LOCAL GOVERNMENT DISCUSSION NOTES
RESOURCES FOR COUNCILLORS

Edited by Jaap de Visser & Nico Steytler

Compiled for the South African Local Government Association

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION
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FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

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INTRODUCTION

This document contains a compilation of short articles related to local government. They have been carefully selected and are presented in **twenty five themes**. The articles discuss major developments, laws, judgments and policies that have affected local government over the past fifteen years. They present overviews but often also the views of authors.

Most of the articles appeared in the *Local Government Bulletin*, a newsletter published by the Dullah Omar Institute at the University of the Western Cape (formerly: Community Law Centre). This *Bulletin* was published from 1999-2012. In addition, this document includes selected opinion pieces published by members of the Institute over the past years.

How to use the information

Each theme starts with a short **introduction**, followed by a number of short articles or opinion pieces. When using these resources, please bear the following in mind:

1. there are separate resources specifically designed for training and induction - these resources **are different from that**: they are meant to equip you with information for further debate and reflection;
2. the articles do not deal with every aspect of each theme - they usually relate to **one or two specific aspects**;
3. the laws, policies or circumstances may have changed after the article was written – if there were major **changes subsequent to the article**, this is indicated in the introduction to the theme.

Copyright statement

The Editors
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August 2016

THEME 1: INTRODUCTION – GENERAL THEME OF LOCAL GOVERNMENT

The status of a municipality as an organ of state with constitutionally protected powers was first recognised by the Constitutional Court in the *Fedsure* judgment, which is discussed in this theme. More judgments have followed, confirming this status (see Theme 19). The second article deals with the question what becomes of this status when municipalities are inundated with laws, regulating each and every aspect of local government in detail? The last two articles discuss key policy questions and trends in local government that have emerged over time.

1. **Constitutional Court Affirms the Status of Local Government** by Nico Steytler and Jaap de Visser, Local Government Bulletin 1999, Volume 1, Issue 1, page 6 – 7
2. **The Strangulation of Local Government: Stifling Innovation, Experimentation and Local Responsiveness** by Nico Steytler, Local Government Bulletin 2008, Volume 10, Issue 1, page 6-8
3. **Challenges for the new councils** by Nico Steytler, , Local Government Bulletin 2006, Volume 8, Issue 1, page 3-5
4. **Policy in the Numbers** by Derek Powel, Local Government Bulletin 2012, Volume 13, Issue 4, page 7-8

Constitutional Court affirms the status of local government

The Constitutional Court has affirmed that the new constitutional order confers on local government the status of an autonomous and distinct component of government. Local government is no longer merely exercising powers delegated to it by the national or provincial governments; instead municipal councils are legislative assemblies and their legislative acts, which include levying taxes and adopting budgets, are not subject to administrative review by the courts. Although decided under the interim Constitution, the decision in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) reinforces the new and increased status the 1996 Constitution accords local government.

The facts

The four transitional metropolitan substructures in the Johannesburg metropolitan area resolved to levy a general property rate of 6,45 cent in the rand throughout the whole area. This would generate a surplus in income for the affluent Eastern (EMS) and Northern Metropolitan Substructures (NMS) while a deficit would occur in the disadvantaged Southern (SMS) and Western Metropolitan Substructures (WMS). The EMS and NMS would pay their surplus income to the Johannesburg Transitional Metropolitan Council (JTMC) in terms of a levy imposed by the JTMC on them, whereupon the JTMC would pay a subsidy to the SMS and WMS to cover their deficits.

Fedsure and other EMS rate payers objected to the rate of 6,45 cents in the rand the EMS levied, the levy imposed by the JTMC on the EMS and the payment of the subsidy to the SMS and WMS. They contended that all powers of a municipal substructure, including the making of by-laws and the imposition of rates and levies, were delegated powers received from the provincial or national government, rendering the exercise of those powers administrative actions. Consequently, such actions could be reviewed in terms of administrative law, including the right to fair administrative action enshrined in section 24 of the interim Constitution. The crux of the argument was thus that the interim Constitution did not change the status of the local government as it was before April 1994. The focus of this note is restricted to the Court's view of the constitutional status of local government.

Bylaws not administrative acts

The Constitutional Court held that under the interim Constitution, and the 1996 Constitution, a local government is no longer a public body exercising delegated powers. A municipal council is "a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself." The council is a deliberative body whose members are elected, and whose legislative decisions are influenced by political considerations for which the council is politically accountable to the electorate. While legislative decisions should be lawful, they are, unlike executive acts of a municipality, not subject to the principles of administrative law, including the requirements of section 24 of the interim Constitution.

A municipal council is "a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself."

Taxing and spending are legislative acts

The question is, then, whether the resolutions of a municipal council of imposing taxes or approving appropriations out of its funds, are legislative or executive acts. The Court held that, in terms of the Constitution, when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it is exercising a power peculiar to elected legislative bodies. The power to tax and spend is exercised by democratically elected representatives after due deliberation. In this case, the Court concluded, the EMS exercised its taxing power by setting the rate. The resolution of the JTMC to raise the levy from two substructures, and to pay a subsidy to the other two, formed an integral part of the adoption of a budget and as such constituted the exercise of its spending power. Resolutions to adopt a municipal budget are legislative acts, and are not subject to review in terms of the principles of administrative law.

Constitutional control of municipal legislatures

The fact that by-laws, including the imposition of rates and levies, are proper legislative actions, and thus not subject to administrative review, does not make them immune from judicial review. The Court held that the principle of legality - that all legislative and executive actions should be taken within the four corners of the law, including the Constitution - is fundamental to the new constitutional dispensation. The principle of legality forms part of the rule of law which is now one of the founding values of the 1996 Constitution. Legislative and executive bodies created by the Constitution may thus not exercise

powers or perform functions that are not given to them by law.

Outcome

On the question whether the EMS in fixing the rates payable, acted lawfully, the Court was unanimous that it acted within its powers. However, on the question whether the JTMC in levying a contribution from the EMS and NMS, and paying a subsidy to the WMS and SMS, acted within the enabling legislation, the Court was evenly divided. Five judges held that the JTMC was acting within its powers while the other five disagreed. In the event of this even division, the decision of the High Court which upheld the lawfulness of the JTMC's actions, was thus not disturbed.

Significance

Although the decision was taken under the interim Constitution, the decision establishes authoritatively the position of local government. First, local government is an autonomous sphere of government; its powers are derived from the Constitution and are no longer delegated from the national or provincial government. Second, although municipal councils' legislative acts are not administrative acts and are therefore not reviewable in terms of administrative law, they remain nevertheless subject to the principle of legality and can be reviewed for compliance with the Constitution and other legislation. Third, the exercise of municipal taxing and spending powers constitutes a legislative act.

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THE Strangulation of local government

In the past decade, local government has experienced a mass of legislation regulating its functioning. The question is whether the sheer volume, style, nature and scope of this legislative framework is facilitating or obstructing the achievement of local government's mandate of development. Are the many laws not impeding two key values of local government, namely that municipalities are best placed to gauge community needs and can become sites of innovation and creativity? This article argues that the overload of laws may be strangulating local government's execution of its mandate. The revision of the White Paper on Local Government should therefore also look at the extent and manner of regulation.

Strangulation

'Strangulation' is not a new word, coined by some frustrated municipal manager seeing the many rules and regulations choke the life out of local initiatives. It is an old physiological term, meaning 'preventing circulation through a vein or intestine by compression'. In legal terms, the more usual word for this condition would be 'overregulation'. It happens when the extent and style of regulation defeat the larger object being regulated. For example, if the aim of integrated development planning is to promote developmental local government, the overregulation of the process may defeat that very object by stifling local initiative.

Extent of strangulation

The torrent of laws has been driven by the need to construct a legal framework for local government which conforms to its new constitutional status. However, the depth of regulation reveals a deeper concern. Local government was seen as the delivery arm of government, which had to be steered from the centre to achieve

STIFLING INNOVATION, EXPERIMENTATION AND LOCAL RESPONSIVENESS

defined outcomes. The underlying premise showed little trust in the new incumbents of municipal councils and offices. Procedures and processes were prescribed in detail on matters where common sense could have sufficed. The premise was based, no doubt, on the reality that an entirely new cadre of councillors and officials, who had little or no experience in local government, were expected to perform better than the administrators of the past. Their tasks were greater, the goals more challenging.

The extent and detail of the laws were also based on the belief that law can solve problems. The response to mismanagement was often more law. Rather than seeking to solve the problem by means such as support and supervision, law was thrown at the problem.

Forms of strangulation

Overregulation takes a number of forms.

Direct command effectively eliminating discretion

Overregulation takes place where a rule commands a municipality or a municipal manager to behave in a prescribed manner in an area that arguably could have been left to the latter's discretion. Other forms of overregulation are more subtle but have the same effect. For example, while there may be a pretence of preserving the discretion of a municipality, the context may leave little or no meaningful room for manoeuvre. The most recent example is the draft regulations prescribing that the municipal rates levied on state buildings may not exceed 25% of those imposed on residential property. (See page 10 on the draft regulations.)

Weight, complexity and costs of regulation

The overregulation of certain processes may render them simply too difficult and / or costly to undertake. The prime example is the outsourcing of municipal services. There has thus been a significant decline in public-private partnerships over the years.

Uniformity of regulation

The same set of rules applies to all municipalities, however large or small and however huge the gaps in human and financial resources. The various interventions in municipalities and the very existence of Project Consolidate speak to the difficulties municipalities have in complying with the law in its many facets. The first actual legal acknowledgement of the problem came from the National Treasury when it implemented the Municipal Finance Management Act in a staggered manner, depending on the capacity of municipalities to implement particular provisions.

Too many 'musts'

Reading the various local government laws, an administrator is immediately struck by the number of 'musts' – do this, do that. The overuse of the word 'must' could lead to the problem that it is not regarded as imposing a binding obligation every time. The courts have said this depends on the intention of the legislature, determined by the context in which 'must' is used. When doubt arises around a 'must', legal certainty is not advanced and a larger scepticism about the binding nature of all 'musts' can flow. Overregulation then leads to greater lawlessness rather than securing the desired outcomes through regulation.

A legislative framework that is not fully integrated

With thousands of pages of law governing all aspects of local government coming from a number of sectors and departments, one cannot expect a harmonious and conflict-free legal regime. However, many of the contradictions, overlaps and inconsistencies could have been prevented. Two major factors contributing to the lack of integration are the insufficiency of coordination among departments and the absence of a common understanding and approach to local government.

Consequences of strangulation

The large body of law is new and the administrators are often inexperienced. Is it, then, only a matter of time before the system matures and the administrators become skilled enough to cope with the demands of the legal framework? It is argued that overregulation has consequences that work against developmental local government.

Cost of compliance

Complying with an elaborate legal framework carries a considerable price tag. Costs come in various forms. At a primary level, municipalities need legal practitioners to guide them every step of the way. The metros and bigger local municipalities have large legal departments devoted to the legal niceties of the framework. It goes without saying that such in-house legal services come at a price, albeit a smaller one than that of lawyers in private practice. The fact that compliance entails considerable financial costs and assumes ready access to legal advice necessarily implies that there are two classes of municipalities: those that rely on their own resources (in-house or contracted) and others that do not. The second form of cost is the transaction cost of implementing complex procedures. The cost of a simple section 78 process for outsourcing municipal services has made all but large-scale projects too costly to be justified.

Opting out of governing

Where a council has the resources, it may outsource to the private sector key processes that are too difficult for it to carry out itself. Where it does not have the resources, the national government will eventually catch up with it and impose solutions on it. In both instances, local government is disempowered. The outsourcing of the drafting of the first IDPs was a prime example.

Stifling innovation, experimentation and local initiative

A consequence of overregulation is that it stifles innovation, experimentation and local responsiveness, the very lifeblood of decentralisation. Even if not directly, the weight and complexity of a number of provisions may make local initiative too difficult and costly to attempt. The most common example is the outsourcing of municipal services, which have been regulated almost out of existence.

Self-strangulation – ticking off boxes

One of the worst forms of strangulation is self-inflicted. This occurs when compliance with the rules becomes more important than achieving the object behind the rules. In adhering strictly to the legal requirements, a council may lose the plot, replacing substance with form. Where there is an overprescription of

KEY POINTS

- A consequence of overregulation is that it stifles innovation, experimentation and local responsiveness.
- Even if not directly, the weight and complexity of a number of provisions may make local initiative too difficult and costly to attempt.
- Law should thus be used in a restrained manner in order to allow scope for local discretion.
- The restrained use of law is not the same as a minimalist approach; a clear distinction should be made between areas requiring detailed regulations and other areas where greater flexibility would be beneficial.

procedural requirements, an administration can be reduced to ticking off a box for each requirement met. Achieving the objective of the rules becomes secondary.

Opting for lawlessness

Possibly the worst consequence of overregulation is opting out of the lawful way of governing and opting for lawlessness. It may become an option for a municipality to avoid the legal regulations and merely do what is necessary. The result is the complete opposite of what the extensive legal regulation sought to achieve. Overregulation may thus have the perverse consequence of increasing lawlessness rather than ensuring greater legal compliance.

Loosening the grip of strangulation

Given the negative consequences of strangulation, the question is how to proceed. Does the system simply need to mature, or is a more fundamental shift of mindset necessary?

It is easy to say that there should be less law and that the laws in place should allow sufficient scope for municipalities to fulfil their constitutional mandate. However, the devil lies in the detail. Which legal provisions strangulate local government? How can they be reformulated? These questions should be addressed in the light of a number of principles.

Appropriate use of law or the limits of law

There must be an appreciation of the limitations of law in directing and influencing municipal behaviour. More law does not necessarily solve social or organisational problems; it may be irrelevant or even exacerbate the problems.

Restrained use of law

Law should be used in a restrained manner in order to allow scope for local discretion. The restrained use of law is not the same as a minimalist approach: a clear distinction should be made between areas requiring detailed regulations and other areas where greater flexibility would be beneficial. Key areas where detailed rules are appropriate are those relating to the democratic processes that underpin local democracy. Likewise, accounting for the expenditure of public money needs to be precise. The scope for policy choices and partnerships with private and civil society should be maximised.

Outcomes-based regulation

At the moment the focus of the legislation is on the process that must produce desired outcomes. Could not a different approach be followed that focuses on the desired outcomes, rather than the preceding processes?

Differentiated use of law

An asymmetrical system should be allowed to evolve. There are two legs to this argument. The first is that the bigger municipalities with adequate capacity to comply with the law should be less regulated. They need greater leeway to mobilise partnerships in their quest for economic and social development. The small municipalities, with less capacity, require more guidance rather than less. While cities need greater flexibility to flex their muscles, smaller municipalities lacking strong administrative capacity are sustained by a set of clear rules. However, the set of rules should be simplified to ensure compliance.

Integrated legal regulation

To ensure better integration of sectoral legislation, it is vital to start with a proper definition of the various functions of local government listed in Schedules 4B and 5B of the Constitution. The issuing of guidelines by the Department of Provincial and Local Government would do much to ensure that all sector departments work from the same page.

Comment

There is a tension between a municipality's "right to govern, on its own initiative, the local government affairs of the community" (section 151(3) of the Constitution) and the duty of both the national and provincial governments to oversee local government through regulation and supervision. This tension is managed as long as the national and provincial governments do not, to use the constitutional expression, "compromise or impede a municipality's ability or right to exercise its powers or perform its functions" (section 151(4)).

There is thus a balance to be struck between letting the flowers of local initiative and innovation bloom, and preventing the weeds of mismanagement, incompetence and corruption from taking over the flower beds. It is now a question of correcting the balance to ensure that the creative energy of municipalities and communities is harnessed in pursuit of developmental local government.

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Challenges
FOR THE NEW COUNCILS

Photo: Jason Meintjies/PictureNET

The election of 5 December 2000 was the formal beginning of the new local government dispensation. Local government was established as the primary site for service delivery and development in the country. Five years on, there are concerns about local government's ability to execute its mandate. For the new councils, the next five years will be critical in meeting these challenges and making local government work effectively in fulfilling its mandate of providing services and development.

There is deep concern about municipalities' ability to deliver services and function effectively. In 2004, the national government launched Project Consolidate, aimed at assisting municipalities to effect their basic functions. This project, driven by the President, identified 136 municipalities facing serious difficulties and in immediate need of assistance. More recently, President Mbeki has even suggested that expertise should be imported from abroad to cope with the skills shortage.

The failure of many municipalities was not only noticed by government, but, more importantly, by the people. Not since the violent protest in the black townships in the 1980s have South Africans witnessed protests on the streets of such magnitude.

Problems

The most common complaints people voice are the following:

- **Failure to deliver services**

Local government is put forward as the engine of development and service delivery, yet some communities are not receiving basic municipal services such as housing, water and sanitation. While there

has been a roll-out of new services in some areas, they are uneven and the basic maintenance of service systems is often neglected. The problems are most evident in the rural areas. The necessary skills levels are not always present. Municipalities cannot comply with the law and financial accounting and, as a result, qualified Auditor-General's reports are regularly issued.

- **Not people-centered**

A frequently voiced complaint is that some municipalities tend to be inwardly-focused – the vehicle for a self-serving elite – rather than being community-centered. People complain about:

- the high salaries of senior officials;
- councillors losing touch with their constituencies;
- political appointments to both high and low positions;
- the high level of the wage bill (the percentage of budget spent on wages is ever-increasing); and
- corruption.

The ultimate form of a self-serving institution is corruption. There are numerous examples. The most dramatic event was the arrest of the mayor and the municipal manager of Mangaung on multi-million rand corruption charges.

Why the problems?

There are a number of reasons for the problems experienced by municipalities.

- **Too much is expected**

Municipal performance should be assessed against what local government can realistically achieve. By demanding too much, local government is set up for failure. It is simply unrealistic to expect that many municipalities (particularly in rural areas) can effect local economic development while the growth in the national economy is slow and urban based. A review of integrated development plans (IDPs) indicates that the expectation of citizens often fall beyond the scope of local government's competencies.

- **Newness of the system**

The local government dispensation is new. New laws are added every year. Last year it was the Property Rates Act and the Intergovernmental Relations Framework Act. For a system that has undergone major changes in the past five years, the track record on the whole is reasonable. All municipalities underwent a process of amalgamation, which in some instances has not been completed yet. However, with each passing year, this factor obviously becomes less important.

KEY POINTS

- With the lack of capacity a key contributing factor in local government's underperformance, capacity building programmes are essential.
- Top management must be equipped to think strategically, with a development focus.
- The new councils will have to ensure that municipalities are community-centered rather than self-centered institutions.

- **Complex system**

Municipalities must function in a highly complex institutional framework which often produces conflict. The relations between district and local municipalities are not always productive. While the Constitution holds out the promise of local self-government, the statutory framework created for municipalities is extremely complex and burdensome. Where the requirements are so onerous and costly, non-observance becomes the inevitable reality.

- **Not developmentally focused**

Part of the problem is that there has not been a complete shift in the thinking of all municipalities towards development. This lack of development orientation manifests itself by the delinkage of the budget and the IDP. Some municipalities start off with their budget and then afterwards try to link it (ineffectively) to the IDP. Strategic planning is consequently weak.

- **A top-down system**

The local government system is premised on representative and participatory democracy, requiring a bottom-up approach to governance. In reality, the converse may be the case. First, the level and effectiveness of participatory democracy is limited. Ward committees are yet to operate

optimally and the participatory process of integrated development planning is often more form than substance. Second, much of local government policy is dictated by national government. Where the national government prescribes all aspects of development, the very purpose of democratic local government is undercut. The danger is that municipalities may become mere appendages of national government. Not only does that often result in unfunded mandates, but development is then no longer shaped by communities.

The challenges

- **Human empowerment of local government**

With the lack of capacity a key contributing factor in local government's underperformance, capacity building programmes are essential. They include a thorough understanding of the legal and policy requirements of good governance. Further, it is of critical importance to effect a change in macro-thinking and strategic planning. Top management must be equipped to think strategically, with a development focus.

- **Political leadership**

The health of local government is much dependent on the quality of the leadership that the new councils will provide. They will have to ensure that:

- municipalities are community-centered rather than self-centered institutions;
- appointments are not politicised;
- corruption is rooted out wherever it occurs – in council or the administration.

The challenge for the new councils is to make local government work. Local government must play its key role to deliver democracy and development. The new councils certainly have their work cut out in the next five years.

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THE POLICY IN The numbers

There is more to the 2011 Local Government Budgets and Expenditure Review than numbers. The review tells a story about the policy behind the numbers. It lays down the policy line, sends clear signals about policy shifts on the way, issues warnings, educates us, and sometimes brings out the big stick or applies the brakes.

The Organisation for Economic Co-operation and Development defines 'policy reform' as an evolutionary process in which 'changes to the formal "rules of the game" – including laws, regulations and institutions – are made to address a problem or achieve a goal'. ('Practices' are among the 'rules of the game' that can be changed in this way.) Governments use many different policymaking tools to lead public opinion, prepare a country for change, build consensus and manage cycles of continuity and change in policy. This article looks at four such policymaking techniques used in the review.

Fitting the pieces of the puzzle together into a story about local government

The 2011 review tells a story about the evolution of local government policy, what works, what doesn't and why, where policy is going and where the review fits in. It tries to show policy continuity – how all the pieces of the local government puzzle fit together over time – and it does that in several ways.

Treasury documents all follow the same simple format
National Treasury budget documents generally follow the same simple format, structure and layout, and that style hasn't changed much over the years. This consistency gives Treasury documents a familiar look and feel, which makes it easier to find and compare information across different documents and periods. This is a very simple technique which other departments should use.

The 2011 review talks to the 2006 and 2008 reviews
The 2011 review explains how it relates to the 2006 and 2008 reviews. We can tell how the 2011 review builds on the earlier reviews. That continuity makes it is easier to trace the evolution of policy thinking over the years.

Data improvements and limitations are clearly explained
The improvements in data from one review to the next, as well as the current data limitations, are clearly explained in a technical note. That tells us what capacity government has to do evidence-based policymaking and how that capacity has evolved over time. The data from Census 2011, which is under way, will add enormously to our knowledge of municipalities.

The 2011 review clearly indicates how it relates to external context, government policy and the budget
The review is contextualised in relation to the socio-economic challenges facing the country, the national budget and fiscal policy, and general government policy and priorities. We can thus clearly see how the analysis and proposals in the review relate to national priorities, the money and the broader constraints of the external environment.

Laying down the law: Municipalities must get back to basics

The HSRC research referred to in the review, the frequency of protests and the rise of rates boycotts all tell us the same thing: the South African public is fed up with the way things are going in local government.

The 2011 review sends out a clear message that the local government sector must get back to basics. Municipalities must be run by qualified managers and staff. Councils must take their oversight role seriously. Budgeting must be realistic and cash-backed. Waste and spending on non-priorities

THEME 2: MUNICIPAL INSTITUTIONS

Municipal boundaries are determined by the Municipal Demarcation Board, an independent institution. Why are municipal boundaries not determined by a political body and how does the Demarcation Board actually do its work? Secondly, the Board also determines municipal categories, i.e. whether an area is classified as a metropolitan municipality or not. What are the drivers for municipalities seeking that status? Lastly, this theme includes an opinion piece, criticising the latest round of demarcations, that preceded the 2016 elections.

1. Demarcating Municipalities by Jaap de Visser, Local Government Project, Community Law Centre, Local Government Bulletin 1999, Volume 1, Issue 1, page 1-4
2. **Stepping Stones and Stumbling Blocks: Changing Municipal Boundaries** by Annette Christmas/Jaap de Visser, Local Government Bulletin, Volume 8, Issue 4 page 15-16
3. **Aspirant Metropolitan Municipalities: Prospects, Problems and Requirements** by Dr K Smith, Local Government Bulletin 2001, Volume 3, Issue 3 page 5-8
4. **Questions abound over demarcation proposals**, Nico Steytler, BDLIVE 30 April2015http://www.bdlive.co.za/opinion/2015/04/30/questions-abound-overdemarcation-proposals (last accessed 25 August 2016)

Demarcating municipalities

the aim: viability, the problem: time

The Municipal Demarcation Board has been established and is working. It has very little time to fulfil the formidable task of demarcating municipalities. This article will outline the functions of the Board, its powers and procedures, and the challenges which face it.

'Apartheid boundaries'

One of the many problems South Africa inherited from apartheid is a structure of race-based municipal boundaries. They are based on a policy of spatial segregation at local level; through separation, influx control and a policy of 'own management for own areas', apartheid aimed to limit the extent to which affluent white municipalities would bear the financial burden for servicing disadvantaged black areas. Municipal boundaries need to be re-demarcated in order to enable redistribution and to achieve democratic, accountable local government that consists of financially viable municipalities.

Demarcation Act

South Africa's Constitution calls for the establishment of an independent authority that will demarcate municipal boundaries and for the establishment of criteria and procedures for the demarcation (s 155(3)(b) of the Constitution, Act 108 of 1996). The Municipal Demarcation Act 27 of 1998 provides for the establishment of a Demarcation Board that will execute the task of demarcating municipal boundaries. This Act, together with the Municipal Structures Act 117 of 1998, which defines the internal structures of municipalities, and the forthcoming Municipal Systems Bill form the three pillars of future local government.

On 1 February 1999 the Demarcation Board was established and the members appointed by the President.

The Demarcation Board

The Demarcation Board is an independent, juristic person that has to determine municipal boundaries in accordance with this Act, other appropriate legislation (for example the Municipal Structures Act) and the Constitution. The fact that the Board is a juristic person means that it can acquire property, hire people, insure itself, go to court etc (s 5). But the Board cannot borrow money and cannot buy immovable property without the consent of the Minister for Provincial

Continued on page 2

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Continued from page 1

Affairs and Constitutional Development. Members of the Board are not liable for anything they do in good faith when performing their duty.

The Act says that the Board must be representative of the South African society. Its members should come from all over the country and be knowledgeable and/or experienced in matters that are relevant to municipal demarcation (s 6). Those include, for example, development planning, community development, traditional leadership, municipal finance, town planning etc. Politicians in national, provincial or local government cannot be members of the Board, nor can office bearers of political parties (s 13(3)).

Who sits on the Board?

The following persons have been appointed to the Board by the President:

Dr Michael Oliver Sutcliffe (Chairperson)
Mrs Nkaro Aldefrida Mateta
Mr V Mlokoti
Ms R Hartslief
Mr Prince Duke Dludta
Mrs Rosemary Monyamane
Mr Abraham Petrus Marais
Mr Kaobitsa Maapa
Ms Jacqueline Marion Subban
Nkosi Tshililo Jeffrey Ramovha
Prof Robert Greg Cameron

The functions of the Board

The Board must determine the boundaries of municipalities in South Africa. The existing municipal boundaries continue to exist until they are replaced by the boundaries determined by the Board (s 44). The Board can determine a boundary on its own initiative or on the request of the Minister or an MEC for local government.

Municipalities can request demarcation

The Board can also act on the request of a municipality with the concurrence of any affected municipality (s 22). This opportunity might prove to be essential for municipalities who do not want to sit back and wait until the Board comes to revisit their boundaries and who want to be participants instead of 'victims'. Municipalities can be pro-active and present a proposal for demarcation in their request, provided that it takes place with the concurrence of all other affected municipalities. In that way

municipalities can have input in the process of demarcation, even though the Board will eventually decide on the demarcation.

Objectives of demarcation

The Board must pursue the following objectives when demarcating an area:

"...the objective must be to establish an area that would-

(a) enable the municipality for that area to fulfil its constitutional obligations, including-
  (i) the provision of democratic and accountable government for the local communities;
  (ii) the provision of services to the communities in an equitable and sustainable manner;
  (iii) the promotion of social and economic development; and
  (iv) the promotion of a safe and healthy environment;
(b) enable effective local government;
(c) enable integrated development; and
(d) have a tax base as inclusive as possible of users of municipal services in the municipality" (s 24).

In short, the Demarcation Board should demarcate *with the aim of establishing municipal areas that are democratic and accountable, financially sound, able to provide good services and able to develop the municipal area.*

The Demarcation Board should demarcate with the aim of establishing municipal areas that are democratic and accountable, financially sound, able to provide good services and able to develop the municipal area.

Factors that the Board must consider

The Act lists the factors that the Board should take into account when trying to attain those objectives through the demarcation of municipal boundaries (s 25). These factors, together with the aims set out above, carry the entire demarcation process.

The factors are -

- how people move in the area, where they go to work, spend leisure time and spend money, how goods and services move and who services whom in the area;
- the need for integrated areas and the need to avoid fragmentation – specific mention is made of the creation of metropolitan areas;
- the financial and administrative capability of a municipality to perform municipal functions;
- existing municipal and provincial boundaries (eg to what province has a municipality always belonged?) as well as areas of traditional rural communities (eg does the demarcation cut right through such an area?);
- functional boundaries, such as voting and magisterial districts, health, transport, police and census boundaries;
- how the land is being used and how it is expected to be used (industrial, agricultural, residential etc);
- the need for co-ordinated municipal, provincial and national programmes and services, including the needs of the administration of justice and health care;
- topographical, environmental and physical characteristics;
- the administrative consequences of demarcation on the municipality's creditworthiness (say a former 'rich' municipality merges with a 'poor' one), on existing municipalities and their council members and staff etc;
- the need to rationalise the total number of municipalities (the Minister can make regulations in which targets and objectives for the rationalisation of municipalities are prescribed).

Undoubtedly, the contentious nature of some of these factors will come out in the demarcation process. Discussions will be held over issues such as the need for decreasing the number of councillors, the demarcation of a metropolitan area, and which municipality will profit in its tax base from an industrial area.

Procedures of the Board

Demarcation procedure

The Board must announce its intention to consider a determination of boundaries in a newspaper and on the radio, and it must invite the public to submit written representations and views (s 26). The following persons and/or organs must also be notified and they can comment on the matter: the MEC, each municipality that will be affected, the magistrate, if a magisterial district is affected, and the provincial House of Traditional Leaders if a boundary of a traditional authority is affected.

The Board is obliged to consider all representations and views. Thereafter it can make a final decision. The Board can also decide to hold a public meeting where it allows the public to ask questions and air their views, or it can decide to conduct a formal investigation (s 27).

The formal investigation can be done by the Board itself or by an investigating committee, established by the Board. The Board (or an investigating committee) has the power to force a person, by means of a summons, to appear before the Board to give evidence or to hand over documents. It can also administer an oath, or solemn affirmation, to persons it is questioning (s 30).

Only the Board can make a final decision on a boundary determination; it cannot delegate that power to any of its committees or members. Questions before the Board are decided by a supporting vote of at least the majority of the members (s 17). When the Board has made a final decision it should send the particulars of the determination to the Electoral Commission. The Electoral Commission decides whether the new boundary affects the present representation of voters in the councils of any affected municipality. If it does, the determination will take effect only after the next municipal election. If it does not, the determination will take effect from a date determined by the MEC (s 23). A boundary determination must be published in the relevant *Provincial Gazette*. The notice should say when the determination takes effect (s 21(3)).

Appeal against a demarcation

Any person who is aggrieved by a demarcation, may, within 30 days after publication, submit written objections to the Board. The Board must consider these objections and can change or confirm its decision (s 21(4) and (5)).

Board members' independence and credibility

Members of the Board should perform their duties in good faith and without fear, favour or prejudice and should refrain from any acts that compromise the Board's credibility, impartiality, independence and integrity. They must disclose any private interests in matters before the Board and withdraw from the proceedings, unless the Board decides otherwise. Members should not use their position or privileges for private gain or to benefit another person. Full-time Board members are not permitted to engage in any other paid work, without the consent of both the Board and the Minister (s 12).

Assistance

The Board may establish committees to

Demarcating municipalities

assist it. Members of these committees are subject to the same rules pertaining to conduct, as those applicable to members of the Board. Those committee members are also subject to the same rules concerning the (dis)qualifications for being a member. The assisting committees can have advisory members.

The Board can ask municipalities who will be affected by demarcation to make facilities available for the holding of meetings.

Offences

To obstruct proceedings of the Board or a committee, to threaten or influence the Board or committee members or to fail to answer to a summons constitute offences, and can be punished by a fine or imprisonment (s 42).

Challenges

The Board has a huge task on its hands. It has to work towards a situation where there is a rationalised number of viable, democratic municipalities while, at the same time, it needs to be sensitive to the views of the communities that will be affected. But the greatest challenge for the Board might very well be the time factor. There will be pressure on the Board to demarcate as many municipalities as possible before the next local elections, to prevent the holding of local elections on the basis of 'apartheid boundaries'. In terms of the recent constitutional amendment (see page 7), elections will be held around 1 November 2000. The fact that the IEC will need 4 to 6 months for voter registration, the preparation of ballot papers etc, leaves the Board with less than one and a half year to finalise as many boundaries as possible. However, the issues and interests at stake do not permit the demarcation process to turn into a race against time.

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STEPPING STONES AND STUMBLING BLOCKS

Changing municipal boundaries

The Municipal Demarcation MDB (MDB) is entrusted with the often-difficult task of demarcating municipal boundaries. Disputes around cross-boundary municipalities and the changing of municipal boundaries have recently been the focus of violent protests by communities affected by these decisions. The recent string of court decisions on the issue is an indicator of the extent to which these processes affect communities at grassroots level. The MDB recently published a proposal about the incorporation of the Paarl, Wellington, Stellenbosch and Drakenstein municipalities into the Cape Town Metropolitan Municipality. The notice attracted much attention in the media and raised important questions around how the MDB engages with proposals received from the public.

The process of delineating and changing municipal boundaries has attracted political tension and community outrage from across the social spectrum. This is attributable, in part, to what the Constitutional Court has described as "the degrading realities inherited from an apartheid history" that have impacted very practically on the ability of certain municipalities to meet even the most basic obligations of service delivery.

The extent to which demarcation processes are riddled with conflict is demonstrated in the recent case of *Matatiele Municipality and Others v President of the SA and Others* (see page 3).

In this case, members of the Matatiele community resorted to violent protest in an attempt to prevent the transfer of their municipality, in KwaZulu-Natal, to the Alfred Nzo District Municipality in the Eastern Cape, claiming that the latter has a poor record of service delivery. The Court, in delivering judgment, emphasised the importance of participatory democracy and public involvement in legislative and other processes.

While the constitutional imperative of public consultation is a necessary stepping-stone to accountable governance, as demonstrated in *Matatiele*, this process is not without its pitfalls. The uproar in the media around the notice relating to the proposed re-determination of the Cape Town Metro demonstrates the contentious nature of these processes. According to reports, the notice, requesting public comment, was published in response to a suggestion submitted by a member of the public.

The Mayor of Cape Town, Helen Zille, expressed shock at first learning about the proposal and the 30-day deadline for public comment from newspaper reports. She stated that it was a "ridiculously short period of time within which to comment on such a far-reaching proposal". Concerns around the proposed re-determination centre on the vast area that the new metropolitan municipality would span and the

KEY POINTS

- The process of delineating and changing municipal boundaries has, in the past, attracted political tension and community outrage from across the social spectrum of South Africa.
- Without fettering the discretion of the MDB as an independent institution, it would be prudent for the MDB to set a standard regulating the types of proposals that merit publication.

capacity for effective and efficient administration of service delivery by the re-constituted municipality. The notice furthermore provides no background to the proposal or framework for the feasibility of implementing such major changes in the affected municipalities.

Process

In evaluating the process undertaken by the MDB in publishing the notice and soliciting public comment in this case, it is clear that the MDB acted within the scope of its authority as defined by the Demarcation Act. Section 22(1) of the Demarcation Act confers on the MDB, as an independent institution, the authority to determine or change a municipal boundary either:

- on its own initiative;
- at the request of the MEC for local government; or
- at the request of a municipality "with the concurrence of any other municipality affected by the proposed determination or re-determination".

In these instances, the MDB is compelled by section 26 of the Demarcation Act to publish a notice stating its intention to consider the matter and inviting written representations and views from the public within a specified period not shorter than 21 days. The notice must be published in a newspaper circulating in the area concerned and its contents must be conveyed in the same area by radio or other appropriate means of communication. In addition, a copy of the notice must be sent to:

1. the relevant MEC for local government;
2. each municipality that will be affected by the MDB's consideration of the matter;
3. the magistrate concerned if a magisterial district is affected; and
4. the relevant provincial House of Traditional Leaders if the boundary of a traditional authority is affected.

However, where the MDB acts on its own initiative after receiving a request from a member of the public, the public notification procedure outlined above does not need to be followed. Upon receiving such a request, the MDB may require that member of the public furnish the information as required by it. It may also solicit the views of those listed under 1–4 above.

Having complied with the above requirements it is therefore at the discretion of the MDB whether to follow the route of public notification. The procedure outlined above, however, relates to instances where the MDB has decided, on receiving a proposal from a member of the public, to publish a notice. The Act does not seem to regulate how the MDB decides when a proposal received from the public has sufficient merit to warrant publication.

Comment

The MDB, in exercising its discretion in this case, decided to follow the public notification route. While it acted well within the ambit of its authority in publishing the notice, the comments by prominent leaders relating to the lack of prior consultation before publishing the notice have generated debate.

Important questions raised by this incident relate to how the MDB balances the imperative of facilitating public participation against that of screening requests or proposals by the public which have little or no substance. Without fettering the discretion of the MDB as an independent institution, it would be prudent for the MDB to set a standard regulating the types of proposals that merit publication. This may go a long way towards minimising unwarranted public concern, which hampers the effective functioning of the MDB.

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Aspirant metropolitan municipalities:

Prospects, problems and requirements

When the Municipal Demarcation Board (MDB) demarcated the boundaries of municipalities in 1999/2000, it identified some areas in the country as 'aspirant metropolitan areas'. These are areas that at that point in time substantially complied with a significant number of the prescribed criteria for metropolitan areas, but not to the extent that they could have been declared metropolitan areas. However, it was anticipated that they would meet the criteria in the near future, at which time they would be declared metropolitan areas.

The aspirant metropolitan areas include, and have at their core, so-called secondary cities. Secondary cities are fairly significant urban settlements that are usually surrounded by smaller and even very small urban, peri-urban and rural settlements. For the settlements surrounding the secondary city, the city is in a real sense the milking cow. For example, the district municipality raises the bulk of its revenue in the city, but the surrounding areas receive the bulk of its allocations and benefit the most from its programmes.

This article first discusses the criteria for becoming a metropolitan area. It will then highlight some of the consequences of becoming a metropolitan area, and explore some of the requirements that would have to be met for such an event to happen. Attention will be given to events that are currently taking place in local government and that may hamper or assist the process of becoming a metropolitan area.

CRITERIA

In terms of section 2 of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act) an area must have a metropolitan municipality if that area can reasonably be regarded as –

(a) a conurbation featuring –
  (i) areas of high population density
  (ii) an intense movement of people, goods and services
  (iii) extensive development, and
  (iv) multiple business districts and industrial areas;
(b) a centre of economic activity with a complex and diverse economy;
(c) a single area for which integrated development planning is desirable; and
(d) having strong interdependent social and economic linkages between its constituent units.

The ordinary dictionary meaning of 'conurbation' is, *'an extended urban area, especially one consisting of several towns and merging suburbs'*. In terms of the criteria listed in the Structures Act, such an extensive urban area must feature areas of high population density (probably measured in persons per square km), intense (internal) movement of people, goods and services, extensive development, and multiple business districts and industrial areas.

Interestingly, it appears that the Structures Act places a high premium on the economic character of a metropolitan area. There is a direct link between the required intense movement of people, goods and services, multiple business districts and industrial areas, and a complex and diverse economy. Consequently, an analysis of the economic character of an area may determine whether an area is metropolitan or not. If the economy of an area is dominated by *primary* economic activity (agriculture, forestry and mining), it cannot become a metropolitan area. However, if primary economic activity is present but not a dominant economic characteristic, the area may become a metropolitan area.

The Structures Act places a high premium on the economic character of a metropolitan area.

An analysis of the economic character of an area should take into account:

- daily commuting patterns and the number of people who commute within the area;
- the movement of goods and services within the area;
- the distinction between primary and secondary business districts and neighbourhood shopping centres; andthe definition of an industrial area– can a locality within the area which has one or two factories and commercial

undertakings be regarded as an industrial area?

The area must also feature 'extensive development'. However, it was left to the MDB to decide what constitutes extensive development. Given the South African tendency to define development in terms of 'things' (infrastructure and buildings), it may be that the legislature contemplated that a metropolitan area would be almost entirely built-up. Seen in this light, a metropolitan area should be an urban settlement in its entirety. It may, however, include the non-urban hinterland to which the urban settlement would expand naturally.

EXAMPLE

One such example is the Mangaung local municipal area. A part of the area that is now included in the Mangaung local municipal area, namely Bloemfontein, Bloemfontein District and Botshabelo, was identified as an aspirant metropolitan area, Before the December 2000 general municipal election, the municipal area consisted of the Bloemfontein, Botshabelo and Thaba Nchu transitional local councils, the Bloemfontein district council and the Thaba Nchu transitional rural council. The area comprises large tracts of land used for commercial agriculture and, near Thaba Nchu, communal farming. Despite the significant non-urban settlements in the area, it is possible that the current Mangaung local municipal area could become a metropolitan municipal area. South African metropolitan areas would therefore differ from international metropolitan areas in that they may include large portions of land used for commercial and communal farming purposes.

For some local and district municipalities the restructuring of local government is far from over.

REQUIREMENTS FOR BECOMING A METROPOLITAN AREA

All the 'aspirant metropolitan areas' currently fall within one or more local municipal areas. These local municipalities share jurisdiction (executive and legislative powers) with the district municipalities in whose areas they fall. When eventually an area becomes a metropolitan area, the local and district municipalities in the new metropolitan area will be collapsed into one. Therefore, for some local and district municipalities the restructuring of local government is far from over.

The most important requirement for becoming a metropolitan area is a clear and rational declaration by the local and district municipalities concerned to become a metropolitan area. The support and commitment of the relevant provincial government would also be required as the provincial government controls significant public resources that could be employed to assist in the effort of becoming a metropolitan area. This, in turn, requires that these three stakeholders separately and jointly commit themselves in public to realising the ideal of becoming a metropolitan area. However, they would first have to make up their collective minds as to whether they want the area to become a metropolitan area.

Becoming a metropolitan area has an exclusionary effect on those areas outside its boundaries.

WEIGHING THE ODDS

Such a decision can only be arrived at after a careful analysis of the consequences (advantages/benefits and disadvantages/costs) of such a declaration. These consequences will be different for those people who are included in the area and those who have been excluded, even though they may have fallen under the same district municipality at the time of the declaration. Becoming a metropolitan area thus has an exclusionary effect on the areas outside its boundaries. These areas would no longer share directly in the resources of the metropolitan area as they would have done when they were included in the district municipality's boundaries.

The consequences of becoming a metropolitan area must also be weighed up against the consequences of not becoming one. The question is twofold:

- How does a metropolitan municipality differ in substance from any other category of municipality?
- What real (against imaginary) advantages would the people within the future metropolitan area enjoy that they would not enjoy under the current system?

Once the decision to become a metropolitan area is made by all three governmental stakeholders, it must be the driving force of all political decisions (including policies and plans) until the goal is achieved.

Arriving at that decision may not be as easy as it sounds. This is so because humans must make the decision. People tend to take decisions on the basis of the benefit that they would derive from it. Very few people are willing to forego immediate benefits in exchange for some supposed future benefit. Also, some people currently have a bigger vested interest than others in either promoting or delaying becoming a metropolitan area. For example, district municipal councils include councillors that represent local municipalities and constituencies outside the aspirant metropolitan area. These councillors may lose their positions if the metropolitan municipality is established and their constituencies may lose access to resources if the district municipality is abolished. Managers of the two municipalities will ultimately compete for fewer management positions. They may therefore try to persuade politicians to delay the decision.

Some district municipal councillors represent local municipalities. As representatives they speak on behalf of the respective local municipalities. Clearly, the local municipal councils would first have to mandate their representatives in the district municipality before they participate in any discussion about establishing a metropolitan municipality. The promoters of the idea would therefore have to work out a lobbying strategy to engage those municipalities that would otherwise be excluded from the metropolitan area.

STRATEGY

Once the politicians have taken the decision, a programme for gaining popular support would have to be made and implemented. Without the support of local residents and specifically their organised groups, the ideal may be lost before it even started. Popular support is extremely important because the local community ultimately bears the cost of everything that follows. This cost is either in terms of financial contributions through taxes and service charges or delays in getting access to much needed services in the short term. It may well be that the decision to become, and to work towards becoming, a metropolitan area may shift the focus of government spending priorities from basic needs to more medium- and long-term economic development investments.

The process of becoming a metropolitan area should be managed with a view to completing it in the shortest possible time.

The next step would be to establish a plan and a time frame for becoming a metropolitan area, in other words for meeting the criteria set out in the Structures Act. Such a plan must be based on an analysis of the extent to which the area does not immediately meet the criteria for becoming a metropolitan area. The plan would have to have a strong economic development focus. This is necessary to guide public investment decisions in order to meet the bulk of the criteria in the shortest possible time.

The vehicles for such a plan are the municipal integrated development planning process and the provincial strategic planning process. These two planning processes would have to be co-ordinated and integrated very carefully.

It is common knowledge that restructuring focuses resources and effort inward towards the institution instead of outward to its customers. More resources and energy are ploughed into the institution than into doing what the municipality is supposed to be doing, namely to promote human development through service delivery and participatory and accountable government. The process of becoming a metropolitan area should thus be managed with a view to completing it in the shortest possible time. This is necessary to prevent perpetual restructuring becoming a feature of local government in aspirant metropolitan areas. The time frame set for achieving the ideal of becoming a metropolitan municipality must therefore be as short as possible, but still realistic.

It is clear that arriving at the decision to actively pursue the ideal of becoming a metropolitan municipality would require a demonstration of co-operative government at a level not experienced up to now. The local and district municipalities concerned and the provincial government in whose province the aspirant metropolitan area falls would have to establish mechanisms and processes for collaboration and joint decision-making to achieve the ideal.

CONSEQUENCES OF BECOMING A METROPOLITAN AREA

Advantages

The most obvious result of becoming a metropolitan area is that the metropolitan municipality gains all the municipal (including fiscal) powers and functions set out in legislation.

It does not share jurisdiction with any other municipality. Therefore:

- development planning may become easier than when two levels of municipality have to co-ordinate their development plans for the same area;
- one municipality commands all municipal sources of revenue in the area, which can contribute to making more rational and focused investment decisions;
- intergovernmental co-ordination and collaboration is easier simply because there are less government institutions to interact with in the area;
- residents are likely to understand the local government system in their area more readily; and
- as there will be less municipal institutions, the cost of maintaining them should decrease.

Authorisations

The three most significant functional competencies of district municipalities that are currently being performed by local municipalities through an authorisation of the Minister for Provincial and Local Government are:

- potable water supply systems;
- bulk supply of electricity, which includes for the purposes of such supply, the transmission, distribution and, where applicable, the generation of electricity; and
- domestic waste-water and sewage disposal systems.

Water and electricity provisions are classified as trading services. A municipality determines the service charges payable for them in such a manner that it realises a trading surplus. This surplus is used to subsidise services financed through the rates account.

Sewage removal and disposal are economic services. Consumer charges are determined in such a way that the consumers pay the full cost of providing the service. Should the Minister withdraw the authorisation, a local municipality would lose the trading surplus on its trading services (see *LGL Bulletin* 2000(4), p. 9).

Some of the advantages and disadvantages of withdrawing the authorisation for a local municipality are listed below. The advantages that the local municipality will experience will automatically become disadvantages for the district municipality. Likewise, the disadvantages for the local municipality would translate into advantages for the district municipality:

- the payroll of the local municipality will decrease, as the staff involved in a particular function would follow the function concerned;
- the local municipality would need much less office and other workspace;
- the local municipality's debtors' book and creditors' commitments will shrink as the liabilities related to a function would follow that function;
- the local municipality would no longer have to maintain costly assets and reticulation networks as these would follow the function concerned; and
- the local municipality would not have to invest in and install new

infrastructure to provide these services.

On the downside, the following would be in store for the local municipality:

- the revenue sources of the local municipality will decrease;
- the trading surplus the local municipality realises on water and electricity will be lost, thereby reducing the amount of money available to subsidise rates and general services. Consequently the municipality would have to increase property rates tariffs and other service charges more drastically;
- the portion of the equitable share of revenue raised nationally that the local municipality is entitled to, will be reduced;
- debt collection will become more difficult because the local municipality would not be able to suspend services, for example, electricity;
- several governance issues would arise, for example, it is likely that local municipalities would become centres for receiving complaints about services;
- as the district municipality would be required to spend more of its own revenue on providing services, less money would be available from that source to fund capital works; and
- employees would for the time being remain uncertain about their employment prospects.

If the authorisation of the local municipalities to perform district municipal functions is withdrawn before the determination of an area as a metropolitan area, massive restructuring of services, systems and structures and transfer of assets, liabilities and people must occur. It is entirely possible that shortly thereafter the district and local municipalities would cease to exist altogether and be superseded by a metropolitan municipality. Everything must then be transferred and overhauled again. Such a course of action will definitely cause an inward focus, perpetuate uncertainty and contribute to massive confusion.

Those areas that are excluded from the metropolitan area are cut off from the income generated from levies in the metropolitan area.

RSC levies

A metropolitan municipality levies and collects so-called RSC levies within its area. This means that the metropolitan municipality has more sources of revenue that yield significant income than the existing district and local municipalities respectively. In most cases the bulk of the income from the RSC levies currently raised by a district municipality is levied on business and industry within the aspirant metropolitan area. The downside is of course that those areas that are excluded from the metropolitan area are cut off from the income generated from these levies in the metropolitan area. They would be included in other district municipal areas that may not be as financially well off as the one from which they have been excluded.

CONCLUSION

Becoming a metropolitan area must be on the agenda of the relevant local and district municipalities and the provincial government. Certainly the Minister for Provincial and Local Government, the MEC responsible for local government in the province and the MDB must also take the 'status' of these areas into consideration when making recommendations and resolutions about the adjustment of municipal functional competencies and amending authorisations granted to local municipalities to perform district municipal functions. On the face of it, it appears that becoming a metropolitan area would be advantageous for the residents within that area, even if the advantage is only a simplification of the government system. Those communities that currently benefit from being in the same district as the aspirant metropolitan area would definitely, and unfortunately, lose out.

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The opinions expressed in this paper are those of the author alone.

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Questions abound over demarcation proposals

Apr 30, 2015 | Nico Steytler

Co-operative governance and traditional affairs minister's requests have presented a major test of the Municipal Demarcation Board's independence

THE Municipal Demarcation Board (MDB) draws the outer boundaries of municipalities, declares metropolitan municipalities, and may declare district management areas. It had set the end of January 2013 as the closing date for considering requests for changes to the outer boundaries of municipalities and the declaration of metros, which could become effective from the 2016 local government election.

This time span would have enabled the MDB to consider requests and, where necessary, conduct in-depth investigations and consultations. This process would have been concluded by the end of 2013, following which the process of ward delimitation would have been conducted in 2014-15, and the Electoral Commission (IEC) would have been timeously provided with a set of boundaries for its preparations in respect of the 2016 elections.

Two years later, in January-February 2015, the minister of co-operative governance and traditional affairs made proposals that could result in the most far-reaching set of boundary changes since the first set of demarcations in 2000. The MDB has accepted these proposals for consideration and published notices for public comment in February and March. The proposals are for:

• Three new metros: the district municipality (DM) of uMgungundlovu, comprising of seven local municipalities (LMs), covering mostly rural areas, with Pietermaritzburg as its core; uThungulu DM comprising six LMs, including Nkandla LM, with Richards Bay as its core; West Rand DM, with four LMs and Krugersdorp as its core.

• Three existing metros are to get more rural municipalities: Buffalo City receiving two rural LMs; Mangaung receiving one-and-a-half and eThekwini receiving more traditional areas.

• 35 local municipalities are to disappear, either through amalgamation with one to two other municipalities or through being governed directly by DMs as district management areas (DMAs).

• In KwaZulu-Natal, 19 local municipalities' boundaries are to be changed to align them with those of traditional authorities.

Most importantly, the proposals will fundamentally change four key elements of demarcation as expressed in statute and policy. First, the driving principle behind the proposals is to eliminate "dysfunctional" and "nonviable" municipalities.

According to the Department of Co-operative Governance and Traditional Affairs' policy document, Back to Basics, a third of municipalities are "frankly dysfunctional". They are also said to be financially nonviable. These two concepts require scrutiny. Are they indeed legitimate criteria for demarcating municipalities?

There is no generally accepted concept of, or articulated policy on, "municipal viability" among key stakeholders. The MDB has in the past worked with the concept only when declaring DMAs in very sparsely populated areas. The department, seems, however, to link viability to financial self-reliance. There are 70 mostly rural municipalities that receive more than 73% of their income from transfers. Are they now all unviable, despite some of them having large populations?

The proposals transform one of the factors relevant to demarcation into a requirement. Section 25 of the Municipal Demarcation Act of 1998 lists "financial viability and administrative capacity of the municipality to perform municipal functions efficiently and effectively" as one factor, among 12 other factors, that must be weighed against the others. If one factor determines the outcome, the decision is contrary to the law and thus void.

Furthermore, financial viability is not a financial principle of multilevel government in SA. All provinces rely on transfers for 97% of their revenue and so do district municipalities. Moreover, no work has been done to show how the new proposed LMs, joining two or more grant-dependent, impoverished municipalities, will somehow become financially viable. As a municipal manager said at the recent South African Local Government Association members' assembly: "Adding three zeros together does not make three."

The second criterion of dysfunctionality refers to how badly a municipality operates, delivers services and accounts for the money it spends. And more than 90 municipalities have been so classified, but what is the link between functionality and boundaries? When does a boundary make a municipality dysfunctional? How can redemarcating boundaries eliminate dysfunctionality? There may be a link, but it is likely to go the other way.

A municipality that is at risk of becoming dysfunctional (and a third of municipalities fall into this category, according to the department), may well become dysfunctional when burdened with a dysfunctional and financially nonviable, disestablished municipality.

If demarcation is not part of the answer to dysfunctionality, what else is there to do? The problem is multifaceted and the Department of Co-operative Governance and Traditional Affairs is tackling the issue on a number of fronts, but it must robustly implement its own rules to effect the professionalisation of municipal administrations.

The second new concept proffered in the proposals is that of the "rural metro"— a large rural area with a small urban core. This concept does not meet the criteria for a metro set in the Municipal Structures Act (MSA), namely an intense movement of persons and goods between multiple urban centres.

The MDB has twice refused to declare as a metro the huge uMgungundlovu DM (stretching from the Drakensberg to the boundary of eThekwini metro (Durban); having Pietermaritzburg as its core does not make the entire district a metro.

Even President Jacob Zuma said in Parliament that he thought the proposal to make a metro of the uThungulu DM (with Richards Bay as its core, and including Nkandla LM) to be a joke. But, more seriously, why the need for a "joke metro" structure for a rural area?

Two possible reasons come to mind. First, the urban core must financially carry the surrounding rural municipalities — so they all become financially viable. Figures, however, will point in the opposite direction.

Second, the rural governance would become less dysfunctional because local municipalities will be stripped of their political and administrative powers, which were previously exercised in a corrupt or inefficient way. A skilled urban core will then govern the rural areas. But is this likely to happen where the majority of the population lives in the rural areas? The more likely scenario is that the same rural politicians will also run the urban areas, to the prejudice of the latter.

If the aim is indeed to get a strong, centralised rural government, why not empower district municipalities to perform their statutory allocated functions, which entail all the major services (which the minister can assign to them) and some minor ones (which the MECs can determine)? There is a ready vehicle that will not cause the anticipated disruption of this major restructuring exercise.

The third concept advanced was changing the meaning of a municipal structure, called the district management area (DMA), to mean an area not fit to have a municipality because it is badly governed (dysfunctional) and does not raise sufficient own revenue (nonviable). Thus, through demarcation, political, managerial and financial problems are solved.

The concept of a DMA was first defined in the White Paper on Local Government as "a few exceptional, very expansive sparse settlements in the country" where no LM is viable and the DM should provide the basic services. The MSA gave effect to this policy, and the MDB in 2000 declared a number of wilderness areas, including the Kruger National Park, as DMAs.

It abolished DMAs as from 2011 because it made no sense to have a DM provide all the functions in a small remote area, when the local municipality, closest to the DMA, could do so equally well, and probably better and more cost-effectively. Declaring 35 municipalities as DMAs because of dysfunctionality and nonfinancial self-reliance would be contrary to the MSA. It is a permanent solution to a temporary (dysfunctionality) problem.

A fourth notion underlying the proposals is that radical changes to outer boundaries can be done effectively in haste, in this case in less than six months. A major restructuring of local government requires at least:

• Proper consultation with affected communities

• Proper investigations, including financial modelling and viability studies

• A transparent policy, including the content and weight of factors such as "viability", in terms of which assessments will be made.

The available time militates against these processes being followed. A hasty redemarcation process is bound to produce more problems than it solves. The proposals also seem to have been put together in haste. They smack of being undercooked and not properly thought through in respect of their implications in terms of feasibility and legality.

The proposal that "dysfunctional and nonviable" municipalities should be declared DMAs was given as an alternative to amalgamation in the first letter the minister wrote to the MDB on January 13 2015. Three weeks later, in a second letter dated February 4, the option had disappeared (even with respect to the municipalities listed in the first letter).

A similar trend is detected with regard to the "Nkandla metro". It was proposed in January by the minister, but in commenting on the proposal the KwaZulu-Natal department of local government thought better of it and suggested that it be considered only for implementation in 2021, after the next local government election (No Nkandla metro ahead of poll — BDlive March 31 2015).

The president's guffaw at the thought of Nkandla being a metro may have done the trick. However, more thought is expected from the government when embarking on such an important venture with enormous consequences, no matter how pressing the problems of local government are.

The ministerial requests and the conceptual shifts they entail have presented a major test of the MDB's independence. Will it accede to the fundamental conceptual changes that have not been thought through? Will it reconsider cases it has closed in the past? Will it be rushed along in hasty decision-making, compromising its status as an independent body, which should make decisions based on objective factors after in-depth research and wide consultation? Will it, ultimately, bow to executive pressure?

The legal framework and the MDB's own policies offer it a clear and rational path through the challenges presented by the minister's proposals.

• *Steytler is research chair in multilevel government at the Law and Policy Community Law Centre, University of the Western Cape.*

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THEME 3: THE FUNCTION OF DISTRICT MUNICIPALITIES

Local government outside the eight metropolitan municipalities comprises two tiers, namely local and district municipalities. What are the functions of district municipalities and how has the legal framework for the role of district municipalities changed over time, particularly as a result of amendments to the division of powers introduced in 2000? Lastly, could district municipalities be used as a platform for shared services at district level?

1. **New District Functions: Their Implications for Local Government** by Koos Smith, Local Government Bulletin 2000, Volume 2, issue 4, page 10-11
2. **The Big Four Function: Finality in Sight** by Charmaine Marè, Local Government Bulletin 2003, Volume 5, Issue 1, page 8-9
3. **Shared Services in the Local Government** by Nishendra Moodley and Tracy Jooste, Local Government Bulletin 2007, Volume 9, Issue 2, page 12-15

NEW DISTRICT FUNCTIONS:

Their implications for local government

The Structures Amendment Act 33 has of 2000 allocated functions that were traditionally local municipal functions to district municipalities, namely -

- potable water supply systems;
- domestic waste-water and sewage disposal systems;
- bulk supply of electricity, which includes transmission, distribution and, where applicable also generation of electricity; and
- municipal health services.

The Minister may issue authorisations to local municipalities to continue to provide these functions permanently or for a period (see p 6). The transition could be worked out in a planned manner. An authorisation means that the status quo as regards assets, liabilities, obligations, rights and employees, could be maintained for the duration of the authorisation. This article deals with the implementation and consequences of the allocation of new functions to district municipalities if the Minister does *not* authorise local municipalities to perform them.

Governance

The 'delocalisation' of decision-making about these services creates the danger that the public - the consumers and potential consumers - may be removed from decision-making about the coverage, quality and cost of these services. Most of these consumers do not have access to transport or communications media to voice their needs and complaints. District municipalities would have to involve local communities in decision-making about these services and would have to find innovative and creative ways of doing so.

The new arrangements may raise the conflict potential between local councillors and municipalities on the one hand and the service providers - the district municipalities - on the other.

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Local municipalities must ensure that they are informed of the needs and concerns of consumers of these services in order to fulfil their constitutional obligation of ensuring access to services for their residents. They would have to engage the service provider in an on-going dialogue in order to ensure that residents have access to services at affordable prices and of acceptable quality.

Administration and accounting

The operation, maintenance and repair activities related to these functions are fairly straightforward and the assets, liabilities and employees involved in those activities easy to identify. The district must take over and integrate a variety of operating systems of these services, including logistical systems such as stores inventory and purchasing, billing systems, budgeting and accounting systems, management information systems including setting and monitoring of key performance indicators.
The identification and transfer of the activities that are *incidental* to delivering these services are more difficult. These incidental activities continue to be performed locally by the employees who previously performed them until the end of the current financial year when those activities and employees are *de facto* transferred to the relevant district municipality. The incidental functions / activities are mainly accounting type functions.

Until the effective date, local municipalities provide these services and are therefore entitled to the income and the subsidies in respect of these services. However, debtors and creditors outstanding on the effective date must be transferred to, and become the responsibility of, the relevant district municipality. Creditors would include money owed to bulk suppliers (ESKOM, water boards etc), salaries and deductions in arrears (eg employees tax, pension fund and medical aid contributions) and other creditors. The debtors' book of the disestablished municipalities in respect of these services is, in most cases, significant.

It is therefore imperative that the local municipalities have accurate records of all the staff, assets and liabilities, tariffs, etc.

Income received and subsidies in respect of these services must be deposited into the bank account of the relevant district municipality from the effective date. All payments must be made from and debited against that account from that date.

The transfer of these services and the related and incidental activities and people may mean that the local

municipalities have an over-supply of office / work space and computer capacity. It will also mean that the district municipalities have too little space and computer capacity. District municipalities should refrain from acquiring new offices and computer systems. They could negotiate with local municipalities to lease office and work space and computer capacity.

At district level there is a real danger of creating large bureaucracies in order to deal with these new responsibilities. Current management of district councils is not used to managing services, managing large bureaucracies, or managing decentralised bureaucracies. Large bureaucracies are known to be less customer focussed and less effective. Simply adding technical and professional staff to existing structures to cope with the additional functions would be a recipe for disaster. Organisational structures and systems of district municipalities must be overhauled to ensure appropriate structures and systems.

It would have to be determined whether local municipalities would be able to survive with the remaining sources of revenue.

Financial implications

Sewage removal and treatment, electricity reticulation and water provision are normally classified as trading services. A municipality that provides these services calculates the consumer charges for them in such a way that they realise a trading surplus, although some municipalities only suspect that they actually make a trading surplus or, at least, break even. The surplus, if any, is used to alleviate property rates. This means that municipalities use trading surpluses to cross-subsidise services funded from the general rates account. In this way a municipality has more control over increases in property rates.

Health services currently provided by municipalities in contrast, are community or non-particular services (no user charges are levied) and consist of two distinct but inter-related services. These are personal health (clinic) services and environmental health services. Municipalities receive subsidies in respect of these services from the provincial government. However, over the last few years, the subsidies have steadily declined, limitations were placed on the subsidisation of certain types of expenditure and new services were introduced without a concomitant increase in subsidy. A growing proportion of municipal own revenue was therefore appropriated to health services.

Municipalities also subsidise the province with regard to these functions. They must first incur the expenditure and claim afterwards on a quarterly basis. Processing these claims takes up to eight weeks. A municipality therefore carries expenses in respect of health services for periods up to five months .

In addition to the loss of the trading surplus on the trading services, which is assigned to district municipalities, local municipalities' equitable share of national revenue will decrease. As local municipalities will not provide water and sewage removal, which are generally regarded as basic services, that portion of the equitable share should be allocated to the district municipalities.

A potentially major implication for local municipalities would be that their income would decrease. If any future grading or classification system for salary purposes includes income and / or number of employees as significant factors, their grade would be affected. Consequently, downward pressure will be exercised on salaries in local municipalities. On the other hand, if any of these two or both these factors remain in a future grading system, district municipalities may expect significant increases in their grading and, consequently, increases in salaries.

The establishment notices do not direct the receipt of income from these services from the actual date of transfer until the end of the financial year. They only state that the local municipality at the cost of the relevant district municipality must pay the employees related to these services. All income in respect of these services must be deposited into and credited against the bank account of the relevant district municipality from the effective date. Similarly, all expenses incurred must be debited against the bank account of the district. The district municipality must reimburse the local municipality for all expenses incurred in respect of any of these services after transfer of the functions has been effected.

For district councils the assignment of these functions means that they could experience cash flow difficulties unless effective debt collection systems are immediately put in place. This would require that the debt collection, credit control and indigent support policies and procedures of the disestablished local municipalities that continue to govern these activities, must be rationalised as soon as possible by the district municipality.

It would have to be determined whether local municipalities would be able to survive with the remaining sources of revenue. These are principally property rates and fees for refuse collection and income from lesser sources. Local municipalities retain important and expensive competencies such as road and street building and maintenance, storm water management, spatial and land use planning, recreation and cemeteries. It is extremely difficult to determine a price for these services to consumers.

Human resources implications

In many municipalities significant numbers of the employees perform work related or incidental to these four services. Those employees must, in terms of the establishment notices of the new municipalities, be trans

Continued on page 10

Continued from page 9

ferred to the new district municipalities. The employees related to a service include all the employees who for most of the normal working day have functional, supervisory or managerial involvement in that service.

The employees transferred by the local municipalities become employees of the district municipalities with retention of their conditions of service, including remuneration. The employees transferred from a local to a district municipality form an administrative unit of that district municipality. These administrative units continue to manage, operate and main tain the services for which they were responsible at the relevant local municipality subject to the budgets, rules, by-laws and resolutions of the local municipality from which they were transferred and any new rules etc that the district municipality may impose. The "governance powers and obligations" are, however, transferred immediately to the district. The administrative units cease to exist when the district adopts a new organisational structure (organigram).

This means a massive increase in the size of the administrations of the new district municipalities. Because these services are actually provided to consumers all over the district area, a new form of geographical decentralisation of administration is imperative. Many employees transferred to district municipalities due to the assignment of these functions would therefore still work in decentralised offices and other work places of that district municipality. This requires districts to implement effective inter-office communication systems, to establish clear lines of command and control. They must acquire office space to accommodate their staff in different places in their municipal areas. Separate offices for district and local municipalities may, however, defeat the government goal of "one stop shops" for government services.

Local and district municipalities should negotiate co-operative agreements about these services and their administration. A critical condition to decide during such negotiations is who supplies the employees to perform these activities? If the district municipality supplies them, the contract should contain explicit provisions regarding the discipline of those staff. If the local municipality supplies the staff, three issues must be considered. First, what would happen to the staff already in the services of the district municipality? Second, the reimbursement of the local municipality for employment expenses. Third, what happens to the employees appointed in respect of these services should any of the parties terminate the agreement?

Service delivery

One of the core challenges of the restructuring of local government is to ensure continued service delivery with the least possible disruption.

The tariffs and conditions of service delivery, debt collection policies and by-laws and other resolutions related to these services must be transferred to and applied by the new district municipalities. The new district would have to rationalise those resolutions, by-laws, policies and procedures as soon as possible.

The approach to the establishment of new municipalities is that resources, assets, liabilities and records follow the function with which they are associated. This also means that any funds that was built up in relation to these services must be transferred to the district municipality concerned, together with the related records, by-laws etc.

The planning and installation of new infrastructure relating to these services requires cooperation between local and district municipalities. Local municipalities remain responsible for certain infrastructure, such as streets, roads, storm water drainage, and other services such as planning and township establishment, which require inter-municipal cooperation.

The assignment of these services would impact on district municipalities. For example, the number of accounts processed monthly would increase drastically. This would require an overhaul of information technology systems, employment of more people for accounting purposes, especially where local municipalities did not employ or assign employees specific responsibilities with regard to accounting for these services.

Specific challenges would arise in debt collection. For local municipalities using the disconnection or restriction of these services as a first option to obtain payment falls away; for district municipalities the burden of debt collection becomes awesome.

Many local municipalities buy purified water in bulk quantities from a water board. In at least one case, a water board is the retail provider of water in a part of an existing municipal area. In some cases local municipalities perform the bulk and retail water functions whilst in others a local municipality would be partially responsible for providing water in bulk whilst it buys some water from a water board.

Section 77 of the Municipal systems Bill, Bill 27B of 2000 requires a municipality to review and decide on an appropriate mechanism to provide a municipal service when, amongst other things, it prepares its integrated development plan or the municipality is restructured or reorganised in terms of the Act. The district municipalities would therefore have to review and decide on appropriate mechanisms for providing municipal services shortly after the election.

Quick response to service breakdowns and customer complaints is critical for effective service delivery. Realising these two challenges requires an effective communications system, custom-designed management arrangements and decentralised service delivery.

Local development

These services constitute four of the "big five" municipal competencies. Municipalities view these services, together with housing, as key instruments for development. The primary means of promoting development for local municipalities became the provision of hardware, ie physical infrastructure. District councils in the Free State, in contrast with a new role as providers of services, saw themselves

as "development agencies".

The assignment of the hardware functions of development to district municipalities means that local municipalities would have to concentrate more on the software of development, ie economic, institutional and human resources development, which is also the more difficult part of the development process. "Losing" the "levers of development" may discourage most local municipalities, especially due to the loss of the trading surplus on the trading services.

Local municipalities stand to loose a substantial part of their income from trading services.

Conclusion

Local municipalities stand to loose a substantial part of their income from trading services. Income from trading services amounts to almost 60 per cent of local municipalities' revenue. If local municipalities are no longer providing these services, the principal source of revenue left for them are property rates and fees for collecting refuse. Other sources are almost non-existent. This will have a serious effect on their operations.

Also, the bulk of councillors will be elected to local municipal councils. District municipal councils are much smaller than local municipal councils. It appears therefore that local municipalities "over-represent" residents in relation to the functions that they may perform.

On the other hand, the functions still remain municipal functions, regardless of the level where they would be performed. This makes it difficult to take a position in this regard from an organised local government viewpoint.

Dr Koos Smith
Strategic Manager
Free State Local Government Association

The 'big four' functions

Finality in sight

On 3 January 2003, Minister Sidney Mufamadi published a notice for all nine provinces which revokes authorisations in terms of section 84(3) of the Municipal Structures Act. These authorisations deal with four important district municipal functions, namely, the bulk supply of water, electricity and sewage purification works, and municipal health services. As of 5 December 2000, the Minister authorised local municipalities to continue performing these district municipal functions.

Clarification on the final allocation of the function division between district and local municipalities was one of the more important matters that had to be resolved before the end of the two-and-a-half year transition period, ending on 30 June 2003. In reaching his final decision, the Minister consulted with the national Cabinet member responsible for the functional area in question as well as the nine MECs responsible for local government.

Final function division

The Minister followed a uniform approach in allocating the bulk supply of electricity and municipal health services. With regard to **electricity**, the status quo will continue to apply until the national restructuring of this industry is finalised. Thus, existing license agreements are respected and the function will be rendered by the municipalities that have licenses to supply bulk electricity to their communities. **Municipal health services** have been defined as environmental health performed by district municipalities. A district municipality may request one, more or all of the local municipalities within its area to perform the function on its behalf. Primary health care is still the responsibility of the nine provincial governments and they may decide with which municipalities they would like to enter into agreements to perform the function. The Minister co-authorised municipalities to perform the **water** and **sewage functions** and the unique circumstances in each province were taken into account when the revocation notices were drafted with regard to these two functions. What follows is a summary of the nine individual revocation notices.

key points

- Section 84(3) revocation notices published in January 2003 will take effect on 1 July 2003.
- District municipalities will be responsible for performing municipal health services.
- Licence holders in the electricity industry will be responsible for bulk supply of electricity.
- District or local municipalities, as authorised per province, will perform the bulk water supply and sewage purification works functions.

Gauteng, Free State, Northern and Western Cape

In these four provinces, the revocation notices empower the local municipalities to continue rendering the bulk water supply and sewage purification works functions to their communities.

Eastern Cape

District municipalities in this province, except for the local municipalities forming part of the Cacadu District Municipality and Buffalo City Municipality, will perform the bulk water supply and sewage purification works functions.

KwaZulu-Natal

District municipalities will perform the bulk water supply and sewage purification works functions except in the instances of the Msunduzi, uMhlathuze and Newcastle Municipalities.

Limpopo

The district municipalities retain the performance of the bulk water supply and sewage purification works functions, except for the local municipalities forming part of Waterberg District Municipality and the Polokwane Municipality.

Mpumalanga

The local municipalities forming part of the Eastvaal, Nkangala and Ehlanzeni District Municipalities are authorised to perform the bulk water supply and sewage purification works functions. In the remainder of the province the district municipalities will perform the function.

North West

The local municipalities forming part of the Bojanala and Southern District Municipalities are authorised to perform the bulk water supply and sewage purification works functions. In the remainder of the province the district municipalities will perform the function.

Northern Cape

The local municipalities forming part of the Kalagadi District Municipality are authorised to perform the bulk water supply and sewage purification works functions. In the remainder of the province the district municipalities will perform the function.

Conclusion

The section 84(3) revocation notices will take effect on 1 July 2003. The publication of these notices finally ends the period of political uncertainty and practical confusion that the communities, district and local municipalities have experienced since 5 December 2000 with regard to budgeting for and performing these four functions. Municipal integrated development plans will in certain instances have to be revised to reflect the new division of functions between the district and local municipalities. This will influence their budgets as well as medium-term expenditure frameworks. Not less important is the effect on the transfer of staff, assets, liabilities and records between the relevant municipalities. Where municipalities currently perform section 84(2) functions, such as fire-fighting services, the division of functions needs to be finalised by the provinces before 1 July 2003 in terms of a provincial section 18 authorisation notice.

Charmaine Maré
Local Government Project
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The transfer of these services and the related and incidental activities and people may mean that the local

Shared services in local government

Local government has been given priority status on the transformational agenda of South Africa. As the sphere of government closest to the people and responsible for basic service delivery, local government is continually striving to improve its efficiency and effectiveness, while facing the challenges of resource and capacity constraints.

Service sharing has been identified as a potential mechanism for improving the performance of local government. District municipalities could play an important role in this regard, by supporting local municipalities and possibly taking part in the establishment of shared service centres (SSCs) in local government. A number of municipalities, many at district level, are already starting to explore the notion of shared services, either in the programmatic transformation of how they work or as an ad hoc coping mechanism.

This article explores the notion of shared services between district and local municipalities, with a focus on the role of district municipalities.

Why shared services?

One of the fundamental motivations for service sharing is the potential cost benefit, such as the savings resulting from bulk procurement, reduced administration costs and reduced duplication of functions. While cost reduction is an important reason to share services, there is an added value in that the opportunity arises for government to focus on its core business of delivering services to its citizens. Furthermore, in the context of local government in South Africa, one of the most compelling justifications for

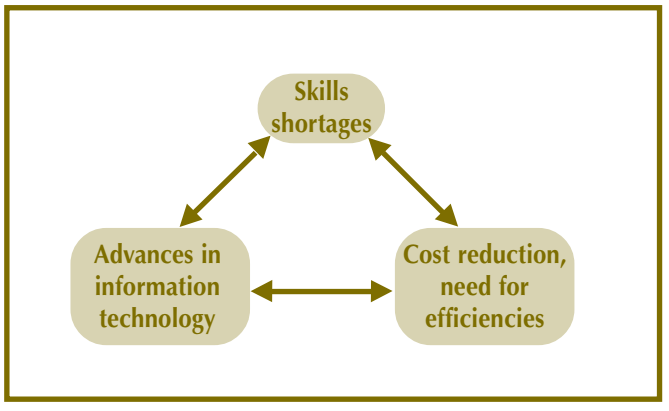

Figure 1: Three main drivers motivating shared services

considering SSCs is to address the shortage of, and growing demand for, specialised capacity and skills. Additionally, SSCs provide an ideal platform for the upgrading and synchronisation of information technology (IT) systems utilised by local government. The benefits of this include greater efficiency in operations as well as greater compatibility of systems between the units or departments linked to the SSC.

In light of the current status of local government in South Africa, three fundamental drivers which could motivate service sharing have been identified and are illustrated in Figure 1. For each district and its local municipalities, the central driver is likely to differ: where some may be responding to demand-side factors such as skills shortages and the need for greater efficiency (doing more with less), others may use shared services as a response to supply-side factors, such as advances in IT. For some it may be a combination of these three factors.

Potential role of districts in shared services

The role of district municipalities has been under debate for some time now, and there is an argument for districts to take on emergent roles as co-coordinators and facilitators of development, as well as playing a more prominent role in supporting local municipalities. Many districts have taken on the task of development facilitation, which means acting with other partners to build relations for development. However, the notion of shared services gives district municipalities an opportunity to consolidate a role for themselves both as providers of support to local municipalities and as potential platforms for the sharing of services between municipalities.

The SSC concept has emerged internationally as a structure through which 'back office' activities are shared with a view to promoting efficiency in the use of resources. The types of skills which could be shared include human resources, IT management, procurement and financial services. This is based on the assumption that human resources and business systems can be shared in such a way that costs can be cut while service effectiveness (responsiveness to consumers particularly) is increased.

At local government level, the SSC approach could involve service sharing between a district municipality and the local municipalities within its area of jurisdiction. Not only could this enhance the efficiency of service delivery, but it is also likely to improve intergovernmental relations between the tiers of local government. Several districts already share their internal audit function. In addition, there have been initiatives in a number of districts across the country to establish the concept and pilot the shared services approach.

The local value of shared services for South African municipalities lies in the sharing of technical skills or other specialist skills that municipalities find difficult to recruit.

Legal basis for shared services

Current legislation provides a firm legal basis for the sharing of these functions. The Municipal Structures Act (Act 117 of 1998) states the following:

88.(1) A district municipality and the local municipalities within the area of that district municipality must co-operate with one another by assisting and supporting each other.

(2)(a) A district municipality on request by a local municipality within its area may provide financial, technical and administrative support services to that local municipality to the extent that that district municipality has the capacity to provide those support services.

(b) A local municipality on request of a district municipality in whose area that local municipality falls may provide financial, technical and administrative support services to that district municipality to the extent that that local municipality has the capacity to provide those support services.

(c) A local municipality may provide financial, technical or administrative support services to another local municipality within the area of the same district municipality to the extent that it has the capacity to provide those support services, if the district municipality or that local municipality so requests.

The legislation highlights that the stronger municipality, be it a local or district municipality, can play the leading role in providing support. Similarly, the stronger municipality could be the platform for any shared services centre envisaged and this can shape the model which is used.

Exploring shared services

There are a number of arguments supporting the implementation of service sharing initiatives in local

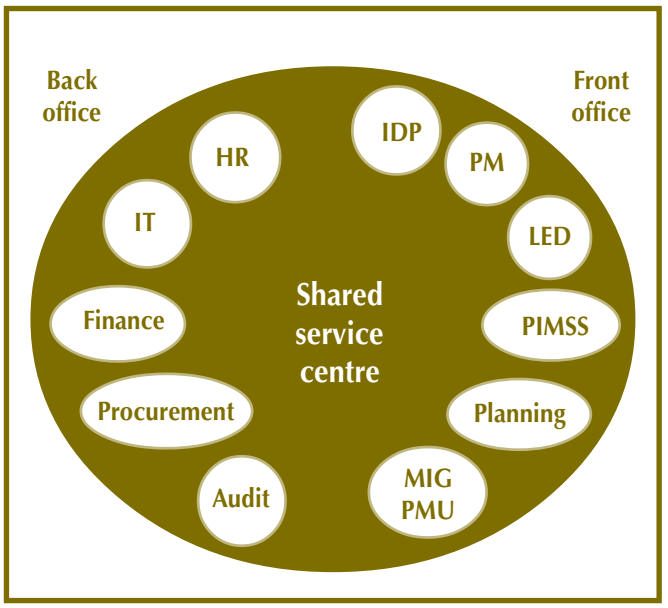

Figure 2: Scope of shared services

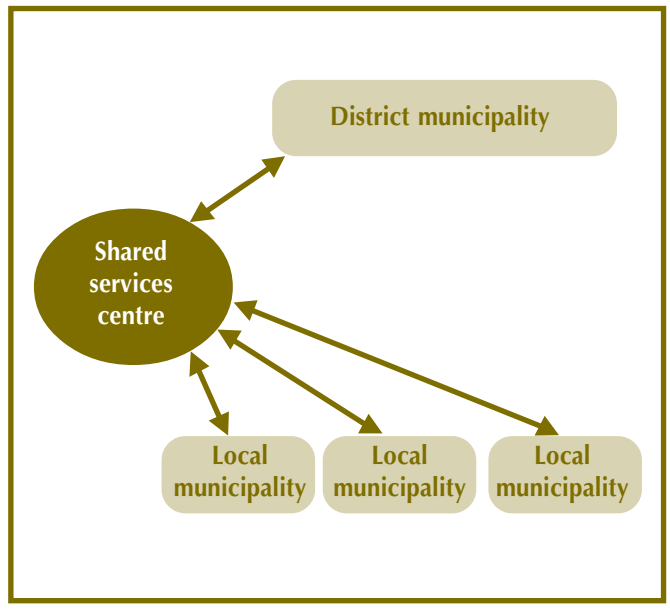

Figure 3: Independent municipal entity

government in South Africa. SSCs could potentially yield efficiency gains, improve effective service delivery, address skills shortages and enhance intergovernmental relations. However, SSCs do not necessarily offer a blanket solution to South Africa's local government service and skills problems, and there are important factors for consideration when contemplating the implementation of shared services.

Scope of shared services

A legal and conceptual framework for 'municipal services' is provided in Chapter 8 of the Municipal Systems Act (Act 32 of 2000). This legislation embeds the notion of the service authority and service provider roles. Section 78 provides for a mechanism for a service authority to decide on the form that service provision will take for these municipal services. This section stipulates how a municipality should set about appointing another municipality to provide a service or how two or more municipalities can set up an independent entity for the purpose of delivering that service.

However, section 88 of the Municipal Structures Act provides a framework for the governance, administration, planning and development functions, where the value of shared service thinking is most likely to have an impact. The following schematic reflects some of the services to be considered for shared services. It makes a distinction between the traditional back-office functions and the planning and development functions.

Models for shared services in local government

The structures described below are potential governance and operating models for municipalities sharing services at district level. Three models are presented: an independent entity, a district agency and a local agency. Each has its own pros and cons, which depend on a district's needs, the location of its current capacity and the level of intergovernmental cooperation in that district.

Independent entity

This refers to the creation of an entirely new entity, separate from the local and district municipalities, where the SSC functions independently to act as a service provider to the municipalities.

District agency

Here the SSC is structured as part of the district municipality, which then provides an organisational platform for the centre and manages and governs it. This works best where the district municipality is well capacitated.

Local agency

The third option is to place the SSC with the most capacitated local municipality. In many cases large local municipalities possess more capacity than the district municipality and all other locals put together.

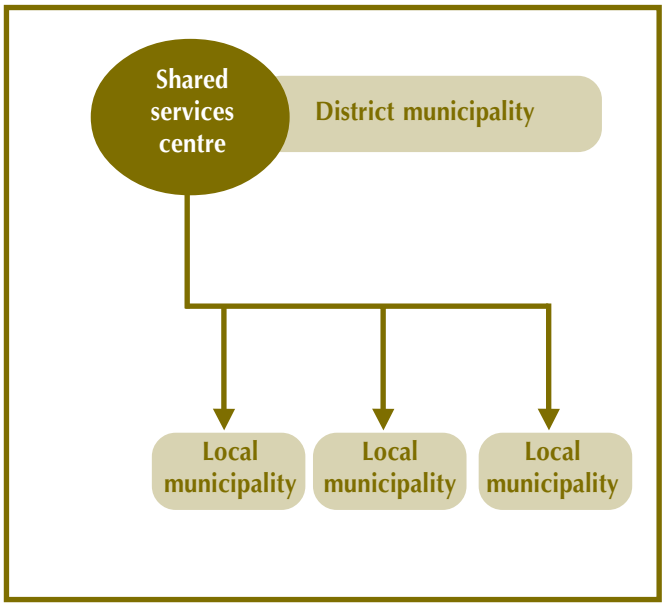

Figure 4: District agency

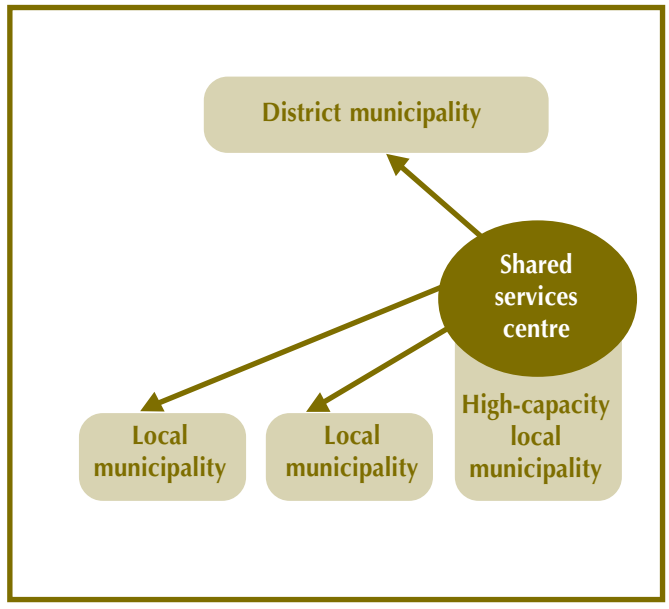

Figure 5: Local agency

Cost recovery

Cost recovery needs to be considered from two important perspectives:

1. **Establishment costs**. Decisions need to be made about where these will be recovered from – donor funding, district funds, national government or a combination of these.
2. **Long-term running costs**. Ideally these should be recovered from the 'client' municipalities, but additional funding may need to be sourced from elsewhere.

Key success factors

While shared services have the potential to yield a host of benefits, the establishment of SSCs in local government is likely to be a costly and time-consuming endeavour. Some key factors need to be resolved locally, such as those already discussed regarding the scope and model of the SSC, as well as mechanisms for funding the establishment and operational costs in the long run.

Here are some suggested key success factors for sustainable and successful shared services between district and local municipalities:

Local initiative

Is this a one-size-fits-all recipe or a voluntary home-grown solution based on local conditions?

Ownership

Are all affected municipalities clearly in ownership of this development?

Cooperative climate

Are intergovernmental relations conducive to the sharing of services?

Geographical proximity

How extensive is the district?

Strong leadership and vision

Is there strong leadership and vision to drive this?

Communication and change management

How will myths and fears be dealt with?

Identity

How will the identity of individual municipalities be protected?

Comment

No two SSCs are the same, and contextual factors are likely to determine whether sharing services is an appropriate way of addressing the needs of local government in each district. In districts where the right conditions exist for municipalities to implement shared services, it is an option that may significantly ease some of the capacity constraints that municipalities are grappling with.

Nishendra Moodley and Tracy Jooste
PDG

THEME4: THE DEBATE ABOUT THE FUTURE OF DISTRICT MUNICIPALITIES

The future of district municipalities has been under discussion for as long as the new local government has been in place. District municipalities are further removed from citizens than local municipalities and defining their precise role is not as easy as defining the role of local municipalities. In addition, the national government has taken decisions that impacted on the role of districts. The articles in this theme pick up the debate about districts at various points in time. They also make suggestions, such as redesigning the political structures of districts and increasing the number of single tier municipalities.

1. **Where to now with District Municipalities** by Nico Steytler, Reuben Baatjies AND Yonatan Fessha, Local Government Bulletin 2007, Volume 9, Issue 3, page 6-8
2. **Are District Municipalities Still Relevant?** by Vuyo MlokOTI, Local Government Bulletin 2007, Volume 9, Issue 2, page 7-9
3. **Redefining the Political Structure of District Municipalities'** by Reuben Baartjies/ Annette Christmas, Local Government Bulletin 2008, Volume 10, Issue 2, page 18-20
4. **The Challenges of Urbanisation: Single Tier Local Government for Urban Areas** by Nico Steytler, Local Government Bulletin 9(3) 9-11

WHERE TO NOW WITH

District municipalities?

REDEFINING THEIR ROLE AND APPLICATION

The debate about district municipalities – their functioning and their future – is widespread. Some critics question whether districts have served their function. Others contend strongly that they should be disestablished. In the debate three broad options have surfaced: At one extreme are calls for the abolition of districts as an institution of government. At the other extreme, there are calls to strengthen districts to enable them to realise fully the statutory mandate as set down in the Structures Amendment Act of 2000. Somewhere between these positions are arguments for (a) redefining the objects of districts by realigning them to the White Paper's vision, and (b) re-determining the areas appropriate for two-tier local government. These options should be assessed within the normative framework of developmental local government: which option would contribute the most to achieving this constitutional goal?

This argument for redefining the role of districts is not based on the current capacity problems or adjustments to the new system; it is more systemic than that.

Current practice

The role and place of district municipalities has been questioned not least because their functioning has been fraught with confusion, conflicts and uncertainty. Nearly half of the districts are not performing the functions prescribed in the Municipal Structures Act; strong local municipalities still execute the core functions of water, sanitation, electricity and health services. The redistributive function of districts has been undercut by the repeal of the RSC and JSB levies from 1 July 2006. The abolition of district management areas proposed by the Municipal Demarcation Board (MDB) would further reduce the role of district municipalities. Relations between districts and large urban municipalities have been problematic – the former question the need for the latter.

Are the policies and purposes of district municipalities facilitating the achievement of developmental local government?

Practice confirms that, for the most part, districts are not performing their statutory responsibilities. Moreover, in its Capacity Assessment Report for 2006/07, the MDB points out that rather than moving closer to the intended allocations of functions in terms of section 84(1) of the Structures Act, more and more functions have been shifted to local municipalities since 2003. There are also marked differences in the service delivery functions of districts. Some provide water and sanitation services, for example, while others do not. This is largely because of the different approaches adopted by provinces. Some, such as the Western Cape and KZN, have chosen to keep closely to the statutory functions of districts, while others have shifted districts to the periphery of service delivery.

On the whole, districts are most active in the rural areas, including in the performance of their water and sanitation authority function. Their support function is also most evident

in non-urban areas and in particular, in the rural areas of the previous TBVC states. They play a key role in performing the main 'priority 1' functions in rural areas where local municipalities are relatively weak and lack capacity.

In contrast, however, districts have hardly any presence in the so-called secondary cities. They play no role in service provision in most urban areas. Secondary cities perform most district functions in their jurisdictions. Districts also do not constitute the communication link between secondary cities and the provinces, as was intended. Further, with the repeal of the RSC levies, the function of redistributing locally generated revenue across the district has lapsed. Moreover, in developing replacement tax instruments, it is the National Treasury's evident policy position that districts are not envisioned to perform a function in redistributing revenue.

Abolition of two-tier local government

The arguments for the abolition of districts centre on their failure to fulfil their basic functions. First, one of the principle reasons for districts was their function in redistributing local financial resources. This object could not be realised in most districts. Moreover, the possibility of districts playing a redistributive role has been reduced by the repeal of the RSC levies. National transfers are now the sole source of revenue. In this situation, are districts, which consist of between two and nine local municipalities, the best decision makers for the distribution of funds? Or could the province make allocation decisions more objectively?

Second, the principle of subsidiarity requires that services should be delivered by the government closest to the area of impact. Local municipalities should thus provide services to end users. Where they lack capacity, the necessary support should be provided by the provinces. The creation of a second tier of local government has been extremely costly in respect of political structures and personnel. Often there is duplication with the local administrations. For example, the Alfred Nzo District Municipality in the Eastern Cape, consisting of only two local municipalities, spends most of its resources in the one municipality where 95% of the district's population resides.

Third, in urban areas, districts hardly perform any functions.

However, the wholesale scrapping of districts may not be opportune or wise. The first, pragmatic, reason is that it will not only be an enormous waste of the financial and human investment that has gone into districts, but would be very disruptive to local governance itself. Second, in rural areas,

KEY POINTS

- For the most part, districts are not performing their statutory responsibilities.
- The current field of operation of districts is almost exclusively in non-urban areas.
- Rather than moving closer to the intended allocations of functions in terms of section 84(1), more and more functions have been shifted to local municipalities since 2003.
- The most appropriate response to debate about the future of districts is to redefine their mandate and confine their application to non-urban areas.
- It is also in these areas that districts contribute to developmental local government.

districts have contributed to developmental local government. Through bulk supply of services they can maximise social and economic development. Their coordinating function could lead to better integrated development planning. Third, districts perform a useful support role for weak local municipalities.

Fulfilling the 2000 vision for district municipalities

Those who support districts argue that it is much too early to review the need for their existence. They have been in operation for only six years and the answer to their lacklustre performance is to capacitate them fully. Given time and capacity, they argue, the current problems will be resolved. It is therefore premature to consider scrapping the two-tier system. Following this line of thought, the MDB's recommendation for the adjustment of functions has thus been that districts should be charged with their full mandate of statutory obligations, thus reversing the trend in which more and more functions have been shifted to local municipalities. This position further asserts the inherent worth of the basic objectives of districts, namely coordinating development planning, providing services to end users where there is poor capacity at local level and supporting struggling local municipalities.

The response to this position is twofold. First, the wisdom of fully implementing the position of districts as service providers for end users is questioned. In terms of the principle of

The future of districts lies in reverting to the vision articulated in the White Paper, namely that of coordination, bulk supply of services to municipalities, limited municipal-wide services and support of weak local municipalities.

subsidiarity the municipality closest to the people should be responsible for the delivery of services consumed by end users. This reinforces the accountability of the service provider to the consumers of the services, which is one of the objects of developmental local government. Political accountability through the election of ward councillors (and holding them accountable) and the possibility of public participation between elections is infinitely better at local level than it is at district level.

Second, it does not address the fundamental misalignment of roles and positions between the secondary cities and the districts. Capacitating districts to take over the functions of secondary cities will not only be highly impractical and a duplication of administration, but will intensify conflicts between these institutions.

The strengthening of districts may receive support in the context of the debate on the future of provinces. Some people have argued for the disestablishment of provinces and for transferring their functions to districts and metropolitan municipalities as the next level of government. Even if this comes to pass, the value of two-tier government in urban areas remains highly questionable.

Returning to the vision of the White Paper on Local Government

Some critics claim that the 2000 amendments to the Structures Act were a mistake. The future of districts, it is argued, lies in reverting to the vision articulated in the White Paper, namely that of coordination, bulk supply of services to municipalities, limited municipal-wide services and support of weak local municipalities. This argument is underscored by the practice that has emerged of districts mainly performing these functions in non-urban areas. These functions are also the most common objects of second tier local government internationally.

At the heart of this option will be the allocation of the current water and sanitation functions of 25 district municipalities to local municipalities. Is it viable? Is it wise? At present, about 150 local municipalities provide these services. Over time it would be feasible to capacitate the remaining 80 local municipalities to perform these functions. More important is the question of whether this is the appropriate direction to take, or should the current division between the so-called C1 and C2 types of districts (those with and those without water authority) be institutionalised?

Limiting the application of two-tier government to non-urban municipalities

Practice has shown that districts currently operate almost exclusively in non-urban areas. It is also in these areas that districts can contribute to the furtherance of developmental local government. First, development planning across a district and the integration of services make scarce resources go further. Second, the provision of bulk supply of services to municipalities provides economies of scale that make rural local government more viable. Third, weak local municipalities are mostly found in non-urban settings where the task of support would find its best application.

The most appropriate response to the debate about districts is thus to redefine their mandate and confine their application to non-urban areas. There is much to be said for the development of a system of local government that shows a measure of uniformity, ensuring stability and predictability. A uniform system of lean and mean districts that can act as effective coordinators, providers of bulk services and as default service providers would promote such predictability.

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Are district municipalities still relevant?

A lot of talk and discussion documents have been making the rounds in the past two or three years about the imminent restructuring of the state machinery and the review of provinces. Yet little or nothing is said about the inevitable question: what is the future of district municipalities?

The role of districts in intergovernmental relations

The Intergovernmental Relations Framework Act requires that, within one year of its coming into operation, districts must have established district intergovernmental forums (DIFs). Most districts have established these forums. In their functioning, some DIFs are realising the vision of the Act with regard to facilitating intergovernmental relations between district and local municipalities as well as discussing national and provincial policies affecting municipalities. However, some are not yet dealing with substantive issues. Many local municipalities have questioned their districts' ability or capacity to provide leadership and action.

The assumption behind the exclusion of local municipalities from the Premiers' intergovernmental forums was that communication with local municipalities could be facilitated via district municipalities and the DIFs. Clearly this assumption does not always hold true. There is no guarantee that the DIFs can serve as effective conduits of communication between a province and local municipalities.

The relationship between district and local municipalities varies from cordial and cooperative to conflictual and unproductive. Having two political structures that must cooperate on numerous complex matters sets the stage for political conflict. The DIFs cannot always sustain their roles as consultative forums for the district and authoritatively engage local municipalities in service provision, coherent planning and development.

One is tempted to also assume that district municipalities were entrusted, through the Intergovernmental Relations Framework Act, with the convening, agenda-setting and alignment of strategic plans of local municipalities – firstly, by virtue of having fiscal and political authority over local municipalities in their jurisdiction and, secondly, because the White Paper on Local Government envisaged that district municipalities, as significant centres of municipal capacity, would play a strong redistributive and developmental role.

Political and fiscal authority of districts over local municipalities

Until recently, and specifically up to 30 June 2006, district municipalities derived their fiscal authority largely from regional services council (RSC) levies, collected from businesses in all local municipalities within their areas of jurisdiction. The base of RSC levies was gross sales and total payrolls of businesses within municipal areas. Despite their deficiencies, RSC levies were an important source of revenue for metropolitan and district municipalities, making up 9% or R5.5 billion of total local government revenue in the 2003/04

municipal fiscal year. Metropolitan municipalities collected two-thirds of the RSC levies, which accounted for a small but significant percentage (7%) of their overall income. District municipalities, on the other hand, collected only a third of RSC levies, but these accounted for a much larger share (34%) of overall district municipality income.

With this financial muscle, district municipalities were able to fund and influence the prioritisation of projects by local municipalities and monitor the implementation of projects identified in the integrated development plans (IDPs) of local municipalities. Hence district municipalities could, with ease, determine the agenda of intergovernmental forums.

The national government has, with effect from 1 July 2006, removed these levies as a local tax instrument. This step has severely weakened the political authority of district municipalities over local municipalities. An anomaly has thus cropped up in the district municipalities' functioning: for the first time they have to plan, budget and operate largely on the basis of allocations from national government. It is unheard of, in the field of local government, to have funding of a municipality's IDP and most, if not all, of its operations entirely reliant on an outside source.

As the old maxim puts it, "capacity defines the potential for development". The capacity of district municipalities to manage intergovernmental responsibilities requires considerable scrutiny. With the loss of RSC levies the district municipalities may no longer be able to fulfil the key functions set for them in the White Paper on Local Government, namely those of coordination, redistribution and cross-subsidisation among and within their local municipalities. Apart from the service delivery functions provided for in section 84 of the Municipal Structures Act of 1998, it is becoming increasingly doubtful that district municipalities will be able to fulfil the broad functions set out as follows in section 83 (3):

A district municipality must seek to achieve the integrated, sustainable and equitable social and economic development of its area as a whole by—

(a) ensuring integrated development planning for the district as a whole;

(b) promoting bulk infrastructural development and services for the district as a whole;

(c) building the capacity of local municipalities in its area to perform their functions and exercise their powers where such capacity is lacking; and

With the loss of RSC levies the district municipalities may no longer be able to fulfil the key functions set for them in the White Paper on Local Government, namely those of coordination, redistribution and cross-subsidisation among and within their local municipalities.

(d) promoting the equitable distribution of resources between the local municipalities in its area to ensure appropriate levels of municipal services within the area.

That grand vision of redistribution as an objective has fallen by the wayside since most district municipalities now depend on national grants for their existence. Unlike local municipalities, the majority of district municipalities do not have trading accounts. Given that local municipalities will now have their capacity significantly boosted, there might be a case to review the role of district municipalities.

Powers and functions of district and local municipalities

A development plan by any sphere of government, be it a municipal integrated development plan, a provincial growth and development strategy or the national spatial development perspective of central government, is largely a translation of constitutionally allocated powers and functions into realisable projects and programmes with corresponding fiscal allocations. Ambiguous definitions of powers and functions carry with them the potential of producing ambiguous service delivery plans with unmeasurable and unattainable targets. Without doubt such a foundation tends to compromise service delivery.

The lack of clarity on the division of powers and functions between district and local municipalities is a major cause of conflict. In a survey done by the National Council of Provinces, nearly half of the municipalities cited indistinct role clarification as a problem in intergovernmental relations.

The way in which powers and functions are divided between district municipalities and local municipalities also continues to be problematic. Many district functions

defined in section 84 of the Municipal Structures Act are described as "shared functions", for example fire fighting services. This not only creates a lot of confusion, but also results in duplication of staff, infrastructure and budgets. Furthermore, the provision that district functions can be "adjusted" from district municipalities to local municipalities when a district lacks capacity does not work in practice. In a study conducted by the Municipal Demarcation Board (MDB), it was found that the adjusted function is generally not performed in the whole of the district area by the receiving local municipality.

Are district municipalities still relevant?

South Africa's system of local government in non-metropolitan areas is conceptualised as a "double-decker bus" with two tiers of local government, one above the other. To function effectively, local government consisting of these two decks is required to act as a collective. Putting together two (political) local government institutions, with the same constitutional objectives, and expecting them to coexist harmoniously is a recipe for conflict. A number of conflict-generating factors have some local municipalities questioning the need for districts.

In terms of section 85 of the Municipal Structures Act, the MDB is required to advise MECs for local government on the capacity of district and local municipalities to perform their functions.

The subsequent process of shifting powers and functions between district and local municipalities creates confusion about who is responsible for executing a function. More tension arises since the shift in function may affect the revenue base of a municipality. These ongoing adjustments of powers and functions by MECs between district and local municipalities create uncertainty regarding which tier of local government is finally responsible for which function. This results in unpredictability and instability at local government level.

There are quite a number of jurisdictional tensions and contests between district and local municipalities which, in some instances, result in an unnecessary duplication of services and wastage of resources. These tensions are most evident in district municipalities that have one or two secondary cities within their areas of jurisdiction. Secondary cities are big local municipalities with total budgets of, mostly, over one billion rands and total populations of close to a million. Examples are the Amathole District Municipality in the Eastern Cape, which has the Buffalo City Local Municipality, including East London, in its area of jurisdiction, and the Msunduzi Municipality (Pietermaritzburg) in KwaZulu-Natal.

Service delivery as a victim of the district-local interchange

Due to the difficulties with cooperation and general service delivery that many districts experience, numerous non-statutory forums were established before 2005. In many instances district forums suffered from a shortage of administrative capacity, and at times overlapping responsibilities became a stumbling block in the way of service delivery. The extensive consultative process that both district and local municipalities have to go through, with a view to producing "well-canvassed" integrated development plans, tends to "bureaucratise the democratic process"-rather than deepen it in a manner that would make communities find the obligation to attend numerous consultative structures meaningful.

While much work has been done to improve the overall capacity of the state to deliver, there are visible constitutional cracks which translate into legislated structural defects with a potential to complicate service delivery. In the end forums are only as useful as the outcomes they achieve.

Comment

At this juncture, when the future of provinces is being debated, the future of district municipalities must simultaneously be questioned. After six years of experience of "double-decker" government in non-metropolitan areas, the question must be asked whether district municipalities have outlived their function.

Dr Vuyo Mlokoti

While Dr Mlokoti is the Chairperson of the Municipal Demarcation Board, the views in this article are expressed in his personal capacity and not as chairperson of the Board.

The forthcoming issues of the *Bulletin* will respond to this question in more depth. The Community Law Centre is conducting research on the role and function of district municipalites, the outcomes of which will be published in upcoming issues.

REDEFINING THE POLITICAL STRUCTURE OF District municipalities

The DPLG's policy review process was kicked off with "65 questions for public engagement". Among the listed 65 questions, it asked: "What role should district municipalities play and how should they be structured?" A key problem has been the governance structure of districts: the uncomfortable combination of district-wide and local council representatives has not resulted in an integrated system of district government.

Problematic functioning of district councils and their relationship with local municipalities

The district council was perceived as a vehicle that would bring together local municipalities so that they could benefit from integrated planning, economies of scale and mutual support. The experience of the past seven years suggests that instead of integrated, interdependent and interrelated government involving district and local municipalities, a distinctive two-tier system has developed. The system is characterised by hierarchical relations, a lack of coordination and, in the end, competitiveness. Local councillors are not certain whether they are delegates of the local council or simply members of district councils in their own right. District issues do not often feature on local council agendas and feedback from the district council is also rare. The sense is that the two district councils are de-linked, operating in isolation from each other.

More often than not, the leadership of the local councils is not represented on the district councils and local councillors do not take ownership of the council. Local mayors and their mayoral committee members or portfolio chairs are usually not elected to represent the locals. Even where local leaders are represented on the district council, they are unlikely to take on further leadership positions in the district council. They are already in full-time positions and may be unwilling or unable to take up other such positions.

The mismatch between local and district leadership has significant consequences for the governance of the district. The locals do not own or control the district council through their elected leaders; instead, the district council functions as a stand-alone independent institution rather than a representative body of the locals which exists to create synergy across the district.

Looking forward: Tweaking the system or radical change?

The question to be addressed is how the districts could be structured to be better governed. Is there scope to improve the current system or is more radical restructuring required? In redesigning the governance system, the district councils should be composed in such a manner that they are able to perform their designated functions. Only three options are suggested here, but there may be others worth exploring. Some of the options not only address the problems of dysfunctional councils and the lack of integration; they also deal with the fundamental problems of two-tier local government, such as the unclear division of powers and functions, and the competition for resources.

Any option should be evaluated in terms of three broad criteria.

- Which option would best promote the values of district-wide governance? Some key considerations are enhancing integrated planning for the district as a whole, the provision of bulk services, the delivery of basic services and developing a skills base for the district as a whole are some key considerations.
- Which option would address the main governance problems that the district councils are experiencing; namely, the hierarchy between district and local councils, a lack of communication and coordination, and the absence of district accountability?
- How would stability best be served? The local

government sphere has been subject to a significant and prolonged process of transition, resulting in 'transformation fatigue'. Officials and communities have endured considerable upheavals of transition and unpredictability. Major changes would only cause further disruption.

Option 1:Increase local leadership on district council

This option involves increasing the representation of local leadership in the district. The principal line of enquiry is thus how local councils can assume more control over the district. First, the 60% local representation could be revised to ensure that local leaders are fully represented in the district council. Local leaders include the mayor, deputy mayor, speaker and members of the executive or mayoral committee. Their compulsory membership would, at the very least, improve routine communication between district executives and local municipalities. More generally, the presence of local leadership on the district council ensures that it is a forum where local needs and priorities can be addressed, thus enabling the purpose of the district council to be served.

Second, and more problematic, is the question of how to elect more local councillors to district leadership positions. Can such positions be reserved for local representatives (which may include local leaders or other councillors) aside from the 40% of PR councillors? The difficulties with this proposition may be that a full-time local leadership position may not be compatible with another full-time position, and it may not be acceptable to prevent PR councillors from standing as mayor. While it is feasible to ensure that local leadership is represented on the district council, the exclusion of the PR councillors from district leadership positions seems untenable.

However, measures would still need to be taken to ensure that the lack of communication between district and local councils is addressed. To this end, local councillors serving on the district council need to have clearly defined mandates from their local councils. Clear channels of regular reporting must be followed and could, for example, be cemented into the committee system of the local municipalities to ensure that synergy is created in the functioning of the district and its constituent local municipalities.

With regard to the three criteria set out above, this option would result in little, if any, radical change and would thus retain a measure of stability. It may have, however, a subtle impact in relation to the two other criteria. First, having the

key points

- Instead of an integrated, interdependent and interrelated government between district and local municipalities, a distinctive two-tier system has developed.
- For the district system to function effectively, its governance structure needs serious attention.
- Once an appropriate role is given to districts, a simple and effective system of governance must be introduced to realise this goal.

local leadership represented on the district council may facilitate integrated planning for the district as a whole, since local leaders can ensure that local concerns are high on the district council's agenda. This approach might lead to much debate and contestation on the district's integrated plan, but should ultimately result in an agreed integrated plan binding the local municipalities. Second, the local leadership can put the district's provision of bulk services, or its support for local municipalities' capacity to deliver services more efficiently, high on the district agenda and ensure that it is a focus of the district council. The representation of local leadership on the district council should equally enhance communication and coordination between the district and local councils.

On the whole, this option would go some way to ensuring that the district council is a forum where local needs and priorities can be addressed, thus enabling it to serve its purpose.

Option 2: Compose district council of local councillors only

A major problem has been that local leaders are reluctant to seek leadership positions in the district. Local control could be effected by doing away with all PR councillors, which would address both the dual nature of the district councils and the marginalisation of local councils. A district council would thus be composed solely of indirectly elected local councillors and would effectively 'belong' to the local councils.

This would counteract the hierarchy that political parties have imposed on district councils, because all councillors would be elected to local councils first. It would also put to rest the question of the representivity and accountability of PR councillors. The district council would comprise local representatives (including ward councillors) who are accountable to their local councils for their decisions taken in the district council. However, safeguards would be required to

ensure that placing the control in the hands of local representatives did not, depending on the composition of a district, result in one or two local councils dominating at the expense of the others.

With regard to furthering the values of district governance, this option may indirectly improve integrated planning and service provision. With local leaders dominating the district council, it might well be easier to coordinate an integrated plan for the district as a whole, since enhanced communication between the local municipalities would be a feature of this model. Local priorities with regard to service provision and the bulk provision of certain services would presumably be high on any district agenda dominated by local leaders. The local leaders on the district council would thus, one presumes, debate the district-wide priorities vis-à-vis those of the local municipalities and agree on a binding and integrated service plan which all local municipalities would subscribe to.

What are the disadvantages of this option? Mayors and other councillors in leadership positions often serve their local municipality full-time, making this model time-consuming and work-intensive. Also, who would serve as the mayor of the district? Could a local councillor feasibly hold two mayorships? Would either the district or local council be vulnerable to neglect? This option would also require statutory amendments to accommodate the change in political composition of the district council. More importantly, it would have major political implications: the elimination of 40% of district councillors would certainly meet with considerable opposition.

Option 3: Absorb local municipalities into the district

A more controversial option involves doing away with the concept of local municipalities (in non-urban areas) as a separate, constitutionally entrenched category of local government. The local councils would be absorbed into the district municipality, becoming subcouncils of the district council. The district would then assume a status similar to that of a metropolitan council with a number of subcouncils. All councillors would be district councillors, but both ward and PR councillors would automatically be councillors of a subcouncil.

This model would involve the creation of large single-tier councils on a district scale with full powers and functions to administer all local and district services. Scarce managerial, administrative and technical resources would thus be pooled in the district municipality. The argument for this model is that district municipalities, spanning a number of local municipalities, are in a better position to attract skilled resources to provide the basic services. It is also more cost-efficient to capacitate a small number of districts than a large number of locals. Moreover, districts are able to generate economies of scale to provide services more efficiently and sustainably. The other functions of districts are equally important. Development planning across a district and the integration of services make scarce resources go further. The provision of bulk supply of services to municipalities generates economies of scale that make rural local government more viable.

A number of advantages may accrue from having a single local authority with several subcouncils. First, the ongoing problem of how a district-wide IDP relates to the IDPs of local municipalities would disappear. The district council would do integrated development planning for the district as a whole and the subcouncils would implement it. Second, uncertainty regarding the division of powers and functions, which has been a major problem, if not the most serious one, affecting district-local relations, should also dissolve, since the district would have all the powers and could delegate certain functions to the subcouncils. Also, this option obviously eliminates the hierarchy of councils.

Comment

For the district system to function effectively, its governance structure needs serious attention. Current practice suggests that there is a disjuncture between the districts and the local councils which are supposed to 'own' the district council. Once an appropriate role is given to districts, a simple and effective system of governance must be introduced to realise this goal. This article has suggested only three options, and there may be better ones. The object is to promote a debate on the best way of governing the non-urban areas, which are lagging behind profoundly in development.

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Photo by Ken Oosterbroek /PictureNET Africa

THE CHALLENGES OF

Urbanisation

SINGLE TIER LOCAL GOVERNMENT FOR URBAN AREAS

The growing importance of cities not only in South Africa but also around the world is well captured in the 2006 Cities Network Report as follows: "[C]ities are simultaneously the most productive sites in the national economy as well as areas that accommodate the largest number of poor people, ... cities are strategically important places for meeting the government's growth and development agenda."

The majority of South Africans (56%) now live in cities and major urban areas. Urbanisation is continuing but at different rates in each province. Migration has largely been towards strong metropolitan areas and secondary cities. While there may be slow growth in the population of cities, the 2006 Cities Report points out that there is a rapid decline in the size of city households. This will result in a significant increase in the number of households in the cities, with "very serious implications for municipal service-delivery and for the sustainability of cities."

The challenge of urbanisation

The nation's wealth is largely created in the major urban areas. The Cities Report classifies the 21 functional urban areas into three categories: "core urban areas" (Johannesburg, Ekurhuleni, Tshwane, Cape Town and Ethekwini), "major urban areas" (Nelson Mandela Bay, Buffalo City, Mangaung, Emfuleni and Msunduzi) and the rest as "significant urban service centres".

The principal criterion for including the latter group is the size of their contribution to the national economy, measured in Geographic Value Added (GVA). The economy of the significant urban service centres is usually dominated by a single sector and the sizes of these economies range from R4.5 to R9 billion GVA per year. The National Treasury identified 21 local municipalities as secondary cities, using criteria that include population size, percentage of urban formal houses, percentage of households with adequate water, own revenue per household per month and household income profile.

key points

- Because urban areas face the challenges of urbanisation, which are not always relevant in non-urban areas, there is a need for specialist, focused municipal governments.
- The appropriate policy and legislative response is to establish single tier local government that is equipped to confront the twin challenges of urbanisation – economic growth and poverty eradication.
- Establishing single tier urban municipalities would simply be a case of confirming the status quo since districts do not play much of a role in these urban areas.

Single-tier local government in urban areas

Because urban areas face the challenges of urbanisation, which are not always relevant in non-urban areas, there is a need for specialist, focused municipal governments. This policy currently underpins the distinction between category A and category B municipalities. In the case of single tier metropolitan municipalities, most of the objectives of district municipalities are not relevant. The debate about district municipalities should be turned around so that the issue is not whether district municipalities have a useful role to play in urban areas, but rather whether the challenges of urbanisation will be better met by single tier local government.

With regard to the institutional framework for urban South Africa, the appropriate policy and legislative response is to establish, as a minimum, single tier local government that is equipped to confront the twin challenges of urbanisation – economic growth and poverty eradication.

From a strategic perspective, an urban municipality, having all the local government powers, can focus on the core business of urban settlement in South Africa. First, it can promote economic development and combat the dualistic nature of the economy through infrastructure development; and second, it can reduce poverty through effective service delivery and housing provision. Not having to share jurisdiction with another level of local government means an urban municipality can develop the necessary expertise to deal with these key developmental issues.

In addressing the twin challenges of urbanisation, there are a number of legal and administrative benefits which flow from having a single tier system. There is legal certainty about who does what, eliminating never-ending turf battles. It reduces the transaction cost of having to work with a second layer of local government, which often delays decisions and flows of funding. It could arguably also increase the status of the municipality – for investors there is only one level of local government to work with. From the residents' point of view, having a single service provider allows for greater accountability. Moreover, urban municipalities would be closer to the communities they serve than distant district municipalities.What would be lost if urban municipalities become stand-alone municipalities? The most important value would be coordination of development planning throughout the district. However, this reason has not prevented the creation of single tier metropolitan municipalities. As this also remains a value to pursue for metropolitan municipalities, other intergovernmental mechanisms and procedures should be developed to ensure alignment and harmony. This should be done at either the inter-municipal or the provincial level.

There are also strong views against extending the single tier local government system. It has been argued that even if a district is frustrating the actions of a strong and better capacitated local municipality, secessionfrom the district and the establishment of a new metropolitan municipality would not be a wise move. Intervention in such issues, it was thus argued, lies with clarifying the functions and more effective intergovernmental relations.

This argument misses the central point – do district municipalities add value to the governance of urban areas? They have not played a significant role in urban areas in the past and are unlikely to do so in the future. It is not an issue of

simply clarifying the powers of functions; rather, the question is whether a district should be the provider of key municipal services to end users in urban areas in the first place. Nor is it an issue of improving intergovernmental relations between districts and secondary cities. Instead, the question is whether districts can or should be the communication link between the secondary cities and the provinces. The crux of the argument for single-tier urban government is to reduce the complexity of government by removing one layer of local government – the districts.

Since the legal definition of a "metropolitan area" would exclude most, if not all, of the secondary cities, it is not possible to create new metropolitan municipalities beyond the four likely candidates (Buffalo City, Mangaung, Emfuleni, and Msunduzi). The question remains whether they should continue to be nominally part of districts or be transformed as single tier municipalities. It is contended that they, like metros, should be stand-alone urban municipalities, unencumbered by the complexities of the two-tier district system to meet the challenges of urbanisation. This raises two questions: (a) what criteria are to be applied? and (b) should a distinction then be drawn between metropolitan and urban municipalities?

Defining urban municipalities

The definition proposed for an urban area is a scaled-down version of the definition of a metropolitan area in the Structures Act. The difference is that references to multiple areas – be they industrial, business or residential – and the intense interaction between them that make up a metropolitan area, should be omitted. A possible legal definition could read as follows:

> An area may have a single category A municipality if that area can reasonably be regarded as –
> (a) an urban area featuring:
> (i) a high population density;
> (ii) extensive development; and
> (iii) significant business and industrial areas;
> (b) a centre of economic activity; and
> (c) a single area for which integrated development planning is desirable for the management of urbanisation.

The key elements are, first, high population density. This has two components – the absolute size of the population and the level of urban households. No figures should be set down but a rule of thumb could be urban settlements in excess of 250 000 inhabitants. The second element of "extensive development" may require closer circumscription to refer to a hub of social, educational and financial activities. The third and fourth elements reflect the economic basis for the urban settlement, which are critical as they usually signify whether there is a sizeable tax base. The final element is a qualitative one: the very object of a single tier urban municipality is the planning for and implementation of an urbanisation policy.

Should a distinction be maintained between the secondary cities and the large metros? There are substantial differences between the current metros and other major urban areas with regard to population size, budgets, personnel and overall capacity. The metros operate at an entirely different level from the secondary cities. It is thus suggested that the current name of "metropolitan areas" be retained alongside the new category A institution of an urban municipality.

Application of definition

The application of this broad definition, underscored by the policy object of managing urbanisation effectively, should be brought to bear on the 27 municipalities categorised by the MDB as large urban centres. Not all of them may qualify.

It is critical that clear policy indicators are developed to identify those urban areas that would do better without district governance. In the end the call is whether single tier governance would be better for discharging the developmental mandate of local government in urban areas. If the preferred choice is a single tier urban municipality, it would simply be a case of confirming the status quo as, for the most part, districts do not play much of a role in these urban areas.

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THEME 5: THE ELECTORAL SYSTEM FOR LOCAL GOVERNMENT

Municipal councils are elected according to an electoral system that combines ward representation with proportional representation. This theme includes a reference to a free resource on how the elections work during general elections and how vacancies are filled. Secondly, how flexible is this system, i.e. can a political party remove councillors after the election, if it turns out that the nomination was not done adequately? What are the consequences of that? Lastly, in the aftermath of the 2016 election, there was debate about the fairness of the electoral system, an issue discussed in an opinion piece.

1. **Electing Councillors: A Guide to Municipal Elections** by Jaap de Visser and Nico Steytler available at http://dullahomarinstitute.org.za/news/electing-councillors-a-guide-to-municipal-elections/view
2. **Removing Elected Councillors: Will Cause Chaos** by Phindile Ntliziyiwana, Local Government Bulletin 2011, Volume 13, Issue 2, page 11-12
3. **'Zuma's plan to swap 'wrong' councillors may create chaos'** by Phindile Ntliziywana & Jaap de Visser http://www.bdlive.co.za/articles/2011/05/16/phindile-ntliziywana-and-jaap-de-visser-local-government (last accessed 25 August 2016)
4. **'Did SA's best loser wins electoral system treat the ANC unfairly?'** by Jaap de Visser http://www.bdlive.co.za/opinion/2016/08/16/did-sas-best-loser-wins-electoral-system-treat-the-anc-unfairly (last accessed 25 August 2016)

Removing elected councillors WILL CREATE CHAOS

Widespread disgruntlement over allegations that candidates nominated by communities had been irregularly removed by the ANC led to a promise by President Jacob Zuma that any candidates found to have been nominated in an improper way would be removed after the May polls. This was seen as a desperate attempt to stop aggrieved communities from boycotting the local government elections.

A high-level ANC task team led by Home Affairs Minister Nkosazana Dlamini-Zuma was formed in May 2011 to investigate allegations that newly elected ANC councillors had cheated their way onto candidate lists . There were, moreover, suggestions that the ANC list could be amended after the investigation 'to ensure that people serving in our local, district and metropolitan municipalities are truly those who have been chosen with the participation of the communities'.

Over the years the ANC's nomination process for candidates has been a combination of a broadly consultative branch-level nomination process with a higher-level determination by the party's national executive council (NEC), whose role is to determine the criteria upon which the party's list is developed. Managing the party lists has always been the responsibility of the provincial and national list committees. These committees consolidate, validate and confirm the nominations received from local branches into a final national list, which is then approved by the national list committee and the NEC. Cosatu, the SACP and the South African National Civic Organisation (Sanco) are also consulted.

However, the Polokwane conference in 2007 resolved to strengthen the list guidelines and processes for nominating public representatives so as to enhance democratic participation. It was decided that, to ensure the selection and deployment of the best cadres for public office, the broader community had to be involved in the selection processes. This approach was adopted in selecting candidates for the local government elections on 18 May 2011. For the first time, the ANC allowed communities to nominate election candidates.

However, this seems to have backfired. It created the expectation that communities, and not the ANC, would be the arbiters in selecting candidates. As a result, angry party members accused ANC leaders of tampering with the lists and removing their preferred candidates. Some also alleged that their preferred candidates had fallen victim to powerful cliques. Angry party members even took the ANC to court in some areas, including the Alfred Nzo, Amatole and Buffalo City regions in the Eastern Cape. In other areas, community members threatened to boycott the elections, and some embarked on mass protest, all of which have unsettled the ANC's election campaign.

In a last-minute rescue plan to prevent a boycott, President Jacob Zuma announced that the ANC would probe the allegation that the nomination process had been manipulated and would remove people if it was found that they had been nominated in an improper way. He said the party was prepared to hold by-elections soon after the municipal elections in areas or wards in which the party's preferred candidates had been fraudulently removed from the candidates' list. In the words of the President, 'Our honesty and track record will ensure that we *remove* non-preferred candidates and *replace* them with those who were wanted in the first place by our structures and our communities' (author's emphasis).

A task team has been charged with addressing the issue and started its work on 8 June in KwaZulu-Natal. It will also go to all the other provinces . SALGA seems to share the view of the ANC that it is possible to manipulate the list after elections, but before the IEC allocates seats in the municipal council.

The ANC and SALGA both appear to have overlooked the fact that a political party does not have the power to *remove* elected councillors and *replace* them with councillors of its choice. A councillor, once elected, can only be removed in

accordance with the rules of the electoral system – and these may seriously complicate the ANC's rescue plan.

When does a councillor legally assume office?

A councillor legally assumes office from the date on which the IEC formally determines the result of the election in the municipality (see page 8 of this issue). In the case of this year's local elections, the IEC made that declaration for all municipalities on 21 May.

Effects of removal

Once a candidate has been elected and has assumed office as a councillor, the party's withdrawal of that candidate's name from the party list has no consequences for his or her council membership. Once a candidate assumes office as a councillor, he or she holds that office for the duration of the council's term. This means that any candidate on a current party list who has been elected to a council will remain a councillor for the next five years. The ANC's probe, and such a councillor's subsequent removal from the list by the party, will be a futile exercise unless that councillor vacates office in terms of circumstances regulated by section 27 of the Municipal Structures Act. This happens if the councillor

- resigns from the council in writing;
- is no longer qualified to be a councillor (eg is declared insolvent or convicted of a lengthy prison sentence);
- ceases to be a member of the party that nominated him or her; or
- is removed by the MEC for local government for contravening the Code of Conduct for Councillors.

Legal impediments to the plan

The point is that a party's instruction to its councillor to step down is not recognised by the law as a reason for that seat becoming vacant. The ANC is therefore taking two gambles.

First, the ANC would have to persuade the councillors concerned to resign of their own accord in the name of organisational discipline. The resultant vacancy would then allow the ANC to put forward another candidate from the list submitted to the IEC before elections. The IEC would then declare such a candidate elected (unless it concerns a ward seat – see below). If the elected councillor refuses to resign, however, there is nothing the ANC can do except expel the councillor from the party. Aside from the political risk this involves, the legal risk is that the expelled councillor could challenge the dismissal in court and claim that the expulsion was nothing but a political strategy. Peter Marais did this successfully in 2002 when the DA expelled him for not giving up his mayoral seat in Cape Town. The Cape High Court condemned the DA for adopting a 'double-barrelled' motion: resign from public office or face dismissal from the party. So it must follow that the ANC cannot expel a member for the mere reason that he or she refuses to resign as a councillor.

Second, if the councillor concerned is a ward councillor, the ANC cannot simply suggest another candidate: it would have to compete in a fresh by-election. This would give other parties and candidates a second opportunity to contest the seat, and those parties and candidates would gratefully take the opportunity offered to them by the ANC to campaign with renewed vigour for the contested seat and would brazenly mine the ANC's internal problems.

In neither situation can the ANC simply remove a councillor and replace him or her with a councillor of its choice. In some cases, protracted court action and further chaos may follow.

Analysis

Aside from these legal risks, this move by the ANC might seriously damage local government if it is followed through. It looks as if the President is putting party interests above sound and stable municipal governance. The temporary absence of a small number of councillors, or even one, could be disastrous for the running of a municipality. Just ask the municipal manager of one of the smaller municipalities, where every councillor is needed for work in the communities and for voting on important resolutions, how difficult it is to deliver services when there is political turmoil. In some cases, the temporary absence of a councillor may even result in a takeover by another party or another faction, resulting in instability and administrative paralysis and leading to the municipality's inability to deliver services.

The list probe by the ANC will result in multiple vacancies on councils across the country, and we can anticipate political instability, spilling over into administrative difficulties, in those municipalities. All this is being done to enable the ANC to deal with an internal party process gone wrong.

Phindile Ntliziywana
Managing editor

Surely this contradicts government's Local Government Turnaround Strategy, which is premised on good governance and stability in municipalities?

Print this page

PHINDILE NTLIZIYWANA and JAAP DE VISSER: Local government

May 16, 2011 | unknown

Zuma's plan to swap 'wrong' councillors may create chaos

IN THE wake of the widespread disgruntlement arising from allegations that candidates nominated by communities were irregularly removed, President Jacob Zuma made a promise that irregularly nominated candidates will be removed after the polls. This was a desperate attempt to stop disgruntled communities from boycotting this week's local government elections.

The African National Congress's (ANC's) nomination process for candidates has, over the years, been a combination of a broadly consultative branch-level nomination process with a higher-level determination by the ANC's national executive council, whose role is to set the criteria upon which the party's list is developed. The process of managing the party lists has always been the responsibility of the nine provincial and the national list committees. These committees consolidate, validate and confirm the nominations received from local branches into a final national list, which is approved by the national list committee and the council. The Congress of South African Trade Unions, the South African Communist Party and the South African National Civic Organisation are also consulted before the final list is confirmed.

However, one of the resolutions of the ANC's Polokwane conference in 2007 was to strengthen the list guidelines and processes for nomination of public representatives to enhance democratic participation. In this regard, it was resolved that to ensure the selection and deployment of the best cadres for public office, the broader community had to be involved in the candidate selection processes. This is the approach adopted in selecting candidates for these elections. For the first time, the ANC this year decided to allow communities to nominate candidates.

However, the inclusion of communities in the nomination process seems to have backfired. It created the expectation that communities, and not the ANC, are the arbiters in selecting candidates. As a result, a number of angry party members accused ANC leaders of tampering with the lists and removing their preferred candidates. Some also allege that their preferred candidates had fallen victim to powerful cliques. In some areas, angry party members have even taken the ANC to court. In other areas, community members have threatened to boycott the elections and some have embarked on mass protest, all of which have unsettled the ruling party's election campaign.

In a last-minute plan to stop disgruntled party members from boycotting the elections, Zuma announced that the ANC would probe the allegation of the manipulation of the nomination process and remove people if it found that they had been nominated in an improper way. He said the party was prepared to hold by-elections in areas or wards in which the party's preferred candidates had been fraudulently removed from the candidates' list.

Zuma appears to overlook that the ANC does not have powers to remove elected councillors and replace them with councillors of choice. A councillor, once elected, can be removed only in accordance with the rules of the electoral system. These rules may seriously complicate Zuma's rescue plan.

If a candidate is elected and assumes office as a councillor, the withdrawal of the name of the candidate from the party list by the party has no consequences for that person's council membership. Once a candidate assumes office as a councillor, he or she holds that office for the duration of the council term. That means that, if elected, the candidates on the current list will be councillors for the next five years. The probe and their subsequent removal from the list by the party, if they were found to have been fraudulently placed on the list, would be a futile exercise unless the incumbent councillor vacates office in terms of circumstances regulated by section 27 of the Municipal Structures Act:

n If the councillor resigns from the council in writing;

n Is no longer qualified to be a councillor (when he is declared insolvent, is convicted of a lengthy prison sentence, etc);

n Ceases to be a member of the party that nominated him; or

n Is removed by the MEC for local government for contravening the code of conduct for councillors.

A party's instruction to its councillor to step down is not recognised by the law as a reason for that seat becoming vacant. Zuma is therefore taking two gambles.

First, the ANC would have to convince the councillors concerned to resign from the council of their own accord in the name of organisational discipline. The resultant vacancy would then allow the ANC to put forward another candidate for the Independent Electoral Commission to declare elected (unless it concerns a ward seat, see below).

If the elected councillor refuses to resign, however, the ANC has a serious problem. There is nothing the ANC can do except expel the councillor from the party. Aside from the political risk to that, the legal risk is that the expelled councillor can challenge his dismissal in court and claim that his expulsion is nothing but a political strategy. Peter Marais did this successfully in 2002 after the Democratic Alliance (DA) expelled him for not giving up his mayoral seat. The Western Cape High Court condemned the DA for adopting a "double-barrelled" motion: resign from your public office or face dismissal from the party. So it must follow that the ANC cannot expel a member for the mere reason that he or she refused to resign as a councillor.

Second, if the councillor was a ward councillor, the ANC cannot simply suggest another candidate but would have to compete with other parties and candidates in a fresh by-election. This would give those other parties and candidates a second opportunity to contest those seats. Surely, those other parties and candidates will gratefully take the opportunity offered to them by the ANC, to campaign with renewed vigour for the contested seat and brazenly mine the problems the ANC is facing internally? This is the second gamble Zuma is taking.

In either situation, the ANC cannot simply remove a councillor and replace them with one of its choice. In some cases, protracted court action and further chaos may follow.

Aside from these legal risks, Zuma's plan might actually seriously damage local government if it is put into operation. It comes across as if he is putting party interests above sound and stable municipal governance. The temporary absence of one or a small number of councillors can be disastrous for the running of a municipality. Ask the municipal manager of a small municipality, where each and every councillor is needed for work in the communities and for voting on important resolutions, how difficult it is to deliver services when there is political turmoil.

There are even cases where the temporary absence of a councillor may result in a "takeover" by another party or another faction, resulting in instability and administrative paralysis, leading to the municipality's inability to deliver services. Zuma is now "promising" the emergence of multiple vacancies on councils across the country and we may expect political instability, spilling over into administrative difficulties, in those municipalities.

All of this is done in order to enable the ANC to deal with an internal party process gone wrong. Surely this is putting the cart before the horse and contradicts the government's turnaround strategy for local government, which is premised on good governance and stability in municipalities.

. Ntliziywana and De Visser are with the Community Law Centre at the University of the Western Cape.

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Did SA's 'best loser wins' electoral system treat the ANC unfairly?

Aug 16, 2016 | Jaap de Visser

The party is questioning the proportional representation system, but it's a system that works well for our democracy for several reasons, writes Jaap de Visser

IN THE margins of last week's ANC national executive committee (NEC) meeting, secretary-general Gwede Mantashe said the NEC would discuss how proportionality in local government elections works and whether it is indeed a fair system. For example, how can it be that in Nelson Mandela Bay the ANC won 15 more wards than the DA but still ended up with fewer seats in the council?

The ANC may be tempted to think that the arithmetic of the electoral rules favoured the DA. But let's unpack this a little and examine what the Constitution and the electoral rules provide.

In my view, the system is a shining example of fairness and very cleverly combines two approaches to elections.

We all instinctively know that the seats are allocated proportionally: each party receives seats based on its percentage of the votes. The Constitution in fact leaves no choice in this regard. In section 157 it says that local government elections must be based either on proportional representation (PR) or on a combination of PR and ward representation. It leaves the choice to Parliament, which had to adopt a law on elections. In section 157(3), it sets the all-important condition: whatever choice Parliament makes, the system must result in general in proportionality. Ultimately, our law combines the two systems. But let's first look at each of them separately.

Ward system

In a ward representation system, voters in a ward elect an individual to represent that ward on the council. It is a "winner-takes-all" system: whoever wins the most votes wins, irrespective of how small the winning margin is.

The advantage is direct accountability of that councillor to the ward. It also opens the electoral system to independent candidates, who cannot enter in a PR system.

The disadvantage is that the result distorts the real picture. For example, a candidate with only a few more votes than her competitor will win the ward seat. All the votes that went to her competitor are lost, even though they are proof that the competitor was almost equally popular with the voters. As we will see, it is this distortion that our system addresses.

Proportional representation

But let's first look at the PR system. Here, the voter votes for a political party, not an individual candidate.

Before the elections, the party puts together a list of candidates and the percentage of the votes received by the party determines how many of them actually become PR councillors.

This produces a nuanced result. For example, if a party receives a third of the votes, it also receives a third of the seats. The distortions that come with ward representation are avoided and smaller parties can also win seats.

A further advantage is that party lists can be used to promote specific groups (such as women) through mechanisms such as quotas enforced by the party or even by the electoral body.

The disadvantage of the PR system is that elected councillors are accountable first to the party and only then to the electorate.

The Municipal Structures Act was adopted in 1998. It combines the above two systems into one electoral system for local government.

Metropolitan and local councils are made up of 50% ward councillors and 50% PR councillors. So it combines the best of both worlds — the direct accountability of the ward system and the PR system's ability to capture the nuance of the outcome.

One could calculate the results of the two systems separately. The candidate with the most ward votes wins the ward, and the calculation of PR seats is done on the basis of the PR ballot.

However, and this is where it gets complicated, the law combines the two calculations. In the calculation of a party's PR seats, the IEC also looks at how many votes that party collected in the ward election. This is the so-called "PR top-up" mechanism, a phrase coined by Paul Berkowitz, prominent local government data analyst.

The key is this: votes cast for party-aligned ward candidates who did not win the ward are used in the calculation of their party's PR seats. To take the example above, the votes cast for the party candidate who lost the ward by a few votes are not ignored. They are used to calculate her party's PR seats.

This reduces the distorting effect that ward elections have on the overall outcome. A party-aligned ward candidate who wins a substantial number of votes but loses the ward, still contributes to his or her party's PR tally. This means the number of wards you win is not decisive: it is also about the number of votes collected in the wards that you did not win.

The election result in Nelson Mandela Bay is a clear example of this. The ANC won 36 wards and the DA won 21 wards. However, the DA still won the most seats. This is because the DA collected more votes overall than the ANC (45,000 more).

A closer look at what happened in the ward elections is important. The ANC collected 153,500 ward votes (which brought it 36 ward victories) but the DA collected 178,000 ward votes (even though these delivered only 21 ward victories to the DA). So even where the DA lost the ward to the ANC, it still collected many votes in those wards. This boosted the DA's PR tally and made it the biggest party in Nelson Mandela Bay. So being "the best loser" is crucial to winning seats. Parties must field ward candidates in as many ward as possible, even in wards they are unlikely to win. And they must get their voters to come out in numbers everywhere.

The choice for this combined system is informed by a number of things.

First, the Constitution demands proportionality. A system with only ward elections is unconstitutional. Keeping the calculation of ward and PR seats separate (in other words, no "PR top-up") would still result in considerable distortion of the real picture and would thus also be unconstitutional. The seat allocation would ignore all the votes cast for party ward candidates who lost the ward.

Secondly, there are sound policy reasons for the combination. With the ward system, community leaders are mobilised and drawn into local politics as direct ward representatives. At the same time, the "tyranny of the majority" is avoided. Inclusivity and reconciliation have always been crucial themes in the transition from the race-based local authorities that existed in 1994 to the current democratic system. This requires a system that brings a variety of parties and interests onto municipal councils — that is, a PR system.

Our electoral system embraces the direct accountability of the ward system and combines it with the PR system's ability to reflect the nuances of voters' will. Critically, losing a ward election does not mean the support your party received in that ward is ignored. Therefore, parties must not only win ward elections. Where they lose the ward, they must try to be "the best losers", a principle that, by the way, rings true more broadly in our democracy.

• *Prof de Visser is director of the Dullah Omar Institute at UWC.*

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THEME 6: VACANCIES IN BETWEEN ELECTIONS

Vacancies on the council need to be filled, either through a by-election or through the party list. This is not always an easy process. What are some of the difficulties encountered here? Also, how do the municipal manager and the IEC determine whether or not there is in fact a vacancy? Sometimes this is difficult to determine, given that vacancies are often the result of party political decisions.

1. **'Help desk: expulsions of members',** Local Government Bulletin 2009, Volume 11, Issue 1, page 17
2. **'Is this seat taken?: Filling the Vacancies During Political Turmoil** by Jaap de Visser, Local Government Bulletin 2008, Volume 10, Issue 5, page 4-7

Help desk

Have your legal questions answered for free!

The law on local government is complex and legal advice is expensive, but subscribers to the *Bulletin* have access to a free telephonic legal advice service. To qualify for free legal advice a question should relate to the content of the *Bulletin* or to the framework legislation for local government, i.e. the Municipal Demarcation Act, Municipal Structures Act, Municipal Systems Act, Property Rates Act or Municipal Finance Management Act. The advice is not a full legal opinion. It is verbal advice, or, if necessary, a short letter of up to 500 words.

Valma Hendricks is the marketing and subscriptions manager. Please direct all questions to Valma, who will refer them to the researchers for answering. She can be contacted at:
vhendricks@uwc.ac.za
021 959 3707

Q **What happens if an independent councillor joins a political party?**

A The councillor loses his or her council seat and a by-election will be held in the ward to fill the vacancy. Section 27(f) of the Municipal Structures Act provides that a councillor who was not nominated by a party loses the seat if he or she joins a registered political party.

Q **If a political party needs to discipline or even expel one of its members who is serving as a councillor, must it consider labour law?**

A As a representative of a political party, a councillor needs to adhere to the constitution of that party. The discipline of a councillor by a political party will therefore have to follow the provisions of the constitution of that party. The law requires fair administrative action in disciplinary proceedings. This includes a fair hearing, sufficient notice of meetings and proceedings, and a fair opportunity to present one's case. However, this does not amount to labour protection. No labour laws apply to dismissing a member from a political party.

Q **Our council has 42 members. Fourteen councillors have been expelled by their political party. We thus have 14 vacancies. What is the quorum while we have the vacancies? Is the quorum still 22 or is it now 15?**

A The quorum is 22. The quorum does not change when there is a vacancy. The quorum is linked to the number of seats determined in the municipality's establishment notice. It is not linked to the number of councillors occupying council seats.

Is this seat taken?

FILLING VACANCIES DURING POLITICAL TURMOIL

It has not taken long for the political turbulence triggered by events at national and provincial level to reach the shores of local government. A wave of resignations and expulsions is breaking on the banks of local, district and metropolitan municipalities. Municipalities, political parties and the Independent Electoral Commission (IEC) face the formidable task of ensuring that the political changes heralded by the new movement led by Mosiuoa Lekota and others unfold in an orderly and lawful fashion.

This article outlines the rules dealing with the expulsion and resignation of councillors from their political parties. Central to these rules is the principle that a councillor must vacate office as a councillor when he or she 'ceases to be a member of the political party'.

Electoral system

Local councils are usually made up of ward councillors and proportional representation (PR) councillors in equal proportions. District councils comprise PR councillors elected by the voters in the district (40%) and representatives of the local municipalities in the district (60%).

Ward councillors

There are two types of ward councillors. Party-aligned ward councillors must remain members of their parties throughout their terms if they want to retain their seats. Independent ward councillors, who won their wards without campaigning on a party ticket, may not join political parties during their terms if they want to retain their seats.

PR councillors

PR councillors are elected on a party list system. A party, having secured a certain number of seats on the council in the general local government election, fills those seats by nominating members through its party list. A PR councillor who is no longer a

member of the political party must make way for a new member nominated by the party.

District representatives

Local municipalities are represented on their district council. Each local municipality is entitled to send a delegation to the district. The delegation comprises ward councillors and / or PR councillors.

The size of the delegation depends on the number of registered voters in the local municipality. The composition of the delegation is not determined by an ordinary council resolution. The law prescribes that the council elects the delegation in terms of a PR system. Each party or councillor on the local council may submit a list of candidates to the IEC. Every councillor then votes for one of the lists. The percentage of votes cast for a particular list determines how many local councillors on that list will go to the district.

For example, let us say that party Y holds a majority of 70% of the seats on a local council and party X holds the remaining 30%. They both submit lists to compete for seats in the district. Party X obtains 30% of the votes and Party Y obtains 70%. The result of this election is that the delegation to the district will be constituted according to the same 70:30 split. This ensures that the composition of the delegation reflects the composition of the council and not just the will of the majority.

Losing a council seat

From the above, it is clear that membership of the party is an essential condition for party-aligned ward councillors and PR councillors to remain councillors. The loss of party membership results in the seat becoming vacant.

District representatives lose their seats on the district council when they lose their seats on the local council: someone who is no longer a local councillor may no longer represent that local council. A local council may also decide, by resolution, to recall all or some members of its delegation to the district.

How are vacant seats filled?

The law provides for procedures which the IEC uses to fill vacancies. No institution or organ other than the IEC may fill vacancies – not a political party, the municipal manager or even the municipal council. The filling of a vacancy is an election, and elections are managed by the IEC.

Ward councillors

A vacant ward seat can only be filled after a by-election. As soon as the ward seat becomes vacant, the municipal manager must set a date for a by-election, after consulting the IEC. This by-election, managed by the IEC, must be held no later than 90 days after the vacancy occurred. Every party that is registered with the IEC to contest municipal elections in the municipality may participate in that election. This means that as soon as the recently launched Congress of the People (Cope) has been registered with the IEC, it may contest municipal by-elections.

Losing a ward seat to another party has no consequences for the number of PR seats that a party has on a council.

KEY POINTS

- When a PR councillors loses his or her party membership, the seat becomes vacant.
- The IEC fills a PR vacancy with the next person on the party list.
- When a party-aligned ward councillor loses his or her party membership, the seat also becomes vacant.
- The IEC fills a ward vacancy with the winner of the by-election.
- A local municipality can recall, by resolution, its representative to the district.
- The local municipality cannot replace the district representative by resolution; the IEC fills the vacancy.
- Suspension from the party has no effect on council membership.
- Parties cannot expel members before giving them a fair hearing.
- When expelled members appeal, this usually postpones the decision.

PR councillors

When the municipal manager becomes aware of a PR vacancy in the council, he or she must inform the IEC. This must be done within seven days after the councillor loses party membership. The IEC then allows the party 21 days in which it may change its party list. The party list contains the names of party members that are not yet on the council. After the 21 days have expired, the IEC declares the person named at the top of the party list elected as councillor.

District representatives

It is not important how the vacancy came about – ie whether the local council recalled the representative or whether the representative ceased to be a local councillor. In both instances,

the district municipal manager must inform the IEC within seven days. The IEC reverts to the lists that were submitted to it when the district delegation was elected in the local council (see above). It allows the party or councillor that submitted the list 21 days to make changes. After that, it declares the councillor at the top of that list elected as a representative to the district.

Importantly, the local council may not, by resolution, fill a vacancy in its district delegation. While it may, by resolution, decide to recall a representative, it does not fill the vacancy. This is left to the IEC, assisted by the municipal manager.

When is there a vacancy?

Even though the rule is clear – namely, loss of party membership results in a vacancy – it may be difficult to decide when a councillor is no longer a party member.

It is often assumed that the vacancy arises when the municipal manager 'declares a vacancy'. This interpretation is wrong. The vacancy arises automatically, by law, at the moment when the councillor loses his or her party membership; the municipal manager's notification to the IEC merely assists the IEC in its preparations to fill the vacancy. Should the municipal manager not fulfil this duty, there is nothing that prevents the IEC from filling the vacancy without having received the municipal manager's notification.

There are two ways in which a party member may lose his or her membership: resignation and expulsion. The constitution of the party will determine what the procedure is for resignation. The constitution of the African National Congress (ANC), for example, requires a written resignation. The date on which the party receives the letter will be the date on which the member has resigned. The municipal manager and the IEC will start counting the days mentioned above from this date.

It is more complex when a member loses membership against his or her will. Political parties are entitled to discipline their members, just like any other voluntary associations. The constitution of the party will provide for criteria, procedures and penalties applicable to these disciplinary processes. The ultimate penalty will be expulsion. For example, the constitution of the ANC provides for four penalties:

- a reprimand;
- payment of compensation and / or performance of useful tasks;
- suspension; and
- expulsion.

However, because political parties exercise public powers, they are not completely free in respect of how they may discipline their members. A member who feels unfairly treated by his or her party may go to court and challenge the manner in which the party conducted itself. That court will not, however, second-guess the party's reasons for disciplining that member. The fundamental right of freedom of association means that the party determines its own criteria, procedures and penalties. All the court will do is assess whether the disciplined member was given a fair hearing, ie a fair opportunity to state his or her case. The court will also assess whether the party acted rationally, ie whether it did indeed present arguments for disciplining that member. The court will not assess those arguments in detail.

It is therefore very important for political parties to discipline their members in ways that can stand the test of a 'fair hearing'. If a party expels a member in his or her absence by simply sending a letter, it exposes itself to possible legal action. Similarly, expulsion without any reason exposes the party to possible legal action. If that member is a councillor, this kind of legal action also exposes the municipality to a prolonged period of uncertainty about the composition of its highest decision-making organ. This kind of uncertainty is often very damaging for the municipality's mandate to deliver services and promote development.

'Suspended from the party' = 'suspended as councillor'

As can be seen from the ANC's constitution and from other party constitutions, suspension and expulsion are not the same. When a member is 'suspended' by a political party, it means that the member *temporarily* loses all party privileges. He or she may not vote or participate in any structures of the party. Clearly, the word 'suspended' means that the penalty is temporary. It is common for a member to be suspended for the duration of disciplinary proceedings. The outcome of the disciplinary proceedings determines whether the suspension is lifted or converted into a permanent expulsion.

Importantly, when a councillor is *suspended*, and not (yet) expelled from his or her party, this has no consequences for his or her membership of the council. If a political party seeks to 'suspend a councillor from the council', it wants to act outside of the law. Political parties may suspend their members, but they do not have any authority to suspend councillors. There is only one authority that may legally suspend council members, and that is the MEC for local government, who may do so in the event of a breach of the Code of Conduct for Councillors (after recommendation by the council).

The fact that the suspension of a councillor is temporary is the reason why political parties cannot expect a speaker or a municipal manager to temporarily ban a councillor from council meetings. A political party is not permitted to prevent a councillor from participating in the council while it investigates misconduct in terms of its internal rules. Councillors are essential for the running of a municipality; decision-making in council and committees cannot take place without them. It is not up to a political party to remove a councillor from the council while it conducts a disciplinary procedure, just to (possibly) put him or her back in the council whenever it has completed those procedures.

The only time a party's decision has an impact on the status of a councillor is when it decides to *expel* a member. The expulsion triggers the procedures to be followed by the municipal manager and the IEC. As shown above, these procedures are tightly regulated, predictable and result in the election of a new councillor within a specified period of time.

Consequences of appeal

Appeal to a higher organ in the party

When a member who has been expelled appeals against the decision, that obviously complicates matters. Political parties generally permit their members to appeal against a decision to discipline them. For example, the ANC constitution provides that "an appeal may be lodged by the charged person against whom a finding has been made or a penalty imposed by the Disciplinary Committee".

What is the status of the councillor during the appeal? Does the appeal postpone the expulsion and does the member therefore remain a councillor during the appeal? Or does the expulsion become effective immediately?

This depends on the party's constitution, which might provide explicitly that the decision is effective immediately. For example, the Independent Democrats' constitution provides that "the receipt of the appeal shall not be interpreted as a suspension of the sentence". This suggests that an expulsion is effective immediately, despite the fact that the member may appeal. If the party's constitution does not make any specific provision, the general rule is that the appeal postpones the penalty. The ANC constitution, for example, is silent on this issue. Therefore an ANC councillor who appeals to a higher ANC body against his or her expulsion remains a councillor during the appeal.

Litigation

Once the appeal body confirms the decision, there is no doubt that the decision is effective; the seat is vacant. If the disciplined member asks a court to review the party's decision, this does not automatically postpone the decision. Only a special order by the court could provide that the member remains a councillor for the duration of the court proceedings.

Role of the municipal manager

The municipal manager is positioned at the centre of these complexities. The duty to inform the IEC of a vacancy can be a very complicated process because it is not always clear whether there is, in fact, a vacancy – yet, at least. A municipal manager who receives a communication from a party about a vacancy would be well advised to consult that party on the following:

- Was the councillor *suspended* or *expelled*?
- Is the party certain that it took the decision after a fair hearing?
- Did the councillor appeal to a higher party organ?
- Does the party's constitution provide that the decision is effective immediately, despite the appeal?

Importantly, these questions do not imply that the municipal manager must judge the validity of the party's decision. In fact, such an approach would compromise the municipal manager's position. However, the municipal manager is best placed to conduct a sober conversation with the party structures to ensure that all stakeholders are clear about the rules that apply. This should go a long way towards ensuring that any political change takes place with minimal disruption.

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THEME 7: THE MUNICIPAL COUNCIL

The municipal council is the highest legislative and executive body in the municipality. In this theme, the rules for the functioning of the council are discussed. In addition, this theme discusses the importance of the Rules and Orders, i.e. the rules that determine how council meetings are conducted. Lastly, it discusses an important judgment that deals with the secrecy of the vote when councils elect office-bearers.

1. **The Municipal Council** by Jaap de Visser, Local Government Bulletin 1999, Volume 1, Issue 2, page 3-5
2. **What You Need to Know about Municipal Governance** by Jaap de Visser, Local Government Bulletin 2011, Volume 13, Issue 2, page 8-10
3. **Rules and Orders: The Building Blocks of Good Governance** by Jaap de Visser, Local Government Bulletin 2008, Volume 10, Issue 2, page 13-16
4. **A Secret Ballot?** By Jaap de Visser, Local Government Bulletin 2007, Volume 9, Issue 1, page 20-21

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.

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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.

WHAT YOU NEED TO KNOW ABOUT MUNICIPAL GOVERNANCE

By now, all municipal councils will have held their first council meeting and constituted most of their political structures. This article provides some basic governance information and highlights key issues that will be on the municipal council's agenda for its first 100 days in office.

When does a councillor legally assume office?

A councillor legally assumes office when the Independent Electoral Commission (IEC) formally determines the result of the election in the municipality. The precise date is important in relation to, for example, remuneration. Legally, the IEC's declaration of the result of the election is the only decisive date. The swearing in of a councillor is an important ceremonial and political event, but the newly elected councillors are councillors **from the day the IEC declares them elected**.

How does the remuneration of councillors work?

The municipality determines the remuneration of councillors, but must do this within the limits of the Remuneration of Public Office Bearers Act (Act 20 of 1998). In terms of the Act, the national Minister of Cooperative Governance and Traditional Affairs determines the **upper limits** of councillor salaries, allowances and benefits from time to time. The current determination is based on a combination of three factors:

- the municipality's **'grade'** (determined on the basis of municipal income and population);
- whether the councillor is **full-time or part-time**; and
- the individual councillor's **position** (eg mayor, member of exco, chief whip).

If a municipality pays someone more than is allowed for, this will be **irregular expenditure** and the municipality will be forced by law to recover the money from the councillor. The municipal budget must include the proposed costs for the remuneration of councillors, and the municipality must report specifically on the remuneration of councillors in its annual report.

Declaration of financial interests and gifts by councillors

The Code of Conduct for Councillors prescribes that each councillor must declare his or her financial interests within **60 days** of election as a councillor. The types of interests (eg shares, membership of close corporations, directorships) are listed in item 7(1) of the code. Any changes to this during the term of office must also be declared.

During his or her term of office, a councillor must also declare **gifts exceeding R1 000**. The financial interests and gifts are declared to the municipal manager, so the municipal manager must inform the councillors how declaration is to take place.

The council is not obliged to publicise everything that is declared in terms of these provisions, but it must decide which items to make public. This is a matter of balancing the public interest and the need for confidentiality.

Election of office bearers

Speaker

Each council should by now have elected a speaker. The role of the speaker is to chair council meetings, oversee compliance

with the Code of Conduct for Councillors and generally perform other statutory and delegated powers. Often the speaker carries specific responsibilities with regard to community participation and ward committees. When there is an equality of votes in the council, the speaker may cast an extra vote to determine the matter. The speaker's position is full-time.

In some municipalities (those that use the plenary executive system), there is no distinction between the speaker and the mayor. These municipalities do not elect an executive committee or executive mayor, and the offices of speaker and mayor are combined into one.

Chief whip

Most municipal councils will by now also have elected a chief whip. A chief whip is responsible for the political management of all councillors. In large municipalities, the chief whip may be full-time. Schedule 3 of the Municipal Structures Act (Election of Municipal Office Bearers) does not apply to the election of a chief whip: the municipal council must treat this as a normal decision in terms of its rules and orders.

Municipal executive

There are three types of municipal executives: executive committees, executive mayors and plenary executives.

Executive committee

Municipalities of the executive committee type should have elected an **executive committee** at their first council meeting. The council determines the procedure to elect members of the executive committee, as this is not regulated by Schedule 3 of the Structures Act. Members of the executive committee are **full-time**.

It is important to note that the Constitution provides that the executive committee may not simply be a 'winner takes all' committee. The council has a choice, but whatever it chooses, it must be **'fair'**. It is important for the council to take a resolution that indicates clearly which system is to be adopted for allocating executive committee seats.

- It may choose a **proportional system**. All parties and interests in the council are then proportionally reflected in the executive committee.

  Tip: A council that chooses this system may want to use the formulas in Part 2 of Schedule 2 of the Municipal Structures Act to allocate seats on the executive committee. These formulas apply to the election of district representatives but could just as well be used as a framework for proportional representation on the executive committee.
- However, the council may also choose an **alternative system**, provided that the system complies with the **'fairness'** principle of section 160(8) of the Constitution.

This means that the room for **'coalitions'** in municipalities of the executive committee type is not unlimited: the Constitution demands that the executive committee at least **'fairly'** represent political parties represented in the council. In other words, it may be illegal for a party that has significant representation in the council to be completely excluded from the executive committee. At the same time, it is not compulsory for each party to have representation on the executive committee in proportion to its representation in the council. This balance is very difficult to strike when the council is very small: there may be so little room to manoeuvre that it is impossible to grant every party representation.

Municipalities of the executive committee type must elect a **mayor** from among the members of the executive committee. A **deputy mayor** may be elected, but only if the MEC for local government agrees that the municipality may have one. The procedure for the election is set out in Schedule 3 of the Municipal Structures Act. The mayor chairs meetings of the executive committee, is the political head of the municipality and generally carries out important delegated and statutory powers. The mayor is full-time.

Executive mayor

Municipalities of the executive mayoral type elect an executive mayor. A **deputy executive mayor** may be elected, but only if the MEC for local government agrees that the municipality should have one. The procedure for the election of the executive mayor is set out in Schedule 3 of the Municipal Structures Act.

The executive mayor appoints a **mayoral committee**, comprised of councillors. The mayoral committee may not be larger than 20% of the council, or ten members, whichever is less. The executive mayor does not have to be counted as a member of the mayoral committee in determining the permissible size of the mayoral committee. Legally, the executive mayor is not compelled to appoint any member of another party. However, he or she is free to do so. Members of the mayoral committee, the executive mayor and the deputy executive mayor are full-time.

Appointing district representatives

A newly elected local council must appoint a **delegation to the district council**. The larger the number of registered voters in a

local municipality, the larger its delegation to the district council will be.

The appointment of the district representatives is not an ordinary majority council resolution. The newly elected councillors of the local council cast votes for the district representatives in an election that is managed by the IEC (often through the municipal electoral officer) in terms of Part 2 of Schedule 2 of the Municipal Structures Act. The composition of the district delegation will broadly reflect the composition of the local council.

The political composition of the local council's delegation to the district will **stay the same** throughout its term of office, even if the political composition of the local council changes as a result of by-elections.

Committees

Section 79 committees

Each council may establish **council committees** in terms of section 79 of the Municipal Structures Act to assist the council. The council must appoint members and chairpersons to these committees. The council committees report directly to the council. Committee chairpersons may sometimes be full-time. These committees are generally linked to the municipality's overall organisational structure and dedicated projects or focal areas of the municipality.

Section 80 committees

The municipal council may also establish **committees to assist the executive mayor or executive committee**. These committees are chaired by members of the executive committee or mayoral committee and report to the executive. The members are appointed by the council.

Other governance matters

Budget and IDP

Each municipality must ensure that its budget is adopted **before the start of the new financial year** on 1 July. Should the council fail to adopt a budget in time, the provincial government must intervene. The council must ensure that the annual review of its integrated development plan (IDP) has been completed so that the budget for 2011 / 12 can be adopted. The rules for the budget process and the key milestones are in the Municipal Finance Management Act, the Municipal Budget and Reporting Regulations, 2009 and relevant Treasury circulars.

Within 28 days after the adoption of the budget, the mayor should approve the municipality's **service delivery and budget implementation plan** (SDBIP), a document that sets out service delivery targets as well as income and expenditure projections for the 2011 / 12 financial year.

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The municipality's powers are vested in the council, subject to limits set in the law. Municipal councils must have systems of delegation to political structures, office bearers and municipal officials so that decision-making can be efficient. At the beginning of the term of office, the municipal council must **review its system of delegations**. This is done on the basis of a report prepared by the municipal manager for the executive committee or mayor. The law does not prescribe a deadline, but it is clear that this must be done as soon as possible.

Rules and orders

The rules and orders (or 'standing orders') of the council determine how council and committee meetings are conducted. Typically, they deal with agenda-setting, decision-making, reporting, behaviour during council meetings and so on. These rules may need to be **updated**. For example, if the municipality has a 'hung council', it is important that the rules and orders provide for a casting vote for committee chairpersons, as this is not provided for in the law.

Election of ward committee members

All local and metropolitan municipalities may have ward committees. The ward committee comprises **ten elected community members**, chaired by the ward councillor. The municipality must have a policy in place that sets out how the community members are elected. The term of the previous ward committees has now expired, so the municipality must prepare for **ward committee elections** to be carried out.

Expiry of municipal manager's contract

By law, the current municipal manager's contract may not go beyond 18 May 2012, and most municipal managers have contracts that expire earlier. The municipal council appoints the municipal manager.

The council should therefore ensure that it starts the relevant procedures towards **extending the contract or recruiting someone else** in time, to avoid a vacancy when the current contract expires.

Prof Jaap de Visser
Editor

WHAT YOU NEED TO KNOW ABOUT MUNICIPAL GOVERNANCE

By now, all municipal councils will have held their first council meeting and constituted most of their political structures. This article provides some basic governance information and highlights key issues that will be on the municipal council's agenda for its first 100 days in office.

When does a councillor legally assume office?

A councillor legally assumes office when the Independent Electoral Commission (IEC) formally determines the result of the election in the municipality. The precise date is important in relation to, for example, remuneration. Legally, the IEC's declaration of the result of the election is the only decisive date. The swearing in of a councillor is an important ceremonial and political event, but the newly elected councillors are councillors **from the day the IEC declares them elected**.

How does the remuneration of councillors work?

The municipality determines the remuneration of councillors, but must do this within the limits of the Remuneration of Public Office Bearers Act (Act 20 of 1998). In terms of the Act, the national Minister of Cooperative Governance and Traditional Affairs determines the **upper limits** of councillor salaries, allowances and benefits from time to time. The current determination is based on a combination of three factors:

- the municipality's **'grade'** (determined on the basis of municipal income and population);
- whether the councillor is **full-time or part-time**; and
- the individual councillor's **position** (eg mayor, member of exco, chief whip).

If a municipality pays someone more than is allowed for, this will be **irregular expenditure** and the municipality will be forced by law to recover the money from the councillor. The municipal budget must include the proposed costs for the remuneration of councillors, and the municipality must report specifically on the remuneration of councillors in its annual report.

Declaration of financial interests and gifts by councillors

The Code of Conduct for Councillors prescribes that each councillor must declare his or her financial interests within **60 days** of election as a councillor. The types of interests (eg shares, membership of close corporations, directorships) are listed in item 7(1) of the code. Any changes to this during the term of office must also be declared.

During his or her term of office, a councillor must also declare **gifts exceeding R1 000**. The financial interests and gifts are declared to the municipal manager, so the municipal manager must inform the councillors how declaration is to take place.

The council is not obliged to publicise everything that is declared in terms of these provisions, but it must decide which items to make public. This is a matter of balancing the public interest and the need for confidentiality.

Election of office bearers

Speaker

Each council should by now have elected a speaker. The role of the speaker is to chair council meetings, oversee compliance

with the Code of Conduct for Councillors and generally perform other statutory and delegated powers. Often the speaker carries specific responsibilities with regard to community participation and ward committees. When there is an equality of votes in the council, the speaker may cast an extra vote to determine the matter. The speaker's position is full-time.

In some municipalities (those that use the plenary executive system), there is no distinction between the speaker and the mayor. These municipalities do not elect an executive committee or executive mayor, and the offices of speaker and mayor are combined into one.

Chief whip

Most municipal councils will by now also have elected a chief whip. A chief whip is responsible for the political management of all councillors. In large municipalities, the chief whip may be full-time. Schedule 3 of the Municipal Structures Act (Election of Municipal Office Bearers) does not apply to the election of a chief whip: the municipal council must treat this as a normal decision in terms of its rules and orders.

Municipal executive

There are three types of municipal executives: executive committees, executive mayors and plenary executives.

Executive committee

Municipalities of the executive committee type should have elected an **executive committee** at their first council meeting. The council determines the procedure to elect members of the executive committee, as this is not regulated by Schedule 3 of the Structures Act. Members of the executive committee are **full-time**.

It is important to note that the Constitution provides that the executive committee may not simply be a 'winner takes all' committee. The council has a choice, but whatever it chooses, it must be **'fair'**. It is important for the council to take a resolution that indicates clearly which system is to be adopted for allocating executive committee seats.

- It may choose a **proportional system**. All parties and interests in the council are then proportionally reflected in the executive committee.

  Tip: A council that chooses this system may want to use the formulas in Part 2 of Schedule 2 of the Municipal Structures Act to allocate seats on the executive committee. These formulas apply to the election of district representatives but could just as well be used as a framework for proportional representation on the executive committee.
- However, the council may also choose an **alternative system**, provided that the system complies with the **'fairness'** principle of section 160(8) of the Constitution.

This means that the room for **'coalitions'** in municipalities of the executive committee type is not unlimited: the Constitution demands that the executive committee at least **'fairly'** represent political parties represented in the council. In other words, it may be illegal for a party that has significant representation in the council to be completely excluded from the executive committee. At the same time, it is not compulsory for each party to have representation on the executive committee in proportion to its representation in the council. This balance is very difficult to strike when the council is very small: there may be so little room to manoeuvre that it is impossible to grant every party representation.

Municipalities of the executive committee type must elect a **mayor** from among the members of the executive committee. A **deputy mayor** may be elected, but only if the MEC for local government agrees that the municipality may have one. The procedure for the election is set out in Schedule 3 of the Municipal Structures Act. The mayor chairs meetings of the executive committee, is the political head of the municipality and generally carries out important delegated and statutory powers. The mayor is full-time.

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Prof Jaap de Visser
Editor

A secret ballot?

The Municipal Structures Act provides that the election of office-bearers must take place in a secret ballot. However, it does not stipulate what the consequences would be if every councillor did not, in fact, cast his or her vote in secret.

Breede Valley Onafhanklik vs The Municipal Manager: Breede Valley Municipality Case No. 3390/006

key points

- This judgment sends out a stern warning to all municipalities to ensure that councillors cast their votes in the election of office-bearers in secret.
- However, it can be argued that the judgment does not appreciate the context of a council decision to elect office-bearers which is different from a general election.
- The Court's argument is based on the general right to a secret vote, which applies to citizens electing their political representative onto legislative bodies.
- In contrast, the election of office-bearers is a decision of the municipal council.
- It could also be argued that the law deliberately does not deal with the specifics of the election as it is the municipality's task to regulate this.

Issue

The newly elected council of Breede Valley Municipality elected its office-bearers on 29 March 2006. As there was no political party with an outright majority, negotiations towards a coalition preceded the election. The African National Congress and the Independent Democrats entered into a coalition agreement.

In order to cement this agreement, these parties agreed on a 'monitoring system' to be applied during the vote at this meeting. The councillors belonging to the two parties would be seated next to one another. Furthermore, each councillor would show his or her ballot paper to his or her neighbour to ensure that voting took place in accordance with the coalition agreement.

The municipal manager chaired the meeting until the speaker had been elected, in accordance with the Municipal Structures Act. The municipal manager, being aware of the existence of this 'monitoring system', addressed the councillors on the issue. He indicated that he had ensured that councillors could choose to exercise the vote in secret but that he could not force them to do so, or prevent them from waiving their right to secrecy. Voting proceeded and the council elected representatives of the two abovementioned parties into office.

Arguments

Two other councillors took issue with the lack of secrecy in the ballot and brought the matter before the Cape High Court. At the centre of the dispute were two questions:

1. does the law instruct the municipal manager to enforce secrecy or merely to facilitate it?
2. What are the legal consequences of an election of office-bearers that was not conducted in secret?

In order to understand what a secret ballot is, the High Court took guidance from the Municipal Electoral Act 27 of 2000, which spells out the electoral procedures for general elections.

It also looked at the general right to vote as a fundamental right. Furthermore, the Court made specific reference to section 19 of the Constitution which contains the right to vote for any legislative body in secret.

Decision

The Court upheld the argument that the municipality did not comply with the Municipal Structures Act. It held that the municipality is obliged to ensure that the requirements of the

Act are met. Similarly, the councillors themselves are under a duty to cast their votes in the prescribed manner, i.e. in secret. The municipal manager was expected to enforce the secrecy.

On the second question, the Court held that the way the election was conducted defeated the provisions of the Municipal Structures Act.

The Court did not see it as a councillor's prerogative to waive his or her right to secrecy as the secrecy requirement is an issue of public law. The Court amplified this argument by commenting that the waiver of secrecy could, for example, put pressure on others to do the same.

The consequence of an election that was not conducted in secret is therefore that the election and council decision is invalid.

Photo: PictureNET

The High Court set aside the election and ordered that a new election must be called.

Comment

This judgment sends out a stern warning to all municipalities to ensure that councillors cast their votes in the election of office-bearers in secret.

The judgment is not, however, without its difficulties, as is also highlighted by the dissenting judgement of Moosa J.

For example, it can be argued that the judgment does not appreciate the context of a council decision to elect office-bearers which is different from a general election. The Court's argument is based on the general right to a secret vote, which applies in the first instance to citizens electing their political representative onto legislative bodies.

In contrast, the election of office-bearers is a decision of the municipal council. Local government's electoral system does not guarantee an outright majority in each municipal council: coalitions may be necessary.

The enforcement of party discipline so as to operationalise coalitions is in itself not inherently anti-democratic. The law should be reluctant to treat it as such.

It could also be argued that the fact that the law does not deal with the specifics of the election is deliberate: it is the municipality's task to regulate this in a by-law or resolution dealing with internal procedures and the consequences of breaches thereof.

The matter has been taken on appeal by the Breede Valley Municipality. We will keep you abreast of any developments in this regard.

Dr Jaap de Visser
Local Government Project
Community Law Centre, UWC

THEME 8: THE ROLE OF THE SPEAKER

The speaker chairs council meetings and ensures compliance with the Code of Conduct, amongst other duties. The position of the speaker was introduced in 2000 and there has been much debate about the function of the speaker, particularly how the role of the speaker is to be distinguished from other office-bearers such as the mayor and the chief whip. This theme includes a number of articles about those debates, focusing on the powers of the speaker in matter such as council agendas, the Code of Conduct, public participation etc.

1. **The Role and Functions of the Speaker** by Nico Steytler and Johan Mettler, Local Government Bulletin 2010, Volume 3, Issue 1, page 9-10

2. **Role of the Speaker** by Jaap de Visser, Local Government Bulletin 2001, Volume 3, Issue 3, page 11-14
3. **Powers of the Speaker** by Lehlohonolo Kennedy Mahlatsi, Local Government Bulletin 2005, Volume 7, Issue 5, page 14-15
4. **Facilitating Public Participation: A Niche Role for the Speakers?** By Reuben Baatjies and Jaap de Visser, Local Government Bulletin 2007, Volume 9 Issue 5, page 3-5

The role and function of speakers

On 12 March 2001, the South African Local Government Association (SALGA) conducted a workshop to deal with the role and function of speakers. What follows is a summary of the findings of the delegates.

POSITION OF THE SPEAKER

The Constitution requires that every council elects a chairperson (s 160(1)(b)). The Municipal Structures Act (Structures Act) calls the chairperson the speaker (s 36). The aim of the office of the speaker is to structure the two functions of a municipal council – its legislative function and its executive function. From the functions listed in section 37 and the provision that the mayor may not be the speaker (s 36(5)), it is clear that the speaker assumes responsibility for the legislative function of the council. The mayor, on the other hand, is responsible for the executive function.

This distinction is not watertight. In local and district municipalities with plenary executive systems, the mayor also acts as the speaker (s 36(5)). These types of municipalities are too small to make a clear distinction between the office-bearers responsible for the two functions of a council.

The legislative function of a council entails the following:

- the passing of by-laws;
- the formulation of policy;
- the oversight of the executive and administration; and
- the communication channel between the community and the municipality.

It is therefore suggested that the councillors elected as speakers should focus on these functions and not be drawn into the council's executive committees or executive positions. The function of the speaker is important in the proper functioning of a council: for this reason it should be a full-time position in the council.

THE SPEAKER AND COUNCIL MEETINGS

The primary function of the speaker relates to the holding and conducting of council meetings. The Structures Act requires that the speaker –

- ensures that the council meets at least quarterly;
- presides over the meetings;
- maintains order at the meetings; and
- ensures that council meetings are conducted in accordance with the rules and orders of the council (s 37).

To perform these functions effectively, the speaker should also be given the following duties:

Rules Committee

The speaker should chair the Rules Committee, which drafts the rules and orders of the council. The Rules Committee should be composed on the basis of proportional representation, with the same proportions as the representation of parties in the council. Each municipality should decide, however, how it accommodates small parties.

The Rules Committee should have access to the legal services of the municipality to draft the rules and orders. The terms of reference of the Rules Committee must be in accordance with applicable legislation. There is a need for uniform terms of reference for rules committees, which SALGA must develop. SALGA should assist in drafting

uniform standard rules and orders, which municipalities can adapt to their own circumstances. These rules and orders should be flexible and should only function as a guide.

Agenda

The speaker has ultimate control over the agenda of council meetings. The signature of the speaker must be appended to the agenda before distribution.

By-laws

The speaker has the responsibility of ensuring that by-laws introduced in the council comply with the Constitution, the Structures Act and, where applicable, national and provincial legislation. To this end, the speaker should have access to the legal services of the municipality.

Reports to council

The speaker must prepare an annual report to council about the activities of the council and the speaker's office. The standing rules of the council determine what should be included in the report. It should contain at least the following:

- the implementation of the Code of Conduct;
- reports from the mayor and the executive committee on implementation of council resolutions;
- public participation in council activities;
- implementation of council resolutions;
- by-laws passed by the council; and
- linkages with other speakers.

Political management

The speaker is responsible for the political management of council activities. In exercising this function impartiality must be demonstrated.

THE SPEAKER AND COUNCILLORS

Since the speaker is responsible for the proper functioning of the legislative side of the council, he or she has specific responsibilities with regard to the other councillors.

Support

In order to facilitate adequate support to councillors, three offices, to be located in the speaker's office, have been identified:

- **a councillor support office** which must provide councillors with infrastructural support to perform all their functions;
- **a legal office** to provide the speaker and councillors with legal advice and a measure of political advice; and
- **a community liaison office** to facilitate the interaction between the council and the community.

Training

The speaker should be responsible for supporting and building the capacity of councillors. This may include holding training programmes and workshops, for which Councils should budget.

Monitoring

In order to ensure that all councillors are accountable to local communities, it is proposed that speakers be empowered to allocate proportional representation (PR) councillors to particular areas within the municipality.

In order for the speaker to be familiar with all the activities of council members, he or she should be entitled to have *ex officio* sitting (without voting rights) on all committees of the council.

Discipline

In terms of Schedule 1 to the Systems Act, the speaker is responsible for the effective implementation of the Code of Conduct for councillors. SALGA should develop standard procedures for the implementation of the provisions of the Code of Conduct. Specific procedures should also be developed for complaints directed against the speaker.

Council budget

The budget of the municipal council is the overall responsibility of the speaker. The budget includes council functions, travel allowances for members, etc.

THE SPEAKER AND THE PUBLIC

Local government must ensure community participation in legislative initiatives. Hence, the speaker has an important role to play with regard to the interaction between the council and the public.

Ward committees

Community participation through ward committees is important for the democratic functioning of the council. The speaker should be responsible for over-seeing the establishment and effective functioning of ward committees.

Public consultation on by-laws

The speaker should monitor whether the constitutional obligation of public participation and consultation with regard to proposed by-laws has been complied with. The speaker should be able to communicate with the public on the performance of the council.

THE OFFICE OF THE SPEAKER

For the speaker to effectively execute his or her duties, the office should be adequately equipped. It should be allocated a budget for functions, etc. The municipality's legal services should also be available to the speaker. A public relations officer may be located in the office of the speaker.

Ceremonial role

The mayor performs the primary ceremonial role as first citizen of the municipality. If necessary, a council may delegate some ceremonial functions to the speaker.

Intergovernmental relations

While the primary responsibility for intergovernmental relations lies with the mayor, a role for speakers in this regard should be investigated. A component could be the structured interaction between speakers of district, provincial and governments.

Deputy speaker

In view of the speaker's many and varied tasks, the possibility of appointing a deputy speaker should be considered. This may entail an amendment to the Structures Act as section 41 only provides for an acting speaker appointed by the council.

Report compiled by:
Nico Steytler and
Johann Mettler
Local Government Project
Community Law Centre, UWC

Role of the speaker

At SALGA's national workshop on the Roles and Responsibilities of Office-bearers, consensus was reached on the principles that underlie the role of the speaker (see page 4). The purpose of this article is twofold. Firstly, it provides the legal background to these themes and identifies the statutory functions. Secondly, the article proposes some implications of the statutory roles and provides suggestions for delegation to the speaker. With regard to the latter, it is important to note that this article does not necessarily reflect the outcome of the SALGA workshop. Rather, it makes certain suggestions for the implementation of the workshop's resolutions.

SOME GENERAL PRINCIPLES

Legislative process

The overall principle in the determination of the function of the speaker is that the speaker is in charge of the *legislative* arm of the municipal council.

This means that he or she must *guard the integrity of the legislative process*. Further, the speaker must protect the 'checks and balances' between the legislature and the executive, in other words, the 'oversight' that the council must exercise over the actions of the executive.

Integrity, privileges and interests of the council and councillors

The speaker is the guardian of the integrity of the council and the guardian of members' privileges and interests as council members. The privileges and interests of councillors include freedom of speech and immunity in the council as well as the use of council facilities, receipt of allowances, training and support, etc. Importantly, this role, combined with the speaker's role in terms of the Code of Conduct (Schedule 1 to the Systems Act), requires the speaker to guard against the abuse of councillor's privileges and interests.

INDEPENDENCE OF THE SPEAKER

The speaker must demonstrate impartiality. The type of functions that the speaker must exercise requires him or her to be recognised by all parties and interest groups in the council as the legitimate guardian of the integrity of the council and of council members.

An important implication of this is that the speaker is accountable to the council. The speaker does not stand *above* the council. He or she must exercise his or her duties within the rules determined by the council. The speaker is not accountable to the executive of the municipality, since the speaker must protect the *council's constitutional control of the executive*.

This means that the speaker must be able to perform his or her function independently from the executive arm of the council. Section 36(5) of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act) is clear in that a mayor cannot be a speaker at the same time (except for municipalities of a 'plenary type'). This is necessary to clearly distinguish between the executive and the legislative arms of the municipal council. Accordingly, it is suggested that a councillor elected as speaker does not

sit on executive committees or mayoral committees accordingly.

RUNNING OF COUNCIL MEETINGS

Section 37 of the Structures Act charges the speaker with the following duties:

- preside at council meetings;
- ensure council meets at least quarterly;
- maintain order during council meetings;
- ensure that council meetings are conducted in accordance with the rules and orders of the council; and
- ensure compliance in the council and its committees with the Code of Conduct.

It is clear from section 37 that the speaker's main function relates to council meetings. He or she calls the meeting, presides, ensures order and compliance with council's rules of order.

Calling a meeting

Section 29(1) of the Structures Act provides that the speaker calls council meetings and decides on their time and venue. However, if a majority of the councillors request a meeting, the speaker must convene a meeting accordingly (see also p 10). The speaker must ensure that members are given adequate notice of meetings in terms of the rules of order.

Policy formulation: Rules of Order

The speaker should take the initiative in the policy formulation around the rules of order. The speaker should chair the committee that deals with rules of order. The ultimate decision-maker on the rules of order is the council.

Freedom of speech

Debating the merits or demerits of an issue before council lies at the heart of local democracy. Free and open debate is protected in the Constitution. The Structures Act provides for the freedom of speech in a municipal council, subject to the rules and order of council (s 28).

The role of the speaker is to ensure that:

1. councillors' freedom of speech in the council *is protected*, i.e. that councillors are allowed to speak freely, that there is order in the meeting, that there are no interruptions, etc.;
2. councillors' freedom of speech *is exercised subject to council's rules of order*, i.e. no insults, defamation, debate management, etc.

Agenda

The speaker's responsibility for presiding over council meetings implies that the speaker must be involved in the preparation of the agenda that is circulated to council members prior to the meeting. Items for the agenda come from various 'corners' of the municipality, e.g. council's executive, the administration, portfolio committees, etc. Council's rules of order should provide for a procedure that must be followed in preparing the agenda. The principle that is suggested here is that this should be a consultative process, including at least the (executive) mayor, the municipal manager and the speaker.

Preparing the agenda should be a consultative process, including (at least) the mayor, the municipal manager and the speaker.

Procedures

The speaker must ensure the implementation of the provisions in the Structures Act dealing with council meetings, such as section 30 which deals with quorums and decisions. Section 30 also contains procedural requirements around certain decisions that require a prior report and recommendation from the executive committee or executive mayor. The speaker must see to it that these provisions are adhered to.

Debate management

The speaker's responsibility to ensure members' freedom of speech, subject to council's rules of order, implies that the speaker is in charge of allocating speaking time to members in terms of the council's policy on that issue. The speaker must also implement section 81(3) of the Structures Act, which affords the participating traditional authorities an opportunity to address the council in particular circumstances.

Voting

The speaker must implement the voting procedures as determined by the council in its rules of order, subject to the Structures Act (quorum, abstentions, voting by division, declaration of the result, etc.). If council cannot take a decision on any matter, the councillor presiding, which would normally be the speaker, can cast an extra vote to decide the matter (s 30(4) of the Structures Act).

Admission of public

The speaker must facilitate the implementation of section 20(1) and (2) of the Systems Act in as far as it deals with the public's admission to council meetings. The council decides whether or not to close a meeting but the speaker must be able to advise council and facilitate the decision making around the issue. The speaker must ensure that members of the public are seated in designated areas and should have the authority to remove any person who refuses to comply with the speaker's ruling.

Granting of leave of absence

The Code of Conduct for councillors provides that councillors can be granted leave of absence in terms of applicable national or provincial legislation or the council's rules of order (item 3(a)). The speaker must maintain an attendance register in order to implement item 4(2) of the Code of Conduct. This provides for the removal of a councillor after a third consecutive absence from a council meeting without having obtained leave of absence.

LEGISLATIVE PROCESS

Legality and constitutionality

Part of the speaker's responsibility in respect of the legislative process is to ensure that by-laws that are tabled comply with the Constitution, the Structures Act, the Systems Act and other applicable national and provincial legislation.

This includes questions such as:

- Does the municipality have the

competency to legislate on the matter?
- Is there national or provincial legislation on the matter?
- If yes, does the proposed by-law conflict with that legislation?
- Does the proposed by-law conflict with the Bill of Rights or other parts of the Constitution?

Procedures

The speaker must ensure that the procedural requirements that apply specifically to the adoption of by-laws have been adhered to. Examples are:
- publication for comment of the by-law;
- public consultation around the by-law;
- reasonable notice to councillors; and
- affording traditional leaders an opportunity to address the council.

The speaker's role around the constitutionality/legality and procedures implies he or she should be equipped to assess the legalities of proposed by-laws by having access to a legal adviser or the municipality's legal office. The Community Law Centre has produced a manual, called *Making Law – A Guide to Municipal Councils* which gives guidelines to many of the questions listed here.

CODE OF CONDUCT

The speaker plays a pivotal role in the implementation of the Code of Conduct for councillors. This role is determined by the statutory duties, assigned to the speaker in the Code of Conduct (item 13), as well as the traditional role of speakers as guardians of the integrity of the legislatures. The speaker must ensure that every councillor receives a copy of the Code and that the Code is available wherever the council meets (item 13(4)).

Policy formulation

The speaker should drive the formulation of policy to implement the Code of Conduct. The Code of Conduct calls for policy on a number of issues, including:
- a standing procedure for the imposition of a fine or removal of a councillor as a sanction for non-attendance of meetings (item 4(3));
- procedures and policy for the granting of leave of absence (item 3(a)); and
- instances where council must decide on permission or consent to be granted to councillors, e.g. consent for outside work by full-time councillors (item 8), permission to disclose information (item 10(1)), etc.

Most of these could be dealt with in rules of order. The speaker's role as protector of council's integrity means that he or she should chair the committee that deals with ethics, member's interests, etc.

If the speaker has a reasonable suspicion that the Code has been breached, he or she *must* –
- authorise an investigation into the facts;
- give the councillor an opportunity to respond;
- report to a council meeting; and
- report to the MEC.

The speaker is not the only person who can enforce the Code of Conduct. The council can also launch an investigation (item 14(1)(a)) and, in extreme circumstances, the MEC for local government can initiate an investigation (item 14(4)).

It is suggested that the speaker at least be involved in setting policy on council facilities and monitoring councillor's use of their privileges.

Sanctions

Ultimately, the Code of Conduct vests the authority to impose a sanction for breach of the Code of Conduct in the municipal council (item 14(2)) or, alternatively, the MEC for Local Government (item 14(6)).

Councillors' accountability towards the community

The preamble of the Code of Conduct widens the ambit of the Code of Conduct by emphasising the accountability of councillors towards the community. It states that councillors must report back at least quarterly to constituencies on the performance of the municipality. The speaker also plays a role in monitoring the degree to which councillors' are open and accountable towards the community.

Complaints against councillors

Municipalities are obliged by the Systems Act to have complaints procedures in place (s 17(2)(a)). It is suggested that the speaker should deal with complaints lodged against councillors by members of the community. He or she could either chair a complaints committee of councillors (special committee in terms of item 14(i)(b) of the Code of Conduct) or (in small councils) deal with the complaint.

Compliance in council's committees

The Structures Act states that the speaker must ensure compliance in the council *and council committees* of the Code of Conduct. This means that the speaker must have a system of communication with the chairpersons of all council committees, including portfolio committees, the mayoral committee (in municipalities with an executive mayor), the executive committee (in municipalities with an executive committee) and *ad hoc* committees on Code of Conduct issues. These chairpersons should inform the speaker of issues related to the Code of Conduct. An example is the attendance by councillors of committee meetings. The same rule as with council meetings applies to the attendance of committee meetings (see above).

Application to traditional leaders

The Code of Conduct applies to a certain degree to traditional leaders that participate in the council in terms of section 81 of the Structures Act (item 15). Ultimately, their right to participate can be suspended or cancelled upon breach of the Code.

SUPPORT AND ASSISTANCE TO COUNCILLORS

The integrity of council and councillors relates to their freedom of speech in the council. But it also deals with ensuring that councillors are enabled and assisted in their responsibilities as public representatives.

Allowances and use of council facilities

The Code of Conduct prohibits councillors from using their privileges

for private gain or to improperly benefit another person (item 6(1)). The speaker must implement and enforce this Code of Conduct. Therefore, it is suggested that the speaker's office at least be involved in the setting of policy on council facilities and the monitoring of councillor's use of their privileges.

ADDITIONAL ROLES

Ceremonial functions

Council can decide that the speaker should fulfil certain ceremonial functions. This would depend on the circumstances within the municipality, in particular whether or not the municipality has a deputy mayor.

Ward committees

An additional role that the municipal council can consider for the speaker relates to ward committees. It has been suggested to task the speaker with overseeing the establishment and functioning of ward committees. In that scenario, the speaker would, for example:

- oversee the election of ward committee members;
- ensure that ward committees meet regularly;
- ensure that ward committees function in general;
- ensure that ward councillors report back to the council on their ward committee meetings; and
- co-ordinate the assignment of PR councillors to ward committees if the council decides to go that route.

The speaker must distinguish between his or her activities as a politician and his or her functions as a speaker.

District representation

Another proposed role for the speaker of a local municipality concerns the facilitation of the municipality's representation on the district council. The speaker could be tasked to ensure that the council formulates mandates that the district representatives take to district meetings. Similarly, the speaker could ensure that the district representatives report back to the local council on the district meetings that they attended.

Appeals in terms of Access to Information Act

Section 74 of the Access to Information Act 2 of 2000 provides for an internal appeal procedure against decisions taken by the information officer (the municipal manager) on requests for access to information held by the municipality.

The Act states in section 1 that the council must decide which person is the appeal authority: the mayor, the speaker or any other person. This means that council can decide to designate the speaker as the appeal authority in terms of the Access to Information Act.

Assessment

The speaker's role will mostly depend on the internal arrangements made by the municipality itself. The formulation of the terms of reference for the speaker in terms of section 32 of the Systems Act (see also *LGL Bulletin* 2001(2) p. 2) will be a critical process.

The introduction of a speaker must have been informed by the wish to establish a legal framework for local government that entrenches mechanisms for ensuring oversight, accountability, integrity, discipline of office, and the efficient running of council meetings.

Impartiality in the exercise of his or her function is essential for the speaker. The speaker must distinguish between his or her activities as a politician and his or her functions as a speaker. It also means that the function of the speaker and the unpartisan exercise of that function must be respected by members, parties and interests represented in the council.

Mayors, speakers and municipal managers in the Northern Province participating in one of the provincial workshops in Warmbaths on the roles and responsibilities of political office-bearers.

Jaap de Visser
Local Government Project
Community Law Centre, UWC

Powers of the Speaker?

Nala Local Municipality and Another v Lejweleputswa District Municipality and Others, Case No. 3228/2003

The Speaker of the Lejweleputswa District Municipality convened a council meeting on 15 July 2003 in which he purported to appoint a commission of enquiry to investigate alleged irregularities at that district municipality. The particular item on the agenda of the meeting read "Appointment of a Commission of Enquiry".

Issue

The issue before the Free State High Court in *Nala Local Municipality and Another v Lejweleputswa District Municipality and Others* (case no 3228/2003) was whether the speaker of a district municipality had the power to appoint a commission of enquiry.

Applicants' argument

Nala Local Municipality and one of the councillors representing Nala in the district council contended that a decision was unilaterally taken by the Speaker to appoint a commission of enquiry and that the district council endorsed or condoned this decision. They argued that the meeting itself was irregularly convened and therefore unlawful and that the resolution condoning the decision was null and void. They therefore sought an order reviewing and setting aside the decision of the Speaker and its alleged condonation by the Lejweleputswa District Council.

Administrative action not authorised by an empowering provision is unlawful and may be reviewed and set aside.

Speaker's argument

The Speaker contended that he had authority in terms of clause 13 of Schedule 1 to the Municipal Systems Act 32 of 2000 (the Systems Act) to investigate breaches of the Code of Conduct for Councillors by a councillor. He argued that he had used the wrong term in describing the intended investigation: it was not to be a commission of enquiry but rather an ordinary investigating committee and that the subject of investigation was to be the conduct of a councillor. He further contended that the meeting did not condone his decision, nor was a resolution passed for this purpose and that he had included the item on the agenda purely to be noted.

Decision

In line with the principle of legality embodied in the Constitution and built into the Promotion of Administrative Justice Act No 3 of 2000, administrative action not authorised by an empowering provision is unlawful and invalid and a person prejudiced by it may have it reviewed and set aside. The Court held that the decision in question was administrative action as defined and therefore subject to review.

The Court noted that the issue turned on what, precisely, the Speaker intended to investigate. The Free State Commissions Ordinance 5 of 1954 vests the powers to appoint such a commission only in the premier and the MEC for Local Government and Housing. The

key points

- **This case highlights the fact that the Courts will not be hesitant to declare acts *ultra vires* and unlawful where they have not expressly been authorised in legislation.**
- **Municipal functionaries should take care to ensure that their actions are expressly authorised by empowering legislation or other applicable laws.**

Speaker relied on clause 13 of Schedule 1 to the Systems Act, empowering a Speaker to investigate breaches of the Code of Conduct for Councillors. He further relied on section 37(e) of the Structures Act which provides that the Speaker must "ensure compliance in the council and council committees with the Code of Conduct [for councillors]". This section clearly refers to conduct of councillors only during meetings of the council and its committees and not to their conduct outside of those structures.

In the relevant report annexed to the agenda of the meeting, full details of what was to be investigated were given. The complaints were clearly directed at the activities of consultants who were engaged in connection with a sanitation project. The Court held that this had absolutely nothing to do with the conduct of councillors, nor was any mention made of the conduct of a councillor in the appointment of the investigating committee. The Court thus found that Speaker clearly acted *ultra vires* the powers conferred on him by clause 13 of Schedule 1 to the Systems Act.

The Court concluded that the Speaker's decision was prejudicial not only for the applicants but for the communities served by the two municipalities as well. First, the remuneration of the members of the investigating committee would have to be paid by Lejweleputswa District Municipality and no-one else. Second, the expenditure would unjustifiably diminish the coffers of the District Municipality and indirectly that of Nala Municipality, which is a contributor to the District Municipality's budget. The funds to be expended could fruitfully have been used for service delivery to the communities involved.

Comment

This case again illustrates that the courts will not be hesitant to declare acts *ultra vires* and unlawful where they have not expressly been authorised in legislation. Municipal functionaries should thus take care to ensure that when they act, their actions are expressly authorised by empowering legislation or other applicable laws.

The decision did not touch on the issue of intergovernmental relations with respect to dispute resolution.

While the decision is supported as correct, it did not touch on the issue of intergovernmental relations with regard to dispute resolution. In terms of the constitutionally enshrined principle of cooperative governance, all spheres of government and organs of state within each sphere must co-operate with each other in mutual trust and good faith, by avoiding legal proceedings against one another. This is a case that most certainly could have been resolved politically rather than through adversarial litigation.

Lehlohonolo Kennedy Mahlatsi
Municipal Manager: Metsimaholo Local Municipality
Sasolburg

Facilitating public participation

A NICHE ROLE FOR THE SPEAKER?

Considerable attention has been drawn to local government's ability to facilitate public participation and the role and effective administration of ward committees. Undoubtedly the most important aspect of the local government review is the need to improve the quality of local democracy, the degree of municipal responsiveness and accountability.

The office of the speaker has increasingly come under the spotlight since its inception in local government in 2000. Their role has often been ill-defined. At times, overlapping roles with the (executive) mayor have caused political tension and misunderstanding. The emergence of the political office of a 'chief whip' has added another dimension to the definition of the role of the speaker. Some argue that there are now three seats of political power in each municipality.

What is clear is that confusion over the political roles of office bearers is undesirable and burdensome to the efficient functioning of local government. This article looks at defining a role for the speaker in managing public participation, particularly the administration and effective functioning of ward committees.

Political contestation and seats of power

The Constitution vests both the legislative and executive authority of the municipality in the municipal council. This is unlike the national and provincial sphere, where legislative and executive authority is divided between the legislature and the executive.

Section 52 of the Constitution provides for the election of the Speaker of the National Assembly and section 111 provides for the election of speakers in the provincial legislatures. In contrast, the Constitution does not identify or assign powers and functions to specific political office bearers in local government. Section 160(1)(b) of the Constitution merely instructs each municipal council to elect "a chairperson". The implementation of this provision in the Municipal Structures Act has resulted in a separation of the chairperson of the council from the mayor; in nearly all municipalities, the chairperson is called a 'speaker' and is not the same person as the mayor. This is not the inevitable consequence of section 160(1)(b) of the Constitution; the legislature could have opted to collapse the chairperson and the mayor in one office, as was the situation prior to the Structures Act. The fact that, in some instances (the so-called 'plenary-type' municipalities), the two offices are combined bears testimony to this.

The establishment of the office of speaker was one of the most notable governance-related reforms introduced in 2000. The Local Government Transition Act of 1993 made no provision for a speaker, referring only to a chairperson. The presence of both offices in a municipal council without any clear statutory directive on the boundaries of their roles and their relationship to one another results in two separate seats of considerable power in that council.

Both mayor and speaker operate on the basis of a mandate from the municipal council. However, the mayor has a much stronger public mandate based on his or her delegated powers, political ranking, the election campaign and visibility to the public. In the case of an executive mayor, this is even more so, considering the strong powers afforded to that office in the Structures Act. Both speaker and mayor typically hold full-time seats in the municipal council. The difficulty in local government is that a neat division between a legislature, headed by the speaker, and the executive, headed by the mayor, is not possible. The municipal council also takes executive decisions and, in doing so, is chaired by the speaker.

In delineating the two roles a division must be achieved which is true to the political weight and the role of the two offices, but is also efficient; the mayor and the speaker should develop different areas of expertise.

The mayor, as political head of the municipality, oversees the management of the administration and represents local

government to the public. The speaker is first and foremost responsible for the administration of the municipal council and for supporting councillors in the exercise of their duties. This, the argument goes, is an efficient division of labour that does not overburden either individual. In reality, however, petty political squabbling and power struggles have all too often prevented this division of labour from taking effect. The role of chief whip adds a level of complexity.

Chief whip

Chief whips often have powers that are similar to those one would generally expect to see assigned to speakers. For instance, in Johannesburg, the chief whip is responsible for "the maintenance of discipline among all councillors". In Cape Town, the chief whip is required to prepare, in consultation with the speaker, the annual calendar of meetings of council and committees, and is authorised to grant leave to councillors.

A critical distinction between the role of chief whip and that of speaker is the means at their disposal for enforcement. The chief whip is essentially a political functionary who can mete out political sanctions, determined by the rules of political parties. The speaker is a local government functionary who has the instruments in the Code of Conduct for Councillors and the rules of order at his her disposal. Conflating the two by affording the chief whip some of the statutory functions linked to the Code of Conduct certainly does not simplify the issue. However, to the extent that the role of the chief whip is an unavoidable political reality, developing clear terms of reference for the chief whip becomes critical.

Ironing out a niche for the speaker in public participation?

A review of systems of delegation in a number of municipalities reveals an increasing role for the speaker in enabling community participation in the affairs of local government. In the Greater Tubatse Local Municipality system of delegations, for example, the speaker has robust authority with respect to the establishment and functioning of ward committees. The speaker "facilitates, oversees and supervises the election of ward committees in accordance with council's policy on the election of ward committee members (other than ward councillors)". In addition, the speaker "deploys proportional representative councillors to ward committees", "monitors and reports on the performance of ward committees to the council" and "makes recommendations to the Municipal Council on the dissolution of a ward committee".

Similarly, in Johannesburg the "ongoing capacity building of ward committees" is listed as one of the key functions of the speaker. The Cape Town system of delegations authorises the speaker to determine the administrative arrangements to enable ward participatory mechanisms to perform their functions and requires the speaker to oversee the establishment and coordination of the ward participatory mechanism.

The trend towards granting the speaker a significant role in enabling community participation mechanisms and in supporting the establishment and functioning of ward committee structures is an important one in the evolution of the role of the speaker. It flows from the speaker's statutory position as the champion of the Code of Conduct, which places a high premium – in its preamble, for example – on accountability and responsiveness. This function may also be complementary to the speaker's role in supporting councillors in the performance of their functions. It may contribute

KEY POINTS

- The speaker's increasing involvement in facilitating community participation mechanisms and supporting the establishment and functioning of ward committee structures is an important trend in the evolution of the speaker's role.
- It may contribute to the improvement of local democracy by creating an office that can be held accountable for the process of public participation.
- In a sense, the speaker becomes responsible and accountable for the success or failure of public participation in a municipality, particularly the functioning of ward committees.
- Municipalities should seek to make a distinction between the process of community participation and the content of the interaction in that process.

Speaker Ms Masana LC Motubatse of Greater Tubatse Municipality

to the improvement of local democracy by creating an office that can be held accountable for the process of public participation. In a sense, the speaker becomes responsible and accountable for the success or failure of public participation in a municipality, particularly the functioning of ward committees.

The current spate of community protests points to a need to improve the quality of local democracy and the degree of municipal responsiveness and accountability. The fact that no individual is responsible and accountable for public participation has perhaps resulted in, or exacerbated, the lack of responsiveness and accountability. There is growing discontent around issues such as the politicisation of ward committees and unresponsive ward councillors – issues which can be dealt with by the speaker as guardian of the Code of Conduct. A distinct role for the speaker might also enhance participation by disadvantaged and marginalised groups.

Being accountable for facilitating public participation and for administering it effectively could potentially create a niche role for the hitherto contested office of speaker. It would lead to better accountability and further entrench that role.

Scope and limits of speaker's role in public participation

However, the allocation of 'community participation' to the speaker without any nuance is dangerous. The municipality's (executive) mayor remains the most politically visible office bearer responsible for representing the municipality politically, including to communities. The suggestion is that municipalities should seek to make a distinction between the *process* of community participation and the *content* of the interaction in that process. The speaker ensures a sound process whilst the mayor (or whomever he or she designates) is responsible for the content. The speaker should never be responsible for prioritising community needs or defending the municipality's policy positions (except when they concern the Code of Conduct or council procedure).

Furthermore, any policymaking on community participation must be done by the council. The speaker can prepare and initiate such a policy, but its adoption is the sole responsibility of the council. The speaker is also bound by the limitations of the Code of Conduct, and has only those powers and functions granted in it or through delegation from the council.

There are a number of functions which the speaker could perform in facilitating public participation in council processes. First, the speaker should ensure that the principles of transparency in the legislation are adhered to – including public notice of meetings, and comment on draft by-laws and policies – and can advise on whether council or committee meetings should be closed to the public.

Second, the speaker should oversee the election of ward committees within the policy set by council to ensure that they are representative and do not become politicised. The speaker can also advise council on the dissolution of such committees. Third, the speaker can ensure the effectiveness of ward committees, within council policy, by supporting their functioning – for example, by budgeting for ward committee meetings and making sure that information about those meetings is readily available to the public in the appropriate languages and media.

Being accountable for facilitating public participation and for administering it effectively could potentially create a niche role for the hitherto contested office of speaker.

Finally, the speaker can ensure the effectiveness of ward committees and the accountability of ward councillors by establishing a system of report-backs from ward committees to council structures. For example, the speaker should ensure that, at every council meeting, all ward councillors table reports on issues raised by their ward committees and, where necessary, follow up on progress made on issues raised at previous council meetings.

Comment

There is little doubt that local communities are best served when all office bearers have clearly defined roles and functions that work symbiotically, with clear reporting lines, such that both politicians and bureaucrats can focus on the business of development rather than political wrangling. Undoubtedly, competition between office bearers regarding their roles and functions can cripple a municipality.

A clearer definition of boundary lines between the offices of speaker and mayor – to the effect that the mayor is responsible for managing and representing the administration or the bureaucracy before council and for representing local government to the public, while the speaker is responsible for the administration of the municipal council and for facilitating the effective functioning and administration of public participation – would go a long way towards ensuring efficiency and development. Municipalities should take heed and create the political structure and climate most conducive to accountability and responsiveness by, among other things, entrusting the speaker with the task of facilitating public participation and accounting for its success or failure.

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THEME 9: COUNCILLORS

This theme includes a selection of articles dealing with certain aspects of being a councillor. The first article discusses key requirements for the declaration of interests which councillors must adhere to at the beginning of their terms. Secondly, there is an article on the circumstances under which councillors may be held individually liable for illegal decisions.

1. **Rooting out Corruption: Code of Conduct and Dialogue of Financial Interest** by Lehlohonolo Kennedy Mahlatsi and Reuben Blaatjies, Local Government Bulletin 2006, Volume 8, Issue 1, page 10-11
2. **Councillors' Individual Liability** by Jaap de Visser, Local Government Bulletin 2008, Volume 10, Issue 4, page 27

Rooting out Corruption

CODE OF CONDUCT AND DISCLOSURE OF FINANCIAL INTERESTS

Councillors are elected to represent local communities on municipal councils, to ensure that municipalities are accountable to their communities. In fulfilling this mandate, councillors must abide by the Code of Conduct as set out in Schedule 5 of the Municipal Structures Act, which requires them, among other things, to disclose their financial interests and refrain from using their position as councillors for personal gain.

Lehlohonolo Kennedy Mahlatsi
Municipal Manager,
Metsimaholo Local Municipality, Sasolburg
and
Reuben Baatjies
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First and foremost, a councillor must at all times act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised. A councillor must also perform his/her functions in good faith, honestly and in a transparent manner. This is particularly important in light of the incidence of corruption reported with increased regularity over the last few years, which has tarnished the image of local government.

Incidence of corruption

Examples of councillor corruption abound throughout the country, but mention of a few is made for illustration purposes only and in no way singles out any particular municipality. The most pertinent examples have taken place in the Free State and Gauteng. In the most publicised case, the mayor of Mangaung was relieved of all leadership positions in the ANC after he was investigated for, and charged with, fraud and corruption. In Gauteng, a number of councillors in the province's 15 municipalities have been dismissed or resigned in the past five years.

Disclosure of personal assets

When elected, a councillor must, within 60 days, declare in writing to the municipal manager the following interest(s) held by that councillor:

- shares and securities in any company;
- membership of any close corporation;

- interest in any trust;
- directorships;
- partnerships;
- other financial interests in any business undertaking;
- employment and remuneration;
- interest in property;
- pension;
- subsidies, grants and sponsorships by any organisation; and
- gifts received by a councillor above a prescribed amount.

The municipal manager keeps a register of assets for each councillor.

Disclosure of financial interests in a matter

A councillor must disclose to the council or committee of council any direct or indirect personal or private business interest that that councillor, his/her spouse, partner or business associate may have in any matter before the council. If that is the case, the councillor concerned must withdraw from the council or committee meeting when that matter is considered. A councillor who, or whose spouse, partner, business associate or close family member stands to benefit either directly or indirectly from a contract concluded with the municipality, must disclose the full particulars of such interest to the council as soon as is reasonably possible. However, this does not apply to an interest or benefit acquired by the councillor, spouse, business associate or close family member in common with other residents of the municipality.

Where councillors have reason to suspect that there may possibly be a conflict of interest, they should immediately disclose this, and where a conflict does in fact exist, they should decline to act. In this regard, though, it is important to note that there is conflict between the Systems Act and the Municipal Finance Management Act (MFMA). While the MFMA provides that a municipality may not award a tender to a councillor, the Systems Act permits this provided there is prior consent from the municipality.

The Department of Provincial and Local Government has subsequently issued a circular to address this problem. The circular states that being the latter and more specific legislation that regulates supply chain management procedures, regulation 44 of the Supply Chain Management Regulations takes precedence over the provisions of Schedules 1 and 2 of the Systems Act. It therefore advises municipalities to refrain from granting the consent referred to in the Systems Act. It provides further that appropriate amendments will be processed in 2006 to align the provisions of the Schedules to the Systems Act with the provisions of the Supply Chain Management Regulations.

key points

- The Code of Conduct seeks to ensure that councillors fulfil their obligations to their constituencies in an honest and transparent manner.
- A councillor must disclose to the council or committee of council any direct or indirect personal or private business interest that (s)he may have in any matter before the council.
- A councillor may not use the position or privileges of a councillor for private gain or to improperly benefit another person.
- It is of paramount importance that all councillors adhere, not only to the letter, but also to the spirit of the Code of Conduct.

Misuse of office

A councillor may not use the position or privileges of a councillor, or confidential information obtained as a councillor, for private gain or to improperly benefit another person. A councillor may also not accept any reward, gift or favour for voting or not voting in a particular manner, or for persuading council to exercise any power, function or duty, or for disclosing privileged or confidential information.

Comment

The Code of Conduct seeks to ensure that councillors fulfil their obligations to their constituencies in an honest and transparent manner, and support the achievement by the municipality of its objectives. It is thus of paramount importance that all councillors adhere, not only to the letter, but also to the spirit of the Code of Conduct in order to ensure that the integrity, credibility and trust of the people in the local government sphere is restored.

COUNCILLORS' Individual liability

Cape High Court, judgment date 11 June 2008, Case No 7136/2008

On 11 June 2008, the Cape High Court handed down a judgment that set an important precedent about councillors' individual liability for taking or supporting illegal decisions.

At the heart of the matter was the composition of the council of the West Coast District Municipality. Floor-crossing had resulted in changes to the council of Saldanha Bay, one of the local municipalities in the district. As a result, the composition and political structures of the district council were also set to change. However, the Speaker of the West Coast District Council initially refused to convene the meeting at which the district council was to recompose its political structures.

The Speaker had to be compelled by the High Court to convene the meeting as required in terms of the Municipal Structures Act. The Court ordered the Speaker to pay personally for the costs of this application. However, when the meeting eventually took place, there was a dispute as to who were the legitimate representatives of the Saldanha Bay Local Municipality. At the meeting, the Speaker of the district council made a ruling on the composition of the delegation. The ruling was politically expedient and contrary to the Municipal Structures Act. It was, in the words of the Court, "misguided and ill-advised". Nevertheless, the meeting continued.

The opposition councillors saw their opportunity to gain the majority thwarted by an illegal ruling on the part of the Speaker, supported by a majority of the councillors. They had no option but to approach a court. Once in court, the Speaker and the councillors who had supported him conceded that they had been wrong and agreed to pay the costs of the court case. The dispute eventually turned on whether they had to pay the full costs. The Court ruled that it saw no reason why the councillors who had been thwarted by the illegal ruling should bear any of the costs. It ruled that the Speaker and the councillors who had supported the ruling should pay all the costs.

Comment

This judgment is a telling reminder to councillors not to participate in or support illegal decisions, particularly when they have been advised against such decisions.

None of the offending councillors raised their immunity in the council as a defence, so the Court did not have to deal with that argument. The Constitutional Court has made it clear that immunity could possibly apply to decisions that appear to be unlawful.

In this case, however, the offence was deliberate and wilful and taken against advice. In other words, even if they had raised the defence of immunity, it would probably not have been successful. A councillor's immunity is not a licence to take or support illegal decisions deliberately.

Jaap de Visser
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key points

- The Speaker made a ruling that was both politically expedient and contrary to the Municipal Structures Act.
- The illegal ruling was supported by a majority of the councillors.
- The court ruled that the Speaker and the councillors who had supported the ruling should pay all the costs.
- A councillor's immunity is not a licence to take or support illegal decisions deliberately.

THEME 10: LEADERSHIP ISSUES

This theme follows on from the previous theme on the role of councillors but looks at it more from leadership point of view. First, it includes an opinion piece by Prof Stephen Friedman on the qualities required of councillors. Then it includes an article discussing the political profile of councillors and mayors. Lastly, there is an article on the quality of political leadership.

1. **Are our Councillors Listening** by Steven Friedman, Local Government Bulletin 2007, Volume 9, Issue 4, page 3-5
2. **Career Patterns of Local Politicians** by Jaap de Visser, Local Government Bulletin 2006, Volume 8, Issue 4, page 10-12
3. **The Quality of Local Political Leadership** by Thabo Rapoo and Robin Richard, Local Government Bulletin 2010, Volume 12, Issue 3, page 8-10

Are our councillors listening?

Not that long ago, a democracy promotion organisation arranged a course to help local councillors improve their capacity to represent voters. The skills it taught were how to hear what local voters were saying and how to speak on their behalf. After a while, the councillors complained that the course did not meet their needs. They wanted, they said, to be taught "how to deliver services".

The councillors' request is a useful example of what is wrong with our current attitudes to local government. They reacted as they did because they had repeatedly been told by national political leadership and the media that their job, and that of the councils on which they served, was service delivery. In reality, it is not the job of councillors to deliver services. Nor is this local government's chief task. Councillors' – and councils' – job is to represent people, which is not at all the same as 'delivery'.

First, while local government obviously does offer services to citizens, it is not the job of councillors to deliver them. Their task, rather, is to speak for those who voted for them. That means making sure that what local government does is what voters want. Rather than 'delivering' anything, it means

Councillors and councils who want the support of their voters should concentrate not on delivering more smartly, but on listening harder to voters, working more with them, and serving them rather than trying to hand out goods to them.

watching over those who do provide services to make sure that what is done and how it is done square with voters' wishes.

Second, 'delivery' is not what local government should be doing. Nor is it what people who have taken to the streets in protest want from their councillors. 'Delivery' happens when those who have something transfer it to those who need it. To insist that the main task of local government is 'delivery' is to insist that councils have goodies which citizens need and that its job is to make sure that they get them. This sees local government as active, voters as passive – councils give, voters receive. And it suggests that the best council is one that has lots of technically smart and qualified people because it is they who can 'deliver' best.

Role of councillors

But, in a democracy, citizens are not meant to be clients of the government – they are meant to own it. It is not meant to hand things out to them, it is meant to serve them. And so citizens are meant actively to hold local government to account, not to wait for it to 'deliver' to them. Local government is meant to be a servant; those who have needs are meant to be its employer. The core task of local government is, therefore, service, not delivery – doing what voters want, not handing goods out to them. This means that their priority is to listen to voters and try to meet their needs, not 'deliver' what they are assumed to need. And the best councillors are therefore not those who have the most degrees or technical skills, but those who know how to listen to citizens and speak on their behalf.

To illustrate this, we can look at some current developments in local government. Last year, a wholesale clear-out of councillors was meant to end grassroots citizens' disenchantment with councils. But protests against mayors and councillors continue, despite the fact that the African National Congress (ANC), whose councillors make up the majority, replaced 60% of its local representatives. And, while some say these protests are motivated by people trying to gain political advantage, we should know from our own history that people do not protest unless they are unhappy.

Government and opposition leaders seem to think that the solution to the protests lies in a common business solution – firing people who do not perform. But this 'remedy' is precisely what did not work last time. The stress on axing 'non-

performers' is a cause of the problem, not a cure, because it rests on the faulty belief that it is possible for anyone to know better than local people who should represent them.

This approach helped cause the problem it was meant to solve. In our first local elections, popular grassroots activists who had developed strong reputations for being able to speak for people and address their problems were passed over as candidates. Because our voters are extremely loyal to their parties, the fact that credible local activists did not gain the party nomination ensured that they were not elected. The effect, inevitably, was to weaken the link between local government and citizens. And it is this weak link – the reality that citizens do not think elected councillors care about them or their problems – which explains the continuing protest: protestors repeatedly complain that their mayor or councillors neither listen to them nor respond to their needs. The protestors clearly feel that they did not choose those who were nominated to represent them. Leaving the choice of candidates to local people could not make voters trust their councillors less and may prompt them to place more faith in them.

But more is needed if councillors are to win voters' trust. Equally important is the need to send out different messages about local government and its purpose. Currently, municipalities are seen largely as implementing agents for national plans. In theory, councils choose their own priorities; IDPs and other processes have been created to allow them to do this. But they are expected to do it within national policies and programmes that limit local government's choices. Disrespect for local difference and choice is often subtle: for example, the expectation that smaller, less resourced, municipalities should perform the same tasks as their big-city equivalents forces some councils into ways of doing things that remove them from their voters' needs. And often, these limits on local government's right to choose are justified as routes to better 'delivery'.

Nor are local councillors encouraged to represent voters – as we saw in the incident mentioned earlier, they are seen as agents of 'delivery'. But councillors are the voice of the people. They are not elected municipal officials – or assistants of other spheres of government. Grassroots voters know what their councillors are meant to do and have become angry at their failure to do it, hence the common complaint that councillors and councils do not listen to them. While that may include a desire for services, people who want to be listened to expect very different things of councils to people who want government to deliver to them.

But, while local voters know what is needed, opinion-formers and decision-makers continue to ignore them by insisting that local representatives be judged not primarily on whether they speak for people, but on whether they implement the plans of others. Only when we begin to insist not that councillors 'deliver', but that they do what local voters want them to do, are all our local governments likely to become valued servants of the people rather than targets of protest.


Photo: PictureNET Africa/Tebogo Letsie

A woman passes the burning house of a councillor after angry Khutsong residents set it on fire.

Comment

For councils and councillors, the message is clear. Technical and management skills can help, but they are only means to an end. Councillors and councils who want the support of their voters will concentrate not on delivering more smartly, but on listening harder to voters, working more with them, and serving them rather than trying to hand out goods to them.

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"WHO WANTS TO BE PRESIDENT WHEN YOU CAN BE MAYOR?"

Career patterns of local politicians

THE CASE OF METROPOLITAN MAYORS

Local government is emerging as a strong third sphere of government. Within local government, metropolitan cities are coming out as powerful institutions. Meanwhile, the discussion on the role of provincial governments is raging.

Instead of looking at constitutional or managerial aspects of local and provincial governments, this article looks at the impact of the emergence of local government on the career patterns of politicians. How have political parties reacted to this new sphere of government in terms of their politicians' career management? What does this say about the role, function and importance of the three levels of government in South Africa? An overview of the history of metropolitan mayors and their profiles, albeit very limited in timespan and scope, reveals some interesting career patterns.

The movement of political representatives: Some examples

It is important to note that, prior to the 2000 local government elections, local government generally did not wield significant power. Positions in local government were therefore unattractive for politicians with an already established career in provincial or national politics.

From national or provincial to local

Johannesburg

The current mayor of Johannesburg, Cllr Amos Masondo, is an example of a provincial politician who moved to local government. Before his entry into local government he was a member of the Gauteng Provincial Legislature.

Amos Masondo, Executive Mayor of Johannesburg

Helen Zille, Executive Mayor of Cape Town

Cape Town

Cape Town has seen a flurry of shifts and mayoral changes in the last six years. It has had four mayors since December 2000. Its first mayor was Mr Peter Marais, whose entry into Cape Town was a move from the provincial executive to a municipal council: he was Minister for Social Services and Poverty Relief in the Western Cape Cabinet until he was elected as mayor of Cape Town in 2000. The then-Premier of the Western Cape, Mr. Gerald Morkel, succeeded Mr. Marais as mayor of Cape Town, again a move from the provincial executive to a municipal council.

In 2002, floor crossers divested Mr. Morkel's Democratic Alliance (DA) of its majority and handed it to the African National Congress-New National Party (ANC-NNP) alliance, which elected Ms Nomaindia Mfeketo as mayor of Cape Town. Ms Mfeketo had been mayor before 2000 and was brought back into local government from the private sector.

The 2006 elections once again brought in a former provincial executive member. The DA-led coalition elected the DA's candidate, Cllr Helen Zille, as mayor. Zille is the former Minister of Health in the Western Cape Cabinet and a former member of the National Assembly. Her entry into Cape Town politics thus again represents a move from the provincial executive and National Assembly to a municipal council.

Ekurhuleni (East Rand)

Ekurhuleni's mayor in both the 2000-2006 and the current term, Cllr Duma Nkosi, was a senior Member of Parliament before he became mayor.

key points

- It appears that local government, specifically its six strong metropolitan municipalities, is claiming its space in the political realm.
- Local government's strong institutional status, its substantial revenue generating powers and its six unicities, have propelled it into 'serious politics'.
- This indicates that local government is becoming an increasingly attractive destination for politicians in South Africa.

Tshwane

Father Smangaliso Mkhatshwa was the first executive mayor of Tshwane. Before he stood for election as councillor and mayor of Tshwane in 2000, he served in the national Cabinet as Deputy Minister for Education. Father Mkhatshwa's entry into the Tshwane City Council was thus a move from the National Executive to a municipal council.

After the ANC secured a landslide victory in the Tshwane City Council during the 2006 elections, the former Gauteng Provincial Minister for Health, Dr Gwen Ramokgopa, was elected as executive mayor of Tshwane. The recent leadership change in Tshwane is thus the fourth example of a move by a provincial executive to a municipal council.

Duma Nkosi, Executive Mayor of Ekurhuleni

Gwen Ramokgopa, Executive Mayor of Tshwane

From local to local

Ethekwini (Durban)

Ethekwini has been led by Cllr Obed Mlaba since 2000. Cllr Mlaba was recruited for the mayoral position from within the City Council and had been a councillor in the transitional city structures prior to the 2000 elections.

Nelson Mandela Bay Metro (Port Elizabeth)

Nelson Mandela Bay Metro is another in this list whose mayors have not come from national or provincial government. Its first mayor, Mr Nceba Faku, was mayor and councillor before he assumed office in 2000.

His successor, Cllr Nondumiso Maphazi, was recruited from within the municipal council. She was also a councillor.

From local to provincial

As recalled above, the then-Premier of the Western Cape, Mr. Gerald Morkel succeeded Mr. Marais and took up the position as mayor of Cape Town. In an ironic twist of events, Mr Peter Marais emerged as the new Premier of the Western Cape. This thus amounted to a metropolitan mayor moving up to become a member of a provincial executive. The turn of events in Cape Town meant, in effect, that the mayor of Cape Town and the Premier of the Western Cape had 'swapped' positions.

From national to provincial?

A review of the positions held by the members of provincial executives prior to their entry into provincial executive reveals a number of interesting patterns. For example, no members of provincial executives came from the national executive. Provincial ministers sometimes came out of the ranks of the National Assembly but no MEC or Premier has come from the national executive.

Nomdumiso Maphazi, Executive Mayor of Nelson Mandela Bay

Assessment

This overview, albeit very limited in its timespan and scope, gives some indication of the impact of the emergence of a new system of local government on the South African polity. Of the 11 mayors that have served, or are serving, in one of the metropolitan municipalities:

- three came from the provincial executive;
- one came from the provincial parliament;
- one came from the national executive;
- two came from the national parliament; and
- four came from within the municipal council.

This shows that the mayoral positions of metropolitan municipalities are attractive positions for career politicians. A move from the national or provincial executive or parliament to a metropolitan municipality is not necessarily a demotion in party political terms. On the contrary, political parties elect strong provincial executives to be moved to metropolitan local level. A move from the provincial executive level to local government is common and even a move from the national executive to local government was recorded. Yet, a move from the national executive level to the provincial executive could not be found.

What does this indicate? It appears that local government, specifically its six strong metropolitan municipalities, is claiming its space in the political realm. Local government's strong institutional status, its substantial revenue generating powers and its six unicities, have propelled it into 'serious politics'. Fiorello La Guardia, New York City mayor in the 1930s, asked the question: "Who wants to be President when you can be mayor of the city?" It would seem that the emergence of a strong level of local government with powerful metropolitan cities has resulted, to some extent, in these words ringing true for South African politics.

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THE Quality of local political leadership IS CRUCIAL FOR EFFECTIVE SERVICE DELIVERY

The Centre for Policy Studies recently completed a study on the role of elected local councillors, particularly ward councillors, in service delivery in South Africa. Currently the public do not see local councillors playing an active role in service delivery. Much of the commentary on service delivery protests appears to focus on the role of municipal technocrats and administrators, as well as contracted service providers. However, we neglect the role of councillors at our peril, given the importance of local political leaders in shaping citizen perceptions of the efficacy of local institutions of government in meeting their needs. Also, local political leaders have an important role to play in mediating state-citizen relationships around issues of quality of local governance. This is especially important in the context of the recent spate of municipal service delivery failures, which have led to public protests across the country.

Understanding the role of local councillors in service delivery will become increasingly important for two crucial reasons. Firstly, it is widely expected that service delivery protests will continue to increase in 2010, and possibly in 2011, when the country is expected to hold the fourth democratic local elections since the dawn of democracy in South Africa. Secondly, and more importantly, the national government places great emphasis on monitoring and performance evaluation. Previously the nature, consistency and quality of oversight, monitoring and evaluation at local government level were extremely poor, as local councillors generally lacked the necessary technical and other vital skills to undertake effective oversight of the work of their municipal administrations.

This research was carried out in four municipalities in Gauteng, the North West, the Northern Cape and the Free State. These four municipalities represent a range of settlement types in South Africa, from predominantly densely populated urban areas to those characterised by sparsely populated rural settlements. This article records some of the key findings.

Key findings

The study investigated a number of important themes in order to understand the current role and functions of local councillors in the processes of service delivery in South Africa. These included relations between councillors and residents, the oversight functions of councillors and the impact of party politics on the quality and effectiveness of local councillors.

The findings suggest that where councillors performed their functions and responsibilities effectively, it was through maintaining frequent contact with residents and ensuring a two-way flow of information between the municipality and residents. This resulted in communities being more satisfied with service delivery, despite a severe lack of resources and perceived municipal failures in service delivery. It was also found that councillors played a mediating role between residents and the administration.

The study found a 'best practice' case in the Northern Cape. In this municipality, councillors effectively conveyed residents' needs to the municipal administration. They were found to have managed the expectations of the local residents effectively, thus possibly obviating the need for community protest action due to unfulfilled expectations. In this case, effective information dissemination and awareness campaigns relating to municipal development programmes and resource limitations played a crucial role in managing community expectations.

The case of the municipalities in the North West and Free State highlighted the consequences of poor councillor-citizen relationships. Factors such as the large size of wards, municipal consolidation and weak councillor capacity aggravated citizen frustration with poor services, leading to widespread service delivery protests.

key points

- Councillor-citizen relations must be strengthened in a way that ensures regular interaction and information exchange on the work of the council and the nature of service delivery deficiencies.
- Local forums such as ward committees need to be strengthened to serve as platforms for interaction between citizens and their elected leaders.
- Greater attention must be paid to helping local councillors acquire the hard skills they need for oversight.
- The selection of local councillors by political parties should place greater emphasis on levels of education and skills such as basic numeracy and basic literacy.
- Greater acknowledgement of individual specialisation in the allocation of oversight committee membership would improve the quality of oversight.
- The choice of local political leadership at municipal level should be given greater priority by political parties, particularly in terms of ideal qualities, prior leadership roles and experience in high office.

In all of the four municipalities covered in this study, it was found that oversight over the municipal administration was the key to the effective municipalities delivering services in a sustainable way. Oversight was generally exercised through the committee system, particularly section 80 committees aligned to specific departments or portfolios (eg transport and community safety). With the exception of the Northern Cape municipality, these oversight committees did not appear to be performing their functions effectively owing to a number of factors: lack of administrative support (Gauteng); incompetence and lack of basic literacy among some councillors (North West); and political interference and heavy-handedness by the leadership, including politically motivated arbitrary assignments and reshuffling of committee memberships (North West).

In many cases, the dual role of councillors serving both as members of the municipal executive (in the mayoral committee) and as office bearers in the council chamber (as chairpersons of committees) tended to aggravate the problem of political interference in the function of effective oversight. This was particularly the case in the municipality located in the Free State.

The ruling party's policy of 'deployment' was also cited for its pernicious effects on the work of councillors, because it resulted in the most skilled and competent councillors in particular service sectors not always being appointed to the relevant oversight committees. The municipality in Gauteng was the prime example. In the Northern Cape municipality, although oversight committees are located within the mayoral committee system, appointments to portfolio committees were done on the basis of knowledge and capacity to exercise effective oversight. This framework was further strengthened by the robust participation in the portfolio committees of members of the opposition, contributing to a more transparent and effective oversight process.

The impact of party politics was evident in all four municipalities in that the governing parties selected council leaders. The political leadership set the tone, defined the agenda of the municipality and determined the framework for the performance of councillors.

In the Northern Cape municipality, the mayor and speaker formed the bedrock of a mature and ethical political leadership structure. Both were seasoned political leaders with the mayor having more than ten years' experience as a councillor. His background as a church minister was a key factor underpinning the trust he enjoyed as a leader among all represented parties and the community. As a result, this mayor's decisions were generally accepted by all parties as being in the interests of the community. Clearly this indicates the crucial importance of the process of leadership selection by political parties at the local level.

It was also found that this mayor valued the principle of inclusivity, and usually ensured that all interest groups and sectors in the municipality were part of decision-making processes, thus avoiding the use of voting as a mechanism for decision-making in the municipality. This created a sense of cross-party consensus on issues that would have created conflict in other municipalities.

By contrast, the North West municipality exhibited the characteristics of weak and divisive political leadership, with negative consequences for service delivery, resulting in calls for the mayor to be fired. Informants in this study perceived ruling party councillors to be ineffective and unable to put the needs of residents before those of the party. Political interference was found to be rife and undermined the ability of councillors to perform their oversight functions effectively. Also, the North West municipality exhibited all the pernicious effects of the policy of deployment, which resulted in poorly prepared and unskilled councillors being placed in key portfolio committees.

The existence and strength of cliques in this municipality ensured fractious governance, which compromised oversight.

Policy implications

The findings of this study point to three crucial policy actions that need to be taken by policymakers to ensure that local councillors become effective in the performance of their roles and functions.

Firstly, it is imperative that councillor-citizen relations be strengthened in a way that ensures regular interaction and information exchange on the work of councils and the nature of service delivery deficiencies. It is generally agreed that citizens respond positively to regular information and credible explanations of why government is unable to meet their basic service needs. The credibility of local forums such as ward committees needs to be strengthened so that they can serve as platforms for interaction between citizens and their elected leaders.

Secondly, greater attention needs to be paid to helping local councillors acquire the hard skills they need for oversight. Also, the selection of local councillors by political parties should place greater emphasis on levels of education and skills such as basic numeracy and basic literacy. In addition, greater acknowledgement of individual specialisation in the allocation of oversight committee membership would go a long way towards improving the quality of oversight.

Finally, the choice of local political leadership at municipal level should be given greater priority by political parties, particularly in terms of ideal qualities. Consideration should also be given to prior leadership roles and experience in high office.

The full report can be accessed and downloaded from the Centre for Policy Studies website at www.cps.org.za.

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THEME 11: MAYORS, EXECUTIVE MAYORS AND EXECUTIVE COMMITTEES

The vast majority of municipalities have either an executive mayor or an executive committee. The first is a 'winner-takes-it-all' model where the executive mayor appoints his or her mayoral committee. This is discussed in the first two articles.

The second is a collective model where the council elects a inclusive committee to govern the municipality. How inclusive must that committee be? This is discussed in the third article.

The fourth article discusses the general functions of mayors, be they executive mayors or not.

1. **Executive Leadership at Local Level** by Jaap de Visser, Local Government Bulletin 2001, Volume 1, Issue 1, page 10-11
2. **Mayoral Committee: The Mayor Appoints** by Geraldine Smith, Local Government Bulletin 2003, Volume 5, Issue 1, page 1-3
3. **Executive Committees: Proportional or Fair Representation?** by Omolabake Akintan and Jaap de Visser, Local Government Bulletin 2006, Volume 8, Issue 5, page 11-13
4. **Roles amd Responsibilities of Mayors** by Koos Smith and Jaap de Visser, Local Government Bulletin 2001, Volume 3, Issue 4, page 9-12

Executive leaders

Apart from introducing the categories and types of municipalities, the Municipal Structures Act outlines the internal systems, structures and office-bearers of a municipality. The executive committee and the executive mayor will undoubtedly be central to those municipalities which allow for the establishment of those organs. This second part of the discussion on the Municipal Structures Act deals with the election, duties, powers and internal proceedings of the executive leadership of the municipality.

The executive committee

As can be seen in the table on page 9, some types of municipalities can have an executive committee. If an MEC establishes a type of municipality that has an executive committee, the municipal council elects the executive committee from members at the beginning of its term (s 45). Parties and interests represented in the municipal council must be represented in the executive committee in substantially the same proportion as they are represented in the municipal council (s 43). In other words, where 50 out of 90 councillors belong to Party A, the Act would not permit an executive committee with five out of six members belonging to Party A. Not more than 10 councillors or 20 per cent of the councillors can be elected to an executive committee.

Duties and powers of an executive committee

The executive committee is the principal committee of the municipal council (s 45). The Act contains a list of functions and powers of the executive committee (s 44(2) and (3)). In terms of that list, the executive committee must –

- identify and prioritise the needs of the municipality;
- recommend to the council on how to address those needs through the Integrated Development Plan (IDP) and estimates of revenue and expenditure;
- develop criteria for evaluation of these activities;
- evaluate progress in addressing the needs of the municipality;
- review the performance of the municipality in order to improve the municipality's -
  - (i) economy, efficiency and effectiveness;
  - (ii) credit control and revenue and debt collection; and
  - (iii) implementation of by-laws;
- monitor the municipality's management;
- oversee the provision of services in a sustainable manner;
- report on the involvement of communities in municipal affairs; and
- ensure public participation and consultation and report on the effects thereof on decisions taken by the council.

Apart from the functions and powers listed above, the municipal council can delegate powers to the executive committee (s 32). Powers that can be delegated by the council exclude the power to approve the integrated development plan and any power mentioned in section 160(2) of the Constitution, that is, the passing of by-laws, the approval of budgets, the imposition of rates and other taxes, levies and duties and the raising of loans.

What the exact powers of the executive will be in each and every municipality, will depend on how the council is going to use its power to delegate functions and powers to other municipal organs.

The executive committee will concern itself with the running of the municipality on a day-to-day basis. It can determine its own procedures, subject to directions and rules of the municipal council and must report on all its decisions to the municipal council.

The municipal council can remove one or more or all the members of its executive committee but it must notify the member concerned beforehand (s 53).

A majority of the members of an executive committee constitutes a quorum for a meeting. Committee decisions are taken on the basis of a majority of members present voting in favour of a proposal. The present

ructures Act

hip at local level

requirement of consensus or at least a two-thirds majority in the executive committee (s 16(6) Local Government Transition Act) will be altered with this provision.

The mayor

One member of the executive committee must be elected by the municipal council as the mayor of the municipality. The election procedure of Schedule 3 to the Act applies. He or she can serve a maximum of two consecutive terms as mayor.

The mayor decides when and where the executive committee will meet. However, if a majority of the committee members requests a meeting in writing, the mayor must convene a meeting. The mayor presides over meetings of the executive committee and performs functions assigned to him or her by the municipal council or the executive committee. These duties include any ceremonial duties.

A mayor who is elected by an executive committee should not be confused with an executive mayor. Despite the existence of a mayor, the executive committee nevertheless exercises its powers collectively, in other words, as a committee. Even though the municipal council and the executive committee can delegate powers to the mayor (s 49(1)(b)), it seems that those powers cannot be of so substantial a nature that they deprive the executive committee of its role as the primary committee. This conclusion can be drawn firstly, from section 49(1)(b), which refers to ceremonial duties, secondly, from the fact that the Act gives a long list of powers and duties that is relative to the executive committee and thirdly, from the referral to that committee as the primary committee of the municipality.

Even though the role of executive mayor is still 'open' and will largely depend on what powers and functions the municipal council will delegate to him or her, it is clear that the executive mayor will be the 'executive leader' of the municipality.

The executive mayor

One can see from the table (page 9) which types of municipality have an executive mayor. At the beginning of its term, the municipal council elects the executive mayor (and, subject to the MEC's approval, a deputy executive mayor) from among its members (s 55). The election procedure of Schedule 3 to the Act applies. The executive mayor's term of office runs parallel to the term of office of the municipal council. It is not possible to serve more than two consecutive terms as an executive mayor.

Duties and powers of an executive mayor

The description of the duties and powers of the executive mayor is almost identical to the list of functions of the executive committee. The executive mayor is also under a duty to report on all its decisions to the municipal council.

In 'bigger' municipalities, that is municipalities with more than 9 council members, the executive mayor must appoint a 'mayoral committee' from among the councillors. This 'mayoral committee' is tasked with assisting the executive mayor, who can delegate specific responsibilities or powers to members of the mayoral committee.

The municipal council may remove the (deputy) executive mayor from office, subject to prior notice (s 58).

Even though the role of executive mayor is still 'open' and will therefore largely depend on what powers and functions the municipal council will delegate to him or her, it is clear that the executive mayor will be the 'executive leader' of the municipality. Section 7(b) speaks of "the exercise of executive authority through an executive mayor in whom the executive leadership of the municipality is vested and who is assisted by a mayoral committee". The executive mayor will be responsible for running the municipality on a day-to-day basis and he or she will be assisted in that by the mayoral committee (if there is any). The municipal council can designate some tasks of the executive mayor that he or she must exercise together with the mayoral committee. In this way, the council can bend the decision-making structure slightly towards a more 'collective' executive, bearing in mind that the mayoral committee is appointed by the executive mayor, whereas the executive committee (see above) is elected by the council.

Assessment

The Municipal Structures Act introduces a new system of executive leadership for a municipality. Important is the change in the required majority in the executive committee. But the key elements are the introduction of the executive mayor and the executive committee, both of which have been assigned a set of powers and duties in the Act. However, what the exact powers of the executive will be in each and every municipality, will depend on how the council is going to use its power to delegate functions and powers to other municipal organs. To that extent, the municipality has a choice in structuring its internal division of powers and functions.

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Mayoral committees

The mayor appoints

The mayoral committee is appointed at the discretion of the executive mayor. It therefore need not include other parties on a proportional basis. In *DA v Amos Masondo* No 2002 JOL 10476 (CC) the Constitutional Court finally put the mayoral saga to rest. The requirement of section 160(8) of the Constitution for proportionality of political parties applies only to committees appointed by council. As the mayoral committee is a committee of the mayor and not council, it is exempted from this requirement.

Facts

After taking office in December 2000 the executive mayor of Johannesburg Metropolitan municipality, Amos Masondo, appointed a mayoral committee in terms of section 60 of the Municipal Structures Act. The African National Congress (ANC) holds 59% of the seats in the council and the mayor appointed only members from the ANC to the mayoral committee. The opposition party in the council, the Democratic Alliance (DA), launched proceedings in the Witwatersrand High Court arguing that the mayoral committee was appointed unconstitutionally because minority parties were not represented on it. The Court found that the mayoral committee was constitutional and the DA appealed against the decision to the Constitutional Court. (*See Local Government Law Bulletin*, vol 3. no.4.)

Issue

The main issue before the Constitutional Court was whether minority political parties in a municipal council are entitled to representation on

Continued on page 3

a mayoral committee. The DA argued that section 60(1) of the Structures Act read with section 160(8) of the Constitution requires fair representation of minority parties, although the subsection does not expressly state this. Masondo argued that a mayoral committee is not a committee of the municipal council and thus falls outside the ambit of section 160(8) of the Constitution.

The DA argued that a mayoral committee *is* a committee of the council since the executive authority vests in the council, and on that basis minority parties should be represented on the mayoral committee.

key points

- Mayoral committees are not committees of council for the purposes of section 160(8) of the Constitution.
- Fair representation is not a requirement for mayoral committees.
- Mayoral committees are appointed by the mayor and dissolve if the mayor ceases to hold office.

Court

In answering this question the Court looked at the primary function of the mayoral committee, which is to render assistance to the mayor in the exercising of his/her authority. This is to ensure effective and efficient government at local level. Although representation of minority parties in the deliberative processes of government is important, the need for effective and efficient service delivery is equally important. Furthermore, the Court looked at the delegations of powers and functions by a municipal council. When a council delegates authority to a city manager or an executive mayor, section 160(8) of the Constitution has no application. Nor does it apply to a committee appointed by the mayor to assist and share responsibilities in the office of the mayor.

Although the need for representation of minority parties in the deliberative processes of government is important, the need for effective and efficient service delivery is equally important.

Furthermore, the Structures Act does not describe the mayoral committee as a committee of council. On the contrary, there is a clear distinction between committees of council and mayoral committees. First, in terms of section 60(1), all powers to appoint, dismiss and delegate are given to the executive mayor. The municipal council can only remove the executive mayor from office in terms of section 58 of the Structures Act. Importantly, the mayoral committee dissolves if the mayor ceases to hold office. Second, there is a clear distinction between the executive committee system, which expressly requires proportionality, and the mayoral committee system, which does not. Third, there is a clear distinction between section 79 (committees appointed by council) and section 80 (committees appointed by the executive mayor or Exco). In terms of section 80(3) there is a direct link between members of the mayoral committee and the executive mayor. The distinction that the Structures Act makes between mayoral committees and committees appointed by the council is a clear indication that the committees are different and that no proportionality is required in terms of mayoral committees.

The majority of the Court decided that mayoral committees do not fall under the scope of section 160(8) of the Constitution and do not require minority party presentation.

Assessment

The mayoral committee is thus equated to the national or provincial cabinets. They are appointed by the President or Premier and their composition is entirely at the discretion of these individuals. Where there is an executive mayor we now have a cabinet-style mayoral committee.

Geraldine Smith
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EXECUTIVE COMMITTEES

Proportional or 'fair' representation?

The recent debate over plans to change the type of government in the City of Cape Town raised some interesting questions about the composition of executive committees. It is often assumed that an executive committee (Exco) must be based on proportional representation, with seats automatically assigned according to the representation of each party in the municipal council. While this is possible, and in most cases desirable, the courts have held that it is an option open to the municipal council but not an imperative.

Section 43 of the Local Government: Municipal Structures Act specifically addresses the composition of an executive committee. It states:

Composition of executive committees:

(1) If the council of a municipality establishes an executive committee, it must elect a number of councillors necessary for effective and efficient government, provided that no more than 20 percent of the councillors or 10 councillors, whichever is the least, are elected. An executive committee may not have less than three members.
(2) An executive committee must be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in substantially the same proportion they are represented in the council.
(3) A municipal council may determine any alternative mechanism for the election of an executive committee, provided it complies with section 160(8) of the Constitution.

Section 160(8) of the Constitution states the general principles that apply to all proceedings of a municipal council. For an alternative mechanism determined in terms of section 43(3) of the Municipal Structures Act to comply with section 160(8) of the Constitution, it must allow for the different parties and interests on council to be "fairly represented". Secondly, the alternative mechanism must be "consistent with democracy".

Dispute

In *Democratic Alliance v ANC & Others* [2002] JOL 10389, the Cape High Court was required to rule on whether Exco appointments must result in proportional representation.

At its first meeting on 15 December 2000, the City of Cape Town council had adopted a resolution relating to the composition of its Exco. The mechanism provided that the council would elect the first eight members of the Exco. If, after such election, certain parties or interests were not fairly

key points

- Municipal councils are permitted to constitute their executive committees based on proportional representation.
- However, the Municipal Structures Act allows a council to adopt an alternative mechanism that may be better suited to the particular circumstances of a specific municipality.
- This alternative mechanism does not need to result in proportionality.
- While a municipal council has considerable leeway in designing such an alternative, the mechanism selected must result in fair representation of the parties and interests in the municipal council on the Exco.

represented as required by section 160(8) of the Constitution, the remaining two seats would be reserved for such parties or interests. The court described the mechanism as a "winner-takes-all" system in which the portfolio seats on the executive committee were allocated to councillors from the ruling party or alliance.

As a result of floor-crossing in 2002, the Democratic Alliance (DA) lost control of the Cape Town municipal council to an alliance of the African National Congress (ANC) and the New National Party (NNP). The speaker of the council convened a meeting at which the council reconstituted its Exco. The application of the above-mentioned formula meant that the DA, which retained 71 seats on council, was left with the two non-portfolio seats while the ANC, with 80 seats, held the mayoral seat and four other portfolio seats on the Exco. Members of the NNP were elected to the three remaining portfolio seats even though the NNP only had 32 seats on council.

It is clear that the Cape Town resolution did not result in proportional representation. Accordingly, the DA asked the court to determine if the mechanism and the result complied with section 43 of the Municipal Structures Act and with the Constitution.

Arguments

The DA conceded that a mechanism that did not result in proportional representation could still be consistent with democracy. However, it argued that "fair representation" required that the outcome of whatever mechanism was chosen should have some rational relationship to the representation of each party in council.

In support of this proposition, the DA argued that a winner-takes-all system was incompatible with fair representation.

Secondly, it argued that "a multi-party system of democracy", which is listed as a founding value in section 1 of the Constitution, underscored the importance of political parties, including minority parties.

Thirdly, the DA argued that section 43(2) of the Municipal Structures Act dealt with the outcome of the election of executive committee members, while section 43(3) dealt with the mechanism used to arrive at the outcome. Accordingly, even though section 43(3) allowed council to choose an alternative mechanism for electing members to the Exco, this still had to result in proportional representation as required by section 43(2).

In response, the ANC argued that it was only on the basis of section 43(2) that the DA could claim an entitlement to any specific number of seats and that section 43(3) did not provide any details on the nature of the alternative mechanism.

They submitted that the DA's argument meant that "fair representation" was the same as "proportional representation", which was not the intention of the legislation, as section 43(3) purported to provide an alternative to "proportional representation".

Decision

The court disagreed with the DA and emphasised that section 43 provided municipal councils with two distinct options.

The first option was to establish an executive committee based on proportional representation.

The second option was to adopt an alternative mechanism for electing members to the executive council.

This alternative mechanism did not need to result in proportionality. This had been done in Cape Town. In essence, if fair representation meant the same as proportional representation, there would have been no need for section 43(3) as both section 43(2) and 43(3) would lead to the same result. Therefore, section 43(3) only made sense if it meant that municipal councils were allowed to use a mechanism that did not result in proportional representation.

The court found that there were no specific restraints on the council's choices under the second option. However, section 160(8) required that the outcome of whatever mechanism was chosen had to be "consistent with democracy" and fairly represent the parties and interests in the council.

Specifically, the court determined that the mechanism chosen did not need to result in proportional representation for it to be consistent with democracy. The court relied on a previous decision of the Constitutional Court in which it had held that proportional representation was one of many electoral systems that would be consistent with democracy.

Comment

It is clear that municipal councils are permitted to constitute their executive committees based on proportional representation. In fact, this is the default position provided in the Municipal Structures Act. A municipality is therefore expected to use a mechanism that would result in proportional representation unless it has adopted a resolution or passed a by-law establishing an alternative mechanism.

It could even be argued that a system that results in proportional representation is more democratic in that it allows a better correlation between the results of the elections and the power of a party or interest in the governance of the municipal council: that is, a party that won 40% of the votes would hold about 40% of the seats on Exco. A proportional representation mechanism may also be preferred because it allows for more varied perspectives and interests to be considered in the Exco's decision-making process.

While the Municipal Structures Act allows a municipal council to constitute its Exco in terms of an alternative mechanism, a municipality is expected to use a mechanism that would result in proportional representation unless it has adopted a resolution or passed a by-law establishing such an alternative mechanism.

However, the legislation allows the council to adopt an alternative mechanism that may be better suited to the particular circumstances of a specific municipality. While the council has considerable leeway in designing an alternative mechanism, the mechanism selected must result in fair representation of the parties and interests in the municipal council.

The court made two important comments regarding the analysis in cases of this kind.

First, it agreed that the principles of majority rule enshrined in the Constitution entitled the controlling alliance or party to govern the municipality.

Second, it recommended a conservative role for courts in ruling on such matters.

As long as the requirement that parties be provided a fair opportunity to participate in the governance of a municipality has been satisfied, courts should be loath to interfere with local government decisions regarding the composition of their committees.

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Roles and responsibilities of mayors

TERMS OF REFERENCE

Section 53 of the Municipal Systems Act (hereafter the Systems Act) determines that every municipality must define the specific role and area of responsibility of each political structure and political office-bearer of the municipality. SALGA resolved to prepare a guide to assist municipalities in complying with this requirement (see *LGL Bulletin* 2001(3) p. 4). This guide highlights and explains the possible content of the terms of reference that a municipality may adopt to comply with the Systems Act. This article contains abbreviated sections of the guide in so far as it deals with roles of executive mayors and mayors in a collective executive system.

THE MAYOR IN A COLLECTIVE EXECUTIVE SYSTEM

Statutory powers of the mayor

Section 49(1) of the Municipal Structures Act (hereafter the Structures Act) lists the statutory powers of the mayor in a collective executive system. The mayor determines the date, time and venue of executive committee meetings, chairs these meetings and performs functions delegated to him or her by the municipal council or the executive committee (including ceremonial functions).

In terms of section 31(2) of the Municipal Finance Management Bill, the mayor is the 'councillor responsible for financial matters' of the municipality. As such he or she must:

- prepare a draft annual budget at least four months before the start the financial year (s 17(1));
- allow the public access to the draft budget by making it available and inviting the public to submit comments and representations to the municipality (s 17(2)(a));
- table the draft budget in the municipal council for discussions and public hearings (s 17(2)(b));
- submit a copy of the municipality's draft budget to the national or provincial treasury, to the district municipality in whose area it falls, in the case of a local municipality and to the local municipalities in its area, in the case of a district municipality (s 17(3));
- prepare the final budget and table it in the council for approval as soon as the council discussions and public hearings on the draft budget have been completed (s 17(5)(b));
- manage the budget process in such a way that the budget is tabled in the council at least 30 days before the start of the financial year (s 17(6));
- table an adjustments budget in the municipal council as and when necessary (s 20); and
- table financial statements and reports received from the municipal manager (regarding a list of matters by regulation) in the council at the first council meeting after receiving them (s 36(3)).

Inferred powers

The fact that the mayor is the chair of the executive committee means that he or she has certain powers similar to those of the speaker. The difference is that these powers relate to the executive committee and not to the council as a whole. The mayor must, in respect of the executive committee:

- preside at public meetings and hearings called by the executive committee;
- receive petitions on behalf of the municipality when requested to do so by petitioners;
- ensure compliance with the law, including the rules of order, during executive committee meetings;
- interpret the rules of order when required to do so during executive committee meetings, taking into account any prior rulings and interpretations of the speaker; and
- ensure that the executive committee's reports to the council will adequately facilitate the council's oversight functions in relation to committees and the mayor.

Agenda

The mayor presides at executive committee meetings where he or she is present. This implies that he or she should be involved in the preparation of the agenda. The mayor must, for instance, ensure that reports that must be submitted to the executive committee are complete, in logical order and submitted in time for inclusion in the agenda. He or she must also ensure that agendas are distributed to executive committee members prior to a meeting in accordance with the timeframes stipulated in the municipality's rules of order.

Meeting procedures

The mayor must see to it that the provisions of the municipality's rules of order with regard to executive committee meetings are adhered to. The rules of order may regulate the detail of the conduct of executive committee meetings. The mayor must know these rules in order for him or her to apply them consistently. Rules of order would, for example, determine which motions and proposals may or may not be made, when a motion or proposal must be disallowed, how an interview with a deputation must be conducted or how to deal with a petition tabled at an executive committee meeting. As in the case of the Code of Conduct for councillors, the mayor should have a record of all the speaker's interpretations of the rules of order, as well as precedents that have developed. This will ensure consistent application of the rules of order.

Debate management and voting

In respect of executive committee meetings, the mayor shares responsibility with the speaker to promote members' freedom of speech, subject to the municipality's rules of order (see also *LGL Bulletin* 2001(3) p. 12). He or she must, however, also assess the content of councillors' input in the executive committee for compliance with the rules of order and other legislation.

The mayor must implement the voting procedures in the executive committee as determined by the municipality's rules of order. Mayors must also uphold a councillor's right to have his or her opposition to a resolution recorded in the minutes of a meeting. If there is a deadlock in the executive committee, the councillor presiding (normally the mayor) can in addition to his or her ordinary vote, cast an extra vote (called a casting vote) to decide the matter (s 52(3) of the Structures Act).

Admission of public to council meetings

In principle, executive committee meetings are open to the public and the media (s 160 of the Constitution read with s 20(1) of the Systems Act). However, the executive committee can close any of its meetings, provided it is reasonable in light of the matter that is being discussed (s 20(3) of the Systems Act). In the circumstances, listed in section 20(2) of the Systems Act, an executive committee cannot close its meetings to the public. While it is the executive committee that decides whether or not to close a meeting, the mayor must be able to advise the committee and facilitate decision-making around the issue. Therefore the mayor must ensure that he or she can explain the legal requirements for closing a meeting and must apply those rules consistently.

The mayor must ensure that members of the public are seated in designated areas from where they can observe the proceedings of the executive committee. The rules of order of municipalities usually authorise the mayor to have anyone who refuses to comply with a ruling removed from the meeting.

Compliance with the Code of Conduct

The Structures Act states that the speaker must ensure compliance with the Code of Conduct in the council *and committees* (s 37(3), see also *LGL Bulletin* 2001(3) p. 13). This requires at a minimum that the speaker must establish a system of communication with the mayor as chairperson of the executive committee to discuss matters relating to possible transgressions of the Code of Conduct.

Delegated powers of the mayor

A council could delegate the following powers and functions to its mayor:

- promote the municipality's image;
- ensure the executive committee performs its functions properly;
- lead and promote social and economic development in municipality;
- preside over public meetings and hearings called by the executive committee or the mayor;
- convene public meetings and hearings;
- promote inter-governmental and inter-institutional relations;
- identify those of the municipality's activities requiring a specific committee of councillors to investigate, discuss, evaluate and report in order to make recommendations to the executive committee after consultation with the municipal manager;
- appoint a member of the executive committee as chairperson for each council committee;
- ensure, in consultation with the municipal manager, that a proper committee service responsible for the agendas and minutes is in place for the executive and other committees, that all committees meet regularly and submit reports to the executive committee timeously;
- take responsibility for the quality and speed of decision-making in the executive committee;
- build, maintain and enhance sound relationships between the council, councillors and the administration in consultation with the municipal manager;
- be available on a regular basis to interview the public and visitors to the municipal offices, and to interact with prominent business people as well as developers;

- perform such ceremonial roles as the council may determine; and
- assess the performance of the municipal manager and the mayor's personal assistant, if any, in terms of the relevant performance agreement.

The council may decide to designate the mayor as the appeal authority in terms of the Access to Information Act 2 of 2000 (see *LGL Bulletin* 2001(3) p. 14).

A council should be careful not to delegate so many powers to the mayor that he or she becomes that a *de facto* executive mayor

Ceremonial powers and functions

The following ceremonial powers can be delegated to the mayor:

- opening projects, civic functions and events and new buildings;
- hosting and welcoming dignitaries;
- advocating council policy;
- representing the council at civic events;
- leading campaigns initiated by the mayor or the council;
- representing the council during disasters; and
- acting as patron of local organisations.

Receiving reports from delegated bodies

A political office-bearer who exercises delegated powers must report to the delegating authority as often as the delegating authority requires, on decisions taken in terms of that delegated power or duty since the previous report (s 63 of the Systems Act).

Where the council has delegated powers to its mayor, the speaker must ensure that the mayor complies with this reporting requirement. The mayor must submit his or her reports on the exercise of his or her delegated powers to the speaker for consideration by the council. Importantly, the speaker does not judge the *content* of the reports. Where the executive committee delegated powers to the mayor, the committee itself must ensure that the mayor complies with these requirements.

Relationship with the speaker

Neither the mayor nor the speaker occupies the superior political office in the municipality. Neither office is subject to the authority of the other. In the context of the activities of the executive committee, the mayor plays the dominant role. In the sphere of the council, the speaker performs that role. With regard to the enforcement of the Code of Conduct for councillors and compliance with the legal requirements regarding delegation of powers to the mayor, the speaker is in charge. This means the mayor must assist the speaker in ensuring legal requirements are met and that in some instances, the decision or ruling of the speaker may be conclusive.

Conclusion

The White Paper listed the following advantages of the collective executive system: 'by spreading responsibility for executive functions across a number of councillors this structure can act as an effective method for building the capacity of emerging political leadership'. This means a council should be careful not to delegate so many powers to the mayor that he or she becomes a *de facto* executive mayor. This would diminish the advantages of the collective exercise of executive powers.

THE EXECUTIVE MAYOR

Statutory powers and duties

Section 56(3) of the Structures Act lists the statutory functions of the executive mayor. In addition to these functions, the executive mayor must:

- perform the ceremonial roles determined by the council (s 56(4) of the Structures Act);
- report to the municipal council on all decisions that he or she has taken (s 56(5) of the Structures Act);
- appoint (and he or she may dismiss) the members of the mayoral committee (s 60 of the Structures Act);
- determine the venue, time and date of mayoral committee meetings;
- exercise those of his or her powers and functions, that were designated by the council, together with the other members of the mayoral committee (s 60(3) of the Structures Act, see below);
- manage the drafting of the municipality's integrated development plan and submit the draft to the council (s 30 of the Systems Act);
- manage the development of the municipality's performance management system and submit the proposed system to the council (s 39 of the Systems Act);
- oversee and monitor the implementation and enforcement of the municipality's credit control and debt collection policy and by-laws as well as the performance of the municipal manager in implementing these (s 99(a) of the Systems Act, see also p. 8);
- when necessary, evaluate or review the municipality's credit control and debt collection policy and by-laws, or the implementation of the policy and by-laws, to improve the efficiency of existing credit control and debt collection mechanisms, processes and procedures (s 99(b) of the Systems Act); and
- at intervals determined by the council, report to the council on the credit control and debt collection policies, and by-laws and their implementation (s 99(c) of the Systems Act).

The executive mayor can delegate any of his or her powers to the respective members of the mayoral committee. An executive mayor is entitled to receive reports from committees of the municipal council. If is not possible to dispose of the matter in terms of his or her delegated powers he or she can forward them, together with a recommendation, to the council (s 56(1) of the Structures Act). Where there is no specific committee established to investigate and make recommendations on a matter, the executive mayor would receive reports from the administration.

The executive mayor is the 'councillor responsible for financial matters' in terms of the forthcoming Municipal Finance Management Bill. As such he or she has the same duties as those discussed above under the mayor.

Inferred powers and functions

The executive mayor has powers similar to those of the speaker, al-

though only in relation to the mayoral committee and not in relation to the council as a whole. This means the executive mayor must, in respect of the mayoral committee, perform the same functions as were mentioned for the mayor under 'Inferred powers'.

Meetings of the mayoral committee

The executive mayor presides at mayoral committee meetings and must see to it that the provisions of the rules of order are adhered to.

Code of Conduct in committees

The executive mayor should inform the speaker of issues related to poss-ible transgressions of the Code of Conduct. An example is councillors' attendance of committee meetings.

Proposed delegated powers

The following powers can be delegated to the executive mayor.

(a) after consultation with the municipal manager, identifying the municipality's activities that need a specific committee of councillors to investigate, discuss, evaluate and report to him or her and make recommendations to the council;
(b) appointing a member of the mayoral committee as chairperson for each committee established by the council;
(c) delegating to such committees any of his or her powers, without being divested of the responsibility concerning the exercise of such delegated powers;
(d) ensuring, in consultation with the municipal manager, that a proper committee service responsible for the agenda and minutes is in place for each such committee and that any such committee meets regularly, submitting reports to him/her timeously;
(e) receiving reports with recommendations from departmental heads through the office of the municipal manager on all matters that must be handled by either the executive mayor or the council in terms of these delegations, and for which a specific committee has not been created to consider the matter beforehand;
(f) considering the matters raised in such reports and either disposing of them in terms of his or her delegated powers, or forwarding them with his or her recommendation to the council for consideration;
(g) receiving reports with recommendations from the committees established for specific matters, considers the matters raised in these reports, and either disposing of them in terms of his or her delegated powers, or forwarding them with a recommendation to the council;
(h) being responsible for the quality and speed of decision-making;
(i) ensuring that integration takes place between the various committees;
(j) playing a prominent role, in consultation with the municipal manager, in building and maintaining a good relationship between the council, councillors and the administration;
(k) being responsible for political supervision of the administration;
(l) being responsible for liaison with the community, ward committees, other committees and councillors, and political office-bearers in the different spheres of government;
(m) being available on a regular basis to interview the public and visitors to the municipal offices, and to interact with prominent business people as well as developers; and
(n) exercising any of the powers of the municipality except such powers:
  (i) reserved by resolution of the council for the council;
  (ii) reserved by law for the council; and
  (iii) the exercise of which requires a resolution taken by a majority other than a simple majority.

A council may decide to designate the executive mayor as the appeal authority in terms of the Access to Information Act.

Ceremonial functions

The same ceremonial functions as above can be considered for delegation to the executive mayor.

Receiving reports from delegated bodies

Where the council has delegated powers to its executive mayor, the speaker must ensure that the executive mayor complies with the reporting requirements set out in section 63 of the Systems Act (see above). The executive mayor must submit his or her reports on the exercise of his or her delegated powers to the speaker for consideration by the council. Importantly, the speaker does not judge the *content* of the reports. Where the executive mayor delegated powers to the members of the mayoral committee, the executive mayor must ensure those members comply with these requirements.

Relationship with the speaker

Similarly to the relationship between the mayor and the speaker, neither the executive mayor nor the speaker occupies a superior political office. Neither office is subject to the authority of the other. The same assessment of the overall focus areas of the two offices applies here as under the mayor.

Mayoral committee members

The Structures Act requires that when the council of a municipality with a mayoral executive system has more than nine members, the executive mayor must appoint a mayoral committee from among the councillors "... to assist the executive mayor" (s 60). In terms of section 60(3) of the Act the executive mayor must exercise those powers and perform those functions designated by the council, together with the other members of the mayoral committee, i.e. not alone (see *LGL Bulletin* 1999(1) p. 11). Of course the executive mayor may, in his or her discretion, decide to submit other matters also to the mayoral committee before taking a decision.

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THEME 12: COALITIONS AND EXECUTIVE STRUCTURES

In some municipalities there is no outright majority and the municipality is governed by a coalition of parties and councillors. This theme includes two opinion pieces that give context to the issue of coalitions.

1. **South Africa's Politicians will have to Adjust to Many more Coalitions** by Jaap de Visser https://theconversation.com/south-africas-politicians-will-have-to-adjust-to-many-more-coalitions-58915 (last accessed 25 August 2016)
2. **The Good, Bad and Ugly of Coalitions** by Jaap de Visser http://www.iol.co.za/capeargus/opinion-the-good-bad-and-ugly-of-coalitions-2054672 (last accessed 25 August 2016)

THE CONVERSATION
Academic rigour, journalistic flair

South Africa's politicians will have to adjust to many more coalitions

May 16, 2016 3.29pm SAST

South African President Jacob Zuma, flanked by ANC Secretary-General Gwede Mantashe (left) and Deputy President Cyril Ramaphosa. Reuters/Mike Hutchings

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This year's local government elections in South Africa are likely to produce shifts in power at municipal level. They will be the fourth local government elections since a new system of local government was adopted under the post-1994 constitutional framework. The polls are expected to be contentious, particularly in the country's eight metropolitan municipalities.

Local government plays a major role in governance and the provision of basic public services in South Africa. First, the country's municipalities are very big. Spain's population size and land mass is similar to South Africa's. But it has more than 8,000 municipalities to South Africa's 278 – which are to be reduced to 257 by the day of the elections. This says something about the size – and the leverage – of municipalities in the country.

Second, South Africa's constitution protects municipalities from national and provincial interference. Some big national projects have stumbled when affected local governments disagreed. An example is the reform of electricity distribution.

Local governments, with metropolitan municipalities as the first line of defence, have

also successfully batted away five attempts by national and provincial governments to limit municipal town planning powers. In each of the cases heard by the Constitutional Court, the court came down on the side of local government, with the Gauteng Development Tribunal judgment as the landmark decision.

At the same time, local government is often seen as the Achilles heel of government's ambitious development plans. The perception is frequently incorrect, but it is true that too many municipalities seriously underperform. When launching the "Back to Basics" programme, Pravin Gordhan, then minister responsible for local government, said that a third of municipalities work well, a third are scraping by and a third are "frankly dysfunctional".

The key question in the coming elections is whether the governing African National Congress (ANC) will retain power in the seven metropolitan municipalities it currently controls.

More coalitions on the cards

Shifts in power in those metropolitan municipalities have been visible for some time. Though the ANC controls outright majorities in seven of the eight metropolitan municipalities, the last time voters were consulted on its performance, in the 2014 national and provincial elections, the party lost support in all except Buffalo City on the country's east coast. It remains to be seen, though, how significant the shifts will be in the upcoming polls.

The Democratic Alliance (DA), the official opposition, controls the Western Cape's City of Cape Town and is a serious contender for power in Tshwane – the city adjacent to Johannesburg – and Nelson Mandela Bay Municipality, the capital of the Eastern Cape province.

Opposition leader Mmusi Maimane at the launch of the Democratic Alliance's local election manifesto in Johannesburg. EPA/Kevin Sutherland

The Economic Freedom Fighters(EFF), led by Julius Malema, will be contesting local elections for the first time and are likely to make a big impact.

The Economic Freedom Fighters launch their election manifesto in Soweto. EPA/Cornell Tukiri

What is likely to set these elections apart is that there will probably be no outright winner in a number of municipalities. Coalitions may thus become necessary in these

"hung councils".

Coalitions are made possible by how elections work in local government. The composition of the municipal council is based on proportionality. Simply put, winning 20% of the vote guarantees a party about 20% of the council seats. If no-one wins an outright majority, a party may suddenly become a real contender for power as part of a coalition.

So there is a strong likelihood that there will be more coalitions after the local elections. But there is not a lot of experience with coalition politics at local level. Most of the experience was built up in the provinces of the Western Cape and, to a lesser extent, KwaZulu-Natal.

The Western Cape's City of Cape Town was run by a DA-led coalition from 2006 until the party won an outright majority in 2011. Though this coalition governed for five years, other coalitions in the province were less successful. Many collapsed or changed shape mid-term, with disruptive consequences.

In the Western Cape town of Oudtshoorn, for example, the DA and the ANC took turns, securing majorities by putting together coalitions that proved to be opportunistic. They fell apart every time one or more of the participating councillors had a change of heart. Local governance collapsed to the point where the provincial government put the municipality under administration.

Coalitions in local government are not only determined by the quest for a workable majority. There is the law, too. Coalition building has to be done within the rules of local government law – the Municipal Structures Act. Some of these rules limit the options of political parties.

Stripped of its glory, a coalition is about two or more parties finding each other on a common programme or platform and cementing their new-found love by dividing political posts among themselves. In municipalities, this revolves mainly around the positions of the mayor and the speaker.

Key positions in the municipal executive may also be distributed. Here the law throws a spanner in the works for parties negotiating a coalition. It has to do with two different executive systems in local government: executive mayors and executive committees.

Executive mayors

Most municipalities have an executive mayor. This is a councillor who is elected by the council to be political head of the municipality and exercise executive powers. He or she is assisted by a mayoral committee. In this case the law doesn't concern itself with the political composition of the mayoral committee, provided its members are elected councillors in that municipality.

In 2003 the DA wanted the Constitutional Court to rule that Amos Masondo, then executive mayor of Johannesburg, should have included opposition councillors on his all-ANC mayoral committee. The court disagreed and confirmed that executive mayors have free rein in putting together their committees.

So if a hung council has an executive mayor, the parties to a coalition may freely divide up all mayoral committee positions among their elected councillors.

Executive committees

All local authorities functioned under an executive committee system until the executive mayor position was introduced in 2000. About a third of South Africa's municipalities are still run by executive committees.

An executive committee is made of not more than ten councillors who are elected by the municipal council to collectively exercise executive powers. One of the members is elected as mayor and he or she functions as the municipality's political head.

The difference between this system and that of the executive mayor is that here the mayor must work *with* the executive committee. And here's the catch: Section 43 of the Municipal Structures Act says the executive committee must either mirror the party composition of the council or at least allow all parties on the council to be "fairly" represented.

So if a hung council is governed by an executive committee, coalition-building efforts are limited in that no major party may be excluded from the ruling committee. For example, if the ANC, the DA and the EFF each win a sizeable share of the vote, each must be represented on the governing executive committee.

Even if the ANC and the DA strike a deal that delivers them a majority, the coalition will have to put up with one or more EFF representatives on its executive. Whatever the permutation of this scenario, the result is awkward.

Where the power lies

The decision about executive structure is a provincial one. In KwaZulu-Natal, for example, there are no executive mayors.

Though executive committees complicate coalition building, their political inclusivity is touted as an advantage, particularly in smaller councils. A more inclusive style of local government benefits local communities. For this reason the South African Local Government Association urged government in 2011 to reconsider the continued appropriateness of the executive mayor system.

In the end, coalitions will be built where it is opportune to do so, including in hung councils governed by an executive committee. The usual mix of political ingenuity and

opportunism will probably ensure that politicians find a way to make it work. But in municipalities with executive committees, local politicians will have to respect the golden rule of “fair inclusion” of all major parties in the executive.

Coalition **ANC** **South African politics** **Democratic Alliance** **Economic Freedom Fighters** **Pravin Gordhan** **African politics** **Constitutional Court** **Municipal elections** **Elections in Africa** **South African elections 2016**

OPINION: The good, bad and ugly of coalitions

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OPINION

Coalition politics at local level could spell uncertainty and instability. However, it could also bring more inclusive politics, says Jaap de Visser.

Cape Town - The local government elections have produced 27 municipalities without an outright majority. This list includes some of the largest municipalities in the country, such as Joburg, Tshwane, Ekurhuleni, Nelson Mandela Bay and Rustenburg. Then there are some of the smaller municipalities such as Modimolle, Laingsburg, Mtubatuba and Thabazimbi where no party won outright.

As of the declaration of the results on Saturday evening, councils have two weeks to convene the first council meeting where office bearers must be elected. File picture: Phill Magakoe. *Credit: INDEPENDENT MEDIA*

Coalitions have therefore become the buzzword. They insert ambiguity and uncertainty into local politics and are notoriously hard to manage. Just ask the residents of Swellendam and Oudtshoorn where erratic coalition politics wrecked the municipal administration.

But what is a coalition and why do you need it? The initial response is obvious: if no party wins a majority, a group of parties can help each other to get that majority.

But why and when do you need it? You need a coalition to gather the necessary votes to elect office-bearers and control the council assembly and you need a majority to take other council decisions. Municipal councils adopt budgets, approve policies but also appoint officials, decide on projects, determine tax rates, write off debt if need be etc. Municipal councils are thus different from national and provincial legislatures which focus exclusively on making laws and overseeing the executive. A solid majority is important at municipal level to ensure stable administration.

Councils take decisions by simple majority. The majority of whoever is present decide, as long as there is a quorum (50 percent+1).

However, important issues, such as the budget, by-laws, deciding tariffs and rates and raising loans can only be done with a majority of all elected councillors. This is an important difference, particularly in small councils where the presence and vote of every individual counts.

A coalition is a political agreement between parties that court each other with promises of influence and power. A fully-fledged coalition is ultimately cemented by the distribution of leadership positions among the participants.

What are those positions? The first prize is the mayoral chain. Even though there is no strict rule, it stands to reason it goes to the biggest party. In bigger municipalities there is also a deputy-mayoral chain which often goes to the second biggest party.

Secondly, there is the position of the Speaker and, in some municipalities, the Deputy Speaker. This is also an important position because the Speaker chairs council meetings and watches over the behaviour of councillors by enforcing the Code of Conduct for Councillors. Thirdly, there are the executive portfolios, i.e. the councillors that join the mayor in the municipal executive. Last, there are "smaller" sweeteners, such as the position of the Council Whip (who manages the political functioning of the council) and chairmen of council committees.

All these positions represent political power and leverage. But they also represent the difference between part-time and full-time remuneration. Part-time councillors receive decent compensation, but full-time office-bearers earn very good salaries. To illustrate this: in a small municipality, being a full-time office-bearer means the difference between R200 000 per year for a part time job or R650 000 for a full-time job.

The rules for coalitions, particularly with regard to the composition of the executive, differ from one municipality to another. Most municipalities elect executive mayors. The council elects a mayor who then appoints councillors to the mayoral committee. The mayor has a free hand to implement a coalition agreement as there are no rules for the political composition of the mayoral committee. The winner (or the winning coalition) takes it all. All large cities have executive mayors, except eThekwini.

About a third of our municipalities have executive committees and their rules are different. The committee is elected by the council and one member is elected as mayor.

Importantly, the composition of this committee must reflect the composition of the council. Municipalities have two options to realise this. The first is to implement “proportionality”, i.e. each party is represented relative to its strength in the council. So if the ANC has 40 percent, DA 40 percent and the EFF 20 percent, the executive committee follows the same division. The alternative is “fair” representation, a watered down version of proportionality.

In this system, all major parties must be represented on the executive committee but notnecessarily in proportion to their strength. In 2002, the DA lost a court case over this. The DA had 36 percent of the seats in the City of Cape Town (which at the time had an executive committee) but was only given 20 percent of the executive committee seats. The DA went to court to challenge the lack of proportionality but lost the case. The Supreme Court of Appeal held it was legal, as long as there was “fair” representation for the DA on the executive committee.

eThekwini falls in this category. The ANC won an outright majority so no coalition is needed. However, the majority does not rule everything. It will have to tolerate opposition councillors on the executive. The DA emerged with 27 percent of the vote and is entitled to fair representation on eThekwini’s executive. A number of the smaller “hung” councils also fall in this category. Mtubatuba, Modimolle and Thabazimbi are examples.

Joburg and Tshwane are particularly complicated from a coalition perspective. Both the EFF and the DA are unwilling to partner with the ANC and the smaller parties have too few seats to push any of the big three comfortably over the 50 percent mark.

If neither of them can overcome their antipathy, it could result in a stalemate.

In Joburg and Tshwane, no party can be forced to enter into a coalition because it operates an executive mayoral system. This would be different under the same system as eThekwini because, under the executive committee system, it is a legal requirement that the executive

represents all major parties.

Ultimately, the decision to change a municipality from an executive mayor to an executive committee is not made by the municipality itself. The provincial MEC for local government decides.

This means that, as a last resort, Paul Mashatile holds the key to resolving an impasse. He has the power (after due process and consultation) to force Tshwane and Joburg to change into an executive committee system and thus be forced to elect an executive comprising all three parties.

Force hardly ever works under these circumstances and we are nowhere near that last resort yet.

As of the declaration of the results on Saturday evening, councils have two weeks to convene the first council meeting where office bearers must be elected.

Coalition politics at local level could spell uncertainty and instability. However, if managed well, it could also bring more inclusive politics. There is no better level of government to have more inclusive politics than local government.

Municipal decisions have immediate and real impact on basic services. They make the difference between communities having access to basic services and dignity or being condemned to exclusion. Those decisions will benefit from inclusive politics.

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THEME 13: COMMUNITY PARTICIPATION AND COMMUNITY DEVELOPMENT WORKERS

Community participation is at the heart of local government. These articles set out and analyse some of the key requirements that appear in the law. In addition, it discusses the framework for Community Development Workers (CDW) that play an important role in community participation.

1. **The Municipal System Act and Community Participation** by Jaap de Visser, Local Government Bulletin 2001, Volume 3, Issue 1, page 6-7
2. **Participatory Democracy: The Duty to Involve the Pubic** by Geraldine Mettler and Reuben Baatjies, Local Government Bulletin 2006, Volume 8, Issue 4, page 3-5
3. **Community Participation: The Cornerstone of (Local) Participatory Democracy** by Jaap de Visser and Reuben Baatjies, Local Government Bulletin 2007, Volume 9, Issue 1, page 6-9
4. **Community Development Workers** by Reuben Baatjies and Zelda Hintsa, Local Government Bulletin 2005, Volume 7, Issue 5, page 10-11

The Municipal Systems Act and community participation

One of the objects of local government in terms of section 152(1)(e) of the Constitution is to encourage the involvement of communities and community organisations in local government. Chapter 4 of the Municipal Systems Act (the Systems Act) deals with community participation. What follows is a summary of that chapter.

A municipality must develop 'a culture of municipal governance that complements formal representative government with a system of participatory governance' (see p1).

The Systems Act emphasises three elements:

a) The municipality must foster participation in –
   - the integrated development planning (IDP) process (see p 5-7);
   - the evaluation of its performance through performance management;
   - the budget process; and
   - strategic decisions around service delivery.

b) The municipality must enable participation through capacity building in the community and of staff and councillors.

c) Funds must be allocated and used for the above purposes.

VEHICLES FOR PARTICIPATION

Participation must take place through structures (ward committees) established in terms of the Municipal Structures Act (Structures Act). It must also take place through mechanisms, processes and procedures that exist in terms of the Systems Act itself or that have been established by the council (s 17). The Systems Act mentions the councillor as a vehicle for participation. In addition to ward committees, the council may, for instance, establish advisory committees consisting of persons who are not councillors (s 17(4)).

The mechanisms, processes and procedures mentioned in the Systems Act must include:

- procedures to receive and deal with petitions and complaints of the public;
- procedures to notify the community about important decisions (such as by-laws, IDP service delivery choices, etc.) and allowing public comment when that is appropriate;
- public hearings;
- consultative meetings with recognised community organisations and, when appropriate, traditional authorities; and
- report back to the community.

These systems must, as a minimum, be established in every municipality.

The special needs of women, illiterate people, disabled people and other disadvantaged groups must be taken into account.

For example, when planning a public meeting, the council must try to accommodate all these groups and consider issues such as:

- Venue: Can the venue accommodate people with disabilities, e.g. does it have wheelchair access?
- Time: Does the time of the meeting make it difficult for women to attend because of family responsibilities?
- Publicising the event: Should the announcement appear only in newspapers?

The council must make the public aware of the mechanisms for participation that it has established.

The council must make the public aware of the mechanisms for participation that it has established. It must also inform the public of the issues in which it wants participation (s 18(1)). The residents must also be informed about municipal governance, management and development.

COUNCIL MEETINGS

The municipal manager must notify the public of the time, date and venue of every meeting of the council (s 19). The council determines how this takes place (e.g. via the local newspaper). This also applies to urgent meetings, except when time constraints prohibit prior notification.

The council must determine – in a by-law or a resolution – the circumstances under which council or committee meetings are closed for the public.

The rule here is that the public and the media can attend council and committee meetings except when it is reasonable to exclude them because of the nature of the items on the agenda (s 20(1)). An executive committee or a mayoral committee can also close its meetings if it is reasonable to do so because of the nature of the items on the agenda.

The meeting must always be open to the public if one of the following things is discussed or voted on:

- a by-law;
- the budget;
- (an amendment to) the IDP;
- the performance management system; or
- a service delivery agreement.

The council must, as far as its financial and administrative capacity allows, provide space for the public in its meeting venues. It can make rules to regulate access to, and public conduct at, council and committee meetings (s 20(4)).

COMMUNICATION

The council must determine what its official languages are, taking into

account the language preferences and usage within the municipal area. Whenever the council notifies the community through the media in terms of any legal provision, these languages must be used. One or more of the following means of notification must be chosen:

- local newspaper;
- other newspaper that has been designated as a newspaper of record; or
- radio broadcasts.

Any such notice as well as those that must be published in the *Provincial Gazette* must also be displayed at the municipal offices.

When the municipality invites comments from the public, it must ensure that someone is available at the municipal offices during office hours to help people who cannot write (due to illiteracy or disability) to put their comments in writing. This option must be communicated to the public in the invitation for comments (s 21(4)).

Similarly, when the council requires a form to be completed, officials must assist people in understanding and completing the form. When the form deals with payment of money to the municipality or the provision of services, the assisting official must explain the terms and conditions of such payment or services.

REGULATIONS

The Minister for Provincial and Local Government can issue further regulations on participation and set minimum standards, including standards on funding for participation (s 22(1)). In doing so, the Minister must take into consideration the capacity of municipalities to comply with the regulations.

PARTICIPATORY DEMOCRACY

The duty to involve the public

THE CONSTITUTIONAL COURT SPEAKS

The Constitutional Twelfth Amendment Act (12th Amendment Act) altered the basis for determining provincial boundaries and resulted, among other things, in the changing of provincial boundaries between KwaZulu-Natal and the Eastern Cape. It effectively relocated the local municipality of Matatiele from Sisonke District Municipality in KwaZulu-Natal to the Alfred Nzo District Municipality in the Eastern Cape and relocated Umzimkhulu Local Municipality from Alfred Nzo District Municipality into the Sisonke District Municipality in KwaZulu-Natal. Amid much controversy, protest and resistance, it was the former transfer which was the crux of the constitutional challenge to the validity of the 12th Amendment Act.

Issue

This case report is limited to the responsibility of a provincial legislature when its provincial boundaries are being altered and, in particular, the obligation of a province to consult the people who are to be affected by the re-drawing of its provincial boundaries. The judgment is of critical importance to local government inasmuch as the duty to facilitate public involvement extends to all organs of state, including municipal councils. As in this case, the effect of non-compliance with this requirement can lead to the invalidation of laws enacted in the legislative process of a particular organ of state.

Provincial approval of boundary change

First, the Court ruled on the applicability of section 74(8) of the Constitution, which provides that when a Bill or any part thereof concerns only specific province(s), the affected province(s) must approve the amendment. The Court held in this regard that "to protect the territorial integrity of the provinces, the framers of our Constitution gave each province the final say on whether its boundary should be altered". The effect of section 74(8) is that the boundary of a province may not be altered without its approval. Thus, the amendment had to be approved by the legislatures of KwaZulu-Natal and the Eastern Cape.

Duty to facilitate public involvement

The question that then arose was whether, in considering a proposed constitutional amendment which alters its boundary, a provincial legislature is obliged to facilitate public involvement as required by section 118(1)(a) of the Constitution.

Section 118(1) provides: "A provincial legislature must – (a) facilitate public involvement in the legislative and other processes of its committees".

The KwaZulu-Natal legislature argued that, as the representative of the people of that province and therefore speaking for them, it was not required to facilitate public involvement in its consideration of the 12th Amendment Act.

In answering this question, the Court emphasised that:

> Our Constitution contemplates a democracy that is representative, and that also contains elements of participatory democracy. Consistent with the constitutional order, section 118(1)(a) calls upon the provincial legislatures to 'facilitate public involvement in [their] legislative *and other processes*' [emphasis added].

The Court said that the Constitution calls for open and transparent democracy, which requires all organs of state, including all legislative organs, to facilitate public participation in their law-making process. Construed in this context, section 118(1)(a) envisages that a provincial legislature will facilitate public participation whenever it is engaged in a legislative, or indeed any other, process of the legislature.

> The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves.

The Court held that Parliament and provincial legislatures have a broad discretion to decide on the best ways of facilitating that involvement, but that ultimately it must be reasonable. The Court emphasised the case-by-case nature of the test, saying that "the nature and degree of public participation that is reasonable in a given case will depend on a number of factors". These include, among others, the nature and importance of the legislation as well as the intensity of its impact on the public. For example, the more discrete and identifiable the potentially affected section of the population and the more intense the possible effect on their interests, the greater will be the expectation that the legislature will ensure that that section of the population has a say. It was not enough, the Court said, to simply point to standing rules of the legislature that provide generally for public involvement as evidence that public participation in fact took place; what matters is that the legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of any given case.

The Court held that there are at least two aspects of the duty to facilitate public participation. First, there is a duty to provide the opportunities for meaningful public participation in the law-making process. Second, there is a duty to ensure that people are able to take advantage of those opportunities. Construed in this light, public involvement may be seen as a "continuum that ranges from providing information and building awareness, to partnering in decision-making".

> Participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and to become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It strengthens the legitimacy of legislation in the eyes of the public. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.

The Court held further that the Constitution makes Parliament, provincial legislatures and municipal councils the primary democratic institutions in the country and, as such, the people have a voice in those institutions, not only through elected representatives but also through access to committee meetings and deliberations. "The people have the right to speak and make representations to committees and meetings."

Were the measures taken reasonable?

Having laid down the principles, the Court turned to determining whether the Eastern Cape and KwaZulu-Natal provincial legislatures acted reasonably in their respective circumstances.

The Eastern Cape Portfolio Committee on Local Government and Traditional Affairs held public hearings in the seven areas that it viewed to be directly affected by the proposed constitutional amendment. The hearings took place in both urban and rural parts of those affected areas. The Committee also received written submissions from individuals, municipalities, political parties and traditional

leaders. Subsequently, the Committee recommended the approval of the Amendment Act, but noted that certain concerns expressed by the public, particularly relating to the quality of service delivery, should be addressed as a matter of urgency. Plainly, there could be no doubt that the Eastern Cape Legislature, for its part, fully complied with its duty to facilitate public involvement in relation to the constitutional amendment.

In stark contrast:

> it is common cause that the KwaZulu-Natal legislature did not hold [any] public hearings or invite written submissions on the proposed amendment. All the provinces which had their boundaries altered held public hearings, except for KwaZulu-Natal.

This, despite the general sentiment in KwaZulu-Natal that public hearings or a referendum were necessary. The Court held in this regard that:

> the Eastern Cape managed to hold carefully monitored public consultations in areas contiguous to Matatiele where facilities were probably less developed. [T]he need for appropriate consultation with the people of Matatiele was especially intense because another governmental agency, namely, the Municipal Demarcation Board…had in fact held public consultation and after listening to the people had arrived at a completely different conclusion. The conclusion that the KwaZulu-Natal legislature acted unreasonably in failing to hold public hearings or invite written representations, is unavoidable. This is a plain, clear and unmistakable violation of section 118(1)(a) of the Constitution.

If the measures taken to facilitate public participation are unreasonable in a given case, it will thus lead to the invalidity of the legislative act in question.

Court order

Considering the drastic implications of invalidity with immediate effect, the Court held that the order of invalidity only applied to that part of the 12th Amendment Act which concerned KwaZulu-Natal. It suspended the order of invalidity for 18 months to allow Parliament and the KwaZulu-Natal legislature to adopt a new amendment consistent with section 118(1)(a) of the Constitution. Should they fail to do so within the given period, the Court will have to (re)determine the consequences.

key points

- The Court held that Parliament, provincial legislatures and municipal councils are the primary democratic institutions in the country and, as such, the people have a voice in those institutions.
- The judgment is of critical importance to local government inasmuch as the duty to facilitate public involvement extends to all organs of state, including municipal councils.
- A court can now review whether or not a municipal council has complied with the public participation requirements for adopting a by-law. If it finds that a council did not comply, the by-law will be invalid.

Comment

The significance of this judgement, for all organs of state including municipal councils, is immense. The Court's willingness to review compliance with public participation in the legislative and other processes of those organs of state has particular implications for local government. A court can now review whether or not a municipal council has complied with the public participation requirements for adopting a by-law. If it finds that a council did not comply, the by-law will be invalid. Significantly, the Court developed a set of criteria for determining whether public participation is reasonable.

While this case dealt specifically with the conduct of provincial legislatures, the wider ramifications of this judgment in relation to public involvement in the affairs of – and the duties on – municipal councils will be critically analysed in the next issue of the *Bulletin*.

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The views expressed in this article are those of the author and do not represent the Gauteng Department of Local Government.

and

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Photo: Courtesy City of Cape Town

Community participation

THE CORNERSTONE OF (LOCAL) PARTICIPATORY DEMOCRACY

Community participation is key to the functioning of local government. One of the constitutional objects of local government is to encourage the involvement of communities and community organisations in local government. The landmark *Doctors for Life* and *Matatiele* judgments, passed by the Constitutional Court in August 2006, are critical for the interpretation of the law of community participation in local government. The judgments are fundamental, particularly in relation to the nature and scope of the duty to involve the community in decision making as well as the enforceability of the legal provisions on community participation.

Applicability of the judgments

The judgments deal with the duty of Parliament and provincial legislatures to facilitate public involvement in their law-making processes. Their key principles, however, apply with equal force to local government. As a result, municipal councils are as much obliged to uphold the principles of participatory democracy as are Parliament and provincial legislatures. Further, the duty of Parliament and the provincial legislatures

to involve the public rests on provisions that bear repetition in local government legislation. It can even be argued that the judgements' key principles apply with additional force to local government, since numerous constitutional and statutory provisions compel it to not only strive towards encouraging public participation in general, but also to adopt and adhere to participatory processes.

KEY POINTS

- The impact of the Matatiele judgement on local government serves to strengthen the public participation spaces and processes envisaged in the Constitution and legislation.
- It reinforces the importance of a citizen's voice in our system of participatory democracy and places the onus on local government to ensure that this takes place.
- The municipality has the duty to facilitate public participation by ensuring that citizens have the necessary information and effective opportunity to exercise this right.
- Municipalities must ensure that, in making by-laws and formulating policy, the public is afforded a 'meaningful opportunity' to engage with and contribute to the decisions that affect them.

Value of community participation

Importantly, the Constitutional Court outlined the benefits of community participation as the following:

- It provides vitality to the functioning of representative democracy.
- It encourages citizens to be actively involved in public affairs.
- It encourages citizens to identify themselves with the institutions of government.
- It encourages citizens to become familiar with the laws as they are made.
- It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of.
- It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice.
- It strengthens the legitimacy of legislation in the eyes of the people.

General principles for community participation

The Municipal Systems Act is the primary statute to give effect to the constitutional commitment to community participation in local government. Fundamentally, it defines the municipality as comprising its political structures, its administration and the community of the municipality. The Act thus makes it clear that communities are an integral part of the municipal governance of local government affairs. A municipality must develop "a culture of municipal governance that complements formal representative government with a system of participatory governance".

The complementary nature of participatory governance was elaborated upon by the Constitutional Court in *Matatiele*. The Court observed that it is a principle established by the Constitution itself and firmly rejected the argument advanced by government to the effect that duly elected representatives of the people possess the legitimacy to speak on their behalf and thereby fulfil the requirements of participatory governance. The Court made it clear that, with its commitment to participatory democracy, the Constitution contemplates a role for communities that is additional to the electoral process.

The Systems Act is clear in that it instructs the municipality to not only encourage community participation in the affairs of the municipality, but also to create conditions for it. In terms of the latter requirement, a municipality must contribute to building the capacity of the community to enable it to participate in municipal affairs. Importantly, the municipality must use its resources and annually allocate funds in its budget as may be appropriate for community participation.

Vehicles for community participation

The Systems Act lists structures and mechanisms for community participation. First, participation must take place through established political structures, defined as the municipal council or any committee or other collective structure of a municipality that has been elected, designated or appointed in terms of the Structures Act. Ward committees and subcouncils are the most visible structures that explicitly relate to community participation in municipal governance. However, it is clear from the Systems Act that all other political structures of the municipality have a role to play in facilitating

Photo: Courtesy City of Cape Town

community participation. Second, the Act mentions the councillor as a vehicle for participation, particularly the ward councillor. Third, community participation must take place through mechanisms, processes and procedures established in terms of the Systems Act itself. Fourth, community participation must take place through mechanisms, processes and procedures established by the municipality to enable the local community to participate in municipal affairs.

Enforceability of community participation requirements

A key issue is the determination of the legal nature and justiciability of the various provisions on community participation. Even though compliance with the formal and procedural requirements is easily measured, the question of whether or not there has been substantive compliance is more difficult.

Standard of reasonableness

The Constitutional Court developed a standard of reasonableness to determine whether the degree of public involvement in law making is in line with the Constitution. The standard was adopted and first used in relation to the question of whether Parliament and the provincial legislatures discharged their duties to facilitate the involvement of the public in law making. However, the ambit of the standard of reasonableness extends to all organs of state exercising legislative actions, including municipal councils. A municipality's efforts at involving the local community must therefore meet the same standard of reasonableness.

The legislative actions, i.e. by-laws and budgets of municipal councils, fall to be gauged by the same standard of reasonableness. However, municipal councils are also vested with executive powers. It is suggested that the standard of reasonableness should not be interpreted to apply to a municipal council's legislative actions only. First, a limitation of the Constitutional Court's principles to municipal by-laws and budgets would be contrary to the manner in which the local government legislation has placed community participation central to the entire municipal enterprise. Second, as outlined below, the standard adopted by the Court is not a rigid, formalistic one but is adapted to the context. This renders it capable of application to actions other than legislative actions.

The standard of reasonableness was first used in the *Doctors for*

Life and *Matatiele* judgments. It is, in the words of the Court, "an objective standard which is sensitive to the facts and circumstances of a particular case". The Court stressed that "context is all important". It is therefore not a rigid test, but rather a set of factors that jointly determine whether or not a municipality's regulations, mechanisms and efforts towards community participation are reasonable. Some of these factors are discussed here.

Photo: Courtesy City of Cape Town

Nature and importance of the decision

The nature and importance of the decision to be taken by the municipality must be considered in deciding whether its efforts to involve the community were reasonable. In this regard, the Systems Act puts forward a number of decisions that are deemed of special importance, in relation to which municipalities are thus under a special obligation to ensure participatory decision making.

Efficiency of decision making

The Court stressed, "[r]easonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process". The need to take into account practicalities is echoed by the Systems Act. However, the Court issued a stern warning that "the saving of money and time in itself does not justify inadequate opportunities for public involvement" and, when it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.

Meaningful opportunity

The Court further stressed that the duty to facilitate community participation entails both the duty to afford the opportunity for participation and the duty to ensure that communities are enabled to seize the opportunity. The sum total is a duty to ensure a 'meaningful opportunity'. To engage in public debate and dialogue with elected representatives at public hearings is not all; the municipality has the duty to facilitate public participation by ensuring that citizens have the necessary information and effective opportunity to exercise this right. The concept of a meaningful opportunity also means that participation must be facilitated at a point in the process where involvement by interested members of the public would indeed be meaningful. Clearly, it is not reasonable to seek the involvement of the public at a stage in the process where amending the proposed decision is virtually impossible.

Comment

The impact of the judgments on local government serves to strengthen the public participation spaces and processes envisaged in the Constitution and legislation. It reinforces the importance of a citizen's voice in our system of participatory democracy and in this regard places the onus on local government, as the sphere of government closest to the people, to ensure that this takes place. Municipalities must ensure that, in making by-laws and formulating policy, the public is afforded a 'meaningful opportunity' to engage with and contribute to the decisions that affect them. Municipalities must develop a 'culture of participatory governance', if the vision of developmental local government, so eloquently articulated in the White Paper, is to be realised.

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Community development workers

At the heart of participatory democracy and developmental local government

In his 2003 State of the Nation Address, President Thabo Mbeki announced that "government will create a public service echelon of multi-skilled community development workers". The community development worker (CDW) programme is an effort to deepen democracy at the local level and is intended to give citizens direct access to government in a people-centred way. It is hoped that this people-centred approach will bring government to the doorsteps of individual citizens in keeping with the principles of *Batho Pele* (people first). In this regard, it is not a separate initiative but is designed to support initiatives at the local, provincial and national spheres of government.

Purpose of CDWs

The CDW programme is a strategic government initiative aimed at bridging the gap between government and the communities it serves.

It aims to bring public services closer to the people and to ensure that information on services and development opportunities are accessible so that they may be more effectively used, especially by poor and disadvantaged communities.

The CDW programme therefore strives to give a voice to vulnerable communities and social groups to address inequities of access to services.

Structure

The Offices of the Premiers in all the provinces are responsible for the programme's co-ordination, while provincial local government departments provide the administrative and logistical support.

For actual workplace experience, CDWs will be deployed to municipalities and, in each one, a workplace mentor will guide and support them.

The national, provincial and local spheres of government (are expected to) work in close collaboration to effectively implement the CDW programme.

The Local Government SETA is managing and implementing the learnership programme.

CDW Handbook

The CDW Handbook and National Policy Framework provide guidelines on the attributes, identification, selection and appointment of CDWs and seek to ensure uniformity in the implementation of the programme across all nine provinces.

Funding

The National Skills Fund allocated R70 million for the implementation of the learnership programme based on 10 CDWs per municipality. The Local Government and Water SETA committed a further R4 million to be used for materials development, project management fees, assessment, certification and accommodation of CDWs.

CDW-Gateway

The CDW-Gateway portal is equipped with the latest mobile technology to enable CDWs to log on to the internet and download a range of information.

The Gateway portal is an important tool that will enable CDWs to provide a value-added service. It will provide CDWs with full access to government information without needing to carry the information with them. It will be there at the 'click of a mouse'.

This will enable CDWs to answer a range of questions and requests for information from citizens at any given time, covering all spheres of government.

Role of municipalities

The role of local government includes, among others:

key points

- **The CDW programme is a strategic government initiative aimed at bridging the gap between government and the communities it serves.**
- **The Offices of the Premiers in all the provinces are responsible for the programme's co-ordination, while provincial local government departments provide the administrative and logistical support.**

- supporting the provincial monitoring and evaluation of the activities of CDWs;
- creating an enabling environment for CDWs;
- ensuring that CDWs are effectively integrated into the work ethos of municipalities;
- mobilising stakeholders at municipal and ward level to understand and support the role of CDWs; as well as
- repositioning local government to support, engage and respond to the issues raised by CDWs.

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THEME 14: WARD COMMITTEES AND PARTICIPATION

The legal framework positions ward committees as critical vehicles for community participation. There are laws applicable to their functioning. National government also issued (non-binding) guidelines on the election and funding of ward committees. Lastly, there are guidelines on how ward committee members can be compensated. All of these aspects are discussed in this series of articles.

1. **The Proposal towards a Framework for Establishment of Ward Committees** by Nico Steytler and Johan Mettler, Local Government Bulletin 2001, Volume 3, Issue 1, page 1-4
2. **Guidelines for Ward Committees** by Geraldine Mettler, Local Government Bulletin 2004, Volume 6, Issue 1, page 1-3

Proposals towards a framework for the establishment of WARD COMMITTEES

This article is based on a discussion document prepared for SALGA by the Local Government Project of the Community Law Centre. The article raises a number of issues regarding the principles that should underpin the establishment of ward committees. The guidelines issued by the Karoo District Municipality were most useful in preparing the draft document.

STATUTORY FRAMEWORK

Constitutional mandate

Section 152 of the Constitution establishes representative democracy and participatory democracy as two objects of local government. Through regular elections councillors are elected both in wards and on party lists to represent the residents of the municipality. Participatory democracy is enshrined in section 160(4) where it says that no by-law may be passed unless it has been published for public comment.

National statutory framework

In both the Municipal Structures Act (Structures Act) and the Municipal Systems Act (Systems Act) a statutory framework is established that broadly outlines a system of participatory democracy. The Structures Act gives the bare bones of a ward committee system while the Systems Act devotes chapter 4 to community participation (see p 8).

Municipal by-laws

The national statutory framework allows municipalities to develop, in the words of the Systems Act, 'a culture of municipal governance that complements formal representative government with a system of participatory government' (s 16(1)). The framework for a system of ward committees is best captured in a by-law.

continued on page 2

COMMUNITY LAW CENTRE

SALGA

Ward Committees

PRINCIPLES OF PARTICIPATORY DEMOCRACY

In section 16, the Systems Act sets out two important principles for community participation:

- Participatory governance should not permit interference with a municipal council's right to govern and to exercise the executive and legislative authority of the municipality. The municipal council, which is the product of representative democracy, not only has the sole legal mandate to govern but also, and more importantly, the political legitimacy to do so.
- Given the pre-eminence of the formal representative structures, participatory democracy is there to 'complement' the politically legitimate and legally responsible structures. This means that any community participatory structure may merely add to the formal structures of government, and not replace or substitute them.

While every council must comply with the broad principles of participatory democracy, councils have the discretion to decide whether or not they want to establish ward committees. Where ward committees are established, the principles of participatory democracy also apply to this system.

FUNCTIONS OF WARD COMMITTEES

When devising a ward committee system it is important to proceed from the principle that structure must follow function. After a clear function is identified and clarified, a structure that may best fulfil that function can be established. Proceeding the other way around could defeat the true functions of the system.

What, then, are the functions of a ward committee?

Communication channel

The primary function of a ward committee is to be a formal communication channel between the community and the council. In terms of the Structures Act, a ward committee may make recommendations on any matter affecting the ward to the ward councillor or through that councillor to the council (s 74(a)). Furthermore, a ward committee would be the proper channel through which communities can lodge their complaints. It would also be a forum for communication between the ward councillor and the ward community about municipal issues and development and service options.

A communication channel for the ward community

A ward committee should, in a broad sense, be a communication channel for the entire ward community. The ward committee cannot merely reflect and replicate the existing configuration of the elected council. That would amount to double representation. Nor should it function as a communication channel for the winning party only. The councillor and his or her supporting political structure already perform this function.

A ward committee should also not provide a forum for the losing candidates to fight the municipal election all over again. Minority parties have their own structures within the system of proportional representation (PR) to make recommendations to the council.

With regard to the composition of ward committees, the Structures Act merely states that the procedure for electing members must take into account the need for women to be equitably represented in a ward committee and for a 'diversity of interests' in the ward to be represented (s 73(3)). The philosophy behind this provision is that the interests that have not been accommodated through the formal political processes should be included in municipal governance. The reference to 'a diversity of interests' stresses this point; it should be an inclusive process.

Other functions

The Structures Act provides that a council may also delegate specific municipal duties and powers to a ward committee (s 74(b)). It is difficult to conceive what executive functions a ward committee should be entrusted with. Once a ward committee is given delegated powers, the issue of election procedures will become contested. Any election procedure, unless it is simply a repli-

cation of the councillor election process, will be inherently problematic and provide an insecure base from which to launch executive decisions. It is therefore suggested that no executive functions be delegated to ward committees.

Apart from its primary communication function, a ward committee could also be an important mobilising agent for community action. The Masakhane Campaign could, for example, be bolstered by the participation of such committees. They can also play an important part in mobilising partnerships for the development of local projects.

The ward committee cannot prescribe to the ward councillor how to vote in council meetings. However, it may well call on the ward councillor to resign and pass motions of no confidence in him or her, but it may not impede any of the activities of the councillor in the ward.

It is suggested that no executive functions be delegated to ward committees

IDENTIFICATION OF INTEREST GROUPS

Interest groups that should be accommodated are those that are directly relevant to the core business of the municipality. In other words, they must relate to the municipality's key performance areas in that ward.

Identification of key performance areas of a ward

Because of the wide range of municipal functions and powers, many interest groups could claim an interest in municipal matters. With a maximum of ten members in a ward committee, one should select from a broad range of interest groups those who would be the most relevant to the key performance areas of the municipality in a particular ward. Key performance areas in a ward are those identified through the integrated development planning (IDP) process (see p 6).

Basic services

In most wards, key performance areas relate to the major services that must be delivered: water, electricity, sanitation, roads and storm water. Other social services that are important include health and safety and security. There is no closed list of key performance areas. Additional areas can be identified through the IDP process.

Ward-specific key performance areas

Some key performance areas could be linked to a particular ward. For example, where a large truck stop along a national road is situated in a particular ward, leading to a high prevalence of HIV/Aids in that ward, the combating of Aids would be a key performance area for that ward. The same applies to economic development in wards where central business districts are located. The identified key performance areas of a particular ward should thus be used to identify interest groups.

Interest groups

The interest groups and formations in civil society are varied and can be categorised as follows:

Service or municipal-directed groups

Some civil society organisations are formed with the specific goal of ensuring performance by a municipality in key performance areas. Such organisations include community based organisations (CBOs) and ratepayers' associations. These structures would obviously be candidates for inclusion. However, where such structures have been political actors in the election campaign, they would already have representation in the council, and should not be included.

Specialist groups

The second set of interest groups comprises organisations that focus on a particular issue, which may or may not intersect with municipal activities. A council should thus identify those groups whose specific areas of interest relate directly to the ward's key performance areas. For example, where safety and security is a key performance area, community safety forums may be appropriate interest groups. Other interest groups may include business chambers, informal trader associations, environmental groups, etc.

Occasional interest groups

Groups that belong to this category are those whose interests only occasionally intersect with municipal business. Because of their peripheral and occasional engagement with municipal affairs, they should be excluded. Religious groupings may fall in this category.

Women's groups

The Structures Act requires that women should be equitably represented on ward committees. Does that mean that they must be equitably represented in the various interests groups, or should women be regarded as an interest group in their own right?

The Structures Act does not refer to equitable representation of women under the heading of interest groups. This may suggest that a procedure prescribed in the Structures Act for political parties (that parties must ensure that at least 50% of the candidates on the list are female) should be followed. With usually only one member of each interest group represented on a ward committee, it may be difficult to achieve an equitable result.

The alternative approach is to regard women as an interest group. The most equitable solution would be both to emphasise the need that interest groups' representation equitably represents women and to accept that women form a relevant interest group in their own right.

Rural areas

The model presented here is based on the assumption that there are well-developed, functioning civil society structures formed around specific interests. In some rural areas this may not be the case; interest groups may not have been sufficiently developed for them to represent the ward community adequately. In such a case, geographical spread of representation would be the preferred option.

Traditional leaders

The possible role of traditional leaders, as a particular interest group in a ward committee, will depend upon the outcome of the deliberations between government and the coalition of traditional leaders. It is suggested that traditional leaders should be considered as an interest group within a ward.

ELECTION PROCESS

The Structures Act requires that a council makes rules regulating the procedure to elect members of ward committees (s 73(3)).

Approach

It is important that the council identifies the relevant interest groups which should be represented on the ward committees. This must be done in accordance with objective criteria and in an open and transparent manner. It should occur independently of the ward councillor in question because there is a danger that he or she may attempt to influence the election process. The rules may differ depending on whether there are well-developed interest groups in a ward. This may or may not coincide with a rural/urban divide.

Approach – urban setting

Identification of interest groups

- The council identifies the key performance areas of each ward, e.g. local economic development (LED), job creation, basic services, etc.
- The council invites interest groups to state their interest in and concern with any of the key performance areas.
- The council identifies the groups that have a demonstrable interest in any of the key performance areas and represent residents of the area.
- The council identifies the clusters of interest groups (no more than ten) that qualify for election.

Election procedure

Option 1: Within the ward

- The ward councillor calls a meeting in the ward for the election of a ward committee.
- Only residents who are registered voters may vote at the meeting.
- In each cluster, an identified group nominates a representative.
- The meeting votes by majority (50% plus one) for a representative of that cluster. If no one gets the majority, the top three candidates go through to the next round.

Option 2: Within the council

- The municipal council calls a meeting of councillors for the election of ward committees to which all residents have been invited to attend.
- All councillors are entitled to vote at the meeting.
- In each cluster, an identified group will have nominated a representative.
- The meeting votes by majority (50% plus one) for a representative of that cluster. If no one gets the majority, the top three candidates go through to the next round.

Approach – rural setting

Identification of interest groups

- The council identifies the villages and clusters of farms that will represent an equitable spread of the residents in the ward.
- Each village or cluster of farms is requested to nominate a representative.
- If five or less villages are identified, a male and female representative should be nominated by each village.

Election procedure

Option 1: Within the ward

- The ward councillor calls a meeting in the ward for the election of a ward committee.
- Only residents who are registered voters may vote at the meeting.
- Each village nominates a representative.
- The meeting votes by majority (50% plus one) for a representative of a village.

Option 2: Within the council

- The municipal council calls a meeting of all councillors for the election of ward committees to which all residents have been invited to attend.
- All councillors are entitled to vote at the meeting.
- Each village would have nominated a representative.
- The meeting votes by majority (50% plus one) for a representative of a village.

MEMBERSHIP, PROCEDURES AND RESOURCES

Qualifications for membership

To be elected as a member of the ward committee, a person must be a registered voter in the ward. A person is not eligible for election if he or she works for the local municipality or the district municipality within which the local municipality falls.

Term of membership

Committee members are elected for a term determined by the council (s 75). In order to involve as many people as possible in this structure, a municipality may restrict the tenure of a committee to one or two years. A person's membership could also be restricted to two terms.

Termination of membership

A person's membership is terminated through death or resignation. The council may also make rules regulating the circumstances under which persons lose their membership.

One issue that must be addressed is whether an interest group can terminate the membership of its elected representative. Since the community elects the representative of an interest group, that group cannot unilaterally withdraw the elected person from the committee. The council may, however, make a rule that if the elected person is no longer a member of the interest group that nominated him or her, the person's membership is terminated. Where a person no longer qualifies to be a member, for example, moving out of the ward, membership should also be terminated. Likewise, a person becomes disqualified as a member when he or she gets elected as a councillor.

The vacancy is filled in accordance with a procedure determined by the council (s 76).

Dissolution of the ward committee

The council may dissolve a ward committee if it fails to fulfil its object (s 78). This will happen when a ward committee exceeds its role as communication channel. For example, when the ward committee seeks to prescribe to the councillor what to do or how to vote, it is exceeding its mandate.

Other examples of circumstances under which a ward committee fails to fulfil its object are instances of corruption among its members or when the ward committee is inactive or fails to meet, etc. There should be due notice before a council acts against a ward committee in terms of section 78.

Internal procedures of ward committees

By and large, the ward committee can determine its own internal procedures. The council must, however, make rules regulating the frequency of the meetings (s 73(3)(c)). The ward councillor is the chairperson of the committee (s 73(2)(a)). He or she calls the meetings and presides over them. The municipal council must determine rules for the manner in which a committee may make recommendations or decisions. Similarly, the council must determine the procedure that the chairperson would follow in transmitting a recommendation or decision from the committee to the council.

Participation of PR councillors

A PR councillor has no formal standing in the ward committee and, in terms of the Structures Act, may not be a member of such a committee. The ward councillor as the chairperson of the committee is in charge of the committee. A council may develop a policy setting out how PR councillors may *participate* (as non-members) in ward committees. For example, should a council decide to allocate PR councillors to wards, it may determine that such councillors participate *ex officio* in the proceedings of the relevant ward committees. Such participation may not, however, disrupt the operation of the ward committee.

Resources of the ward committee

The Structures Act leaves it within the discretion of the council to make administrative arrangements to enable ward committees to function effectively (s 73(4)). While no remuneration is to be paid to ward committee members (s 77), this does not prevent the council from reimbursing committee members for travel costs and other out-of-pocket expenses. The council should also provide assistance such as secretarial assistance, venues for meetings, etc. The Systems Act provides specifically that councils must allocate funds annually in their budgets for the implementation of community participation. This should include funds for ward committees.

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Guidelines for ward committees

Strengthening participatory governance

Following a national conference on ward committees in June 2003, the Department of Provincial and Local Government published its long-awaited *Draft Guidelines for the Establishment and Operation of Municipal Ward Committees* (the Guidelines) for comment. The Guidelines aim to streamline the process of establishing ward committees and their internal operations and are a product of comments and suggestions received at the conference.

Powers and functions

Ward committees may be established by all metropolitan and local municipalities that are ward-participatory municipalities. Their objective is to enhance participatory governance and to serve as independent advisory bodies. Although ward committees' powers and functions are left to municipalities' discretion, the Guidelines do provide a list of duties that can be delegated to them. These include:

- advising ward councillors on policy matters affecting wards;
- identifying the needs and challenges that wards face;
- receiving complaints from residents about municipal service delivery; and
- communicating information to wards on budgets, IDPs and service delivery options.

This list is not exhaustive and is there merely to guide municipalities on ward committees' duties and functions. Of importance is that no executive powers can be

Continued on page 2

delegated to ward committees. The Guidelines also include a list of potential capacity building and training programmes for ward committee members.

Composition of ward committees

The election procedure and the composition of ward committees should take women's needs into account and the representation of diversity in the ward. Furthermore, gender equity should be pursued by ensuring an even spread of male and female ward committee members. The Guidelines include a list of interest groups to guide municipalities on their selection. A ward committee may only have ten members but the Guidelines make provision for the establishment of sub-committees to assist them in performing their functions and to involve the community more broadly. Some ward committees cover large areas that include a wide variety of interest groups, which cannot all be accommodated on the ward committee. Sub-committees are helping to ensure the participation of all interest groups in the affairs of the ward committee and to enhance participatory governance. The sub-committees and the ward committee can meet around issues requiring major discussion, forming the ward forum.

Election criteria and procedures

The Guidelines provide for a choice between two types of election models, namely sectoral and geographic representation. These models are only a framework, however, and municipalities can combine and adapt them to suit their needs. In the sectoral model, a council identifies interest groups that focus on the key performance areas of the ward. These interest groups can also form a cluster and nominate a qualifying person for election. In the geographic model, a council identifies the villages and clusters of farms that represent an equitable spread of the residents in a ward. As with the sectoral model, the clusters can also nominate a person who will qualify for elections.

Conduct and meetings

The Guidelines provide that a ward committee can adopt a draft code of conduct. Once adopted, each member of the ward committee must sign the code

of conduct and the ward councillor must implement and administer it within the committee. Municipalities can make rules to regulate the frequency of meetings, though a ward committee must meet quarterly and the meetings should coincide with council meetings. Decisions in the committee are largely taken by consensus or by majority vote. Public meetings should be held to register concerns with the ward and to get input on matters such as service delivery and the general development of the community. The ward councillor should chair these meetings and the community should be notified about them well in advance by radio, posters at clinics, schools, bus stops, and libraries, and/or through notices in local newspapers.

Administrative support and term of office

Municipalities must make administrative arrangements to support ward committees in performing their functions. More importantly, municipalities should allocate resources and allocate funds for community participation. The term of office for members of the ward committees is at the discretion of the municipality, but it may not be less than two years or more than three years. Municipalities should apply the same term of office to all ward committees within their jurisdiction.

Vacancies and termination of membership

Municipalities can determine their own procedure to fill vacancies, but the Guidelines make some recommendations on how it can be done. It is recommended, for example, that the ward councillor declare that the person who received the second highest number of votes in the most recent election is elected to fill a vacancy. If a person cannot be declared elected in this way, the election process must be repeated. Termination of membership occurs as a consequence of the following circumstances: resignation, death, relocation from the ward, election to position of councillor, failure to attend three consecutive meetings without apology, proven involvement in corruption, failure to adhere to meeting procedures, misconduct during ward meetings, failure to submit priorities with the mandate of the community, involvement in proven activities that undermine the council or ward councillor, being dismissed by the executive mayor in consultation with the ward councillor or in terms of a resolution by the ward committee, ceasing to be a member of the organisation the member represents, or being declared insolvent or mentally incompetent by a court.

key points

- No executive powers can be delegated to ward committees.
- No remuneration for ward committee members.
- Composition of ward committees should take women's needs into account.

Budget and accountability

Of importance is that no remuneration is to be paid to ward committee members, though municipalities must budget for members' out-of-pocket expenses incurred in their participation in the committees. The ward councillor must, among other things, keep full and proper records of minutes of meetings, and of the committee's income and expenditure, assets and liabilities and financial transactions. Disputes should be resolved through meditation, and if this fails, through arbitration. Where the majority of members of the ward committee remain aggrieved, the matter can be referred to council through a channel decided by council. A council can dissolve a ward committee if it fails to meet for three consecutive times, when the members decide to dissolve it, or when there is misadministration, fraud, corruption or serious malpractice.

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This article is only a snapshot of the Guidelines, which can be viewed in full at www.communitylawcentre.org.za/links.php

THEME 15: LANGUAGE

How does a municipality deal with language diversity? There is a constitutional framework for language rights and accommodating the languages spoken in the municipal area is a crucial aspect of involving communities and residents in the municipality's affairs. These two articles provide background to these questions.

1. **Facing the Language of Challenge** by Hennie Strydom, Local Government Bulletin 1999, Volume 1, Issue 4, page 6-8
2. **The Guidelines for Multilingualism in Local Government** by Leah Cohen, Local Government Bulletin 2008, Volume 10, Issue 3, page 14-15

Facing the language challenge

The entrenchment of multi-lingualism in section 6 of the 1996 Constitution confronts the South African government with the obligation to design and put into practice a language policy that will give effect to the constitutional directives on multi-lingualism.

The purpose of this contribution is to first focus on the theoretical and practical issues that are likely to emerge from an interpretation and application of section 6 of the 1996 Constitution which provides for the officialization of eleven languages. How local governments understand and cope with the constitutional obligation to put into practice a policy for the advancement of multi-lingualism that complies with the provisions of section 6 is the follow-up theme. The commentary on the latter issue is based on a survey that was undertaken in early 1999 amongst 79 local government structures in the Free State Province to determine the status of language policy and planning on local government level against the background of the constitutional directives for local governments contained in section 6 of the Constitution.

The structure of the official language clause

The results of the survey, some of which will be discussed later on, show that there is, amongst the municipalities surveyed, no clear vision as to how the official language clause of the constitution should be applied. At least part of the blame for this confusion must be attributed to the lack of clear guidance contained in the official language clause itself on when and to what extent the declared official languages should be used in the official business of municipalities. The basic problems regarding section 6 are the following:

First, section 6, on the one hand, states that official languages should enjoy parity of esteem and be treated equitably (section 6(4)), but on the other hand, provides that in the actual choice of language for government use, cognisance should be taken of factors such as usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned (sections 6(3)(a) and (b)). Clearly, in practice these subsections, when applied in isolation, can and do point municipalities in different directions. Section 6 itself does not provide any clear indication of how these subsections are supposed to inter-relate. This results in a practice where they are applied individually and separately, depending on which subsection serves the political interest at stake.

Second, the factors themselves differ in nature and could also, in the absence of any guidance on their relative importance, cause arbitrary decision-making when some are emphasised and others ignored.

Third, municipalities are treated separately from national and provincial government, in the sense that the normative guidelines for official language policy that are prescribed for national and provincial government are not repeated in the case of municipalities, and only some of the prescribed practical factors to be taken into account in language choice, are provided for in the case of municipalities. This creates confusion as to whether the same basic principles governing official languages on the national and provincial level, also apply to local government.

In what follows, these problems will be addressed and a framework for the application of the official language clause will be proposed.

Normative guidelines and factors for official language policy

The Constitution now provides three basic normative guidelines that should inform the formulation of language policy and legislation. Section 6(4) states that the national and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages, but that all official languages must enjoy "parity of esteem and equitable treatment". Regarding indigenous languages specifically, section 6(2) provides that the state must take practical and positive measures to "elevate the status" and "advance the use" of these languages. Section 6(3)(a) provides that in the actual choice of language, the national government and the provincial governments shall take into account a number of practical factors such as usage, practicality, expense, and so on. Regarding municipalities, section 6(3)(b) states that municipalities must take into account the language usage and preference of their residents. There is certainly no shortage of instances where economic concerns, or considerations regarding communicative effectiveness, or sometimes even a specific concept of nation-building have been used to brush aside claims for the recognition of language diversity and equity. From the survey, it appears that language choice is often based on one or more of these factors only, without relating them to the guidelines or any reflection on their collective or individual relevance as such.

The subsections ought to be related to one another in a way that respects the principle of constitutionalism and affords a legal meaning to all, which does not reduce any to a mere non-binding symbolic status. It is submitted that the factors can only have the function of providing a justificatory basis for limiting and balancing competing language claims in actual situations. This view of the relationship between the factors of section 6(3)(a) or (b) and the normative directives of parity of esteem, equitable treatment and development is attractive in that it provides a framework for a coherent understanding of the language clause with the potential to integrate its constituent elements. This puts the normative guidelines and the limiting factors into a relationship of rules and their exceptions.

If, as has been argued, section 6 contains a clear instruction to recognise language diversity and equity, then the purpose of the qualifying factors is not to release the state from the duty to fulfil this obligation. It is, of course, self-evident that the promotion of parity of esteem and equitable treatment of languages cannot be approached in a mechanical way, but must take into account factors such as the relative level of development of languages, the measure of historical disadvantage or privilege of specific languages, and their geographical distribution. The qualifying factors mentioned in section 6(3)(a) and (b) obviously also have the purpose of keeping all language claims within reasonable bounds and providing a basis for the integration of these claims with other constitutionally

recognised interests and concerns. However, practical considerations of feasibility cannot be allowed to dictate language policy with the same force as the clear constitutional commitment to the promotion of language equity, diversity and development. Therefore, no organ of state may approach section 6 with the sole motive of finding loopholes in it only to justify its lack of commitment to overcoming the practical problems encountered while striving for the realisation of the constitutional directives of parity of esteem and equitable treatment of all official languages, as well as the development of the neglected indigenous languages.

Municipalities

It is noteworthy that municipalities are treated separately and that the criteria for language use are reduced in the case of local government. Municipalities are to apply only one demographic criterion, "usage", and one attitudinal criterion, "preferences of their residents". In terms of language demographics, it seems reasonable that a more flexible and individualised approach be allowed at the local level, since national or even regional language demographics are not necessarily replicated in each municipal area within a particular region. This allows a municipality to have a different official language profile from that of its provincial government or even those of its neighbours. It also stands to reason that, owing to vast discrepancies in the financial capacities of individual municipalities as well as differences in the governmental mandates of various municipal structures, it would be difficult to formulate uniform guidelines for municipalities, particularly in respect of the task of the development and promotion of official languages. It is, nevertheless, difficult to explain why some of the factors to be taken into account in making language choices at the national and regional levels are not repeated at the local level. Most noticeably, no reference is made to factors such as expense, practicality or the language needs of residents. Above all, it is not clear why the principles of parity of esteem and equitable treatment of official languages are not repeated in section 6(3)(b). Whatever the case may be, it is submitted that this separate treatment of municipalities must not be read to mean that they, as the third sphere of government, stand completely unintegrated in the over-all constitutional scheme for official language policy. Within the ambit of their own governmental mandate, municipalities should comply with the general obligation to respect and promote official multi-lingualism.

Language planning and policy on local government level

Only some results of the survey are being dealt with here. For a more comprehensive account see Strydom & Pretorius "How do local governments cope with multi-lingualism?" in 2 *Tydskrif vir Regswetenskap* 1999.

How local governments handle multi-lingualism

In response to the question: How do you handle multi-lingualism? 40,5% of respondents indicated that English is used predominantly, while other languages are allowed and accommodated, apparently by means of interpreters and translation facilities as 15,2% of the respondents have indicated. In 15,2% of the cases Afrikaans and English are used alternately and/or simultaneously while 7,6% of the respondents decided on Afrikaans only and 6,3% on English only. Only 1,3% indicated that Sesotho, the dominant indigenous language, is used predominantly and in such cases minutes of meetings are made available in English only.

The vast majority of municipalities has not yet adopted an official language policy.

Responses to open, unstructured questions aimed at eliciting further explanations disclosed a pragmatic approach determined by the exigencies of the occasion. Debates and reports are predominantly in either Afrikaans or English and when another language is used (mainly in debates) translation takes place, often by other members in the Council, as opposed to a professional translation or interpretation service. What is abundantly clear, however, is that the language that the majority can understand tends to dominate.

The adoption of written language policies

A high percentage (60,8%) of local governments have indicated that they have no official written language policy and of this figure 95,8% have indicated that no steps are being taken to rectify the matter. Reasons given for this attitude were either that such a policy is not a priority or that a resolution has been taken that English will be used during Council meetings.

Local government councils that had adopted written language policies amounted to 39,2%. A question on the content of such policies elicited responses that once again indicated that the language policy amounts to little more than the officialization of English and Afrikaans as dominant languages by virtue of their utilization. Of the respondents 41,9% have indicated that English is both the spoken and written language while other languages are used only in the spoken form. In 25,8% of the cases English is the only language medium while according to 19,4% of the respondents minutes and reports are made available in both Afrikaans and English. Only 12,9% of the respondents followed a policy that accommodates all three dominant languages (in terms of users as opposed to mother tongue speakers) in the region by means of interpreting and translation services. Responses on the content of language policies must be read in conjunction with the responses on local governments' familiarity with section 6 of the Constitution. Of the respondents 86,3% have indicated that they are familiar with the provisions of section 6, and 85,7% have indicated that section 6 was taken into consideration when the language policy was determined. The only reasonable conclusion to be drawn from these and other responses is that local governments either did not understand the implications of section 6, or if they did, section 6 was for some or other reason not implemented.

With regard to the question: Has the policy been made known to staff and the public? an interesting discrepancy seems to prevail. While 87,1% of respondents communicated their policy to staff, mainly by means of circulars and memos, 67,7% did not communicate the policy to the public at all. Whether this lack of external dissemination of information on language policies is owing to the fact that the majority of Councils still consider such issues as internal in nature and not of importance to the communities they serve, is difficult to tell.

Whether local governments deem their handling of multi-lingualism sufficient for effective communication, or not?

Councils that responded negatively (12,5%) cited as reasons the domination of Afrikaans and English (which makes communication with the Sotho-speaking public problematic) and the absence of official interpreting services.

Councils that were upbeat (87,5%) about their effective communication showed a considerable amount of complacency with regard to the fact that no problems are experienced since everybody understands (as opposed to prefers) the languages used, which invariably turn out to be Afrikaans or English or both.

As far as obstacles were concerned the majority of responses can be grouped

Facing the language challenge

together according to the following categories:

- The absence of terminology in the African languages;
- The costs involved in providing a multilingual service coupled with the poor financial situation of local governments;
- The shortage of trained professional staff to provide translation and interpretation services.

Although respondents mentioned these issues in order to betoken the nature of the obstacles, the vast majority (60%, 85% and 76,2% in the sequence of the three listed categories) indicated that these are not considered to be problems, which perhaps means that the obstacles are considered to be surmountable. This positive assessment of the respondents, especially with regard to the first two stumbling blocks, could be somewhat unrealistic if it stems from a perception that the stumbling blocks can be overcome with relative ease. Developing the terminology in African languages to make them effective for present-day communication may take longer than initially anticipated. Secondly, the financial situation in local government structures throughout the country does not seem to have entered a phase that points to a meaningful recovery in the near future.

Determining the language preferences of the community and the need to promote African languages

The language preferences of communities had been determined in the areas of only 35% of the respondents. The vast majority (62,5%) had not taken any steps in this regard while 2,5% were uncertain or did not know whether any steps had indeed been taken.

Opinion polls or surveys seem to be the dominant strategy (35%) adopted to determine the language preferences of communities. In 28,6% of cases an assessment of the language preferences was made after informal conversations with members of the community or on receipt of feedback after ward or mass meetings.

Those local governments which had not made any assessment indicated that they would opt for opinion polls (36%) or mass, ward or community meetings (22%) to determine the language preferences. Interesting, however, is the fact that 22% of respondents in this group indicated that it was unnecessary to determine the language preferences of the community since the local government knows the language profile of the community and is fully aware of the community's needs and preferences. Another interesting result of the survey in this category is that 20% of respondents indicated that they had no specific idea or plan on the strategy to be followed.

Somewhat startling results were obtained in response to the question concerning the policy of local governments to promote African languages. In 93,7% of cases no such policy exists. To the question: How would the Council go about promoting African languages? 42,7% responded that they had never thought about it or did not know; 38,7% suggested training courses while 12% adopted the view that it was unnecessary to promote African languages since they were not used by the respective local government Councils.

Any significant change in the demographics of council membership or the municipal workforce might radically alter the standing of a particular language.

Concluding remarks

A number of points emerge when the results of the survey are interpreted in terms of the constitutional obligations of municipalities in terms of section 6.

On the level of municipalities' understanding of the constituent elements of the official language clause, what appears is a general tendency not to interpret this clause as an integrated whole. As was explained above, the formulation of the clause itself must carry some part of the blame. However, especially in regard to municipalities' inactiveness regarding the development of indigenous languages, practical factors are allowed to dictate decisions on a level completely undermining the constitutional obligation of increasing the usage and promoting the status of such languages. In particular instances, this also happens in decisions regarding the official use of Afrikaans or English.

There does not seem to be any unequivocal awareness of and commitment to the intent of the official language clause as a binding directive for the promotion of multilingualism. It has been noted above that a natural outcome of such an awareness and commitment would have been a formal official language policy providing some regulatory system for the use of official languages in the normal business of municipalities. The survey has brought to light that the vast majority of municipalities has not yet adopted an official language policy, and neither are any such policies in the planning phase. The low status of official language policies in the range of priorities of municipalities is further underscored by the fact that of those municipalities that did adopt a formal policy, almost 70% did not deem it necessary to communicate its contents to the public at all.

As a result of the above, it is not surprising that the de facto use of official languages by municipalities is not so much dictated by a considered application of the Constitution, as the result of pre-existing socio-linguistic patterns informally transplanted into official local government business. It has to be said that this form of informal accommodation of language preferences, with some notable exceptions, seems to have provided a reasonable successful format for addressing language conflicts. The survey indicated that language complaints comprise only a small percentage of the total of complaints received by municipalities. The vast majority of respondents also stated that language has not been experienced as a problem during council meetings. It would be wrong, however, to deduce from this that language is not a politically volatile issue. The present approach clearly harbours inherent dangers. Its extent of language accommodation relies largely on personalities, relationships and the strength and persistence of historical patterns of inter-personal language use. Should these informal mechanisms become dysfunctional and fail to prevent or address language conflict, there is nothing to fall back on which may provide an acceptable basis for its resolution. A great many factors have the potential of undermining the effectiveness of the present pattern of informal accommodation. For instance, any significant change in the demographics of council membership or the municipal workforce might radically alter the standing of a particular language in the internal and external communication of a municipality; present language accommodation might be the outcome of political compromise or expediency, wiped out by a different constellation of events in the future, etc. A legal framework for official language use, based on the Constitution, remains an essential ingredient in the resolution of language conflict.

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GUIDELINES FOR

Multilingualism in local government

AMBITIOUS RHETORIC OR A REALISABLE GOAL?

The Department of Provincial and Local Government (DPLG) recently announced draft Guidelines for Implementing Multilingualism in Local Government.

Multilingualism refers to "the ability of societies, institutions, groups and individuals to engage on a regular basis, with more than one language in their day-to-day lives". The implementation of multilingualism at the municipal level aims to promote more effective participation and civic engagement by removing the language barriers to communication between local government and its community, improving communication within local government, and promoting cultural and linguistic diversity through the greater use of African languages.

The draft Guidelines attempt to provide for more systematic arrangements in meeting the linguistic needs of those who lack proficiency in English, or who are illiterate or disabled.

Legal requirements of multilingualism for local government?

The Constitution, together with the Municipal Systems Act, require local governments to "take into account the language preferences and usage in their municipality; and the special needs of people who cannot read or write" for all internal and external communication.

Councils are responsible for determining the official language(s) for the municipality based on local "language preferences and usage" and all public notifications must be communicated in these languages. In addition, councils must provide for the language needs of those who are not proficient in the official languages and render assistance to people who cannot read or write. This would include services such as interpretation at ward committee or other public meetings, translation and other support for inviting and submitting comments, assistance in completing required forms, as well as aspects of communication regarding service delivery and internal administration. How a municipality provides for additional language needs and assistance is left to the municipality's discretion.

What is proposed by the draft Guidelines?

The draft Guidelines comprise a set of recommendations for implementing multilingualism at the local level. They are not compulsory. The recommendations focus on three main steps for implementation:

- developing a language policy detailing the municipal position and procedures regarding communication, capacity building, administration and financing for language-related issues;
- establishing a municipal language unit to develop and administer the policy; and
- engaging ward committees and community development workers in implementing multilingualism.

Developing a language policy

Municipalities are encouraged to assess their community's language needs and formulate a language policy that addresses them. The policy is expected to cover internal and external forms of spoken and written communication, including language of record, labour relations, workplace training, translation and interpretation, monitoring and evaluation and mechanisms for engaging the public on language-related issues.

Establishing a municipal language unit

The Guidelines recommend establishing municipal language units to develop and implement the language policy. These units would be responsible for all language-related needs, including conducting language needs assessments; coordinating language needs related to communication, interpretation, and translation; helping to mainstream language policies into municipal strategies and processes; conducting training and capacity building; raising

awareness of multilingualism within both local government and the community and monitoring the implementation of municipal language policy. These units should also manage municipal participation in district, provincial and national language forums responsible for coordinating progress on the development and implementation of multilingualism and for discussing the promotion of African languages.

The Guidelines also mention the establishment of an office to deal with language-related enquiries and complaints, but do not specify how this structure relates to the proposed language units.

Engagement of ward committees and community development workers

As the crucial link between the community and the municipality, the Guidelines see a key role for ward committees and community development workers. They are expected to engage communities in developing a municipal language policy as well as ensure that multilingualism is mainstreamed in participatory planning and service delivery on an ongoing basis.

Ward committees, in cooperation with community development workers, are specifically expected to: draw up a language charter for the use of multiple languages in different sectors (e.g. housing, transportation, education); support multilingual IDP analysis, in which community inputs and documentation are provided in local languages and then translated into English and identify additional gaps and language-related barriers to service delivery.

What are the cost implications?

Budgeting for multilingualism will occur through the Medium-Term Expenditure Framework. The cost implications of implementing multilingualism are clearly substantial. Funds will be required for staff, materials and equipment for the new municipal language units; technical assistance in developing language policies; training for municipal staff and elected officials; campaigns to raise public awareness; translation of public documents; participation in local and regional forums; and fielding enquiries and language-related complaints.

Sample costs for the establishment of national language units were approximately R18.2 million over a three-year period from 2003 to 2005. While costs for the establishment of municipal units are expected to be much lower, if implemented on the scale envisioned, expenditures are still likely to be considerable.

Photo: LUCKY MORAJAN/PictureNET Africa

Comment

The draft Guidelines fail to provide clear direction on implementing multilingualism in local government. This results from four main weaknesses. First, it fails to identify the language-related barriers to effective participation and service delivery at the municipal level. Without a concrete evaluation of the language-related needs of different types of municipalities, it is difficult to gauge the extent of the problems and develop relevant solutions. Although a detailed needs assessment would still be required for each municipality before developing its own language policy, better identification of the different challenges that municipalities face is necessary to evaluate the ability of the Guidelines to provide effective guidance in implementing multilingualism.

Second, no accommodation is made for differences in strategy between urban and rural municipalities or municipalities of different sizes. For instance, implementing the recommended approach is likely to be inappropriate for those rural municipalities which have fewer languages spoken within their boundaries than in the larger metropolitan municipalities.

Third, the entire exercise begs the question of whether this complex structure is really necessary for addressing multilingualism at the municipal level.

Finally, the Guidelines envision the creation of a further layer of bureaucracy at some fiscal burden to municipalities and without any indication that such an unwieldy structure is required for meeting local needs. DPLG still has considerable work to do before the Guidelines will provide a useful tool for realising multilingualism in the local sphere. Municipalities would be wise to exhibit creativity and discretion when deciding how to realise this mandate.

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THEME 16: APPOINTING A MUNICIPAL MANAGER

Appointing a municipal manager is one of the most important decisions a municipal council makes. There are many rules and regulations applicable to the process and criteria for appointment of a municipal manager. In this theme, there are articles dealing with a few particular issues, such as the extension of a municipal manager's contract and the question as to who in the municipality may deal with the suspension and dismissal of a municipal manager.

1. **Extending the Municipal Managers Contracts** by Nico Steytler, Local Government Bulletin 2006, Volume 8, Issue 3, page 18-19
2. **Who Can Dismiss Municipal Manager?** by Nico Steytler, Local Government Bulletin 2005, Volume 7, Issue 3, page 7-9
3. **Who can Suspend the Municipal Manager?** by Reuben Baatjies, Local Government Bulletin 2008, Volume 10, Issue 3, 20-21
4. **Delegating the Power to Preside over Disciplinary Appeal** by Douglas Singiza, Local Government Bulletin 2008 Volume 10 Issue 4, page 25-26

EXTENDING Municipal managers' CONTRACTS

From the COURTS

Mgoqi v City of Cape Town
3619/06

The change of government in the City of Cape Town Metropolitan Council has also seen a change in the office of the municipal manager. Although the decision of the Cape High Court in *Mgoqi v City of Cape Town* dealt with a number of issues, at the core of the dispute was whether the outgoing mayor could have extended the contract of the then-municipal manager, Wallace Mgoqi.

The facts

The municipal manager's three-year contract was due to end on 28 February 2006, one day before the local government election. Although in the latter half of 2005 he was promised by the mayor that his contract would be extended, the matter was not put on the agenda of the last meeting of the council in December 2005, at which it was decided to go into recess pending the 1 March 2006 election. By mid-January 2006 the mayor sought to deal with the extension of the contract. The City's legal advisor suggested three options:

(a) Convening a council meeting because, in terms of the Municipal Structures Act, the council must make the appointment of a municipal manager.
(b) The mayor using her delegated power to make an acting appointment for six to 20 working days.
(c) Changing the system of delegations to make the mayor capable of appointing the municipal manager.

The mayor was of the opinion that it was not feasible to convene a council meeting so shortly before the election. The municipal manager was also not interested in taking an acting appointment for up to 20 days. The remaining option involved assessing whether the mayor could make the appointment in terms of the City's system of delegations, or whether the system needed to be changed to allow this.

key points

- As this case highlights, council is the key decision maker in the appointment of municipal managers and the extension of their contracts.
- It is a function that cannot be delegated.
- Contracts therefore cannot be negotiated and signed at the last minute.
- A municipality's system of delegations must therefore be carefully framed and then observed.

City's system of delegation

In the system of delegation then in operation, clause 5.2.10 provided:

> When the Council goes into recess, the Executive Mayor, in consultation with Municipal Manager, takes decisions on behalf of the Council or any of its Committees, where the failure to exercise such delegated authority as a matter of urgency would, in the view of the Executive Mayor, prejudice the Council and/or its services.

The difficulty, the legal adviser pointed out, was that the executive mayor could not consult with the municipal manager on extending his own contract because that would be a clear case of conflict of interest. The only option open, which the legal adviser described as legally complex, was for the mayor, in consultation with the municipal manager, to change the delegation. The reference to consultation with the municipal manager was deleted "solely for purpose of considering an amendment to conditions of service of the Municipal Manager". Having changed the delegation thus, on 16 February 2006 the executive mayor, acting alone, extended the manager's contract for one year, to 28 February 2007.

With the election of DA-led coalition, the new council first attempted to review the delegated decision in terms of the Municipal Systems Act, which provides that a council must review a delegated decision when requested by more than an quarter of its members. It was against the calling of the meeting to do so that the first legal challenge came from the municipal manager. When the matter came before court, the central issue was whether the municipal manager's contract was lawfully extended.

Argument

The validity of the extension of the municipal manager's contract was challenged on three grounds:

First, the council cannot delegate the decision to appoint a municipal manager to the mayor; it can only be done by the council. The Court held that section 82 of the Structures Act is clear: the appointment of a municipal manager is the task of the council and cannot be delegated to the executive mayor.

The first alternative ground of challenge was that the City's system of delegation did not allow for the executive mayor to extend the contract acting alone. The City's system even provided that the determination of the municipal manager's remuneration rested with the council. The Court agreed that the only delegated power the mayor had was to extend the contract for a maximum of 20 days.

The final ground of challenge was, then, whether the power delegated to the mayor could be amended by the mayor, acting in consultation with the municipal manager, in order for the mayor to act alone when appointing the manager. The Court held that the mayor could not, whether in consultation with municipal manager or not, amend the terms of her own delegated power by removing the requirement that the mayor had to act in consultation with the manager during recess, when dealing with the manager's appointment. The recipient of delegated power is confined to the powers so delegated and cannot change the terms of the delegation.

Two of the defences the municipal manager raised are important. First, it was argued that if the manager was not validly appointed after 28 February 2005, then all actions following on the invalid extension of the contract must also be invalid. The first meeting of the council, called by the municipal manager, was thus invalid as were all other actions of the council, including the election of the speaker and mayor and so on. The Court rejected this argument and held that an invalid action remained in existence until set aside by a court. All actions done in terms of invalid act, remain valid.

The second defence of the municipal manager was one of estoppel; the council could not renege on promises of the executive mayor that the municipal manager would be reappointed. The Court disagreed: no representation was made to the municipal manager by the council on which council could be estopped from acting against him.

Decision

The Court concluded that the municipal manager's contract was not validly extended and thus on the termination of his original contract his employment lapsed on 28 February.

Comment

The case illustrates two important matters. First, the importance of council was highlighted as the sole decision maker when it comes to the key appointment of municipal managers and the extension of their contracts. It is a function that cannot be delegated. This means that contracts cannot be negotiated and signed at the last minute. Second, a municipality's system of delegations must be carefully framed and then observed.

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Who can dismiss a municipal manager?

The recent controversy surrounding the municipal manager of the Central Karoo District Municipality raised important questions regarding which sphere of government is responsible for the conduct of a municipal manager. Ultimately, who has the power to dismiss a municipal manager?

The Truman Prince controversy

The municipal manager of the Central Karoo District Municipality, Truman Prince, faced public accusations that he made lewd remarks towards under-aged women (as captured on a Special Assignment broadcast), followed by allegations of unseemly conduct. A number of institutions became involved in the matter. First, the Municipal Council suspended Prince pending a disciplinary hearing and later lifted the suspension. Second, the South African Local Government Association (Salga) sent a report

about the manager to the council, recommending suspension. Third, the Western Cape MEC for Local Government directed the council to suspend Prince. The Premier of the Western Cape also expressed his unhappiness about the matter. Fourth, the ANC, the party to which Prince belonged, held a disciplinary hearing, found him guilty of misconduct and gave him a warning. Fifth, a children's rights organisation called on President Mbeki to intervene.

Which of the above-mentioned institutions is responsible for a municipal manager? Who is responsible for good governance in a municipality? These questions go to the heart of our local government system.

Constitutional framework

One of the fundamental elements of our new constitutional dispensation is the division of public authority between the three spheres of government: national, provincial and local. The Constitution affords a municipality the right to govern, on its own initiative, the local government affairs of its community, within the framework of national and provincial legislation. The national and provincial government must respect this right and may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

The municipal council

The municipal council, democratically elected by the residents of a municipality, has the power to appoint the municipal manager and dismiss him or her on the basis of misconduct. It can also suspend a municipal manager pending a disciplinary hearing. A municipal manager is subject to a code of conduct which includes the duty to act at all times in the best interest of the municipality in such a way that the credibility and integrity of the municipality is not compromised. Where there are allegations of misconduct, there is a duty on the council to act speedily: it must be decided whether a manager must be suspended pending a disciplinary hearing.

key points

- **The municipal council has the power to appoint a municipal manager and dismiss him or her on the basis of misconduct.**
- **A municipal manager is subject to a code of conduct which includes the duty to act at all times in the best interest of the municipality.**
- **Where there are allegations of misconduct there is a duty on the council to act speedily.**

The question is then what happens if a council, regardless of self-evident offences by a municipal manager, does not want to act against the person? In the first instance, the onus rests on the residents, through the ward committees, to carry their voice across to their council members or directly to the council. This is the nature of democracy at local level.

If they are unsuccessful, it is not the end of the story. Other bodies and spheres of government also have an important role to play.

Organised local government

Salga, which represents all municipal councils, has as its aim the protection of local government interests. This includes the assurance of good governance. Salga can, however, only make recommendations to its members. By submitting a report on the Prince case, the principle that local government can solve its own problems without interference from elsewhere was strengthened.

MEC for Local Government

Within the framework of the Constitution, the provincial government, namely the minister

responsible for local government, holds a supervisory competence and duty over municipalities. Empowered with this competence, provincial government can regulate the business of municipalities. Regulation does not include the usurpation of decision-making on behalf of municipalities. There is a duty to monitor whether municipalities remain within the four walls of a law. There is also a duty to support and strengthen municipalities so that the latter will be able to properly execute their functions. This includes giving advice. Unless a municipality does not comply with a constitutional or legislative obligation, the provincial government cannot intervene.

When a municipal manager faces charges of misconduct, the provincial government can do a number of things. First, it should closely monitor whether the municipal council complies with its legal duty, including enforcing the code of conduct among its employees. Second, advice can be given regarding concrete situations. Third, if the municipal council does not meet its legal obligations, the MEC for Local Government may issue a mandate obligating the municipality to act. If the municipality refuses to act, the provincial government may implement that legal duty on behalf of the municipality.

National government

Within the constitutional framework, the national government plays an indirect role only, by setting the framework within which local government operates. The duty to monitor and intervene rests on the provincial government and not the national government.

Political parties

When local politicians are accused of corruption and misconduct, political parties are central to the issue. In terms of the Constitution, if a councillor loses his or her membership of a political party (outside the floor-crossing window period), their position on the council is forfeited. Thus, the political party in control of a municipal council can dispense of a corrupt mayor by expulsion from the party.

This is not possible with regard to municipal officials. A municipal manager is appointed by the council and can only be dismissed by that council, not through the party of which he or she is a member. Nonetheless, a political party plays an important, indirect role. The expulsion from membership and the conducting of disciplinary hearings is a clear message to the community and municipal councils about the seriousness with which a party views good governance. Complacency is equated with condoning misconduct.

Good governance should triumph if the institutions and sphere of government observes their respective powers and functions.

Conclusion

Whether a municipal manager remains in his post as municipal mayor will be decided by the municipal council. It will be influenced by the advice of other municipalities, as voiced by Salga. A political party may influence the council by conducting disciplinary proceedings against its members and, in the appropriate circumstances, dispelling a member from the party. An MEC may give advice on what good governance means in the circumstances. The provincial government may intervene if the municipal council does not meet is legal duties. Good governance should triumph if each institution and sphere of government observes its respective powers and functions.

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WHO CAN SUSPEND

The municipal manager?

From the COURTS

Mbatha v Ehlanzeni District Municipality and Others (Labour Court of SA) (J1392/2007) [2007]

Section 56 of the Municipal Structures Act provides that the executive mayor is obliged to perform duties and exercise such powers as the council may delegate in terms of section 59 of the Municipal Systems Act (the Systems Act). Section 55 of the Systems Act deals with the obligations of municipal managers and provides that the municipal manager is accountable only to the municipal council.

Facts

The municipal council of the Ehlanzeni District Municipality (the Council) held a special meeting on 4 May 2007 in which it passed a resolution to suspend the municipal manager because of allegations of misconduct. The Council delegated the mayor to deal with the allegations until the issue was finalised and the mayor subsequently issued a suspension notice to the municipal manager.

A few days later, the Council revoked its earlier resolution and lifted the suspension. However, on 17 May the Council held another special meeting and passed another resolution, again giving the mayor authority to suspend the municipal manager. The intention of the suspension was apparently to create a free and uninhibited environment to investigate the allegations against the municipal manager. The Council's delegation to the mayor entailed the following powers:

- the decision to suspend the municipal manager;
- the implementation of that decision;
- the authority to take the necessary decisions to have the required disciplinary procedures instituted against the municipal manager; and, if necessary; and
- to appoint an acting municipal manager as and when needed.

key points

- It is normal for a municipal council to delegate the implementation of a decision.
- For example, the mayor can be delegated to implement the council's decision to discipline and/or suspend a municipal manager.
- However, this must be distinguished from the power to take decisions reserved exclusively for the council.
- There are some powers that cannot be delegated by the council.
- The power to hold the municipal manager to account, including his/her suspension, is one such power.

On 29 May the executive mayor suspended the municipal manager with immediate effect on full remuneration in order to investigate the allegations against him.

Issues

The issue before the court was whether a council can delegate, to the mayor, the power to charge and suspend a municipal manager.

Argument

The municipal manager argued that the council resolution was invalid as it delegated to a political office bearer, in this case the executive mayor, the power to suspend and institute disciplinary proceedings against him. Such power, he argued, cannot lawfully be delegated. A delegation can only be lawful if it conforms to enabling legislation. He conceded that, naturally, a municipal council may and indeed must logically authorise persons to *implement* its decisions. However, that must be distinguished from the power to *take* decisions reserved exclusively for the council. The resolution was invalid precisely because it failed to make that distinction.

The Council argued that the execution of the resolution was an administrative and operational necessity that was within the Council's discretion to delegate to the executive mayor.

Judgment

In its assessment, the Court considered that section 60 of the Systems Act permits the delegation to an executive mayor of the power to determine or alter the remuneration, benefits or other conditions of service of the municipal manager. The Court observed that this came very close to giving the Council authority to delegate to the executive mayor the power to discipline the municipal manager. This is because the Systems Act does not stipulate how far the delegated powers of the executive mayor may go in changing the municipal manager's conditions of service. However, the Court held that it is:

> …inevitable that, in the execution of their statutory duties, a conflict might arise between the municipal manager and mayor. It would not be desirable, in the administration of justice, that the municipal manager must live with a constant fear that, in the event of such conflict, the municipal manager is at the mercy of a mayor with disciplinary powers.

After analysing the provisions of the Structures and Systems Acts in relation to delegations and municipal managers, the Court agreed with the municipal manager's argument that it is:

> ...plain that these provisions do not envisage the municipal manager being accountable to any political office-bearer, including the Executive Mayor, but rather being accountable to Council itself. There are some powers that cannot be delegated and the power to hold the Municipal Manager to account is one such example.

The Court held that the municipal manager is not accountable to any political office-bearer, including the Executive Mayor, because "it would not be desirable, in the administration of justice, that the municipal manager must live with a constant fear that, in the event of ...conflict, the municipal manager is at the mercy of a mayor with disciplinary powers."

The Court considered the municipal manager's concession that, naturally, a municipal council may and indeed must logically authorise persons to implement decisions taken by it. For example, once a decision to discipline and/or suspend a municipal manager has been considered and taken by the council, the mayor may take appropriate steps as required by law, in the execution of that decision. However, that function must be distinguished from the power to take decisions reserved exclusively for the council.

The Court held that the delegation was invalid because it failed to distinguish between the power to *take* decisions and their *execution*. The delegation removed the power from the Council and wholly delegated it to the executive mayor. As a result, the resolution unlawfully delegated to the mayor the power to decide to suspend the applicant and to decide whether or not to institute disciplinary proceedings against him.

Comment

Any decision to take disciplinary action against a municipal manager, be it suspension or dismissal, must be taken by the Council itself. The execution or implementation of that decision can be delegated, but not the decision itself. Councils should thus take care when delegating powers to ensure that they distinguish between the powers and their execution, particularly the delegation of so-called 'non-delegable' powers. Only the execution or implementation of such powers is delegable.

Reuben Baatjies
Managing Editor

DELEGATING

The power to preside over disciplinary appeals

From the COURTS

Bester v Sol Plaatje Municipality and Others [2004] 9 965 (NC) High Court of Northern Cape Division 19/12/2003.

The Constitution provides that "everyone has a right to administrative action that is lawful, reasonable and procedurally fair". This entitlement extends to municipal employees and must therefore be reflected in municipal labour and administrative practices. The Northern Cape High Court considered whether a municipal council could delegate the power to preside over an appeal process which stemmed from a disciplinary hearing.

Background

Following a lengthy disciplinary inquiry against a senior section 56 manager, the Sol Plaatje municipal council accepted the recommendation from its internal disciplinary committee that the employee be dismissed. The municipality's disciplinary code clearly provides that employees have the right to institute an appeal against such a council decision.

The council decided to appoint an appeals sub-committee from within its ranks to preside over the matter. In response, the employee unsuccessfully applied to the Labour Court to stop the appeal process until an external chairperson who was "an independent legal practitioner with substantial experience" and who was "politically neutral" was appointed to chair the appeal.

key points

- A section 56 manager was dismissed and appealed against this decision to the Council.
- The Council delegated the right to hear the appeal to a sub-committee but reserved for itself the right to make the final decision.
- The Court resolved that this was legally possible; a municipal council cannot be expected to have the specialised knowledge and expertise to conduct disciplinary hearings.

Every organ of state must comply with the constitutional directive that ensures the right of everyone to just and fair administrative action.

Following this unsuccessful application, the employee then brought an application to the High Court challenging the council's decision to delegate its appeal function to the sub-committee. He argued that this not only breached the council's disciplinary code but was also in contravention of the collective agreement, which clearly provided that disciplinary appeals must be heard by the *full* council.

Issues

The Court had to deal with a number of issues, including whether a council can delegate to a sub-committee the power to preside over appeals flowing from disciplinary hearings. Furthermore, the Court had to examine whether a council can delegate the power to dismiss an employee to a sub-committee.

The High Court

Delegations

In terms of section 59 of the Municipal Systems Act, a municipal council must develop a system of delegations that will maximise administrative and operational efficiency. Consequently, a municipal council has the power to delegate appropriate powers by directing any political structure or office bearer, to perform certain of its duties. The Court cautioned, however, that the power to delegate must be clearly provided for, either expressly or implicitly.

Where the law does not say in so many words that the power may be delegated, it must be shown that the law implicitly allows for those powers to be delegated. In this case, neither the disciplinary code of the council nor the collective agreement provided for the power to delegate the right to preside over disciplinary appeals. The Court thus had to assess whether the law implicitly permitted the Council to delegate the power to hear the internal disciplinary appeal. Using the following criteria, the Court came to the following conclusions:

1. *The nature of the power that was delegated:* The power to hear an appeal did not confer unlimited discretion on the sub-committee of council.
2. *The extent of the transfer of power:* The discretion to implement the decision of the sub-committee still rested with the Council.
3. *The importance of the person to whom the powers have been delegated:* The Court stated that considering the character and composition of the Council, it was not intended to hear internal appeals. The Council has no specialised knowledge that equips it to hear technical disciplinary appeals. The majority of council members may never have been to law school so as to understand matters of law and procedure. The delegation of powers was therefore permissible in this case to ensure that the appeal was heard by a competent person or body of persons
4. *Practical necessity*: The Court observed that if the appeal was to be heard by the full Council it would have led to immense logistical and practical difficulties. For example, the disciplinary record (consisting of more than 1,000 pages) would have to be given to each councillor.

The Court thus resolved that the delegation by the council of the power to hear the dispclinary appeal was legitimate.

On the question of whether a council can delegate the power to dismiss an employee to a sub-committee, the Court cautioned that a resolution that completely confers such power to a sub-committee would in all likelihood amount to an "unlawful abdication of power" by a council. However, because no final decision had been made by the appeal committee and the employee was yet to go through the appeal process, the Court could not make a judgment on something that had yet to happen.

Comments

The judgment highlights the fact that every organ of state must comply with the constitutional directive that ensures the right of everyone to just and fair administrative action. It is also noted that for an organ of state to delegate any powers, the delegation of such power must be authorised by the law, unless there is an implied power to delegate. In reaching its decision, the Court however was careful to engage the specific facts and circumstances of the case and found that in this case, the Municipal Council could delegate its appeal functions to a more competent body for the purposes of fairness and smooth running of its business.

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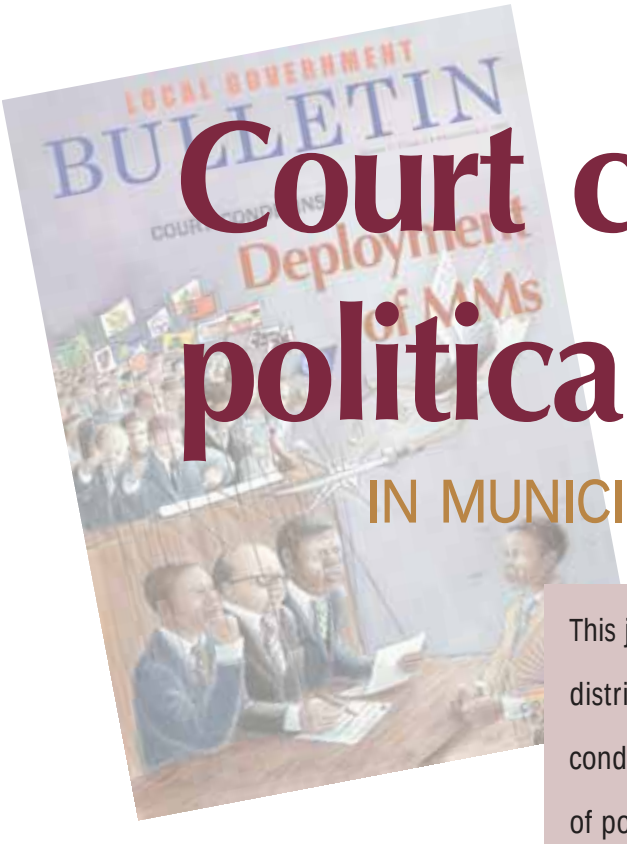
THEME 17: PROFESSIONALISATION OF THE ADMINISTRATION

The municipality needs a professional administration that is sufficiently insulated from politics. These three articles shed light on that discussion. The first article discusses a court case where political interference in the appointment of a municipal manager led to the appointment being set aside. The other three articles make the case for greater professionalisation of the municipal administration and assess proposal for building capacity.

1. **Court condemns Political Interference in Municipal Manager's Appointment** by Jaap de Visser, Local Government Bulletin 2009, Volume 11, Issue 1, page 5-7
2. **Professional Administration is Crucial for Service Delivery** by Annette May and Jaap de Visser, Local Government Bulletin 2011, Volume 13, Issue 1, page 16-17
3. **Should all Municipal Managers get the Boot?** By Phindile Ntliziywana, Local Government Bulletin 2009, Volume 13, Issue 1, page 18-19
4. **Purging after Polls a Waste of Scarce Resources** by Phindile Ntliziywana available at: http://www.bdlive.co.za/articles/2011/04/18/phindile-ntliziywana-purging-after-polls-a-waste-of-scarce-resources (last accessed 25 August 2016)
5. **The Political-Administrative Interface in Local Government: Assessing the Qualities of Local Democracies** by Jaap de Visser, Local Government Bulletin 2009, Volume 11, Issue 5, page 18-20
6. **Proposals on Municipal Capacity Building** by Tania Ajam, Local Government Bulletin 2012, Volume 14, Issue 4, page 6-10



Court condemns political interference

IN MUNICIPAL MANAGER'S APPOINTMENT

This judgment deals with the appointment of a municipal manager in a district municipality. It contains the strongest signal yet that the law condemns the practice of appointing municipal managers on the basis of political affiliation rather than suitability for the post.

Amathole District Municipality, a municipality controlled by the African National Congress (ANC), advertised the position of municipal manager. The recruitment process was subject to the municipality's *Recruitment Policy*, in which the municipality binds itself to fair and transparent recruitment procedures. It states:

> The Municipality encourages the policy of open recruitment of individuals to positions on the basis of qualifications and suitability and with due regard to the provisions of the pertinent employment legislations.

It goes on to state that the municipality "is determined to fill vacant position(s) with the best qualified and best suited candidates".

Of the more than 20 people that applied, two candidates were shortlisted after an intensive selection process involving psychometric testing and interviews. A selection panel, including councillors and representatives of the Department of Provincial and Local Government and the local chamber of commerce, conducted the interviews. The two candidates that were shortlisted in the final stages of the selection process were Dr Vuyo Mlokoti and Adv Mlamli Zenzile. Both names were submitted to the municipal council for a decision. During the selection process, Dr Mlokoti performed considerably better. All the interview panelists rated him higher than his contender by, on average, a difference of 16%. The panel concluded with regard to Adv Zenzile:

> His lack of managerial experience is evident and this sent discomforting concerns from the majority of the panel members. His abilities and command of local government issues were far outweighed by those of his contender (Dr Mlokoti).

This did not prevent the council from appointing Adv Zenzile. The judgment reveals "that the Regional Executive Committee of the ANC instructed the caucus to appoint Mr Zenzile and the caucus carried out this instruction". The judgment also details that the Executive Mayor was uncomfortable enough with this instruction to obtain two legal opinions on whether Mr Zenzile could be appointed. Both opinions advised the municipality that appointing Mr Zenzile would be illegal in

Vuyo Mlokoti v Amathole District Municipality and Mlamli Zenzile, unreported judgment, Case No: 1428/2008, 6 November 2008

key points

- A council resolution is valid only if it has been voted on, unless there is no opposition to the proposal.
- The appointment of a municipal manager by the council is an administrative action and can be reviewed by a court.
- The appointment of a municipal manager is illegal if it is taken as a result of unauthorised or unwarranted dictates of outside party structures.

view of the obvious differences in skills, experience and qualifications. During the ANC caucus meeting prior to the council meeting where the decision was to be made, the legal opinions were discussed. The caucus resolved to withhold the opinions from the council and go into the meeting with the mandate to appoint Mr Zenzile. At the meeting, Mr Zenzile was indeed appointed as municipal manager. The council minutes reflect as a motivation that "he was still young and knew the institution well and it was believed that he would take the institution to greater heights with his level of education and expertise". Dr Mlokoti requested the municipality to furnish reasons for his not being appointed. When he did not receive any feedback, he took the matter to court. The Court, in assessing Dr Mlokoti's arguments, dealt with a number of issues.

Deciding without a vote

At the relevant council meeting, the ANC, supported by the United Democratic Movement, moved for the appointment of Mr Zenzile. The Democratic Alliance and the Pan Africanist Congress moved for the appointment of Dr Mlokoti. The council did not conduct a vote but merely recorded its majority party's nomination. The Court found this to be procedurally flawed. Some form of voting is required in order for a valid decision to be taken. The only exception to this rule is when there is no opposition to a proposal. According to the Court, the failure to conduct a vote "falls woefully short of the requirements of the enabling legislation" and "the resolution … was therefore a nullity".

Decision out of the Court's reach?

The municipality argued that the Court had no right to review the resolution because it had been taken by a legislative assembly. It argued that the post of municipal manager had a political dimension and that the decision was therefore a "political" one which fell outside of the reach of judicial review. The Court disagreed. The decision to appoint a municipal manager was an administrative act, despite the council being a body that also exercised legislative and executive powers. The council could not, the Court said, evade the law by merely labelling its decision "political".

Political interference

The Promotion of Administrative Justice Act (section 6(2)(e)(iv)) provides that an administrative action is illegal "if

the action was taken because of the unauthorised or unwarranted dictates of another person or body". Dr Mlokoti argued that the political interference by the ANC's Eastern Cape Regional Executive made the council's decision unlawful. The evidence to support this contention was damning. Much of it was derived from communication between the Executive Mayor and the ANC Eastern Cape Chairperson, detailed in a letter that was accepted as evidence. The letter reveals a command-and-control relationship between the ANC's Regional Executive and the municipal council of Amathole District Municipality, through its majority on that council. The Executive Mayor wrote to the Chairperson:

> The above matter was discussed within the ANC caucus in ADM in presence of the Regional Secretary and the legal opinions were disclosed. After considerable debate the caucus decided to withhold the opinions from council although they were primarily obtained to advise the council. The REC's instruction, to appoint Adv. Zenzile was then accepted by caucus.

In language that reveals the switching of roles, the Executive Mayor goes on to say that "the ANC erred by not resolving to appoint Dr Mlokoti as he was clearly the most suitable candidate" and "I would urge that you reconsider the matter and advise the writer on the further conduct of the matter".

In assessing this scenario, the Court did little to save the council and the party from embarrassment. Firstly, the Court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made it clear that, in deciding to withhold the legal opinions from the full council, the ANC caucus had acted improperly. Secondly, the Court characterised the instruction from the ANC Regional Executive as

> an usurpation of the powers of [Amathole]'s council by a political body which, on the papers, does not appear even to have had sight of the documents relevant to the selection process including the findings of the interview panel. In my view, the involvement of the Regional Executive Council of the ANC in the circumstances described in [the letter] constituted an unauthorised and unwarranted intervention in the affairs of [Amathole]'s council.

As regards the behaviour of the councillors, the Court said that they had deliberately abdicated to their political party their responsibility to fill the position with a suitable candidate. The responsibility they had passed on to the party "was a responsibility owed to the electorate as a whole and not just to the sectarian interests of their political masters".

The Court thus concluded that, indeed, the council's decision was illegal because of the unauthorised and unwarranted interference by the ANC Regional Executive.

The Court appointing municipal managers?

The question then arose whether the Court should order the appointment of Dr Mlokoti or refer the matter back to the council for a new decision. The Court looked at the outcomes of the selection process and concluded that "[t]here is, quite simply, no objectively justifiable basis on which applicant can be rejected in favour of second respondent. He was and is therefore entitled to be appointed".

Assessment

It is clear from the judgment that the Court wanted to send out a signal strongly condemning outside interference in the appointment of municipal managers.

Firstly, after the Court had found that the decision was procedurally flawed, it could have safely ignored the arguments surrounding the outside political interference; it could have decided the matter on those grounds. However, it decided not to leave it at the procedural issue but devoted considerable attention to the outside political interference argument.

Secondly, it is unusual for a court to make appointments on behalf of organs of state. Normally, courts will show restraint and invalidate a decision when necessary, but rather leave it to the organ of state concerned to rectify its decision. In this case, the Court proceeded to appoint Dr Mlokoti.

Thirdly, the language used by the Court is unusually forthright and condemnatory of the behaviour of the council. For example, in explaining why it did not want to refer the matter back to the council for a fresh decision, the Court stated that this council had "demonstrated a lamentable abdication of its responsibilities by succumbing to a political directive from an external body, regardless of the merits of the matter". In other words, the Court felt it could not trust the council to take a proper decision even after its judgment. The Court was clearly irritated by the municipality's argument that this was "democracy in action". It deplored the municipality's argument that this was normal politics, saying:

> [Amathole] continues, with an equally lamentable lack of insight into its conduct, to contend that it was proper for it to have done so.

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SHOULD ALL MUNICIPAL MANAGERS

Get the boot?

With the election of new councils on 18 May, many municipal managers are likely to lose their jobs. The same applies to the managers reporting to the municipal managers.

How is this possible, given that the law provides for fixed-term contracts? What impact does it have on service delivery? Can we afford this when there are so few municipal managers with experience? Does the phenomenon take any account of the skills deficit in most municipalities and the fact that the law requires all municipal officials to have qualifications, competencies and the relevant experience by 31 December 2012?

Experience has shown that a change of government brings a clean-up of senior administrative staff, the so-called political appointees. This is more likely if the incoming party used to be the opposition party. An incoming DA administration, for example, would purge the officials appointed by the ANC government and appoint officials favourably disposed to the DA's policies, and vice versa. This also happens, however, when one faction of a party takes over from a rival faction of the same party, a practice prevalent in, but not exclusive to, many ANC-run municipalities. This change is often occasioned by the inclination to accommodate the people who saw to it that the victorious party or faction took the reins of power: it becomes their turn to benefit. As a result, the administrative apparatus that kept the organisation going for years is often dismissed, or placed on paid permanent leave or even given a golden handshake.

Effects on service delivery

This practice disrupts service delivery because, two years before the end of a term, many municipal managers start looking for new jobs. The prospects of a change in administration, with the resultant dismissal of municipal managers and managers directly accountable to municipal managers, shifts the focus from service delivery to securing new employment. This affects the provision of services to communities.

Brain drain

The phenomenon also ignores the fact that some administrators have, over the years, gained experience and competence in their fields of responsibility. Dismissing them merely to accommodate one's cronies or cadres leads to the dissipation of institutional memory. The machinery that has kept the organisation going for years is replaced by people who need a whole local government term or more to gain that experience. To the extent that this delays the provision of basic services to communities, it also contributes to the distress faced by local government.

Effects on experience requirement

This practice flies in the face of commitments by government to professionalise local government and improve service delivery to the people. Professionalisation, as understood by government, has three elements: experience, qualifications and competence. Municipal managers must have five years' relevant experience at the top management level and a bachelor's degree in a relevant field, and must be competent.

The law requires all municipal officials to satisfy these criteria on 31 December 2012. Will the clean-up of top management after the forthcoming local government election not render this target unachievable? It is difficult to imagine how people appointed in June this year could have gained the requisite experience – that is, five years' relevant experience at senior management level – by December next year, unless they already have experience when they are appointed. If the practice of wholesale replacement of managers is not resisted, the government's insistence on managerial experience will ring hollow.

Effects on qualifications requirement

The accommodation of those who ensure that a certain faction or a party emerges victorious in the local government elections has, by its very nature, no regard for qualification: the relevant consideration is whether a person is instrumental in ensuring that victory comes the way of a particular faction or party. This means that notwithstanding the legal requirement to consider proper formal qualifications in the appointment process, the political

parties or factions in the municipalities that adopt this practice in the elections will disregard the law, once the elections are over, and accommodate cronies or cadres. In respect of fixed-term contracts, political parties will plunder taxpayers' money to give golden handshakes to officials appointed by the previous administration, just so that they can appoint their preferred individuals. This is cause for concern as a change of administrative staff often has severe repercussions for the proper functioning of local government.

The problem will be exacerbated if the number of new councillors exceeds the number of returning councillors. New councillors will not immediately appreciate the complexity of local government and the importance of having experienced and competent personnel. This realisation might dawn only when things start to go awry. Purging the administration under these circumstances will deal service delivery a devastating blow, because the new managers will need more time to fully grasp what is expected of them.

The country can no longer afford to kill capacity in this way; we need to build it. Let us create favourable conditions so that the scarce skills are not easily poached by the private sector.

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Managing editor

Print this page

PHINDILE NTLIZIYWANA: Purging after polls a waste of scarce resources

Apr 18, 2011 | unknown

WITH the election of new councils on May 18, most municipal managers are likely to lose their jobs.

WITH the election of new councils on May 18, most municipal managers are likely to lose their jobs. The same applies to most managers reporting to municipal managers. How is this possible, given that the law provides for fixed-term contracts? What effect does it have on service delivery? Can we afford this when there are limited numbers of municipal managers with experience? Does this phenomenon even consider the skills deficit in most municipalities and the fact that the law requires all municipal officials to have qualifications, competencies and relevant experience by the end of next year?

Experience up to now has shown that with a change of government comes a clean-up of senior administrative staff - the so-called political appointees. This is more common if the incoming party used to be the opposition party. The Democratic Alliance, for example, would purge the officials appointed by the African National Congress government and appoint officials favourably disposed to its policies and vice versa.

This also applies when one faction from the same party takes over from a rival faction. As a result, the administrative apparatus that has kept the municipality going for years is often dismissed, placed on paid permanent leave or given a golden handshake.

This phenomenon is disruptive when it comes to services because, in the two years towards the end of the term, many municipal managers start looking for new jobs. This affects the provision of services to communities.

This phenomenon also does not respect the fact that some administrators have gained experience and competence and that dismissing them to accommodate your cronies or your cadres leads to the dissipation of institutional memory.

As much as this delays the provision of basic service to communities, it also contributes to the distress faced by local government. The phenomenon also flies in the face of commitments by the government to professionalise local government and improve services.

Professionalisation, as understood by the government, has three tenets to it: experience, qualifications and competence. Municipal managers must have five years' relevant experience at the top management level and a bachelor's degree in a relevant field, and must be competent. The law requires all municipal officials to satisfy these criteria by December 31 next year.

Will the clean-up of the top management after next month's elections not render this target unachievable? It is difficult for people appointed in June this year to gain the required experience by December next year. If this practice is not guarded against, the managerial experience required would ring hollow.

The accommodation of those who ensure a certain faction or a party emerges victorious in the local government elections has, by its very nature, no regard for qualification. The relevant consideration is whether a person was instrumental in ensuring the victory comes the way of a particular faction or party.

This means that, regardless of the legal requirement to look at proper formal qualifications in the appointment process, the political parties or factions in the municipalities that fall victim to this phenomenon after the elections will disregard the law and accommodate cronies or cadres. In respect of fixed-term contracts, political parties use taxpayers' money to give golden handshakes to officials appointed by the previous administration. This is a cause for concern because the consequences of the change of administrative staff often holds severe repercussions for the proper functioning of local government.

This problem will be compounded if the number of new councillors exceeds the number of returning councillors. New councillors will not immediately appreciate the complexity of local government and the importance of having experienced and competent personnel. This realisation might dawn only when things go awry.

Purging the administration under these circumstances will deal the provision of service a devastating blow because the new managers will need longer periods of time to fully grasp what is expected of them. We can no longer afford to kill capacity in this way; we need to build it. Let us create favourable conditions so that the scarce skills are not easily

poached by the private sector.

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The political-administrative interface in local government

ASSESSING THE QUALITY OF LOCAL DEMOCRACIES

Municipalities have registered a tremendous democratic and service delivery record, yet the public perception of them is troubling. Municipalities are too often identified with corruption, inefficiency and inaccessibility. Councillors are sometimes perceived as inward-focused and too preoccupied with the political goings-on within the council and the technicalities of the municipal administration. As a consequence, there is a serious breakdown in the relationships between councillors and communities. This is evidenced by continuing community protests, directed at councillors and municipal officials.

This article examines whether aspects of the law contribute to these problems. President Zuma has remarked, for example, that there may be a need to separate the legislative and executive roles of the council. This theme has been taken up in the discussion towards a turnaround strategy.

Council as executive and legislator

Section 151(2) of the Constitution provides that the council possesses both legislative and executive powers. In other words, the council both makes laws (by-laws) and implements them. This is different from the national and provincial governments where the legislature makes laws and the executive implements them. The legislature oversees the executive.

The Municipal Structures Act creates a degree of separation in municipalities by providing for executive committee and executive mayor systems. However, in both those systems, the executive is dependent on the council to delegate executive power. The council remains the original source of executive power and bears the responsibility for overseeing the executive. This merger of legislative and executive powers is often singled out as a cause for the governance problems in municipalities.

Political-administrative interface

Indeed, it does not make the relationship between councillors and administrators easier. For example, who directs the municipal administration? At national level, where there is a separation of powers, it is clear that the President, together with his Cabinet, directs the administration. Parliament has an oversight role over the administration but does not issue instructions to it. The municipal council is constitutionally designed as an executive body. It is essentially the employer of all municipal staff.

Legislation has separated the council from the administration to some extent. The Municipal Systems Act (MSA) mandates the municipal council to appoint senior managers, but further appointments are made by the administration itself. Furthermore, the Code of Conduct for Councillors includes a provision that prohibits them from inappropriate interference in the administration. The Municipal Finance Management Act (MFMA) takes a harder line on separation. It bars councillors from taking part in tender decisions and includes many provisions that seek to separate the council from the administration. Despite these laws, the definition of roles remains a challenge.

Party political interference

It would be wrong to suggest that the governance problems in municipalities are caused by the law. Inappropriate party political interference has complicated the political-administrative interface. Too often, regional party structures,

instead of giving strategic and ethical guidelines to the local caucus, try to manage municipalities by remote control. Research indicates that this kind of undue interference mostly takes place in staff appointments, tenders, credit control decisions and the implementation of the Code of Conduct.

Further confusion between the political party and the municipality is created when a senior party political office-bearer becomes a municipal staff member. The normal lines of accountability then no longer apply, particularly when the staff member outranks the mayor. The staff member then actually becomes the political head, undermining the political leadership of the mayor. The municipality is thus 'rewired' in a very damaging way. This often leads to perennial power struggles that spill over into service delivery problems.

Way forward: changing the law?

What is the way forward with regard to the quality of local democracies? A combination of political and institutional solutions are proposed here.

Firstly, the advantages and disadvantages of separating legislative and executive powers in local government need to be investigated.

Secondly, a rule should be inserted in the MSA prohibiting senior party officials from being municipal officials. Local government practitioners need to choose whether to pursue a political or an administrative career, rather than trying to combine both simultaneously. In addition, political parties should adopt this rule in their own internal systems of deployment.

Thirdly, the rules in the MSA about staff appointments and staff discipline need clarification. Practice indicates a number of areas of confusion. The legislation limits the municipal council's involvement with staff appointments to three aspects. Firstly, the council adopts human resources policies, including a recruitment policy, to be implemented by the municipal manager. Secondly, as indicated earlier, the council appoints senior managers. Thirdly, the council oversees the implementation of its human resource policies. However, there are many instances where councillors are involved in staff appointments (other than senior management) by being members of appointment committees or by participating in interviews as 'observers'. The MSA should make it clear, just like the MFMA does with regard to tenders, that staff appointments are administered by the relevant managers, not by councillors. These managers, in turn, are overseen by the council. Another area of confusion is the position of the managers who report to the municipal manager. They are appointed by the council but are answerable to the municipal manager. The law is not clear on where the responsibility and authority lies to discipline senior managers when they violate staff codes. It is suggested that the law should make the municipal manager responsible for appointing, disciplining and dismissing the managers that report to him or her. The municipal manager must consult the council but must ultimately be responsible for the decision.

Achieving progress without changing the law

Legal solutions and new systems are not the final answer. Many of the problems can be addressed without changing the law.

Firstly, political parties need to recast their roles vis-à-vis local government, particularly at regional level. The local caucus needs to be repositioned as a political structure that is trusted to take decisions and that cannot be by-passed or undermined by party structures. Party structures need to focus their attention on providing strategic support to the local caucus, rather than micro-managing the administration.

Secondly, municipalities should use instruments such as the terms of reference, delegation and rules and orders to clarify the role of office-bearers, structures and the administration. The terms of reference, in particular, is important. In section 53, the Systems Act provides that municipalities must adopt this instrument which is specifically designed to deal with overlapping responsibilities, grey areas and disputes. It is a document that outlines the organisational values, dispute resolution rules, reporting rules etc. It requires an inclusive decision-making process in the municipality. It can be adopted by a majority but should actually be endorsed by every councillor in order to be truly effective. Unfortunately, too many municipalities have not adopted terms of reference yet or have adopted inadequate ones.

Thirdly, council oversight should be improved. Council oversight over the municipal executive is critically important. Many municipalities adopt committee systems that hamper oversight. Except in the smallest of councils, where portfolio committees are superfluous, these committees are critical to ensure robust engagement between councillors, municipal executives and the administration. The Municipal Structures Act provides for 'section 79' and 'section 80 committees'. A section 79 committee is chaired by a councillor who is not a member of the executive committee and it reports directly to the council. In contrast, a section 80 committee is designed to assist the executive committee and is chaired by a member of the executive or mayoral committee. It thus also reports to the executive committee, not to the council.

Municipalities may adopt combinations of the above two systems. However, in practice municipalities prefer section 80 committees (except perhaps for ethics committees and oversight committees). Thus reports, recommendations, draft resolutions etc. are prepared by the administration, discussed and refined by the section 80 committee under the chairpersonship of the member of the municipal executive, and submitted by the executive to the plenary council meeting. In most cases, the deliberation at the full council meeting is minimal as the preparatory work is done in the committee.

This system, despite its advantages in terms of efficiency, does not assist in enabling oversight by the council over the executive and the administration. The committees should be the engines of local democracy, where policies and decisions are interrogated, progress is measured and the hard questions are asked in an open and vigorous debate. The objective of a committee meeting should be to measure the progress made by the administration and not just preparation of an item that can go to the municipal executive.

Municipalities should establish section 79 committees, chaired by non-executive councillors. In many instances, this will require significant investment in the functioning and skills of councillors that are designated to chair section 79 committees. In fact, municipalities will be quick to argue that there are too few councillors that are sufficiently empowered to chair a section 79 committee. Even if that were true, political parties and municipalities that are serious about enhancing local democracy should empower them.

Conclusion

Despite the progress made, there are serious deficiencies in the manner in which municipalities are governed. The lack of separation of powers in the council is an important background to these challenges in municipalities. The separation of powers is worth investigating but there are some critical changes that can already be made without amending the Constitution. Most importantly, political party structures need to find a new balance between effective political oversight and micro-management. Municipalities need to devote much needed energy into adopting effective terms of reference for their office-bearers, structures and senior management. Finally, some legal changes may be required to clarify the relationship between municipalities' political and administrative arms.

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PROPOSALS ON

Municipal capacity building

DOING THINGS DIFFERENTLY, OR RE-PACKAGING PAST INITIATIVES?

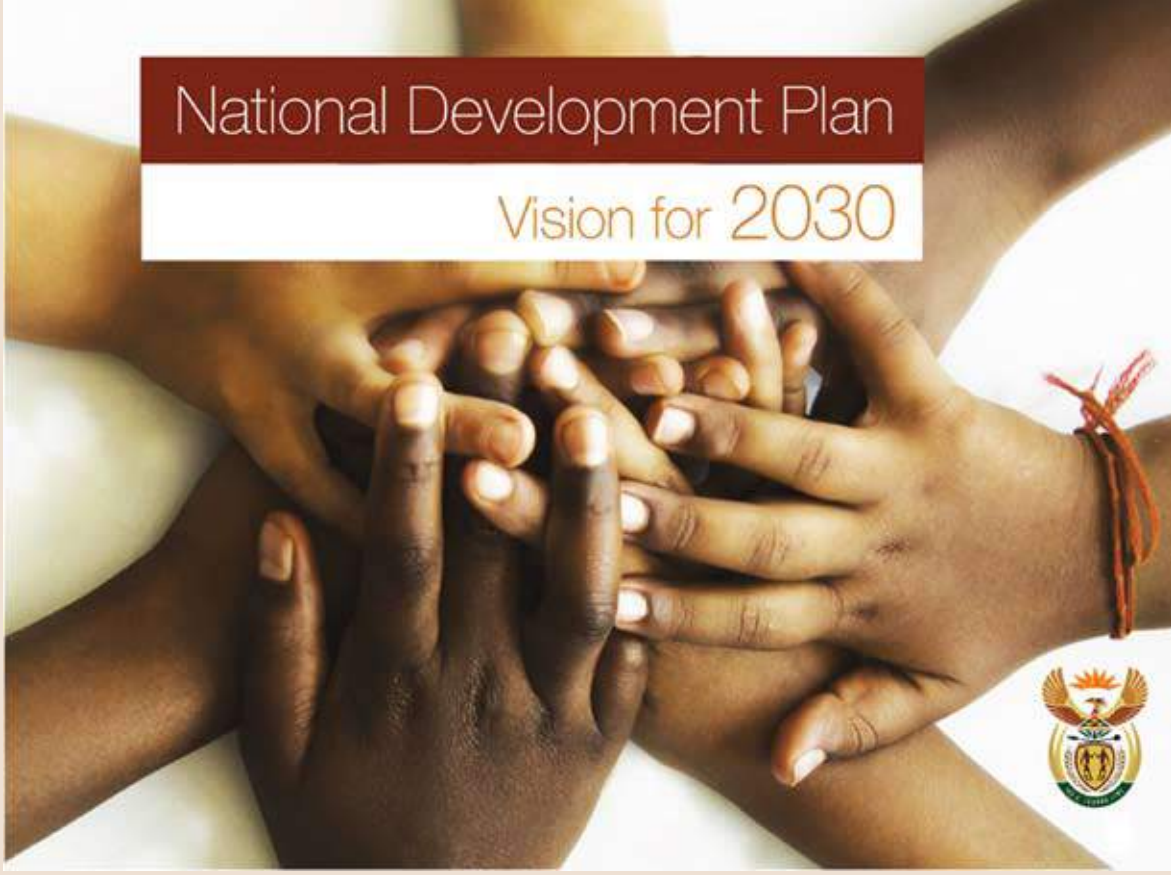
It is common cause that there are huge economic disparities and differences in municipalities' social, demographic and spatial profiles, which are inevitably also reflected in their financial profiles. These contextual structural factors external to municipalities also tend to be correlated with, and compounded by, institutional internal weaknesses such as poor governance and accountability, ineffective financial management and outright corruption, high vacancy rates in key senior-management posts, technical skills shortages such as in engineering, poor planning skills, ineffective internal controls etc.

While these problems are pervasive throughout the local government sphere, they tend to be especially acute in rural municipalities and localities containing only one or two small towns. This article assesses the recent recommendations of the National Development Plan 2030 (NDP) on capacity building, the latest approach to strengthening local government.

Institutional capacity in municipalities: salient trends

Human resource management in municipalities is often weak, characterised by poor recruitment practices, many vacancies for key positions, political interference in the appointment and dismissal of employees, inability to attract and retain technical skills and ineffective performance management systems.

In 2009/10, the average vacancy rate for the six metros was 24.2%, with substantial variances between 9.3% in the City of Cape Town and 51.1% in the City of Tshwane. In the district and local municipalities collectively, in 2008/09 there were 110 694 persons employed relative to cumulative approved establishment of 144 114. This would at first glance seem to imply that the vacancy rate is 51 200 or 36% in aggregate. However, only 22 482 of these vacancies are actually funded (less than 50%) while the remaining 28 700



vacancies are unfunded. The unfunded positions within the approved establishments of district and local municipalities are to some extent offset by appointments to non-existent positions which were not on the approved organisational structures. In 2009, there were 17 832 appointments to non-existent positions in district and local municipalities (National Treasury, 2011: 114–115). The preceding analysis illustrates how unaffordable approved staff establishments, exacerbated by a casual disregard for legally approved establishments in appointing persons to unfunded or non-existent positions, can lead to the apparently paradoxical situation of municipalities overspending their personnel budgets while at the same time vacancies persist.

In 2009 there were vacant 274 senior management posts in municipalities (referred to as section 57 managers in the Municipal Systems Act). This is only a marginal improvement on the 280 vacancies in 2006 (National Treasury, 2011: 116). Category B (local) municipalities were most affected, with 24% of senior management posts being vacant.

The long turnaround times for filling vacancies and long duration of 'acting' incumbents undermines service delivery. In June 2011, 83 municipalities had acting municipal managers and 75 had acting chief financial officers (CFOs), while in 37 municipalities both of these crucial positions were filled by acting officials. The phenomenon is most prevalent in Mpumalanga, North West and Limpopo. This picture reflects a similar pattern observed after the 2006 local government elections, namely that vacancies in both these positions spiked immediately after elections (Presidency, 2012: 34). This suggests that, on assuming office in a municipality, political parties begin a purge of senior management appointed by the previously governing party.

The State of Municipal Capacity Report (SMCR) for the 2010/11 financial year indicated that staff vacancies were higher in rural municipalities than in urban ones. Vacancy rates were highest in provinces with large rural populations, such as Limpopo (47.2%), KwaZulu-Natal (39.9%) and the Eastern Cape (36.9%). They were lowest in the Western Cape (14.4%). Staff turnover averaged 7% across all municipalities, which is acceptable.

Municipal managers on average had 10.4 years' work experience, ranging from an average of 5.2 years in the Free State to 14.6 in the Western Cape. Municipal managers had been in their jobs for 3.3 years on average, with substantial provincial variation: in the North-West (1.5 years), Gauteng (1.7 years) and the Free State (1.8 years) tenure was quite short whereas municipal managers in the Eastern Cape (4.3 years) and KwaZulu-Natal (4.2 years) had occupied their positions for longest. Given the seniority of the municipal manager's post, the brevity of certain incumbents' work experience, and in particular experience as a municipal manager, is cause for concern.

Well over 30% of municipal managers have a Masters or PhD qualification, as do 20% of corporate services managers and over 10% of CFOs. In 2008, 35% of all municipal managers had a qualification above a Bachelor's degree; by 2011 this had risen to 63% of all municipal managers. A similar increase, from 16% to 37%, pertained to CFOs. This is pleasingly indicative of increased professionalism in local government administration.

What is not clear yet is whether this increase in professional qualification will in fact translate into heightened quality of management in municipalities (in education, for example, 95% of teachers have three-year qualifications as opposed to 60% in 1994, but the quality of teaching and learning has definitely not improved!).

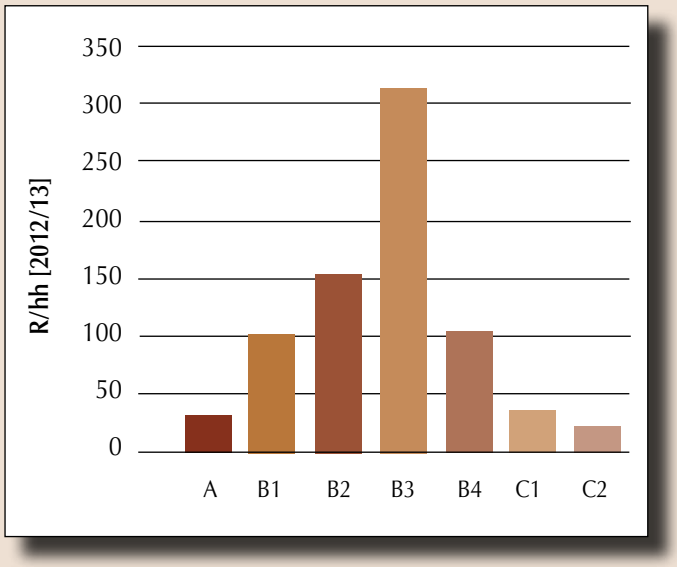
In relation to technical skills, there are on average 127 engineers in each metro and 3.5 in each secondary city. The rural local municipalities and district municipalities have only one engineer each, on average, while some (44% of rural district municipalities) have none . The disparity between the metros and other municipalities is illustrated by the fact that there are four engineers for every 100,000 people in the metros, but only one per 100,000 across the other municipalities. The same applies to municipal planning skills. On average metros have 250 planners, secondary cities have 53 and other municipalities have fewer than 50, while in district municipalities this drops to fewer than 30.

Capacity-building initiatives, past and present

National and provincial government are constitutionally obliged (in section 154(1)) to support and strengthen the capacity of municipalities but this means that they, in turn, should have the requisite capacity building and monitoring and evaluation capability to do so. There is already some capacity within the Department of Cooperative Government (formerly known as COGTA – Cooperative Government and Traditional Affairs) for municipal supervision, support and oversight, with significantly more capacity to be developed through the establishment of the Municipal Infrastructure Support Agency.

The Financial and Fiscal Commission has raised serious concerns about whether the sustained government spend on municipal capacity (through programmes such as Project Consolidate and Siyenza Manje) and conditional grants

Figure 1: **Allocation of capacity-building grants per poor household by municipal sub-category**



Source: Financial and Fiscal Commission (2012:58)

(such as the financial management and municipal systems improvement grants and infrastructure skills development grants) has actually impacted positively on municipal institutional capability. Monitoring of capacity-building initiatives is ineffective and seldom independently evaluated, with a dearth of comprehensive information on municipalities' expenditure on staff training, the number of staff that benefit from such programmes and the nature of the training, not to even mention whether they have achieved their anticipated outcomes in terms of building applied competence, skills transfer and return on investment

Besides reservations about the impact of capacity-building spending, there are also concerns relating to whether these funds are being directed at the municipalities that need them most. To assess the targeting of capacity-building grants, the grant per poor household was calculated across various categories of municipality: Category A municipality (metro); Category B1 municipality (secondary city); Category B2 municipality (municipality with a large town at its core); Category B3 municipality (with small towns and commercial farms), Category B4 municipality (with mostly rural areas, traditional settlements), Category C1 district municipality with no major service functions and Category C2 district municipality with major service functions.

Capacity grants are allocated primarily as a fixed sum per municipality. Because there are many, typically small B3 municipalities (with small towns and commercial farms), they receive the lion's share of funding. In contrast, B4 municipalities (with mostly rural areas, traditional settlements) and C2 municipalities (district municipality with major service functions) receive comparatively little funding despite facing the greatest capacity-building challenges. Clearly the strategic logic behind the targeting of grants could be improved. To this end, the Financial and Fiscal Commission has recommended that capacity-related conditional grants should:

1. commit municipalities to specific, independently verifiable capacity and performance improvements;
2. be redesigned to consider the quality of capacity-building interventions, instead of having a narrow quantitative focus;
3. encompass an external, objective evaluation of their impact on their grant frameworks.

The National Treasury has also noted that despite the tendency to blame lack of capacity for all municipal performance failures, 'the reality is that many municipal failures can be directly attributed to failures in local political leadership'. While failure to perform is in some cases

attributed to a genuine lack of capacity, this is often used as an excuse to evade accountability for managerial or political dysfunction.

Prior attempts at transforming the institutional capability of local government are legion (Project Viability, Project Consolidate, Siyenza Manje etc) and their impact universally disappointing despite the significant resources allocated for this purpose since 1994. The Local Government Turnaround Strategy (LGTS) is one of the latest initiatives with this laudable objective. Unlike many of its predecessors, which took a narrowly technical perspective, its diagnostic of root causes was much broader. It not only looked at factors within municipalities, but also at political and intergovernmental issues and the socio-economic environment within which the system of local government planning, budgeting and delivery operates. Like many of its predecessors, the perceptive diagnostic and coherent strategy of the LGTS has been undermined by slow progress in implementation. Deloitte and Touche (2011) enumerate some of the factors that have bedevilled its implementation:

- municipalities are assumed to have sufficient capacity to turn themselves around: 'the patient is often required to not only diagnose, but also cure himself!'
- insufficient dedicated funding for the required LGTAS interventions;
- COGTA's own on-going restructuring and consequent internal focus;
- political instability and the 2011 local elections, which detracted from its focus;
- too much focus on 'quick solutions and achieving compliance with minimum requirements, rather than developing a long-term, sustainable solution with an appropriate execution plan and scientific change-journey management';
- their economic base, demographics, location, history, access to skills and resources mean many municipalities – even with the best management – could never be financially viable, and indefinite grant dependency would limit the success of any 'turnaround';
- cynicism from municipalities about yet another intervention, and 'transformation fatigue'.

National Planning Commission proposals

The capacity-building proposals in the NDP cover the enhancement of management and technical skills, as well as the improvement of organisational systems within municipalities. To make local government a career of choice, the National Planning Commission has proposed:

- A formal graduate recruitment scheme for the public service, in addition to existing recruitment mechanisms, based on merit-based selection assessments such as examinations, group exercises and interviews, representivity and on-the-job training and support.
- A career path for local government. Municipalities would be given an opportunity to employ graduates from the formal graduate scheme, use of secondments to develop experience in working with other spheres of government, mentoring and peer review schemes for senior management.
- Making adequate experience a prerequisite for senior posts. As a result of country-wide skills shortages, promotion of staff to senior positions has been too rapid, with premature assumption of greater management responsibilities before the necessary skills have been acquired. Furthermore, the authority and experience attached to posts such as deputy director has been downgraded, with the result that salaries are too high for the work required.
- Improve the systems for skills development: The Department of Cooperative Government must play a more active role in driving skills development and professionalisation within the local government sphere, in addition to its existing regulatory and oversight role. The NDP recommended that Department coordinates with other government agencies that play a skills and development role, in implementing long-term skills development strategies.

These recommendations in respect of recruitment and skills development are unexceptionable. What makes them more cogent and credible are the National Planning Commission's complementary recommendations on stabilisation of the politico-administrative interface and limiting the politicisation of senior management within local government. Formal merit and representivity-based recruitment processes are not likely to attract the most competent candidates if political affiliation or connectedness rather than capability predetermines employment outcomes. A further hindrance is career uncertainty, given that job tenure is contingent on election results as each new incumbent party replaces senior managers appointed by the previous party or coalition.

Not only is this demotivating to junior managers, but it creates an incentive for them to invest in cultivating

party or factional allegiances rather than in their own skills development. Furthermore, career-pathing and succession planning is a complete non-starter if the ascendency of a new party precipitates wholesale purges of the previous management team.

These NPC recommendations are supported by recent legislative changes. The Municipal Systems Amendment Act of 2011 regulates the duties, benefits and other terms and conditions of municipal managers and senior managers reporting directly to municipal managers (section 57 managers). The Amendment Act also regulates the setting of competence standards for these managers, and outlines recruitment process requirements to ensure that only candidates meeting these competence standards are appointed, as well as the consequences of appointments made in contravention of the legislated procedures. Finally, it regulates the employment of municipal employees who have been dismissed or subjected to disciplinary processes. This is to prevent scenarios when, for example, a CFO being investigated for maladministration or having been found to be incompetent simply resigns and is appointed by another municipality. The question that arises is the alacrity and effectiveness with which these legislative provisions will be enforced.

Regulations in terms of the Municipal Finance Management Act of 2003 (MFMA) prescribe minimum competence requirements which came into effect on 1 January 2008. All relevant officials (e.g. accounting officers, CFOs, heads of budget and treasury offices, supply-chain managers etc) involved with financial management were supposed to have complied with these competence standards by 1 January 2013. By November 2012, there was little chance of this happening. The Financial and Fiscal Commission expressed concern in this regard and recommended that these minimum competency regulations be enforced urgently and with vigour to ensure that appropriate technical skills are in place.

One of the problems with the original minimum competence regulations was that the consequences of non-compliance were never spelt out. Ntliziywana (see *LGB*, 13(4), pp. 16-18) has argued that dismissal of non-compliant official would constitute fair labour practice in view of the following contextual factors: the regulations were based in the objective, legitimate operational requirements of the municipal management, they set out a fair procedure through which officials could obtain the necessary qualifications and a reasonable five-year deadline, and, finally, officials had been repeatedly warned of the imminent deadline (see *LGB* 13(4) p 18). One of the main problems with the minimum competence standards in the MFMA was that municipalities had continued to appoint new incumbents without the requisite skills. The Municipal Systems Amendment Act is much stronger than the MFMA in this respect and therefore may be more successful in achieving its aim through more thorough enforcement.

Tania Ajam
Commissioner:
Financial and Fiscal
Commission

Hopefully some of the lessons learned through MFMA capacity-building attempts will ensure that appropriate incentives are created for municipal councils and municipal managers to appoint competent personnel and for managers and technical personnel currently employed to enhance their professional skills.

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THEME 18: PROTESTS

Community protests have become a regular occurrence and are most often directed at municipalities. This theme includes two articles with statistics on protests that give some insight into where protests tend to occur, what percentage is violent and what grievances are cited by the protesters. The other two articles concern the management of demonstrations. The first deals with an overview of the municipality's role in protecting political freedoms in terms of the Gatherings Act and the second article discusses an important judgment about who pays for the damage caused by violent protests.

1. **MLGI Protest Barometer** by Jaap de Visser, Derek Powel, Kathryn Staples and Stella Gilliland, Local Government Bulletin 2012, Volume 14issue 3, page 4-7
2. **The Municipality in Implementing the Gatherings Act** by Phindile Ntliziywana, Local Government Bulletin 2011, Volume 13, Issue 3, page 8-9
3. **Riot Damage: Who Pays** by Tinashe Chigwata, Local Government Bulletin 2011, Volume 13, Issue 4, page 9

MLGI Protest Barometer

The MLGI Protest Barometer presents data on the frequency and the nature of protests throughout South Africa. The study has been developed from media reports of community protests in the Community Protest Monitor of the South African Local Government Briefings Report and the online Lexis Nexis database. Data was collected monthly from February 2007 until August 2012 and displayed through a series of four barometers that analyse trends in protest activity over the six-year period.

For the purposes of this project, protest is defined as: any complaint or issue cited by protesters, whether related to service delivery claims or not, over which citizens decide to engage in protest activity. For a full review of the methodology please visit www.mlgi.org.za.

Barometer 1: National distribution of protests by season and by year

Figure 1 compares total protests per year. With the exception of 2010, there has been a consistent increase in these numbers. The first eight months of 2012 have already seen the highest number of protests of any year (226). If current trends continue, the 2012 total will be around 300. This will put protests numbers for 2012 at more than double the number in 2011 (144) and also more than double the number of protests in 2010 and 2011 combined.

Figure 2 shows the average number of protests per month and also reflects a significant increase in 2012. The first eight months of 2012 have averaged 28.25 protests per month while 2011 was less than half that, at 12 protests per month. However, numbers of protests vary greatly between months. As shown in Figure 3, protests are far more likely during

Figure 1: **Total number of protests per year, February 2007–August 2012**

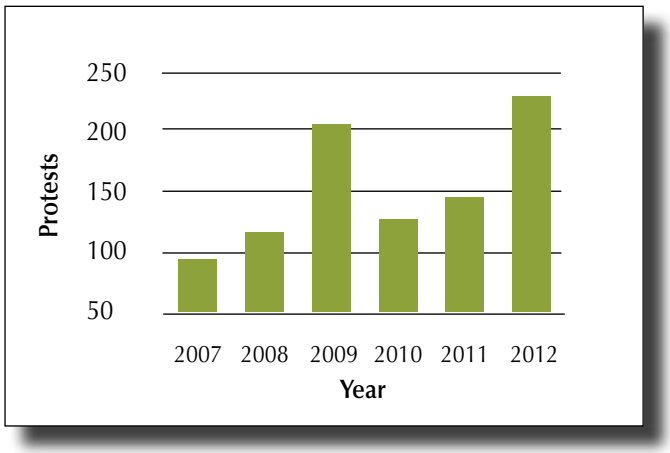
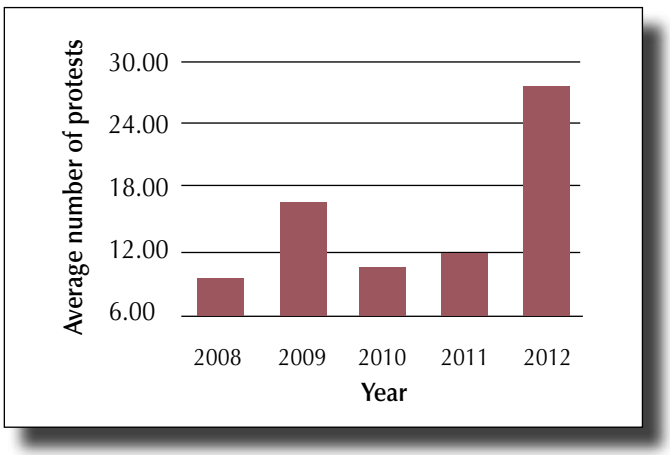


Figure 2: **Average number of protests per month, February 2007–August 2012**



the winter months (June, July, and August) than in summer (December, January, and February). This trend is consistent throughout the dataset, with the seasonal disparity also increasing.

Barometer 2: Provincial distribution of protests per year

This barometer measures the geographical distribution of protests by province. Figure 4 reflects yearly protest figures in each of the nine provinces. For the first time in the six-year dataset, Gauteng has not had the most protests, having been surpassed by both the Western Cape and the Eastern Cape. Gauteng's percentage of total protest activity has fallen by almost half (from 22.92% to 12.95%) in 2012. The Western Cape now leads the provinces in protests for 2012, with 49. Alone, these three provinces account for over half (56.98%) of all protests and more than all the other provinces combined. Prior to 2012, the Western Cape recorded its highest protest activity during election years, in 2009 and 2011.

Barometer 3: Percentage of protests that are violent in nature

Violent protests are defined here as protests where some or all of the participants have engaged in actions that create a clear and imminent threat of, or actually result in, harm to persons or damage to property. Thus, in addition to the more obvious indications of a violent protest (the intentional injuring of police, foreigners, government officials, the burning down of houses or municipal buildings, looting shops), instances where police disperse protesters with tear gas, rubber bullets or water cannons, where rocks are thrown at passing motorists, or tires are burned to blockade roads are protests that are also considered to be violent in nature. (See Figure 5.) Instances of protesters submitting a petition or memorandum, organising marches outside government buildings, or assembling peaceably in public areas are considered non-violent protests.

The data show that protests are not only increasing in frequency, but are also far more likely to turn violent. In the

Figure 3: **Average number of protests per month by season and year**

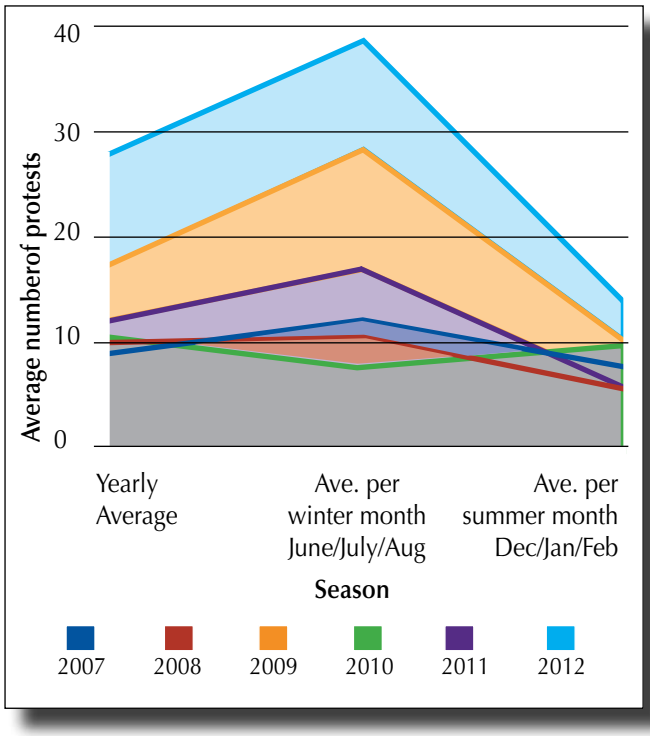


Figure 4: **Number of overall protests per province, February 2007–August 2012**

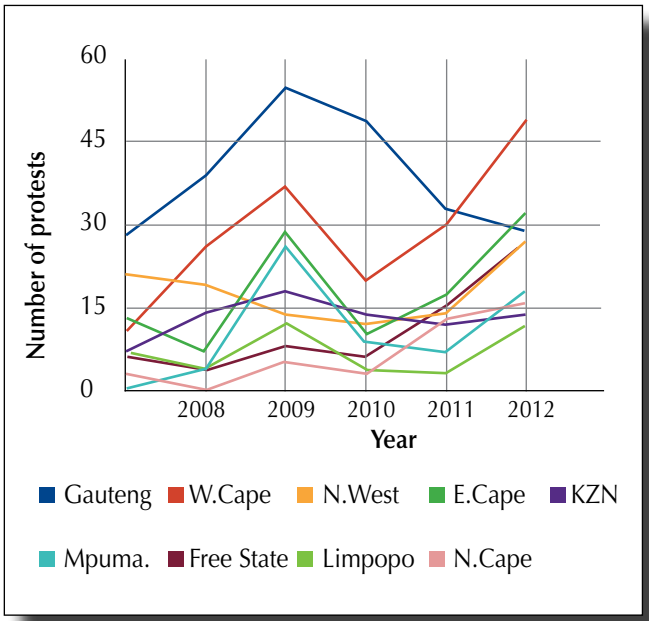
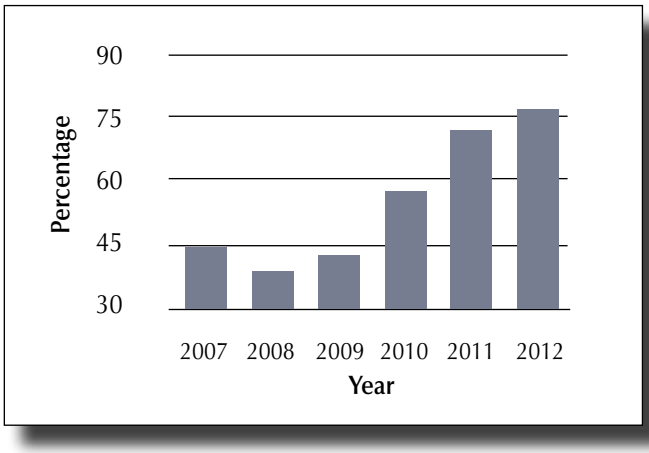


Figure 5: **Percentage of violent protests, February 2007–August 2012**



first eight months of 2012, 79.20% of protests turned violent. This trend, combined with the significant increase in total protests, means that there have been more violent protests in the first eight months of 2012 than there were total protests in 2011.

The geographical distribution of violence has been consistent with other trends in protest activity: the Western Cape has surpassed Gauteng as the province with the largest number of violent protests in 2012. Gauteng and the Eastern Cape currently rank as the third most violent provinces (both with 22 violent protests in 2012) after the Western Cape and the North West. The North West has more than doubled the number of violent protests from 2011(from 12 to 26), with most of the violent protest activity occurring in August 2012 as result of the Marikana massacre and service delivery-related protests. Again, the top three most violent provinces account for 55.9% of all violent protests over the six-year period. (See figure 6.)

Barometer 4: List of grievances cited by protesters

This study also analyses the 'grievances' or any issue and complaint over which protesters decide to engage in protest activity. The project documents any mention of a grievance, whether from the protesters' recollection of events, reporters' interpretation of events, information submitted

Figure 6: **Violent protests per province by year**

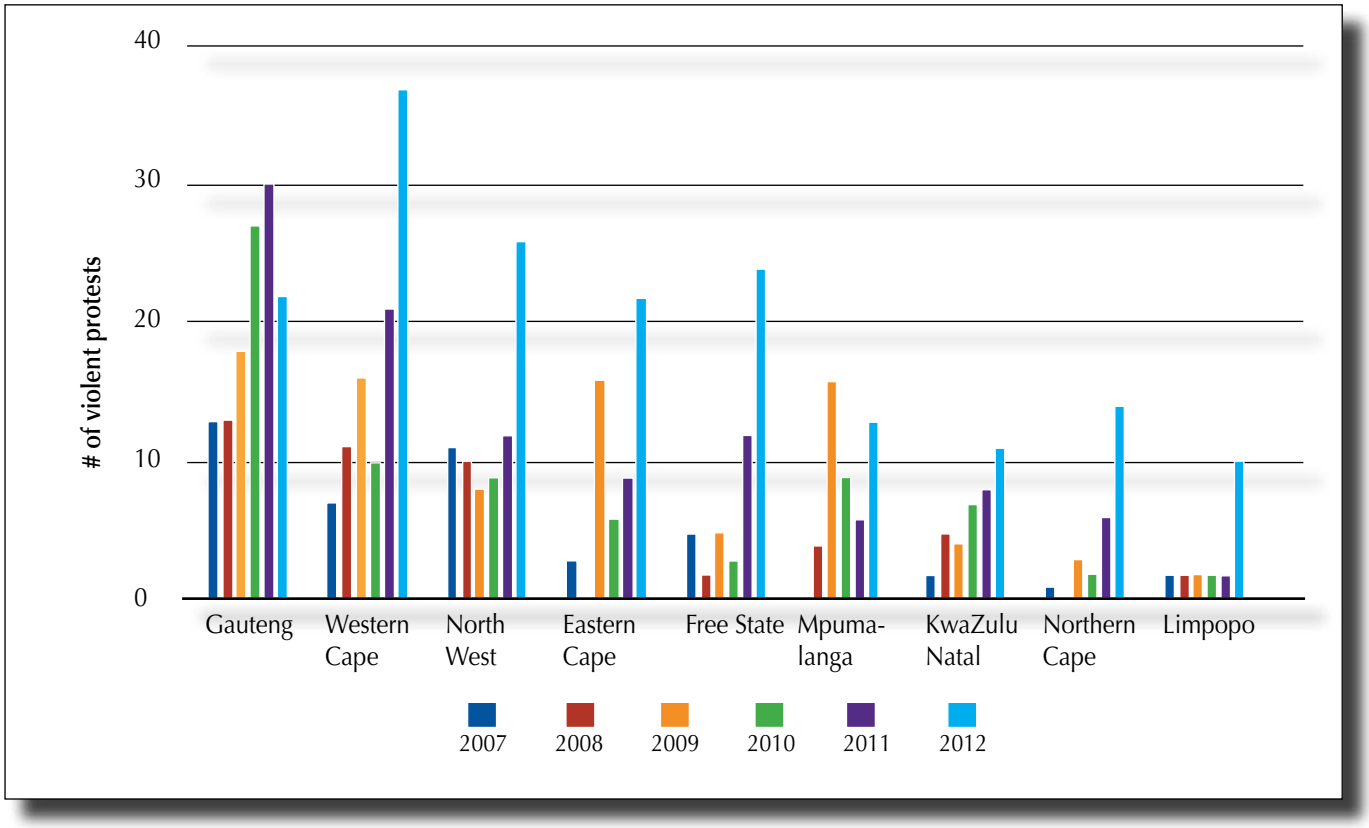


Table 1: **Top five grievances per year**

	2007	2008	2009	2010	2011	2012
1	Poor service delivery	Land and housing	Land and housing	Land and housing	Electricity	Land and housing
2	Land and housing	Electricity	Poor service delivery	Poor service delivery	Party political	Water/Poor service delivery
3	Water	Poor service delivery	Corruption/nepotism	Water	Land and housing	Electricity
4	Electricity	Water	Electricity	Electricity	Water	Ignored grievances
5	Party political	Sanitation/waste	Sanitation/waste	Sanitation/waste	Sanitation/waste	Infrastructure

by memorandum to local officials, or any mention of party political motivations underlying protest activity. For this barometer, we developed a series of indicators that count 52 specific grievances and then aggregated those grievances into 20 micro-level categories and four macro-level categories. The table below displays the most frequently-cited protest issues (micro category).

Land and housing issues are the most often-cited incidents (303 over the six-year period), with poor service delivery second most frequent (218 incidents). Grievances related to broken promises and government officials ignoring protesters' grievances have risen exponentially since 2010, but still account for less than 10% of total complaints. Non-municipal services is the second highest macro grouping of grievances this year, representing 22.4% of the total issues cited. Grievances related to municipal services – lack of electricity, water, sanitation, or roads – is the most frequently cited category of grievance. Party political issues are the least cited overall, making up 6.19% of the total number of grievances. (See figure 7.)

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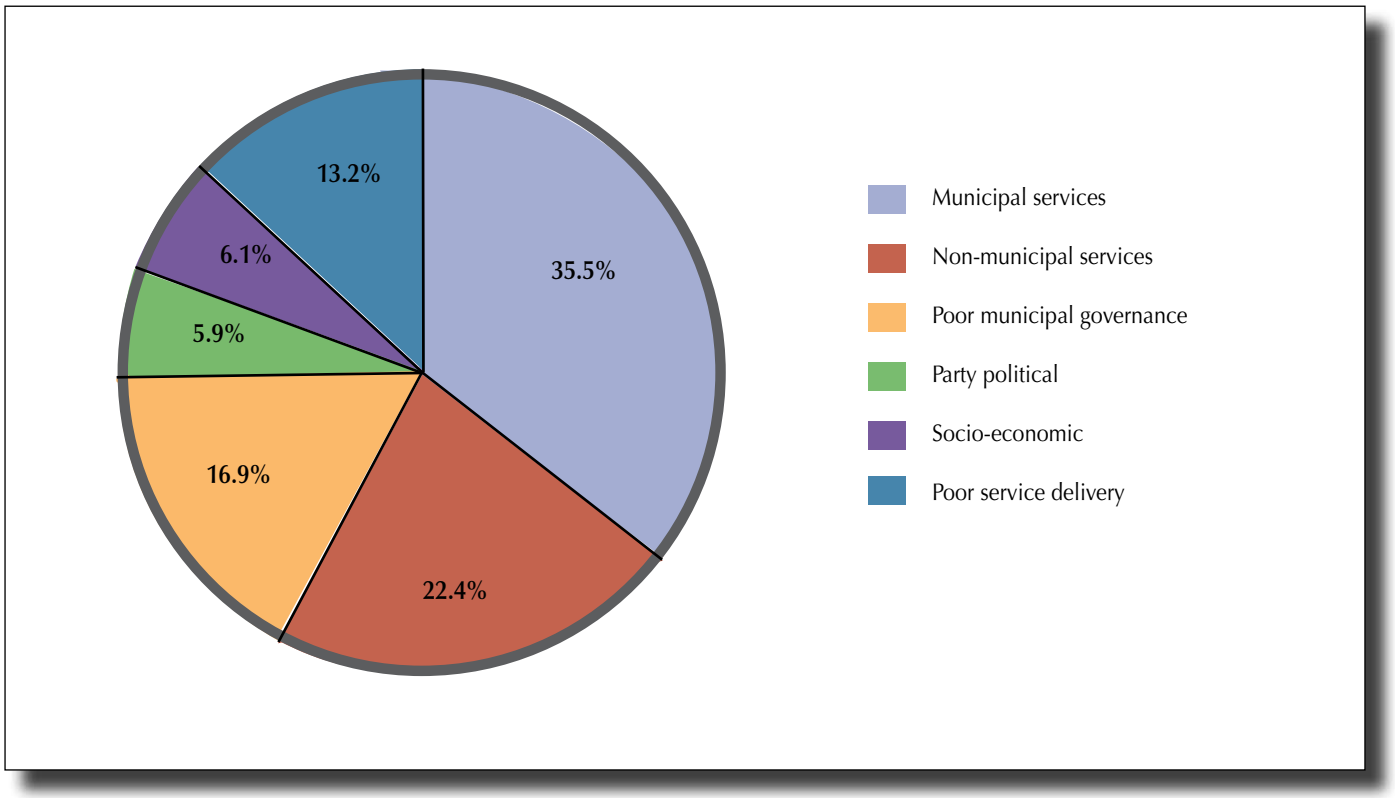
Conclusion

It is of paramount importance to develop a nuanced understanding of service delivery protests as they are becoming an enduring feature of South African society. The MLGI Protest Barometer aims to assist in the development of this understanding by providing basic but relevant data. It is clear from the above summary of the Barometer that protests are becoming more frequent and more violent and that the phenomenon has spread throughout the country. With regard to the grievances raised by protesters, the picture remains complex. It is clear that protesters raise a variety of issues and many of them relate to municipal services and governance.

The full MLGI Protest Barometer is accessible at www.mlgi.org.za

Figure 7: **Proportion of grievances raised from February 2007–August 2012**



THE MUNICIPALITY'S ROLE IN IMPLEMENTING The Gatherings Act

Community protests have become prevalent in South Africa in recent times, with the incidence of violence in these protests rising (see page 10). The ongoing strike by the South African Municipal Workers' Union (SAMWU) provides a classic example of gatherings with a high level of violence.

Strike action, especially violent strike action, has multiplier effects that municipalities must consider. For example, public safety, the destruction of property and environmental pollution in the aftermath of protest action all weigh heavily on municipalities. This gives rise to the questions: What is the regulatory framework governing such gatherings, and what is the municipality's role in terms of this framework?

Constitutional guarantee

Section 17 of the Constitution protects everyone's right to make themselves heard. It provides for the right to assemble, demonstrate, picket and present petitions peacefully and unarmed. This right is not contingent on approval by the state. In theory, protesters are entitled to assert their fundamental rights and freedoms. They can demand that state agents, such as police officers, respect these rights and freedoms.

However, section 17 excludes certain forms of assembly, demonstrations, pickets and petitions from constitutional protection, namely those not conducted 'peacefully and unarmed'. Assemblies, demonstrations and pickets that are not peaceful include those that involve assaults on members of the public, employ tactics of intimidation or are accompanied by physical violence to property. The term 'armed' may include the carrying of defensive devices and, possibly, the use of masks. Protesters who obscure their facial features and prevent their identification may have criminal motives or be prone to criminality.

Regulation of Gatherings Act

The Regulation of Gatherings Act (Act 205 of 1993) gives expression to the right guaranteed in section 17 of the Constitution. The Act took effect in November 1996 and marks a significant departure from the way in which marches and gatherings had been policed before, when the emphasis had been on police control. Under the Regulation of Gatherings Act, the emphasis is on the joint management of marches by the organisers, municipalities and police.

The Act significantly qualifies the right to gather in public. It limits and defines how, where, when and why individuals may gather, and it defines the shape, size and location of gatherings. It is arguable that such rigid definition could be vulnerable to constitutional challenge. However, until the Constitutional Court rules on the constitutionality of the Act, the current position remains. The Act only applies to 'gatherings', defined as 'any assembly, concourse or procession of more than 15 persons in or on any public road … or any other public place or premises wholly or partly open to the air'. The Act does not make a distinction between labour and political gatherings, and applies to both equally. In fact, any gathering of more than 15 persons in any public place in the Republic falls within the ambit of the Act.

The role of municipalities

Municipalities have a duty to facilitate all gatherings within their area of jurisdiction. Notice of the intention to gather must be given to the municipality concerned, whether or not the gathering is directed against it; even in the case of gatherings against private bodies, notice must be given to the municipality. The municipality must appoint a responsible officer to perform functions relating to gatherings. The Act requires the group intending to protest to appoint a convener, whose role is to organise the gathering. The convener must

give the responsible officer notice of the gathering seven days in advance, unless it is not reasonably possible to do so. In that case, notice must be given 48 hours before the intended gathering. If no responsible officer has been appointed, the municipal manager or his or her immediate junior performs the functions relating to gatherings. The municipality must respond to the notice of gathering within 24 hours of receipt. If it sees a need to discuss any amendment to the contents of the notice and to impose conditions regarding the conduct of the gathering, it must respond by convening a meeting between the municipality, the convener and the South African Police Service (SAPS) (known as a 'golden triangle' meeting).

Municipalities have a statutory and constitutional obligation to facilitate the right to assembly, but they may not thwart it. They should respond timeously to properly filed notices and must engage the convener in good faith. This means that in the golden triangle meeting, the views of the convener must be taken seriously. If the municipality sees no need for such a meeting, it must facilitate the gathering's proceedings as specified in the notice.

Prohibition of gatherings

Municipalities may only prevent or prohibit a gathering when 'credible information on oath' is presented that it poses a threat of serious traffic disruption, of injury to participants and others or of extensive damage to property, and that the police and traffic officers cannot contain the threat. Even then, the golden triangle meeting or consultation should first take place and reasons for the prohibition must be furnished. Past indiscretions by people associated with the convening group cannot be a ground for prohibition, nor can the reasonable suspicion of violence. There must be credible information on oath. The reason, topic or content of the protest does not matter. In essence, the prohibition may only be based on the inability of SAPS to ensure security. This rules out blanket prohibitions by municipalities in response to notices of peaceful demonstrations.

Even when credible information on oath concerning threats is brought to the attention of the municipality, the municipality may not summarily prohibit the gathering. The golden triangle meeting between the municipality, the police and the organiser of the gathering is then supposed to explore ways of conducting the gathering with less disruption, such as trying to ensure that vehicular traffic is less impeded.

Conduct of gatherings

The organiser must appoint clearly distinguishable marshals to control participants in the gathering, and to take the necessary steps to ensure that it proceeds peacefully at all times. The notice of gathering, which may be amended after the golden triangle meeting, includes binding conditions. The convener and marshals must take all reasonable steps to ensure compliance with them. Moreover, if there is riot damage as a result of the gathering, the organisation on behalf of which the gathering was held and each demonstrator are jointly and severally liable.

The police also have a duty to enforce the conditions of the notice. They may take such steps, including negotiations with the protesters, as are reasonable in the circumstances and appropriate to protect property and persons, whether participants in the gathering or not. Moreover, the Act permits the use of 'firearms and other weapons' for crowd control and the use of force where there is a 'manifest intention' to kill or to seriously injure persons, or to destroy or seriously damage property. However, use of firearms or force must be necessary, moderate and proportionate to the circumstances.

With these safeguards, it becomes senseless for municipalities to be hell-bent on responding to notices for gatherings with blanket prohibitions.

Comment

Protests, assemblies and mass demonstrations played a central role in the struggle against apartheid. Now that the battle for liberation has been won, and all possess the franchise, there might be an assumption that there is no place for demonstrations in the current dispensation. Still, mass protests continue to be an important form of political engagement.

Organised labour, landless people, anti-privatisation movements, students, squatters and even the police have all used demonstrations to press their demands. After all, dialogue, not the franchise, is the condition without which democracy cannot thrive.

Most importantly, the poor and the marginalised majority in South Africa cannot afford to litigate to get their voices heard. Neither are they in a position to press their demands through political channels. For them, the freedom to assemble counters feelings of helplessness and isolation.

Phindile Ntliziywana
Managing editor

RIOT DAMAGE

Who pays?

South African Transport and Allied Workers' Union v Garvis and Others (007/11) [2011] ZASCA 152

Protest action has become part of South Africa's political landscape. The extent to which it is increasingly marked by violence is cause for alarm (see *LGB* 13(3), p 10).

Assemblies, pickets, marches and demonstrations are essential features of a democratic society. However, unlawful behaviour when exercising the political rights set out in section 17 of the Constitution not only causes damage to public and private property, but also infringes the rights of others. That is why section 11(1) of the Regulation of Gatherings Act (Act 205 of 1993) provides that a person or organisation can be held liable for damage caused during a gathering which degenerates into a riot. In terms of section 11(2)(b), no liability exists when the convenor can prove that 'the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable'.

A recent judgment of the Supreme Court of Appeal provides valuable lessons to labour organisations, protest organisers and municipalities on their role in the context of protest action and the interpretation of this provision.

The facts

In May 2006 the South African Transport and Allied Workers' Union (SATAWU) organised a protest march, which constituted a gathering as defined in the Gatherings Act. The march turned into a riot, causing extensive damage to vehicles and shops in Cape Town's city centre. Eight people instituted action in the Western Cape High Court to hold SATAWU liable for the damages in terms of section 11(1) of the Gatherings Act. In denying liability in its Supreme Court appeal against the High Court judgment, SATAWU argued that section 11(2)(b) of the Gatherings Act was unconstitutional because it had 'stultifying' effects on the right to demonstrate, to assemble, to picket and to present petitions, as protected by section 17 of the Constitution.

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Doctoral intern

Decision

Although SATAWU had met all the material steps required when organising a gathering, the Court held it liable for the damage caused to the eight Cape Town citizens. The Court considered SATAWU's testimony, which showed that events leading up to the march had led to a volatile situation, characterised even by fatalities. Because SATAWU persisted in organising the march when it was reasonably foreseeable that nothing could prevent it from degenerating into a riot, the Court decided that it ought to be held liable.

Analysis

The Court emphasised the important role that municipalities play in facilitating gatherings. As discussed in the previous *Bulletin* (*LGB* 13(3), p 8), municipalities receive and process notices of gatherings. They convene the 'golden triangle' meetings with the South African Police Service (SAPS) and the convenors of gatherings. They are expected to generally take steps to try and limit any foreseeable harm that a gathering may create, which is a very complex and difficult task.

The judgment provides clarity on the scope of section 11(2) of the Gatherings Act, particularly regarding the SAPS' role in providing security. It makes it clear that municipalities may prohibit a gathering if the SAPS cannot ensure security. This authority is crucial, considering that municipalities are often at the receiving end of destructive behaviour during riots.

Importantly, the judgment clearly establishes that a gathering's convenor can be held liable for damages caused during the gathering, despite having taken measures to ensure a peaceful gathering. This is so if the gathering takes place despite it being reasonably foreseeable that nothing will prevent it from degenerating into a riot.

Ultimately, the judgment instructs all stakeholders to act responsibly, particularly when the situation is highly charged and the demonstration has the potential to result in harm to others. It calls for a higher duty of care from all stakeholders.

Photo: Thys Dullaart/Sunday Times

THEME 19: DEFINING MUNICIPAL POWERS

Municipalities have constitutionally protected powers. They are listed in the Constitution. On a number of occasions, municipalities have successfully asserted these powers in court (see also Themes 1 and 25). However, it is not easy to determine exactly what is included in these powers. This theme includes four articles that reflect on this problem. The first is an article discussing this problem of uncertain powers and suggesting solutions for it. The second is a case study of municipal powers on liquor matters: where does the municipal power to regulate liquor outlets end and where does the provincial power to issue liquor licenses begin? The third is a similar case study of road and transport powers. Lastly, it includes an opinion piece about a law that is out of line with the constitutional framework for municipal powers, namely the law on business licensing.

1. **Defining Local Government Powers: The Need for Guidelines** by Nico Steytler/Yonatan Fessha, Local Government Bulletin 2005, Volume 7, Issue 4, page 7-9
2. **Powers Over Liquor Matters: A Case Study of Provincial and Local Powers over Liquor Retail** by Jaap de Visser, Local Government Bulletin 2004, Volume 6, Issue 4, page 6-10
3. **Who Makes the Law: Providing Legislative Power between Provincial and Local Government** by Jaap de Visser, Local Government Bulletin 2002, Volume 2 Issue 3, page 8-10
4. **Parly has No Say in Sex Shop Site** by Jaap de Visser available at: http://www.iol.co.za/news/parly-has-no-say-in-sex-shop-site-1698878#.U5AIw_mSyBJ (last accessed 25 August 2016)

Defining local government powers

The need for guidelines

The powers and functions of local government are listed in Schedules 4B and 5B of the Constitution. The Schedules list functional areas without detailed definitions of each area. There is a considerable overlap between local government functional areas and those of provincial government, listed in Schedules 4A and 5A. Due to this, there is a degree of confusion about who does what. A lack of clarity about role definition may prejudice service delivery and cause conflict over resources and authority.

Defining functional areas with reference to 'provincial' and 'local'

The most obvious case of overlap is where the functional areas allocated to each sphere are circumscribed with reference to 'provincial' or 'local'. There is local tourism and provincial tourism, municipal planning and provincial planning, municipal health services and provincial health services, municipal public transport and provincial public transport, municipal roads and provincial roads and traffic, and so on. The question has often been asked: where does a provincial road stop and a local road commence?

Inclusive provincial functional areas

Since most provincial functions are broadly defined, by necessity they cover or include a listed local functional area. Examples are listed below.

key points

- **There is a considerable overlap between the powers and functions of local and provincial government.**
- **This may affect effective and efficient delivery of services.**
- **Guideline definitions may help all spheres of government interpret local government powers.**
- **It may be necessary to conclude intergovernmental protocols to apply definitions in practice.**

Local functional areas	Provincial functional area
Air pollution (4B)	Environment (4A)
Control of undertakings that sell liquor to the public (5B)	Liquor licenses (5A)
Local sport facilities (5B)	Provincial sport (5A)
Pounds (5B)	Animal control and diseases (4A)
Refuse removal, refuse dumps and solid waste disposal (5B)	Environment (4A)
Traffic and parking (5B)	Road traffic regulation (4A)

Liquor licences are an exclusive provincial function as far as retail licences are concerned. How must this competency be aligned with local government's power to "control undertakings selling liquor"? Any licence may include conditions on how liquor is to be sold to the public. How does it comply with municipal zoning competencies?

Problems

The overlapping of functions and unclear allocation of responsibilities may give rise to various problems, such as:

- *lack of accountability* to the electorate: blame for underperformance can be shifted from one sphere of government to the other;
- *duplication of services*: where both spheres of government are responsible for a functional area, both may provide the same service;
- *ineffective service delivery*: confusion over responsibility can lead to inefficient and slow service delivery;
- *no service delivery*: confusion could even lead to a situation where none of the responsible spheres provides the service; and
- *local government solely responsible*: local government as the sphere closest to the people will inevitably 'face the music' if no services are delivered on a concurrent functional area and will be compelled to fill the gap without necessarily having the funds.

The overlapping of functions and unclear allocation of responsibilities may give rise to various problems.

Courts

As the interpreters of the Constitution and all its schedules, the courts have the final word on defining the ambit and reach of functional areas. However, very few cases come before the courts for them to give a full definition.

Statutory interpretation

It is open to the national and provincial legislatures to define the functional areas. This power flows from their regulatory function in terms of section 155(7) of the Constitution. The difficulty with the legislative interpretation of functional areas is the adequacy thereof. Definitions may unduly restrict local government powers, or extend local government powers beyond their constitutional mandate.

Further, there is a lack of uniformity in approach by national line departments. Each line department that deals with local government may have a different conception of how local government powers should be defined and consequently implemented in practice. The definition of "municipal health services" in the National Health Act of 2003 as it relates to water quality monitoring may be at odds with the regulation of water quality by the Water Services Act of 1997.

An approach to the definition of local government powers and functions

To devise appropriate definitions for each competence, the following three-step process could be followed:

1. develop and adopt official guideline definitions;
2. develop and adopt statutory definitions; and
3. if required, negotiate the practical implementation of definitions.

The first step is to develop a set of guideline definitions that will guide all spheres of government in the exercise of their constitutional powers. The Minister responsible for local government can issue such regulations in terms of the Municipal Structures Act. The aim is three-fold:

1. to give municipalities guidance on the ambit of their powers and functions. This will be of great relevance to the drafting of by-laws and the structuring of the executive authority, including the drafting of integrated development plans (IDPs);
2. to guide the national and provincial departments when they draft statutory definitions of powers and functions concerned with a particular sector of government; and

3. to guide the provincial governments in defining the scope of their monitoring and support functions with regard to municipalities.

The aim of the guidelines is to secure a uniform and consistent approach to Schedule 4B and 5B competences. This will promote a coherent, overarching view of the nature and ambit of local government powers and functions. The guideline definitions would not, however, have the binding force of law, but would provide municipalities and sector departments at both national and provincial level with a framework in terms of which the details of a particular functional area can be determined.

The guidelines should be developed in consultation with the various line departments and local government to achieve an informed and sector-specific definition as possible.

Negotiated definitions or applications of definitions

Any definition, whether in a form of a guideline or statute, will not resolve all definitional ambiguities. Clear cut-off points are always elusive. Moreover, while the general principles can be captured in law, their application may require administrative decisions. The final step towards defining competences is using intergovernmental forums where the application of definitions can be finally settled. This can be done through the conclusion of protocols and memoranda of understanding on a particular competency.

An example of the need for an intergovernmental protocol is the classification of roads. While a provincial Act could define the broad framework of how to distinguish between provincial and municipal roads, the application of the Act to actual roads could best be done in an intergovernmental agreement by an IGR forum envisaged by the Intergovernmental Relations Framework Act of 2005.

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CAGE project

The Local Government Project at the Community Law Centre is conducting research on the definitions of the powers and functions of provincial and local government. This research is part of a project on Managing Concurrency of Powers and Functions through Cooperative Government. Funding was contributed by the Conflict and Governance Facility (CAGE), a project of National Treasury, which is funded by the European Union under the European Programme for Reconstruction and Development.

Making headlines

Intergovernmental Relations Framework Act finally in operation

The Intergovernmental Relations Act 13 of 2005 was signed into law by the President on 10 August and took effect on 15 August 2005. The implementation of the Act brings a long process of consultation and drafting to a close. The next step is the implementation of the Act.

For local government, the following must occur. At provincial level, the Premier must establish a Premier's Coordinating Forum, consisting of the Premier and some members of the Executive Council, the mayors of metropolitan and district municipalities and a representative of Salga in the province. At district level, the district and local municipalities must convene a district intergovernmental forum.

In both cases, a protocol must be drafted that will structure the way the forums operate.

Local Government Bulletin 6

Powers over liquor matters

A case study of provincial and local powers over liquor retail

The demarcation of local government powers vis-á-vis other spheres of government is fast becoming a critical area of research and intergovernmental dialogue. It is expected that municipalities will start asserting their institutional integrity.

This article presents a case study of the demarcation of local government powers in the regulation of the liquor retail industry. The research was made possible by the Western Cape Local Government Association and the City of Cape Town.

The Constitutional Court's *Liquor Bill* judgment (*In re: Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC)) provided clarity on *national* versus *provincial* powers regarding liquor retail.

However, another important issue is the division between *provincial* and *local* powers. Schedule 5A of the Constitution lists *liquor licences* as a provincial competency. Schedule 5B of the Constitution lists the *control of undertakings that sell liquor to the public* as a local government competency.

This overlap raises two issues: firstly, what is the difference between liquor licences (as a provincial competency) and the control of undertakings that sell liquor to the public (as a local government competency)?

Secondly, to what extent can provinces still exert influence over municipal lawmaking on the control of undertakings that sell liquor to the public?

key points

- Municipalities must promote social and economic development.
- Municipalities decide where liquor may be sold.

Liquor licences

The competency *liquor licences* is concerned with retail sale. According to the Constitutional Court in the above *Liquor Bill* judgment, it encompasses:

- the grant or refusal of permission to sell liquor at specified premises;
- the power to impose conditions pertinent to that permission; and
- the collection of revenue that might arise from or be attached to its grant.

It is submitted that the background to the provincial competency is the need to achieve provincial uniformity in three areas, namely:

- a fair, equitable and flourishing liquor retail market;
- health and basic safety; and
- security and reducing socio-economic costs of alcohol consumption.

A *fair, equitable and flourishing liquor retail market* includes matters such as protecting free market principles (e.g. retailers should have no substantial interests in wholesale distributing companies), promoting the entry of new participants, stimulating regional and provincial retail industries (e.g. the wine industry), rules for the content of advertising, employment issues in

the retail industry, promoting the business skills of retailers etc.

The issue of *health and basic safety and security* includes what types of liquor may be sold, the suitability of premises, hygiene issues, the suitability of the applicant (avoiding situations in which unsuitable candidates go 'shopping' at different municipalities), etc.

Reducing *socio-economic costs* of alcohol consumption has to do with matters such as addressing alcohol abuse, preventing the sale of liquor to minors, combating drunk driving, preventing the sale of liquor to drunk persons, promoting general social responsibility in the retail industry, etc.

Control of undertakings that sell liquor to the public

A more complex issue is the delimitation of the above provincial competency and the municipal competency, *control of undertakings that sell liquor to the public*. The mere fact that the Constitution includes the two competencies in two different lists indicates that, despite the obvious overlap, there is a difference between them.

The development of communities and the protection of the environment in which they live are primary concerns for local government.

Delimitation of competencies can never be absolute. Overlap is inevitable and the resulting tension must be resolved within the framework of cooperative government. However, this does not mean that delimitation of competencies is unnecessary. Cooperative government is based on respect for institutional status and on the duty to refrain from assuming powers or functions, except those conferred in terms of the Constitution.

A certain degree of clarity on functions and powers is necessary before negotiations to resolve the above tension can be useful.

Defining local government's role

The definition of local government's role, as enunciated in the constitutional competency *control of undertakings that sell liquor to the public*, comprises two elements: firstly, *the undertakings* that sell liquor to the public and secondly, the *control* of such undertakings.

The first element reveals an overlap with the abovementioned definition of the retail sale of liquor. The undertakings include bars, taverns, bottle stores, restaurants, grocery stores, micro-breweries and wine estates.

What, then, does the Constitution want local government to 'control', if it is not the possession of a liquor licence? In view of the fact that the Constitution refers to "the undertakings" that sell liquor, it is suggested that the control measures must relate to *the act of selling liquor to the public*.

Municipalities must promote social and economic development and they must promote a safe and healthy environment (Ss 152(1)(c), (d) Constitution). In other words, the development of communities and the protection of the environment in which they live are primary concerns for local government.

It is submitted that the Schedule 5B competency sees to the 'public order' effects of liquor outlets. Local government's perspective in regulating the liquor industry is: *the impact that the act of selling liquor has on the community around a liquor outlet*.

What are public order effects?

What are the public order effects that the Constitution wants local government to control? It is submitted that they involve *where* and *when* liquor should be sold to the public.

Municipalities decide *where* liquor may be sold mainly by zoning properties for such a purpose. Local government, as the institutional *locus* of community interests, can articulate the interests of residents and is best placed to have regard to issues such as traffic noise, other noise pollution, development of the area, social considerations pertaining to the community concerned, children's safety, the vicinity of places of worship,

old-age homes and child-care facilities, and particularly communities' views on these matters.

Municipalities also decide *when* liquor may be sold: they decide the opening hours of liquor outlets and decide on which days of the week liquor may be sold. In this regard, it is contended that the current practice, whereby provincial Liquor Boards prescribe in a liquor licence when the licensee can sell liquor, lies outside the provincial competency *liquor licences*.

Provincial competency to regulate municipal lawmaking

Local government does not exclusively hold the competency to legislate on the control of liquor outlets. Provincial governments can also legislate on these matters, though only "to the extent set out for provinces in sections 155(6)(a) and 155(7)" (heading Schedule 5B).

This means that the provincial government has two areas of competency with regard to the liquor industry. The first is the *full* competency on liquor licences (as defined above). The second is the *limited* competency to legislate on the control of liquor outlets by local government.

Local government does not exclusively hold the competency to legislate on the control of liquor outlets.

Sources of provincial power on local government matters

If local government is to live up to the constitutional promise of 'developmental local government,' it must be allowed to govern at its own initiative without undue interference from central and/or provincial governments. At the same time, the imperative of coherent governance requires provincial oversight and regulation.

As stated above, there are two provisions in the Constitution that provide a basis for provincial lawmaking on local government matters. Section 155(6)(a) confers the power on provincial governments to:

> *by legislative or other measures…provide for the monitoring and support of local government in the province*.

Section 155(7) states that provincial governments:

> *have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)*.

It is suggested that the provincial power to *monitor* can be used as a means to obtain information from local government on the exercise of its powers to control liquor outlets and as a means to prescribe ways and procedures to provide information.

This information can then be used in the context of provincial support and provincial supervision of local government.

Although the power to *support* is substantial, it is clear that it comes into play only in the event of (threatening) decline or degeneration of local government performance. When there is no need to address or prevent such degeneration or decline, the power to support cannot be construed as providing the provincial government with any say in the content of municipal law on the control of liquor outlets.

The powers to *regulate* conferred by section 155(7) are significant, though also limited. It is suggested that the provincial power to regulate Schedule 5B matters provides the province with a say in the content of municipal law on the control of liquor outlets.

However, this provincial say is limited to setting a framework. It is not open to provincial governments to regulate the detail of municipal law on the control of liquor outlets. The framework must be understood as setting the outer boundaries, providing minimum standards while leaving intact a substantial degree of municipal discretion to make policy decisions on the issue for the locality.

In sum, sections 155(6)(a) and 155(7) give provinces the power to provide a framework

within which local government must exercise its powers to control liquor outlets. These provincial powers do not extend to the detail of municipal law on control of liquor outlets. They permit the provincial government to set standards and establish minimum requirements, coupled with monitoring procedures.

Some practical examples

What does this mean for current developments in liquor retail? Particular reference will be made to recent policy developments in the Western Cape, which provide a useful illustration of some of the issues that create debate.

Opening hours

It was suggested above that the constitutional division of powers implies that for a province to decide on the opening hours of a liquor outlet is not in keeping with the Constitution. The Constitution wants local government to control the times when a particular undertaking sells liquor. However, sections 155(6)(a) and 155(7) of the Constitution allow provincial government to determine a framework for the exercise of this power. This could include categories of outlets linked to maximum hours of trade, as well as other general principles for opening hours, monitoring procedures etc. Provincial government could set a standard for days on which liquor outlets are open (e.g. relating to Sundays and public holidays).

For a province to decide on the opening hours of a liquor outlet is not in keeping with the Constitution.

Examples of provincial mishaps

It seems that provincial departments are not appreciating the new constitutional dispensation and its consequences for provincial and local government powers. An analysis of the recently promulgated *Proposed Liquor Policy for the Western Cape* (hereafter the Provincial Liquor Policy) reveals a lack of understanding of local government powers.

Firstly, the policy seems to follow the right course when it says that "liquor trading days and hours in an area of jurisdiction of a municipality will not be imposed by the provincial liquor legislation" (at p. 77). However, it states further that provincial legislation will authorise *appointed* municipalities to set liquor trading days and hours by by-law. As shown above, the Constitution has already authorised *all* municipalities to set liquor trading days and hours. The provincial government exceeds the limits of sections 155(6)(a) and 155(7) when it prevents municipalities from exercising their constitutional competency by not 'appointing' them.

Secondly, municipal by-laws that set the liquor trading days and hours are "subject to the approval process by the Minister responsible for economic development" (p. 77). It is not open for the provincial government to require a provincial approval of municipal by-laws. These by-laws are enacted within a competency that the Constitution has reserved for local government, namely *control of undertakings that sell liquor to the public*. Sections 155(6)(a) and 155(7) of the Constitution do not permit this kind of 'regulation' of a local government competency either. Other proposals that the Provincial Liquor Policy makes, such as the Minister setting closed days and maximum hours of trade, are permissible (p. 148).

Thirdly, the Provincial Liquor Policy states that the provincial Liquor Board will have the right to impose restricted trading hours *despite* the municipal by-law "should the location or circumstances warrant this" (p. 78/150). If this became law, it would clearly go beyond the parameters of the Constitution. There would be no point in a constitutional competency to legislate on a particular topic, if that legislation can be ignored in a provincial procedure.

Another proposal that does not bode well for local government makes provision for the approval of a licence when the land use requirements are not met. The policy asserts that, under certain conditions, the outlet "will be deemed to meet the land use planning requirements set by the municipality for the

premises" (p. 20). It is submitted that this proposal goes beyond what is constitutionally permitted. Municipal planning is a local government competency. To allow provincial government to unilaterally make the decision on whether or not municipal planning requirements are (deemed to be) met is not in keeping with the constitutional division of powers and functions.

In short

This article argues that the Constitution instructs provincial and local government to arrive at an approach where provincial government is responsible, through liquor licensing, for regulating the liquor retail market in general, for securing health and basic safety, and for reducing the socio-economic costs of alcohol use, while local government's developmental mandate requires municipalities to regulate the 'public order' effects of liquor sales (subject to provincial standards). The latter comes down to determining *when* and *where* liquor may be sold.

The division of responsibilities between provincial and national government cannot be absolute and problems arising from the inevitable overlap need to be solved within the framework of co-operative government. Examples from the *Western Cape Provincial Liquor Policy* reveal that the changes in the constitutional design of local government have not yet fully dawned on policy makers in this area. In order for the policy to meet constitutional muster, it needs revision where it encroaches on local government's institutional integrity.

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WHO MAKES THE LAWS?

DIVIDING LEGISLATIVE POWER BETWEEN PROVINCIAL AND LOCAL GOVERNMENT

As from the day of the forthcoming local government elections, local government's legislative and executive powers are going to be squarely based on the Constitution. Section 156 of the Constitution affords local government authority over the matters listed in Schedule 4B and Schedule 5B to the Constitution as well as over any other matter assigned to it by national or provincial legislation. Further, Schedule 4A or Schedule 5A matters can be assigned to *a particular* municipality by *agreement* between that municipality and national or provincial government. In sum, local government derives legislative powers from -

- the competencies, listed in Schedule 4B and Schedule 5B; and
- the assignment of the administration of any other matter to municipalities.

An issue, that increasingly plagues the minds of many lawyers and local government practitioners deals with the division of legislative and executive power of local government on Schedule 4B and 5B matters, relative to the other two spheres of government. This problem has two equally important angles to it, one of which will be touched on in this article.

Powers of other spheres

Firstly, provincial and national government also have regulatory and intervention powers related to Schedule 4B and 5B matters (on the basis of ss 155 and 44 of the Constitution). This discussion about the powers of other spheres on the local government matters of Schedule 4B and 5B will not be discussed in this article.

Overlap with other functional areas

Secondly, there is overlap between certain matters in Part B of the Schedules, which belong to local government and matters listed in Part A of the Schedules, which belong to national and provincial government. For example, Schedule 5A allocates the authority over 'Provincial Roads' and 'Provincial traffic' to provinces. How do these competencies relate to the local government competencies of 'Municipal Roads' and 'Traffic and parking' of Schedule 5B respectively? Similarly, Schedule 4A accords provincial and national government concurrent powers over 'Public transport' while Schedule 4B lists 'Municipal public transport' as a local government function. The question that arises is how to distinguish between these competencies and how to determine the cut-off points between provincial, national and local competencies on the same functional areas? This article highlights this debate with respect to these three examples and proposes possible solutions to the problem.

Municipal roads / Provincial roads

Firstly, the functional area 'roads' in general seems to deal with the functions and powers, that are normally related to the management of roads, including –

- making, constructing, reconstructing, altering and maintaining roads;
- opening, closing or deviating roads;
- entrance and exit to roads;
- law enforcement relating to roads;
- signposts, warning signs, resting places, fencing;
- claiming damages when a road has been damaged;
- stormwater drainage, distance indicators, signposts, warning signs, resting/ parking places etc.

Presently, the division of powers and functions between provincial and local government with regard to roads is mainly regulated in provincial ordinances. These ordinances stand to be repealed come the final phase of local government transformation. In most ordinances, the width of the road is key to the classification of a public road. However, its appearance is not the only relevant consideration. Public roads have been classified in a particular way on the basis of their expected use (eg. linkage between growth points) together with sufficient documentation with regard to the (future) development of the relevant areas. The picture that emerges from these ordinances is one whereby the discretion of provincial government plays an important role in the division of powers and functions between local government and provincial government with regard to roads. Further, a myriad of agencies and delegations exist, whereby local authorities are afforded powers over public roads or are assisted by provincial government in the management of public streets.

...how to determine the cut-off points between provincial, national and local competencies on the same functional areas?

New dispensation

Key to the new local government dispensation is the principle of 'wall-to-wall' local government. Consequently, every road in the country will fall within a municipal area. Key to the new dispensation is also the constitutionally protected status of local government. Therefore, the criteria used by provincial governments for the classification of roads as provincial or local will have to be in line with the distinction made in the Constitution between 'Provincial roads' and 'Municipal roads'. The criteria used at present deal mainly with the width of the road. The usage, purpose, status, appearance etc. are criteria that usually flow from the width of the road. Instructive are also the criteria that are used in the Local Government Transition Act (LGTA) to divide the powers between metropolitan councils and metropolitan local councils with regard to roads. In terms of the LGTA (Item 7 of Schedule 2), metropolitan councils are responsible for '[T]he construction and maintenance of arterial roads that transcend more than one metropolitan local council boundary, including –

- roads with significant traffic volumes;
- roads forming major public transport corridors;
- roads used extensively by traffic from outside the metropolitan local council within which such roads are situated;
- roads in respect of which access and egress have been limited in accordance with a law;

- roads of a major nature linking significant urban growth points or potential growth points; (...) but excluding national roads, toll roads, provincial freeways and provincial arterial roads.'

Provincial legislation can provide for a classification procedure, provided that it accords with the new dispensation. The power for provinces to classify roads exists in terms of the provincial power to regulate on Schedule 5B matters. It has to be borne in mind that a provincial classification is certainly not the beginning and the end of the division of powers. The classification would have to reflect the new constitutional scheme of division of powers and functions and can be challenged if it is in conflict with the Constitution.

Distinguishing 'Provincial roads' from 'Municipal roads'

What criteria can be applied to distinguish a 'Provincial road' from a 'Municipal road'? Firstly, the word 'municipal' must be understood to apply to all Categories of municipalities. In a metropolitan area, the 'competitors' are the province and the metropolitan municipality (Category A). In areas outside the metros, the 'competitors' are the province on the one side and the district (Category C) and local (Category B) municipalities on the other side. A further division is then made between district and local municipalities.

A municipal competency deals with intra-municipal activities and concerns only. It excludes activities with an 'extra-municipal' dimension. An example of an 'extra-municipal' dimension is a road that links two separate municipalities. The primary criteria is the purpose of the road. If the purpose of the road is to link two or more municipalities, there is an extra-municipal dimension to the road and it must be regarded as provincial. Within the 'purpose' criteria, various aspects are important. For example, the usage of the road is important: if the road primarily serves the inhabitants of one municipality it is a 'municipal road'. Roads that begin and end within a municipality are 'municipal roads'. Logically, the scope of 'municipal roads' has increased, following the demarcation of municipal boundaries by the Municipal Demarcation Board. The width of the road – the main benchmark to classify roads in terms of current legislation – can be useful, but is not decisive; a road with a 'lesser' appearance can still have critical linkage and usage functions between municipalities. And a wide road that has no extra-municipal dimension or purpose is still a 'municipal road'.

If the purpose of the road is to link two or more municipalities, there is an extra-municipal dimension to the road and it must be regarded as provincial.

In sum, the distinction that is proposed is the following: 'municipal roads' are roads that have a 'municipal' purpose in that they primarily serve the inhabitants of the municipality and do not have a linkage function between municipalities. Conversely, 'provincial roads' are roads that have an 'extra-municipal dimension' in that they form major linkages between two or more municipalities.

Public transport / Municipal public transport

The term 'public transport' seems to be limited to public transport over land. Public transport over water is covered by another Schedule 4B competency, namely "Pontoons, ferries, jetties, piers and harbours...". Public transport in the air is regulated by national and international aviation regulations. Presently, railway services are conducted in terms of national legislation. However, in terms of the new dispensation, provincial and municipal governments can regulate on certain types of railway services, subject to 'supervisory' powers of national government (in terms of section 44(2)). For example, certain forms of 'light commuter rail' such as subways, trams and other intra-municipal railway services can be regulated at local government level. In conclusion, these two competencies therefore seem to refer to public transport over roads and rails only.

Current distinction

In terms of the current legislative dispensation on public transport, the thrust of which is regulated in the Road Transportation Act 74 of 1977 and the Urban Transport Act 78 of 1977, there does not seem to be a clear distinction between provincial and municipal public transport matters. No specific legislative powers with regard to public transport matters exist for local government outside the metropolitan areas, where metropolitan municipalities have certain powers and functions under the LGTA and the Urban Transport Act. However, these powers are limited in that they are subject to provincial approval or intervention.

New dispensation

In the new dispensation, a distinction will have to be made between provincial and municipal transport. The current legislative framework for transport matters encroaches on the competency of local government to deal with municipal transport matters. Apart from the fact that it only applies to very limited situations, the powers given in terms of the Urban Transport Act are not 'real powers'. They do not accord with the status of local government in the Constitution and its legislative and executive authority.

Distinguishing 'Provincial public transport' from 'Municipal public transport'

It is submitted that the same principle as above should guide the distinction between the provincial and municipal competency regarding public transport. A municipal competency deals with intra-municipal activities and concerns only. It excludes those activities with an extra-municipal dimension. 'Municipal public transport' deals with public transport over roads which commence within the boundary of a municipal area and terminate within the boundary of the same municipal area. An example of that is public transport provided by city buses. Public transport that transcends municipal boundaries does not deal with intra-municipal activities and requires to be addressed on provincial or national level. However, this does not mean that local governments have no authority whatsoever on public transport that transcends their boundary, but starts or ends within their boundaries. An example is the establishment of taxi ranks and bus ranks and the issuing of permits and making of regulations therefor. Taxi and bus ranks, whether for intra-municipal or long distance purpose could in any event be regulated on the basis of the municipal competency to deal with traffic matters (Schedule 5B).

'Provincial ... traffic' / 'Traffic and parking'

In the discussion about these two overlapping competencies in Schedule 5A and 5B respectively, a third competency comes into play. Schedule 4A also mentions 'Road traffic regulation' as an area over which provincial and national government have concurrent authority. How should one interpret the fact that 'Provincial...traffic' and 'Traffic and parking' appear in Schedule 5, whereas Schedule 4 already mentions 'Road traffic

regulation'? The two sets of competencies seem to deal with different matters. 'Road traffic regulation' deals with the making of rules regarding traffic on public roads. It deals with the rules of the road, general rules for speed limits, rules regarding accidents, accident reporting, reckless driving, driving under influence, legal procedures, drivers' licences etc.

A possible interpretation of the fact that the two competencies on traffic in Schedule 5 do not contain the word 'regulation' is that they do not deal with the making of rules on road traffic as such. In other words, they do not deal with the regulation of the substance of road traffic, which is, amongst other things, the issues mentioned above. In determining what the competencies on traffic in Schedule 5 do entail, the LGTA is instructive (Schedules 2 and 2A of the LGTA). In terms of the LGTA, metropolitan councils have authority over the functional area 'Traffic Matters' which is further described as:

- The co-ordination and determination of policy for traffic matters which affect more than one metropolitan council.
- The provision and control of road traffic engineering which affects more than one metropolitan local council.
- Traffic law enforcement, if so requested by the metropolitan local council concerned.

The metropolitan local councils' authority over 'Traffic Matters' contains the following:

- Traffic law enforcement.
- The testing of vehicles and drivers.
- Matters pertaining to road safety.

It is submitted that 'Provincial...traffic' in Schedule 5A and 'Traffic...' in 5B deal with issues that are related to facilitation, implementation and enforcement of the road traffic rules (that are based on the Schedule 4A competency). The two competencies include matters such as:

- determination of policy on traffic matters, such as the promotion of road safety and combatting road congestion;
- road traffic engineering;
- traffic law enforcement; and
- vehicle and driver testing.

Parking

One specific aspect of road traffic, namely parking, has been allocated to local government in Schedule 5B. That means that local government has the authority to make rules with regard to parking in its area of jurisdiction. These rules can deal with matters such as:

- the determination of parking areas, loading zones etc;
- rules regarding parking areas, loading zones etc;
- the determination and collection of parking fees; and
- rules regarding parking meters / parking attendants.

Distinguishing 'Provincial... traffic' from 'Traffic...'

What is then the content of the local government competency 'Traffic..' as opposed to the provincial competency 'Provincial...traffic'? As discussed earlier, both competencies relate to the facilitation, implementation and enforcement of the road traffic rules and policies, that exist on the basis of Schedule 4A. Many of the general rules, alluded to in connection with the other functional areas above apply. Municipal traffic deals with traffic matters which are most appropriately dealt with on a municipal level. In other words, with traffic matters that are intra-municipal and do not require regulation on provincial level. Examples are:

- rules regarding pedestrians;
- rules regarding use of sidewalks;
- general road safety rules (road behaviour, road obstruction);
- rules on the use of roads for purposes other than traffic;
- rules regarding animals / uncommon vehicles / vehicles drawn by animals on the road; and
- rules regarding processions (regulations, permits).

Conclusion

A major challenge lies ahead for local government practitioners to start defining the legislative roles of provincial and local government. The LGTA, coupled with the transitional arrangement in the Constitution and assisted by an 'understanding' judiciary, shields the current legislative dispensation from attacks based on its inconsistency with the institutional integrity of local government. However, come the election date, local government's legislative powers will be squarely based on the Constitution and more clarity will be needed on the issues addressed above.

Jaap de Visser
Local Government Project
Community Law Centre, UWC

Parly has no say in sex shop site

NEWS / 5 June 2014, 08:29am

The municipality cannot refuse granting a licence to an adult store on the grounds of objections from the community (including Parliament), says Jaap de Visser.

Cape Town - The Sunday Times reported with some glee that African Christian Democratic Party (ACDP) leader the Rev Kenneth Meshoe refused to join the ANC in condemning the location of an adult store opening up in front of Parliament.

In terms of the current Businesses Act, the municipality cannot refuse granting a business licence to an adult store on the grounds of objections from the community (such as schools and places of worship or Parliament), says the writer. Picture: Tracey Adams. *Credit: INLSA*

Apparently, the ACDP stated that it had no sympathy with the ANC because “they set the laws for business licences allowing such business to trade in any premises zoned for business use in the first place”.

Of course, the ACDP would not miss an opportunity to deliver a sting to the ruling party. But actually, a closer look at the national law on business licensing, and particularly how this law uses municipalities to grant licences, does suggest that there is a problem in our law for business licensing.

More fundamentally, in a strange way, this incident should make Parliament know what it feels like when government takes decisions without considering the views of surrounding communities.

Media reports suggest that the City of Cape Town had granted a licence for the operation of the adult store in 2004 and that it is now investigating that decision and whether it indeed still allows the opening of the store.

The city grants business licences to entertainment facilities such as adult stores in terms of the Businesses Act 71 of 1991. Municipalities are designated as licensing authorities in terms of this act. Business activity in the municipal area is subject to the licensing regime of the act and the municipality receives business licence applications and decides them in terms of the act.

What is critical about the act and how it uses municipalities to deal with business licences is that the act limits the municipality's discretion to decide on the applications for the licences. The municipality must grant a business licence if certain conditions are met.

In the case of an adult store, the licence may only be refused if the business premises do not comply with a requirement relating to town planning, with the safety or health of the public or with any law which applies to those premises.

The municipality may refuse a licence when it is satisfied that the applicant is not a suitable person to carry on the business. The act does not allow the municipality to refuse business licences for any other reason. The municipality may thus not take the views of neighbours or the suitability of the location into account when considering the licence. In fact, if the municipality refuses a licence based on such considerations, it violates the act and can be taken to court.

In other words, if the area where the adult store is located was zoned for "business" (which the CBD undoubtedly is), if the building met all the safety and health requirements and if the applicant was a suitable person to carry on this type of business, the city would have been compelled in 2004 to grant the licence.

It is thus a fairly safe assumption that the licence was granted by the city, not necessarily because the location of the adult store was such a great idea but simply because the applicant complied with the requirements of the Businesses Act and the city was forced to grant the licence.

Of course, the city must still complete its investigation into this saga, including whether the premises are still compliant with the Businesses Act and whether the owner has changed since 2004 (which would necessitate a new licence application). However, in the original licence application in 2004, the act would probably not have allowed the city to consider the views of the surrounding community.

Ironically, in this case the "community" includes Parliament. So strictly speaking, Parliament's views on the suitability of the location would not have come into play, as strange as that may sound. Of course, there may still be other permits necessary to operate the adult shop. The Films and Publications Act of 1996, for example, requires that people who wish to distribute or exhibit adult material in public must apply for permission from the board. However, that process does not place a high premium on community views either.

Parliamentarians may be confounded with a sex shop opening in front of its doors and they are fully entitled to raise their concern. Parliament, like anyone else living or working in the area, is a critical stakeholder when the city makes decisions with respect to the precinct in which it operates.

However, many communities are faced with similar stories and theirs do not necessary make it into the media.

They do not even relate to the sensitivities of our public representatives but to the well-being of children and with the establishment of adult shops offending religious communities.

Imagine the scenario where an entrepreneur applies to the municipality to operate an adult shop in a business area. The applicant has an impeccable business record and operates a number of other adult stores without ever breaking any law or causing any difficulty.

However, right opposite the proposed location for the adult shop is a mosque. Furthermore, the shop will be located right between a secondary school and the local train station, thereby forcing pupils to pass the shop on their way to the train station.

The municipality, as the designated authority to decide on the business licence, is concerned about the impact of this type of business on the broader school environment.

Both the school and the mosque are vehemently opposed to the operation of an adult shop in their area. Shouldn't the municipality refuse the licence?

In terms of the current Businesses Act, the municipality cannot do that and is instructed to ignore the views of the community and to grant the licence.

Municipalities have complained about this to the national government and have argued that the legislative framework should change.

Last year, Minister Rob Davies published a new Licensing of Businesses Bill for comment. This bill created an opportunity to deal with the problem.

However, the bill faced stiff opposition for creating too much red tape and is being reconsidered by the Department of Trade and Industry.

It will probably be submitted to Parliament some time during its current term.

One very good thing may come of this incident: when the bill is resubmitted to Parliament, there is no doubt that our parliamentarians will sit up straight and pay particular attention to it.

Professor Jaap de Visser is director of the Community Law Centre at the University of the Western Cape.

Cape Times (/capetimes)

THEME 20: PROPERTY RATES

Local and metropolitan municipalities levy property rates. The legal framework for this is the Municipal Property Rates Act. The MPRDA provides that municipalities must adopt property rates policies and by-laws. It also regulates property rates, for example by prescribing ratios that limit a municipality's freedom to determine a rate for a specific category of property. Furthermore, the MPRDA deals with valuation, upper limits to rates, appeals against valuation etc. These articles discuss various aspects and developments related to the MPRA.

1. **The Property Rates Act: A Tool for Poverty Alleviation** by Achmat Toefy, Local Government Bulletin 2005, Volume 7, Issue 4, page 4-5
2. **Implementing the Property Rates Act: Getting the Policies, by Laws and Resolutions Right** by Nico Steytler Local Government Bulletin 2008 Volume 10, Issue 5, page 17-20
3. **Property Rates: Latest Developments** by Jaap de Visser and Douglas Singiza, Local Government Bulletin 2010, Volume 12, Issue 2, page 14-16
4. **The New Municipal Property Rates and Regulations: Mere Regulation or Rational Ratios** by Nico Steytler, Local Government Bulletin 2008, Volume 10, Issue 1, page 10-11
5. **Municipal Property Rates Act: Some Valuation** Issues by Riel Franzsen, Local Government Bulletin 1999, Volume 1, Issue 1, page 25-28

The Property Rates Act

A tool for poverty alleviation

Property rates are an important source of revenue for municipalities and this is reflected in the preamble to the Property Rates Act of 2004 (the Act): "there is a need to provide local government with access to a sufficient and buoyant source of revenue necessary to fulfil its developmental objectives". At the same time, however, a municipality's financial health should not be attained at the unjustifiable expense of the poor within its area. The power to impose rates should take into account the imbalances of the past and the burden of rates on the poor.

The Act, while permitting the levying of rates, also requires that the poor are taken into account, provided that such consideration is not arbitrary or haphazard. This much is clear from section 3(6), which prohibits a municipality from granting relief to property owners on an individual basis. Rather, the poor and other vulnerable sectors must be catered for in terms of a rates policy that sets out the criteria for identifiying categories of property owners that may benefit from alleviation measures. The alleviation must thus be granted in a structured and fair manner.

Municipalities are bound by the general principles of administrative law, including the duty to act fairly, when they determine such categories. The general administrative law requirements are further reflected in section 3(3)(a), which obliges the rates policy to "treat persons liable for rates equitably". Thus, while equal treatment is not required, differential treatment must be equitable. Accordingly, the rates policy may take into account "the effect of rates on the poor and include appropriate measures to alleviate the rates burden".

Categories of owners and property

The rates policy may differentiate between categories of owners or categories of property. The members of the categories may then benefit through rates exemptions, reductions or rebates. Specific reference is made in section 15 to various beneficiaries, including the indigent, owners dependent on pensions or social grants, owners temporarily without income and owners of residential properties valued below a threshold set by the municipality.

However, other rational differentiations may also form part of the categorisation. An example that looks beyond purely financial thresholds may be where broader economic factors harshly impact on the ability of certain categories of owners to pay rates. An example would be a category of low-income owners in areas largely inhabited by the previously disadvantaged. Such areas may, due to property market trends, suddenly become fashionable and marketable, with the values of properties in those areas surging. This may mean that certain residents cannot afford the proportionate increase in rates. Eventually, when long-standing community members move to more affordable areas and the rich buy their homes, gentrification results.

Municipalities may wish to determine criteria that would identify areas that are transforming through gentrification and establish measures such as discounts that counteract the effects of any potential inequity.

Moreover, a municipality may not levy rates in respect of property that belongs to land reform beneficiaries (or their heirs) for a period of ten years after title is transferred to the beneficiaries. In addition, they may not levy rates on the first R15 000 of the market value of a category of residential property determined by the municipality. These measures will, on the whole, be most beneficial to those belonging to the lower income groupings.

A further measure is the deferment of the payment of rates under 'special circumstances'. The temporary loss of income suffered by property owners in the middle or upper income groups may warrant a deferment rather than a discount as contemplated in section 15. On the other hand, deferment may well undermine the aims of the Rates Act should a municipality defer payments owed by the indigent or temporarily unemployed poor, as it may simply compound the indebtedness of such persons.

Comment

These measures are aimed at alleviating the rates burden on the poor. The exemption, reduction and rebate mechanism will clearly evolve and be pivotal. However, such mechanisms must be prudently conceived and applied.

Municipalities should carefully consider the financial implications of the proposed policies and how best to structure the overall package of exemptions, reductions and rebates. Municipalities must also ensure that their policies comply with the principles in the Act

key points

- **Municipalities must adopt a rates policy that sets out the criteria for identifying the categories of property owners who may benefit from alleviation measures.**
- **The rates policy may differentiate between categories of owners or of property.**
- **Municipalities should carefully consider the financial implications of the proposed policies and how best to structure the overall package of exemptions, reductions and rebates.**

and the general principles of administrative law, in particular whether a policy's differentiation between categories of owners or categories of property is lawful. Thus, the Act seeks to create a framework within which municipalities are able to equitably balance their own revenue needs with those of deserving categories of property owners. Whether that balance will be attained will largely depend on the manner in which municipalities apply the principles outlined in the Act.

Achmat Toefy
Director, Public Law Department
Mallinicks Inc.

MALLINICKS

Implementing the Property Rates Act

GETTING THE POLICIES, BY-LAWS AND RESOLUTIONS RIGHT

As from 1 July 2009, all municipalities must implement the Municipal Property Rates Act. This requires all municipalities to have a proper rates policy, which is in turn implemented in a by-law and a rates resolution. Among the municipalities that have implemented the Act thus far (only 40% of all municipalities) there is great confusion about the exact content of the policy and by-law. The danger in this uncertainty is that if the policy and by-law do not correctly implement the Act, a municipality's ability to enforce the payment of rates may be fatally flawed.

Legal requirements: Policy, by-law and resolution

Rates policy

The Rates Act requires a council to "adopt a policy consistent with this Act on the levying of rates on rateable property in the municipality". The policy must address a number of issues. It must set out the "criteria to be applied" if the municipality wants to levy different rates for different categories of properties, exempt specific categories of owners or allow rebates or reductions. The policy must further "identify and quantify in terms of cost to the municipality and any benefit to the local community" any exemptions, rebates and reductions. Working out the cost of policy decisions is typical of a policy document because it informs the decisions which are eventually made – such as which properties are to be excluded from rating and which owners should receive a rebate. The policy must also "take into account" a number of social factors, such as the effect of rates on the poor, on public benefit organisations and on public service infrastructure. Furthermore, the object of the policy is "to allow the municipality to promote local, social and economic development".

Rates by-law

A municipality "must adopt by-laws to give effect to the implementation of its rates policy". The message is clear: A firm legal base is required to give effect to the rates policy, which imposes financial obligations on property owners.

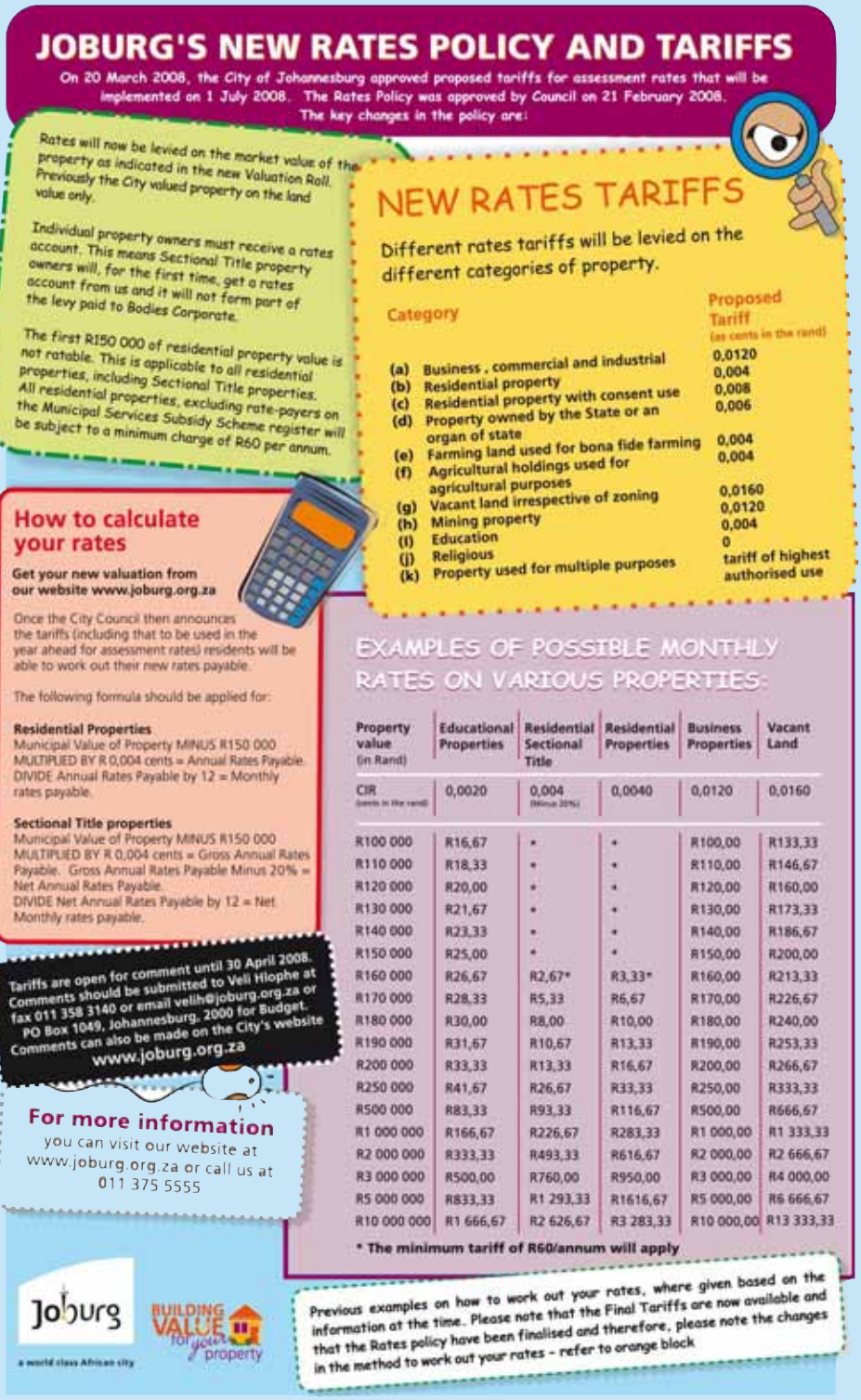
Rates resolution

The final step in the process is the determination of the actual rates in a resolution, which much comply with the requirements of the Constitution. First, the resolution must be adopted by a majority of the members of the council, and second, it must be promulgated by publication in the *Provincial Gazette*.

The meaning of policies, by-laws and resolutions

Policy

The underlying purpose of requiring first a policy and then a by-law is to force municipalities to state their policy choices. They must not only state *what* is decided, but, more importantly,



JOBURG'S NEW RATES POLICY AND TARIFFS

On 20 March 2008, the City of Johannesburg approved proposed tariffs for assessment rates that will be implemented on 1 July 2008. The Rates Policy was approved by Council on 21 February 2008. The key changes in the policy are:

Rates will now be levied on the market value of the property as indicated in the new Valuation Roll. Previously the City valued property on the land value only.

Individual property owners must receive a rates account. This means Sectional Title property owners will, for the first time, get a rates account from us and it will not form part of the levy paid to Bodies Corporate.

The first R150 000 of residential property value is not ratable. This is applicable to all residential properties, including Sectional Title properties. All residential properties, excluding rate-payers on the Municipal Services Subsidy Scheme register will be subject to a minimum charge of R60 per annum.

NEW RATES TARIFFS

Different rates tariffs will be levied on the different categories of property.

Category		Proposed Tariff (as cents in the rand)
(a)	Business , commercial and industrial	0,0120
(b)	Residential property	0,004
(c)	Residential property with consent use	0,008
(d)	Property owned by the State or an organ of state	0,006
(e)	Farming land used for bona fide farming	0,004
(f)	Agricultural holdings used for agricultural purposes	0,004
(g)	Vacant land irrespective of zoning	0,0160
(h)	Mining property	0,0120
(i)	Education	0,004
(j)	Religious	0
(k)	Property used for multiple purposes	tariff of highest authorised use

How to calculate your rates

Get your new valuation from our website www.joburg.org.za

Once the City Council then announces the tariffs (including that to be used in the year ahead for assessment rates) residents will be able to work out their new rates payable.

The following formula should be applied for:

Residential Properties
Municipal Value of Property MINUS R150 000
MULTIPLIED BY R 0,004 cents = Annual Rates Payable.
DIVIDE Annual Rates Payable by 12 = Monthly rates payable.

Sectional Title properties
Municipal Value of Property MINUS R150 000
MULTIPLIED BY R 0,004 cents = Gross Annual Rates Payable. Gross Annual Rates Payable Minus 20% = Net Annual Rates Payable.
DIVIDE Net Annual Rates Payable by 12 = Net Monthly rates payable.

EXAMPLES OF POSSIBLE MONTHLY RATES ON VARIOUS PROPERTIES:

Property value (in Rand)	Educational Properties	Residential Sectional Title	Residential Properties	Business Properties	Vacant Land
CIR (cents in the rand)	0,0020	0,004 (Minus 20%)	0,0040	0,0120	0,0160
R100 000	R16,67	*	*	R100,00	R133,33
R110 000	R18,33	*	*	R110,00	R146,67
R120 000	R20,00	*	*	R120,00	R160,00
R130 000	R21,67	*	*	R130,00	R173,33
R140 000	R23,33	*	*	R140,00	R186,67
R150 000	R25,00	*	*	R150,00	R200,00
R160 000	R26,67	R2,67*	R3,33*	R160,00	R213,33
R170 000	R28,33	R5,33	R6,67	R170,00	R226,67
R180 000	R30,00	R8,00	R10,00	R180,00	R240,00
R190 000	R31,67	R10,67	R13,33	R190,00	R253,33
R200 000	R33,33	R13,33	R16,67	R200,00	R266,67
R250 000	R41,67	R26,67	R33,33	R250,00	R333,33
R500 000	R83,33	R93,33	R116,67	R500,00	R666,67
R1 000 000	R166,67	R226,67	R283,33	R1 000,00	R1 333,33
R2 000 000	R333,33	R493,33	R616,67	R2 000,00	R2 666,67
R3 000 000	R500,00	R760,00	R950,00	R3 000,00	R4 000,00
R5 000 000	R833,33	R1 293,33	R1616,67	R5 000,00	R6 666,67
R10 000 000	R1 666,67	R2 626,67	R3 283,33	R10 000,00	R13 333,33

* The minimum tariff of R60/annum will apply

Tariffs are open for comment until 30 April 2008. Comments should be submitted to Veli Hlophe at fax 011 358 3140 or email velih@joburg.org.za or PO Box 1049, Johannesburg, 2000 for Budget. Comments can also be made on the City's website www.joburg.org.za

For more information
you can visit our website at www.joburg.org.za or call us at 011 375 5555

Previous examples on how to work out your rates, where given based on the information at the time. Please note that the Final Tariffs are now available and that the Rates policy have been finalised and therefore, please note the changes in the method to work out your rates – refer to orange block

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Website of the city of Johannesburg (www.joburg.org.za)

why. This is the practice in national government. In many cases, the first step towards legislation is the drafting of a White Paper giving the policy positions that will be taken and the reasons for them. The most obvious example is the White Paper on Local Government, which sets out the policy objectives of the Municipal Structures Act and Municipal Systems Act that followed.

The closest parallel to a financial policy is the integrated development plan (IDP), which is an internally binding document. The Systems Act provides that the IDP binds the municipality in the exercise of its executive authority. However, once the municipality seeks to bind any other person to the provisions of the IDP, it must do so in terms of a by-law. Section 35(1)(c) of the Systems Act is clear about this, stating that the IDP "binds all other persons to the extent that those parts of the integrated development plan that impose duties or affect the rights of those persons have been passed as a by-law".

By-laws

The Systems Act states in clear language that a by-law is necessary for the implementation and enforcement of a policy, the reason being that if a policy intends to bind a resident and compel him / her to pay an amount of money and, on the strength of that obligation, to sue defaulters in court, it can only be on the basis of a rule of law. Given the importance of a by-law, a more demanding adoption procedure is followed than in the adoption of a policy. The Constitution prescribes the basic requirements in section 160(3)(b). No by-law may be passed by a council unless all the members have been given reasonable notice and the proposed by-law has been published for public comment. In addition, the decision to pass a by-law must be supported by a majority of the council members. A by-law may be enforced only after it has been published in the *Provincial Gazette* and it must be accessible to the public. The Systems Act restates the constitutional requirement of section 160(3)(b).

The adoption of a policy is less demanding. Although a community participation process is prescribed for the rates policy, there is no requirement of a reasonable notice period prior to the tabling of the policy. A key difference is that there is no need for a majority of councillors to approve the policy, but only for a majority of the quorate council, namely at least half of the councillors, to approve it. In addition, the adopted policy does not need to be promulgated in the *Provincial Gazette* before it can be implemented.

Resolutions

The actual rates and rebates are determined by an annual council resolution. In terms of the *Fedsure* decision, the resolution is a legislative act which is not reviewable in terms of administrative law. Although the resolution is not called a by-law, it constitutes a legislative act and is accordingly adopted in the same manner as a by-law – by the majority of councillors – and promulgated through publication in the *Provincial Gazette*.

Practice

How have these distinctions between policies, by-laws and resolutions been implemented in practice? The practice actually adopted varies considerably, not only between provinces, but also within provinces.

Policies

The main difficulty with the policies is that very few of them formulate and justify policy *choices*. They often merely repeat what the legislation says, without making any choices.

- *Writing policy*. Examples of by-laws adopted indicate that some councils grasp the meaning of 'a policy'. They set out general policy principles that are appropriate for a policy. One rates policy sets out in its financing policy that the trading services must be self-sustainable and operated as cost centres, and that community services and other non-fee paying services will be funded by the rates income and surpluses from the trading services.
- *Rewriting the Property Rates Act*. A feature of most policies is that they merely repeat what the Property Rates Act says. It is almost impossible, in writing a comprehensive law, not to refer to the Act – but the trick lies in how one does this. One policy devotes a section to the "legislative background", which sets out the legislative framework neatly.
- *Writing law*. The most common problem is that the policies are written as laws, with neat sections and subsections. That in itself is not objectionable, but the difficulty arises when such a policy is used as a substitute for a by-law.

By-laws

A significant number of municipalities get it right: they translate the policies neatly into well-formulated by-laws, containing the key elements necessary to enforce the rates policy in relation to property owners. These elements are: the categories of properties in respect of which differential rates may be applied, the categories of properties and owners in terms of which exemptions, reductions, and rebates will be granted, and the enforcement mechanisms. There are, however, a significant number of municipalities with policies that are, in our view, flawed.

The 'cart before the horse' by-law

In a number of municipalities, the order of instruments is wrong: the by-law merely authorises the adoption of a policy – it does not implement it. One metropolitan municipality's by-law reads:

> (1) The Municipality shall adopt and implement a rates policy consistent with the Property Rates Act on the levying of rates on rateable property in the municipality.
> (2) The Municipality shall not be entitled to levy rates other than in terms of a valid rates Policy.

The by-law prescribes further that the content of the policy must comply with sections 3, 4 and 5 of the Rates Act. The policy is to be enforced through the municipality's customer

care, credit control and debt collection by-law and policy "and any further enforcement mechanisms stipulated in the City's rates policy".

The difficulties with this approach are the following: First, the by-law does not implement the policy, as there is no policy yet. Consequently, the policy adopted in terms of the by-law is never given the force of law. A by-law cannot prospectively implement a policy whose drafting is not yet certain. Second, there can be no enforcement mechanisms in terms of policies alone.

The one-liner by-law: Incorporation by reference

Equally defective is a by-law that merely proclaims that property rates will be implemented in terms of the property rates policy. One local municipality's by-law, for example, does not determine categories but leaves that to the rates policy. The by-law reads: "The municipality levies different rates for different categories of rateable property, as set out in the property rates policy." The same applies to exemptions, reductions and rebates: "[T]he municipality will grant exemptions from, rebates on or reductions in rates, as set out in the policy."

Incorporation by indirect reference does not make the policy an effective legal instrument. There is no certainty about the content of the policy, and it may be changed at any time. Can such a policy determine an owner's rate liability? It is argued that it cannot. If an owner is sued for payment of rates, there must (a) be a legal provision setting out the method of calculating the amount due, and (b) an actual rate adopted by resolution.

Writing policy in a by-law

While it is clearly a problem to have too little law in the by-law, problems also arise when too much policy is included. General policy principles are often included, which are really not appropriate for a by-law. When operationalising a policy, it is not necessary to include that policy's objectives. One municipality has the following provisions in its by-law, for example:

> (8) Property rates will be used to finance community services.
>
> (9) Profits on trading and economic services can be used to subsidize community services.
>
> (11) The income base of the municipality will be protected at all costs by limiting reductions, exemptions and rebates.

The difficulty is that these legal provisions, which are essentially intended to reflect broad guiding principles, can be used to challenge the way a budget has been put together.

Resolutions

The final financial instrument, setting the rate (or rates), builds on the validity of the policy and the by-law. If there is no policy, operationalised by an appropriate by-law, then the resolution may be equally defective. One municipality's resolution setting the rates for differentiated categories of properties for the 2008 / 09 financial year also gives a further reduction of R85 000 on residential properties. This introduces the following problems: First, the resolution refers to "the municipality's draft rates policy" – that is, the resolution is based on a rates policy that has not yet been adopted. Second, key aspects of the draft policy have not been operationalised in the municipality's by-law. For example, the resolution refers to categories of properties (referred to as "institutional" and "special purpose" properties) that will get a rate lower than residential property. The problem is that there is no mention in the by-law of these categories. The result is that the rates burden of some owners will be eased, and others not, on the basis of a policy that has yet to be adopted. Third, the by-law exempts residential properties of a value of up to R30 000 from paying rates. This adds a further R15 000 to the statutory exemption of R15 000. However, the resolution increases the reduction to R85 000. Consequently the resolution is in conflict with its own by-law.

Comment

This confusion and lack of alignment between the three financial instruments hold considerable financial risks for municipalities. If rates are not imposed on a solid legal basis, their collection may be opposed in court for want of compliance with the basic principles of the rule of law and with the Property Rates Act.

As the Property Rates Act has to be implemented by 1 July 2009, municipalities must urgently ensure that their financial instruments are in order so that revenue can be collected. If valid revenue-raising measures are not in place, the possibility of an intervention in terms of section 139 of the Constitution looms large.

Professor Nico Steytler
Community Law Centre

Property rates

LATEST DEVELOPMENTS

Property rates, as a form of tax imposed on the market value of land and buildings, are the key source of revenue for municipalities. The framework for the imposition of property rates is carefully regulated by the Municipal Property Rates Act (Act 6 of 2004) (MPRA), which provides municipalities with a measure of discretion in determining and levying property rates in a localised context. The imposition of property rates is, however, subject to national limits or maximums. This article discusses some recent developments with regard to these maximums (ratios), as well as the suggested amendments to the MPRA.

key points

- When imposing property rates, municipalities must comply with national ratios between the residential rate and rates on certain protected categories of property.
- The recent addition of 'public benefit organisation property' to the list of protected categories has been the subject of controversy.
- CoGTA has commenced a process of public consultation on possible amendments to the Municipal Property Rates Act.
- These amendments may deal with further exclusions from property rating, how to rate mines and a tighter system of ratios.

The MPRA provides that the Minister for Cooperative Governance and Traditional Affairs (CoGTA) may determine ratios between the residential category and other categories of property. Municipalities may, in this respect, not levy a rate higher than the maximum determined in the national ratio.

The Minister recently promulgated new ratios, in the 2010 Amended Municipal Property Rates Regulations on the Rate Ratios between Residential and Non-Residential Properties. The amended regulations provide for different ratios of property rates between non-residential and residential property. The residential property rate ratio is 1:1, while the agricultural property, public service infrastructure property and public benefit organisation property rate ratios are 1:0.25. The new regulations have thus added public benefit organisation property as a newly protected category.

Section 8(2)(q) of the MPRA defines 'public benefit organisation property' as a property 'owned by public benefit organisations and used for a specified public benefit activities' listed in item 1 (welfare and humanitarian), item 2 (health care) and item 4 (education and development) of Part 1 of the Ninth Schedule to the Income Tax Act.

The debate about private schools

The new ratios were prompted by a court action against the Minister of CoGTA, the Minister of Finance and the South African Local Government Association by the Independent Schools Association of Southern Africa (ISASA). ISASA argued that its members were 'public benefit organisations' as they fell within the definition of 'school' in terms of the South African Schools Act (Act 84 of 1996). They insisted that, as such, they should be protected by national ratios. The two Ministers settled the matter with ISASA by promulgating a ratio for all public benefit organisations.

SALGA disagreed and argued that ISASA members operated private schools as businesses, and therefore should not be viewed as public benefit organisations. They generated income from which they were able to pay for municipal services. Affording them protection over other property categories was

therefore not fair to other ratepayers. Moreover, SALGA argued, the regulations would undermine the discretion of municipalities to regulate the rating of property by determining criteria in their rates and policies applicable to different categories of properties. In keeping with these arguments, SALGA urged the Minister not to promulgate the regulations as a fixed ratio. However, according to CoGTA, SALGA's recommendations were submitted two months *after* the ratio was promulgated, despite the fact that the Minister had requested their inputs on the substance of the regulations 30 days prior to promulgating them.

Photo: Bigstock.com/elenathewise/2005

The Institute of Municipal Finance Officers (IMFO), like SALGA, supports the view that ISASA members are schools that are generally run as businesses, some of which are actually listed as companies. In fact, according to IMFO, some municipalities have already requested public benefit organisations seeking rebates to provide their financial statements to ensure that rate benefits are granted to those who require them and not to those who clearly have the ability to pay.

For now it seems that the debate has been settled in favour of ISASA, as all public benefit organisations are now protected by a 25% ratio. However, section 8 of the MPRA provides that municipalities have discretion in choosing property rates categories for differential rating. They are not obliged to include 'public benefit organisations' as a distinct category in their property rates policies. If they do, that category is subject to the 25% ratio. If they do not, the 25% ratio misses its target and does not apply. It is this aspect of the law, and a range of other issues, which the Minister seeks to address in possible amendments to the MPRA.

The agenda for debate on the MPRA

CoGTA has commenced a process of public consultation on possible amendments to the MPRA. The agenda with respect to the proposed amendments incorporates the exclusion of the poor from rating, the exclusion of public service infrastructure, places of worship and communal areas, the regulation of property categories, redefining the MEC's role, the rating of mining property, group applications for rate relief and the quality of valuation.

Excluding the poor from rating

CoGTA proposes to amend the MPRA to exempt the poor from paying property rates. Vulnerable citizens would then be exempt according to an income threshold, determined by the Minister of Finance, that identifies poor households . This threshold would be determined on an annual basis and would provide relief to vulnerable residents across South Africa.

Excluding public service infrastructure

Certain types of public service infrastructure (PSI) serve a developmental role. Currently, the first 30% of the market value of PSI is excluded from rating. CoGTA proposes to exclude PSI (roads, railways, airport aprons and runways, breakwaters and dams) from rating altogether.

Excluding places of worship

Despite the fact that places of public worship and related residences are excluded from rating in terms of the Act, there have been different interpretations of the Act with regard to places of worship or properties linked to these places of worship. This has resulted in various approaches, which differ from municipality to municipality and in rating perspectives in respect of places of worship. CoGTA proposes to define places of worship and related residences to ensure that misinterpretations in this respect are done away with and to bring certainty for owners of these properties, so that clarity may prevail and all such properties are treated appropriately and in the same manner by all municipalities.

Communal areas

Most municipalities, with the exception of some municipalities in KwaZulu-Natal, do not value and rate communal areas. CoGTA is asking for input on the correct way forward with regard to the rating of communal areas – that is, whether they should be excluded from property rates.

Tighter regulation of property categories

As highlighted above, the basis for the determination of property categories by municipalities is currently open-ended. Municipalities may choose a method of determining property categories (ie according to use, permitted use or geographical area) and may use the categories provided for in section 8 of the MPRA. However, nothing compels them to use any or all of the categories in the Act (aside from the obvious categories such as residential, agricultural, business and industrial). Municipalities that do not use the categories in the Act escape the Minister's ratios on those categories. CoGTA proposes to change the Act to ensure that the Minister can, in future, effectively regulate the ratios between property categories.

Redefining the MEC's role

CoGTA takes the view that provinces have not been provided with sufficient tools to monitor and support property rating by municipalities. The proposed legislation provides for more details on the role of the MEC responsible for local government in monitoring, supporting and, where necessary, intervening in a municipality.

How to rate mining properties

CoGTA also proposes to provide clarity with respect to whether 'above surface improvements' related to mining activities should be valued. In addition, CoGTA intends to clarify who is liable for paying rates for mining properties, namely the holder of the mining right or the owner of the property, in cases where the two are not the same person or entity.

How groups may apply to the Minister for rates relief

CoGTA furthermore proposes to provide for a cut-off date for applications from groups or sectors of the economy with respect to relief from specific rates imposed by a municipality. CoGTA suggests requiring that any such application be submitted not more than 12 months after the rates in question were imposed by the municipalities.


Photo: Graeme Williams, MediaClubSouthAfrica.com

Quality of valuation

Finally, CoGTA poses the question: is there, in fact, a need to amend the Act to deal with the quality of valuations, as they tend to vary greatly across municipalities?

It is clear that changes to the legal framework for municipal property rates are under way. CoGTA has been engaging stakeholders and the public on these matters and intends to table amendments to the MPRA in Parliament in the second half of 2010. Municipalities are advised to follow this important process critically and make their voices heard.

This article is based on *A Guide to the Draft Municipal Property Rates Act Amendments* by CoGTA, as well as on the submissions made by IMFO and SALGA on the 2010 ratios. Readers are invited to engage CoGTA on the suggested changes to the MPRA via Ms Veronica Mafoko on e-mail mpra@cogta.gov.za

Professor Jaap de Visser
Editor

Douglas Singiza
Doctoral intern

THE NEW Municipal property rates regulations

MERE REGULATION OR IRRATIONAL RATIOS?

On 19 December 2007 the Minister of Provincial and Local Government published for public comment draft regulations on property rates. The draft regulations set ratios for municipal property rates on different types of properties. A key ratio that stirred much controversy was that the rate on state-owned property should be no more than 25% of the rate on residential property. This has been slammed as unconstitutional and a threat to municipalities' financial sustainability. Moreover, the draft regulations determine that rates on (categories) of properties may not be increased by more than the Consumer Price Index (CPI).

Proposed ratios

In terms of the Municipal Property Rates Act (Act 6 of 2004), the Minister responsible for local government may, with the concurrence of the Minister of Finance, prescribe that a rate on non-residential property may not exceed a certain ratio in relation to residential property. Before issuing the regulations, the Minister must first consult with SALGA on the substance of the regulations and publish them for public comment.

The draft regulations determine a number of ratios:

- The rate on business, commercial, industrial and mining property may not be more than double of that on residential property. For example, if the rate on residential property is 4c in the rand, the rate on business property may not exceed 8c in the rand.
- The rate on agricultural property may not be more than a quarter of the rate on residential property.
- The rate on public benefit organisation property may not be more than a quarter of the rate of residential property.
- The rate on state-owned property and public service infrastructure may not be more than a quarter of the rate of residential property.

Reaction

With respect to state-owned properties, the ratio has provoked loud protests from local government quarters. A meeting of municipal chief financial officers strongly voiced its concern that these regulations would compromise municipalities' financial sustainability. These comments were attributed to SALGA, which responded by publishing a quarter-page advertisement in a major newspaper, saying that, on the contrary, it "has been a key role player in the process leading to the publishing of the draft regulations". It had made inputs to the Department of Provincial and Local Government (DPLG) prior to the publication of the draft regulations, raising the issues that were now being raised in the press.

The position SALGA then took was to say that the matter would be considered by its national executive committee during February 2008, followed by further members' conferences. More forthright was the approach by the municipal manager of eThekwini Metropolitan Municipality, Dr Michael Sutcliffe, who rejected the draft regulations outright, saying they would be challenged on constitutional grounds as well as on the basis of the chaos they would cause.

Constitutionality of the ratios

Could the regulations be challenged in court? I would argue that there are at least two grounds on which they can be challenged.

discretion to municipalities; and the exclusion of certain properties and persons from the payment of property rates, and the valuation process of rates.

Involvement of the provincial sphere

It has been noted that the current Act excludes the provincial sphere from the process. There are two amendments that set out to rectify this. First, the MEC for local government must be consulted before any sector of the economy can apply to the minister for a review of rates that they deem prejudicial to their sector of the economy. Secondly, the Bill seeks to extend the validity of a valuation roll from four to five years, and allows the MEC to extend it for a further two years. Furthermore, the MEC is enabled to monitor the implementation of the Act, especially to ensure that municipalities adhere to all regulations in regard to the preparation of valuation rolls.

Greater clarity of provisions and discretion to municipalities

Because the provisions in the current Act are of a general nature, different municipalities have used different criteria in rating properties. The Bill seeks to provide just two grounds for setting rates, namely use and permitted use. There will also be a compulsory categorisation of properties and a clearer definition of types in the different categories. The categories of property are: residential properties, industrial properties, agricultural properties, mining properties, properties used for public service purposes, public service infrastructure, properties owned by public benefit organisations and used for public benefit purposes, and properties used for multiple purposes. The minister may also determine any other category. Importantly, the municipality may also categorise vacant land in respect of a number of listed categories.

There are also some amendments in regard to property rates on residential properties. A uniform rate for residential property rates does not apply to vacant residential property.

The Bill also provides a wider discretion for municipalities to decide the grounds on which municipalities can determine categories of property exempted from paying property rates or eligible for reduced rates or rebates. Municipalities must then, however, present figures on the total revenue forgone through this process.

Exclusion from payment of property rates

The Bill excludes certain categories of public service infrastructure from the payment of rates. The Bill also sets time frames for the period within which the different municipalities must start phasing in the exemptions, based on when they started implementing property rates under the Act.

In regard to mining, the Bill excludes mining rights and / or mining permits from property rates. However, infrastructure above the surface in respect of mining property will still be subject to property rates. Furthermore, mining rights and mining permits cannot be used to determine the value of the mining property for purposes of rates.

The Bill also excludes recipients of an older person's grant or disability grant from property rates. However, the market value of the property of such a person should not exceed the amount set by the minister responsible for local government with the agreement of the Minister of Finance.

Process of valuation of rates

There are a number of proposals in regard to the process of valuing property. Firstly, the requirement that a person whose property has been valued upwards should pay interest is removed. Secondly, municipalities must repay an owner whose property has seen a downward adjustment of its value. The current requirement that each district municipality has to establish a valuation appeal board is abolished.

There are also amendments introducing supplementary valuation where the value of a property was recorded incorrectly through a clerical or typographical error and regarding the date from which the corrected rates take effect after due notification of the ratepayers concerned.

Conclusion

The amendments seek to provide a more uniform framework within which municipalities can administer and regulate the collection of property rates.

As noted in the explanatory memorandum on the objects of the Bill, the amendments are a culmination of lessons learned in the administration of property rates and are geared towards enhancing efficiency in the collection and use of municipal property rates.

Conrad Bosire
Doctoral intern

Municipal Property Rates Act

SOME VALUATION ISSUES

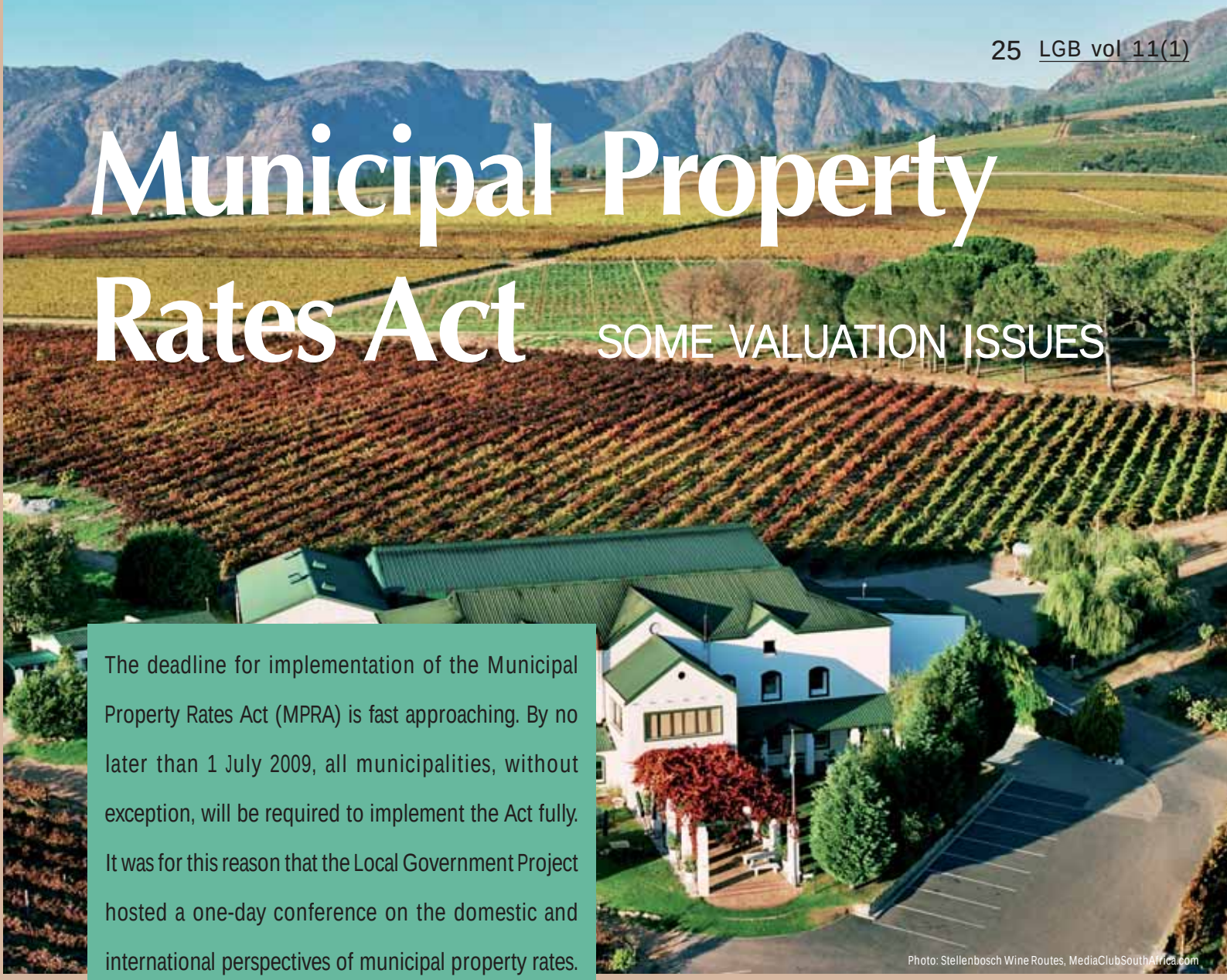

Photo: Stellenbosch Wine Routes, MediaClubSouthAfrica.com

The deadline for implementation of the Municipal Property Rates Act (MPRA) is fast approaching. By no later than 1 July 2009, all municipalities, without exception, will be required to implement the Act fully. It was for this reason that the Local Government Project hosted a one-day conference on the domestic and international perspectives of municipal property rates. The conference, attended by municipal practitioners from across the country as well as international experts, provided a platform for sharing perspectives on the MPRA and key issues that affect its implementation.

This article highlights a few issues regarding the valuation of properties as presented to the conference by Professor Riël Franzsen of the African Tax Institute at the University of Pretoria.

Market value

Property tax legislation in some countries (notably Canada and the United States) allows, for example, for farms to be valued with reference to their current use, rather than with reference to their potential highest and best use (ie market value). This preferential valuation of a specific property use category (eg farms) is not allowed in terms of the MPRA. The MPRA provides for a single standard for the determination of rateable value for all properties, irrespective of use, namely 'market value'.

In principle this uniform standard, which must be applied by all municipalities across all property use categories, is to be welcomed. If applied strictly, it means that, at least from a valuation point of view, all property owners are treated equitably and fairly. Property owners deserving of relief should not be assisted through preferential valuations which are difficult (if not impossible) to quantify. As prescribed by the MPRA, relief must be granted annually through rebates, reductions or exemptions. The fact that rebates, reductions and exemptions must be justified and their impact quantified ensures that those who benefit from and those who subsidise these forms of tax relief are properly informed.

Value reductions

In respect of public service infrastructure (PSI) and residential properties, the MPRA mandates value reductions. For PSI the reduction is a percentage (currently 30%) of the market value

Photo: Graeme Williams, MediaClubSouthAfrica.com

and in respect of residential properties it is a minimum amount (currently R15 000). These value reductions can obviously only be applied once the market values of the relevant properties have been determined.

The MPRA also allows municipalities to apply value reductions in respect of other categories of property. These reductions are determined according to criteria set out in their rates policies and are taken into account before determining a rate payable in respect of such property. Many municipalities use additional value reductions (beyond the minimum R15 000) to provide, for example, further relief in respect of residential properties. However, not all municipalities that provide an additional value reduction in respect of residential properties identify and quantify the revenue foregone as a result of that reduction. This is despite the fact that the Act mandates that such revenue be identified and quantified both in a municipality's annual municipal rates policies and in its annual budget.

Municipal valuers: Capacity and skills

The MPRA provides that each municipality must appoint a "municipal valuer" to conduct a general valuation and prepare a valuation roll in respect of all rateable properties. To ensure that proper standards are maintained, the municipal valuer must be registered as a professional valuer or professional associated valuer in terms of the Property Valuers Profession Act.

According to the South African Council for the Property Valuers Profession there are only 599 professional valuers and 702 professional associated valuers registered in terms of the Property Valuers Profession Act. Apparently fewer than 25% of these registered valuers actually do municipal valuations and many currently lack the technical skill to utilise computer-assisted mass appraisal valuation techniques. Others lack the experience to value unique properties, such as certain types of PSI.

Given the shortage of registered valuers and limited skills levels, and given that general revaluations must be undertaken at least once every four years in all municipalities, it remains to be seen whether the valuers profession can actually cope with what is required by the MPRA.

Objection and appeal

The MPRA specifies a detailed objection and appeal process in terms of which "any person" has a right to object to any matter reflected in or omitted from the roll in respect of an individual property. However, no one can object to the validity or quality of the valuation roll as such.

Allowing property owners to lodge informal queries could significantly reduce the numbers of formal objections (and

appeals) and the concomitant costs. It could also have a positive impact on the relationship between property owners and the municipality. Although the MPRA does not explicitly provide for informal queries in respect of property values determined by the municipal valuer, it does not prohibit them either.

The low percentage of objections received by the City of Johannesburg Metropolitan Municipality in response to the publication of its 2008 valuation roll can be explained, at least to some extent, by the publication of a draft valuation roll at the end of 2007. The draft roll gave property owners an opportunity to challenge inaccurate data, and municipal valuers an opportunity to informally address misconceptions regarding the valuation of individual properties or the valuation process, before the actual valuation roll was published.

Sectional title property

Under the pre-MPRA dispensation, a sectional title scheme was deemed to constitute a single property owned by a single owner, and was valued and rated accordingly. The MPRA provides that each sectional title unit constitutes property to be valued at market value and to be rated individually. This is a much more equitable approach, not only in respect of sectional title units within a specific scheme, which may have significantly different market values, but also in relation to other property categories that have always been valued as individual properties in the past. However, equity comes with a price tag. Municipal valuers must:

- value many more properties – as each unit constitutes rateable property; and
- obtain data on individual sectional title units and their owners – a laborious and costly exercise, especially where bodies corporate are uncooperative and gaining access to individual units is difficult, which is often the case.

Some municipalities are also finding it difficult to comply with the added administrative burden of serving valuation notices and rates bills on so many new property owners.

Public service infrastructure

PSI presents municipalities and especially municipal valuers with significant challenges. Firstly, an analysis of the definitions of "public service infrastructure" and "property" reveals that:

- there is uncertainty as regards the scope of these definitions;
- there are property types (especially types of PSI) that could be classified in more than one of the four categories of "property" defined; and
- certain types of PSI that would have constituted "equipment or machinery" (and as such would have been excluded from the tax base) have now been defined as PSI and therefore also as property (eg power lines and communication masts).

From a practical point of view it could be extremely difficult for a municipal valuer to determine the market value of linear PSI (eg pipelines and power lines) that forms part of a network extending beyond the boundaries of the municipality concerned.

Recent amendments to the MPRA were effected to address some of the PSI-related problems. Although municipalities now have the option not to value PSI if they do not plan to levy a rate on it, some problems remain. For example, a municipality with a national or provincial airport may decide not to rate (and therefore not to value) PSI. But as only the runways and aprons at the airport constitute PSI, the remainder of the airport must be valued, so some apportionment of value between the runway and apron on the one side and the remainder of the airport on the other is still required! Lastly, even if it is not to be valued, PSI must be properly identified and described, as it must still be reflected in the municipal property register and on the valuation roll.

Quality control in respect of valuation rolls

The introduction of monitoring and oversight powers for the provincial and national spheres of government must be welcomed in principle. However, if the problems experienced in some provinces with the appointment of valuation appeal boards are anything to go by, much will have to be done before the general provincial oversight powers given to MECs for local government become effective.

The pre-MPRA provincial legislation did not provide for the external quality control of valuation rolls. The MPRA now provides that the national government Minister responsible for local government "may monitor, and from time to time investigate and issue a public report on, the effectiveness, consistency, uniformity and application of municipal valuations …". Such an investigation *may* include:

- studies of the ratio of valuations to sales prices; and
- other appropriate statistical measures (eg the relative treatment of high- and low-value properties).

Furthermore, these investigations may be undertaken in respect of one, more or all municipalities.

It is unfortunate that this important oversight function has


Photo: Jeffrey Barbee, MediaClubSouthAfrica.com

been assigned to the Minister and provides for mere ad hoc interventions. What is really needed is an independent technical government valuation agency to perform this task. Australia, Canada and New Zealand all have government valuation agencies performing, in some instances, valuation functions on behalf of municipalities, and, in most instances, also some oversight as regards the overall quality of valuation rolls.

In a South African context such an agency could:

- undertake the monitoring of the quality of valuation rolls on a continuous basis and at a technical level – rather than at the political level, as is the case at present;
- value network PSI (such as railway lines and pipelines) on a national scale in a uniform manner, and apportion the values in an equitable manner among municipalities – a task that simply cannot be performed by the "municipal valuer" in an individual municipality;
- advise and assist provincial MECs with the appointment of valuation appeal boards; and
- step in and undertake general valuations on behalf of municipalities where even the skills to appoint a municipal valuer seem to be lacking.

The fast-approaching deadline

When it was enacted in 2005, the MPRA provided a four-year period within which municipalities had to implement its provisions. To date only 104 municipalities have implemented the MPRA. A further 162 municipalities (more than 60%) still have to implement new valuation rolls and municipal rates policies by the 1 July 2009 deadline.

Given all of the preliminary tasks required to implement a general valuation roll, it is highly unlikely that all of these remaining municipalities will be able to implement a credible valuation roll prepared in accordance with the MPRA by 1 July 2009. Without an amendment to the MPRA, defaulting municipalities will be unable to lawfully determine and levy rates from 1 July 2009. The impact of this on the revenue side of their budgets is likely to be significant, as will be the impact on the already strained levels of service delivery.

How national government will respond to the looming crisis remains to be seen.

Professor Riël Franzsen
African Tax Institute
University of Pretoria

THEME 21: MUNICIPAL REVENUE

Municipalities raise a significant portion of their revenue by levying property rates, charging services and imposing surcharges. In addition, they receive funding from national and provincial governments in the form of intergovernmental grants.

These articles reflect on specific issues in the fiscal framework for local government. The first two provide an overview of a recent review of the framework for local government financing. The second summarises a law that permits municipalities to apply for new taxes and tariffs.

1. **Review of the Local Government Fiscal Framework** by Mayur Maganlal and Jonathan Patrick Local Government Bulletin 2010, Volume 12, Issue 4, page 19-21
2. The Process of Reviewing: The local government equitable share formula Local Government Bulletin 14(2) 15-16 WE DO NOT HAVE THIS ISSUE
3. **Municipal Fiscal Powers and Functions Act: Towards the Coordination of Macro-Economic Tax Policy** by National, Treasury Local Government Bulletin 2007, Volume 9, Issue 5, page 8-10

REVIEW OF THE Local Government Fiscal Framework

In 2009, SALGA recommended to the Local Government Budget Forum that there should be a review of many aspects of fiscal policies in relation to municipal finances. This year SALGA proposed a comprehensive review of the local government fiscal framework (LGFF). While there have been some ad hoc policy changes over the past few years, many remain incomplete or unattended to. In SALGA's view, the review of the LGFF should address the fundamental structural challenges, rather than introducing minor ad hoc adjustments, if it is to improve operational efficiency in the short and long term.

While there have been some attempts to introduce a differentiated approach to local government finance, SALGA recommends that the proposed comprehensive review of the LGFF should outline a long-term vision for sustainable local government finance. This entails a differentiated approach to all the main elements of the LGFF configuration, which include expenditure assignment, revenue assignment, the vertical division of revenue, the local government equitable share (LGES) formula, conditional grant design, infrastructure funding and borrowing powers.

Policy constipation

As far as the powers and functions of local government and its associated expenditure responsibilities are concerned, a number of protracted national policy processes have been initiated, but not concluded from a revenue assignment perspective. The processes of establishing regional energy distributors to consolidate electricity services and of introducing a single public service have not been finalised. The process of municipal housing accreditation has been painfully slow, and clarity is still lacking about the funding of urban public transport in the wake of the new National Land Transport Act (Act 5 of 2009).

The Provincial and Local Government Policy Review, initiated by the Department of Cooperative Governance and Traditional Affairs in July 2007, has not yet been concluded. One of the objectives of this exercise was to clarify the roles and responsibilities of district and local municipalities.

A differentiated approach to revenue assignment is therefore essential. This will allow significant own revenue instruments to be allocated to municipalities so that those with sufficient fiscal capacity are able to finance investment in infrastructure to lay the foundations of economic growth and to ensure that ageing core infrastructure is maintained. To this end, SALGA is exploring the modalities of implementing a local business tax, particularly benefitting larger cities and metros.

Municipalities with high concentrations of poverty and low fiscal capacity (mainly S3 municipalities) will unfortunately have to continue relying on intergovernmental grant funding. National and provincial government departments will need to commit resources to provide intensive implementation support to build the capacity of these municipalities to spend effectively and efficiently.

All municipalities, including those heavily dependent on grant funding, should exert the maximum effort to collect their

own revenues, even though these may be limited. SALGA will continue to strongly encourage its members to do so by improving metering, billing, credit control and other dimensions of revenue management. This is a concern in light of indications that municipal revenue may be declining, due, for example, to the limitation of ratios of non-residential to residential property categories as part of the implementation of the Municipal Property Rates Act.

Review of the local government fiscal framework

A review of the LGFF should systematically reassess the appropriateness of the baselines that underpin the vertical division of revenue, in order to establish whether the local government sphere is receiving adequate revenue to fund its broader development mandate, not just free basic services. The substantial increases in the prices of bulk electricity and water anticipated over the medium term need to be factored in as well.

There is ample evidence that the LGES is deeply flawed and will need to be reconceptualised in its entirety rather than through minor adjustments to parameters. The basic services component omits critical municipal services such as municipal roads, street lighting, storm-water management, and fire fighting services. The institutional component for rural S3 municipalities with virtually no own-revenue sources is inadequate, relative to their salary, wage and allowance commitments. The development component has also not been activated. The revenue-raising component as currently implemented (using actual revenues as a proxy for revenue-raising capacity) is probably unconstitutional. The formula is not sensitive enough to target poor municipalities effectively. Overall, the formula is seen by some SALGA members as overly complex and non-transparent, yielding allocations which some believe favour urban centres.

The data underpinning the LGES formula is now severely outdated and out of touch with the dynamically changing municipal service delivery context (migration patterns, etc). The data from Census 2011 will only be available about two years later. In the interim, a credible mechanism is needed to update the LGES data. These issues need to be explored further in the comprehensive review of the LGFF.

Municipalities with sufficient fiscal capacity (mainly S1 and S2 municipalities) will be able to fund economic infrastructure extension through their own revenue instruments, such as the proposed local business tax. The implementation of development charges should also be encouraged. In addition, own revenue instruments will enhance the ability of these municipalities to leverage financing from private capital markets. The existing infrastructure funding envelope can then be channelled to poorer municipalities. To this end, a capital-raising capacity component should be considered for the municipal infrastructure grant (MIG).

In poorer municipalities, the expansion of infrastructure to poor communities through the MIG has resulted in greater pressure on operating and maintenance budgets. The comprehensive LGFF review should explore ways in which to link the LGES explicitly to the MIG. After 1994, the main policy thrust was on new infrastructure to enable service extension to previously underserved communities. However, it is now clear that ageing core infrastructure in many municipalities requires considerable investment in rehabilitation because the infrastructure has deteriorated beyond the point at which routine maintenance can keep it functioning. The current fiscal framework does not adequately address the issue of operating and maintaining infrastructure.

Last year SALGA outlined the challenges in the existing system of conditional grants that the comprehensive LGFF review should address. These included

- insufficient coordination between grants, eg the municipal systems improvement grant, the financial management grant and Siyenza Manje;
- little account of the impact of the grants, especially on smaller municipalities;
- the heavy reporting burden on municipalities, which is costly and time-consuming;
- the fact that local government is not central to setting the agenda for capacity-building programmes; and
- delays in the gazetting and transfer of provincial allocations.

Unfunded mandates continue to exist across many services, including libraries, museums, primary health care and hostels (linked to the issue of housing accreditation). For instance, in 2009/10, in the Western Cape, the community service library service grant amounted to only 10.7% of municipal expenditure on libraries. EThekwini municipality has quantified its annual unfunded mandate in respect of libraries, museums, hostels and formal housing at R191.2 million, R261.7 million, R26.9 million, R224 million and R25 million respectively, totaling R728.8 million per annum.

Local business tax

The abolition of the regional services council levies sharpened SALGA's long-standing concerns regarding municipal revenue

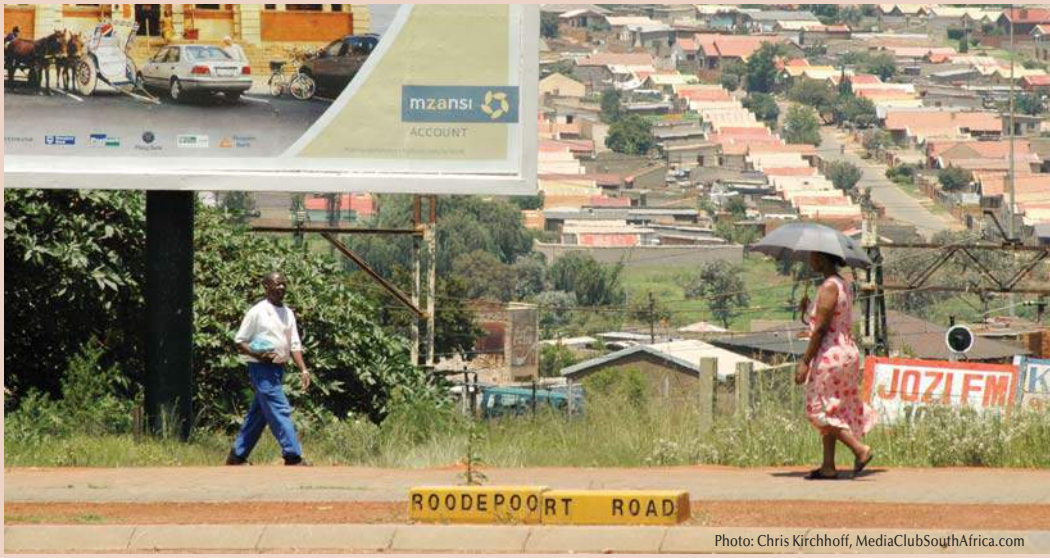

Photo: Chris Kirchhoff, MediaClubSouthAfrica.com

sources, and the organisation embarked upon a two-year process to develop a position on the future funding sources of local government. SALGA investigated 14 potential alternative sources of revenue (including a local business tax) which could be implemented within the framework of the Constitution. The local business tax envisaged is a levy payable on all factors of production used by business in the course of its activities. The SALGA 2009 National Members Assembly supported the idea of a local business tax and resolved that SALGA should do the necessary lobbying.

In October 2009, SALGA submitted to the Budget Forum a proposal to introduce a local business tax as a second general tax revenue source for local governments. Specifically, SALGA proposed that

- steps be taken to implement a local business tax to increase municipal responsiveness to the local economy and local accountability generally, and to increase municipal fiscal capacity, so that municipalities are better able to provide the infrastructure services required for economic development and growth; and
- appropriate adjustments be made to the overall intergovernmental fiscal structure, in particular by reviewing the basis for distributing the LGES to make it more redistributive.

SALGA, together with the Institute of Municipal Finance Officers and some of the larger cities, has further developed this proposal, outlining the need and modalities of a local business tax. An additional revenue source in the form of a local business tax is needed because municipalities face a significant fiscal gap between their expenditure responsibilities and their revenue resources, the nature of which varies according to the circumstances of the municipality. In the cities and some other municipalities, much of the gap relates to the requirement to provide infrastructure and services for economic growth and development, and specifically public transport infrastructure and operations. For many other municipalities the gap still consists largely of a basic service standards backlog. Some, but not all, of this fiscal gap is the responsibility of municipalities themselves. Municipalities must make determined and ongoing efforts to improve revenue collection and increase expenditure efficiency.

SALGA and the metros will be developing a formal proposal, in terms of the Municipal Fiscal Powers and Functions Act (Act 12 of 2007) (MFPFA), advocating a local business tax for economic infrastructure and services for economic growth and development to ensure a greater focus by municipalities on supporting long-term growth and development.

The MFPFA requires that any application for a new tax must comply with the requirements of section 5 of the Act, which requires, among other things, reasons for the imposition of the proposed tax, the purpose for which the revenue will be utilised and the outcomes of consultation with stakeholders.

Recommendations

SALGA recommended to the Budget Forum that it support the rapid implementation of a more comprehensive review of all the elements of the municipal fiscal framework over the medium term. It also recommended the speedy resolution of a number of protracted national policy processes that are precluding the finalisation of a long-term, sustainable municipal fiscal framework configuration. Finally, it also proposed that an independent commission be appointed to ensure maximum stakeholder participation and transparency in order to arrive at long-term solutions that are sensitive to the wide variations in municipal delivery contexts.

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THE Municipal Fiscal Powers & Functions Act

TOWARDS THE COORDINATION OF MACRO-ECONOMIC TAX POLICY

The Municipal Fiscal Powers and Functions Act (Act 12 of 2007) gives effect to sections 229(1)(b) and 229(2) of the Constitution and is one of the final building blocks in the creation of a regulatory framework to coordinate macro-economic tax policy objectives across all three spheres of government. The Act took effect on 7 September 2007. In 2003, the Provincial Tax Regulation Process Act was enacted, setting out the framework for provincial taxes; the Municipal Fiscal Powers and Functions Act sets out a similar framework for local government.

Purpose of the Act

The Municipal Fiscal Powers and Functions Act (the Act) aims to promote predictability, certainty and transparency in respect of municipal fiscal powers and functions and to ensure that these powers and functions are exercised in a manner that will not materially and unreasonably prejudice national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour.

The Act regulates municipal taxes and surcharges referred to in section 229 of the Constitution, other than property rates (which are regulated by the Municipal Property Rates Act). The Act does not list or identify specific taxes which municipalities may enact. Responsibility for initiating a tax proposal rests with municipalities and organised local government (SALGA); they may propose any tax not prohibited by the Constitution. The Act further provides for the process and procedure necessary for the authorisation of taxes, levies and duties that municipalities may impose under section 229(1)(b) of the Constitution in a way that allows for the evaluation of applications for consistency with national economic policy and other constitutional requirements. It also regulates the exercise by municipalities of their power to impose surcharges on fees for services under section 229(1)(a) by empowering the Minister of Finance to prescribe norms and standards.

Although the importance of surcharges as a funding source to assist municipalities in meeting their expenditure obligations, especially for poverty alleviation and social and economic development, is acknowledged, these surcharges do increase the tax burden on consumers. It is therefore important to regulate the imposition of surcharges to ensure:

- the reasonableness of the overall tax burden on consumers (who are also subject to provincial and national taxes); and
- that surcharges on fees for services do not materially and unreasonably prejudice national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour.

Who is affected by the Act?

The Act has a direct impact and places various responsibilities on all municipalities. It also has indirect or ad hoc implications for other local government stakeholders, such as SALGA, the Financial and Fiscal Commission and sector departments regulating municipal services, such as the Department of Minerals and Energy, the Department of Water Affairs and Forestry, and the Department of Environmental Affairs and Tourism. For example, the National Electricity Regulator will need to review its current regulatory processes to exclude the surcharge component which currently forms part of the electricity reticulation tariff – that is, the tariff should only regulate the 'base tariff', as soon as regulations are issued to prescribe norms and surcharges on electricity reticulation services.

What are the immediate implications for municipalities?

If municipalities are considering the introduction of any new municipal tax, they must comply with the process prescribed in section 5 of the Act. In respect of existing municipal taxes, they must put in place a process to identify all taxes currently levied or imposed, after which they must apply for the continued imposition of the tax in terms of section 12 of the Act. In respect of surcharges, municipalities must ensure that surcharges on municipal services are affordable and reasonable, are set through a transparent process and are disclosed in accordance with section 75A of the Municipal Systems Act. Once the norms and standards for surcharges have been prescribed, municipalities must also comply with them.

When can a new municipal tax be introduced?

A municipality, group of municipalities, SALGA and / or the Minister of Finance (on his / her own accord) may apply for the introduction of a new municipal tax in terms of section 5 of the Act. A municipality may introduce a new municipal tax only after the Minister of Finance has:

- notified the municipality, group of municipalities or SALGA and the minister responsible for local government, in writing, of his / her approval of the proposed municipal tax; and
- prescribed regulations regarding the imposition and administration of a municipal tax or taxes. The regulations will, among other things, determine the date from which the municipal tax may be imposed (the commencement date must coincide with the start of a municipal financial year), the collecting agent of the tax and any limitations placed on it.

KEY POINTS

- The Municipal Fiscal Powers and Functions Act is one of the final building blocks in the creation of a regulatory framework to coordinate the macro-economic tax policy objectives across all three spheres of government.
- The Act aims to promote predictability, certainty and transparency in respect of municipal fiscal powers and functions.
- It seeks to ensure that these powers and functions are exercised in a manner that will not materially and unreasonably prejudice national economic policies and economic activities across municipal boundaries.
- Municipalities must ensure that any existing taxes and surcharges comply with the requirements of the Act within two years.
- The Minister of Finance will announce a ong-term replacement for the RSC and JSB levies in the 2008 or 2009 budget.

What about existing municipal taxes?

All existing municipal taxes will be subjected to a verification process to determine whether they may be continued or should lapse. Municipalities must, by no later than 7 September 2009, apply to the Minister of Finance for the authorisation of any taxes imposed by them prior to the commencement of the Act on 7 September 2007, except for a regional establishment levy or regional services levy imposed under the Regional Services Council Act (Act 109 of 1985) or the KwaZulu and Natal Joint Services Act (Act 84 of 1990). An existing tax will lapse on 6 September 2009 if a municipality fails to apply for its authorisation or six months after the Minister of Finance has notified the municipality that an application is not approved.

What about surcharges?

With regard to surcharges, although municipalities can continue to levy current surcharges on municipal services as

What is a municipal tax?

In general a tax ('levy' and 'duty' have the same meaning) is a government charge which is not in return for a specific benefit. There is not necessarily a direct relationship between the tax payable and the benefits provided by government. Taxes are taken into general revenue and used for general purposes. The taxpayer receives no specific service in return for the payment of tax, but rather a set of general services such as municipal roads, street lighting and the like. Taxes may be contrasted with fees or user charges. For fees and user charges there is a direct link between the amount paid and the benefit provided.

What is a municipal surcharge?

A surcharge on a municipal service is a charge levied by a municipality in addition to the fee or tariff charged for the provision of the service. A surcharge is thus an indirect tax, as it is a payment in addition to the normal charge. Surcharges generated from trading services, such as water and electricity reticulation, are usually used by municipalities for the funding or subsidising of other essential municipal activities where limited or no charges are levied.

budgeted for, municipalities will have to reassess current practices as and when the regulations are made. In the interim, municipalities have been urged by the Treasury to ensure that surcharges on fees are affordable to all categories of users of all municipal services.

The Minister of Finance may prescribe compulsory national norms and standards for imposing municipal surcharges. The norms and standards may differentiate between different kinds of municipalities, types and levels of municipal services, categories of users, debtors and customers, consumption levels and geographic areas. The norms and standards may also determine:

- maximum municipal surcharges that may be imposed;
- the basis and intervals for increasing municipal surcharges; and
- matters that must be assessed and considered by municipalities in imposing municipal surcharges on fees.

Municipalities must comply with any norms and standards prescribed by the Minister of Finance when imposing a surcharge on fees for services. Municipalities must, as part of their budget preparation process, annually review any municipal surcharges and comply with the Municipal Systems Act relating to the manner in which fees, charges or tariffs are levied and how a resolution in that respect must be made known. The Minister of Finance may, where practicalities impede strict compliance with norms and standards, or on application by a municipality, group of municipalities or SALGA, or of his / her own accord, exempt a municipality from complying with any norms and standards for a period and on the conditions determined in that notice.

Replacement of the RSC and JSB levies

Any permanent replacement(s) for the regional services council (RSC) and joint services board (JSB) levies will be dealt with in terms of the Act. Various medium- to long-term options to replace these levies were proposed in a discussion document by the National Treasury in December 2005. Replacement options, as listed in the discussion document and identified through the consultation process, are currently being evaluated in terms of the intergovernmental fiscal and taxation framework as well as the fiscal framework for local government so as to ensure that any replacement option will have limited negative economic impact, provide adequate revenue at acceptable rates and be easy to administer. The intention is for the Minister of Finance to announce long-term replacement options for the RSC and JSB levies as part of the 2008, or possibly 2009, budget.

This is an adapted version of *MFPFA Circular No. 1: Introduction to the Municipal Fiscal Powers and Functions Act No. 12 of 2007*, issued by the National Treasury. Many thanks to Ms Wendy Fanoe (wendy.fanoe@treasury.gov.za) for her kind assistance in this regard.

THEME 22: DEBT COLLECTION

Municipalities collect revenue from ratepayers and residents who consume services. They must do so in terms of policies and by-laws adopted by the council. Disconnecting or limiting access to municipal services such as electricity and water are used by municipalities to compel residents to pay. Municipalities may only do so within the limits determined by the Constitution, in particular the Bill of Rights. The rights to equal treatment, dignity, access to water and housing protect residents. These articles discuss the legal framework for tariffs and debt collection, an important Constitutional Court judgments on the right to equality and a High Court judgment on the issue of disconnecting electricity in response to municipal arrears.

1. **Tariffs and Debt Collection in the Municipal System Act** by Jaap de Visser, Local Government Bulletin 2001, Volume 3 Issue 4, page 7-9
2. **Equality and differentiated Electricity Rules and Selective Debt Collective, City Council of Pretoria vs Walker 1998** by Jaap de Visser, Local Government Bulletin 1998, Volume 1, Issue 3, page 5-6
3. **Disconnections Electricity Supply as Debt Collection Mechanism** by Koos Smith, Local Government Bulletin 2007, Volume 9, Issue 4, page 18-20

The Property Rates Act

A tool for poverty alleviation

Property rates are an important source of revenue for municipalities and this is reflected in the preamble to the Property Rates Act of 2004 (the Act): "there is a need to provide local government with access to a sufficient and buoyant source of revenue necessary to fulfil its developmental objectives". At the same time, however, a municipality's financial health should not be attained at the unjustifiable expense of the poor within its area. The power to impose rates should take into account the imbalances of the past and the burden of rates on the poor.

The Act, while permitting the levying of rates, also requires that the poor are taken into account, provided that such consideration is not arbitrary or haphazard. This much is clear from section 3(6), which prohibits a municipality from granting relief to property owners on an individual basis. Rather, the poor and other vulnerable sectors must be catered for in terms of a rates policy that sets out the criteria for identifiying categories of property owners that may benefit from alleviation measures. The alleviation must thus be granted in a structured and fair manner.

Municipalities are bound by the general principles of administrative law, including the duty to act fairly, when they determine such categories. The general administrative law requirements are further reflected in section 3(3)(a), which obliges the rates policy to "treat persons liable for rates equitably". Thus, while equal treatment is not required, differential treatment must be equitable. Accordingly, the rates policy may take into account "the effect of rates on the poor and include appropriate measures to alleviate the rates burden".

Categories of owners and property

The rates policy may differentiate between categories of owners or categories of property. The members of the categories may then benefit through rates exemptions, reductions or rebates. Specific reference is made in section 15 to various beneficiaries, including the indigent, owners dependent on pensions or social grants, owners temporarily without income and owners of residential properties valued below a threshold set by the municipality.

However, other rational differentiations may also form part of the categorisation. An example that looks beyond purely financial thresholds may be where broader economic factors harshly impact on the ability of certain categories of owners to pay rates. An example would be a category of low-income owners in areas largely inhabited by the previously disadvantaged. Such areas may, due to property market trends, suddenly become fashionable and marketable, with the values of properties in those areas surging. This may mean that certain residents cannot afford the proportionate increase in rates. Eventually, when long-standing community members move to more affordable areas and the rich buy their homes, gentrification results.

Municipalities may wish to determine criteria that would identify areas that are transforming through gentrification and establish measures such as discounts that counteract the effects of any potential inequity.

Moreover, a municipality may not levy rates in respect of property that belongs to land reform beneficiaries (or their heirs) for a period of ten years after title is transferred to the beneficiaries. In addition, they may not levy rates on the first R15 000 of the market value of a category of residential property determined by the municipality. These measures will, on the whole, be most beneficial to those belonging to the lower income groupings.

A further measure is the deferment of the payment of rates under 'special circumstances'. The temporary loss of income suffered by property owners in the middle or upper income groups may warrant a deferment rather than a discount as contemplated in section 15. On the other hand, deferment may well undermine the aims of the Rates Act should a municipality defer payments owed by the indigent or temporarily unemployed poor, as it may simply compound the indebtedness of such persons.

Comment

These measures are aimed at alleviating the rates burden on the poor. The exemption, reduction and rebate mechanism will clearly evolve and be pivotal. However, such mechanisms must be prudently conceived and applied.

Municipalities should carefully consider the financial implications of the proposed policies and how best to structure the overall package of exemptions, reductions and rebates. Municipalities must also ensure that their policies comply with the principles in the Act and the general principles of administrative law, in particular whether a policy's differentiation between categories of owners or categories of property is lawful. Thus, the Act seeks to create a framework within which municipalities are able to equitably balance their own revenue needs with those of deserving categories of property owners. Whether that balance will be attained will largely depend on the manner in which municipalities apply the principles outlined in the Act.

key points

- **Municipalities must adopt a rates policy that sets out the criteria for identifying the categories of property owners who may benefit from alleviation measures.**
- **The rates policy may differentiate between categories of owners or of property.**
- **Municipalities should carefully consider the financial implications of the proposed policies and how best to structure the overall package of exemptions, reductions and rebates.**

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Property rates

LATEST DEVELOPMENTS

Property rates, as a form of tax imposed on the market value of land and buildings, are the key source of revenue for municipalities. The framework for the imposition of property rates is carefully regulated by the Municipal Property Rates Act (Act 6 of 2004) (MPRA), which provides municipalities with a measure of discretion in determining and levying property rates in a localised context. The imposition of property rates is, however, subject to national limits or maximums. This article discusses some recent developments with regard to these maximums (ratios), as well as the suggested amendments to the MPRA.

key points

- When imposing property rates, municipalities must comply with national ratios between the residential rate and rates on certain protected categories of property.
- The recent addition of 'public benefit organisation property' to the list of protected categories has been the subject of controversy.
- CoGTA has commenced a process of public consultation on possible amendments to the Municipal Property Rates Act.
- These amendments may deal with further exclusions from property rating, how to rate mines and a tighter system of ratios.

The MPRA provides that the Minister for Cooperative Governance and Traditional Affairs (CoGTA) may determine ratios between the residential category and other categories of property. Municipalities may, in this respect, not levy a rate higher than the maximum determined in the national ratio.

The Minister recently promulgated new ratios, in the 2010 Amended Municipal Property Rates Regulations on the Rate Ratios between Residential and Non-Residential Properties. The amended regulations provide for different ratios of property rates between non-residential and residential property. The residential property rate ratio is 1:1, while the agricultural property, public service infrastructure property and public benefit organisation property rate ratios are 1:0.25. The new regulations have thus added public benefit organisation property as a newly protected category.

Section 8(2)(q) of the MPRA defines 'public benefit organisation property' as a property 'owned by public benefit organisations and used for a specified public benefit activities' listed in item 1 (welfare and humanitarian), item 2 (health care) and item 4 (education and development) of Part 1 of the Ninth Schedule to the Income Tax Act.

The debate about private schools

The new ratios were prompted by a court action against the Minister of CoGTA, the Minister of Finance and the South African Local Government Association by the Independent Schools Association of Southern Africa (ISASA). ISASA argued that its members were 'public benefit organisations' as they fell within the definition of 'school' in terms of the South African Schools Act (Act 84 of 1996). They insisted that, as such, they should be protected by national ratios. The two Ministers settled the matter with ISASA by promulgating a ratio for all public benefit organisations.

SALGA disagreed and argued that ISASA members operated private schools as businesses, and therefore should not be viewed as public benefit organisations. They generated income from which they were able to pay for municipal services. Affording them protection over other property categories was

therefore not fair to other ratepayers. Moreover, SALGA argued, the regulations would undermine the discretion of municipalities to regulate the rating of property by determining criteria in their rates and policies applicable to different categories of properties. In keeping with these arguments, SALGA urged the Minister not to promulgate the regulations as a fixed ratio. However, according to CoGTA, SALGA's recommendations were submitted two months *after* the ratio was promulgated, despite the fact that the Minister had requested their inputs on the substance of the regulations 30 days prior to promulgating them.

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The Institute of Municipal Finance Officers (IMFO), like SALGA, supports the view that ISASA members are schools that are generally run as businesses, some of which are actually listed as companies. In fact, according to IMFO, some municipalities have already requested public benefit organisations seeking rebates to provide their financial statements to ensure that rate benefits are granted to those who require them and not to those who clearly have the ability to pay.

For now it seems that the debate has been settled in favour of ISASA, as all public benefit organisations are now protected by a 25% ratio. However, section 8 of the MPRA provides that municipalities have discretion in choosing property rates categories for differential rating. They are not obliged to include 'public benefit organisations' as a distinct category in their property rates policies. If they do, that category is subject to the 25% ratio. If they do not, the 25% ratio misses its target and does not apply. It is this aspect of the law, and a range of other issues, which the Minister seeks to address in possible amendments to the MPRA.

The agenda for debate on the MPRA

CoGTA has commenced a process of public consultation on possible amendments to the MPRA. The agenda with respect to the proposed amendments incorporates the exclusion of the poor from rating, the exclusion of public service infrastructure, places of worship and communal areas, the regulation of property categories, redefining the MEC's role, the rating of mining property, group applications for rate relief and the quality of valuation.

Excluding the poor from rating

CoGTA proposes to amend the MPRA to exempt the poor from paying property rates. Vulnerable citizens would then be exempt according to an income threshold, determined by the Minister of Finance, that identifies poor households . This threshold would be determined on an annual basis and would provide relief to vulnerable residents across South Africa.

Excluding public service infrastructure

Certain types of public service infrastructure (PSI) serve a developmental role. Currently, the first 30% of the market value of PSI is excluded from rating. CoGTA proposes to exclude PSI (roads, railways, airport aprons and runways, breakwaters and dams) from rating altogether.

Excluding places of worship

Despite the fact that places of public worship and related residences are excluded from rating in terms of the Act, there have been different interpretations of the Act with regard to places of worship or properties linked to these places of worship. This has resulted in various approaches, which differ from municipality to municipality and in rating perspectives in respect of places of worship. CoGTA proposes to define places of worship and related residences to ensure that misinterpretations in this respect are done away with and to bring certainty for owners of these properties, so that clarity may prevail and all such properties are treated appropriately and in the same manner by all municipalities.

Communal areas

Most municipalities, with the exception of some municipalities in KwaZulu-Natal, do not value and rate communal areas. CoGTA is asking for input on the correct way forward with regard to the rating of communal areas – that is, whether they should be excluded from property rates.

Tighter regulation of property categories

As highlighted above, the basis for the determination of property categories by municipalities is currently open-ended. Municipalities may choose a method of determining property categories (ie according to use, permitted use or geographical area) and may use the categories provided for in section 8 of the MPRA. However, nothing compels them to use any or all of the categories in the Act (aside from the obvious categories such as residential, agricultural, business and industrial). Municipalities that do not use the categories in the Act escape the Minister's ratios on those categories. CoGTA proposes to change the Act to ensure that the Minister can, in future, effectively regulate the ratios between property categories.

Redefining the MEC's role

CoGTA takes the view that provinces have not been provided with sufficient tools to monitor and support property rating by municipalities. The proposed legislation provides for more details on the role of the MEC responsible for local government in monitoring, supporting and, where necessary, intervening in a municipality.

How to rate mining properties

CoGTA also proposes to provide clarity with respect to whether 'above surface improvements' related to mining activities should be valued. In addition, CoGTA intends to clarify who is liable for paying rates for mining properties, namely the holder of the mining right or the owner of the property, in cases where the two are not the same person or entity.

How groups may apply to the Minister for rates relief

CoGTA furthermore proposes to provide for a cut-off date for applications from groups or sectors of the economy with respect to relief from specific rates imposed by a municipality. CoGTA suggests requiring that any such application be submitted not more than 12 months after the rates in question were imposed by the municipalities.

Photo: Graeme Williams, MediaClubSouthAfrica.com

Quality of valuation

Finally, CoGTA poses the question: is there, in fact, a need to amend the Act to deal with the quality of valuations, as they tend to vary greatly across municipalities?

It is clear that changes to the legal framework for municipal property rates are under way. CoGTA has been engaging stakeholders and the public on these matters and intends to table amendments to the MPRA in Parliament in the second half of 2010. Municipalities are advised to follow this important process critically and make their voices heard.

This article is based on *A Guide to the Draft Municipal Property Rates Act Amendments* by CoGTA, as well as on the submissions made by IMFO and SALGA on the 2010 ratios. Readers are invited to engage CoGTA on the suggested changes to the MPRA via Ms Veronica Mafoko on e-mail mpra@cogta.gov.za

Professor Jaap de Visser
Editor

Douglas Singiza
Doctoral intern

THE NEW Municipal property rates regulations

MERE REGULATION OR IRRATIONAL RATIOS?

On 19 December 2007 the Minister of Provincial and Local Government published for public comment draft regulations on property rates. The draft regulations set ratios for municipal property rates on different types of properties. A key ratio that stirred much controversy was that the rate on state-owned property should be no more than 25% of the rate on residential property. This has been slammed as unconstitutional and a threat to municipalities' financial sustainability. Moreover, the draft regulations determine that rates on (categories) of properties may not be increased by more than the Consumer Price Index (CPI).

Proposed ratios

In terms of the Municipal Property Rates Act (Act 6 of 2004), the Minister responsible for local government may, with the concurrence of the Minister of Finance, prescribe that a rate on non-residential property may not exceed a certain ratio in relation to residential property. Before issuing the regulations, the Minister must first consult with SALGA on the substance of the regulations and publish them for public comment.

The draft regulations determine a number of ratios:

- The rate on business, commercial, industrial and mining property may not be more than double of that on residential property. For example, if the rate on residential property is 4c in the rand, the rate on business property may not exceed 8c in the rand.
- The rate on agricultural property may not be more than a quarter of the rate on residential property.
- The rate on public benefit organisation property may not be more than a quarter of the rate of residential property.
- The rate on state-owned property and public service infrastructure may not be more than a quarter of the rate of residential property.

Reaction

With respect to state-owned properties, the ratio has provoked loud protests from local government quarters. A meeting of municipal chief financial officers strongly voiced its concern that these regulations would compromise municipalities' financial sustainability. These comments were attributed to SALGA, which responded by publishing a quarter-page advertisement in a major newspaper, saying that, on the contrary, it "has been a key role player in the process leading to the publishing of the draft regulations". It had made inputs to the Department of Provincial and Local Government (DPLG) prior to the publication of the draft regulations, raising the issues that were now being raised in the press.

The position SALGA then took was to say that the matter would be considered by its national executive committee during February 2008, followed by further members' conferences. More forthright was the approach by the municipal manager of eThekwini Metropolitan Municipality, Dr Michael Sutcliffe, who rejected the draft regulations outright, saying they would be challenged on constitutional grounds as well as on the basis of the chaos they would cause.

Constitutionality of the ratios

Could the regulations be challenged in court? I would argue that there are at least two grounds on which they can be challenged.

discretion to municipalities; and the exclusion of certain properties and persons from the payment of property rates, and the valuation process of rates.

Involvement of the provincial sphere

It has been noted that the current Act excludes the provincial sphere from the process. There are two amendments that set out to rectify this. First, the MEC for local government must be consulted before any sector of the economy can apply to the minister for a review of rates that they deem prejudicial to their sector of the economy. Secondly, the Bill seeks to extend the validity of a valuation roll from four to five years, and allows the MEC to extend it for a further two years. Furthermore, the MEC is enabled to monitor the implementation of the Act, especially to ensure that municipalities adhere to all regulations in regard to the preparation of valuation rolls.

Greater clarity of provisions and discretion to municipalities

Because the provisions in the current Act are of a general nature, different municipalities have used different criteria in rating properties. The Bill seeks to provide just two grounds for setting rates, namely use and permitted use. There will also be a compulsory categorisation of properties and a clearer definition of types in the different categories. The categories of property are: residential properties, industrial properties, agricultural properties, mining properties, properties used for public service purposes, public service infrastructure, properties owned by public benefit organisations and used for public benefit purposes, and properties used for multiple purposes. The minister may also determine any other category. Importantly, the municipality may also categorise vacant land in respect of a number of listed categories.

There are also some amendments in regard to property rates on residential properties. A uniform rate for residential property rates does not apply to vacant residential property.

The Bill also provides a wider discretion for municipalities to decide the grounds on which municipalities can determine categories of property exempted from paying property rates or eligible for reduced rates or rebates. Municipalities must then, however, present figures on the total revenue forgone through this process.

Exclusion from payment of property rates

The Bill excludes certain categories of public service infrastructure from the payment of rates. The Bill also sets time frames for the period within which the different municipalities must start phasing in the exemptions, based on when they started implementing property rates under the Act.

In regard to mining, the Bill excludes mining rights and / or mining permits from property rates. However, infrastructure above the surface in respect of mining property will still be subject to property rates. Furthermore, mining rights and mining permits cannot be used to determine the value of the mining property for purposes of rates.

The Bill also excludes recipients of an older person's grant or disability grant from property rates. However, the market value of the property of such a person should not exceed the amount set by the minister responsible for local government with the agreement of the Minister of Finance.

Process of valuation of rates

There are a number of proposals in regard to the process of valuing property. Firstly, the requirement that a person whose property has been valued upwards should pay interest is removed. Secondly, municipalities must repay an owner whose property has seen a downward adjustment of its value. The current requirement that each district municipality has to establish a valuation appeal board is abolished.

There are also amendments introducing supplementary valuation where the value of a property was recorded incorrectly through a clerical or typographical error and regarding the date from which the corrected rates take effect after due notification of the ratepayers concerned.

Conclusion

The amendments seek to provide a more uniform framework within which municipalities can administer and regulate the collection of property rates.

As noted in the explanatory memorandum on the objects of the Bill, the amendments are a culmination of lessons learned in the administration of property rates and are geared towards enhancing efficiency in the collection and use of municipal property rates.

Conrad Bosire
Doctoral intern

Municipal Property Rates Act

SOME VALUATION ISSUES

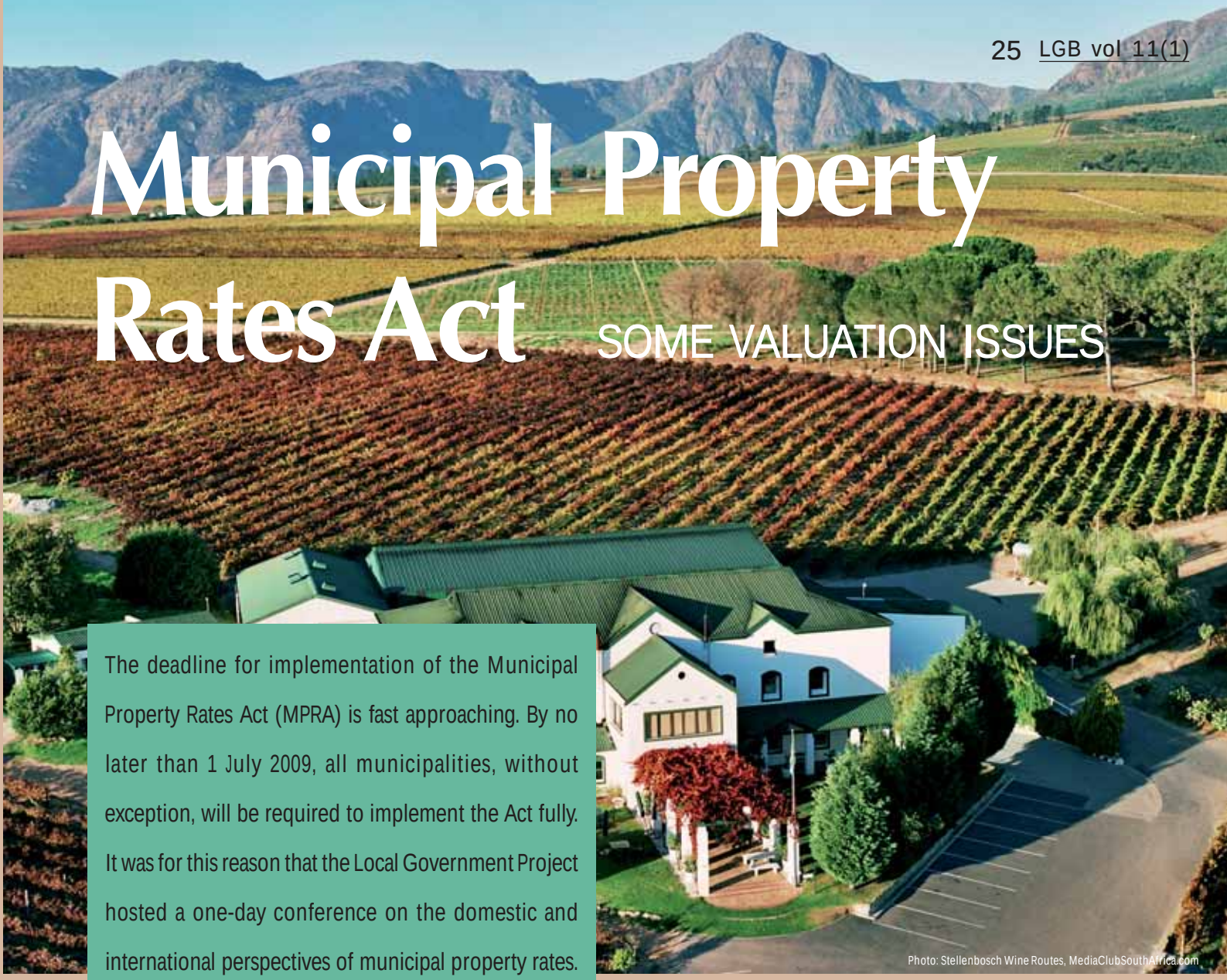

Photo: Stellenbosch Wine Routes, MediaClubSouthAfrica.com

The deadline for implementation of the Municipal Property Rates Act (MPRA) is fast approaching. By no later than 1 July 2009, all municipalities, without exception, will be required to implement the Act fully. It was for this reason that the Local Government Project hosted a one-day conference on the domestic and international perspectives of municipal property rates. The conference, attended by municipal practitioners from across the country as well as international experts, provided a platform for sharing perspectives on the MPRA and key issues that affect its implementation.

This article highlights a few issues regarding the valuation of properties as presented to the conference by Professor Riël Franzsen of the African Tax Institute at the University of Pretoria.

Market value

Property tax legislation in some countries (notably Canada and the United States) allows, for example, for farms to be valued with reference to their current use, rather than with reference to their potential highest and best use (ie market value). This preferential valuation of a specific property use category (eg farms) is not allowed in terms of the MPRA. The MPRA provides for a single standard for the determination of rateable value for all properties, irrespective of use, namely 'market value'.

In principle this uniform standard, which must be applied by all municipalities across all property use categories, is to be welcomed. If applied strictly, it means that, at least from a valuation point of view, all property owners are treated equitably and fairly. Property owners deserving of relief should not be assisted through preferential valuations which are difficult (if not impossible) to quantify. As prescribed by the MPRA, relief must be granted annually through rebates, reductions or exemptions. The fact that rebates, reductions and exemptions must be justified and their impact quantified ensures that those who benefit from and those who subsidise these forms of tax relief are properly informed.

Value reductions

In respect of public service infrastructure (PSI) and residential properties, the MPRA mandates value reductions. For PSI the reduction is a percentage (currently 30%) of the market value

Photo: Graeme Williams, MediaClubSouthAfrica.com

and in respect of residential properties it is a minimum amount (currently R15 000). These value reductions can obviously only be applied once the market values of the relevant properties have been determined.

The MPRA also allows municipalities to apply value reductions in respect of other categories of property. These reductions are determined according to criteria set out in their rates policies and are taken into account before determining a rate payable in respect of such property. Many municipalities use additional value reductions (beyond the minimum R15 000) to provide, for example, further relief in respect of residential properties. However, not all municipalities that provide an additional value reduction in respect of residential properties identify and quantify the revenue foregone as a result of that reduction. This is despite the fact that the Act mandates that such revenue be identified and quantified both in a municipality's annual municipal rates policies and in its annual budget.

Municipal valuers: Capacity and skills

The MPRA provides that each municipality must appoint a "municipal valuer" to conduct a general valuation and prepare a valuation roll in respect of all rateable properties. To ensure that proper standards are maintained, the municipal valuer must be registered as a professional valuer or professional associated valuer in terms of the Property Valuers Profession Act.

According to the South African Council for the Property Valuers Profession there are only 599 professional valuers and 702 professional associated valuers registered in terms of the Property Valuers Profession Act. Apparently fewer than 25% of these registered valuers actually do municipal valuations and many currently lack the technical skill to utilise computer-assisted mass appraisal valuation techniques. Others lack the experience to value unique properties, such as certain types of PSI.

Given the shortage of registered valuers and limited skills levels, and given that general revaluations must be undertaken at least once every four years in all municipalities, it remains to be seen whether the valuers profession can actually cope with what is required by the MPRA.

Objection and appeal

The MPRA specifies a detailed objection and appeal process in terms of which "any person" has a right to object to any matter reflected in or omitted from the roll in respect of an individual property. However, no one can object to the validity or quality of the valuation roll as such.

Allowing property owners to lodge informal queries could significantly reduce the numbers of formal objections (and

appeals) and the concomitant costs. It could also have a positive impact on the relationship between property owners and the municipality. Although the MPRA does not explicitly provide for informal queries in respect of property values determined by the municipal valuer, it does not prohibit them either.

The low percentage of objections received by the City of Johannesburg Metropolitan Municipality in response to the publication of its 2008 valuation roll can be explained, at least to some extent, by the publication of a draft valuation roll at the end of 2007. The draft roll gave property owners an opportunity to challenge inaccurate data, and municipal valuers an opportunity to informally address misconceptions regarding the valuation of individual properties or the valuation process, before the actual valuation roll was published.

Sectional title property

Under the pre-MPRA dispensation, a sectional title scheme was deemed to constitute a single property owned by a single owner, and was valued and rated accordingly. The MPRA provides that each sectional title unit constitutes property to be valued at market value and to be rated individually. This is a much more equitable approach, not only in respect of sectional title units within a specific scheme, which may have significantly different market values, but also in relation to other property categories that have always been valued as individual properties in the past. However, equity comes with a price tag. Municipal valuers must:

- value many more properties – as each unit constitutes rateable property; and
- obtain data on individual sectional title units and their owners – a laborious and costly exercise, especially where bodies corporate are uncooperative and gaining access to individual units is difficult, which is often the case.

Some municipalities are also finding it difficult to comply with the added administrative burden of serving valuation notices and rates bills on so many new property owners.

Public service infrastructure

PSI presents municipalities and especially municipal valuers with significant challenges. Firstly, an analysis of the definitions of "public service infrastructure" and "property" reveals that:

- there is uncertainty as regards the scope of these definitions;
- there are property types (especially types of PSI) that could be classified in more than one of the four categories of "property" defined; and
- certain types of PSI that would have constituted "equipment or machinery" (and as such would have been excluded from the tax base) have now been defined as PSI and therefore also as property (eg power lines and communication masts).

From a practical point of view it could be extremely difficult for a municipal valuer to determine the market value of linear PSI (eg pipelines and power lines) that forms part of a network extending beyond the boundaries of the municipality concerned.

Recent amendments to the MPRA were effected to address some of the PSI-related problems. Although municipalities now have the option not to value PSI if they do not plan to levy a rate on it, some problems remain. For example, a municipality with a national or provincial airport may decide not to rate (and therefore not to value) PSI. But as only the runways and aprons at the airport constitute PSI, the remainder of the airport must be valued, so some apportionment of value between the runway and apron on the one side and the remainder of the airport on the other is still required! Lastly, even if it is not to be valued, PSI must be properly identified and described, as it must still be reflected in the municipal property register and on the valuation roll.

Quality control in respect of valuation rolls

The introduction of monitoring and oversight powers for the provincial and national spheres of government must be welcomed in principle. However, if the problems experienced in some provinces with the appointment of valuation appeal boards are anything to go by, much will have to be done before the general provincial oversight powers given to MECs for local government become effective.

The pre-MPRA provincial legislation did not provide for the external quality control of valuation rolls. The MPRA now provides that the national government Minister responsible for local government "may monitor, and from time to time investigate and issue a public report on, the effectiveness, consistency, uniformity and application of municipal valuations …". Such an investigation *may* include:

- studies of the ratio of valuations to sales prices; and
- other appropriate statistical measures (eg the relative treatment of high- and low-value properties).

Furthermore, these investigations may be undertaken in respect of one, more or all municipalities.

It is unfortunate that this important oversight function has


Photo: Jeffrey Barbee, MediaClubSouthAfrica.com

been assigned to the Minister and provides for mere ad hoc interventions. What is really needed is an independent technical government valuation agency to perform this task. Australia, Canada and New Zealand all have government valuation agencies performing, in some instances, valuation functions on behalf of municipalities, and, in most instances, also some oversight as regards the overall quality of valuation rolls.

In a South African context such an agency could:

- undertake the monitoring of the quality of valuation rolls on a continuous basis and at a technical level – rather than at the political level, as is the case at present;
- value network PSI (such as railway lines and pipelines) on a national scale in a uniform manner, and apportion the values in an equitable manner among municipalities – a task that simply cannot be performed by the "municipal valuer" in an individual municipality;
- advise and assist provincial MECs with the appointment of valuation appeal boards; and
- step in and undertake general valuations on behalf of municipalities where even the skills to appoint a municipal valuer seem to be lacking.

The fast-approaching deadline

When it was enacted in 2005, the MPRA provided a four-year period within which municipalities had to implement its provisions. To date only 104 municipalities have implemented the MPRA. A further 162 municipalities (more than 60%) still have to implement new valuation rolls and municipal rates policies by the 1 July 2009 deadline.

Given all of the preliminary tasks required to implement a general valuation roll, it is highly unlikely that all of these remaining municipalities will be able to implement a credible valuation roll prepared in accordance with the MPRA by 1 July 2009. Without an amendment to the MPRA, defaulting municipalities will be unable to lawfully determine and levy rates from 1 July 2009. The impact of this on the revenue side of their budgets is likely to be significant, as will be the impact on the already strained levels of service delivery.

How national government will respond to the looming crisis remains to be seen.

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THEME 23: PROPERTY RATES: CHALLENGES AND OPPORTUNITIES

Property rates are a critical revenue stream for local and metropolitan municipalities. It presents both challenges and opportunities. These articles discuss two specific issues. The first discusses the phenomenon of ratepayers' associations withholding rates and taxes as a form of protest. The second is an article discussing the potential of rates policies to be used to benefit the poor.

1. **The Withholding of Rates and Taxes in Five Local Municipalities** by Derek Powell, Annette May and Phindile Ntliziywana Local Government Bulletin 2010, Volume 12, Issue 4, page 9-12
2. **Municipal Rates Policies and Urban Poor: Promoting Access to Urban Land Markets** by Alison Hickey Tshangana, Local Government Bulletin 2010, Volume 12, Issue 1, page 12-14

The withholding of rates and taxes IN FIVE LOCAL MUNICIPALITIES

The Community Law Centre, in partnership with the German Agency for Technical Cooperation (GTZ) and SALGA, recently completed a research project on the phenomenon of rates withholding in five South African municipalities. 'Rates withholding' is the practice by ratepayers of withholding their property rates and, in some cases, fees for municipal services because they believe that municipalities are not delivering. We argue that this practice, though less visible than service delivery protests, is equally destructive.

The objectives of the research were to understand the disputes from the perspective of the parties involved; examine the implications for local government and cooperative governance; and recommend ways to help resolve the disputes and strengthen local government. In the process, we interviewed stakeholders including local ratepayers' associations, municipal leaders, councillors, provincial departments responsible for local government, the Department of Cooperative Governance and Traditional Affairs and the National Taxpayers' Union.

Rates withholding is a 'new' form of protest from a possibly unexpected quarter. These ratepayers are mostly white, professional people from traditionally well-off communities. The research shows, however, that rates withholding is motivated by many of the same imperatives that drive service delivery protests, indicating that certain municipal failures affect all citizens, regardless of financial status.

Importance of the research

While rates withholding may not come with the violence and damage associated with other forms of protest, its consequences can be just as bad. Firstly, it can exacerbate the historical racial and class divisions in South African society, to the detriment of nation-building. Secondly, a stand-off between ratepayers and their municipal council can damage public trust and effective government in a municipality. Thirdly, withholding rates without sound legal grounds undermines the rule of law and the constitutional authority of the state. Lastly, it reduces the municipal revenue base, which in turn can reduce expenditure on services to the community. This article provides a synopsis of the key findings of the research and its recommendations.

'Rates withholding' defined

The majority of ratepayers who withhold their property rates and/or service fees have formed ratepayers' associations to represent their interests. Many of these associations belong to a national umbrella body called the National Taxpayers' Union.

There is no uniformity in rates withholding across municipalities: the reasons for withholding vary, and local conditions determine the nature and form of a particular dispute. However, the research did identify a pattern in the sequence of steps that precipitate a formal declaration of a dispute by a ratepayers' association.

1. A service delivery failure is identified.
2. Ratepayers engage the municipality with a view to resolving the dispute.
3. If engagement fails, a dispute is declared in terms of section 102(2) of the Municipal Systems Act (hereafter the Systems Act).
4. Ratepayers often disaggregate the municipal account and pay for services received such as water and electricity, while withholding the amounts due for property rates.
5. The payments withheld are deposited into a private interest-bearing account until the municipality remedies the service delivery failure.

6. Ratepayers provide the municipality with regular accounts of the money withheld.
7. In worst-case scenarios, ratepayers use the money to deliver services themselves.

Legality of withholding rates and taxes

Ratepayers' associations justify withholding rates on various legal grounds, but municipalities contest this. Several municipalities have used aggressive strategies to coerce defaulting ratepayers to pay outstanding rates and/or service charges.The most common is the disconnection of the electricity supply to individual ratepayers. In turn, ratepayers' associations argue that municipalities do not have the legal right to disconnect electricity for the non-payment of *rates*, as long as payments for electricity are not withheld.

Contractual relationship between ratepayers and municipalities

The first ground upon which the ratepayers' associations rely is that the relationship between ratepayers and municipalities is contractual. In other words, if ratepayers pay for the services they receive, municipalities must deliver, because, in a contractual relationship, a duty to perform arises where both parties to the contract perform. However, the Constitutional Court, in *Joseph and Others v City of Johannesburg and Others* (CCT 43/09) [2009] ZACC 30, 2010, firmly located the relationship between municipalities and citizens within the domain of public law. The Court referred to

> the special cluster of relationships that exist between a municipality and citizens, which is fundamentally cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of persons living in its jurisdiction.

The Court thus confirmed that the relationship between ratepayers and municipalities is not a *quid pro quo one*, so failure to perform by either the municipality or ratepayers can never result in the *automatic* termination of the public duties owed by each to the other.

Dispute clause in section 102(2) of the Systems Act

The second ground on which ratepayers rely is the 'dispute clause' in section 102(2) of the Systems Act. The declaration of a dispute in terms of this subsection has the effect of suspending the municipality's credit control and debt collection processes until the dispute is resolved. The Act states clearly, however, that any dispute must relate to a 'specific amount claimed by the municipality'. A dispute on the basis of general dissatisfaction with municipal services, such as failure by the municipality to maintain roads or public places, does not qualify.

Disaggregation of property rates and trading services

Thirdly, the ratepayers' associations' actions rest on the perception that income from property rates is used to fund communal services such as road building and maintenance or storm-water drainage. Income from trading services such as water and electricity, on the other hand, is generally thought to fund the delivery of these specific services. The key difference between property rates and service charges, however, is that the right to levy property rates is derived from the Constitution itself, which makes rates a municipal tax. As such, it can be used to finance various activities, from the running of the council and municipal administration to the delivery of trading services to the public. The courts have therefore made it clear that property rates and service charges are not mutually exclusive. Service charges are defined narrowly, but property rates are defined broadly and may include service charges. There is thus no watertight distinction between property rates and service charges.

Section 102(1)(a) of the Systems Act also allows municipalities to consolidate municipal accounts and suspend any municipal service to enforce the payment of an unsettled account. For example, the fact that the 'electricity portion' of a municipal account has been paid does not preclude the municipality from allocating that payment to any other outstanding portion of the municipal account, such as property rates or water.

The Constitutional Court, in *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC), furthermore made it clear that it is the courts' function to make a declaration of rights and grant appropriate relief. Local government, it pointed out, cannot function properly

> if every person who has a grievance about the conduct of a public official or a governmental structure were to take the law into his or her own hands or resort to self-help by withholding payment for services rendered. That conduct carries with it the potential for chaos and anarchy and can therefore not be appropriate. … It is pre-eminently for the courts to grant appropriate relief against any public official, institution or government when there are grievances. It is not for the disgruntled individual to decide what the appropriate relief should be and to combine with others to take it upon himself or herself to punish the government structure by withholding payment which is due (para 93).

Legality of disconnections in response to rates withholding

The duty to collect debts

Section 96(a) of the Systems Act provides that a municipality 'must collect all money that is due and payable to it'. Case law has confirmed the peremptory nature of this duty. In *Mkontwana v Nelson Mandela Metropolitan Municipality* (CCT 57/03) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (6 October 2004) the Constitutional Court held that municipalities must

> send out regular accounts, develop a culture of payment, disconnect the supply of electricity and water in appropriate circumstances and take appropriate steps for the collection of amounts due.

The municipality's credit control and debt collection processes must, however, be pursued within the stringent framework outlined in section 97 of the Systems Act. By specifying the details to be included in the credit control and debt collection policy, the Act strives to ensure legal certainty, so that citizens are fully aware of what is expected of them and of the recourse available to them in the context of the termination of services. Importantly, section 97 directs municipalities to make specific provision for indigent and vulnerable debtors.

Legal clarity is important, but a legal declaration of rights in itself will not help the parties get along in future as partners rather than adversaries, nor will it solve the underlying administrative and service delivery problems behind these disputes. It is the parties themselves – namely, the municipalities and the ratepayers' associations – that must do so, with the assistance of others.

Key findings

The financial impact of the disputes is limited, but the political impact is substantial

The interviewees generally agreed that the financial impact of withholding was negligible, but the political impact was much more pronounced, through the loss of trust between the municipality and its citizens. Accommodation and cooperation, not adversity and protest, are necessary for peaceful coexistence and development. As one municipal official put it, a loss of confidence in the municipality benefits no one.

The disputes relate to a variety of problems with municipal service delivery

In all cases, the grievances giving rise to disputes were linked to concrete service delivery problems. In most cases, municipal and provincial officials confirmed that there were genuine service delivery problems, indicating a high degree of convergence among parties on the facts of the dispute. As one provincial official put it, 'There may be politics at play, but at the end of the day they [ratepayers] wouldn't have a space if the municipality had done what it was supposed to do.' So agreement on the factual problems provides a strong basis for resolving the dispute, irrespective of how the parties may perceive each other's motives.

Ratepayers see a connection between their grievances and municipal incapacity, maladministration and corruption

In all cases, ratepayers saw the service delivery problems as nested within systemic failures of governance and administration. Many municipal and provincial officials also mentioned broader institutional problems. The Auditor-General's reports make clear that problems of this kind do exist in all five municipalities. The high probability that actual problems of governance are involved again provides a factual basis for resolving the disputes, and suggests the need to reform certain aspects of governance and administration.

Municipalities respond to the declaration of disputes in many ways

Municipalities' responses to the declaration of disputes ranged from disengaging entirely, while employing aggressive legal strategies (such as cutting off electricity) to compel payment, to engaging the ratepayers' associations with a view to finding a solution. In trying to engage the municipality, ratepayers were most often in contact with the office of the mayor or municipal manager, through correspondence and meetings. Encouragingly, there was evidence of these kinds of contact in all five municipalities, even where the relationship between the parties was extremely strained. Evidence of engagement, even where the parties were locked in legal battle, is a further indication that there are firm grounds for resolving these disputes.

Disputes often involve a breakdown in communication between municipalities and ratepayers

Poor communication emerged as a major contributor to the disputes. In all five municipalities, communication breakdowns precipitated the disputes and hampered efforts to find a solution. Interviewees in all groups agreed that open and frank engagement between the parties was essential, and that poor communication bred discontent and misunderstanding. A strong message was that communication did not mean simply talking about the problem, but instead taking practical action to resolve the problem and following through on that action in a responsible and reliable manner. Had communication and engagement been effective to begin with, some of these disputes could have been avoided. Most ratepayers and officials were explicit on this point: the absence of dialogue, engagement and follow-through had frustrated and alienated the ratepayers and undermined trust between the parties.

Representative organs of councils do not appear to play a significant role in disputes

A fundamental question of the research was what part, if any, the democratic structures of the council played in addressing or resolving the grievances. Where were the grievances registered and discussed with a view to resolving them?

When asked whether they participated in ward committee, integrated development planning or budgeting processes, most ratepayers indicated that they did. However, most seemed discontented over the way these processes were organised and run. Several ratepayers expressed concern that budget and planning meetings 'were not properly advertised' and that they had to find out about meetings 'from each other via SMS'. Ratepayers generally expressed discontent about the accessibility and efficacy of these participatory mechanisms.

This is crucial, given that the participatory structures in municipalities are designed to be the main avenues through which community needs and concerns are discussed and addressed. We inferred that these structures were not addressing the ratepayers' concerns and, thanks to poor administration, may even have added to their discontent.

How did the dispute play out in the council itself? No convincing examples were provided of these disputes being discussed in the council. Some councillors appeared unsure about whether they had been discussed there at all. It was not clear, in any of the five municipal councils, how the dispute had been registered or discussed within its executive and legislative organs. A clear message from the councillors was that part of the problem was that council structures were generally organised along party-political lines, which elevated the party caucus and offered few incentives for deliberative politics across party lines.

One of our main conclusions is that the executive mayoral committee system is neither suited to South African conditions nor an effective instrument for local nation-building. It leads to executive-centeredness and carries the risk of the party caucus replacing the council. Nation-building in our context requires that we actively build local political communities for the long term. That goal will only be achieved when leading sectors of a local community have incentives to deliberate and find common ground on the matters that separate and unite them.

Recommendations

- ***Resolving the stand-off is necessary and possible.*** There are opportunities to resolve disputes before they escalate to the point of breakdown, but they require substantive engagement by both parties. The municipality, as the elected authority, must take the lead.
- ***Practical leadership and open communication are essential.*** Open and frank dialogue is the only basis for a sustainable solution to rates withholding. However, effective communication must translate into tangible action. This requires personal and institutional reliability, which entails following through on decisions and practical actions like returning phone calls, honouring commitments and scheduling and showing up for meetings.
- ***Improvements to strengthen governance and administration can prevent a recurrence of the problem.*** Officials, councillors and ratepayers suggested several possible areas of improvement:
  - The Auditor-General should have statutory powers to take action against persistent non-compliance by municipalities.
  - Ordinary residents must become more involved in the formal participatory structures of council, in respect of both formal participation and substantive outcomes. This relates to budget preparation, IDP processes, ward committee meetings and ward-specific processes and projects.
  - Engagement outside formal structures must be robust.
  - Petitions, complaints mechanisms and report-backs to communities need to be regularised and better managed.
  - Council executive structures should be made more transparent and inclusive.
- ***The possibility of creating an ombudsman for service delivery to investigate citizens' complaints should be considered.***

Conclusion

Our recommendations may give some ideas towards resolving these disputes, but it is the people who are directly involved, and have to live together, who must ultimately resolve their own problems. This is part of what the White Paper on Local Government had in mind when it defined 'developmental local government' as 'local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives'.

Rates withholding highlights the real challenges that affect citizen engagement in the public participatory processes designed to achieve this vision. While rates withholding may be a 'new' form of protest action from an unexpected quarter, there is clear evidence of problems and vulnerability in common with communities that undertake service delivery protests.

Our research highlights the need for new forms of collaboration and consensus-seeking in communities against the historical background of divided communities . It shows how community life could benefit from an active citizenry that crosses traditional divides to address the institutional failures of municipalities and the failure of political representatives to exercise oversight over municipal affairs or represent their communities' interests.



This article is a summary of a larger research paper, 'The withholding of rates and taxes in five local municipalities', by Derek Powell, Annette May and Phindile Ntliziywana. The full report can be downloaded at http://www.ldphs.org.za/news-and-events/roundtable-discussion-rates-withholding.

Photo: Graeme Williams, MediaClubSouthAfrica.co.za

Municipal rates policies and the urban poor

PROMOTING ACCESS TO URBAN LAND MARKETS?

In urban areas, the poor continue to struggle to access well-located land. Secondary residential property markets are also constrained from functioning effectively in black townships. Recent research supported by the South African Cities Network (SACN) and Urban Landmark has investigated how municipal property rates policies are, or could be, used to promote access by the poor to urban land markets.

Property rates policies are foremost an instrument created through the Municipal Property Rates Act (MPRA) of 2004 to provide a policy framework at municipal level within which a transparent and fair system of rating, exemptions, reductions and rebates can be implemented. However, the MPRA explicitly incorporates a pro-poor objective alongside its fiscal goals and allows municipalities to explore approaches which seek to balance municipal revenue concerns with pro-poor policy intentions. By providing direct tax relief, municipal rates policies can impact on the demand side of the equation by making it more affordable to remain in one's current property or to move up the property ladder.

Direct tax relief to improve affordability for poor households

Municipal rates policies include rebates, exemptions and reductions which are targeted at vulnerable groups for the purpose of eliminating or relieving their rates liability. An unaffordable property rates account could have the following effects on property owners:

- It could result in eviction or downward movement in the housing ladder.
- Households might be discouraged from moving up the housing ladder due to fear of being unable to pay in the future.
- It reduces disposable income available for other household necessities.

To the extent that ownership by the poor of formal housing is limited by affordability, direct tax relief can assist by putting more money in the pockets of low-income property owners or prospective property owners.

Impact of the residential exclusion on the poor

The rates rebate known as the 'residential exclusion' is probably the most important instrument in the municipal rates policy for providing direct relief to the poor. The MPRA excludes the first R15 000 of the market value of a residential property. A number of municipalities have chosen to raise this limit to as much as R150 000.

At the time of the drafting of the MPRA, the amount of R15 000 was chosen to reflect the perceived average market value of a house subsidised by the government through its Reconstruction and Development Programme (RDP). Since then, however, the amount of the subsidy has increased significantly as the specifications for the standard RDP house have improved. The mandated R15 000 residential exclusion therefore has not kept up with the input costs of a government-subsidised house or the estimated resale price of a house subsidised through the government's Breaking New Ground Programme (BNG, a successor to the RDP). As a consequence, the wide variation in residential exclusion thresholds means that RDP beneficiaries in some municipalities are liable for rates while beneficiaries in neighbouring municipalities are exempt.

Johannesburg and eThekwini have the highest residential exclusion rate of R150 000. According to the current valuation roll for Johannesburg, the R150 000 residential exclusion completely eliminates rates liabilities for 32% of residential property owners, or 24% of ratepayers. However those properties which are entirely exempt from property rates due to the residential exclusion are a very small portion of the total properties on the roll and the total value of the roll. The total rand value of residential properties under R150 000 is R11.6 billion, which is only 3% of the rand value of all residential properties and only 2% of the rand value of the entire valuation roll.

> Analysis suggests that the residential exclusion is one of the most effective and least costly mechanisms (from an administration perspective) for targeting the poor for rates relief.

Ultimately, the reality of lower collection rates for residents with lower-value properties means that the municipality must weigh the higher administrative costs of attempting to collect bad debts against the actual revenue foregone if that category of property owners is instead blanketly exempted from rates liabilities. Lower collection rates imply higher administrative costs and less revenue foregone.

Rebates and exemptions for vulnerable groups

Analysis of the municipal property rates policies of the nine largest municipalities shows that some limit themselves to the minimum in rebates and exemptions, while others apply more generous and innovative rebates. Cape Town, Nelson Mandela Bay and Ekurhuleni have innovative sliding scale rebates for senior citizens, pensioners and disabled persons, with varying numbers of income categories. Linking rates relief to twice the amount of the old age grant (OAG) is fairly typical.

In a number of municipalities the key driver in setting the policy was the desire to continue the principles of the old rates policy in the new rating system. The policy intent and impact of the old rates ordinance were translated into terms and mechanisms allowable under the MPRA.

Another way to improve targeting is to supplement the means test with a limit on the value of the property. The difficulty arises in situations where property owners may be asset-rich but cash-poor: for example, senior citizens who have fully paid off their homes but survive on an OAG as their only income. If hit with substantial property rates, such residents may be forced to sell and move from homes they have lived in for most of their lives.

Many municipalities, including Tshwane and Ekhurhuleni,

provide full exemptions to persons on the indigent register, although with some exceptions. Johannesburg has developed the innovative approach of targeting rates and tariffs relief for the poor through its 'social package' policy, which provides benefits based on a poverty index that takes into account factors other than income, including access to services.

Special relief for child-headed households has appeared in the rates policies of some municipalities, such as Mangaung, Ekurhuleni and eThekwini, as a progressive mechanism to provide support to vulnerable children, many orphaned by HIV and AIDS.

The key challenge for municipalities in applying rebates to vulnerable groups is that it is difficult to determine who is poor from the information on the valuation roll alone. The rebate process puts the onus on the ratepayer to access the benefit. Hence pro-poor rebates have sound social objectives but are very difficult to implement. The requirement for documents to be produced to show eligibility and low levels of public awareness keep take-up rates very low. Also the verification of eligibility information, in the case of rebates for farm workers, often relies solely on the applicants' self-reporting. As a result, a high number of eligible poor people are not accessing available property tax rebates.

Municipalities must also consider revenue foregone when selecting and designing direct tax relief measures for the poor. In the case of the residential exclusion, the revenue foregone is a function of the value of the threshold, the number of qualifying properties on the roll and the estimated collection rate. In the Johannesburg case, one of the factors in setting the residential exclusion threshold at R150 000 was the collection rate for lower-value properties, specifically avoiding the administrative burden and debt write-offs associated with chasing high numbers of low-amount arrears. The examples of Johannesburg and Buffalo City suggest that the ability to calculate collection rates of different property value bands is therefore a critical part of determining the residential exclusion amount.

Given the ability of these vulnerable groups to pay, and the rates base, revenue foregone due to these direct tax relief measures described above is not significant relative to total rates revenue. However, the total cost to the municipality of implementing any tax relief measure is the cash revenue foregone plus the administrative costs and staff time to chase arrears, verify documentation and conduct public awareness campaigns to increase uptake. Weighing up the options, the means-tested rebate instrument has higher accuracy in terms of reducing errors of inclusion. However, low public awareness and difficulty in verifying eligibility may reduce uptake and therefore lead to errors of exclusion.

Towards pro-poor property rates policies

From the perspective of local government, the main issue appears to be the legality of giving special treatment to a particular area. Some municipalities are more aggressive than others in considering and experimenting with ways to provide rates relief to categories of property or property owners, in order to alleviate poverty or promote economic growth and development. The legality of such schemes will likely be questioned, if not tested in court. Other municipalities are being more cautious in interpreting the Act regarding impermissible discrimination between property owners and property categories.

As municipalities shift their energy from sorting out start-up problems with their new policies and valuation rolls, we may see the addition of further rebate schemes and the wider spread of special rating areas. In the meantime, research on the impact of some of these measures (such as the density bonus in Johannesburg or rebates to farmers who provide services to farm workers) would be extremely useful in developing an understanding of the potential of property rates for impacting land use and property markets in favour of the poor.

Analysis suggests that the residential exclusion is one of the most effective and least costly mechanisms (from an administration perspective) for targeting the poor for rates relief. Better information on collection rates per income band and on the secondary residential property market in township areas could improve the methodology for setting the residential exclusion threshold, thus increasing its pro-poor benefits while meeting municipal revenue needs. Income-based rebates and other specific measures to target particularly vulnerable groups can then be used to fill the gaps.

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This research was prepared by Isandla Institute and PDG for the South African Cities Network and Urban Landmark. The full paper can be downloaded at www.urbanlandmark.org.za/downloads/municipal_rates_policies_urban_poor.pdf

THEME 24: BUDGETING AND EXPENDITURE

The articles in this theme discuss two specific matters related to local government budgets. The first article provides an overview of the responsibilities of the mayor with respect to the budget process. The second article looks at local government budgeting from a women's rights perspective. The third article discusses what municipalities ought to be doing to optimise the use of resources, particularly when revenues are dwindling.

1. **Counting the Cents: Municipal Budgets and Mayor's Responsibilities Budget Under the MF MA** by Geraldine Mettler, Local Government Bulletin 2004, Volume 6, Issue 2, page 1-3
2. **Gender and the Budget** by Geraldine Mettler, Local Government Bulletin 2004, volume 6, Issue 2, page 7-8
3. Coping with Crunch Time: What the Recessions Means for Local Government' by David Savage, Local Government Bulletin 2009, Volume 11, Issue 3, page 8-12

Counting the cents

Municipal budgets and mayors' responsibilities under the MFMA

A new era has dawned in municipal finances with the enactment of the Municipal Finance Management Act 56 of 2003 (MFMA) The main objective of the MFMA is to ensure sound and sustainable financial management. In short the MFMA will pave the way for three-year budget planning on capital appropriations. It will provide for more strategic budgeting and will deepen the budgetary process in municipalities by making community involvement compulsory. The new budgetary process cements the connection between budgets and integrated development plans (IDPs), which should be regarded as municipalities' business plans.

Budget preparation process

The mayor plays the key role in coordinating processes for preparing and reviewing the budget and the IDP. It is important that there is a consistent and credible connection between the IDP and the budget. The process must begin in September every year with the review of the IDP, in which there must be community participation. In preparing the budget the mayor must refer to:

- the municipality's IDP;
- national and provincial budgets;
- national government's fiscal and macro-economic policy;
- the Annual Division of Revenue Act (DORA);

Continued on page 2

- any agreements reached in the Budget Forum;
- the provincial treasury and, when requested, the national treasury;
- the local municipalities in a district's area; and
- in case of a local municipality, the district and the other local municipalities within the district.

The MFMA encourages a more integrated approach to budgets and to this end, the mayor is obliged to supply budgetary information on request to:

- the national treasury;
- the national departments responsible for water, sanitation and electricity;
- other departments dealing with services;
- provincial or national organs of state; and
- other municipalities affected by the budget.

Annual budgets

By 1 April the mayor must table the annual budget at a council meeting. It may include appropriation for capital expenditure for a period not exceeding three years, as long as a separate appropriation is made for each of those financial years. It is important that the budget sets out the realistic anticipated income and expenditure of the municipality and identifies each revenue source. A clear division must be made between the capital and operational budgets and the budget must be accompanied by draft resolutions on municipal taxes, rates and tariffs. This means that municipalities should have tariff and rates policies in place before the tabling of the budget.

Consultation on tabled budget

The Act requires a council to consider the views of the local community. In some municipalities the mayor will conduct a road show with the budget or undertake a 'listening campaign' in communities. The mayor then has the opportunity to respond to all submissions and questions and, if necessary, to revise the budget and table the amended budget for council's consideration. In terms of the Act, the national treasury may issue guidelines on the manner in which a municipal council should process the budget, which may include forming a committee and holding

public hearings. These guidelines will only be binding on a municipality if the council adopts them. No guidelines have been issued yet.

After the consultation process, the mayor must take all reasonable steps to ensure that the municipality approves the annual budget before the start of the financial year. Within 28 days of the budget's approval, the mayor must approve the municipality's service delivery and budget implementation plan. As the guardian of performance management in the municipality, the mayor must ensure that the annual performance agreements of the municipal manager and the senior managers comply with the MFMA and the Systems Act and are linked to measurable performances objectives. Any delays in tabling the budget, approving the service delivery plan and budget implementation plan or signing annual performance agreements must be reported to the municipal council and the MEC for Finance without delay.

Notification to public

The MFMA advocates transparency and openness in municipal finances and obliges the mayor to make the following documentation public within 14 days of the approval of the budget implementation plan and the service delivery plan:

- monthly revenue and expenditure projections;
- quarterly service delivery targets and performance indicators; and
- performance agreements for municipal managers and senior managers.

This measure will help to keep the mayor accountable to the electorate on the overall performance of the municipality.

key points

- Preparation of the budget starts with reviewing the IDP in September.
- The Act advocates transparent and accountable financial management.

Decision-making

In the case of a municipality with an executive committee system, the mayor must make all decisions in terms of the Act in consultation with the members of the executive committee.

Assessment

As the political head of the municipality, the mayor provides political guidance on its fiscal and financial affairs. The provisions of the Act are very detailed and prescriptive and mayors must familiarise themselves with them. Failure to do so may result in grave consequences for both mayors and municipalities, as will be seen in the next issue of the *Local Government Bulletin* which will discuss the municipal adustment budget and the consequences of a failure to approve a budget.

Geraldine Mettler
Transformation Manager
Drakenstein Municipality

The MFMA will be phased in from 1 July 2004. Please see our website for details.

Gender and the budget

While budgets have been instrumental in transmitting and reproducing gender biases, they also offer the possibility for transforming existing gender inequalities. It is important to note that a gender budget is not a separate budget for gender activities and issues; rather, it is the normal budget from a gender perspective or analysed through a gender lens. In other words, at the municipal level a gender budget is an analysis of the municipality's main budget that specifically disaggregates certain information that is pertinent to gender, such as expenditure earmarked for gender-based programmes and projects including safe facilities for women and local economic development strategies that target women entrepreneurs.

Gender responsive budgets

The question is often asked: What is a gender-responsive approach to municipal expenditure and revenue? Answering this question requires an understanding of how gender issues arise in a budgetary context and how gender disaggregated data are used in the budget formulation. It also requires a gender analysis to assess the impact on

women of government policies, resources and revenue measures. This understanding should be brought to bear when the budget is analysed to see whether it is gender sensitive.

Through gender-responsive budgeting we can determine the effect of government revenue and expenditure policies on women and men. Furthermore, it creates a direct link between social and economic policies.

Importantly, a gender analysis can also demonstrate the way in which municipalities or government structures that are seemingly gender neutral do, in fact, bear and transmit gender biases. It also creates greater consistency between economic goals and social commitments and leads to a more efficient use of resources.

One of the great advantages of this approach is that it not only evaluates the nature and extent of the paid economy but also evaluates unpaid work, in particular the provision of care, with which women are usually involved.

From an administration perspective, gender budgets also deal with issues such as expenditure towards equal employment opportunities within municipalities, for example, expenditure on training to help the mobility of women at different job categories and levels. The main criterion is, however, that each budget allocation or vote is subject to the question: does it advance gender equality or not?

Each budget allocation or vote is subject to the question: does it advance gender equality or not?

Municipalities should work in close consultation with gender NGOs, women's CBOs and developmental organisations to fully maximise the information they gain from a gender analysis. At this stage Gauteng and the Western Cape have launched gender budget initiatives at the provincial level and there is a growing interest in the concept among municipalities.

Impact of unfunded mandates

Unfunded mandates and delegations of functions from national and provincial government without the necessary resources and fiscal allocations restricts the availability of resources and the ability of local government to be responsive to the needs of their communities.

The poor and women are often at the receiving end of expenditure cuts due to unfunded mandates. The need to raise extra revenue to fund these delegated functions often disadvantages them.

One needs to understand the effectiveness of the various forms of intergovernmental fiscal arrangements in addressing poverty alleviation and gender equality.

Gender-responsive budgeting thus also requires planning of intergovernmental fiscal resources to ensure gender equality.

A more holistic approach to financial planning and gender-responsive budgeting is required to successfully address the needs of communities.

key points

- A gender budget is a normal budget analysed through a gender lens.
- Gender-responsive budgeting creates a direct link between social and economic policies.
- It requires budgeting of intergovernmental fiscal resources.

Geraldine Mettler
Transformation Manager
Drakenstein Municipality

Back: Mr Mohammed Bhabha, Prof Steytler, Deputy Minister of Basic Education Enver Surty, Prof Renfrew Christie. Front: Cllr Surty

government, a clear delineation of responsibilities between elected and appointed leaders, an equitable and systemic distribution of revenue between central and local government, and the depoliticisation of traditional leadership

Mr Zemelak Ayele, addressing local government in Ethiopia, also argued that the lack of clarity in the division of power between the regional and local level of government, coupled with the financial dependence of local government on the regions, has compromised the autonomy of local government. With regard to key challenges, it was maintained that the domination of the country's political system by one party and the acute lack of capacity of local government are among the biggest challenges undermining the decentralisation process in Ethiopia.

Mr Douglas Singiza found similar problems in the decentralised system of Uganda. Although decentralisation is the icon of the Ugandan system of government, it has not brought about the financial empowerment of local government.

In his speech (delivered by Johann Mettler, SALGA's executive director for intergovernmental relations and international relations), Father Smangaliso Mkhatshwa noted that the South African system of local government has become the envy of other African countries, most of which have no local government as such, but merely local authorities whose powers are generally determined by and subject to the whims of national government. The slowness of development in most African countries is directly traceable and attributable to weak local government systems.

In its submission to the African Union, the United Cities and Local Governments of Africa (UCLGA) requested the continent-wide establishment of local government as a distinct sphere of government. In this context the South African model is obviously attractive.

COPING WITH Crunch time

WHAT THE RECESSION MEANS FOR LOCAL GOVERNMENT

Municipalities have already passed their budgets for the 2009/10 municipal financial year, and are beginning to finalise financial statements for 2008/09. Both of these processes are driving home to managers and councillors the impact of the global economic crisis on their own operations.

According to the International Monetary Fund, 'the global economy is in a severe recession inflicted by a massive financial crisis and an acute loss of confidence. … [W]orld output is projected to decline by 1.3 percent in 2009 and to recover only gradually in 2010, growing by 1.9 percent.'

South Africa has not escaped the effects of the global recession. The direct effects of the crisis have been felt predominantly in the financial sector, facilitated by our strong integration into the global financial system. For example, the average stock index in South Africa fell by 23%, while stocks in the US, England and Japan fell by 12% to 19%. There have been other less direct but more tangible effects as well. Since the last quarter of 2008 our economy has been in decline, export earnings have fallen and jobs have been lost. The demand for mining products reduced overnight and manufacturing activity has declined significantly. Job losses are expected to be high in these sectors. Manufacturing alone accounts for 16% of gross domestic product (GDP) and employs 14% of workers. These job losses will have a negative impact on the demand for goods and services. Banks are experiencing a huge increase in bad debts resulting from massive lending prior to the introduction

of the National Credit Act and the effect of the credit crunch. They are now unwilling to grant new loans. South Africa is also facing a recession in gross domestic fixed investment, judged by the decline in the number of building plans passed. Stats SA data showed that the real value of recorded building plans passed by larger municipalities (at constant prices) from January to September 2008 decreased by 14.9%, or R5.4 billion, compared with the same period for 2007.

Many analysts think that the economy will continue to shrink for the rest of 2009. This means that job losses are likely to continue and salary increases will probably be smaller than anticipated, while food prices stay high, despite the decline in fuel prices. House prices are also likely to continue to decline.

However, some analysts also detect positive signs in the economy. Interest rates have come down and, some predict, will fall by a further 1% to 1.5% by the end of 2009. This is helping not only households and businesses, but also the government, as it pays less interest on its domestic debt. Inflation is expected to return to the Reserve Bank's target band of between 3% and 6%, which should reduce the need for price increases. The 2010 soccer world cup will result in an influx of tourists and foreign capital, and the government's ongoing infrastructure investment programme will continue to support GDP, particularly in the local construction industry.

Impacts on municipalities

Despite these 'green shoots', municipalities have not been immune to the trends. Households are under severe financial strain, with breadwinners losing their jobs and many families forced to cut back their expenditures to make ends meet. Businesses face similar pressures, with declining demand for their goods and services forcing production cutbacks. Many families and some businesses are thus also struggling to pay their municipal accounts. Third-quarter financial results for municipalities released recently by the National Treasury confirm that, as at March 2009, debt owed to municipalities has increased by 13.8% year on year (or R3.7 billion) in the metros and 12.5% (or R1.2 billion) in secondary cities. Total outstanding debt in these 27 municipalities alone now amounts to R41 billion. Most of this debt is more than 90 days overdue: in other words, it should have been paid in 2008.

So far the actual revenues of municipalities have kept pace with both budget projections and municipal expenditures. However, it is likely that the situation has continued to deteriorate after March. This means that municipalities may increasingly face cash flow problems as their income declines while expenditures proceed. Already, some signs of weakening cash flow are evident, particularly in non-metropolitan provinces. The Treasury's municipal creditor age analysis (the time it takes for a municipality to pay its own bills to suppliers) shows that Mpumalanga has the highest percentage of creditors outstanding for more than 90 days, at 64.5%, followed by the Northern Cape at 42.5%. Percentages for the Eastern Cape, Free State and North West range from 20% to 30%.

Where will the shoe pinch?

Households, and particularly poor households, are likely to feel the pinch of the recession the hardest. Four out of ten South

Africans exist on less than R3 000 per annum. For a quarter of households, the main source of income is the state. Unemployment is hovering at around 25%. Among young black South Africans the problem is particularly acute. Despite service delivery successes, a significant proportion of households still do not have access to a formal house with running water and electricity. And now, as tax revenues decline, the government may have to reconsider the speed at which it can achieve its goals of universal access to basic services.

Households are likely to feel the impacts in very different ways, depending on their location, employment status, expenses and adaption strategies. Urban dwellers will be more exposed to the crisis than those in rural areas due to their stronger linkages with internal and external markets, and some poor households may be cushioned by their lack of substantial relations with the markets. Job losses may result in a slowing or reversal of urbanisation trends, and a reduction in the transfer of money from urban to rural areas. At the same time, lower prices for non-food-related goods and services may assist urban residents in particular.

Like households, municipalities are likely to feel the effects of the recession in different ways, depending on both the economic and social characteristics of their area and their current financial status. Those municipalities whose local economies are exposed to foreign trade, such as through mining (excluding gold), petrol, steel, motor vehicle manufacturing and electronics, are likely to feel the pinch first. The effects will also reach those local economies linked to but not heavily dependent on foreign trade, as consumption of, investment in and demand for intermediate goods all decline. These include construction, electricity production, hotels and restaurants, transport services, communications and real estate. Local economies based on gold, agriculture, food production, textiles, footwear and water are likely to be less effected by declines in foreign trade. But similarly, those municipalities that have not managed their financial positions effectively in the past are likely to find their deepest weaknesses exposed as the impacts of the recession reach their local areas. Most directly, municipal revenues, expenditures and debt profiles are all likely to feel the consequences of the recession.

Depending on where municipalities fall in this broad categorisation, their revenues are likely to come under pressure from rising job losses that reduce the ability of consumers to pay for services. Already, data shows an increase in consumer debtors. Although many households will not be able to reduce their consumption (and thus the cost) of services such as water and electricity, some businesses will do so, further eroding municipal revenues.

Other revenue sources are likely to come under pressure too. Interest received on municipal bank balances has already plunged in response to falling interest rates, harming those municipalities with large investment portfolios. The collapse of the property market is not only likely to bring reductions in fees from property developers and planning applications, but will probably also undermine the accuracy of recent property valuations on which municipal rates are based. In particular, if

the decline in house prices continues and is felt differentially across different segments of the property market, this will lead to an unfair distribution of the rates burden among property owners.

Municipalities will find it difficult to respond to declining revenues by merely hiking tariffs and rates. Household budgets are already under stress, and large rate increases are likely to result in higher levels of non-payment and increased bad debts.

Similarly, applying firm credit control measures is likely to be politically challenging. Already, proposals have been made that for the duration of the current economic crisis there should be no cut-offs of water and basic services due to debt or if the households concerned are affected directly by the consequences of the crisis. It has been argued that firms in distress should also be spared and not face cut-offs for at least six months while attempts are made to save jobs.

To some extent, the decline in municipal own revenue will continue to be offset by ongoing increases in grant funding from national government. However, already the pace of increases in the local government share of national revenues has slowed (after a prolonged period of rapid growth). National grants to municipalities will climb just 7.7%, compared to 10% for national and provincial government. This reflects the limitations faced by national government, which faces other large revenue and expenditure pressures. Should national revenues underperform, even in the context of current expectations, there is a very real possibility that transfers may actually decline. In April 2009, for example, year-on-year growth in government revenue was heavily negative at –10.6%, while, conversely, growth in government expenditure soared to 50.2%! Increasingly, municipalities will need to demonstrate the higher relative returns of their expenditures in comparison with those of other spheres, as well as strong spending capacity, if they are to motivate for revenue shortfalls to be made up by national transfers.

As revenues come under pressure, municipalities will need to review their expenditure priorities. Rising consumer debt will require increased provision to be made for the non-payment of residents' accounts. This will reduce the resources available for other priorities. The growth in unemployment is likely to increase the number of households on municipal indigent registers and cause a spike in subsidy applications.

Municipalities will need to carefully balance these forms of relief to households with the longer-term strategic priorities of their areas. Infrastructure networks in particular came under considerable pressure during the previous period of growth, leading to extensive road congestion and other service delivery failures. The maintenance and rehabilitation of infrastructure have historically been ignored by municipalities, and the risk remains that they will

continue to be ignored as resources are pushed elsewhere.

New infrastructure to support future economic growth also remains a priority. Although demand may well be reduced now, it is likely to return as the recession ends. Large infrastructure projects have long lead times before networks are installed and available for use. Delayed implementation now can lead to delays in the positive effects of an economic recovery being felt in a municipal area. Similarly, careless human resource policies that result in a freeze in employment can undermine the ability of a municipality to respond to both recession and recovery.

As revenues shrink, the management of these competing expenditure priorities will be a difficult challenge for all municipalities. Failure to develop realistic plans and budgets for both recession and recovery will result in de facto choices being made. Continuing to provide unaffordable levels of service, for example, will lead to an implicit rationing of access between households, as those in the front of the queue are serviced first and others not at all.

There have been some immediate effects of the recession on the ability of municipalities to borrow in order to finance their capital programmes. In particular, banks have been cautious about issuing new loans, and when they have done so this has typically been at higher rates than would have been obtainable before the crisis began. This means that municipalities will have to direct more of their resources to servicing loans, as opposed to building infrastructure. Similarly, the length of loans is likely to be reduced, meaning that municipalities will have to pay back their debts faster than would have otherwise been the case. Again, this reduces the resources available for infrastructure investment.

What can municipalities do?

Despite the grim global picture, South Africa is currently better off than many other countries. The current state of the global economy presents us with an opportunity to transform and

restructure our economy so that we can take full advantage when the tide turns. The well-timed infrastructure investment programme of national government is intended to contribute to this, particularly through helping to generate income for individuals and households in difficulty while laying the foundations for a resumption in growth.

But, unlike the national fiscus, individual municipalities have little if any capacity to try to address the economic crisis head-on. Indeed, national government explicitly prevents municipalities from trying to borrow money to fund their operating expenditures. However, national government has attempted to significantly boost the infrastructure spending of municipalities through providing grants, in part to insulate them from the full impact of the reduction in their own revenues. Municipalities need to ensure that their financial position remains sustainable over the medium term, even in the face of the current economic crisis.

Municipalities themselves will need to take some very tough decisions in the coming year. The National Treasury has already requested them to give priority to managing all revenue streams, especially debtors; protecting the poor from the worst impacts of the economic downturn; supporting meaningful local economic development initiatives; securing the health of their revenue-generating asset base by increasing spending on repairs and maintenance; and expediting spending on capital projects that are funded by conditional grants. The latter is particularly important, as national government has announced a significant step-up in spending on the Expanded Public Works Programme, which is partly implemented by local government. This is a critical measure necessary to protect poor households from the crisis.

But municipalities must also focus on ensuring that they obtain value for money in their expenditures. This means not only seeking better, smarter partnerships with the public and private sectors to improve service delivery, but also real efforts to reduce leakage through fraud, corruption and wasteful or unnecessary expenditure. The former Minister of Finance, in his budget speech in February this year, highlighted the insufficient control of foreign travel, advertising and public relations activities, as well as the use of consultancy services. The new Minister has also made it clear that fraud and corruption can no longer be tolerated

Finally, SALGA has noted the critical role municipalities have to play in identifying the local impacts of the recession and communicating to residents about them, to explain how municipal strategies are addressing the crisis and positioning the municipal area for the future.

David Savage is a specialist in municipal finance and local service delivery and serves as a national appointee on the Financial and Fiscal Commission

Crunch time

TO DO LIST

START

- regularly engaging residents and business about joint responses to the crisis
- boosting infrastructure spending, particularly using labour intensive methods
- ensuring that expenditures occur on time and in budget
- reviewing subsidy programmes to improve targeting accuracy
- closely watching revenue performance, including tightening credit control over those who can pay and closely monitoring cash flow
- investing in asset maintenance and replacement

STOP

- wasteful travel, particularly foreign trips and business class travel
- poorly thought through consulting assignments
- underspending on conditional grants
- installing unsustainably high levels of service

THEME 25: SPATIAL PLANNING AND LAND USE MANAGEMENT

Municipalities are crucially important when it comes to preparing and implementing spatial plans and granting land use rights. For a long time, it was unclear whether municipalities were constitutionally empowered to take town planning decisions. In 2010, the Constitutional Court settled this debate in favour of local government. They are thus constitutionally empowered to take decisions on issues such as township establishment (subdivision) and rezoning. This series of articles discusses two critical Constitutional Court judgments that confirm the role of municipalities in planning. It also includes an overview of an early version of the Bill that was passed to implement this new dispensation, namely the Spatial Planning and Land Use Management Act as well as a KwaZulu-Natal provincial law on the matter.

Lastly, it includes an article on an issue that is related to land use management, namely the expropriation of land.

1. **Constitutional Court shows DFA the Door** by Jaap de Visser, Local Government Bulletin 2010, Volume 12, Issue 2, page 13
2. Macsand Local Government Bulletin (Jaap to send through the Article details)
3. **Draft Spatial Planning and Land Use Management Bill** by Jaap de Visser, Local Government Bulletin 2011, Volume 13, Issue 2, page 15-17
4. **The Kwa Zulu-Natal Planning and Development Act** by Jaap de Visser, Local Government Bulletin 2011, Volume 13, Issue 2, page 17-18
5. **Roundtable on Law Reform in Planning** by Muthakga Kangu/Stella Gilliland/Annette May Local Government Bulletin 2012, Volume 14, Issue 3, page 8-11
6. **Expropriation of Property: Right to be Heard** by Lehlohonolo Kennedy Mahlatsi, Local Government Bulletin 2005, volume 7, Issue 1, page 13-14

Constitutional Court

SHOWS DFA THE DOOR

In October 2009, the Supreme Court of Appeal (SCA) declared parts of the Development Facilitation Act (DFA) unconstitutional.

The Gauteng Development Tribunal was making land use management decisions and bypassing municipal land-use planning processes on the basis of the DFA. The SCA held that this violates municipalities' right to administer 'municipal planning', listed in Schedule 4B of the Constitution as a municipal power. The SCA concluded that, when the Constitution provides that municipalities have authority over 'municipal planning', it includes land-use planning and management. Certain sections of the DFA were declared unconstitutional. In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11, the Court was asked to confirm the judgment. Gauteng opposed the confirmation. Some other provinces joined Gauteng's efforts to save the DFA. EThekwini Municipality also joined the proceedings but to argue against the DFA. The arguments revolved around the meaning of 'municipal planning' and the effects of striking down the DFA.

Meaning of 'municipal planning'

The key question was whether the term 'municipal planning' in the Constitution includes the power to authorise land rezoning and the establishment of townships, which provincial tribunals are doing in terms of the DFA. Gauteng argued that 'municipal planning' deals with forward planning only. The Constitution also uses the word 'planning' in other powers such as 'regional *planning* and development' and 'provincial *planning*' where it is clear that it does not include town planning. Gauteng argued that the word 'planning' must mean the same throughout the Constitution and therefore does not include rezoning and the establishment of townships. The Court disagreed and held that the word 'planning' in 'municipal planning' is different from the word 'planning' in 'provincial planning' and 'regional planning and development'.

> Municipal planning has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land.

The Court also held that none of the provincial powers of 'regional planning and development' 'provincial planning' and 'urban and rural development' (see Schedules 4A and 5A) gave provincial governments the right to authorise land rezoning and establish townships similar to that of municipalities. The Court acknowledged that there is no watertight division between the functional areas but insisted that the provincial powers should not be interpreted so wide that they also include municipal powers. For example, the Court stated, 'provincial roads' does not include 'municipal roads'. In the same vein, 'provincial planning' and 'regional planning and development' do not include 'municipal planning'. The Court thus agreed with the SCA that the DFA is unconstitutional insofar as it empowers provincial tribunals to grant applications for rezoning and establish townships.

Disruptive effects of striking down the DFA

In many parts of the country, the DFA is indispensible. The old-order land use ordinances do not apply to areas of the former Transkei, Bophuthatswana, Venda and Ciskei. Also, in areas where they do apply, many municipalities have insufficient capacity to administer them and rely on their provinces to determine applications for rezoning and the establishment of townships. Striking down the DFA with immediate effect would halt land development in many areas. The Court thus suspended the order for two years, during which time the tribunals may continue to determine applications for rezoning and establish townships. However, they must consider IDPs, SDFs and urban development boundaries and may not use their powers to exclude the operation of certain laws and by-laws in respect of land over which they are deciding. To accommodate the two Cities that successfully challenged the DFA, the Court prohibited the tribunals from exercising their powers in Johannesburg and Ethekwini (barring those already in the pipeline).

Professor Jaap de Visser
Editor

DRAFT

Spatial Planning and Land Use Management Bill

Last year, the Constitutional Court declared the Development Facilitation Act unconstitutional and gave the government until June 2012 to rectify the problems it had identified.

On 6 May this year, the Department of Rural Development and Land Reform published a Spatial Planning and Land Use Management Bill for public comment, with a deadline of 6 June. What follows is a basic outline of the Bill.

Municipal planning and provincial planning

The Bill contains definitions of municipal planning and provincial planning. The definition of municipal planning refers to integrated development planning, the spatial development framework (SDF), and the control and regulation of land use if the nature, scale and intensity of the land use does not affect the provincial planning mandate of the provincial government or the national interest. Provincial planning is defined with reference to the provincial SDF, integrated planning by the province, and provincial policies and laws.

Development principles

The Bill contains a list of development principles that guide land use planning and development management.

These principles refer to spatial justice, sustainability, efficiency and spatial resilience. Importantly, the Bill provides that the exercise of planning authority may not be impeded or restricted on the ground that the value of land or property is affected by the outcome of the application. This provision may bolster municipalities in their search for avenues to establish mixed housing projects.

On the other hand, it may face opposition from property owners.

Intergovernmental relations

The Bill provides that the Minister of Rural Development and Land Reform must monitor and support provinces and municipalities in implementing this law, and must consult with other sector ministries.

The consequence of this provision is that the Minister of Rural Development and Land Reform will become the guardian of land use planning and development management throughout the country, including urban areas.

Provincial legislation

The Bill envisages that provincial legislation will be enacted, and contains an elaborate list of matters that should be included in such legislation. For example, it states that a premier may take steps to resolve disputes in connection with land use schemes.

Spatial development frameworks

The Bill requires national and provincial governments to adopt SDFs. This means that if the Bill becomes law, the municipal SDFs will no longer be the only spatial plans regulated in post-1994 legislation.

The Bill sets out a range of minimum standards that national and provincial governments must comply with when compiling their spatial plans. Accessibility, citizen participation, the inclusion of disadvantaged communities and predictability are some of the Bill's themes with respect to national and provincial spatial plans. In addition, the plans of the various spheres must be coordinated, aligned and harmonised.

The Bill reiterates the principle that municipal SDFs must contribute to the policies and plans emanating from other spheres of government. It lays down basic procedural provisions regarding municipal SDFs and lists minimum standards for the content that will then apply in addition to the existing requirements in terms of the Municipal Systems Act. The Bill instructs municipalities to include in their SDFs

- a five-year spatial development plan;
- a longer-term spatial development vision;
- current and future structuring elements of the spatial form of the municipality (corridors, nodes etc);
- population growth estimates;
- housing demand estimates;
- estimates of economic activity and employment trends; and
- engineering infrastructure requirements for existing and future development needs.

Planning decisions must be consistent with a municipal SDF, unless 'site specific circumstances justify a departure' from the SDF, or the application of the SDF leads to 'illogical or unintended' results. If a municipal SDF is inconsistent with the provincial SDF, the MEC must take the necessary steps to ensure the revision of the frameworks.

Land use schemes

Municipalities must adopt single land use schemes within five years of the commencement of the Act. Again, the Bill lists minimum standards and principles, such as provision for the incremental introduction of land use management and regulation in informal settlements, compatibility with environmental legislation and the inclusion of provisions to promote affordable housing.

Land development management

The Bill envisages the submission of all land development applications to a municipality as the authority of first instance. Each municipality must establish a municipal planning tribunal consisting of officials of the municipality and outsiders with relevant knowledge and experience. Councillors may not be members of the tribunal. The Bill sets out basic procedures for the tribunal, stipulates a term of office for its members and equips it with investigating authority. If a municipality fails to appoint members to its tribunal, the premier will appoint persons on its behalf.

The Bill provides that the decision of a tribunal is final, subject to an appeal to, and judicial review by, the High Court.

Appeal

The Bill also establishes provincial planning tribunals, to which anyone aggrieved by a decision of a municipal planning tribunal can appeal, as long as the matter relates to

- national security;
- economic unity;
- the protection of the common market;
- the promotion of economic activities across provincial boundaries;
- the promotion of equal opportunity or equal access to government services; or
- the protection of the environment.

Provincial planning tribunals will also hear matters where a municipal planning tribunal has failed to take a decision within a specified period.

Furthermore, the MEC may make a determination that a particular matter must be decided by the provincial planning tribunal if it affects the provincial interest.

National interest

A land development application must be referred to the national minister if it impacts on matters within the functional area of the national sphere or on national policy objectives, or if it proposes land use for a purpose that falls within the functional areas of national government. Furthermore, if the outcome of an application may prejudice the economic, health or security interests

of one or more provinces, or if it may impede the effective performance of functions by one or more municipalities, the matter must also be referred to the national government.

Provision of services

The Bill sets out a framework for the provision of services arising from any development application. It establishes the principle that the provision of services must be determined through an agreement between an applicant and the municipality. The applicant is held responsible for the provision of internal engineering services, and the municipality is responsible for external engineering services. The Bill defines both terms in clause 1. It also regulates the payment of development charges and provision for parks, open spaces and so on.

The Bill provides that the procurement rules of the Municipal Finance Management Act do not apply when an applicant installs external engineering services instead of paying development charges.

Prof Jaap de Visser
Editor

Conclusion

This Bill is set to become one of the most important laws affecting local government. This article only sketches its broad outline, so municipalities are advised to study it carefully and engage with the public participation processes that are still to follow once the Bill is tabled in Parliament.

It is clear that the Bill raises a number of questions, many of which relate to the constitutionality of some of its provisions. Is it constitutional to require municipalities to establish a planning tribunal from which councillors are banned and to which outsiders are invited? Is the division of authority to deal with land use applications set out clearly and in a manner that is predictable? How will this legislation affect those provinces that have existing land use planning frameworks and laws? These and many more questions will undoubtedly be raised in the debates surrounding this Bill

The Bill can be accessed at http://www.ruraldevelopment.gov.za/DLA-Internet//content/document_library/documents/Bills/SpatialPlanning-LandUse2011.pdf.

THE KwaZulu-Natal Planning and Development Act

The KwaZulu-Natal Planning and Development Act came into operation on 1 May 2010 and governs land use planning and development management. KwaZulu-Natal is thus the only province that has put land use legislation into operation since promulgation of the 1996 Constitution.

This article briefly summarises key features of this legislation that may be relevant to other provinces wishing to take similar measures and adopt provincial legislation on planning and development. The main areas covered under the Act are zoning schemes, the powers of municipalities under the Act, provisions on the appeals tribunal and forward planning.

Zoning schemes

Under the Act, a municipality is given five years to adopt a zoning scheme for its entire jurisdiction. It must review the zoning scheme within six months of adopting an IDP for the new term of the council – in other words, every five years.

Municipalities adopt their own zoning schemes, but the Act provides for minimum standards. In terms of the Act, a scheme must distinguish three type of land use: land use permitted by the zoning scheme; land use that may be permitted by the zoning scheme with the municipality's approval; and land use

Roundtable

ON LAW REFORM IN PLANNING

This year marks a critical turning point for the planning sector in South Africa. A number of crucial legislative and reform processes pertaining to the planning sector are under way, which entail the drafting of law and reviewing planning practice to determine how best to harmonise the planning roles of local, provincial and national government.

The key legislative development underpinning this is the Spatial Planning Land Use Management Bill (SPLUMB). If enacted into law, the Bill will replace, among other laws, the Development Facilitation Act (DFA), a key instrument for regulating spatial planning and land-use management in South Africa.

In the landmark judgment of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* the Constitutional Court declared key provisions of the DFA unconstitutional on the grounds that provincial development tribunals (established and operating within the framework of the DFA) were exercising powers that encroached on the municipal planning function, which the Constitution assigns to municipalities. While the Court declared the DFA to be unconstitutional, it suspended the declaration of unconstitutionality for 18 months to allow Parliament time to enact legislation that is consistent with the Constitution.

See also 'Regional spatial development framework vs municipal zoning scheme: Which trumps the other?', *LGB* 14(2): 9–12, available for downloading from our website at http://www.mlgi.org.za/local-government-bulletin

The result is seen in SPLUMB, currently before Parliament.

While SPLUMB is a crucial component of the land-use management framework, it cannot solve all of the challenges encountered in practice. The broad constitutional competency of planning is shared by all three spheres of government. For this reason (and in the absence of national legislation strictly defining the parameters of the competence of planning for each sphere), various provinces are concurrently preparing or amending their own planning legislation.

The harmonisation of these national and provincial efforts is thus a key challenge. The goal is to avoid overlaps, conflict and costly processes for all role players, including the public who are the consumers of these planning services.

Key questions that need to be answered therefore relate to how each sphere is to execute its planning mandate without infringing upon the interests of the other spheres.

Moreover, how can development potential be unlocked while facilitating coordination between government and other agents?

As a contribution to fostering debate around these key developments, the Community Law Centre (CLC, UWC),

Prof Jaap de Visser and Stephen Berrisford, co-conveners of the roundtable

South African Cities Network, Urban Landmark and the Department for Rural Development and Land Reform (DRDLR) organised a roundtable session. Convened by Prof Jaap de Visser (CLC) and Stephen Berrisford (Urban Landmark), it brought together officials and planners from various provinces and municipalities, representatives of the Parliamentary Portfolio Committee on Rural Development and Land Reform and the DRDLR to exchange ideas and build some common understanding of the issues. The roundtable was held on 22 and 23 August 2012 at the Protea Hotel in Sea Point.

This summary captures some of the key themes emanating from the discussions. The full report is available at http://www.mlgi.org.za/news-and-events/roundtable-on-land-use-planning-law.

The discussions at the roundtable were structured around five issues:

1. conceptualising the role of local government in land-use planning;
2. securing national and provincial interests in the course of the execution of municipal planning by the municipalities;
3. providing affected parties with an effective remedy against municipal decisions;
4. the impact of reform on professional and administrative capacity; and
5. harmonising development management across sectors as the three spheres of government execute their respective planning and development functions.

The major challenge is that the three spheres of government share one space in which to execute their assigned planning functions. Land planning and use is the shared platform upon which the three must execute their planning and development functions.

This constitutional reality means all spheres of government must embrace a cooperative approach in order to confront the constitutional position that their roles are distinct and that the relationships are no longer determined by hierarchy. The participants lamented this and expressed concerns about the following issues.

1. Municipalities have been given powers that they often are not able to manage.

See also 'Proposed provincial planning laws compared', *LGB* 14(1): 12–15, available for downloading from our website at http://www.mlgi.org.za/local-government-bulletin

2. The current accountability system is flawed in that it inhibits efficient decision making and risk taking.
3. The law is a blunt instrument for solving planning problems. It provides only one form of recourse, namely judicial review, which focuses on procedural shortcomings rather than substantive issues. Current appeals processes allow planning initiatives to be scrapped over legal technicalities instead of evaluating the merits of the plan and creating suitable remedies.

The five issues around which the discussions were structured were addressed as follows:

1. Conceptualising the role of local government in land-use planning

Participants agreed that national and provincial governments may not use legislation to take away or diminish the administrative responsibilities of planning that have been assigned to municipalities in the Constitution. The planning function cuts across all three spheres of government, precipitating serious harmonisation and coordination problems. The relationship between local government and provincial government is no longer based on hierarchy.

2. Securing national and provincial interests in the execution of municipal planning by the municipalities

Some participants advocated for co-decision making between municipalities and the other two spheres of government, while others favoured a more strict separation of functions. It was also suggested that, when it comes to land-use applications, national and provincial governments should raise their concerns at the public hearings organised by the municipalities rather than insisting on parallel procedures. National and provincial governments should focus on persuading municipalities to take their concerns into account in the decision-making process rather than imposing decisions on them. Proponents of this approach emphasised that the principle that the municipality is the decision maker must be firmly protected. Overall, participants agreed that the municipal Spatial Development Framework is the key planning instrument around which national, provincial and municipal interests should come together.

3. Providing affected parties with an effective remedy against municipal decisions

Some participants suggested an appeals tribunal system in terms of which the decisions of municipalities can be appealed to a provincial tribunal. The tribunal would therefore need to reflect municipal interests both in its composition and operation. It was also suggested that an alternate model could take the form of a district tribunal. This tribunal could operate at the district level and comprise experts as well as community members. It would provide advice or make recommendations in respect of municipal planning decisions. There was no overall consensus between the provinces on how the problem of appeals should be addressed.

4. The impact of reform on professional and administrative capacity

Participants agreed that capacity is a problem in most municipalities, in various manifestations. There is a disjuncture between the planning functions assigned to municipalities by the Constitution and their capacity to fulfil them. There was overall agreement that ways must be found to manage the interim period as efforts are made to build capacity. For example, in the latest version of the Free State legislation, if a report from and consultations with a municipality lead the MEC to the opinion that it needs assistance with any of its planning functions, the MEC may prescribe by notice in the *Provincial Gazette* that certain functions will be performed by the province until such time as it has developed the required capacity. If it is thus established that the municipality lacks capacity, the MEC is empowered to assume responsibility for the functions.

5. Harmonising development management across sectors as the three spheres of government execute their respective planning and development functions

Ultimately, the principal issue in the context of fragmented legislation is: who can make the decision to grant approval for a development? Recent case law makes it clear that it may very well be that more than one sphere needs to grant approval for a specific development to proceed. One proposal was to create a special vehicle at regional level to which all relevant organs of state could delegate decision-making power around specific projects or programmes. Another proposal was for different decision makers to streamline the decision-making process by following a 'planning package' approach, with decision making deliberately streamlined into one efficient process as opposed to sequential or parallel decision making.

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It was also observed that the legislation has thus far failed to incentivise private sector involvement in land-use planning and management decision-making. To resolve this, some provinces proposed a spatial planning forum in which professionals from different sectors (mining, agriculture, etc.) could form a creative think-tank and make recommendations to local governments.

Conclusions

It was felt that the final efforts in revising the SPLUMB should be focused on two key aspects of the regulatory framework:

1. The 'first level' application process for land use and land development (i.e. which applications get submitted to which authorities, when, and how they will be decided); and
2. appeals processes.

The outcomes of the roundtable were sent to the Portfolio Committee, and it was recommended that a smaller group of roundtable participants should work together on final revisions to the SPLUMB that address the two key aspects identified above.

of one or more provinces, or if it may impede the effective performance of functions by one or more municipalities, the matter must also be referred to the national government.

Provision of services

The Bill sets out a framework for the provision of services arising from any development application. It establishes the principle that the provision of services must be determined through an agreement between an applicant and the municipality. The applicant is held responsible for the provision of internal engineering services, and the municipality is responsible for external engineering services. The Bill defines both terms in clause 1. It also regulates the payment of development charges and provision for parks, open spaces and so on.

The Bill provides that the procurement rules of the Municipal Finance Management Act do not apply when an applicant installs external engineering services instead of paying development charges.

Prof Jaap de Visser
Editor

Conclusion

This Bill is set to become one of the most important laws affecting local government. This article only sketches its broad outline, so municipalities are advised to study it carefully and engage with the public participation processes that are still to follow once the Bill is tabled in Parliament.

It is clear that the Bill raises a number of questions, many of which relate to the constitutionality of some of its provisions. Is it constitutional to require municipalities to establish a planning tribunal from which councillors are banned and to which outsiders are invited? Is the division of authority to deal with land use applications set out clearly and in a manner that is predictable? How will this legislation affect those provinces that have existing land use planning frameworks and laws? These and many more questions will undoubtedly be raised in the debates surrounding this Bill

The Bill can be accessed at http://www.ruraldevelopment.gov.za/DLA-Internet//content/document_library/documents/Bills/SpatialPlanning-LandUse2011.pdf.

THE KwaZulu-Natal Planning and Development Act

The KwaZulu-Natal Planning and Development Act came into operation on 1 May 2010 and governs land use planning and development management. KwaZulu-Natal is thus the only province that has put land use legislation into operation since promulgation of the 1996 Constitution.

This article briefly summarises key features of this legislation that may be relevant to other provinces wishing to take similar measures and adopt provincial legislation on planning and development. The main areas covered under the Act are zoning schemes, the powers of municipalities under the Act, provisions on the appeals tribunal and forward planning.

Zoning schemes

Under the Act, a municipality is given five years to adopt a zoning scheme for its entire jurisdiction. It must review the zoning scheme within six months of adopting an IDP for the new term of the council – in other words, every five years.

Municipalities adopt their own zoning schemes, but the Act provides for minimum standards. In terms of the Act, a scheme must distinguish three type of land use: land use permitted by the zoning scheme; land use that may be permitted by the zoning scheme with the municipality's approval; and land use

that is not permitted by the zoning scheme. For the last two uses, there is a prescribed procedure and a requirement for a planner's evaluation.

The zoning scheme is binding unless it contradicts the IDP (or, by implication, the spatial development framework, as part of the IDP). In the event of a contradiction between the scheme and the IDP, the IDP prevails. Permission for a land use may not be approved if the proposed use is irreconcilable with the scheme, the IDP or provincial planning and development norms that are listed in the Act.

Regarding the application procedure, a schedule to the Act prescribes a single, uniform procedure to be followed when lodging applications for the amendment of a municipality's scheme, for the subdivision or consolidation of land, for the development of land situated outside the area of a scheme, and for the alteration, suspension or deletion of restrictions relating to land. This procedure is fairly detailed and may go beyond the setting of minimum standards.

The Act prescribes criteria to be taken into account when deciding on an application to adopt, replace or amend a zoning scheme. Persons who applied or commented may appeal against a zoning scheme decision if they feel aggrieved. The appeal suspends the decision.

Specific powers of municipalities in the Act

Under the Act, municipalities decide on applications to consolidate and subdivide. A registered planner's evaluation is required, and the Act prescribes a set of criteria that must be taken into account. Appeal against the outcome is possible, in which case the decision is suspended until the appeal is heard and determined.

A specific dispensation for the development of land outside of a scheme is included, and this too requires a registered planner's evaluation. The Act prescribes a set of criteria that must be taken into account. Again, appeal against outcome is possible; and again, the appeal suspends the decision until its outcome. Furthermore, the Act gives the municipality powers to approve the alteration, suspension or deletion of a restriction relating to land, excluding mineral rights.

Appeal tribunal

The appeal tribunal comprises 12 members, of whom three must be lawyers, three planners and the rest also professionals. The Act excludes politicians from the tribunal. The MEC calls for nominations and appoints the members from among these professionals. Tribunal members are part-time but may be remunerated if they are not full-time government employees. The chairperson assigns cases to a bench of three members chaired by a lawyer, and including at least one planner. The MEC is responsible for appointing a registrar and further provides operational support to the tribunal.

Provincial planning and development standards and general forward planning

The Act does not regulate the adoption of spatial development frameworks, nor does it require specific municipal forward planning instruments. It seeks to effect provincial forward planning through the adoption of provincial planning and development norms and standards, and it relies on the IDP alignment for forward planning.

The Act provides that a municipality may not adopt an amendment to a zoning scheme that is in conflict with its IDP or with the provincial planning norms and standards. The MEC adopts provincial planning and development standards whose purpose is to 'guide municipal decision-making' in relation to all land use applications.

The preparation of the norms and standards is an intergovernmental process. The MEC must appoint a steering committee with representatives of local government, provincial government and the private sector. The steering committee prepares a consultation paper, including draft norms and standards, and consultation takes place on these drafts before they are adopted.

Municipalities, the appeal tribunal and any other organ of state that considers applications for the amendment of schemes, the subdivision and consolidation of land, the development of land outside the area of a scheme, the phasing or cancellation of an approved layout, or the alteration, suspension or deletion of restrictions relating to land, must consider these standards when making a decision in terms of the Act or any other law.

Prof Jaap de Visser
Editor

For the courts, the provincial planning and development norms and standards are a 'relevant consideration for the purposes of review as provided in section 6(2)(e)(iii) of the Promotion of Administrative Justice Act'.

restricts a municipality to using only a final, as opposed to a 'provisional', valuation roll.

Power to impose property rates

The Court found that section 10G obliges a municipality to ensure that property within its jurisdiction is valued or measured 'at intervals prescribed by law'; that a single valuation of property is compiled and that all property valuation 'procedures prescribed by law' are complied with. The Court held that the transitional scheme gives substantive powers to municipalities to measure or value property and, based on the valuation, to impose property rates. Clearly, the Ordinance is the law that regulates and defines the property valuation process by a municipality for rating purposes in the Western Cape. Accordingly, the property measurement and rating powers conferred by section 10G of the LGTA must be exercised within the procedural and other requirements of the Ordinance.

Local government autonomy

The High Court seemingly adopted the approach that a municipality has no power to act without empowering legislation. The Constitutional Court held that such an approach to powers, duties and status of local government is a relic of our pre-1994 past and is no longer permissible in a setting underpinned by constitutional supremacy. In the past, Parliament was sovereign and municipalities were creatures of statute. However, the Constitution has ushered in a new vision of government in which the local government sphere is interdependent, inviolable and possesses the power with which to define and express its unique character subject to constraints permissible under the Constitution. The Constitution itself, and in particular sections 229(1) and (2), authorises municipalities to impose property rates.

Comment

This decision clarifies and confirms the powers, duties and status of municipalities and, in particular, the power of the municipality to levy property rates. The Constitutional Court's recognition and affirmation of the new status of local government is welcomed.

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Expropriation of property

Right to be heard

Buffalo City Municipality v Will Gauss
SCA 5/04

THE EXPROPRIATION ACT OF 1975 (the Act) authorises and regulates the acquisition of property by the State. If a municipality has the power to expropriate property, then this power may only be exercised in accordance with the Act.

In terms of the Municipal Ordinance (Cape) No 20 of 1974 (the Ordinance), a local authority does not have the power to expropriate property except with the prior approval of the provincial Premier. The Premier's approval may only be sought after the local authority has followed a prescribed procedure. Only if the Premier approves the expropriation may the local authority proceed to expropriate in accordance with the Expropriation Act.

Facts

In this case, the municipality wanted to expropriate part of a privately-owned farm to accommodate the expansion of an existing residential rural settlement. The municipality decided, by way of special resolution, to expropriate the property. But it had overlooked the fact that the Ordinance requires the Premier's approval. When this procedural error was brought to its attention, the municipality withdrew the notice of expropriation and formally approached the Premier for approval.

However, before the Premier had either approved or disapproved the proposal, the farm owner alleged that the municipality's decision to expropriate was unlawful because the owner had not been given prior notice of this intention to expropriate, nor had the owner been given an opportunity to make representations. The Eastern Cape High Court ruled in favour of the farm owner and the matter was taken on appeal to the Supreme Court of Appeal.

Issue

The issue in *Buffalo City Municipality v Will Gauss* (SCA 5/04) was whether or not the respondent landowner was entitled to be heard before the municipality resolved to expropriate his property.

Decision

The Court held that the farm owner did not have a right to be heard before the municipality made a decision to expropriate. It held that it has long been a principle of our law that when a statute empowers a public official or body to make a decision prejudicially affecting an individual's liberty or property or existing rights, the latter has a right to be heard before the decision is taken, unless the statute expressly or by necessary implication indicates otherwise.

The Court noted that the farm owner had not as yet been deprived of his property. It was also not disputed that ample opportunity had been afforded to him to be heard before that occurred. The Ordinance made express provision for the landowner to be heard before that power was exercised.

key point

- **An affected landowner does not have a statutory right to be heard before the municipality resolves to expropriate.**

The Court concluded that the Ordinance clearly does not envisage a hearing before the municipality's decision to expropriate is taken. The fact that the owner is invited to object only after the decision is taken necessarily means that no right to be heard before then is contemplated. This approach is not in conflict with the Constitution.

Comment

It is clear from this decision that that the principle of *audi alteram partem* (to hear the other side) cannot operate in a vacuum. In this case, the farm owner was still going to be given an opportunity to present his side of the story. This was specifically provided for in the Ordinance. While the Court in this case declared the municipality's decision to be lawful, despite not following the prescribed procedure correctly, municipalities should take particular care to observe the procedural rules applicable when taking action in terms of enabling legislation.

It should also be noted that the requirement that a municipality may not expropriate without the Premier's approval, as provided in the Cape Municipal Ordinance, dating from the pre-1994 era, is most likely unconstitutional as it fails to respect the autonomy of a municipality.

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