision other municipal services and this lack of reinvestment leads to the deterioration of markets; there is failure to implement current municipal by-laws; financial problems hamper local government's exercise of power; presence of unregulated micro-markets undercutting the market system; the adoption of municipal by-laws that are not trade friendly and municipalities reluctance to learn about the management and ownership models best suited for their markets and the implications of separating the two models on local government's exercise of power.

CHAPTER FIVE

CONCLUSION: SUMMARIES, FINDINGS AND RECOMMENDATIONS

1. INTRODUCTION

Led by the argument that local government's regulation and management of fresh produce markets can be used as an instrument to facilitate access to food and enhance food security, this chapter highlights the findings of the study with regard to the questions it set out to answer. The chapter also provides a summary of the preceding chapters and ends off with recommendations on the way forward.

2. SUMMARY OF THE PREVIOUS CHAPTERS

The second chapter discussed the concept of food security, as well as the three important elements of the definition which are 'availability', 'accessibility' and 'utility' of food. The chapter further pointed out that South Africa's food insecurity issues centre on national food security and household food security. The former issue is linked to production and the government's bias towards increased production as a solution to food insecurity, while the latter is linked to inaccessibility of the available food.

Ancillary to the above, the chapter further looked at 'access to food', its importance for food security and made mention of the fact that it is the government's responsibility to plan markets, distribution systems and economic activities in a manner that enhances people's access to food. Flowing from the aforementioned, the chapter then discussed the right to food, its entrenchment in the Constitution and the obligation placed on the state to progressively realise this right.¹ It was also mentioned that the right to food is recognised internationally as well, through treaties and resolutions.

The national policy and strategic framework was also discussed. The discussion focused on the IFSS, the Food Security Policy and the National Policy on Food and Nutrition Security; what the three strategies propose as solutions to food insecurity; the strategies' bias towards agricultural production and lastly, a critique of the policy and strategic framework was provided. There was also a brief discussion of local government and its potential link to food security. The discussion

¹ Section 27 of the Constitution.

looked at the links in general, as well as the links in the South African context. The section set out three reasons to argue that local government has various powers to enable it to play a role vis-à-vis food security such as, being custodians of land and being empowered to plan and manage the built environment; its ability to engage in localised strategic planning and its ability to use local laws in a manner that impacts markets and trade to influence food access.

Lastly, the importance of local food markets in enhancing food security was also explored. The link between fresh produce markets and informal traders was identified as one of the most important links, as informal traders ultimately avail fresh produce to the end consumers, especially the poor and marginalised populations.² Furthermore, it was argued that fresh produce markets enable increased consumption of fresh produce because they facilitate the flow of produce from the farmer to the buyer.³ Another importance of local food markets lies in the fact that they can serve as an outlet for farming households to sell their produce and earn money to buy food, they have the ability to build local economies, as well as to re-circulate money back into the local economy.⁴

The third chapter discussed the local government powers and functions. The constitutional objects and developmental objectives of local government were also set out.⁵ These objects and objectives are further echoed in the *White Paper on Local Government* and they oblige local government to create a conducive environment for social and economic development of communities.

Whilst local government has the constitutionally entrenched power to legislate over local government matters,⁶ the section argued that the absence of constitutionally entrenched definitions for the functional areas in Schedule 4 and 5 often creates confusion as to the extent to which local government (and the other two spheres) can exercise its powers. Furthermore, examples of the consequences of concurrency between ‘trade’ and ‘trading regulations’ and

² Chikazunga D & Deall S *The Role of Fresh Produce Markets in South Africa*, Southern Africa Policy Brief 4 (2008) 6 para 4.

³ National Agricultural Marketing Council *Fresh Produce Marketing in South Africa*, Report 2 (2000) 37.

⁴ See Wooten H & Ackerman A *From the Ground Up: Land Use Policies to Protect and Promote Farmers’ Markets* (2013) 7.

⁵ Section 152 and 153 of the Constitution.

⁶ Schedule 4B and 5B of the Constitution.

‘abattoirs’ and ‘municipal abattoirs’ were provided,⁷ together with the four strategies that may be used to alleviate the consequences of concurrency.⁸ The division of Schedule 4B and 5B powers between the two tiers of local government was examined next.⁹ The principal provisions that authorise the division of local government powers are set out in the Structures Act.¹⁰ Whilst district municipalities are specifically allocated functions in section 84(1) of the Structures Act and local government in section 84(2) of Structures Act, there are exceptions that enable the shifting of powers from a district municipality to a local municipality and vice versa.¹¹

Finally, the chapter discussed the limitations of/on local government’s exercise of power. National and provincial governments are allowed to set regulatory frameworks, which local government must adhere to when exercising its powers.¹²

3. FINDINGS

The main findings of this study stem from chapter four. What can be deduced from the findings is that different interests were involved in the discussions of markets and local government’s administrative and legislative role in regards to markets. The conversations were based largely around ‘who owns what’, ‘who is dominating what and when’, ‘what are the stakeholder’s interests’, ‘when is ownership handed over and to whom’ and all these factors affected how the discussions played out. The findings are summarised below.

Municipalities are generally sceptical to exercise executive and legislative power in relation to markets due to the problems and/or risks associated with the exercise of such power. These problems include the inability to provide financial resources for the implementation of by-laws due to municipal financial constraints, capacity constraints in the form of insufficient staff, inability to provide infrastructure and facilities necessary for the effective performance and operation of markets, a minimal municipal operating budget decreases the number of functions

⁷ Steytler N & Fessha Y *Defining provincial and local government powers and functions: The management of concurrency* (2007) 9-10.

⁸ The four strategies that can be used are: judicial interpretation, statutory definitions, negotiated definitions and administrative. See Steytler N & Fessha Y *Defining provincial and local government powers and functions: The management of concurrency* (2007) 12-21.

⁹ ‘Two tiers of government’ refers to district and local municipalities.

¹⁰ Sections 83(1),(2) and 84(1) of the Structures Act.

¹¹ Sections 84(3)(a) and 85(1) of the Structures Act.

¹² Section 155(7) of the Constitution.

that can be provided for, and uncertainty regarding the functions of local and district municipalities which often result in duplication of services, wastage of resources, unfunded mandates and blame shifting for non-fulfillment of functions.

There were concerns raised regarding the deteriorating state of infrastructure and facilities at fresh produce markets, as well as the lack of reinvestment for the maintenance of market infrastructure. Fresh produce markets, for example the Philippi Market, often do not turn out as planned. The lack of reinvestment is due to the fact that markets are not the core business of local government and as such, municipalities are not keen to partake in their up-keeping. The changing nature and priorities of local government also result in funds generated from fresh produce markets being used to provide other basic municipal services for communities.¹³ Furthermore, bureaucratic and financial problems experienced within municipalities were cited as factors that tend to hamper the effective management and operation of fresh produce markets.

The trends in the ownership and management models of markets showed that the separation of ownership from management was largely supported.¹⁴ It is believed that the separation will assist markets to achieve efficient business practices. However, it was found that municipalities are not well informed of the models, what the separation of ownership and management entails, what the implications of separation or non-separation of ownership and management are and how the implications may affect local government's exercise of power over fresh produce markets.

With regard to the presence of other players in the agricultural value chain, the pre-1992 scenario shows that at the time all fresh produce was sold and marketed through fresh produce markets only. The deregulation of the sector in 1992 has resulted in wholesalers and retailers entering the sector as well to sell produce that they are now permitted to purchase directly from the farmer. This has resulted in wholesalers and retailers in the agricultural sector growing at an alarming rate. The growth of the aforementioned role players is often to the detriment of the producers because wholesalers and retailers 'dictate' the purchase price to producers and this does not give the farmer space to negotiate, as he does when produce is sold at a fresh produce market. The growth is also detrimental to fresh produce markets because wholesalers and retailers that purchase produce directly from farmers undercut the market system and markets are unable to

¹³ Venter PM 'Understanding Fresh Produce Markets in South Africa' (2000) 3:16.

¹⁴ National Agricultural Marketing Council *Fresh Produce Marketing in South Africa*, Report 2 (2000) 22.

retrieve enough commission from the sales made to sustain the markets. Buyers are also affected because wholesalers and retailers often add margins to the produce they sell, meaning the produce costs more than the produce sold at fresh produce markets.

Whilst some wholesalers and retailers operate similar to fresh produce markets, they are not subjected to the same regulations that fresh produce markets are subjected to. These micro-markets are built and operate close to the market without municipalities taking any steps to regulate their establishment, despite the Constitution entrusting to local government the power to regulate trading activities within a municipality through the competence 'trading regulations' and section 84(2) of the Structures further affirming this constitutionally entrenched power. The outcome of these practices is that wholesalers and retailers have an unfair advantage as they operate without being regulated.

Municipal by-laws are applicable to municipal owned markets, to the exclusion of privately owned markets.¹⁵ Privately owned markets are often protected by by-laws and only derive protection from the APA Act. Furthermore, the legislation (by-laws and the APA Act) currently in place only regulates fresh produce markets, despite there being other micro-markets in and around the fresh produce markets that operate similar to fresh produce markets. The Mangaung fresh produce market by-law used as an example in chapter four did not have provision separating privately owned markets from municipal owned ones. Furthermore, the Constitution does not make a distinction between private or public markets when it entrusts local government with competency over markets. What is evident in this regard is that, all markets are a local government competence as per Schedule 5B of the Constitution. Regardless of being privately owned or being termed as 'micro-markets', local government may exercise executive and legislative authority over these markets.

The absence of legislation that regulates all the businesses/stakeholders that operate in the fresh produce value chain has the potential to hinder access to food. A farmer has no further protection should his agent fail to pay him on time, despite the APA Act stating the time periods for payment to be effected. The absence of protection may affect food production, which lessens the food available for sale and hampers food security.

¹⁵ See National Agricultural Marketing Council *Fresh Produce Marketing in South Africa*, Report 2 (2000) 27.

Chapter two and three of this paper provide information that aims to support the argument that through the regulation and management of fresh produce markets, local government can attempt to facilitate access to food and enhance food security. This is to say that local government should consider drafting new and improved by-laws, that perhaps include other local government competencies relevant to fresh produce markets; that will regulate fresh produce markets comprehensively; that link the regulation of fresh produce markets to the developmental objectives of local government and also address the issues and gaps that have the potential to hinder access to food. In response to this argument, commentators counter-argued that improved management and regulation of fresh produce markets is not going to solve the problems faced by markets and local government. The commentators argued that it is like the analogy of saying ‘new police uniforms are going to reduce crime’, the problem remains unsolved.¹⁶ What should be done instead is to look at all the players in the value chain and consider who the people are that the markets are distributing to. This will require interaction and linkages of farmers, markets, hawkers and the end user. A commentator further stated that better regulation of the entire value chain needs to take place, which would require regulation of the hawkers, the distributors and the farmers to collectively assist in food security.

In response to the argument that through improved regulation and management of fresh produce markets, local government can attempt to facilitate access to food and enhance food security, it was found that improved regulation and management is not the only solution. Instead, all the players in the value chain must be engaged and the most important consideration should be the people that the markets are distributing to and how to get food to them.

4. RECOMMENDATIONS

The discussions under section 5 of chapter two highlighted that local food market can contribute to addressing food insecurity as they bring fresh fruits and vegetables directly to communities, at reasonable prices. Municipalities should therefore take advantage of their powers to regulate and support fresh produce markets and further, take hold of the opportunity to use fresh produce markets as a platform to enhance food security.

¹⁶ Comment made by James Billy (Cape Town market) at the Roundtable on Local Government and Food Security (11 November 2015).

The argument that through improved regulation and management of fresh produce markets, local government can attempt to facilitate access to food and enhance food security guides the recommendations outlined below.

a) Realising the strategic importance of fresh produce markets

Municipalities should consider strategic approaches that recognise and respond to the specific challenges faced at the local community level and through this, also recognise the strategic importance of markets. This would require municipalities to provide for fresh produce markets in their IDPs and formulate policies that speak to the effective management of fresh produce markets with the aim to facilitate access to food. Funds would have to be allocated to fresh produce markets in the municipal operating budgets and their exercise of power over fresh produce markets would have to be aligned with the developmental objectives of local government and in the process. Furthermore, an assessment of the local economic development benefits that fresh produce markets may bring to local communities would have to be complete, to ensure that the economic objectives and priorities identified are realised.¹⁷

Furthermore, municipalities need to take strategic decisions about the institutional structure of fresh produce markets. For example, the issues around the management and ownership of fresh produce markets, educating themselves on the differences of the models and the implications of separation, how the management model inhibits or enhances local government's regulation of fresh produce markets, how the separation of the management and ownership hinders or increases the performance of the market and how the financial standing of a municipality determines the improvement and growth of a market.¹⁸

Municipalities should view fresh produce markets as an institution for marketing strategies that assist farmers to maintain financial viability, a space where small activity centres involved in the sale of fresh produce (sourced from the market) can emerge and facilitate food access, encourage agricultural activity within communities (as a platform for small scale farmers to enter the agricultural sector), which could encourage livelihoods (informal sector; subsistence farming

¹⁷ See Report of the Ministerial Interim Committee on the Restructuring of Fresh Produce Markets in South Africa (2009) 22.

¹⁸ For more on local government and the separation of management and ownership of fresh produce markets, see chapter 2 subsection 3.5 of this paper.

with a goal to sell the produce at the markets).¹⁹ Municipalities should build fresh produce markets into on-going businesses that benefit growers, local residents and the municipality itself. And in order to protect fresh produce markets, local government should devise strategies to ensure that encouraging and supporting the growth of supermarkets in communities does not undermine the viability of fresh produce markets.²⁰

b) Importance of regulating the trade practices in markets

The competence 'trading regulations' presents local government with opportunities to explore the scope of its legislative and administrative power. The Constitution empowers local government to regulate all trading that takes place within its jurisdiction. The trade of fresh produce takes place at markets, which are a local government competence and as such, may be regulated by local government. The national legislation discussed in section 6 of chapter four shows that national law does not fully regulate the fair business practices in markets. This leaves a gap for local government to regulate the activities not covered in the national legislation.

Regarding distribution and facilitating access to food, what one would like to see happen in practice are trading policies that encourage, assist and lubricate trade, instead of inhibiting it.²¹ Flowing from this, it is recommended that local government consider the following to streamline/enhance trading: first, the creation of bylaws that do not prevent access to trading areas; secondly, the reduction of red tape for informal traders applying for trading permits and thirdly, the creation of trade friendly by-laws that do not reduce small businesses' ability to distribute food.²² Municipalities should consider drafting by-laws that regulate fair trade at fresh produce markets; they may determine the operation times of the market, the activities permitted at the market, the activities prohibited at the market and also determine the interactions between the farmers, agents, market authorities and buyers at the market so as to address the issues of markets and food security comprehensively.

¹⁹ Montague M *Local Government and Food Security: An Evidence Review – What we know about what works and what might work* (2011) 3.

²⁰ See Montague M *Local Government and Food Security: An Evidence Review – What we know about what works and what might work* (2011) 15.

²¹ Haysom Gareth (AFSUN) at the Roundtable on Local Government and Food Security (11 November 2015).

²² James Billy & Allie Omar (Cape Town market) at the Roundtable on Local Government and Food Security (11 November 2015).

c) *Planning/location of markets*

Planning and the importance of land use management were mentioned in the earlier parts of the chapter two. Even the Food Security Policy proposed that local government should participate in addressing food security, as custodians of land and the built environment. To this end, literature also suggests that local government/municipalities can make a significant contribution to food security if they identify and prioritise prospective sites for the establishment of fresh produce markets, with the objective of increasing access to (healthy) food for all residents.²³

Municipalities should therefore consider public property as such schools, parks, transit stations and temporary street closures to locate/extend fresh produce markets.

In order to sustain farmers markets in low-income communities, the best strategy would be to establish farmers markets in locations that have a 'mixed-income' customer base. This entails 'locating farmers markets in highly mixed-income neighbourhoods or on the shared border of low-and-higher-income communities'.²⁴

It is further recommended that municipalities should integrate the location of markets into the transportation system.²⁵ This is to say that municipalities should plan transportation around fresh produce markets and vice versa. Therefore, municipalities should consider establishing/locating fresh produce markets on sites that not only allow for the use of a variety of transportation modes, such as bike, pedestrian and public transit access, but locations that can be accessed through various transport routes.

Access to food can be enhanced through the use of social welfare, food stamps and farmers market nutrition programme vouchers at fresh produce markets.²⁶ As mentioned under subsection 3.2 of chapter two, the use of such benefits can facilitate low-income households' ability to access food, therefore municipalities need to be wise about the location of markets and

²³ See Wooten H and Ackerman A *From the Ground Up: Land Use Policies to Protect and Promote Farmer's Markets* (2013) 9.

²⁴ Mikkelsen L et al *Healthy eating and physical activity: Addressing inequalities in urban environments* (2007) available at Prevention Institute <http://www.preventioninstitute.org/component/jlibrary/article/download/id-321/127.html> (accessed 17 June 2015).

²⁵ See Wooten H and Ackerman A *From the Ground Up: Land Use Policies to Protect and Promote Farmer's Markets* (2013) 11.

²⁶ Healthy Access Food Portal 'Farmers Markets' (2015) available at <http://www.healthyfoodaccess.org/retail-strategies/farmers-markets> (accessed 10 August 2015).

start planning the location of their markets in close proximity to the payout points where social welfare grants and food stamps are collected or distributed.

d) *Facilities and infrastructure*

Subsection 7.1 of chapter four above noted the importance of having well maintained infrastructure at fresh produce markets, such as (covered) stands used for the display of produce, electricity, water and sanitation in the form of running water and a sufficient number of bathrooms and spacious market halls to provide agents and consumers enough floor space to trade smoothly and effectively.²⁷ When regulating and managing fresh produce markets, municipalities should make sure that as many as possible of the fresh produce markets have water and sanitation, as well as properly maintained infrastructure.

The discussions in subsection 7.1 of chapter four suggest that fresh produce markets should have cold storage facilities to control temperatures in different sections of markets, in order to keep produce fresh.²⁸ Municipalities should attempt to ensure that there are sufficient cold storage facilities for each product type, prioritising produce that does not have long shelf life, for daily sales and short-term storage on the market premises. Ancillary to this, fresh produce markets should have ripening facilities on their market premises and also make sure that these ripening facilities are well maintained and improved on the market premises .

e) *Law and order*

Like any other retail space, buyers and sellers at fresh produce markets want a sense of security at the premises where trading takes place. To guarantee safety to people, stock and money at the markets, the market management, service providers and the municipality need to take measures to strengthen security and safety.²⁹ To ensure the safety of buyers using cash on the markets, best

²⁷ See California Certified Farmer's Markets and Farm Stands A Closer Look at State Law (2010) 2 available at http://changelabsolutions.org/sites/default/files/CACertFrmrsMkts_FctSht_20141106.pdf (accessed 10 August 2015)

²⁸ See California Certified Farmer's Markets and Farm Stands A Closer Look at State Law (2010) 3.

²⁹ Mogala M 'Codes of Best Practice for National Fresh Produce Markets' (2014) 12 available at http://www.apacweb.org.za/Codes%20of%20Best%20Practices%20for%20NFPMs%20Version%202.pdf&sa=U&ved=0CAOQFjABahUKEwiDyZXQhoniAhWi_XIKHbEYAkE&sig2=OBWYAr9YIYtzuEIMQFuqPw&usq=AFQjCNFOzbcmu4huKMIx90lwENbafyGt8A (accessed 25 May 2015).

practices provide that there must be visible security on a daily basis.³⁰ For example, municipalities should devise a ‘safety and security’ procedure, which outlines what should be done at the market in cases of emergency.³¹

Therefore, security at fresh produce markets should include close circuit TV cameras (CCTV) to cover the trading halls, cashiers points, platforms and cold storage areas, visible security guard(s)/officer(s) and active communication with the (metro) police by-law enforcement unit.³²

It is believed that the consideration of the above recommendations will help local government explore the scope of its administrative and legislative competence over the functions ‘markets’ (and ‘trading regulations’) and in doing so, contribute to find initiatives that enhance food security. In the long run, better management of markets could result.



³⁰ Mogala M ‘Codes of Best Practice for National Fresh Produce Markets’ (2014) 13.

³¹ For example, the Agriculture and Environmental Management Department at the Tshwane Fresh Produce Market sets out the following in their ‘safety and security’ procedure:

- I. ‘Handling of the least severe incidences to be performed by the security officer or market officials responsible for operations, within a reasonable time-frame;
- II. The more serious incidents to be captured and handled by the Director at the market, within a reasonable time-frame;
- III. The most serious incidents, which are likely to be life-threatening, to be handled as soon as possible.’

Agriculture and Environmental Management Department ‘Tshwane fresh produce market escalation procedures for security incidents’ (undated) 1 (Fresh Produce Market Division; City of Tshwane) available at http://www.tshwane.gov.za/tshwanemarket/Safety%20and%20Security%20Procedure/SafetyandSecurityprocedure.pdf&sa=U&ved=OCAsQFjAAahUKEwiDyZXQhoniAhWi_XIKHbEYAK&siq2=XPt2Ujxv8TmxPHfQCfH_2A&usq=AFQjCN_GlxqJkUp7X4iYsFvTISd8M56Yng (accessed 16 September 2015).

³² See Agriculture and Environmental Management Department ‘Tshwane fresh produce market escalation procedures for security incidents’ (undated) 1-2.

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