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The Employment Equity Act

Preparing for change

There are those who say that the old South Africa is alive and well in the workplace. The upper levels of many organisations remain white- and male-dominated. Left to market forces, 'transformation' proceeds at a snail's pace.

1999 sees the end of this chapter in our history. On 9 August – Women's Day – Chapter II of the Employment Equity Act 55 of 1998 comes into force, prohibiting unfair discrimination against any employee. And in December, Chapter III takes effect, requiring positive steps by medium and large employers to transform their workforce in a planned and systematic way.

Municipalities will be fully subject to the Act. Following is a brief preview of what will be required. Extensive changes and far-reaching measures, which could contribute significantly to the organisational effectiveness of municipalities, are called for. Preparing for this major transformation cannot start too soon.

Unfair discrimination

Chapter II of the Act prohibits unfair discrimination in much the same terms as the Labour Relations Act 66 of 1995 (LRA) does at present. It is by definition unfair to discriminate directly or indirectly in any employment policy or practice on the grounds of race, gender, disability, religion, political belief, HIV status or a series of other grounds mentioned in section 6, unless it can be shown that such discrimination is fair.

The list is not exclusive – discrimination is also prohibited on any other grounds which are shown to be unfair. For example, a requirement that employees should be above a certain height might be unnecessary or unjustified, and therefore unfair.

Discrimination on the listed grounds (eg race) is permissible only if it is (a) an affirmative action measure consistent with the purpose of the Act, or (b) based on 'an inherent requirement of a job'. Harassment of any kind is tantamount to unfair discrimination.

Complaints about alleged unfair dis-

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Editorial Board:
Johann Mettler (CLC)
Nico Steytler (CLC)
Shoots Naidoo (SALGA)
Thabo Mokwena (SALGA)

Editors:
Johann Mettler
Nico Steytler

Reporter:
Jaap de Visser

Contact
Johann Mettler/Nico Steytler
Local Government Project
Community Law Centre
University of the Western Cape
Private Bag X17
Bellville
7535
Tel: (021) 959 2950
Fax: (021) 959 2411
E-mail: jmettler@uwc.ac.za or
nsteyt@uwc.ac.za

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Preparing for change

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crimination must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA). If conciliation fails, matters may be referred to the Labour Court, unless both parties agree to arbitration by the CCMA.

In such disputes, the employee or workseeker complaining of unfair discrimination has only to establish that an act of discrimination has taken place. It is then up to the employer to prove that such discrimination was fair.

Employment equity plans

The Act not only prohibits future discrimination; it sets about undoing the results of past discrimination by requiring all 'designated employers' to draw up and implement 'employment equity plans'. Designated employers include medium and large employers in the private sector, as well as municipalities.

Employment equity plans must include 'affirmative action measures', designed to ensure that 'suitably qualified people from designated groups' are 'equitably represented in all occupational categories and levels in the workforce'. 'Designated groups' mean black people (ie, those formerly classified as African, Coloured or Indian), women and disabled people.

The Act spells out the process for drawing up and implementing an employment equity plan. The main features are -

1. Transparency. There must be consultation with representative trade unions, as well as employees from all occupational categories or their representatives, about the steps outlined below. All relevant information must be disclosed by the employer subject to the limitations of confidentiality as laid down in the LRA.
2. An organisational analysis. The employer must draw up (a) a profile of the workforce at each level, and (b) an analysis of all employment policies and practices as well as the working environment, to identify barriers to the employment or advancement of black people, women and disabled people.
3. A plan with deadlines. The plan should be based on the analysis and address the problems which have been identified. The Act sets out in detail what it must contain – for example, numerical targets for the employment of people from designated groups. Such targets are set by the employer in consultation with its employees, in contrast to quotas imposed by the state.
4. Reporting. Reports on progress must be submitted regularly to the Department of Labour.
   Municipalities with over 150 employees must report six months after Chapter III takes effect (ie in June 2000) and thereafter on 1 October of each following year.

Enforcement

The Act aims at promoting compliance rather than punishing non-compliance. The main trigger of enforcement will be complaints from trade unions or employees, which could lead to an inspection by the Department of Labour. If a complaint is found to be justified, a compliance order can be issued against the employer, subject to a right of appeal to the Director-General of Labour and the Labour Court.

Penalties of up to a maximum of R900 000 may be imposed for repeated failure to comply with the various requirements of drawing up and implementing an employment equity plan. The Director-General also has the right to review an employer's compliance with the Act.

Taking a broader view, however, the Act is more than a series of new duties. It is also an opportunity to engage in a process of organisational development which can reshape relationships among management and staff, unleash new synergies and lead to more effective service delivery.

Prof Darcy du Toit
Dean: Faculty of Law
UWC

The Employment Equity Consortium can assist municipalities to comply with the Act. The Consortium combines expertise in labour law, organisational development and human resource development. It offers a structured process based on each municipality's unique situation for designing and implementing an employment equity plan.
For more information contact Dena Lomofsky at PO Box 3260, Cape Town, 8000; Phone/ fax: 021 4611360 or email: wfutures@sn.apc.org

Municipal Structures Act

The Municipal Council

The municipal council receives ample attention in the Municipal Structures Act. The Act contains provisions on issues such as the election and removal from office of councillors, and the internal proceedings in, and the dissolution of the council. The Act also contains a Code of Conduct. This third part of our series on the Structures Act summarises chapter three of the Act that deals with the municipal council, discusses the Code of Conduct as well as the ward committees and the role of traditional leaders in municipal councils.

Election, appointment and removal from office

The Structures Act stipulates that each municipality must have a municipal council which must meet at least four times a year. The MEC determines in the 'section 12 notice' the number of councillors and which councillors can be designated by the council as full-time councillors. Councillors of local municipal councils, metro councils and district management area councils are elected according to a system of proportional representation. In other words, the parties that entered into elections are represented proportionally in the council. District councillors are elected partly by the voters in the district and are partly appointed by the local councils to represent the interests of those local municipalities. The term of office of councillors is five years (s 24). A by-election must be held if a court sets aside the result of a municipal election, if a council is dissolved, when there is a vacancy in a ward or when the Electoral Commission has not declared the result of an election in time.

A councillor has to vacate office when he or she:

- resigns;
- no longer qualifies to be a councillor - section 158 of the Constitution and section 21 of the Act deal with the (dis)qualifications of councillors;
- ceases to be a member of the political party that he or she was listed under at the time of election;
- contravenes a provision of the Code of Conduct and is removed from office in terms of that code;
- is a representative from a local council to a district council and ceases to be a member of the local council that he or she represents;
- is a representative from a local council to a district council and is replaced with another representative by the local council;
- was elected to represent a ward and -
  (i) ceases to be member of the party, which mark or symbol was used on the part of the ballot paper for wards; or
  (ii) becomes a member of a party, which mark or symbol was not used on the part of the ballot paper for wards (s 27).

Privileges and immunities

The privileges and immunities of councillors should be provided for by provincial legislation (s 28, see also s 161 of the Constitution). That legislation must at least give the councillors freedom of speech in the council and its committees. It must also deal with immunity from civil and criminal consequences for anything said by councillors in council or committee meetings. Until such legislation has been enacted, these two principles apply as they have been laid down in the Act.

Procedures

When conducting its business, the council must act in an open manner. It can only close its sittings if it is really necessary, and consistent with the values of an open and free democracy. The council can only vote on a matter if at least half of the councillors are present (s 30, see also s 160(3)(a) of the Constitution). Certain matters can only be determined by a majority vote of the councillors. That means that, with regard to those matters, a majority of all the councillors must vote in favour of a particular proposal before a decision can be taken. All those matters are listed in section 160(2) of the Constitution and concern:

- the passing of by-laws;
- the approval of budgets;
- the imposition of rates and other taxes, levies and duties; and
- the raising of loans.

All other matters are determined by a majority of the votes cast. That means that a majority of the councillors present in the council meeting must vote in favour of a particular proposal before a decision can be taken. Therefore, in a situation where only half of the councillors is present, a decision can be taken with only a quarter of all the councillors + 1 voting in favour. In the case of an equal number of votes, the presiding councillor must cast an extra vote.

The council must ask the opinion of its executive committee or executive mayor (if there is one) before it decides on one of the 'special' matters, mentioned above, and before it decides on the approval of an Integrated Development Plan (IDP) or the appointment of a municipal manager (CEO)/head of a department.

Delegation

The council can delegate powers and duties to the committees and persons listed in section 32(1):

- the executive committee;
- the executive mayor;
- metropolitan subcouncils;
- ward committees;
- other committees;
- elected office-bearers; and
- any municipal official.

The delegation must be in accordance with the Constitution and this Act. The council can always review a decision taken in consequence of a delegation. It must do so if 25 per cent of the councillors request it.

Dissolution

The council may dissolve itself, as long as it has been in office for a minimum of two years (s 34). It can also be dissolved by the MEC:

- as a consequence of a boundary determination by the Demarcation Board; or

- when an intervention in terms of section 139 of the Constitution has not resulted in the municipality being capable of doing its work. It is unclear what form of intervention has to precede the dissolution by the MEC (section 139 authorises different forms of intervention).

The MEC needs the concurrence of the Minister and the approval of the National Council of Provinces for dissolution of a council.

When a council is dissolved or does not have enough members for a quorum, the MEC can appoint administrators to ensure the continued functioning of the municipality until the council has sufficient members , or until a new council has been elected.

The speaker

Each municipal council must elect a chairperson who will be called the 'speaker'. The council can remove the speaker from office by resolution. Powers and duties can be delegated to the speaker by the council. Among other things, the speaker must preside over and ensure order in meetings, and also ensure that the council and its committees comply with the Code of Conduct (s 37).

The Code of Conduct for councillors

Schedule 5 to the Structures Act contains a Code of Conduct for councillors. The speaker of the municipal council must give each councillor a copy of this Code and make it available in every room where the council meets. In general, councillors must perform their duties in good faith, honestly, in a transparent manner, in the best interest of the municipality and without compromising the municipality's credibility or integrity.

Attendance at meetings

Councillors must attend meetings of the council or committees of which they are members unless they have obtained leave of absence or are required to withdraw from the meeting. The council can determine fines, but failure to attend three or more consecutive meetings must result in removal from office.

Personal interests

Councillors must disclose any personal interests in matters before the council or its committees and withdraw from meetings about such matters unless the council decides otherwise. Financial interests in businesses, partnerships, employment and remuneration, gifts above a certain amount, directorships etc must be made known in writing to the municipal manager (CEO). The council can decide to make those financial interests public. Full-time councillors are not permitted to engage in any other paid work without the consent of the council.

Personal gain

Section 6 of the Code of Conduct forbids councillors to use their position, privileges or confidential information for private gain for themselves or other persons. Without prior consent of the council, a councillor may not:

- be a party to or a beneficiary under a contract for -
  - (i) the provision of goods or services to the municipality; or
  - (ii) the performance of any work other than as a councillor for the municipality;
- obtain a financial interest in any business of the municipality;
- appear on behalf of any other person before the council or a committee in return for a fee or other consideration.

A councillor may not use, take or acquire or benefit from any property or asset owned, controlled or managed by the municipality to which that councillor has no right (s 12).

Bribery

Councillors may not request, solicit or accept rewards, gifts or favours for activities such as voting in a particular manner, persuading the council, making a representation to the council or disclosing confidential information (s 9).

Confidentiality

Without the consent of the council, councillors are not allowed to disclose privileged or confidential information to unauthorised persons (s 10). 'Privileged or confidential' is information -

- that is declared so by the council, a committee or by law;
- that has been discussed in a closed session by the council or a committee; or
- disclosure of which would violate a person's right to privacy.

This does not derogate from the right to access to information in terms of national legislation (ie s 32 of the Constitution and the forthcoming Open Democracy Bill).

Administration

A councillor may not interfere in the administration of any of the municipality's organs (unless mandated by the council) or instruct any employee of the council without authorisation. Councillors may not obstruct the implementation of any council or committee decision or behave in such a way that would contribute to maladministration in the council.

Consequences of a breach of the Code

There are three organs or persons that can instigate an investigation into an alleged breach of the Code.

1. The Speaker

If the Speaker suspects a breach of the Code of Conduct, he or she has to investigate, allow the councillor concerned to respond to the allegations and report the matter to a council meeting. This report is open to the public. The MEC should also be informed of the outcome of the investigation.

2. The council

The municipal council can investigate and make a finding on an alleged breach of the Code. It can also establish a special committee to investigate and make recommendations to the council.

The council can punish a councillor by:

- issuing a formal warning;
- reprimanding the councillor;
- requesting the MEC to suspend the councillor;
- fining the councillor; or
- requesting the MEC to remove the councillor from office.

Councillors can appeal to the MEC against a warning, reprimand or fine and the MEC can, after hearing both sides of the story, confirm or change the decision taken by the council.

3. The MEC

The MEC can appoint a person or committee to investigate any alleged breach and to recommend whether or not the councillor should be suspended or removed from office. If the MEC finds that there was a breach, he or she can either suspend the councillor or remove the councillor from office.

Any investigation into a breach of the Code by a councillor or traditional leader

Act

should be in accordance with the rules of natural justice (s 14(7)). That means that a 'fair hearing' must take place - the councillor concerned should be notified of the intended action to be taken against him or her and he or she should be given a proper opportunity to be heard .

Ward committees

Certain types of local and metropolitan municipalities can have ward committees. The object of ward committees is to increase the participation of citizens in local government. The ward committee serves as an advisory forum on matters affecting its ward. It can make recommendations to the ward councillor and, through him or her, to other organs of the municipality. The municipal council can delegate other duties and powers to the ward committee. If a ward committee fails to fulfil its objectives, it can be dissolved by the council (s 78).

A ward committee consists of the councillor that represents that ward in the municipal council and not more than 10 other persons, who must reside in the ward. The latter are unpaid committee members. The metropolitan council or the local council must regulate how the unpaid committee members are elected, taking into account the need for women to be equitably represented and the need for a diversity of interests in the ward committee (s 73).

Traditional leaders

The role of traditional leadership in the council is twofold:

- traditional leaders have the right to participate in the proceedings of the council; and
- traditional leaders have the right to address the council on a matter that concerns their area.

The MEC must identify, along the procedure set out in Schedule 6 to the Act, which traditional leaders are allowed to attend and participate in the meetings of the district or local council concerned (s 81). The number of traditional leaders that may participate may not exceed 10 per cent of the total number of councillors. If a number larger than that has been identified, the MEC can determine a rotation system allowing them all to participate. The MEC can regulate their participation and prescribe a role for traditional leaders in the affairs of the municipality. Before a district or local council takes a decision that affects the area of a traditional authority, the leader of that authority must be given the opportunity to express a view on the matter.

The Code of Conduct

Most of the rules in the Code of Conduct apply to the traditional leaders who participate in proceedings of the council. The council may investigate any alleged breach of the Code by a traditional leader and issue a warning or request the MEC for suspension or cancellation of the traditional leader's right to participate in the proceedings. The MEC can appoint a person or committee to investigate a breach by the traditional leader. He or she can decide to suspend or cancel the right to participate. However, after suspension or cancellation, the traditional leader still has the right to address the council on matters affecting the area of traditional authority.

Assessment and challenges

The Structures Act introduces a number of important new aspects regarding the municipal council. Most notably is perhaps the Code of Conduct for councillors, which will serve as a tool to fight corruption and mismanagement at local level. Another important issue is the possibility for the MEC to dissolve the council after an unsuccessful intervention, made in terms of section 139 of the Constitution. Special provision had to be made in the recent amendment of the Constitution (Act 65 of 1998, see *LGL Bulletin* 1999 (1) 7) to ensure the constitutionality of this provision. The introduction of a Speaker in the council has prompted the Cape Metropolitan Council to argue in their challenge of the Act before the Cape High Court (see *LGL Bulletin* 1999 (1) 10) that this deals exhaustively with a matter falling within the scope of the council's exclusive power to make by-laws regulating their own internal affairs (s 160(6) of the Constitution). Also noteworthy is the consequence of the Structures Act for municipal budgets - after the Act has come into power, budgets will no longer need a two-thirds majority, as is presently the case under the LGTA. A simple majority of the council members will suffice for a budget to be passed.

Jaap de Visser
Local Government Project
Community Law Centre, UWC

DEMARCATION

On 28 June 1999, the Municipal Demarcation Board issued an integrated framework of nodal points for metropolitan and district council areas. What follows is an extract from the report dealing with only one aspect of urban demarcation.

Possible metropolitan nodal points

The Board considered the possible nodal points for metropolitan areas and in realising the significant differences between them in terms of size, scale and intensity of economic activity, believes they may be classified into four distinct groups:

- Nodal points which should definitely be considered as metropolitan areas: Greater Johannesburg, Cape Town, and Durban fulfil all the requirements of being classified as category A municipalities and should be declared as such by the Minister;
- Nodal points which should probably be considered metropolitan areas: Greater East Rand and Pretoria fulfil in large measure all the requirements of being classified as a category A municipality and should probably be considered as category A municipalities.
- Nodal points which could possibly be considered as a metropolitan area: Greater Port Elizabeth fulfils in large measure many of the requirements of being classified as category A municipalities, but does not score as highly as the 'definites' and 'probable' urban conurbations.
- Nodal points which should simply be regarded as aspirant metropolitan areas: The analysis indicates that Greater Vereeniging, Bloemfontein, East London, Pietermaritzburg and Richard's Bay are not in the same league as the urban conurbations analysed above and should not be considered as metropolitan areas.

Finally, for purposes of proper definition as a nodal point, the Board has suggested the actual nodal point to be declared by the Minister as the nearest intersection to the main civic centre of the urban conurbation under consideration.

The process of municipal demarcation has begun in all earnest and all interested parties must take the opportunity to study all proposals and comment extensively thereon.

Municipal Police

Towards a safer environment

Visible policing has long been considered as indispensable in the fight against crime and lawlessness. Quick-fix solutions, such as rent-a-cop schemes, were put forward as the answer. With the passing of the South African Police Services Amendment Act 83 of 1998, the legal framework has been created for the establishment of municipal police services. The Act, which came into operation on 1 January 1999, gives effect to section 206(7) of the Constitution which requires that national legislation must provide for a framework for the establishment, powers, function and control of municipal police services. The establishment of municipal police services can rightly be seen as giving effect to some of the objectives of local government stated in section 152(1) of the Constitution - the promotion of a safe and healthy environment and the provision of services in a sustainable manner.

The Act intends to govern all aspects of municipal policing. A municipality may thus not establish a municipal service with the word "police" in its name, unless it has been established in terms of this Act.

Background

The interim Constitution of 1993 made provision for municipal police services. When the South African Police Services Act 68 of 1995 was enacted, it contained one short section setting out the broad framework for the establishment of municipal and metropolitan police services. The national Minister of Safety and Security and the National Commissioner of the South African Police Service were the principal decision-makers with no role for the provinces.

A National Task Group on Municipal Police Services was formed at the end of 1995 to report on key issues relating to municipal police services. The Task Group consisted of representatives of the Departments of Justice, Safety and Security, Constitutional Development, the Local Authority Security Association, Organised Local Government Interim Committee, the Institute of Traffic Officers, the Institute of Town Clerks of Southern Africa and some NGOs. The Department of Safety and Security and the Task Group drafted a Bill that was published for comment. After a process of consultation and debate, the Bill was finally adopted as the South African Police Service Amendment Act 83 of 1998.

This Amendment Act should be seen in light of the Draft White Paper on Safety and Security, published in May 1998, which proposed that local government, because it is the closest to the people, should actively participate in social crime prevention initiatives and redirect the provision of services to facilitate crime prevention. It is thus said that crime prevention programmes are most likely to be effective if they are developed in the areas where crime occurs.

... the new function of crime prevention allows municipalities to play a much more active role in making their cities and towns safe

Functions

The functions of a municipal police service are -

- traffic policing;
- the policing of municipal by-laws and regulations; and
- the prevention of crime.

A municipal police service is thus more than a municipality's traffic department or law enforcement agencies. While traffic policing remains an important function of a municipal police service, the new function of crime prevention allows municipalities to play a much more active role in making their cities and towns safe. By establishing a municipal police service, a municipality can focus on co-ordinating a wide range of crime prevention strategies. These include: providing visible policing, co-ordinating local policing initiatives, including crime prevention strategies in planning and services provision, and experimenting with innovative crime prevention strategies.

Powers of a municipal police service

The powers of members of a municipal police service are conferred by law or may be assigned by the Minister of Safety and Security. These include powers of arrest and, by assignment, powers of seizure.

Every municipal police officer is a peace officer and may thus exercise the powers of a peace officer within the area of the municipality. The most important power of a municipal police officer is that, by virtue of being a peace officer, he or she has the power of effecting an arrest. An arrest may be effected only within the boundaries of the municipalities. However, where a municipal police officer is pursuing a person who is reasonably suspected of having committed an offence, and the pursuit began within the area of the municipality, then the officer may arrest that person outside the municipal area. A municipal police officer may also exercise his or her powers in another municipality where it is done in terms of an agreement with the other municipality. Upon arrest, the powers of a municipal police officer are limited. The arresting officer must, as soon as possible, bring the arrested person to a police station under the control of the South African Police Service.

Additional powers may be given to municipal police officers by the Minister of Safety and Security. If such a power includes the power to seize an article, the officer must forthwith deliver the seized article to a member of the South African Police Service. In terms of regulations promulgated on 11 June 1999 (*Government Gazette* no 20142, see page 10), extensive powers of search and seizure under a number of statutes have been granted to municipal police officers. Under the Criminal Procedure Act 51 of 1977, such officers have the power to search and seize with or without a search warrant. They may enter premises for the purpose of interrogating a person who is reasonably suspected of having information about an offence. Where they may lawfully search a person or premises, they may use such force as is necessary to

Services

overcome any resistance against the search. They may also take finger-prints, administer breathalyser tests and cause blood samples to be taken. Under the Drugs and Drug Trafficking Act 140 of 1992 municipal police officers have extensive search and seizure powers with regard to drugs. In terms of the South African Police Services Act 68 of 1995 municipal police officers may set up roadblocks. They also have extensive arrest powers under the Domestic Violence Act 116 of 1998.

Establishment

A municipality may apply to the provincial Member of the Executive Council (MEC) for Safety and Security for the establishment of a municipal police service for its area.

Before the MEC may give approval, a municipality must be able to show that the following requirements have been met:

- it has the resources to provide for a municipal police service which complies with national standards on a 24-hour basis;
- its traffic policing services will not be prejudicially affected by the establishment of the police service;
- it has made proper provision to ensure civilian supervision of the police service;
- the establishment of the police service will improve effective policing in that part of the province.

The regulations of 11 June 1999, issued by the Minister of Safety and Security, describe in detail the information that an application must contain with reference to the above requirements.

Before approving an application, the MEC must consult with the National Commissioner of the South African Police Service and the metropolitan council if the municipality falls within a metropolitan area. (The latter requirement will fall away under the new Municipal Structures Act 117 of 1998 as metropolitan substructures as independent municipalities disappear. See *LGL Bulletin* 1999 (1)10). Furthermore, the MEC must get the approval of the MECs for local government, finance, transport and traffic matters. Again, the regulations of 11 June 1999 issued by the Minister of Safety and Security prescribe in detail the application procedure and time frames within which an application should be dealt with by the province and the National Commissioner.

As the municipality has to carry all expenditure with regard to the establishment, maintenance and functioning of a police service, the availability of financial resources will be an essential precondition for approval. The MEC may also determine the conditions under which approval will be granted.

... the availability of financial resources will be an essential precondition for approval.

Structure

As with all other services, the chief executive officer (CEO) of a municipality is responsible to the municipal council for the functioning of the municipal police service. The council must, however, appoint a fit and proper person as executive head of its police service. This person exercises control over the police service subject to national standards and the directives of the CEO.

Executive head

In particular the executive head is responsible for -

- maintaining an impartial, accountable, transparent and efficient municipal police service;
- the recruitment, appointment, promotion and transfer of police service members;
- the discipline of the police service; and
- ensuring that the municipality's traffic policing services are not prejudicially affected by the establishment of the police service.

An important duty of the executive head is to develop an annual plan that sets out the priorities and objectives of the police service. In so far as the plan deals with crime prevention, it must be developed in co-operation with the national Police Service. The annual plan must be ready before the end of the previous financial year. The regulations issued on 11 June 1999 also describe in detail the requirements that the annual plan must meet, and the process that should be followed for its approval.

The executive head also plays an important role in liaising with the community through structures established for this purpose. He or she represents the municipal police service on every local policing co-ordinating committee or community police forum in the municipality. While a local policing co-ordinated committee may be established by a Provincial Commissioner of the South African Police Service after consultation with the MEC for Safety and Security, a community police forum, representative of the local community, must be established at every police station. The establishment, composition, functions and duties of policing co-ordinating committees are set out in the regulations of 11 June 1999.

Municipal Council

The Council is responsible for the overall functioning of the police service. Any legal proceedings instituted against the police service or a member of the service, must be instituted against the council. The time period in which an action must be instituted is not governed by the South African Police Services Act, but by the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970. Whereas the South African Police Services requires that an action be instituted within a 12 month period, in the case of a municipal police service, the period is 24 months.

Civilian control

One of the requirements for approval for the establishment of a municipal police service, as indicated above, is that proper provision is made to ensure civilian supervision of the police service. A municipal council must appoint a committee whose

task it is to ensure civilian oversight of its police service. The committee must consist of councillors and other persons determined by the council. It is suggested that such persons should not be in the employ of the municipality, but should represent the broader community of the municipality.

The committee performs important tasks. Firstly, it must advise the council, at the council's request, on any matter relating to the police service. It must also advise the CEO with regard to the performance of his or her functions in respect of the police service. Secondly, it must promote accountability and transparency in the police service. This it can do by monitoring the implementation of policy and directives issued by the CEO, evaluating the functioning of the police service, and reporting on these activities to the council or CEO. Thirdly, the MEC, the council or the CEO may add further functions that they consider necessary or expedient to ensure civilian oversight of the police service. The council or CEO may also assign further functions to the Committee.

National standards and supervision

The national government plays an important role in the day-to-day functioning of municipal police services by issuing regulations and setting national standards for municipal police services, and monitoring whether they are complied with. These standards may include, in addition to the training prescribed for traffic officers, training requirements for municipal police officers.

Regulations

The Minister of Safety and Security may make regulations regarding the effective functioning of municipal police services. Draft regulations must be published in the *Government Gazette* for comment for a period of at least 60 days. The first draft regulations were published for comment in February this year. After receiving feedback, the first set of regulations dealing with the requirements for the appointment of members of municipal police services were promulgated on 11 June 1999 (*Government Gazette* no 20142).

Requirements for appointment as a municipal police officer

The requirements for appointment as a member of a municipal police service include having obtained a senior certificate or equivalent qualification, having no previous criminal convictions, and being proficient in English. However, the National Commissioner may, upon the recommendations of the executive head, waive these requirements in the interest of the effective functioning of a municipal police service.

Determining national standards

When determining national standards, the National Commissioner of the South African Police Service must first publish a draft in the *Government Gazette*, inviting all interested parties to submit, within a period of not less than 60 days, comments regarding the proposed national standards. This provides municipalities with a valuable opportunity to participate in formulating national standards. The first draft national standards have been published for comment on 11 June 1999 (See page 10). After considering any submission, the Commissioner may promulgate national standards in the *Government Gazette*.

... the national Minister of Safety and Security may intervene directly in the municipality by issuing a directive to the municipality to comply with national standards

National Training Standards

In the *Government Gazette* of 11 June (no 20142) the National Commissioner set out the National Standards regarding the training of members of a municipal police force. In order to qualify for appointment as a member of a municipal police service a person must have successfully completed the following:

- the training required for registration as a traffic officer as prescribed in terms of the Road Traffic Act 29 of 1989 and be registered as a traffic officer; and
- training at a training institution accredited by the SAPS in nineteen modules which include criminal law and procedure, the use of force, selected fire-arm skills, prevention of police corruption and departmental forms.

A person may be exempted from any of the modules that he or she has covered in his or her prior learning. Such exemptions will be made in terms of the prescribed evaluation measurements set in accordance with the approved learning programme of the National Commissioner.

Emphasis is also placed on continuous in-service training every year. A member must receive at least two days (16 hours) refresher training in selected fire-arm skills, practical survival and physical education. Amendment to the law and procedure relating to the exercise of policing powers and the performance of duties must be brought to the attention of every member during regular mustering or staff meetings at least once per month.

Supervisory powers of the National Commissioner

The National Commissioner must ensure that national standards are maintained. To this end he or she may request and obtain information and documents from a municipal police service or the municipality. Furthermore, the National Commissioner may enter any building or premises under the control of the municipal police service or municipality. Overall, in executing this duty, the National Commissioner is entitled to all reasonable assistance from the municipal police service and any employee of the municipality.

Where a municipal police service has failed to maintain national standards, the National Commissioner must report this to the national Minister of Safety and Security. The national Minister may then request the relevant MEC to intervene in the municipality in terms of the provisions of section 139 of the Constitution on the basis that the municipality has not fulfilled an executive obligation which, in this case, is the maintenance of national standards. For a full explanation of the provisions of section 139, see page 11. If the MEC fails to intervene as requested, the national Minister of Safety and Security may intervene directly in the municipality by issuing a directive to the municipality to comply with national standards.

Provincial supervision

The first line of supervision is likely to be the provincial government. Supervision relates to two aspects of municipal policing. The first is whether or not the municipality has complied with the conditions set out for the establishment of the municipal police service, while the second is the maintenance of national standards.

MEC's monitoring powers

In order to execute the supervisory duty, the MEC has similar powers as the National Commissioner. He or she, or an official of the provincial secretariat designated by the MEC in writing, may request and obtain information and documents under the control of the municipal police service of a municipality. He or she may also enter any building or premises under the control of the municipal police service or municipality, and is entitled to all rea-

sonable assistance from the municipal police service and any employee of the municipality.

MEC's powers of intervention

If the MEC is satisfied that the municipal police service has failed to comply with the conditions of establishment or national standards, he or she may, by written notice, inform the municipal council of the failure and direct that the municipal police service complies with the conditions or national standards within a set period of time. If the municipal council fails to comply with this notice, the MEC may, after consulting with other relevant MECs, appoint a provincial government official as administrator of the municipal police service. The responsibility of the administrator is to ensure that the municipal police service complies with the conditions or national standards. The administrator then exercises all powers and performs all duties of the executive head of the municipal police service. If the MEC is satisfied the failure has been remedied, he or she may terminate the appointment of the administrator. It is important to note that the municipality carries the cost of all expenditures incurred by the MEC in connection with the intervention.

The procedure of intervention, prescribed by the Act, should be applied in the light of the general provisions of section 139 of the Constitution, as outlined on page 11. The procedural safeguards contained in that provision should thus be complied with.

Transitional arrangements

The Act contains a number of important transitional arrangements that allow for continuity between existing municipal police services and the establishment of new services and meeting the new training requirements.

Durban City Police

The position of the only existing municipal police service, the Durban City Police, is dealt with specifically in the Act. This police service will continue to exist until 30 September 1999 and if an application for the establishment of a municipal police service is lodged before that date, the Durban City Police will continue to exist until the application is either approved or disapproved.

Existing traffic officers

When a municipal police service is established, existing traffic officers may be appointed as members of the municipal police service even though they do not comply with the training requirements set out in the national regulations. Such persons have, however, four years within which they must successfully complete a training course that complies with the requirements determined by the National Commissioner.

The question that has to be asked is whether or not municipalities will be able to afford this service

Renaming services

Municipalities should have changed the name of any municipal service that includes the word "police" by 1 January 1999, unless it was a municipal police service when this Act came into operation.

Evaluation

The vital role that local authorities can and must play in making South Africa's cities and towns safer places to work in and live in, is undeniable. The question that has to be asked is whether or not municipalities will be able to afford this service. While municipalities must carry the full burden of any municipal police service, the national government sets national standards and imposes regulations for the effective functioning of municipal police services. Should there be over-regulation which makes it difficult for a medium to small municipality to meet the criteria for establishment and the cost of training, the local component of the overall national crime prevention strategy may not come off the ground. It is thus critical that national standards determined by the National Commissioner and the regulations promulgated by the Minister of Safety and Security are reasonable in the light of the resources of the wide array of municipalities which make up local government.

Nico Steytler
Local Government Project
Community Law Centre, UWC

This issue deals mainly with four noteworthy topics. Municipalities are well advised to take cognisance of the rapidly changing legislation in these areas and, where necessary, to act proactively.

The first topic is employment equity. Municipalities, as designated employers, will have a legal duty to implement the provisions of the Employment Equity Act. Of utmost importance is the drawing up and implementation of an employment equity plan by each and every municipality. The process of the transformation of the workplace will take giant leaps forward with the implementation of legislation on 9 August 1999 and in December this year.

The second topic deals with the issue of municipal policing. By law, municipalities are empowered to establish their own police services. On 11 June 1999, national training standards were proclaimed as were regulations governing the application to establish a municipal police service. In addition, proposals for national standards have been issued for comment. Comment must be submitted by 12 August 1999. However, by far the majority of municipalities will, due to financial constraints, not be able to fund such a service. Important issues therefore arise. Will a safer environment become the privilege of a few? Will poorer municipalities be financially assisted to establish such services? Do the draft national standards adequately address all of the issues necessary for establishing an accountable service? Comments on these and other matters are essential.

A thorny issue is that of provincial intervention into the affairs of municipalities. The current draft of the Municipal Systems Bill contains detailed provisions for such interventions. Organised local government has made substantial input into the draft and when the bill is eventually published, the general public and other interested parties must make full use of the opportunity to contribute to this fast evolving area of intergovernmental relations.

Finally, the restructuring of local government stepped up one gear with the issuing by the Demarcation Board of the all important draft framework of nodal points for metropolitan and district council areas. Opportunities to comment will flow thick and fast during the next few months. All role-players are urged to keep abreast of developments and use all fora, including the pages of the *LGL Bulletin*, to make their voices heard.

National Standards for a Municipal Police Service

An invitation for comment

On 11 June 1999, the National Task Group on proposed Municipal Police Services, appointed by the Minister of Safety and Security, published draft National Standards (*Government Gazette* no 20142) for general information. Comment from interested parties is required by 5 August 1999. The Standards deal with two matters: the aspects of the internal organisation of policing and the exercise of powers of search, seizure and arrest.

Departmental Forms

Every municipal police service must maintain a high level of documentation of its policing activities. For example, every municipal police officer must carry a pocket book in which daily events are recorded, and every municipal police service office must maintain an occurrence book. These requirements are similar to those of the SAPS standing orders. The use of standardised departmental forms, the National Standards say, is "essential to facilitate the exchange of information between the South African Police Service and municipal police services". This also ensures uniformity in the organisation of police services.

The departmental forms that a municipal police services must use, include the following:

Pocket book

While a member is on duty he or she must record in a pocket book all occurrences which are noteworthy. The book would then reflect the extent of the member's work and the measure of his or her diligence. After effecting an arrest, for example, a member must enter detailed information, including whether the arrestee has been informed of his or her constitutional rights upon arrest. All information about crime prevention actions must also be recorded. The officer in charge of a municipal police service office must inspect the pocket books of all members under his or her command on a weekly basis.

Occurrence book

An occurrence book must be kept in every municipal police service office where all noteworthy occurrences in that office are recorded. The commander of the office must inspect the book on a daily basis.

Other forms that must be used are:

- Arrest statement;
- Computer circulation of stolen, lost or found property;
- Property Acknowledgement of Receipt;
- Search register;
- Application for a warrant to search and seize;
- Circulation of particulars of persons; and
- Circulation of missing/unidentified persons.

Municipalities must obtain these printed forms from the Government Printer by placing a request with the Head: Logistics South African Police Service. They are, however, directly responsible for payment to the Government Printer.

Definition of powers

The National Standards contain a very useful outline of the powers of search and seizure, but reflect no more than what the law, including the Constitution, requires. The Standards are thus not standards from which any municipal police service can deviate. Therefore, comment on these Standards would serve little purpose. These Standards are nevertheless very useful because they set out the relevant legal rules in a clear and understandable manner.

Crime scenes

The National Standards lay down general guidelines for actions to be taken on the scene of a crime, to ensure that this valuable source of evidence is secured. The emphasis is on guidelines - setting out the best practices of a professional police service.

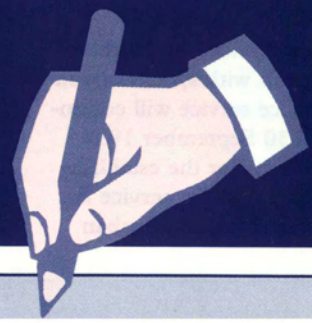
Comment

The effect of these National Standards will be that there will be uniformity between the various police services in the country with respect to their internal organisation and the application of the important powers of arrest, search and seizure. The National Standards are only minimum standards and any municipal police service may require higher standards. Of course, the question remains as to whether or not any but the larger metropolitan councils will be able to meet these requirements.

An important aspect of policing that has been omitted from the National Standards is the use of firearms. While the law on the use of deadly force is at present unsettled, urgent attention should be given to provide proper guidelines in this vital area.

Comments should be addressed, before 5 August, to:
The Chairperson
National Task Group
Attention: Adv. A Brink
P O Box 5306
PRETORIA 0001

Fax: (012) 339 1748



Provincial intervention

The principles and rules

Section 139 of the Constitution authorises the provincial executive to intervene in a municipality when it does not fulfil an executive obligation in terms of legislation. This article seeks to introduce the rules and principles that can be derived from the Constitution.

Context: provincial monitoring and support of local government

The basis of the power of the province to monitor local government is set out in section 155(6) of the Constitution where it provides that

"(e)ach provincial government ... by legislative or other measures, must provide for the monitoring and support of local government in the province."

Under the heading *Provincial supervision of local government*, section 139 provides for intervention. But section 139 covers more than just the provincial executive taking remedial action. It also includes a process, whereby the province reviews and monitors the actions of municipalities. Thus, section 139 has two components. The first one is the process of provincial review of the actions of local government in order to measure the fulfilment of its executive obligations. The second one is a process of correction should local government fall short of its obligations. In *In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) para. 120 the Constitutional Court identified five successive steps in the process of supervision:

(a) the review or monitoring of local government by the provincial executive;
(b) the identification of the non-fulfilment of executive obligations by the provincial executive;
(c) the intervention by the provincial executive;
(d) the review by the National Council of Provinces (NCOP) of the assumption of responsibility of an executive obligation by the provincial executive;
(e) the managing and termination of the assumption of responsibility by the provincial executive.

What does the power to review and monitor entail? At present, various Acts of Parliament set out measures that may be used to monitor performance. These measures are useful indicators of the content of the powers to review and monitor. They range from a mere request for information to an intrusive power to enter buildings and seize documents.

Request for information

A fairly evident measure in terms of monitoring is the request for information. In many cases, local authorities are compelled by legislation to supply information to different organs. For example, the Health Act 63 of 1997 obliges the Medical Officer for Health of a local authority to submit reports to the national-, provincial- and local authorities.

Right to access sources, places and persons

More intrusive is the right of the monitoring authority to have physical access to the records, books and other documentation of a local authority or to interrogate persons. For example, the Fire Brigade Services Act 99 of 1987 allows the Chief Fire Officer to enter any premises under his or her jurisdiction in order to determine whether the Act is complied with.

Right to assistance

The power to monitor and review also entails that the institution that is being monitored must render reasonable assistance to facilitate the supervising authority in exercising this power. In that vein, the Auditor-General Act 12 of 1995 requires that suitable office accommodation and other facilities be made available for the duration of the audit.

Interventions as a result of monitoring

These examples of monitoring measures also make provision for intervention by a competent authority when conditions are not complied with. The Health Act provides that the Minister may, in some cases, intervene by taking over powers of the local authority.

These examples of measures of monitoring can often be very intrusive and pose a threat to the autonomy of local government. Most of the current legislation still dates from the old order where local government was the lowest of the three tiers of government. The current system of municipal monitoring by a province is fragmented. Each piece of legislation concerning a municipal competence has its own monitoring mechanism. There is a need for a uniform and effective intervention scheme. The legislation in terms of section 139(3) currently forms part of the draft Municipal Systems Bill that will be published in bill form shortly. A set of principles that has guided the drafting of this legislation, and that should guide the implementation of it, can be identified. These principles relate to the requirements for intervention, the procedure before intervention, the procedure after intervention and the powers of the province after the assumption of responsibility.

Requirements for intervention

The requirements for intervention are as set out in the first part of section 139(1) of the Constitution that reads:

"When a municipality cannot or does not fulfil an executive obligation in terms of legislation, the relevant provincial executive may intervene..."

Failure in fulfilling what?

The basis of the obligation must be in legislation. This includes the Constitution, Acts of Parliament, provincial Acts and by-laws. Other subordinate legislation, such as national and provincial regulations also qualify as legislation. Directives and standing orders do not, however, qualify. In the case of Butterworth, the Eastern Cape provincial executive pointed at the general objectives of local government (s 152 of the Constitution) and invoked section 139 on the basis of failure of Butterworth to fulfil these objectives. However, section 152 contains merely objectives, not statutory obligations. Reference to failure in meeting these general objectives is not sufficient to invoke section 139. The Constitution particularises the type of obligation that must be fulfilled. It must be an *executive* obligation. Section 139 is not concerned with a municipality's legislative authority but rather with the *execution* of those and other decisions. The fact that section 139 refers to *an* obligation suggests that the

province must indicate precisely which executive obligation is not being fulfilled. There is no need for a total collapse of a municipality before a province may intervene. Non-fulfilment with respect to a single identifiable obligation is sufficient for intervention.

Who or what fails?

Section 139 stipulates that failure of *a municipality* may lead to intervention. In the Constitution, the council is regarded as having the highest authority and therefore the province must direct itself to the council to correct any wrongdoings. The council is the only body that is accountable to the province in the context of section 139. The focus of a section 139 enquiry is therefore conduct of the municipal council whether directly or through inaction by not giving proper direction to or exercising proper control over the CEO.

Failure to perform

When a municipality *cannot or does not* perform, it may lead to intervention. The inability to perform may even be a result of a lack of resources. But the only thing that is really important in this context is the failure to meet certain standards. What is the yardstick? Because clearly, all municipalities do not have the same resources and can consequently not all fulfill the same obligation to the same extent. Section 139(1)(b) mentions *essential national standards* and *established minimum standards for the rendering of a service*. Therefore, the failure to meet minimum standards may give rise to an intervention. A 100 % fulfilment is not required.

Province's duty to support

The lack of performance by a municipality could be the result of the failure of the province to fulfil its obligation to support. Can a municipality challenge the intervention by arguing that the intervening province did not 'support and strengthen' the capacity of the municipality and therefore shares guilt in the problem? It would be unfair if a province would fail in its constitutional duty to support a local authority and subsequently intervenes. On the other hand, and this is the preferred view, it does not make sense to prohibit a province from intervening, and allow the situation to get worse just because of the inaction of the province in the past.

Procedure before intervention

Section 139 enables the province to take *any appropriate steps* which include issuing directives and assuming executive responsibilities. In other words, the province has a discretion in deciding which measure to take. But its discretion is limited by the procedures and rules of section 139 and also by the principle of local autonomy entrenched in the Constitution. The assumption of authority is a method of last resort and other attempts of remedying the situation should first be sought. Before assuming authority in terms of section 139(1)(b), a province should, in the normal course of events, first have issued a directive in terms of section 139(1)(a).

Issuing directives

Before a province issues a directive compelling a municipality to perform certain acts, a notice should be sent to the municipality regarding the intended action. A municipality can then respond to the alleged failure to fulfil its obligations and to the appropriateness of the intended issuing of a directive.

Assuming responsibility

Before assuming responsibility, the province must notify the municipality in writing of its intention to do so. The province must provide reasons why it is considering to assume responsibility and offer the municipality the opportunity to respond. The municipality can make representations and try to convince the province that the directive has in fact been complied with.

Procedure after intervention

After the assumption of responsibility by a province, the national Minister responsible for local government must approve the intervention within 14 days. A notice of the intervention must be tabled in the NCOP and in the provincial legislature within 14 after their first sittings. Unless the NCOP approves the intervention within 30 days after its first sitting, the intervention comes to an end.

Approval by the Minister and the NCOP

The Minister can disapprove the intervention, upon which the intervention ends. The Minister can also approve the intervention under certain conditions or unconditionally. The Minister's approval is important because it may serve the function of 'filling the gap'. If the NCOP is in recess, it might take time before Parliament can approve the intervention. It can also serve as a 'filter'. Should vexatious and frivolous interventions by provinces occur, they can be filtered out, without having to set a whole parliamentary chamber in motion over it.

The NCOP can disapprove the intervention. The Minister's decision to approve is then overruled. The NCOP can also approve the intervention conditionally or unconditionally. It may occur that the NCOP approves under conditions that differ from the Minister's conditions. The NCOP's conditions then prevail and the Minster's conditions lapse.

Section 139(2)(d) instructs the NCOP to review the intervention on a regular basis and make recommendations to the provincial executive. The role of the NCOP is to assist the provincial executive in managing the intervention and protect the institutional integrity of local government against interventions that are too intrusive, not properly defined or not properly implemented.

Powers after assumption of responsibility

The intention of the assumption of responsibility should not be to totally take over the municipal powers, but only to deal with those aspects where the municipal council has failed. The intervention should be viewed as a corrective measure, not as a punitive one. During the intervention the council must continue exercising those powers that were not taken over by the province, and should be enabled to do so by the province.

The province appoints administrators, who are accountable to the provincial executive and act in a provincial capacity. The province is liable for actions performed by them and is responsible for their salaries. The provincial executive must manage the intervention and regularly report to the NCOP.

Termination of the intervention

The intervention must end when the reason for the intervention no longer exists. Therefore, the reason for the intervention should be clearly stated in the notice preceding the intervention. The objective of the intervention should be to restore the functioning of the municipality to an acceptable standard.

Conclusion

Three main principles should inform the forthcoming legislation on section 139 as well as its implementation. Firstly, the assumption of responsibility is a measure of last resort. Secondly, the integrity of local government as an independent sphere of government protects municipalities from provincial interference with its legislative functions. Thirdly, the aim of the intervention should be restorative rather than punitive.

Nico Steytler, Johann Mettler and Jaap de Visser
Local Government Project
Community Law Centre, UWC

The Battle of Butterworth

A section 139 intervention in the Eastern Cape

Butterworth, an industrial and business centre halfway between East London and the former Transkei capital of Umtata, made history as the first municipality to be subjected to an intervention by provincial government under the 1996 Constitution. The Eastern Cape provincial executive intervened in the Butterworth Transitional Local Council and assumed full responsibility for the administration of Butterworth. The legal basis was section 139 of the very same Constitution that provided Butterworth with its new status as being part of an 'independent and autonomous sphere of government'. How did the Eastern Cape intervene? What transpired after that? And what are the comments to be made from a legal angle? This article aims to report on the major issues and events surrounding this intervention and it attempts to answer the above questions.

Background to the intervention

Butterworth had been beset with a host of problems. It suffered from administrative and financial problems, largely inherited from earlier lack of administrative competence in the homeland of Transkei. Basic services were not being provided in a sustainable manner, there were allegations of fraud, nepotism, corruption and misuse of municipal assets by councillors. The collection of arrear rates and taxes had been completely neglected. This left the municipality on the verge of complete financial collapse.

At the end of February 1998, Butterworth's financial predicament resulted in its failure to pay the municipal workers their wages. They embarked on a strike, leaving the municipality in a situation where, according to a Senior Superintendent of the SAPS stationed at Butterworth, 'all services came to a complete standstill'. Refuse was not being collected and the town was deprived of water for three full days, which posed a serious threat to the health of the residents. At the same time, there was a threat that electricity supply to the municipality would be severed. There were continuous protest actions, organised by local political parties, civic organisations and unions, resulting in a state of civil unrest in Butterworth. The allegations of fraud, corruption and mismanagement gained momentum in a preliminary report of the Heath Commission. This report divulged the status of investigations by the commission and noted unauthorised payments, improper appointments, unauthorised use of municipal property and services, maladministration and huge outstanding amounts of taxes and rates.

The MEC for Housing and Local Government in the province reacted to these mounting problems in Butterworth by sending a letter, in which a meeting was requested within 24 hours. The MEC pointed at the council's failure to deliver services, to promote a safe and healthy environment and to promote the development of the municipality. In general, the MEC stated, the municipality failed to fulfil its obligations in terms of the Constitution. In the meeting that took place the following day (12 March 1998), assurances were given by the Butterworth TLC that the situation was actually improving and normalising.

However, on the 13 March it was discovered that there was no improvement at all, but rather a further deterioration: the hospital was now also under threat of closure, the strike continued and business and education institutions were closed. The MEC visited the town and met with relevant stakeholders, including business, municipal workers and political structures. They demanded the dissolution of the council. In a meeting with the council, the MEC requested the council to step aside and allow the province to take over the administration of the town.

The council acknowledged its inability to perform, and requested intervention by the province, but on its own terms. It sought to place the blame for the state of affairs in Butterworth on certain groups and factions outside the council. It also wanted to negotiate which powers were to be taken from the council and wanted the intervention to be limited to the restoration of basic services and to the duration of the emergency. These terms were unacceptable to the MEC, who subsequently obtained a mandate from the provincial executive to send a directive in terms of section 139(1)(a) of the Constitution.

The section 139(1)(a) - directive

In the directive, dated 16 March, the MEC listed the shortcomings of the council:

- administrative and financial chaos;
- failure to collect a substantial amount in arrear rates and taxes;
- the severance of water supply to residents of Butterworth;
- the threat to cut electricity;
- discontinued or irregular provision of other services, such as refuse and sewage removal;
- the health risk for the residents as a result of this;
- the closure of businesses;
- civil unrest;
- the hostility between the council and the community; and
- mismanagement, fraud, nepotism and unauthorised use of municipal property and services by councillors.

In general, the directive stated that the council had not been complying with the provisions and/or underlying values and principles of the Constitution. The directive explained why the MEC found the terms, under which the council would step aside, unacceptable or irrelevant. The appointment of blame for the deterioration of the town is irrelevant for the operation of section 139. And negotiating which functions and powers were to be taken from the council would be futile, since it would be impossible to separate the areas where performance was satisfactory from those where it was not. Limiting the intervention to lifting the emergency was not advisable, as the aim of the intervention should be the permanent and sustainable ability of Butterworth to fulfil its obligations.

A comment on the directive

A few comments can be made here. First of all, the directive is right in stating that the only jurisdictional fact required by section 139 is the inability of the council to fulfil its executive obligations. Blame is, to a very large extent, irrelevant in the operation of section 139. In the light of the circumstances that prevailed in Butterworth during

February and March 1998, the province seemed to have good reason to find that it was impossible to draw a line between the functions of the council that were being performed satisfactorily and those that were not. But it must be noted that section 139(1)(b) clearly states that, if the intervention takes the form of the assumption of responsibility, it should be limited to 'the relevant obligation' and 'to the extent necessary'. This obliges the provincial executive to attempt to limit the assumption of responsibility to those functions and powers where the problem lies and not to use section 139(1)(b) in a sweeping way, relieving the relevant local authority of all its powers.

Steps to be taken

The directive continues with the steps that the MEC was considering to take against Butterworth.

- The councillors and the town clerk would be relieved from their respective functions and duties with retention of full benefits, and would be replaced by administrators appointed by the MEC.
- The councillors and the town clerk should be available to render assistance or provide information to the administrators.
- This position would endure until -
  - the provincial executive was satisfied that economic and financial order and stability, as well as the ability to render sustainable and effective local government services, had been established; and
  - the investigation of the Heath Commission, as well as any legal proceedings, connected to it, had ended.

Butterworth's response to the directive

The council was given until 17 March, 15h00, to make written or oral representations with regard to the directive. A response was received in which the council once again blamed political structures for the problems in Butterworth. It suggested that the history of poor administration in the area should be seen as extenuating circumstances. It further noted that the collection of arrears was being attended to and referred to the strike of municipal labourers as 'serious acts of sabotage' committed by 'criminal elements'. The water supply had been taken over by a private contractor and legal action had been taken to force the labourers back to work. In conclusion, the council refused to step down.

Eastern Cape assumes responsibility for administration of Butterworth

This response did not convince the provincial executive not to intervene. On 18 March, the Eastern Cape provincial executive intervened as set out in the directive. The councillors were requested to comply with the provisions of the directive and to 'temporarily relinquish' their functions. Two administrators were appointed to administer the affairs of the municipality. On 11 May a third administrator was appointed.

A comment on the terms of the intervention

From the terms of the intervention, as set out in the directive, it seemed that the province misinterpreted section 139. The provincial executive 'relieved' the councillors 'from their functions and duties' on the basis of section 139. However, section 139 does not authorise a province to do so. The Constitution speaks of the non-fulfilment of an *executive* obligation. Section 139 is not concerned with the municipality's *legislative* authority, that is its authority to make by-laws. The effective dissolution of the council meant that its legislative authority was being curtailed without a legal basis. In line with that, the councillors should not have been ordered to vacate their offices, but should have retained access to them, in order to be able to fulfil that legislative function.

Another problem arises with regard to the duration of intervention. The province linked the duration to, among other things, the duration of the investigation by the Heath Commission as well as the duration of all legal proceedings in connection with its findings. These seem to be very uncertain criteria, considering that legal (appeal) proceedings can continue for a number of years and that the intervention must be limited to the extent necessary to maintain and meet minimum standards.

Approval by the Minister

On 27 March the provincial executive requested the Minister for Provincial Affairs and Constitutional Development to approve the intervention. Five days later, the Minister approved unconditionally.

Approval by the NCOP

Approval of the National Council of Provinces was sought on 30 March. The NCOP discussed the intervention in a special plenary on 20 April, in which the intervention was approved by the Council. However, the NCOP did give terms with which the intervention had to comply. It empowered the administrators to assume 'executive and functional responsibility' in the following areas:

1. Provision of basic services -

- the restoration of services such as water and electricity supply, refuse removal etc; and
- ensuring that the social, economic, commercial and industrial viability of Butterworth was no longer threatened.

2. Financial management -

- collection of rates, fees, service charges and other moneys due and owing to it;
- ensuring that the municipality meets its financial obligations; and
- ensuring that the municipality is enabled to comply with the provisions relating to financial management in section 10(G) of the LGTA.

3. Administrative procedures -

- ensuring compliance with policies and procedures for the use of assets of the municipality;
- ensuring use of those assets for their lawful purpose only; and
- ensuring that the municipality's affairs are conducted in an open, transparent, accountable and responsible manner.

With regard to the powers of the council, the NCOP stated: "The powers of the Council are limited to the extent that the Administrators have assumed the duties of the Municipality to maintain essential national standards or meet established minimum standards for the rendering of services." It was further decided that the Select Committee on Constitutional Affairs & Public Administration would concern itself with the procedures for the review of the intervention.

A visit to Butterworth by the NCOP

The Select Committee undertook a study tour to Butterworth on 25 and 26 May 1998. The aim of the visit was to ascertain whether or not the NCOP's Terms of Intervention were being adhered to. It further aimed to find out whether the intervention should continue, what was being done to support and strengthen the capacity of the municipality in terms of section 154(1) of the Constitution and what was being done to address the root cause of the problems, namely the conflict between the community of Butterworth and the council. The representatives of the NCOP met with all the stakeholders; provincial legislature, community structures, unions, municipal administration, councillors, mayor, MEC and the administrators. Subsequently, it drafted a report and proposed recommendations, which were approved by the NCOP.

The NCOP reviews

Firstly, the NCOP again made it clear that the administrators only had capacity to perform executive functions. They could not legislate. Any legislative acts, including the budget, had to be approved by the council. Councillors could not be prevented from using the facilities of the municipality that

they required to perform their responsibilities. Secondly, the report clarified the relationship between the council and the administrators by saying that the administrators were accountable to the MEC, but that they had to ensure regular reporting to the council. Thirdly, vacancies that occurred had to be filled and those members entitled to allowances had to be paid those allowances. The MEC was to investigate allegations that members were receiving allowances in excess of the amount they were entitled to. Fourthly, the town clerk, who had been suspended, had to be reinstated. He was to work together with the administrators to resolve the problems. However, if the town clerk was unwilling or unable to do so, the MEC was to require the council to take necessary steps to relieve him of his responsibilities. Fifthly, in dealing with the community, the administrators were encouraged to remain impartial at all times and to appear to act in an even-handed manner. In conclusion, the report stated that all stakeholders, including staff and the councillors, agreed that the intervention should continue.

Comment on the report

The report provided clarity on a few problematic elements of the intervention and corrected some mistakes on the part of the province. The notion, created by the directive and the actual intervention by the province, that the councillors were to lay down their functions altogether, was corrected by the NCOP. The councillors retained their capacity to legislate. They could therefore not be refused access to facilities they wanted to use for that purpose. The NCOP also reversed the suspension of the town clerk. This implied that the NCOP was of the opinion that the council, and not the administrators, remained the designated organ to take disciplinary action against the town clerk. However, the report did not deal with the question of whether or not the jurisdictional facts leading to the intervention, namely the deterioration of basic services and management, were still prevalent. The aims of the visit required an investigation into these objective facts, but the report details that most of the visit was spent on addressing the lack of clarity surrounding the intervention and the conflict between the community and the council.

The finale: court action

On 3 July, the town clerk was suspended from his position by the MEC. The MEC also investigated the allegations of excesses in the payment of allowances to the councillors, and reset their allowances to the legal amount. The councillors and the mayor of Butterworth then embarked on legal action. On 14 August they approached the High Court in Umtata for an interdict. In their application, they asked for reinstatement of the town clerk, invalidation of the intervention (or continuation on the terms of the NCOP), re-instatement of the original payment of allowances to the councillors and the MEC and the administrators to be prevented from interfering with the council. After negotiations between the council, the provincial executive and the NCOP, the case was settled out of court. In terms of the agreement, the intervention was withdrawn and in its place the parties agreed to a new intervention, the terms of which were described in the agreement. The settlement contained the following terms:

- the town clerk had to be re-instated;
- any allegations of misconduct of the town clerk had to be dealt with by the council;
- the intervention had to be withdrawn and the administrators had to cease their activities in Butterworth;
- all expenditures incurred after the start of the intervention, which were not approved by the council, were acknowledged as being unauthorised;
- the council had to review and approve those expenditures retrospectively - all expenditure not approved by the council had to be repaid by the MEC;
- a new intervention had to be undertaken by the province, limited to -
  - directing and assisting the staff of the municipality to deliver services; and
  - providing resources and skills and build capacities in conjunction with municipal staff;
- the new intervention had to be approved by the NCOP and the province had to abide by and implement the terms of the approval, if granted;
- under the new intervention, the council had to convene in the usual manner to exercise its legislative functions;
- one or more persons, nominated by SALGA and appointed by the MEC, had to direct and control the intervention; and
- the MEC had to appoint an administrator to administer and implement the terms of the agreement.

The status of local government as an autonomous sphere of government prevents the province from assuming a municipality's legislative capacity

A comment on the agreement

The most interesting aspects of this agreement are the reinstatement of the town clerk and the provision regarding the expenditures made without approval of the council. The reinstatement of the town clerk, after his suspension by the MEC, affirms the position taken by the NCOP in its report that, despite the intervention, the council, and not the MEC, was the designated organ to take disciplinary action against the town clerk. The provision regarding the expenditures made without approval of the council, makes clear that the approval of expenditures falls within the ambit of the legislative capacity of the council. This legislative capacity remains intact in the event of an intervention. In conclusion, the section 139 intervention does not affect the legislative capacity of the relevant municipality and it does not go as far as assuming the council's authority to take disciplinary action against its employees. The agreement also refers to a new intervention, to take place after the withdrawal of the original intervention. This new intervention never materialised. Apparently, the need for provincial interference was no longer there.

Assessment

In the end, the intervention seems to have accomplished its aims. Relative normality has returned to Butterworth, the delivery of services is at an acceptable level and there are no serious complaints by business or communities about the municipality. From a legal point of view, two important notions emerge from this unprecedented section 139 intervention. Firstly, the assumption of responsibility for a municipality's obligations by a province cannot effect the legislative capacity of that municipality. The status of local government as an autonomous sphere of government prevents the province from assuming a municipality's legislative capacity. Secondly, the role of the NCOP should be emphasised. The NCOP took its obligation to review this intervention very seriously. The NCOP's constitutionally mandated supervision works in two ways; not only must the NCOP assist the province in creating workable terms for the intervention as well as clarifying its role, but it must also protect local authorities from interventions that reach beyond that which is constitutionally permitted.

Jaap de Visser
Local Government Project
Community Law Centre, UWC

Intervening into Warrenton

On 17 February 1999, the provincial executive of the Northern Cape Province intervened into the Warrenton municipality. On 16 March, the matter was reported to the chairperson of the NCOP and three days later, the NCOP process got off to a start. This article will examine the circumstances that gave rise to the intervention, the handling of the intervention by all concerned and any lessons that may be learnt from it.

Problem areas

Between 1995 and February 1999, the provincial department of housing and local government gave financial assistance to the tune of close to R 7 m to avert the total collapse of municipal services in Warrenton. In April 1998, the MEC for Housing and Local Government appointed an administrator. His report revealed that the council's debtors stood at over R 9 m and the outstanding creditors at over R 1,75 m with both amounts escalating at an alarming rate; that the overdraft limit of R 1 m had been exceeded by R 620 000,00 and that Warrenton was unable to pay the salaries and wages of its staff for February and March 1998. This resulted in court action and the MEC had to foot the settlement bill to the value of R 1,2 m to avoid further legal costs. A further corrective measure was the appointment of financial consultants to manage the treasury department of Warrenton for a period of three months. However, a review of the financial situation as at 10 February 1999, indicated that Warrenton continued its plunge into financial crisis. To add to its financial woes, the municipality was unable to generate acceptable levels of revenue although it had over R 12 m worth of outstanding debt on its books. During February, ESKOM, one of its main creditors, had to cut the electricity supply and the Water Board was due to follow suit. The MEC had to pay more than R 300 000 to ESKOM for the re-connection of the electricity supply. The Provincial Executive found this scenario sufficient to justify intervention in terms of the Constitution.

The intervention

On 17 February 1999 the Northern Cape provincial government appointed an administrator, Mr Abraham Marais, to take over the entire administration of the Warrenton municipality in terms of section 139(1)(b) of the Constitution.

The Minister of Constitutional Development and Provincial Affairs duly approved the intervention and the MEC for Local Government and Housing, notified the NCOP on 16 March 1999.

Terms of intervention

The provincial government sought approval from the NCOP, and obtained it on the following terms:

A. Provision of services

The administrator had to ensure that:

- the water supply is maintained;
- water purification standards are met;
- the electricity supply is maintained;
- refuse removal services are rendered on a regular and sustainable basis; and
- all other services are maintained.

B. Financial management

The administrator had to ensure that:

- rates, fees, levies and other outstanding monies due to the municipality are collected;
- the financial obligations of the municipality are met; and
- the municipality is placed in a position to comply with the provisions relating to financial management as outlined in section 10 G of the LGTA.

C. Administrative procedures

The administrator had to ensure that:

- policies and procedures for the use of assets and services of the municipality are adhered to;
- municipal services and assets are used solely for the purposes for which it was intended; and
- the affairs of the municipality are conducted in an open, transparent, accountable and responsible manner.

D. Co-operation of the Town Clerk

The Town Clerk must co-operate fully with the administrator and must render all reasonable assistance to the administrator in the carrying out of his or her functions.

E. Meetings of councillors and administrator

The Executive of the Council and the administrator must meet once a week to discuss matters of mutual interest and to allow the administrator to submit a progress report to the Council. The full Council and the administrator must meet at least once a month.

F. Co-operation between councillors and administrator

The administrator and councillors must carry out their respective duties in a co-operative manner. However, in the event of a dispute between the parties, such dispute must be resolved by mediation by a representative of SALGA. Should the matter remain unresolved after mediation, it must be decided by the MEC.

G. Competency of councillors

Councillors remain competent to carry out their legislative functions.

Visit by the NCOP delegation

The NCOP delegation consisting of the Chairperson of the Select Committee on Constitutional Affairs, Public Service and Administration, a NCOP permanent delegate of the Northern Cape, and staff of Parliament met with the role players in the area namely the MEC, councillors, the Town Clerk, SALGA representatives and representatives from the community. It transpired that the main reason for the state of affairs could be ascribed to a severe lack of capacity on the part of certain municipal officials which resulted in, among other things, the ineffective collection of revenue. On the positive side, there was the political will on the part of the councillors and officials to return the municipality to a position of financial and administrative viability.

Current position

The administrator, Mr Marais, is confident that, after a period of 5 months since the intervention started, the municipality is able to fulfil its executive obligations. He noted that the total amount due to creditors decreased from close to R 6 m to R 2,5m. Also, the culture of payment increased from 43% in February to 70%. At the next review by the NCOP, due to take place on 23 July 1999, he may recommend that the intervention ceases.

Assessment

Although one could probably find fault with certain of the procedures preceding the intervention (see article on Butterworth, page 13), it appears that the purpose of the intervention was achieved. The test, however, would be whether the municipality can sustain its newfound lease on life. The onus would surely be on the province to monitor the progress and to render effective support.

Johann Mettler
Local Government Project
Community Law Centre, UWC

Section 139 interventions

Establishing a regulatory framework

The Constitution demands that each sphere of government must respect the constitutional status, powers and functions of the other spheres and that each should exercise its powers and perform its functions without encroaching on the geographical, functional or institutional integrity of another sphere. On the other hand, sections 100 and 139 of the Constitution allow for the intervention into the affairs of provincial and local government by national and provincial government respectively. The Constitution then provides that national legislation must be enacted to regulate these processes. SALGA realised the urgent need for such legislation to be passed, but, more importantly, saw the need to start a process at the end of which it can emerge with a well considered position on all the issues germane to section 139. That process commenced during October 1998 and culminated in a workshop on Provincial Support and Supervision of Local Government in Pretoria on 12 and 13 March 1999.

Assessing the interventions

In the evaluation of the processes around the interventions in Butterworth and Warrenton, there was general consensus around the following points:

- prior to intervention, there must be statutory recognition of the role, and consultation with, organised local government both within the province and the NCOP;
- there must be an obligation to report regularly to organised local government and to the provincial standing committee;
- a need to establish permanent intergovernmental structures at provincial level with a view to provide for consultation on identification of problems, terms of intervention, reporting mechanisms and appointment of an administrator;
- interventions must be preceded by measures to support and strengthen local government;
- provincial commissions of enquiry must be preceded by consultations with organised local government;
- an urgent need for a regulatory framework to capacitate provinces to deal with interventions; and
- a commitment that SALGA must be the principle organ to draft the required framework.

Defining provincial powers of intervention

The purpose of intervention is not to punish but to assist local government in addressing very specific problems. Intervention into the affairs of a municipality is a measure of last resort in a process of provincial supervision which would normally commence with review and monitoring of a municipality, followed by steps to strengthen and support where needed.

One aspect which elicited some discussion, was where the non-fulfilment of an executive obligation could be attributed to the failure of a province to fulfil its constitutional duty of support. In other words, in order to intervene, must a province show that it has fulfilled a supporting function in respect of a particular executive obligation which has been left unfulfilled by a municipality? One expressed view was that an intervention could only take place where a province had complied with the provisions of section 154 of the Constitution. The other was that an intervention should not be conditional and may take place without the province first having to comply with its obligation to support.

The procedure before intervention has to include the issuing of directives before an assumption of responsibility can occur. A clear position was taken that there must be adequate notice to a municipality and to organised local government of a province's intention to issue a directive, its reasons and an opportunity to respond. A similar notification has to precede an assumption of responsibility.

After having assumed responsibility for a particular executive obligation, a province may only deal with those issues which are germane to the fulfilment of that obligation; a municipal council must be able to continue with the exercise of the remainder of its powers. Only in the event where a council has been dissolved in terms of legislation, does the question of municipal powers during an intervention not arise.

It was emphasised that provinces have certain duties during an intervention. There is a supportive role to be fulfilled, and mechanisms must be put in place to ensure that problems do not persist. Regular reporting to the municipal council must take place.

Supporting and monitoring municipalities

Building capacity can be seen as the main purpose of rendering support. This can take place through the training of staff and councillors, through the provision of material and technical support, making available legislative support systems, through methods of skills transfers and through the sharing of resources.

There is a constitutional obligation upon national and provincial governments to support and strengthen the capacity of municipalities. In respect of requests for support by municipalities, there was a general consensus that legislation should determine issues such as when and how support may be requested, the role of organised local government in that process, the identification of instances when support may be imposed (eg disaster management) and general criteria in terms of which indicators, showing a need of support, may be drawn up.

The Constitution also assigns a particular monitoring role for provincial governments in respect of municipalities under their jurisdiction. Certain general principles of establishing one uniform monitoring regime have been identified such as it taking place in a spirit of co-operative governance, in consultation with all interested parties, clearly setting out all rights and obligations and establishing reasonable limits within which monitoring may take place. The role and function of organised local government in a province with regard to monitoring needs to be provided for in such legislation.

SALGA emerged from this workshop with clearly identifiable goals in respect of issues such as interventions, monitoring and support of local government and will take these forward in the national legislative process.

Thabo Mokwena
SALGA

Gauteng Social Services

Gauteng Welfare Relations Act 17 of 1998

This Act has as its main objectives the delegation of certain welfare functions to officials in local government so as to provide for effective provision of quality welfare services. It seeks to promote the participation of local government in the delivery of welfare services and to provide for the building of capacity in the provision of welfare services at local level.

Delegation

The MEC and the Head of the Department of Welfare and Population Development (with the permission of the MEC) may delegate any power, function or duty imposed on them by the Social Assistance Act of 1992 to officials in the service of local government in the province. The MEC or Head of the Department may impose conditions on such a delegation and are obliged to (a) consult with the local authority concerned and (b) take into account the views, capacity and funding available to the local authority. The local government official is then obliged to perform such functions in accordance with the conditions and directives of the MEC or Head of Department, as the case may be. Funding for the discharge of this function comes from the MEC with the concurrence of the member of the Executive Council responsible for finance in the province.

Monitoring and support

Provision is made for the monitoring of the delegated function/s by the MEC or his or her appointee. The MEC is obliged, in terms of the Act, to take appropriate measures for the development of programmes that build capacity for the provision of welfare services at the local level.

Finally, the Act makes provision for the withdrawal of mandates by the MEC or the Head of Department, and the making of regulations regarding the delegated functions in order to achieve the objectives of the Act.

Gauteng Street Children Shelters Act 16 of 1998

This Act sets out to provide a comprehensive framework in terms of which street children shelters must be operated. The main objectives of the Act are to meet the basic needs and to protect the rights of street children.

Aims

It aims to do this by, among other things, creating a safe environment, empowering street children to deal constructively with their world, encouraging family reunification, developing appropriate placement programmes, and ensuring competent care, treatment, development and education for street children.

Duties

The Act sets out the duties of shelter operators, employees and volunteers and provides specifically that those in charge must protect the street children against abuse, exploitation and discrimination. Corporal punishment is outlawed and disciplinary measures taken against children must be recorded. It is the duty of the shelter operator to provide each child under his or her care with certain social services, such as educational, health and social welfare services.

Governance

As far as the governance of shelters is concerned, the Act makes provision for a management board and stipulates its composition, powers and duties. Shelters are supposed to operate on a 24-hour basis and a register must be maintained of all who use the facility. Certain minimum standards are laid down regarding physical facilities that are consistent with humane living conditions. The Act further provides that funding for a shelter may be obtained from the provincial coffers subject to conditions. Extensive provision is made for the monitoring of shelters. Inspectors with powers of search and seizure, may be appointed to enforce compliance with the Act. Lastly, the Act makes provision for the obligatory registration of shelters with the provincial authorities.

Comments

Significantly, when one compares the two Acts, there appears to be inconsistency. Whilst the Welfare Relations Act makes express provision for the delegation of certain welfare services to the local level in order to promote the participation of local government in the delivery of such services, the involvement of local government in the Street Shelters Act is conspicuous by its absence. Both Acts deal with the provision of social services at local level and one could argue that the involvement of local government in the provision of social services may result in more effective service delivery. A more compelling reason for the involvement of local government in the provision of shelters for street children, is the fact that the management of childcare facilities is, firstly, in terms of the LGTA, a competence of metropolitan local councils and secondly, in terms of the Constitution, a Schedule 4 competence of local government.

Johann Mettler
Local Government Project
Community Law Centre, UWC

Does a town clerk have the authority to institute legal proceedings on behalf of the municipality?

In *Gcali NO v MEC for Local Government in the Eastern Cape* 1998 JOL 117*, Case No 802/95 (12/06/1995) it was decided, among other things, that a town clerk does not have authority to institute legal proceedings on behalf of the municipality in his or her capacity as town clerk, without instruction from the council to do so. The High Court of Transkei held that "(T)he general rule in regard to the institution or defence of legal proceedings by a municipality is that such proceedings must be authorised by the council of the municipality, an authority usually afforded by means of a resolution of the council or a committee possessing delegated authority." In authorising the institution or defence of legal proceedings, the council acts as an agent of its principal, the municipality. There was no legislative provision in section 59 of the Transkeian Municipalities Act 24 of 1979, nor the LGTA, which authorised the town clerk to institute proceedings for and on behalf of the municipality. This does not mean that a town clerk cannot seek legal relief as an employee, acting in his personal capacity.

Internal proceedings: language

The issue in *Louw v Transitional Local Council of Greater Germiston* 1997(8) BCLR 1062 (W) was whether local authorities could decide to use one particular language as the written and spoken language in the municipal council. The High Court, Witwatersrand Local Division, decided that the right of every person to use the language of his or her choice (s 31 interim Constitution) did not limit the council's authority to regulate its own procedures, including the right to select a language of government or debate. The provisions in the interim Constitution which stipulated that the equal use of languages should be promoted and provided for the right to address Parliament in any official language (s 3 interim Constitution), applied to national and provincial levels only and had no bearing on proceedings at local level.

Access to information

In *Uni Windows CC v East London Municipality* 1995 (8) BCLR 1091 (E) the Eastern Cape High Court ordered a municipality, on the basis of the constitutional right of access to information, to divulge information. The East London Municipality had to give access to the relevant information notwithstanding the fact that this information might 'incriminate' the municipality. The company could use the information as a basis for a claim against the municipality. The facts of the case were as follows: Uni Windows was building a dwelling having obtained the necessary approved building plan. The East London Municipality then ordered Uni Windows to stop building, because it had made a mistake in approving the building plan. This had rendered the approval invalid and the building activities illegal. Uni Windows had to wait six weeks for the mistake to be rectified and could not build during that time. It suffered loss and was considering claiming damages from either the municipality or from the person who had brought the error to the attention of the municipality. It requested that the municipality grant access to all information pertaining to the incident, and based the claim on the right to access to information (s 23 interim Constitution). The East London TLC refused on the basis of section 209 of the Municipal Ordinance which says that, except where otherwise provided for, the town clerk has custody over all documents and no unauthorised persons may have access to them. It argued that this was a limitation of the right to access that was justified (s 33(1) interim Constitution). The High Court disagreed with the East London TLC. The Municipal Ordinance merely said that access, without the consent of the town clerk was not possible and in fact provided that access may be given. Uni Windows needed the records of the municipality's decisions to approve the plan, to withdraw the approval and to stop the building in order to assess its legal position. This information was relevant to making the decision as to whether or not to sue and whom to sue, and was therefore covered by the right to access to information.

Illegal squatting

Who must act against illegal squatters?

In *Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd* 1997(8) BCLR 1023 (SE) the High Court, South Eastern Cape Local Division, was confronted with the question as to who must act against illegal squatters - the landowner or the municipality. A resident in the municipality owned land on which illegal squatters were settled. The squatter population was growing steadily. The owner had given them notice to leave and had also entered into negotiations to sell the land to them. But the problem remained unresolved. The parties to the dispute, namely the landowner and the municipality, agreed that it was necessary to stop the erection of structures on the land. They disagreed, however, on who should take the necessary steps. The municipality wanted the landowner to act, and invoked section 3A of the Prevention of Illegal Squatting Act 52 of 1951 that prohibits the owner of land to permit the erection of structures without approval from a local authority. The landowner, however, wanted the municipality to act, and contended that the municipality could not invoke the Prevention of Illegal Squatting Act, because it had an alternative in the National Building Regulations and Building Standards Act 103 of 1977. This Act renders it an offence to erect any building without approval from a local authority. The Court took it that the landowner permitted the erection of the structures, since he failed to take any legal action against the squatters. It did not accept the argument that the municipality had an alternative in the Building Regulations Act, since the Prevention of Illegal Squatting Act was specifically directed at the problem of squatting. It placed duties on the landowner. The landowner could not evade these by shifting responsibility to the local authorities.

The constitutionality of demolition without an order of court

The Court also observed that section 3B of the Prevention of Illegal Squatting Act, which provides for the demolition without a court order of illegally erected

*** 'JOL' refers to 'Judgments Online', an internet database at http://www.lawreports.co.za**

structures, could no longer be applied. It was in conflict with section 26(3) of the Constitution which prohibits the eviction of any person from his or her home without an order of court.

Administrative justice when a municipality evicts

In *Uitenhage Local Transitional Council v Zenza* 1997(8) BCLR 1115 (SE), the High Court, South-Eastern Cape Local Division, ruled that when a local authority, acting in its capacity as landowner, makes a decision concerning the eviction of illegal occupiers, such a decision does not amount to administrative action. Illegal occupiers are therefore not entitled to a fair hearing, and the decision is not open for review. There is no difference in principle between a landowner who happens to be a public authority and any other citizen who owns land.

Administrative justice when a municipality lifts building conditions

In *Nyangane v Stadsraad van Potchefstroom* 1998 (2) BCLR 148 (T) the Transvaal High Court was asked to rule on the constitutionality of restrictive conditions (a minimum floor area of 90 m^2) on building in a township, that were registered against title deeds. The Court acknowledged restrictive conditions, registered against title deeds, as a legitimate means of facilitating the harmonious development of areas. But the lifting of these restrictions could not take place without notifying the people affected and allowing them to have their say, particularly when these restrictions are for the benefit of all owners in the area. A municipality cannot lift the restrictions without adhering to the principle of administrative justice, which requires prior notice, even when the restrictions are contained in title deeds.

Affirmative action in appointment

In *Swanepoel v Western Region District Council* 1998 JOL 2732, Case No: 1021/97, (17/06/1998) the South-Eastern Cape High Court had to deal with an application by a white female for the setting aside of the appointment of a black male to a post for which she had applied. She argued that she had been unfairly discriminated against, that she was the victim of an affirmative action policy and that her constitutional right to fair administrative action had been violated because she had had a legitimate expectation to be appointed. The Court ruled that the applicant did not have a shred of evidence to support her contention that she had been discriminated against. Her allegations that she had been prejudiced against for being white, female and not affiliated to the ANC were not based on facts, but on her subjective feelings. The fact that she was female had actually been taken into account in her favour. There was no evidence that the council subscribed to a policy of affirmative action and besides, if that would have been the case, such policy is not unlawful or unconstitutional. The applicant did not object to the manner in which the interviews had been conducted and there had been no practices or promises from which a legitimate expectation of appointment could have arisen. The appointment was therefore not unlawful.

Charging a service fee for making electricity available, regardless of usage

The Supreme Court of Appeal dealt with this issue in *Omter (Edms) Bpk v Welkom Stadsraad* 1999 JOL 4724, Case No: 357/97, (26/03/1999). The applicant owned a number of shops on an erf. One of the shops had been vacant for some time and no electricity had been used. Nonetheless, the council charged a service fee for the supply of electricity to that shop. The applicant argued that this was unlawful, because section 128 of the Free State Ordinance 8 of 1962 speaks of the 'supply' ('verskaf') of electricity for a 'price'('prys'), determined by the council. According to the applicant, the word 'price' refers to a 'purchase price', implying the supply and subsequent use of electricity. Since no electricity was used in that particular shop, the levying of the service fee for the supply of electricity would not be authorised by the Ordinance. The Supreme Court of Appeal did not agree. The word 'supply' means 'making available' ('beskikbaar stel') rather than 'actually deliver' ('daadwerklik lewer'). Therefore, the 'price', referred to in the Ordinance, could mean the consideration in return for the 'making available' of electricity and thereby authorised the service fee, as charged by the council.

The duty of care for dangerous roads

Mr. Graham suffered serious injury and permanent disablement when a mass of water, mud and stones slid and fell down from a rock ledge above Chapman's Peak Drive onto the roof of his car. The landslide onto the road was the result of heavy rainfall, which caused the descent of earth and rocks from the steep slopes. Mr. Graham sued the Cape Metropolitan Council for negligence in exercising its duty of care towards road users. Mr. Graham argued that the failure of the council to close the road after the heavy rainfall or place warning signs, in addition to the normal "Falling Rocks" sign, constituted negligence. The Cape High Court ruled in *Graham v Cape Metropolitan Council* 1999 JOL 4498, Case No: 6982/96, (18/02/1999) that "a local authority which is in control of a dangerous road such as in this case is under a duty to warn intending road users specifically of the nature of the hazard and the risk involved, by special and appropriate road signs or other means. In the case of a road like Chapman's Peak Drive which may under specific weather conditions such as high rainfall be subject to natural catastrophes like latent slope failures with rock and earth slides, the controlling authority's duty is to close the road under such conditions, unless closure would not be reasonably practical, in which case the most effective alternative means to avoid injury or decrease the risk thereof must be employed." The council was not entitled to rely on the familiar "Falling Rocks" sign, because it does not particularise the actual latent hazard and the high risk of serious injury. A special sign, in forceful wording should have been put up to warn road users of the danger of earth and rock slides due to heavy rain, or the road should have been closed. The council was held liable.

Jaap de Visser
Local Government Project
Community Law Centre, UWC