

Submitted in partial fulfillment of the requirement
for the degree LLM by :

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**AN EVALUATION OF THE ROLE AND
FUNCTIONING OF AN APPEAL
AUTHORITY CREATED IN TERMS OF
SECTION 62 OF THE LOCAL
GOVERNMENT:
MUNICIPAL SYSTEMS ACT 32 OF 2000.**

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26 August 2013



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CHAPTER 1: INTRODUCTION.

1.1 General background.

Prior to 1993 local government was regulated in terms of ordinances passed by provincial governments in South Africa. Apparently it was in order to treat different culture groups differently in terms of legislation that existed at the time.¹ It is common knowledge that when the interim Constitution of South Africa,² was adopted and later the Constitution of South Africa 1996,³ local government as a government institution was elevated to become one of three spheres of government in South Africa. The disparity of the past was dispensed with. Local government was no longer regarded as an inferior government institution, and it was acknowledged that local government was the sphere of government that dealt directly with the public. The constitutional objects of local government post 1993, were not only developmental in nature, but also aimed at delivering services equally to all the people in South Africa. It seems this drastic change between the old order and the new constitutional order is aimed at improving the lives of all the people in South Africa.⁴ In order to ensure that the executive authority in local government fulfils its constitutional objects, the Constitution,⁵ places an obligation on local government to involve members of the community to participate in the matters of local government.

The intention of section 62 of the Local Government Municipal Systems Act,⁶ (hereinafter referred to as "section 62") is to create a mechanism, available to members of the public to insist,⁷ that a municipal council in its capacity as the legislative body in

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- 1 Nico Steytler & Jaap de Visser *Constitutional Law of South Africa* (2010) Juta, Second Edition Volume 2 Chapter 22 (hereinafter referred to as "Steytler & de Visser (2010)") 22- 2 to 22- 3.
 - 2 Act 200 of 1993 (hereinafter referred to as the "interim Constitution").
 - 3 The Constitution of the Republic of South Africa 1996 (Hereinafter referred to as the "Constitution").
 - 4 See The Constitution s152. For a discussion on the objects of local government and service delivery in local government, refer to ch 2 of this study.
 - 5 See the Constitution ss160(7) and 152(1)e.
 - 6 Act 32 of 2000 (hereinafter referred to as "the Systems Act").
 - 7 This could only be so, if the mechanism created in terms s 62 is understood in its proper context.

local government, hold the executive in a municipality accountable for its actions. This concept of accountability is also an underlying principle implied by the Constitution. The intention it seems is that there should be a separation of powers between different organs of state. This model of separation of powers equally apply to all three spheres of government, although it seems that the execution thereof is distinctly different between the different spheres of government. The model of “separation of powers”, specifically the way in which it applies in South African governments, is a field of study on its own and will not be dealt with at length in this study. It is, however, important to note that the appeal mechanism created in terms of section 62, not only enhances the participation of the community in matters of local government, but it also enhances the principle of separation of powers in local government. It does so by being an integral part of the checks and balances to the system of delegations in local government. It is important in this context, to note that section 62 only operates within the system of delegations within local government.⁸

There is an argument to be made that the Constitution envisages that some form of separation of powers will be constructed in local government, through a system of delegations. It seems that the Constitution left this matter open, to be developed in terms of national legislation such as the Systems Act and/or the Local Government: Municipal Structures Act,⁹ and/or the Local Government: Municipal Finance Management Act.¹⁰ Section 59 of the Systems Act makes it compulsory for a municipal council to develop a system of delegations that will maximise administrative and operational efficiency and provide for adequate checks and balances. Furthermore, section 53 of the Systems Act makes it compulsory for a municipal council to clearly define the delegations which support the roles and responsibility of the relevant members of the executive. It is therefore submitted that the system of delegations in local government is not only the foundation upon which the executive is constructed,

8 S 62 is contained in Part 2 of Ch 7 to the Systems Act, which is devoted to roles and responsibilities of political structures and political office bearers, from which the system of delegations flow.

9 Act 117 of 1998 (hereinafter referred to as the Structures Act)

10 Act 56 of 2003 (hereinafter referred to as the MFMA).

but also a cornerstone which provides for the local government executive to be held accountable through structures of oversight and checks and balances. The appeal mechanism created in terms of section 62 of the Systems Act, is one of these checks and balances.

1.2 Statement of the problem.

As stated previously the appeal mechanism in terms of section 62 of the Systems Act can only operate within the system of delegations as created in terms of statutory law for local government. At first it seems that this appeal mechanism could have general application in local government,¹¹ which is available to any person who can prove that his/her rights have been adversely affected by a decision taken in terms of delegated authority. Recent interpretations by various South African courts, however, indicate that section 62, although a very useful appeal mechanism in local government, was formulated by the legislator in somewhat loose terms and to some extent cannot be effective in its current form. It was further said that section 62 is “problematic” and “ineptly drafted”. An example of one such case is the matter of *Loghdey v City of Cape Town and Others*.¹² For further examples refer to chapter 3 of this work.

In order for members of the community to effectively take part in the matters of local government, it should be possible for such members to question those decisions taken by functionaries in a municipality which affect their every day lives. The appeal authority created in terms of section 62 is largely regarded as a mechanism through which the members of the community could question such decisions. The purpose of this work is therefore :

11 In this context the word “general” should not be confused with the concept of a “wide” appeal. The concept of section 62 as a “wide appeal” was dealt with in the matter of *Groenewald N.O. and Others vs M5 Developments* 2010 (5) SA 82 (SCA) (hereinafter referred to as “*Groenewald* (2010)”) which will be discussed in chapter 3 of this work.

12 *Loghdey v City of Cape Town and Others* ZAWCHC 25 (20 January 2010). Bins Ward J said s 62 is “ineptly drafted and has given rise to great difficulty and confusion”. At par 34. (Source at www.saflii.org.za)

- to discuss and explain the legal provisions of section 62; and
- to indicate that the application of section 62 is not only complex, but also subject to so many limitations, that it does not have general application; and
- to highlight the limitations to the appeal mechanism created in terms of section 62, in order to show when this appeal mechanism applies, and to whom it is available; and
- to show how the appeal mechanism in terms of section 62 can encourage the involvement of members of the community in the matters of local government; and
- to show in which instances section 62 can be used to hold the executive authority in local government accountable for its actions.

1.3 Significance of the study.

Section 59(3) of the Systems Act determines that the system of delegations in local government must provide for “adequate checks and balances”, as previously stated herein. The section 62 appeal mechanism is one of these checks and balances. It seems also that section 62 is a mechanism designed to enhance the separation of powers concept in local government. It is furthermore a mechanism through which the members of the community can participate in local government affairs. The aim of this study is further to indicate that section 62, although limited in its application, is a useful tool in local government on more than one level.

1.4 Research methodology.

The Constitution,¹³ provides the broad legislative framework as a source that sets the parameters within which local government operates. This broad framework is supplemented by national and provincial legislation and local government by-laws. Current legislation pertaining to local government in South Africa is the main source of information upon which the research of this study is based. In this context the main focus of the study will be on such legislation that regulates the system of delegations

13 Refer to ch 7 of the Constitution.

within local government, and the subsequent formation of an executive structure within a municipality. Against this background the role and functioning of Section 62 will be investigated. To assist with the interpretation of section 62, the research will include authorities such as books and articles, as well as applicable case law.

1.5 The structure of the study

The study and subsequent evaluation will be divided into four chapters. Chapter 1 is, by way of introduction, a broad overview of the topic that is being researched, including the questions to which answers are sought in this study, and briefly state the significance thereof. It further gives an indication as to the structure of the research that will be used, to, not only provide the background against which the research is done, but also the method that will be used to arrive at the answers sought. Chapter 2 will provide an overview of the current legal framework that regulates local government in South Africa. It will show how the adoption of the interim Constitution and later the final Constitution, transformed and created municipalities to become developmental, but more so to become mechanisms whose main object must be to provide services to all the people in its geographical area. It will then touch on various aspects of municipal governance, but will deal in some detail with municipal powers and functions. Specifically how local government obtain these powers and functions, and how or by whom the functions are executed. It will further show how an executive authority in local government is created, through a system of delegations and what the structure of a municipality consists of. Chapter 3 is a discussion and evaluation of the appeal mechanism created in terms of section 62 of the Systems Act in the context of a municipality with an executive mayoral system.¹⁴ From this discussion and evaluation, it will become apparent who is regarded as an aggrieved person to whom section 62 is available, and in which instance section 62 is regarded as an effective remedy.¹⁵ The analysis will not be complete, unless it also

14 This study is limited to the application of section 62 of the Systems Act in a municipality with an executive mayoral system.

15 The word "remedy" was used in the case of *Reader and another v Ikin and another* 2008 (2) SA 582 (C) (hereinafter referred to as "*Reader* (2008)"), as an administrative legal concept of

pinpoints the instances when section 62 will not apply. Chapter 4 contains concluding remarks. The purpose of this chapter is to show how the appeal mechanism in terms of section 62 contributes to create a separation between the legislature and the executive in local government, and further to enhance good governance. It will further show that section 62 is the very mechanism through which members of a community can influence decisions taken by the executive in terms of delegated authority. This may be necessary to keep the attention of the executive, in general terms, on the matters that they should pay their attention to.¹⁶

1.6 Summary.

Local government operates within a complex legislative framework, founded and/or imbedded on a supreme constitutional foundation, which determines how a municipality is governed and administered. This legislative framework creates an interwoven authority from which a municipality derives its powers to perform certain functions in achieving its constitutional objects. The model of “separation of powers” applies to all three spheres of government. It seems that this is a model which purports to ensure that one organ of state is checked by another organ of state, distinct from it, and held accountable for its actions. The Constitution envisages that national legislation should supplement the Constitution, to provide for some measures that must be instituted by a municipal council to ensure that there is, to some extent, a certain measure of division between the legislature and the executive. The Constitution, further envisages that national legislation will ensure that there are adequate measures in place for the legislature to hold the executive accountable for their actions. Section 62 of the Systems

“internal remedy” that had to be exhausted prior to approaching the High Court on review. This work will also refer to section 62 as an appeal mechanism.

16 See the Constitution s152. In order to fulfil its objects, local government must not only be developmental in nature but be driven to provide services. This can only be done if municipalities pay attention to its core functions.

Act creates one such measure in local government. Its application, however, is limited, and therefore it is important to know when and to what extent section 62 will apply.¹⁷

17 From time to time it may become necessary for persons who are of the opinion that specific decisions taken by the executive authority within a municipality must be reconsidered. In such instance an effective mechanism must be available to such person.

2. CHAPTER 2 : LOCAL GOVERNMENT : THE SOUTH AFRICAN CONSTITUTIONAL FRAMEWORK.

2.1 Introduction.

Local government, prior to the enactment of the interim Constitution in 1993,¹ was controlled and directed by national and provincial governments.² Since the enactment of the interim Constitution and later the Constitution of the RSA 1996,³ local government was elevated to one of three spheres of government in South Africa.⁴ The various sections in the Constitution which deal with separate spheres of government and their competencies, provide a broad constitutional framework that is supplemented by national legislation, to create an interwoven network of legislation that regulate local government. This legislation, amongst others, determines that the three spheres of government should function independently, yet together, to fulfil the overall ideals enshrined in the Constitution. With regard to local government, the object is to be developmental and to enhance service delivery, in order to create a better life for all the people of South Africa.⁵ This is achieved in the first instance by determining the category and type of municipality.⁶ Thereafter, a structure must be created in each

1 The Constitution of the Republic of South Africa Act 200 of 1993. (hereinafter referred to as the "Interim Constitution").

2 Nico Steytler & Jaap de Visser, *Constitutional Law of South Africa* (2010) Juta, Second Edition Volume 2 (hereinafter referred to as "Steytler & De Visser (2010)") ch 22 par1.

3 The Constitution of the Republic of South Africa 1996 (hereinafter referred to as the "Constitution").

4 Note s40 of the Constitution.

5 See s40(1) of the Constitution which determines that government in South Africa is constituted as national, provincial and local spheres of government which are distinctive, inter dependent and inter related, and each sphere must respect the constitutional status, institutions, powers and functions of government in the other spheres. It further determines that the different spheres may not assume any power or function except those conferred on them in terms of the Constitution, and as such may not encroach on the geographical, functional or institutional integrity of government in another sphere.

6 Refer to s155 of the Constitution.

municipality with regards to the execution of the powers and functions of such municipality, through a system of delegations.⁷

The structure within a municipality is instituted by a municipal council, and is ultimately aimed at separating the legislative functions from the executive functions, and to determine through specific terms of reference,⁸ which functionaries are responsible for the execution of which functions. The legislation that confers powers and functions on local government, whether it is original or derived from national or provincial delegations, assignments or agency agreements,⁹ also determines the division between functions which are to be executed either by the political executive or the administrative executive structure within each municipality. The legislative functions are always exercised by a municipal council.¹⁰ This structure can differ from municipality to municipality as it is designed by a municipal council to fit the needs of each specific municipality.

Although the structure can differ from municipality to municipality, the object of local government remains the same for all municipalities in South Africa. There is no longer any differentiation between different areas and/or groups of people. It is now one of the very objects of local government to provide services to all the people within the geographical area of each municipality in South Africa, and to involve the community in local government affairs.¹¹

When the interim Constitution was enacted and later the Constitution, the different spheres of government received specific competencies. These competencies became the mandate of each respective sphere of government. It seems with regard to local

7 Local Government Municipal Systems Act 32 of 2000 (hereinafter referred to as the "Systems Act").

8 See s53 of the Systems Act.

9 See the Systems Act : Regulations (published on 26 April 2007 in GG 29844).

10 Refer to s160(2) of the Constitution.

11 See Section 152(1) of the Constitution.

government, that this was the first attempt to create local autonomy.¹² The oversight powers of national and/or provincial government became limited and it became incumbent on national and provincial government to invite the comments from organized local government before enacting legislation, which may impact on the “status, powers, functions or boundaries of local government.”¹³ Although local government is an autonomous sphere of government in South Africa,¹⁴ it seems to be the intention of the Constitution, that local government must function independently, yet in harmony, with provincial and national government.¹⁵ In this regard chapter 3 of the Constitution is important, because it determines that the different spheres of government must co-operate. The boundaries of such co-operation, however, is not clear, and have become the subject of many court cases, as it is not uncommon to find that the different spheres of government infringes upon the competencies of the other spheres of government.¹⁶

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- 12 See *Ex Parte Chairperson of the Constitutional Assembly : In Re : Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC)* (hereinafter referred to as “*The Certification Judgement 1996 (4) SA 744 (CC)*”).
- 13 See Steytler & de Visser (2010) 22-8.
- 14 Note s156(5) of the Constitution, which determines that a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.
- 15 See Section 151 of the Constitution which determines that a municipality has the right to govern, on its own initiative pertaining to the local government affairs of its community, subject to national and provincial legislation, and also that the national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. See also s150(1) which determines that national or provincial government must support and strengthen the capacity of municipalities to manage their own affairs and/or to exercise their powers and to perform their functions. See further s154(2) which determines that draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced into parliament or a provincial legislature, in the manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.
- 16 Note *The Premier of the Western Cape v Overberg District Municipality* (801/2010) [2011] ZASCA 23 (18 March 2011) (hereinafter referred to as “*The Premier v Overberg District*.”(Source www.saflii.org.za))

National and provincial government must in certain instances exercise oversight over local government, but generally may not interfere with the exclusive competencies conferred on local government by the Constitution. The obligation to exercise oversight is closely linked to the ability of national government and provincial government to assign or delegate legislative and/or executive powers and functions to local government. In this regard, national and provincial governments are charged with the responsibility to exercise oversight over the matters delegated to local government, and as such, to monitor and support local government.¹⁷

2.2 A brief history of local government in South Africa.

During the 17th century in South Africa, people mainly made a living from subsistence farming. Some of these people moved away from the farms and started to cluster together to form communities. The need arose to create community based institutions to provide basic services to such communities. It could be argued that these community based institutions were indeed nothing other than informal municipalities.¹⁸ During the 20th century, formal towns and cities were created.¹⁹ It is commonly known that at this time the Union of South Africa had four provinces, and the municipalities within these provinces, were under provincial control and supervision.

Municipality) ; *Premier of the Province of the Western Cape vs President of the RSA and others* 1999 (4) BCLR 382 (hereinafter referred to as “*The Premier v President of the RSA*”); *City of Johannesburg v Gauteng Development Tribunal* (335/08)ZASCA 106 (22 September 2009) (hereinafter referred to as “*The City of Johannesburg v Gauteng Development Tribunal*”); *Swartland Municipality v Hugo Wiehahn Louw and Others* (Western Cape High Court Case Number 1373/2009) (hereinafter referred to as “*Swartland Municipality v Louw (2009).*”) (Source www.saflii.org.za).

17 See par 2.9.2 of this study.

18 Bekink B *Principles of South African Local Government Law* (2006) Lexis Nexis Durban. (hereinafter referred to as “Bekink (2006)”) 19.

19 One example of such a community that grew to become a city is Cape Town, which started off in 1652 as a port on the Cape coast. It later grew into a town and later into a city, that is currently recognized as a metropolitan area.

It was evident in the mid 20th Century that there was a differentiation between ethnic African people and white African people. This disparity between racial groups was later defined by the National Party government in an “Apartheid” policy during 1948.²⁰ This policy advocated separation between “black” and “white” townships, ensuring that there will be no cross subsidization between affluent white local authorities and disadvantaged black local authorities. According to Kriegler J, in the case of *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*,²¹ it was apparent during the apartheid years that service delivery in local government was divided between racial lines and that white urban areas were favoured at the cost of black urban areas. Kriegler J goes further to say that this is due to a “colonial relationship of exploitation and unequal exchange.”²²

During the 1980's, the people disparaged by apartheid, started to mobilize through mass action, which culminated in a process to start the transformation of local government, early in the 1990's.²³ During the period 1992 to 1993, the national negotiators realized that there was a need to guide the transformation process. Following this realization, the Local Government Transition Act,²⁴ was promulgated during 1993. It is submitted that the LGTA gave momentum to the restructuring and transformation process of local government. The implications of which were later taken up in chapter 10 of the interim Constitution.

The process of transformation was aimed at rebuilding local communities and to “establish a new foundation for a democratic, integrated, prosperous and non-racial

20 Bekink (2006) 23.

21 *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* (1999)(1) SA 374 (CC)(hereinafter referred to as “*Fedsure v Greater Johannesburg Metropolitan Council*.”) par 122.

22 See *Fedsure v Greater Johannesburg Metropolitan Council* par122.

23 See *Fedsure v Greater Johannesburg Metropolitan Council* par124.

24 Local Government Transition Act 209 of 1993 (hereinafter referred to as “LGTA”)

society”.²⁵ During the period November 1995 to June 1996, the transitional metropolitan and other municipal councils were elected, which marked a big step forward in the transformation and restructuring process. During the period 1996 to 2000, the interim Constitution was replaced by the final Constitution of the RSA 1996, which together with subsequent national legislation, paved the way for the local government elections of 2000. These elections earmarked the end of the transitional phase in South African local government.

2.3 The legislative framework for local government in South Africa.

Local government is a collective name for all the municipalities that form the third sphere of government in South Africa. It is the face of government in South Africa, and in the lives of the ordinary citizens on the street, it is probably the most important sphere of government.²⁶ After the enactment of the Constitution, local government had to be transformed to become the institution that the Constitution intended it to be. The process commenced with the White Paper on Local Government (1998),²⁷ The White Paper further provided the “policy framework”²⁸ for national legislation to supplement the Constitution, in order to ensure that the constitutional objects were met by municipalities. Many of these objects were defined in more detail in subsequent national legislation.²⁹ The Local Government : Municipal Demarcation Act,³⁰ was enacted in

25 Bekink (2006) 16.

26 *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of Kwazulu Natal v President of the Republic of South Africa and Others (CCT 15/99, CCT 18/99) [1999] ZACC 13; 2000(1) SA 661; 1999 (12) BCLR 1360 (15 October 1999)* (herein after referred to as *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of Kwazulu Natal v President of the Republic of South Africa and Others*) par 44.

27 See Steytler & de Visser (2010) 22-12

28 See Steytler & de Visser (2010) 22-13

29 For example the Systems Act),; Local Government : Municipal Structures Act 117 of 1998 (hereinafter referred to as “The Structures Act”),; Local Government : Municipal Finance Management Act 56 of 2003 (hereinafter referred to as “The MFMA”).

30 Act 27 of 1998 (hereinafter referred to as the “ Demarcation Act”)

1998. In terms of this Act, a demarcation board was established, which in turn was tasked to establish the municipal boundaries in terms of specified criteria. Also in 1998 followed the Structures Act, which, amongst others, provided for the establishment of different categories and types of municipalities and for the regulation of the internal systems and structures of a municipality. It is important in the context of this work to understand how these structures derive their powers and functions, how they operate, and how they account to functionaries distinct from it. This will be dealt with fully later herein. In 2000 just prior to the local government elections, the Local Government Municipal Electoral Act,³¹ was enacted in order to regulate the ensuing elections. Also during 2000, followed the Systems Act, with the purpose “to provide for the core principles, mechanisms and processes that were necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and to ensure universal access to essential services..”.³² It further provides for the manner in which powers and functions are exercised,³³ and also to provide for the manner in which communities must be allowed to participate in local government affairs.³⁴ Community participation is very important as this is one of the underlying requirements to check the executive authority in local government, and as such, to enhance the principle of separation of powers as it applies to local government. It is submitted that the appeal mechanism created in terms of section 62 of the Systems Act supports this principle of separation of powers.³⁵ In 2003 followed the Municipal Finance Management Act (MFMA) with the purpose to regulate financial management in local government. In the context of this work, the MFMA is important as it determines that certain matters must be delegated to specific functionaries, which in turn makes decisions taken by such functionaries, subject to the appeal mechanism created in terms of section 62 of the Systems Act. In 2004 followed the Local Government :

31 Act 27 of 2000 (hereinafter referred to as “The Electoral Act”).

32 Note the preamble to the Systems Act.

33 See ch 3 of the Systems Act.

34 See ch 4 of the Systems Act.

35 Refer to the requirement to create adequate checks and balances in Section 59(1) of the Systems Act.

Municipal Property Rates Act,³⁶ with the purpose to regulate the power of municipalities to derive revenue through the imposition of property rates. This Act provides for its own appeal mechanism. It will be shown later herein why the appeal mechanism created in terms of section 62 does not apply to decisions to impose property rates. However, other decisions in terms of this Act, may be subject to an appeal in terms of section 62.³⁷

2.4 The establishment of municipalities in South Africa.

In terms of section 155(6) of the Constitution, it is the responsibility of provincial government to establish municipalities in their relevant provinces.³⁸ Subsequently national legislation determines the criteria and/or parameters to be applied by provincial government with regards to boundaries, categories and types of municipalities. National legislation also determines how powers and functions should be divided between category “B” and category “C” municipalities, within each province. The criteria for the establishment of a municipality was specifically designed to disable political interference. In the matter of *Matatiele Municipality & Others v President of the Republic of South Africa & Others*,³⁹ the court confirmed that :

“if municipalities were to be established along party lines, or if there was to be political interference in their establishment, this would undermine our multi-party system of democratic government.”

It is further important to note that the establishment of different municipalities by provincial government does not infringe on the autonomous identity of municipalities. It is submitted that, although provincial government determines the type of municipality, the actual structure of a municipality is only created once a municipal council decides to effect the institution of the municipal type suggested by provincial government.

36 Act 6 of 2004 (hereinafter referred to as the “Property Rates Act”).

37 Note par 3.2.4.2a(ii) herein.

38 See Steytler & de Visser (2010) at 22-16.

39 2006(5) BCLR 622 (hereinafter referred to as “Matatiele v President of the RSA”) ; Steytler & de Visser (2010) 22-17.

- Local government consists of municipalities, which must be established for the whole territory of South Africa.
- Both the legislative and executive authority vest in the municipal council.
- Local government is an autonomous sphere of government.
- National and/or provincial government may not infringe on the autonomous identity of local government.⁴⁰

The determination that both the legislative and executive authority vest in a municipal council,⁴¹ must be understood in the context that a municipal council will, inter alia, through a system of delegations, delegate most of its executive powers and functions to an executive structure, which is to some extent, distinct from the municipal council. The structure of the executive in local government is important in the context of this study, in that only the matters delegated by a municipal council may be subject to an appeal in terms of section 62. It will later become clear in this study, that the executive powers and functions performed by a municipal council can never be subject to an appeal in terms of section 62.⁴² With regards to the autonomous identity of local government, it will also become apparent later herein, that although the autonomy of local government is a carefully protected constitutional principle, it is subject to the obligation of monitor and support by national and provincial government.⁴³

2.4.2 The objects of municipalities in South Africa.

The Constitution, sets strict parameters within which the conduct of municipalities must be exercised in fulfilling its objects.⁴⁴ These parameters are found in the specific competencies allocated to municipalities within which their specific powers and

40 Refer to Bekink (2006) par 7.4.

41 Note also s160(2) of the Constitution.

42 Note par 3.2.2.4 herein.

43 See par 2.9.2 herein

44 The word "object" in the context of s152 of the Constitution, is important. (as opposed to objective) as it indicates that these are the matters that Local Government should pay attention to, whereas the word "objective" refers to goals that should be reached.

functions,⁴⁵ must be exercised.⁴⁶ Section 152(2) of the Constitution, requires each municipality to strive, within its capacity, to achieve these objects. This is important in the context of this study, as members of a respective community derive rights from the obligation that flow from section 152 of the Constitution. These rights may qualify as “rights” in the context of section 62, which in turn may determine whether section 62 is available as an appeal mechanism or not.⁴⁷

The objects that flows from section 152 of the Constitution, are indeed the “purpose” of local government within the structure of government in South Africa.⁴⁸ Municipalities must fulfil the object,⁴⁹ to provide “accountable government”, “provision of services”, “promote social and economic development”, “promote a safe and healthy environment”, and encourage the involvement of communities in local government matters.⁵⁰

The object to involve communities in the affairs of local government supports the principle of separation of powers, as it applies to local government. It is suggested by Steytler & de Visser,⁵¹ that the absence of a “constitutionally determined separation of powers at municipal level, should be viewed in light of a municipality’s specific developmental mandate.” It seems that the premise is based upon the duty of local government to focus its attention on the constitutional objects for local government. One of these objects is to encourage the involvement of communities in the affairs of local government.⁵² It will later become clear in this study, that such involvement is limited. Section 160(7) of the Constitution, does assist in some way to involve communities in the affairs of local government, in that municipalities must enable members of the public

45 See ss156 and 160 of the Constitution.

46 Refer to part B of respectively Schedule 4 and Schedule 5 of the Constitution.

47 See par 3.2.2.3 herein.

48 Bekink (2006) 67 par 7.5.

49 Note s152(2) of the Constitution.

50 See The Constitution ss152(1)(a) to 152(1)(e).

51 See Steytler & de Visser (2010) at 22-36.

52 Note the Constitution s152(1)(e).

to witness the actual working of a municipal council, and its committees, and even in limited instances, to partake in council meetings.⁵³

It is contended that the delegation of powers and functions does not impede on this principle. The notion that a municipal council and/or an executive must be accountable to a functionary distinct from it, elevates the members of communities to become an integral part of local government to the extent that the “separation of powers” doctrine in local government is supported through the participation of communities or members of the public in the affairs of local government. The very mechanism available to members of the public to enforce such participation, specifically to question the decisions of the executive authority, taken in terms of delegated authority, is the appeal mechanism in terms of section 62. Should such a member of the community wish to question any other decision, such member may refer the matter to a relevant court.

2.4.3 The duties of municipalities in South Africa.

It was mentioned earlier that the Constitution requires local government to focus its attention on the objects that flow from section 152 of the Constitution. It was also mentioned that local government is developmental in nature, and must seek to provide sustainable basic services to its communities.⁵⁴ It is thus clear that the very purpose of a municipality, is to serve its community. In the matter of *Mkontwana v Nelson Mandela Metropolitan Municipality*,⁵⁵ the Constitutional Court ruled that the responsibility of a municipality is to achieve and implement the objects of local government as a matter of public duty. Section 16 of the Systems Act places an obligation on a municipality to develop a culture of community participation, and as such, involve the community in matters such as the preparation of the Integrated Development Plan (hereinafter

53 See the MFMA s130.

54 For an in depth discussion see Bekink (2006) par 7.7 to par 7.8.

55 *Mkontwana v Nelson Mandela Bay Metropolitan Municipality* 2005 (1) SA 530(CC) ;2000 (2) BCLR 150 (CC) (6 October 2004) (hereinafter referred to as “Mkontwana v Nelson Mandela Bay”).

referred to as an “IDP”),⁵⁶ the performance management system and the preparation of the budget. Furthermore, the community must take part in strategic decisions pertaining to the provision of services.⁵⁷ The Systems Act goes even further by devoting an entire chapter,⁵⁸ to give detailed guidance on how municipalities must ensure community participation. In this regard, section 153 of the Constitution, is of particular importance, in that it indicates that municipalities must determine and give priority to the basic needs of its communities. A municipal manager must facilitate participation by the local community in the affairs of a municipality and must also develop and maintain a system whereby community satisfaction with municipal services are assessed. The Structures Act,⁵⁹ also deals with community participation and/or involvement of communities in municipal affairs. Whereas the Speaker is responsible for and ensures that all meetings of a municipal council and its structures are open to the public, for as far as it is reasonable. The executive mayor is responsible for identifying the needs of the community, prioritizing such needs, and ensuring that such needs are executed.⁶⁰ Therefore, the executive mayor must ensure that regular feedback is given to the community as to the management of the budget and other affairs of a municipality. Feedback to communities occurs in a structured manner, either through a ward participatory system or by means of public meetings. On a smaller scale, feedback is also given through correspondence to individual requests.

In the type of municipality that has a ward participatory system, active participation by communities in the affairs of municipalities is encouraged through such ward committee system. It is submitted that the purpose of a ward committee system is to enhance

56 See Ch 5 Part 2 of the Systems Act.

57 Section 19(b) of the Systems Act determines that a municipal manager must notify the public of the time, date and venue of each council meeting, and Section 20(1)b of the Systems Act determines that all meetings of Council is open to the public, and may only be closed when it is reasonable to do so.

58 See Ch 4 of the Systems Act.

59 See the Structures Act s56(3) (g) to (h).

60 Refer to the Structures Act s56(3).

public participation in a structured manner.⁶¹ An effective ward committee system also assists the ward councillor in effectively representing the public in his/her ward. Although the Structures Act devotes a whole chapter to the establishment and operation of ward committees, it is left open to each municipality to determine the specific rules that must govern the establishment and the day to day operation of such a ward committee system within such a municipal area. These specific rules are drafted and adopted by each individual municipality, and is generally based on rules drafted by certain municipalities who were known to be best practices in this field. These rules determines the functions, powers and resources that are given to ward committees. It further regulates the procedures for election of members, and the procedure of conduct during meetings.

Ward committees have no statutory powers, but they may be granted delegated authority.⁶² This is important in the context of this study, because if a ward committee takes decisions in terms of delegated authority, such decisions may be subject to an appeal in terms of section 62 of the Systems Act.⁶³

2.4.4 Categories of municipalities.

61 Note The Structures Act ss72 to 78. The Structures Act devotes the whole of Ch 4 Part 4 to the establishment and operation of ward committees. It specifically states that : "The object of ward committees is to enhance participatory democracy in local government".

62 See The Structures Act Section 74(b).

63 The ward councillor is the chairperson of the ward committee and is responsible for the agenda and minutes of the ward committee meetings. A ward committee makes recommendations on any matter affecting its ward to its ward councillor who communicates the recommendations of the ward committee to the executive mayor, from where feedback is given to the particular ward committee(s) by the ward councillor. In case of an emergency, such as a pipe that burst, reporting will be through the ward councillor directly to the administration. It will thereafter be reported to the executive mayor. Attendance at meetings, and/or any other matter of a disciplinary nature is reported to and dealt with by the Speaker. The responsibility to render administrative support to the ward committees is an administrative function dealt with by the directorates / managers who are accountable to the municipal manager.

Section 155(1) of the Constitution, determines that all municipalities in South Africa fall within one of three categories. Category “A” is a municipality that has exclusive municipal executive and legislative authority in its area. This is the category municipality usually referred to as a “metropolitan council”, due to its size. A category “B” municipality is a municipality that shares municipal executive and legislative authority in its area with a category “C” municipality, within whose area it falls. A category “C” municipality, commonly referred to as “District Municipalities” has municipal executive and legislative authority in an area that includes more than one municipality.

Section 155(1) of the Constitution, further determines that national legislation must establish the criteria to determine which category municipality should be established in which area, and provide for the division of powers and functions between a category “B” and category “C” municipality, where their geographical area overlaps.⁶⁴ The category of municipality determines amongst others the source of funding. It further determines the specific powers and functions that each municipality may perform. The appeal authority created in terms of section 62 of the Systems Act is not qualified by the category of municipality, but rather by the type of municipality, as it operates in all three categories of municipalities, but only in the type of municipality where final decisions are taken in terms of delegated authority.

2.4.5 Types of municipalities.

In terms of the Constitution, the competency to define the different types within each category,⁶⁵ rests with national government. In following this direction, the Structures Act specifies the different types of municipalities in chapter 1 part 2,⁶⁶ as follows :

- (a) Collective executive system which allows for the exercise of executive authority through an executive committee in which the executive

64 Steytler & de Visser *Local Government Law of South Africa* : Lexis Nexis Durban : Issue 5 – December 2011 (hereinafter referred to as “LGLAWSA”) : 2-19 par 3 ; 5-40 par 4 ; Steytler & de Visser (2010) par 22-20.

65 See the Constitution s155(1)

66 Note LGLAWSA 2-25 par 4.3.

- leadership of the municipality is collectively vested.
- (b) Executive mayoral system which allows for 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.
 - (c) Plenary executive system which limits the exercise of executive authority to the municipal council itself.
 - (d) Sub council participatory system which allows for delegated powers to be exercised by sub councils established for parts of the municipality.
 - (e) Ward participatory system which allows for matters of local concern of wards, to be dealt with by committees established for wards

The type of municipality determines the structure of the functionaries within that municipality, and specifically what the relationship between the legislative authority and the executive authority will be.⁶⁷ This in turn directly reflects on the system of delegations and the principle that powers should be divided. It further determines whether participation by the communities in the affairs of a municipality will be enhanced through a ward participatory system. In the context of this study, the type of municipality is a key concept, because only municipalities with an executive structure other than the municipal council itself, has a need for “checks and balances,”⁶⁸ of which section 62 is one.

2.5 The structure within a municipality.

The structure within a municipality is created when a municipal council adopts the type of municipality, suggested by provincial government. The word “suggest” is operative, because it is submitted that provincial government cannot instruct, it can at best authorize a municipal council to adopt a certain type of municipality. The specific structure adopted by a municipality is closely linked to the type of municipality.⁶⁹ It may have far reaching consequences if a municipal council decides not to adopt the type

67 Refer to the addendum 2 herein.

68 Note s59(1) of the Systems Act.

69 Note the schematic outlay of a municipal structure included herein as addendum 2.

suggested by provincial government, because a municipality who is authorized to institute for example an executive mayoral system, may not for instance institute an executive committee system.⁷⁰ If a municipal council does not follow the suggestion of provincial government, it will inevitably result therein that all executive powers and functions remain vested in the municipal council. This will undermine the principle of separation of powers, as it applies to local government.

Because legislation assigns certain powers and functions to a municipal manager or executive mayor as members of an executive structure, the legal framework seems to suggest that a municipal council must create an executive. It is submitted that in practice therefore, when provincial government authorizes a certain type of municipality, a municipal council will adopt the type of structure that accompanies such type of municipality.

Section 160(1)a of the Constitution, determines that a municipal council “makes decisions concerning the exercise of all the powers and the performance of all the functions of a municipality”. The Structures Act and the MFMA anticipate that the council will delegate some of its executive powers to an executive mayor,⁷¹ and to a municipal manager.⁷² In this instance, council is the delegating authority, and the executive mayor/municipal manager, who will fulfil such executive functions on behalf of a council, is the delegated authority. In terms of the system of delegations, the delegated authority must account to the delegating authority.⁷³ It could be argued that this is an attempt to enhance the principle of separation of powers as it applies to local government.

70 See Steytler & de Visser (2010) par 22-17

71 Note s56(3)f of The Structures Act.

72 Refer to the MFMA chapter 8.

73 See s59 of the Systems Act. Also note the oversight structures in terms of ss166 and 165 of the MFMA.

The structure within a municipality must be created in such a way as to enable a municipal council to concentrate on the matters listed in section 152 of the Constitution. In order to fulfil its objects,⁷⁴ a municipality has to take certain actions. Before taking action, it must be clear that such action is authorised, either by legislation or by delegation. In other words, there must be a decision taken by a person or body, authorized to deal with a specific matter, and to take a final decision. Someone must be accountable for such decision. The person or body, who takes such final decision, is referred to as a functionary. If a legislative decision is required, such as taking budgetary resolutions, then a municipal council will be the designated functionary to take such decision.⁷⁵ Every other decision that needs to be taken will be taken by a functionary authorised, to take executive decisions, such as a municipal council, an executive mayor, or a municipal manager, or persons acting in terms of delegated authority by a municipal council, an executive mayor or a municipal manager.⁷⁶ In this respect it is important to note that these functionaries are authorised by legislation to appoint committees to assist them, prior to taking a decision.⁷⁷ In practice the members of these committees will debate a specific matter and then make a recommendation to the functionary. For example, the members of a portfolio committee will debate an item and then make a recommendation to the executive mayor. This is an interim decision which is not subject to an appeal in terms of section 62 of the Systems Act. The executive mayor is the competent functionary to take a final decision. In some instances, however, where the delegation to an executive mayor is not restricted,⁷⁸ an

74 Note s152 of the Constitution.

75 Refer to s160(2) of the Constitution.

76 By empowering legislation or in terms of a delegation.

77 Note s80 of the Structures Act. A committee of councillors, usually referred to as a portfolio committee, instituted to assist an executive mayor. Note further s79 of the Structures Act, which authorizes a municipal council to institute committees which report back to a municipal council. See also s165 of the MFMA which provides for an internal audit unit to assist a municipal manager.

78 Refer to s59(2)(c) of the Systems Act.

executive mayor may sub-delegate authority to a portfolio committee, or members of a mayoral committee, to dispose of matters.⁷⁹

If a portfolio committee refers a matter to an executive mayor, where a municipal council is the competent authority to take a final decision, then such executive mayor can at best make a recommendation to such municipal council to take a final decision.⁸⁰ In certain matters, a municipal council will appoint a special committee of councillors,⁸¹ to deal with a specific matter. Such committee will then make a recommendation to such municipal council. Because such municipal council will make the final decision, it is the competent functionary in such matters. Examples of such committees are discussed separately, later in this study.⁸²

The specific structure of each municipality will be different. This is an inevitable result of the wide discretion of a municipal council to decide which functionaries to adopt in support of its system of delegations, and the subsequent exercise of its oversight obligation.⁸³ In the context of this study, the specific functionaries who exercise executive powers and functions are important, because not all executive decisions are subject to an appeal in terms of section 62 to the Systems Act. This will be dealt with more fully in chapter 3.

2.5.1 The municipal council as a functionary within a municipality.

2.5.1.1 The composition, election and term of municipal councils.

During the local government elections of 1995/1996 South Africa entered into a phase to transform local government. Municipal councils were referred to as transitional municipal councils. The transformation stage was set to achieve a local government

79 See s59(2)(d) of the Systems Act.

80 Note s56 of the Municipal Structures Act.

81 Refer to s79 of the Municipal Structures Act.

82 See paragraph 2.5.1.4 herein.

83 S59 of the Systems Act is not prescriptive as to the format of the system of delegations.

which had to adhere to certain democratic constitutional principles.⁸⁴ During the local government elections of December 2000, the new municipal boundaries were demarcated and smaller municipalities were incorporated with larger municipalities in a demarcated area to create larger municipalities, in each demarcated area. The purpose it seems was not only to reduce the number of municipalities in South Africa, but also to ensure that municipalities were sustainable. With the enactment of new legislation,⁸⁵ municipalities were categorized, and within each category, different types of municipalities were authorized. At that time the transitional process was completed. Municipalities were composed in terms of section 157 of the Constitution, which not only provided the broad framework for such composition, but also determined how members of municipal councils were elected to a municipal council. Section 158 of the Constitution determines when a person is qualified to be a member of a municipal council, and what the term of municipal councils are, specifically that it may not be more than five years. Section 158 of the Constitution, further provides for when a municipal council may be dissolved, and how this will influence the term of a municipal council.⁸⁶

2.5.1.2 Internal procedures : Delegation of powers and functions by a municipal council.

A municipal council governs within the geographical area of a municipality by exercising the legislative and executive authority conferred upon it in terms of the Constitution.⁸⁷ A municipal council is the primary structure of a municipality and takes all the decisions, unless it has delegated its powers or a statute has conferred municipal powers on other structures or individuals.⁸⁸ The Systems Act acknowledges this relationship by stating the rights and duties of a municipal council.⁸⁹ A municipal council consists of members

84 See ch 10 of the Interim Constitution, and ch 7 of the Constitution.

85 Refer to ch 1 of the Structures Act.

86 For an in depth discussion of the composition, election and term of municipal councils, see Bekink (2006) Ch 12.

87 See The Constitution ss151(2), 156 and 229.

88 Refer to s117 of the MFMA. Councilors are barred from taking part in tender processes.

89 Note the Systems Act s4.

elected by a community, and its members act collectively in terms of resolution(s) properly taken. The role of an individual councilor is discussed later herein.⁹⁰

At the start of a municipal term, during the first municipal council meeting, a specific administrative structure and staff component will exist, as the employment contracts of employees are not influenced by the terms and/or election of municipal councils. It is however important that a municipal council adopts or establishes, an administrative and executive structure during its first meeting, in order to be able to delegate powers and functions to the functionaries within such executive structure. Without such an executive structure, a municipality will not be able to exercise its powers and/or perform its functions effectively.⁹¹ The administration is a shared responsibility between a municipal council and municipal manager, as head of the administration.

The system of delegations in local government is the foundation upon which “administrative and operational efficiency” is built.⁹² Section 59(1) of the Systems Act places an obligation on a municipal council to develop a system of delegations. The powers and duties conferred on a municipal council may be delegated to any of its political structures, political office bearers, councilors or staff members. This delegation in terms of section 59 does not operate in isolation, but should be evaluated against the whole of part 3 of chapter 7 to the Systems Act. The purpose of an effective and efficient political and administrative structure in a municipality is essential, in order to achieve the objects of local government.⁹³ In terms of section 59(2)a, of the Systems Act, delegations may not be in conflict with the Constitution, Systems Act or Structures Act. In certain instances, legislation prescribes that specific powers and functions should be exercised by a specific functionary.⁹⁴ This is generally referred to as an

90 See par 2.5.2.1.3 herein.

91 See s11(3)(c) of the Systems Act.

92 *The white paper on local government* (GN 423 of 1998-03-13) which suggests that a municipal council should delegate its executive powers.

93 See The Systems Act s152.

94 See for example s60 of the MFMA with regard to a municipal manager.

assignment.⁹⁵ Therefore, where a certain power or function is assigned to a specific functionary by legislation, the municipal council must delegate such power or function to such specific functionary. The limitations placed on such delegation must also follow the prescription of the relevant Act.⁹⁶ When limitations are imposed by a municipal council, it should be followed by the functionary as imposed by the municipal council. If the functionary does not execute the function as intended by the municipal council, its action will be unlawful.⁹⁷ This is important in the context of this study, because unlawful decisions gives rise to an infringement of rights in the context of section 62. In this context it is important that a person or functionary who receives a delegation from council, may not in turn sub-delegate this delegation to another functionary, unless the original delegation specifically authorized it.⁹⁸ Therefore, for example, if a municipal council delegates a function to an executive mayor in person, the function may only be performed by such executive mayor, and may not be sub-delegated by such executive mayor to any other functionary. This means that the purpose of the other functionary, is merely to support an executive mayor, and make recommendations to an executive mayor, but may take no final decisions pertaining to the execution of such function. If the delegation is, however, made to an executive mayor "in committee", it means that such executive mayor may take no decisions without consulting his/her mayoral committee.

95 Refer to ch5 of the Guidelines on Allocation of Additional Powers and Functions to Municipalities. (Published under Gen N 490 in GG 29844 on 26 April 2007)

96 See LGLAWSA 8-17 par 2.3.2.2 to 8-18 par 2.3.2.6.

97 Refer to LGLAWSA 8-19 par 2.3.3, See the discussion of the cases *Mgoqi v City of Cape Town and Another (2006) JOL17349(C)* (hereinafter referred to as "*Mgoqi v City of Cape Town*"); and *Molefe v Diblabung Local municipality [2008] JOL 22365 (O)* (hereinafter referred to as "*Molefe v Diblabung*") and also, LGLAWSA 8-14 par 2.3.2.1, and the discussion of *Bester v Sol Plaatjie municipality (2004) 9 BLLR 965 (NC)* (hereinafter referred to as "*Bester v Sol Plaatjie*").

98 S59(2)c of the Systems Act determines that the delegations from a municipal council to its political structures, political office bearers, councilors or staff members, is "subject to any limitations, conditions and directions the municipal council may impose."

It must be noted that certain matters fall outside the system of delegations. Section 160(2) of the Constitution, determines that certain matters may not be delegated. The words “legislative function” refers to the ability or power of a municipality to create legislation.⁹⁹ Execution of a (purely) legislative function is when a council makes original legislation, such as a by-law.¹⁰⁰ In the matter of *Fedsure v Greater Johannesburg Metropolitan Council*,¹⁰¹ it was confirmed that the ability to adopt a budget, and/or to make budgetary resolutions, is also done in execution of a municipality’s legislative function. It follows from this that budgetary resolutions may also not be delegated. In terms of other legislation, certain matters may also not be delegated. Section 82 of the Structures Act determines that a municipal council is responsible for the appointment of a municipal manager. Section 2 of the Local Government : Municipal Systems Amendment Act,¹⁰² which inserted section 54A into the principal Act, now also determines that a municipal council must appoint the “acting municipal manager” and section 3 of the Systems Amendment Act, which substitutes section 56 of the principal Act, determines that those managers accountable to a municipal manager, is appointed by council, after consultation with the municipal manager. It can be argued that the aforesaid legislation, which authorizes the appointment of a municipal manager, acting municipal manager and managers accountable to him/her may not be delegated, and as such will not be subject to an appeal in terms of section 62 of the Systems Act. However, the determination of the remuneration, benefits or other conditions of service of these officials may be delegated, but only to an executive mayor.¹⁰³ These decisions

99 See The Constitution s156(2).

100 Cora Hoexter *The New Constitutional and Administrative Law* (volume two) (2002) Juta, (hereinafter referred to as “Hoexter, Volume Two (2002)”) at 28 par 1.8(a) “Council is an elected, deliberative body, making original Legislation.”

101 *Fedsure v Greater Johannesburg Metropolitan Council*. The court defined the most prominent acts and held that budgetary resolutions made by a local authority were legislative and not administrative, since the Constitution, gave such resolutions the status of original legislation.

102 the Local Government : Municipal Systems Amendment Act, 7 of 2011(hereinafter called the “Systems Amendment Act”),

103 Note s60(1)(b) of the Systems Act.

may be subject to an appeal in terms of section 62 of the Systems Act. A municipal manager on the other hand must approve the staff establishment, subject to a framework approved by council and is empowered to appoint all other staff.¹⁰⁴ Although a municipal manager plays a prominent statutory role in regard to personnel matters, the municipal council remains the employer, and serves in that capacity on the local labour forums, and bargaining council for local government. Due to this relationship between a municipal council and a municipal manager, it is important that a municipal manager takes part in all deliberations that may lead to collective agreements. Decisions reserved for a municipal council is important in the context of this study, as these matters will never be subject to an appeal in terms of section 62 of the Systems Act. For a full discussion of these matters refer to chapter 3 of this study.

2.5.1.3 The role of the chairperson of a municipal council.

The Speaker is the chairperson of a municipal council. The election of a Speaker should follow the procedure set out in the Structures Act.¹⁰⁵ The court recently considered the core aspects of a Speaker's function in the matter of *Brummer N.O. vs Mvimbi and Others*¹⁰⁶

A Speaker not only presides at council meetings,¹⁰⁷ but also decides when and where a municipal council meets,¹⁰⁸ subject thereto that a municipal council must meet at least quarterly,¹⁰⁹ and further subject thereto that a majority of the councillors may request

104 See the Systems Act ss55 and 60.

105 See s36(4) of the Structures Act and Schedule 3 to the Structures Act. See also LGLAWSA 3-12 to 3-14 par 3.3.1.

106 *Brummer N.O. v Mvimbi and Others (13535/2011) [2011] ZAWCHC 385 (28 September 2011)* (hereinafter referred to as "*Brummer v Mvimbi*"). at par 48 the Court said as follows: "... core aspects of the Speaker's functions are regulated by the common law which demands that the Speaker be completely impartial and non-partisan, both inside and outside the council chamber."

107 Refer to s37 of the Structures Act.

108 See s29 of the Structures Act.

109 Note s18 of the Structures Act.

that a meeting of the municipal council be convened at a specified time.¹¹⁰ A Speaker may convene special meetings of a municipal council, should the need arise to deal with urgent matters. In practice, such meetings are requested by a mayor or a municipal manager. The need may also arise to have more than the required quarterly, ordinary council meetings. It is within a Speaker's discretion to allow further ordinary council meetings. This is a matter that can be discussed at length, but does not fit within the framework of this study. Suffice to say, it is now clear that should the occasion arise where there is no Speaker to convene a council meeting, that a municipal manager may follow a "common sense" approach and convene the next council meeting in order for a Speaker to be elected.¹¹¹ The other functions of a speaker are as follows :

- A Speaker enforces the code of conduct.¹¹² It is important to note that when a Speaker enforces the code of conduct, it should be done in terms of the disciplinary process prescribed by the Act, and the rules adopted by a municipal council for this purpose.¹¹³
- A Speaker is the recipient of delegated powers. In this regard, a Speaker may be the chairperson of committees created in terms of section 79 of the Structures Act.
- The responsibility of a Speaker may extend beyond what is provided for by statute and could include a number of responsibilities which have developed as a matter of practice.¹¹⁴

110 See s29 of the Structures Act.

111 *Overberg District Municipality and Others v Premier of the Western Cape and Others* (16166/2010) [2010] ZAWCHC 533 (8 November 2010) (hereinafter referred to as "ODM v Premier of the Western Cape") at par 54. (source www.saflii.org.za).

112 See the Structures Act s37(e).

113 See Schedule 1 to the Systems Act, specifically ss13 and 14.

114 A Speaker assumes political leadership in facilitating access by councillors to capacity building and training programs and obtaining qualifications. A Speaker is in general responsible for the welfare of the councillors. A Speaker may be mandated to represent a municipality on inter-governmental forums such as a Provincial Speaker's Forum and any other such forums as may be necessary in the discretion of a municipal council. A Speaker may be mandated to represent a municipality on organized local government forums such as SALGA, and any other such forums

2.5.1.4 Functionaries who account only to a municipal council.

The functionaries directly accountable to a municipal council pertain to matters that a municipal council did not delegate to an executive structure, in that legislation assigns the power and function to a municipal council. As such, the function should be exercised by a committee/functionary of a municipal council to advise such municipal council. These committees are established in terms of section 79 of the Structures Act and do not take final decisions. There is an argument to be made that these committees act in terms of delegated authority, and their decisions should therefore be subject to an appeal in terms of section 62 of the Systems Act. However, the decisions taken by these functionaries are interim decisions, and as such, not subject to an appeal in terms of section 62 of the Systems Act. Examples of these committees are the unauthorised, irregular or fruitless and wasteful expenditure committee,¹¹⁵ or the disciplinary committee against councillors,¹¹⁶ or the municipal public accounts committee (hereinafter referred to as "MPAC").¹¹⁷ These committees are authorized in terms of section 79 of the Structures Act. (hereinafter referred to as "section 79 committees"). Legislation further authorizes council to institute committees that report directly to council, but which are not created in terms of section 79 of the Structures Act, since the members of the committees are not councillors only, but also consist of members of the public and/or labour unions. (hereinafter referred to as "external committees"). In some instances, these committees take final decisions, and the report to a municipal council is simply noted by such municipal council. Examples of these committees are the audit committee authorized in terms of section 166 of the MFMA, and the Local Labour Forum

as a municipal council may deem necessary. A Speaker may be responsible for the community development workers (hereinafter referred to as "CDW") program in a municipality. The community development workers are allocated to specific wards, and reports to the ward councillor, through which the reports are then submitted to the Speaker's office. If a Speaker becomes aware of any problem areas concerning the CDW, he reports these to the municipal manager of the relevant municipality.

115 See the MFMA. s32.

116 Note Schedule 1 to the Systems Act

117 Refer to par 2.9.1 herein for a discussion on MPAC.

(hereinafter referred to as the “LLF”). Then there is the section 62 appeal committee,¹¹⁸ which is not necessarily a section 79 committee or an external committee. As a functionary this committee has different formations. It may consist only of councillors, alternatively, councillors and a knowledgeable specialist, or it could be an executive mayor only, or it could be a municipal manager only.¹¹⁹ Notwithstanding the formations this functionary has, it takes a final decision, which is reported to council to be noted. There are still further types of functionaries which report directly to a municipal manager, and not necessarily to an executive mayor and/or a municipal council, such as the a tender evaluation committee.¹²⁰ Then there are functionaries who indirectly report to a municipal council, such as an internal audit unit.¹²¹ An internal audit unit is appointed in terms of section 165 of the MFMA to advise a municipal manager, but it is also obliged to report to a municipal audit committee, and therefore indirectly to a municipal council.¹²² Refer to the addendums attached hereto for a schematic layout of committees who only account to a municipal council.

2.5.2 The various functionaries who comprise the executive authority within a municipality.

It is submitted that the Constitution only refers to an executive in local government in broad terms. It seems that the specific powers and functions of an executive was left open, to be determined by subsequent national legislation. In following this notion, section 59 of the Systems Act makes it compulsory for a municipal council to create a system of delegations, and section 53 of the Systems Act requires a municipality to record the delegations in a “Terms of Reference” document. An executive authority of a municipality therefore derives its powers and functions through these delegations by a municipal council. A municipal council’s discretion to delegate powers and functions to an executive authority, is to some extent restricted, in that national and provincial

118 See the Municipal Systems Act s62.

119 See the Municipal Systems Act s62(4).

120 Note the MFMA s117 which determines that councillors may not partake in the evaluation or awarding of tenders.

121 Refer to the MFMA s165.

122 See the MFMA s165(2)(b).

legislation may assign certain powers and functions to specific functionaries within the executive structure of a municipality. An executive structure of a municipality is important in the context of this study, because it is the decisions of the functionaries within this executive structure, which may or may not be subject to an appeal in terms of section 62 of the Systems Act. The functionaries within an executive structure in a municipality is therefore dealt with in more detail below.

2.5.2.1 The political executive structure within a municipality.

During the transitional phase of local government, a political executive consisted of a committee of councillors, called an executive committee. The chairperson of such committee fulfilled the role as head of the political executive, similar to what the executive mayor currently does. A chairperson of a municipal council, during the transitional phase was referred to as the mayor. Although a very important person within the political structure of a municipality, the mayor, in that instance, fulfilled a ceremonial role and did not have any executive powers. After the enactment of national legislation such as the Structures Act, the Systems Act and the MFMA, the provincial government was empowered to decide on the type of municipalities in each respective province. This changed the position of the executive in municipalities drastically.¹²³ Post 2000, a municipal type with an executive committee, is now structured in such a way that the chairperson of an executive committee is called the mayor and a chairperson of a municipal council is called the Speaker. This study focuses mainly on a municipality of the type “mayoral executive system, combined with a ward participatory system.

(a) The executive mayor as a functionary within an executive structure of a municipality.

The executive mayor is an important functionary within the executive structure of a municipality. The Structures Act stipulates the powers and functions of an executive mayor,¹²⁴ and also envisages that a municipal council will delegate some of its executive

123 Refer also to paragraph 2.3 herein.

124 See s56 of the Structures Act.

powers and functions to an executive mayor.¹²⁵ The political executive leadership vested in an executive mayor for as far as it is authorized through a system of delegations. The decisions taken by an executive mayor in terms of the powers and functions delegated to him/her is important in the context of this study, as these are the decisions that may be appealed in terms of section 62 of the Systems act.¹²⁶

An executive mayor is appointed by a municipal council from amongst the members of a municipal council,¹²⁷ and fulfils a very important role as head of the executive on the political side of a municipality. His/her area of responsibilities and/or influence, is not only functional, i.e. the exercise of powers and functions received from a municipal council by means of delegation, within the geographical area of the municipality, but in fact is much wider. The area of responsibility of an executive mayor, due to his/her influence, also includes a commitment to inter-governmental relations and co-operative government. It is expected from an executive mayor to work closely with provincial and national government, and also to take part in various discussion forums.¹²⁸ An executive mayor is also expected to fulfil a ceremonial role, and will therefore host public functions and deliver public speeches. It is submitted that the functional area of an executive mayor's responsibility is derived from statutes, delegation and practise.

A municipal council may establish committees to assist an executive mayor.¹²⁹ The chairperson(s) for these committees are appointed by an executive mayor,¹³⁰ and his/her/their term of office coincides with the term of office of an executive mayor.¹³¹ These chairpersons are collectively referred to as the mayoral committee. Should a

125 Note s56(3)(f) of the Structures Act.

126 See the Systems Act s62(4)(c).

127 The Structures Act determines the procedure to be followed when an executive mayor is elected. See the Structures Act s55 and Schedule 3 to the Structures Act.

128 Such as District Co-ordinating Forums (hereinafter referred to as the "DCF"), the Premiers Co-ordinating Forum (hereinafter referred to as the "Minmay" Forum) etc.

129 Note s80 of the Structures Act.

130 See the Structures Act s60(1)(a).

131 Refer to the Structures Act s60(4).

mayor resign or cease to hold office, for whatever reason, then such mayoral committee is dissolved.¹³² In the matter of *Democratic Alliance and Another v Masondo N.O. and another*,¹³³ the issue before the court was whether minority political parties in a municipal council are entitled to representation on a mayoral committee in terms of section 60 of the Structures Act, read with section 160(8) of the Constitution. The contention was that an executive mayoral committee is a committee of council and should therefore be fairly represented by all political parties as intended by section 160(8) of the Constitution. The court held that an executive mayoral committee is not a committee of council, but indeed a committee appointed by an executive mayor and as such it does not have to comply with the requirements of section 160(8) of the Constitution. A mayoral committee should not be confused with portfolio committees, also referred to as section 80 committee(s), which is appointed by a municipal council.¹³⁴ The purpose of these committees are to support and advise an executive mayor, with regard to matters where a municipal council has designated powers and functions to an executive mayor in person, or where such powers are assigned to an executive mayor in terms of chapter 7 of the MFMA. It should be noted that an executive mayor may not sub-delegate any of the powers or functions received from a municipal council, unless such municipal council has specifically authorized the executive mayor to sub-delegate such matters.¹³⁵ Therefore, unless a portfolio committee has received specific sub-delegations from an executive mayor, it takes no decisions, but merely acts in a supporting role to such executive mayor. Unless such portfolio committee is authorised by sub-delegation to take final decisions, its decisions are not subject to an appeal in terms of section 62 of the Systems Act.

132 See the Structures Act s60(5).

133 *Democratic Alliance and Another v Masondo and Another 2003 (2) SA 413 (CC)* (hereinafter referred to as “*DA v Masondo*”).

134 See the Structures Act s80(1).

135 S59(2)(b) of the MFMA, authorizes council to impose conditions or limitations when delegating powers and functions.

The essence of a system of delegations is that a delegating authority always remains ultimately responsible. In that a mayor only has powers and functions that he/she received from a municipal council through a system of delegations, he/she must report to the municipal council on all decisions taken by him/her. This is done in a structured way, either directly or through the exercise of council's oversight role.¹³⁶ An executive mayor may take a report directly to a municipal council on specific matters, and/or deliver reports to an oversight committee/MPAC,¹³⁷ and/or to an Audit Committee,¹³⁸ who considers the mayoral reports and/or conduct and then makes recommendations to a municipal council.

(b) The portfolio committee.

A municipal council may appoint committees of councillors to assist an executive mayor and such committees must report to an executive mayor in accordance with its directions.¹³⁹ These committees must be composed in a manner that allows for parties and interests reflected within a municipal council to be fairly represented.¹⁴⁰ Although a municipal council appoints such committees and the members to such committees, an executive mayor appoints the chairpersons of the relevant committees.¹⁴¹ The chairpersons are collectively referred to as the mayoral committee. The mayoral committee may not consist of more than 10 persons or 20% of the total amount of councillors in a respective municipal council, whichever is the least.¹⁴² Although the members of a mayoral committee may receive powers and functions from an executive mayor to dispose of specific matters, the portfolio committee generally only have advisory powers, and as such takes no decisions, it could at best debate an issue and make recommendations to a member of a mayoral committee, or an executive mayor,

136 Refer to par 2.9 herein for a discussion on oversight.

137 See the MFMA ss127 and 129. For a discussion on MPAC see par 2.9.1 herein.

138 Note the MFMA s166 and the responsibilities of executive mayors in terms of s56 the Structures Act.

139 See the Structures Act s80.

140 Note the Constitution s160(8)(a).

141 See the Structures Act s60(1).

142 Refer to the Structures Act Section 60(2).

whoever is vested with delegated authority to dispose of a matter. It is, however, possible for an executive mayor to sub-delegate to a portfolio committee, subject to the direction of a municipal council.¹⁴³ As such, the portfolio committee may be important in the context of this study, because if it is indeed vested with delegated authority to dispose of matters, then its decisions will be subject to an appeal in terms of section 62.

(c) The individual councillor.

Although a Speaker, Mayor and members of a mayoral committee are regarded as “full time” councillors, they are also individual councillors, who are referred to in legislation as “political office bearers”.¹⁴⁴ The discussion in this paragraph is aimed at those councillors who are not political office bearers. An individual councillor is not only a member of a municipal council, but also a member of a political structure. The powers and functions of a municipal councillor are not clearly defined in the legislation which applies to local government. It flows from this that an individual municipal councillor generally has no powers. This should, however, be qualified, in that it is possible for an executive mayor, or executive committee to delegate powers and/or functions to individual councillors, if so permitted by a municipal council. This, however, is the exception to the rule. The strength of an individual councillor is generally a collective strength, which is exercised when municipal councillors act in a group within a committee structure. A municipal ward councillor is the exception to this rule, pertaining to his/her participation in ward committees. As a collective, municipal councillors have specific duties. A councillor is obliged to attend meetings of a municipal council and its committees on which he/she serves, simply because without such attendance, the collective structure and power of councillors will be seriously undermined. It is therefore to be expected that non-attendance of meetings or the failure to remain in attendance is a serious transgression of the code of conduct, which may result in a councillor being fined or removed as a councillor. The further obligation of individual councillors flows from the code of conduct for councillors.¹⁴⁵

143 Refer to s59(2) of the Systems Act.

144 Note the Systems Act s1.

145 See Schedule 1 to the Systems Act s2.

A councillor's access to information is limited. He/she may only inspect documents in the possession of a municipality to the extent that access to such information is reasonably necessary to perform his/her duties as a councillor. Furthermore, a councillor acting on his/her own, has very limited authority, if at all, to request members of a municipal administration to act in a certain way. Section 11 of the code of conduct for councillors provides that a councillor may not interfere in the administration of the municipality. Interference in the administration is often misunderstood. There could never be interference when a municipal council, or a committee of a municipal council, with the authority to do so, takes a decision directing the administration to act in a specific manner. However, when an individual councillor, acts on his/her own in a similar way, it may constitute interference in the municipal administration.

It was mentioned earlier herein that councillors act collectively, and that a ward councillor is an exception to this rule, because ward councillors, through the ward committee system, plays an important role in representing the community, and in promoting local democracy. It is also a mechanism through which councillors account to the electorate. In this instance, a ward councillor as chairman of a ward committee, has additional functions and responsibilities,¹⁴⁶ as follows :

- He/she convenes the meetings of the ward committee.
- He/she determines the agenda.
- He/she presides at meetings of the ward committee.
- He/she ensures that the attendance register is signed by the members present, and that it is forwarded quarterly to the office of the Speaker.
- He/she ensures that written minutes of the ward committee meetings are kept, and that it is forwarded to the executive mayor.

146 Refer to the Structures Act chapter 4 Part 4.

- He/she ensures that the views of the ward committee members on specific issues are carried forward to the portfolio committee structures to be debated, and if so, decided to be adopted.

The importance of an individual councillor in the context of this study, is the influence that an individual councillor has, as part of a collective, in the process of decision making. As stated earlier herein, it may also be that an individual councillor possesses delegated authority to dispose of matters, which may render his/her decisions in such instance subject to an appeal in terms of section 62 of the Systems Act.

2.5.2.2 The administrative executive authority within a municipality.

A municipal manager is the accounting officer of a municipality.¹⁴⁷ He/she must not only possess the relevant skills and qualifications that a position of this magnitude requires, but must also be empowered by a municipal council to fulfil his/her duties, through a system of delegations. In the last mentioned regard, the Systems Act,¹⁴⁸ determines that an employment contract of a municipal manager must include details of his/her duties as well as time frames within which certain performance objectives and targets must be met. The Systems Act further determines that the performance of a municipal manager must be measured. It flows from this that a municipal manager not only holds an important position in a municipality, but is in fact the corner stone upon which an efficient and/or successful municipal administration is built. For this reason, the legislature saw it fit to confer a number of important duties, powers and functions on a municipal manager.¹⁴⁹ A municipal manager is further responsible for the exercise of all powers and the performance of all duties delegated by a municipal council, or sub-delegated by other delegating authorities of a municipality, to a municipal manager. This is important in the context of this study, because the appeal mechanism created in terms of section 62 operates within the framework of delegations. A municipal manager is also an appeal authority. Section 62(4)a of the Systems Act determines that a

147 See The MFMA s60.

148 Note the Systems Act ss 56(1)(b) and 56(3) and 56(4).

149 Refer to the Systems Act s55.

municipal manager is the competent appeal authority, pertaining to a decision taken by a member of the administration in terms of a power or duty delegated or sub-delegated to such member, and whose decision has affected the rights of a person.

It is important for a municipal manager to develop an appropriate system of delegations. Such a system will enable a municipal manager, to manage effectively and to account to an executive mayor and a municipal council, and other bodies as may be required by the relevant legislation,¹⁵⁰ Furthermore, such an appropriate system of delegation that will both maximise administrative and operational efficiency and provide adequate checks and balances in a municipality's financial administration. In accordance with such system, a municipal manager may, if permitted by a municipal council delegate any of the powers or duties assigned to such municipal manager, to any member of the administration of a municipality.¹⁵¹

The MFMA, chapter 8 part 1,¹⁵² provides detail of the assigned financial responsibilities that are to be delegated to a municipal manager. These matters so delegated form the main source of a municipal manager's financial duties, powers and functions. Section 79(3)e of the MFMA determines that a municipal manager in his/her capacity as accounting officer remains liable for decisions taken by members of the administration in terms of delegated authority where a municipal manager was the delegating authority. A municipal manager is therefore obliged to exercise oversight in this regard. In order to assist a municipal manager in the performance of oversight, the MFMA determines in section 165 that each municipality must have an internal audit unit to advise and assist the municipality.¹⁵³

150 See the MFMA s79.

151 Note ss59(2)(c) and 59(4) of the Systems Act.

152 Refer to the MFMA ss60 to 76.; See also the MFMA s55(2).

153 Note par 2.9 herein.

Because a municipal manager as a functionary, operates within a system of delegations, his/her decisions are in certain instances subject to an appeal. The competent appeal authority in this instance is an executive mayor.¹⁵⁴

2.6 The role of traditional leaders in local government.

Prior to the adoption of the Constitution, traditional authorities fulfilled the role of municipalities in the former “homelands”.¹⁵⁵ During the transition phase, traditional authorities were in some instances, regarded as local government bodies.¹⁵⁶ Section 182 of the Interim Constitution authorized traditional leaders to be ex officio members of the relevant municipal councils. When the Constitution was enacted, provision was made for municipalities in the whole territory of South Africa. Therefore the need for “Traditional Authorities”, to be recognized as municipalities, no longer existed. Chapter 12 of the Constitution, now determines that national legislation may provide for traditional leaders to play a role as an institution at local government level to deal with matters relating to traditional leadership. The subsequent Structures Act reduced the role of traditional leaders to that of an advisory body, who may participate in council meetings. Such participation it seems is only aimed at areas where a system of customary law is traditionally observed.¹⁵⁷ The value of this in the context of this study is to indicate that traditional leaders no longer play an important role in the executive of a municipality, and as such, it is not envisaged that traditional leaders can participate in decisions within a municipality that could be subject to an appeal in terms of section 62. Notwithstanding the aforesaid, the participation by traditional leaders, in the way that it is currently structured can enhance the local government object to ensure that communities participate in the affairs of local government, which is important in the context of this study, because the very purpose of the appeal mechanism created in terms of section 62 of the Systems Act, is not only to enhance community participation

154 See the Systems Act s62(4)(b).

155 See Steytler & de Visser (2010) ch22.

156 Note Section 1(2) of the Local Government Transition Act 209 of 1993 (hereinafter referred to as the “LGTA”).

157 See the Structures Act s81.

in the structure of checks and balances to the system of delegations, but in fact to create a mechanism through which members of the public can question decisions taken by functionaries within the executive structure of a municipality.

2.7 Municipal powers and functions.

2.7.1 Original powers and functions.

In terms of the Constitution, local government not only has an autonomous identity, but as one of the three spheres of government, has constitutionally protected powers and functions. Furthermore, the legislative powers of municipal councils result in original legislation being created. The Constitution determines that a municipality has the right to govern on its own initiative.¹⁵⁸ This confirms that national and provincial government may not interfere with the execution of powers and functions allocated to local government. As such, local government must regulate its own affairs. This autonomous identity, however, is executed not only within the parameters of local government policies and legislation, but also within the parameters of national and provincial legislation. It will become apparent later herein that it is not always easy to determine when national and provincial government impede on the autonomous identity of local government, due to the complex and interwoven nature of legislation that govern local government.¹⁵⁹

A municipality derives its original powers and functions not only from statutes, but also from its status as a legal person created in terms of legislation.¹⁶⁰ As a legal personality, a municipality may enter into agreements with others to rent or lease property, or to purchase or sell property, and it may sue or be sued.¹⁶¹ As to powers derived from statutes, the Constitution is the primary source of the powers and functions that is reasonably necessary for, or incidental to, the effective performance of the

158 Note s151(3) of the Constitution.

159 See par 2.9.2 herein.

160 See ss156(1) and 156(2) of the Constitution.

161 Note the Systems Act s2(d).

municipality's main functions.¹⁶² The exclusive competencies of municipalities are listed in part B of schedule 4 and part B of schedule 5 to the Constitution. Section 156(1)(a) of the Constitution, determines that municipalities have the exclusive right to administer all matters contained therein. This includes the executive authority,¹⁶³ and the legislative authority.¹⁶⁴ Although municipalities have the exclusive competency to regulate these matters, national government and provincial government may regulate the way in which municipalities exercise those powers and functions.¹⁶⁵

The difference between schedules 4 and 5 of the Constitution with regard to local government is important. Part A of schedule 4 of the Constitution contains the functional areas of concurrent national and provincial legislative competence which means that both spheres have competitive legislative competence. Part B of schedule 4 of the Constitution contains local government matters, although restricted to the extent that provincial legislation may make provision for the monitoring and support of local government,¹⁶⁶ and national and provincial governments may regulate the executive competence of a municipality for reasons of efficiency.¹⁶⁷ Part A of schedule 5 of the Constitution contains the functional areas of exclusive provincial competence and part B of schedule 5 of the Constitution contains local government matters, although restricted to the extent that provincial legislation may be made for the monitoring, support and regulation of such matters.¹⁶⁸ The main difference in part B of schedule 4 of the Constitution is that the national government has no legislative competence therein, except in exceptional circumstances when necessary for the purpose of :

- “(a) to maintain national security ;
- (b) to maintain economic unity ;
- (c) to maintain essential national standards ;

162 Refer to the Constitution s156.

163 See the Constitution s156(1)a.

164 See the Constitution s156(2).

165 Note the Constitution s155(7).

166 Refer to the Constitution s156(6)a.

167 See the Constitution s155(7). See also chapter 10 of the Systems Act.

168 Note the Constitution ss155(6)a and 155(7).

- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or the country as a whole.”¹⁶⁹

Municipalities also have the original power and function to generate revenue. Municipalities are empowered by section 229 of the Constitution to impose taxes and fees for services rendered. Section 229 of the Constitution determines that a municipality may impose :

- “(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
- (b) if authorized by national legislation, other taxes, levies and duties appropriate to local government ... “

These powers, however, are not unlimited in that section 229(1) of the Constitution which clearly states that these powers are subject to sub sections (2), (3) and (4) of section 229, which determines that :

- “The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of a municipality, or other taxes, levies or duties may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across the municipal boundaries, or the national mobility of goods, services, capital or labour,” and it “may be regulated by national legislation”.¹⁷⁰
- “ When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation” taking into account certain criteria”.¹⁷¹
- When the need arises to interpret whether a specific competency is exclusive to local government, it should be borne in mind that the very purpose of these

169 See the Constitution s44(2).

170 Refer to the Constitution s229 (2).

171 See the Constitution ss229 (3)(a) to (3)(e).

competencies are to enable local government to fulfill its constitutional objects.¹⁷² In this regard, it may be that a municipality may decide to execute a power or function which is not explicitly listed in part B of schedule 4 or part B of schedule 5, but which is incidental to those competencies, and which is reasonably required for the effective performance of its functions as stipulated in section 156(5) of the Constitution. Section 151(3) of the Constitution, further determines that national and provincial government may assign matters to local government. These assignments set the parameters within which local government may lawfully execute its powers and functions. In this context it is important to note that the competencies of local government listed in part B to schedule 4 and part B to schedule 5 of the Constitution, are subject to monitoring and support by national and provincial government.¹⁷³ This obligation on national and provincial government to exercise oversight should be carefully balanced against the prohibition to interfere with the autonomous identity of local government as stated in the Constitution, section 151(3). In this regard, the Constitution, section 155(7) read with the Constitution, section 44(1)(a)(ii) is significant in that it empowers national government to regulate the exercise by municipalities of their executive authority, but is limited to "all matters except the functional areas described in Part 2 (sic) of Schedule 4 and Part 2 (sic) of Schedule 5. In these areas Parliament has limited legislative authority."¹⁷⁴ It seems that the ability of national government to create legislation in order to regulate the execution of executive powers and functions, is limited to the creation of a legal framework to exercise oversight, and to set minimum standards.

2.7.2 Additional powers and functions in terms of assignments.

172 Note s152 of the Constitution.

173 See the Constitution ss155(6) and 155(7).

174 Steytler & de Visser (2010) at 22-53. Note also the discussion of *Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC), 2001(9) BCLR 883 (CC)* at par 25.

A municipality may perform certain powers and functions which fall within the functional areas of another sphere of government, subject thereto that such powers and functions are lawfully transferred to a municipality.¹⁷⁵ If a municipality performs a power or function that was not lawfully transferred to it, and which falls outside the functional area of local government, its act will be unlawful. This is important in the context of this study. Although one of the rights that stands to be protected in terms of section 62(1), is the right to administrative action which is lawful, reasonable and fair, it must be emphasized that section 62 only operates within a system of delegations in local government. It flows from this that if a municipal council, who is the delegating authority in local government did not have the authority to delegate a specific matter, such decision falls outside the ambit of the system of delegations, because the unlawful act is the municipal council's act of delegation, The decisions of a municipal council is never subject to an appeal in terms of section 62.

Pertaining to oversight it is also important that the regulations to the Systems Act indicate that there is an assumption as to the legal character of a legislative assignment, in that it implies that the municipality acts in the name and on behalf of the principal. The municipality therefore binds the principal in the decisions taken within its mandate.¹⁷⁶

The matters which may be so assigned by parliament are those listed in schedule 4 A of the Constitution, or matters which fall within parliament's exclusive competence, which relate to matters which are not listed in schedule 4 and 5. Parliament is empowered in terms of section 156(1)(b) of the Constitution, to assign such additional matters which falls within the exclusive competence of parliament to municipalities. If section 156(2) of the Constitution is read with section 156(1)(b) of the Constitution then it becomes clear that municipalities have both executive and legislative power in terms of any additional matters assigned to them by national legislation. With regard to matters which falls within parliament's exclusive competence, section 44(1)(a)(iii) of the Constitution

175 Refer to the Constitution ss44, 99, 104, 126 and 156.

176 See the Systems Act : Guidelines on allocation of additional powers and functions s2(b).

empowers parliament to assign to municipalities the power to make by-laws "on any matters specified in the Act, irrespective of whether those powers fall within parliament's concurrent powers listed in schedule 4A or parliament's exclusive legislative domain".¹⁷⁷ It seems that such an assignment by parliament to municipalities is done when parliament passes legislation to that effect. Such legislation may be repealed at any time, effectively revoking the assignment. Section 156(1)(b) read with section 156(2) of the Constitution, empowers provincial legislatures to assign any additional executive and/or legislative powers and functions to municipalities. In this regard, section 104(1)(c) of the Constitution, empowers provincial legislatures to assign to a municipality the power to make by-laws on any matters in terms of a provincial Act. Only matters listed in schedule 4A and 5A may be assigned in terms of section 156(1)(b) and section 104(1)(c) of the Constitution.¹⁷⁸ These assignments are additional to the original legislative power of municipalities in terms of the matters listed in schedule 4 B and schedule 5 B. Any matter assigned in terms of a provincial Act to municipalities invoke the responsibility by provincial government to exercise oversight over the execution of such power or function and can be revoked at any time by repealing the Act.

Section 156(4) of the Constitution recognises that municipalities may in certain instances be the more effective level of government to exercise certain matters listed in part A of schedule 4 or part A of schedule 5. This is always subject thereto that a municipality has the capacity to exercise such power or function. Such an assignment and/or transfer of power or functions are done in terms of an agreement, and as such, both parties should reach consensus as to the terms and conditions of such assignment. The agreement itself should provide when the transfer of such power or function should be terminated. It is important to note that an assignment in terms of section 156(4) of the Constitution, cannot include the transfer of legislative power to a municipality, as this can only be done through parliamentary or provincial legislation.

177 See the Systems Act : Guidelines on allocation of additional powers and functions. s7(4).

178 See the Systems Act : Guidelines on allocation of additional powers and functions. s8(4).

A cabinet member may, in terms of section 99 of the Constitution assign any power or function that is to be exercised in terms of an Act of parliament, to a municipality. This is done by agreement which will become effective upon proclamation thereof by the president. There is a distinct difference between such an executive assignment and that of a legislative assignment. An executive assignment is based on an agreement between two parties, whereas a legislative assignment is regulated in accordance with the requirements of co-operative government as set out in chapter 3 of the Constitution.¹⁷⁹

In terms of section 126 of the Constitution, an MEC may assign any power or function which should be exercised by provincial government in terms of an Act of Parliament (national or provincial) to a municipality. This assignment is done in terms of an agreement between the parties and the terms and conditions of each agreement must be consistent with the national or provincial Act in terms of which the relevant power or function must be exercised or performed. The assignment becomes effective upon proclamation by the premier of the province.¹⁸⁰

2.7.3 Additional powers and functions in terms of delegation.

Delegation to local government is authorized in terms of section 238(a) of the Constitution or in terms of a power contained in national or provincial legislation.¹⁸¹ The regulations to the Systems Act indicate that there is an assumption as to the legal character of a delegation, in that it implies that the municipality to whom the power or function is delegated, acts in the name of the delegating authority, and that the delegating authority therefore remains responsible and accountable for the execution of the power or function.¹⁸²

179 See the Systems Act : Guidelines on allocation of additional powers and functions. s10.

180 Note the Systems Act : Guidelines on allocation of additional powers and functions. s11.

181 Refer to the Systems Act : Guidelines on allocation of additional powers and functions. s1.

182 See the Systems Act : Guidelines on allocation of additional powers and functions. s2(c).

The legal framework for the delegation of powers and functions in terms of legislation is found in section 238(a) of the Constitution which authorises executive organs of state to delegate to municipalities powers or functions that are to be exercised or performed in terms of legislation, and section 238(b) of the Constitution which authorises municipalities to exercise any power or function for any other executive organ of state on a delegation basis. Section 238(a) of the Constitution empowers executive organs of the state, such as cabinet members and MEC's, to transfer certain powers and functions, subject thereto that the delegation must be consistent with the legislation in terms of which the relevant powers and function is exercised. These delegations are done by means of enacting legislation to that effect. Although section 238(a) of the Constitution does not specifically provide therefore that there should be an agreement between the parties, it is important to note that before the enactment of legislation, a process should be followed during which the relevant municipalities may comment, and as such, take part in the formulation of the specific Act.

2.7.4 Additional powers and functions in terms of agency agreements.

An "Agency" agreement is defined as "an agreement contemplated in section 238 (b) of the Constitution, in terms of which a municipality undertakes the exercise of power or function on behalf of an executive organ of state on an agency basis".¹⁸³ Part 2 of chapter 2 to the guidelines on allocation of additional powers and functions to municipalities in the regulations to the Systems Act, indicate that municipalities may execute powers and/or functions for and on behalf of a cabinet member, MEC or other executive organ of state. The execution of the aforesaid power or function is done in accordance with an agreement. In this regard, the executive organ of state, being the cabinet member or MEC will be the agency and the municipality will be the agent. The agent will act on behalf of the agency, and the terms and conditions of such agency must be agreed upon by the parties. As there are no statutory provisions regulating the allocation of powers and functions to municipalities on a delegation or agency basis, such delegations should be confined to that specifically authorised by section 238 of the

183 See the Systems Act : Guidelines on allocation of additional powers and functions. s1.

Constitution which should be closely followed in order to conclude a valid agency agreement. Before an organ of state initiating a delegation by means of an agency agreement could enter into such an agreement with a municipality, it should obtain the views of the minister of provincial and local government, and of national treasury. If such organ of state is a provincial organ of state, it should obtain the views of the MEC for local government as well as the views of the MEC for finance in the province.¹⁸⁴ In obtaining the views of the different role players as aforesaid, an explanatory memorandum should be submitted to these role players.¹⁸⁵ It was said earlier herein that section 62 of the Systems Act only applies to lawful decisions. The proper procedure to be followed is therefore important in the context of this study.

2.7.5 Division of powers and functions between local and district municipalities.

The Constitution, determines that national legislation must make “an appropriate division of powers and functions” between category B and category C municipalities.¹⁸⁶ The Structures Act does provide a list of the various functions of district municipalities,¹⁸⁷ and allocates the balance of the functions of parts B of schedules 4 and 5 to local municipalities.¹⁸⁸ It is also important to note that the MEC for local government in the province may adjust the division of powers and functions between a district and local municipality.¹⁸⁹

2.8 The provision of services to communities.

It was mentioned earlier in this study that municipalities are developmental in nature. The provision of services is a core function of municipalities through which communities are developed. If this is considered against the background that communities must be

184 See the Systems Act : Guidelines on allocation of additional powers and functions. s64.

185 Note the Systems Act : Guidelines on allocation of additional powers and functions. s63.

186 Refer to the Constitution s155(3).

187 See the Structures Act s84.

188 Note the Structures Act s83(1).

189 Refer to the Structures Act s85.

involved in local government affairs, then it makes sense for local government to give effect to its mandate, a mechanism should exist through which members of the community can enforce participation. One such mechanism is section 62 of the Systems Act. The responsibility to ensure that the needs of the community is adequately addressed, rests with the executive committee or executive mayor,¹⁹⁰ mainly through the compilation of an IDP. The responsibility to ensure that sustainable services are rendered is the responsibility of a municipal manager.¹⁹¹ As a mayor and a municipal manager both act in terms of delegated authority, their decisions in this regard may be subject to an appeal in terms of section 62. The services to be provided are those listed in schedule 4B and schedule 5B of the Constitution. As discussed earlier herein, these competencies may be supplemented by assignments, delegations and agency agreements from national and provincial government. Section 156(1) of the Constitution, by using the words “authority” and “right”, suggests that the obligation to provide services is not a choice, but instead an obligation which cuts to the core of local government.¹⁹² If a municipality fails to provide basic services to its community, then a municipal council may be dissolved, by means of provincial intervention.¹⁹³

Communities should through public participation take part in the compilation of the IDP in which their specific needs are recorded, in order of priority. In that municipalities have an obligation to be developmental, it should address issues such as social upliftment and early childhood development and economic growth, to name but a few. Stated differently, members of the community should be able to take part in decisions that affect their every day lives, in order to shape the environment they live in, to be what they want it to be.

2.9 Oversight over the executive structure within a municipality.

190 See the Structures Act s56(2)(a).

191 Note s55(1)(d) of the Systems Act.

192 Refer to Steytler & de Visser (2010) at 22-66.

193 See the Constitution ss152(1)b and 153 and 139(5).

Oversight flows from a system of delegations where the delegating authority remains ultimately responsible for the execution of the function. Due to the complex nature of local government and the extent of the powers conferred on the political structures, political office bearers and a municipal manager,¹⁹⁴ the need arises, on the political side to institute a framework of functionaries to assist a municipal council and executive mayor, and an administrative structure to assist a municipal manager. In order to ensure that these functionaries and/or persons exercise their powers within the boundaries of their delegated authority, the legislator created a system of oversight and a review and appeal mechanism, respectively in terms of section(s) 129, 165 and 166 of the MFMA and section(s) 59 and 62 of the Systems Act. These mechanisms support the obligation to have adequate checks and balances. It seems that the purpose of oversight is to ensure that the functionaries who are the recipient of delegated powers, perform their work effectively. Whereas the purpose of review and/or appeal is to revisit decisions taken, by functionaries in terms of delegated authority. As such, this review and/or appeal authority is to provide for “adequate checks and balances” to the system of delegations.¹⁹⁵ It could be argued that the obligation to provide for adequate “checks and balances” imposes on local government an obligation to create a separation of powers within municipalities. As such, a system in terms of which the executive structure is held accountable for its actions by a structure distinct from it.

In terms of the separation of powers model, the functions of government are divided into legislative, executive and judicial functions. Although the division is not absolute,¹⁹⁶ the purpose of the model is to prevent the abuse of power by separating the functions of government. Therefore the legislature will make laws, the executive will implement the

194 Refer to the Systems Act. ss53 and 59 and 62(1).

195 See the Systems Act. s59(1); Bekink (2006) at 259 par 15.2.2.1.

196 *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry & Fisheries and others* ZACC26(11 July 2013) (hereinafter referred to as “*National Society for the Prevention of cruelty to Animals v Minister of Agriculture, Forestry & Fisheries*”) par 13.

laws and the judiciary will enforce the laws. The model was first introduced in the South African Constitution by principle VI, contained in the Interim Constitution as follows :

"There shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness".

The model was not directly included in the Constitution, but it was implied, in that section 43 of the Constitution prescribe that the legislative power, executive power and judicial power vest in different institutions.¹⁹⁷ It is submitted that although this model applies equally to every sphere of government, its application in local government is subject to certain measures being instituted by a municipal council. As such, the application of the model of separation of powers may differ from municipality to municipality. The appeal mechanism created in terms of section 62 of the Systems Act is important in this context, as it is a mechanism that supports the model of separation of powers.

2.9.1 Oversight by a municipal council over a municipal executive structure.

The obligation to exercise oversight flows from a municipal council's ultimate responsibility as the accountable legal person over all matters it has delegated to councillors, political office bearers and the administration. Although there is a responsibility on the councillors, political office bearers and the administration to report back to a municipal council on the matters delegated to them, a municipal council is also responsible to ensure that structures exist through which matters could be reported

197 The legislative authority of the national sphere of government is vested in parliament. See the Constitution s44 : The legislative authority of the provincial sphere of government is vested in provincial legislature. See the Constitution, s104; The legislative authority of the local sphere of government is vested in the municipal council. See the Constitution, s156; The executive authority of the Republic is vested in the president. See the Constitution, s85; The executive authority of the Province is vested in the premier of that province. See the Constitution, s125 ; The legislative and executive authority of a municipality is vested in its municipal council. See the Constitution, s151(2) ; The judicial authority of the Republic is vested in the courts. See the Constitution, s165(1).

back to a municipal council. The oversight structure consists of an oversight committee created in terms of section 79 of the Structures Act. Municipalities in South Africa have during 2011 instituted “Municipal Public Accounts Committees” (MPAC) in terms of section 79 of the Structures Act to exercise this oversight function. The oversight structure further consists of an audit committee authorized in terms of section 166 of the MFMA and the internal audit unit, authorized in terms of section 165 of the MFMA. These oversight functionaries are dealt with in more detail below. It is important to note that councillors in their individual capacity have no oversight authority.

The legal framework in terms of which oversight is prescribed, is as follows :

- a) Section 11(3)g and section 11(3)f of the Systems Act, obliges a council to monitor municipal services, and the impact and effectiveness of any services, policies, programs and plans.
- b) Section 40 of the Systems Act determines that the council must establish mechanisms to monitor and review its performance management system.
- c) Section 129 of the MFMA requires a committee of council to consider the annual report and to prepare an oversight report reflecting on the matters set out in this section.

Oversight in the context of this study is important. It is submitted that oversight is a vital component of the obligation to provide for adequate checks and balances to the system of delegations of each respective municipality in South Africa.

2.9.1.1 The Municipal Public Accounts Committee.

The MPAC is an oversight committee of a municipal council, over the political and administrative executive structures within a municipality. The main purpose of MPAC flows from section 129 of the MFMA, to consider the Annual Report, and to make recommendations to a municipal council in this regard. It is also possible for a municipal council to delegate further oversight functions to the MPAC, specifically with regard to matters which are not being exercised by the other oversight functionaries. An example

of one such function is to investigate and advise a municipal council whether the municipal budget is supported by the IDP. The MPAC reports directly to council,¹⁹⁸ and its decisions are not subject to an appeal in terms of section 62 of the Systems Act.

2.9.1.2 The audit committee.

Section 166 of the MFMA requires each municipality to have an audit committee. The audit committee is an independent advisory body which must advise the municipal council, the political office-bearers, the accounting officer and the management staff of a municipality relating to internal financial control and internal audits. The purpose of an

198 Although it seems that the powers and functions of MPAC overlap with the powers and functions of the Audit Committee, this is not so. These two oversight committees operate parallel to one another, and both report to council on different matters. There are various matters that could be included in the terms of reference of MPAC, at the discretion of a municipal council. Currently the only statutory obligation of MPAC is found in Section 129 of the MFMA, as such, to evaluate the annual report and to report to the municipal council thereon. This entails amongst others, an evaluation of the financial statements, the Service Delivery and Budget Implementation Plan (hereinafter referred to as the "SDBIP"), and also the performance of the municipal manager and managers who report to the municipal manager. Another important oversight function that can be exercised by MPAC is to evaluate and determine whether the IDP informs the budget. Meetings of the MPAC should be open to the public. s160(7) of The Constitution, is prescriptive, in that a municipal council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted. As the MPAC is a formal committee of a municipal council, dedicated administrative as well as committee staff members must be made available to assist in the execution of its functions. Formal agendas and minutes of meetings need to be prepared by committee staff under the guidance of the chairperson. Agendas of meetings must be delivered to members in advance in order for them to prepare for the meeting. Documents produced in a municipality that need to be submitted to the MPAC in terms of its terms of reference, must be submitted to the committee staff as soon as it is finalised in order to include it in the MPAC agenda for the next meeting. The purpose of the MPAC should be to enhance oversight in a municipality, and not to duplicate functions which already exist. In this regard the MPAC should not infringe upon the competency of the audit committee as stated in s166 of the MFMA, but in fact focus on the matters over which oversight could be exercised and which is not addressed in s166 of the MFMA.

audit committee is to assist a municipal council in the exercise of its oversight obligation over powers and functions delegated by a municipal council to an executive. The audit committee must include at least three people with appropriate experience, and no councillor may be a member of the audit committee, to the end that the audit committee should evaluate the financial instruments and conduct of a municipality without interference.¹⁹⁹ The audit report should reflect an objective opinion of the financial status of the relevant municipality, which is reported directly to the municipal council. This committee is not a section 79 committee, and makes recommendations to a municipal council. Its decisions are not subject to an appeal in terms of section 62 of the Systems Act.

2.9.1.3 The internal audit unit.

The main purpose of this oversight functionary is to assist a municipal manager with internal financial control over the matters delegated by a municipal manager to members of the administrative executive. This oversight functionary does not function in isolation, but in fact is part of the oversight structure within a municipality, in that section 165(2)b and section 166(3)(b)(i) of the MFMA determines that the report of the internal audit unit must be submitted to the audit committee who reports directly to a municipal council. The specific area of responsibility of the internal audit unit is prescribed by section 165(2) of the MFMA. The decisions of this functionary is not subject to an appeal in terms of section 62 of the Systems Act.

2.9.2 Oversight by national and provincial government over local government.

2.9.2.1 Supervision of municipalities.

In the *first Certification Judgement*,²⁰⁰ the court struck a balance between the autonomous identity of local government and the need for supervision by “higher” levels of government. It said as follows :

199 See s166(1) of the MFMA which determines that the Audit committee must be an independent body.

200 See the discussion in Steytler & de Visser (2010) at 22 – 112 of : *Ex Parte Chairperson of the Constitutional assembly In Re : Certification of the Constitution of the Republic of South Africa*,

"What the [new text] seeks hereby to realize is a structure for [local government] that, on the one hand, reveals a concern for the autonomy and integrity of local government and prescribes a hands-off relationship between local government and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor local government functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy. This is the necessary hands-on component of the relationship."

Due to the protection of the autonomous identity of local government, national and provincial government may only intervene after adequate supervision and support indicate that drastic measures should be taken as a last resort.²⁰¹

(a) Monitoring of municipalities.

By way of an example section 155(1) of the Constitution, should be read with section 155 (2) and section 155 (3) of the Constitution, which provides that national government has the legislative competency and provincial government has the executive competency pertaining to the establishment of municipalities. The words "legislative or other measures" referred to in section 155(6) could at best refer to a legislative competency which is limited to "monitoring and providing support to local government, and promoting the development of local government."²⁰²

(b) Support to municipalities.

National government provides the broad legislative framework in terms of which local government must effectively perform its function.²⁰³ This framework may be supplemented by provincial legislation.²⁰⁴ The word 'supervision' is a broad concept that

1996, 1996(4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) (hereinafter referred to as the "first Certification judgement").

201 See *ODM v Premier of the Western Cape*.

202 *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of Kwazulu Natal v President of the Republic of South Africa and Others*, at par 43.

203 Note the Constitution s155(7).

204 Refer to the Constitution s155(6).

"encompasses the practice of monitoring".²⁰⁵ To monitor in essence means to check whether local government executes its functions in terms of the current legislative framework within which it operates. One example is the submission of municipal annual financial statements to the auditor general and its report thereon.²⁰⁶ A further example with regard to provincial government, is the quarterly reports in terms of section 72 of the MFMA which municipalities are obliged to submit to provincial treasury.

(c) Duty of support.

The support which occurs within the framework of supervision, such as to deliver a comment on a report submitted is distinctly different from support given in terms of co-operative government. Steytler & de Visser argues that :

"...the duty of support in terms of FC section 41(1)(b)(ii) is reciprocal. The support contemplated by FC section 154(1) reflects the guardianship that the higher levels of government have over local government. While both forms of support would require the participation of the receiving municipality, different consequences could follow a failure to fully participate in the planned supervision".²⁰⁷

For example, if the auditor general advises that certain legislative measures were not complied with and the municipality did not take corrective steps, it may lead to more drastic measures being imposed on the municipality. The duty to support from national government and provincial government, it seems is aimed at ensuring that the powers and functions in local government is exercised properly in order to keep municipalities on a sound footing. Support given in terms of co-operative governance, it seems is aimed at capacity building, and is done from a basis that all three spheres of government are equal, whereas the support which is given within the framework of supervision, seems to be from a basis where national and provincial governments are "higher" levels of government.²⁰⁸

205 See Steytler & de Visser (2010) at 22 -114.

206 Note the Constitution s216(2).

207 See Steytler & de Visser (2010) at 22 -16.

208 Refer to the MFMA chapter 5.

2.10 Co-operative government.

2.10.1 Constitutional framework for co-operative government.

Before 1993, local government was a competence of provincial government. The Constitution,²⁰⁹ now determines that government consists of 3 spheres which are distinctive, inter-dependent and inter-related. Post 1993, local government was elevated to become an equal sphere of government in South Africa. In that, national and provincial government was tasked with a roll of supervision, which to some extent is reciprocal, it became necessary to create a relationship between the 3 spheres. This relationship is aimed at protecting the autonomy of each sphere. Steytler & de Visser argue that :

"distinctiveness refers to the elements of local autonomy, inter-relatedness, to the supervision roll of national and provincial government over local government, and inter dependence to connote the co-operative relationship that must be pursued when the other two characteristics are being played out in practice. Co-operative government thus serves as a restraining principle of all three spheres of government when they exercise their distinctive powers and functions".²¹⁰

The broad framework for local government is found in chapter 7 of the Constitution. The Constitution also includes a mandate to national government to supplement the constitutional framework.²¹¹ In compliance with this framework, the Inter-Governmental Relations Framework Act,²¹² was enacted. Due to the large amount of municipalities, it was necessary to create a representative institution for all the municipalities which comprise of local government. Thus, the South African Local Government Association (hereinafter referred to as "SALGA") was instituted.²¹³ In a similar fashion, section 9 of the IGRF, authorises a representative institution on national government level. The national council of provinces (hereinafter referred to as the "NCOP") fulfil this function in parliament. Section 67 of the Constitution, determines the participation of local government in the NCOP through SALGA, who must nominate 10 members from local

209 Note the Constitution of the RSA 1996 s40(1).

210 See Steytler & de Visser 22-127.

211 Note the Constitution s164.

212 Act 13 of 2005 (hereinafter referred to as the "IGRFA").

213 Sometimes referred to as organised local government.

government to represent local government in the NCOP proceedings. These members, however, may not vote. This reminds one almost of the participation of the community in local government affairs, in that they may sit in, but not speak. On a provincial level, section 16 of the IGRFA, provides for a premiers inter-governmental forum. Local government is represented in these forums, by the mayors of municipalities in the respective provinces. As far as the legislature is concerned, local government is not on equal footing with national and provincial government, as it merely takes part in a consultative manner.²¹⁴

The inter-governmental relationship also spans between categories of municipalities in that category "C" municipalities must work with category "B" municipalities on services that can be shared and performance of certain functions such as fire fighting, health services, etc. There also exists consultative forums such as the district co-ordinating forum,²¹⁵ in which matters of common interest in the district are discussed. Between provincial and local government exists further intergovernmental forums such as the minmay,²¹⁶ and speakers forum,²¹⁷ in which matters of common interest are discussed. These forums are authorised by the IGRFA.²¹⁸

2.10.2 Principles of co-operative government.

A municipal council as an organ of state, is obliged to comply with the principles of co-operative governance and inter-governmental relations.²¹⁹ The term organ of state has a particular meaning and implications. The Constitution and other legislation place a number of duties and responsibilities on organs of state. The Constitution also attach

214 See the Constitution ss154(1) and 154(2).

215 Hereinafter referred to as the "DCF".

216 In this forum the mayors of all municipalities meet with all the members of the provincial executive in a province.

217 In this forum the municipal Speakers meet with the provincial Speaker, alternatively it is a structure that resort under the Inter-governmental Relations portfolio of SALGA in a province.

218 See the IGRF ss6, 9, 16 and 24.

219 Note the Constitution s41.

certain duties and implications to the term “organs of state.”²²⁰ Further to the aforesaid, the status of being an organ of state also confers general powers of delegation.²²¹ Therefore an executive organ of state may delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed. Likewise, any executive organ of state is authorized to exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.²²²

Organized local government is an organization recognized in terms of national legislation,²²³ and plays a meaningful role in influencing national views, sentiments and policy on local government matters. The most prominent organization currently recognized as such is SALGA. All municipal councils in South Africa should not only be members of SALGA, but should be adequately represented by SALGA.²²⁴ This occurs through a system of provincial and national executive committees who act in accordance with mandates received from their member municipalities.

On the administrative side, a municipal manager must pursue the constitutional obligation to practice co-operative government by maintaining relationships with municipal managers and administrations of other municipalities, serving on and attending various municipal managers' forums. In addition, the municipal manager is responsible for providing technical support and advice to representatives of a municipal

220 Refer to the Constitution s239.

221 See the Constitution s238

222 See the Constitution s41(3) the duty to settle disputes before any litigation and s165, the prohibition on interference in functions of court, and s238, the authority to delegate and involve agents.

223 The Organized Local Government Act 52 of 1997.

224 SALGA “means the South African Local Government Association recognised in terms of s2 of the organised Local Government Act 1997 (Act 52 of 1997), as the national body representing organised local government in the Republic”.

council who attends inter-governmental forums and he/she represents a municipal council on inter-governmental forums, where appropriate.

2.11 Concluding Remarks.

It was mentioned earlier herein that local government operate within a framework of complex legislation which includes the Constitution, other national legislation as well as provincial and local government legislation, regulations and policies, which are so interwoven, that it is not always easy to know when a decision may lawfully be taken. It is also not easy to know to what extent national and/or provincial government must exercise oversight over local government, in the fulfilment of their monitor and/or support of local government. This may cause friction between the different spheres of government. As alluded to earlier herein, the Constitution and subsequent national and provincial legislation prescribe that the three spheres of government must work together. As such the co-operative government system determines that the three spheres of government should be distinctive, interdependent and interrelated, and should not infringe upon the competencies of the other spheres. One should never lose sight that the very purpose of local government is to fulfil its constitutional objects, in order to create a better life for its communities. To this end, the exclusive competencies, as supplemented by matters assigned and/or delegated to local government should support this obligation. The monitor and support obligation of national and provincial government should be exercised in such a manner as not to impede on the developmental obligation that rest on local government. In the context of this study, it is important to note that in contrast with other legislation,²²⁵ section 62 of the Systems Act does not contain a provision, which enable provincial government to exercise an oversight function over the decisions taken by this appeal mechanism.

A municipal council exercises both the legislative and the executive functions in local government. In order for a municipal council to fulfil its obligations effectively, the Constitution, as supplemented by national legislation anticipates that powers and functions of a municipality will be divided through a complex, but flexible system of

225 Refer to LUPO s44 and Schedule 1 to the Systems Act s14

delegations, through which an executive authority is instituted. This system of delegations becomes the cornerstone to enhance a system of division of powers and functions. The underlying principles enshrined in the Constitution, determines that the model of separation of powers should apply to all three spheres of government. However, it seems that with regard to local government a different dispensation is envisaged. It further seems that the involvement of communities in the affairs of municipalities plays a pivotal role, in holding the executive authority accountable for its actions. One of the mechanisms available to members of the community, in this respect is the appeal mechanism created in terms of section 62 of the Systems Act.

A municipal council, although empowered to delegate its executive functions, remains ultimately responsible for the effective execution of the executive functions. This is done through the exercise of structured oversight, and the ability to review decisions of the executive.²²⁶ The manner in which the power or function is transferred, is important. Matters which were assigned to a specific functionary, must be transferred with the complete responsibility, and/or limitations imposed by legislation. Where the functionary is vested with the ability to take a final decision, and as such to dispose of the matter, such functionary is liable for its actions in the execution of the functions. The appeal mechanism in terms of section 62 may apply in this instance. The Act, requires the system of delegations to include adequate checks and balances. In this regard the legislator provided therefore that delegations may be withdrawn, and that a decision taken may be reviewed by councillors or appealed by any person who can allege that his/her rights were affected by a decision taken in terms of delegated authority. The review in terms of section 59(3) of the Systems Act, and the appeal in terms of section 62 of the Systems Act, are distinctly different. Both relate to decisions taken in terms of delegated authority, and both may “review” a previous decision taken and both operate within the system of delegations. The distinction lies therein that the review in terms of section 59(3) is a remedy available to a political structure, political office bearer or councillor who does not have to allege and prove that such person’s rights were affected by the previous decision, whereas the appeal in terms of section 62 is an

226 Refer to the Systems Act s59(3)

alternative remedy available to any person who can prove that the previous decision affected his/her/its rights.²²⁷ For a critical overview as to when the section 62 appeal will be available to an aggrieved person as an alternative remedy, refer to chapter 3 of this study.

227 See also LGLAWSA 8-20 par 2.3.4.4.

3. CHAPTER 3 : THE APPEAL AUTHORITY CREATED IN TERMS OF SECTION 62 OF THE SYSTEMS ACT 32 OF 2000.

3.1 Introduction.

Section 62 is contained in part 3 of chapter 7 of the Local Government : Municipal Systems Act,¹ which is headed “Delegation system.”² In terms of section 53 of the Systems Act, each municipality must develop a delegation system which is adopted as a policy. This system of delegations, must also provide for adequate checks and balances. The checks and balances referred to in this instance refers to controlling measures which must be instituted by a municipal council and a municipal manager, respectively in terms of section 59(1) of the Systems Act and section 79(1)a of the Local Government : Municipal Finance Management Act.³ It is submitted that the obligation to provide for adequate checks and balances indicates that an opportunity must be given to individual staff members, councillors and/or the public to influence decisions taken in

1 Local Government : Municipal Systems Act 32 of 2000 (hereinafter referred to as “the Systems Act”).

2 Weclogo Circular 108 of 2003 (2003-12-11) “The context of Part 3 [Chapter 7 of The Systems Act] has some consequences in determining the application and purpose for Section 62. It is significant that Section 59 to 65 of the Act are grouped together in Part 3 of Chapter 7 of the Act and that this part is headed “Delegation System”. This part relates to the delegation of power and the regulation or control thereof. It is therefore reasonable to surmise that one of the prime purposes of Section 62, given the context in which it is placed, is that it also comprises a mechanism to balance and check the use of delegated power in the municipality.” And further; “It is important to isolate the elements of the aforesaid Section, i.e. that a decision is taken in terms of a duty that has been delegated or sub-delegated by a delegating authority. The term delegating authority is defined in the Act and in relation to delegation it means the council and in relation to sub-delegation it means a political structure, political office-bearer, councillor or staff member. It therefore follows, for example, that when a municipal manager delegates a power which the law confers personally on him/her to some other person and that person takes a decision in terms of such delegation, no appeal lies in terms of Section 62. The reason for this is simply that the municipal managers act of delegating is not that of a delegating authority as defined in the Act and therefore the requirements of Section 62 are not met.”.

3 Local Government : Municipal Finance Management Act 56 of 2003 (hereinafter referred to as the MFMA).

terms of delegated authority. In this instance, section 59(3) of the Systems Act authorises councillors, subject to certain conditions, to compel a municipal council to review a decision taken in terms of delegated authority. It must be noted though that section 59(3) of the Systems Act, is only available to councillors. In order to provide checks and balances that are adequate, the legislature has included another system of checks and balances, being the appeal authority in terms of section 62 of the Systems Act, which is available to any person whose rights are affected by a decision taken in terms of a power or duty delegated or sub delegated by a delegating authority. In order to determine whether these checks and balances supplement the oversight role of council and the municipal manager to an extent where it can be said that the checks and balances are adequate, is a matter which is dealt with in more detail below.

It is submitted that the purpose of this appeal authority is to enhance the “adequate checks and balances” to control the exercise of delegated authority within local government.⁴ Ultimately Section 62 allows members of the public to take part in local government affairs. Participation by members of the public in local government affairs does not only support the separation of powers model as it applies to local government, but is indeed a carefully protected constitutional right.⁵ To allow members of the public to take part in municipal affairs also flows from the Systems Act.⁶ In order for members of a community to effectively take part in the affairs of a municipality it should be possible for members of the community to question those decisions taken in terms of delegated authority, by functionaries in a municipality, which affect their every day lives.⁷ It is submitted that the appeal authority created in terms of section 62 is intended to be the general mechanism through which the members of the community can

4 Bekink B *Principles of South African Local Government Law* (2006) Lexis Nexis Durban. (hereinafter referred to as “Bekink (2006)”) 259 par 15.2.2.1.

5 See the Constitution of the Republic of South Africa 1996 (hereinafter referred to as the “Constitution”) ss160(7) and 152(1)(e).

6 See the preamble to the Systems Act; see also s5 and ch 4 of the Systems Act.

7 See in this regard the Systems Act s5(1)(c) which determines that a municipality is obligated to inform members of a local community whenever a municipal council or its committees takes a decision which affect such members rights, property or reasonable expectations.

question such decisions. It is submitted further, that the application of section 62 is not only complex, but also subject to so many limitations, that it is doubtful whether it can be regarded as having general application as an adequate check and/or balance available to members of a community to hold the executive authority in local government accountable. This will be dealt with more fully later herein. It is submitted further that section 62 could only be an effective appeal authority, if the members of the appeal authority and the general public know how it applies and/or understand the limitations to section 62.

3.2 Appeal in terms of Section 62 of the Systems Act.

3.2.1 Analysis of Section 62.

The Act reads as follows :

- “62(1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of notification of the decision.
- (2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).
 - (3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.
 - (4) When the appeal is against a decision taken by –
 - (a) a staff member other than the municipal manager, the municipal manager is the appeal authority;
 - (b) The municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or
 - (c) a political structure or political office-bearer, or a councillor -

- (i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or
 - (ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.
- (5) An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.
- (6) The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law.”

3.2.2 Disecting section 62(1).

3.2.2.1 Introduction.

When reading section 62(1) for the first time, the ordinary meaning of the words seems to be clear and unambiguous and as such easy to interpret. It is, however, immediately apparent that section 62(1) includes certain threshold requirements that must be considered prior to dealing with the merits of the matter, in order to determine whether section 62 is available as an appeal mechanism, in terms of the Act. When these threshold requirements are tested against a given set of facts, it becomes apparent that the questions that flow from section 62(1), is not that simple to answer. In turn that creates uncertainty as to whether section 62 applies or not in any given situation. The matters that may create uncertainty as to how it must be interpreted is dissected and analyzed in what follows.

3.2.2.2 Who is “a person” referred to in section 62(1).

The ordinary meaning of the words in the Act, leads one to believe that section 62 is indeed available to any person who can prove that his/her rights are affected by a decision taken in terms of delegated authority. The courts recently considered this question in a series of cases which became known as the *Reader* cases. The cases will be identified as they are discussed. Some of the earlier *Reader* judgements caused confusion as to whom section 62 is available to as an alternative remedy, but as will

become evident later herein, this position was clarified by the supreme court of appeal at a later stage. The factual matrix is briefly as follows:

On 20 February 2003, the municipality of the city of Cape Town,⁸ approved a building plan for alterations to a dwelling situated in Sea Point. The plans were submitted by the owner, Mrs. J Ikin.⁹ On 20 February 2003, a neighbouring owner, Marina Guilletter Reader,¹⁰ brought an application to review and set aside the decision of the municipality of Cape Town to approve the building plans. On 30 May 2005, Veldthuisen J dismissed the application without considering the merits, based on a point *in limine* taken by the municipality of Cape Town that Reader failed to exhaust her internal remedies, prior to approaching the high court. The internal remedies referred to in this instance is the appeal in terms of section 62 of the Systems Act. Reader then, with leave of appeal from the supreme court of appeal, approached the Cape Town high court on appeal against the decision of Veldthuisen J.¹¹ The question amongst others, considered by this court, was whether Reader "enjoyed a right of appeal" in terms of section 62 of the Systems Act. The appellants contended that they enjoyed no internal remedy by way of an appeal in terms of section 62 of the Systems Act. Reader argued that section 62(1) could not be read in isolation, but should be read with section 62(3), in that the effect thereof is that only a party whose rights are affected by the previous decision may appeal in terms of section 62, and that in the event where rights accrued, the appeal authority may not come to any other decision other than to confirm the previous decision. It was argued further, that when the building plans were approved that rights accrued, and that section 62 therefore did not qualify as a remedy as contemplated by section 7(2)(A) of the Promotion of Administrative Justice Act.¹² The court found that section 62(1), read with section 62(3), did not provide a viable internal remedy to an

8 Hereinafter referred to as "the municipality of Cape Town".

9 Hereinafter referred to as "Ikin".

10 Hereinafter referred to as "Reader".

11 *Reader and another v Ikin and another 2008(2) SA 582 (C)*(hereinafter referred to as "*Reader v Ikin CHC (2008)*").

12 Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as "PAJA").

aggrieved person, who was not party to the initial decision. As such, section 62 does not extend to "third parties who contend that their rights or legitimate expectations have been adversely affected by the decision". The judgement of the Cape high court of appeal, was taken on appeal by the municipality of Cape Town to the supreme court of appeal. The question before the supreme court of appeal was whether section 62 of the Systems Act was available to Reader as an internal remedy, as contemplated in terms of section 7(2) of PAJA.

In the majority judgement of Lewis JA, it was confirmed that the appeal should be dismissed but on a different construction of what seems to be the ordinary meaning of section 62 of the Systems Act. This is important in that it clarifies the judgement to apply only to the approval of building plans. The supreme court of appeal,¹³ drew a distinction between the approval of the building plans and the actual building process. In the judgement of Jaffa JA, the court held that Mrs. Reader did not allege that the approval of the building plans adversely affected her rights, but that the "erection of the building" adversely affected her rights. As there was no obligation on the municipality to call for a public participation process prior to the approval of the building plans, the approval of the plans did not involve third parties and, as such, no rights of third parties were infringed upon. It was said that the only parties to the approval of the building plan was the owner of the property and the municipality who approved the plan.¹⁴ In the judgement of Lewis JA at paragraph 30, it was said that :

"...as I see it, Section 62(1) gives only one whose rights are directly affected by a decision, taken by a person delegated to make such a decision, a right to appeal against that decision within the strictures of Section 62"... "although on an initial reading it might appear that anyone who is in some way affected by a decision to grant permission to build (a neighbour, say, who believes that

13 *The Municipality of the City of Cape Town v Reader and Others* (719/2007) ZASCA 130 (14 November 2008) (hereinafter referred to as "*City of Cape Town v Reader SCA (2008)*") (Source www.saflii.org.za).

14 See par 19 of the judgement. See also the discussion of *Walele v City of Cape Town & Others* 2008 (6)SA129(CC) (hereinafter referred to as "*Walele v City of Cape Town*").

his or her property rights are in some way diminished) may appeal, that cannot be. How can a person not party to the application procedure itself appeal against the decision that results ?”

The learned Judge then went on to say that :

“...it seems plain that the purpose of Section 62 as a whole is to give to the dissatisfied applicant for permission, no one else, an opportunity for the matter to be reheard by a higher authority within the Municipality. It is only the aggrieved applicant, who has failed to secure the permission sought in his/her application, who is afforded a right of appeal under Section 62. If it were otherwise, any appeal would be pointless; only those affected by the grant of permission, or a decision favourable to an applicant, would wish to apply and they could not succeed if the appeal resulted in the revocation or variation of a right that has accrued to the applicant.”

Lewis JA concurred with the judgement of the Cape Town high court of appeal. It seems that the judgement of Lewis JA should be carefully considered against the factual matrix of that case, being a decision by a municipality to approve a building plan when no public participation is required and where the parties therefore to such approval is the applicant and the relevant municipality only. It is submitted that the judgements in the Reader cases focused on a very narrow set of facts, and did not consider as to whom section 62 would be available in the event that public participation had to be followed. That is most probably why the court did not consider the judgement in *Muller v City of Cape Town*.¹⁵ In the event that public participation did take place and there were valid objections to the approval of the application, then it seems that such objectors do indeed become parties to the decision, but may only succeed on appeal if no rights have vested in terms of section 62(3). The vesting of rights is dealt with more fully later herein.

In the matter of *Muller v City of Cape Town*,¹⁶ the court dealt with the approval of building plans where the proposed building would exceed the zoning scheme

15 *Muller NO & Others v City of Cape Town 2006(5) SA 415(C)* (hereinafter referred to” *Muller v City of Cape Town*”), It was held in this matter that a local authority must refuse building plans if interested parties were denied the opportunity to object to, and comment on the plans of an owner of adjoining property.

16 *Muller v City of Cape Town 2006(5) SA 415(C)*.

regulations, in that it exceeded the permissible height. The facts of the case are briefly as follows. During 2002, the municipality of Cape Town approved building plans which were submitted by an owner of a property situated in Bloubergstrand. The owners started to build the house, but deviated from the plans and a trustee of the Reenen Muller Trust represented by a trustee accepted that the house will be built in accordance with the approved plans, but as the building progressed, he became concerned about the height of the building. The trustee enquired from the municipality of Cape Town to see the approved building plans but was denied access. Muller held the view that the building being erected exceeded the permissible height and will detrimentally affect his sea view and ultimately the value of his property. Muller submitted an appeal to the municipal manager in terms of section 62, which appeal was dismissed. Muller then approached the Cape high court in which he claimed certain relief. The court considered the requirements to lawfully approve a building plan and said as follows at paragraph 23:

"[23] The National Buildings Act and Zoning Scheme Regulations provide for the requirements the building plans need to comply with for the approval of such building plans to lawfully occur. Section 4(1) of the National Buildings Act provides that the erection of any building in respect of which plans and specifications are to be drawn may lawfully occur, with prior written approval by the local authority, of plans and specifications submitted to it for such approval. The plans submitted by the second respondent, and purportedly approved by the first respondent on 9 September 2003, were submitted to the first respondent in order to comply with the provisions of Section 4(1) of the National Buildings Act."

And at paragraph 26, it dealt with section 7(1) of the aforesaid Act,¹⁷ in which it is said that a local authority must also be satisfied that the application complies with any other applicable law. At paragraph 27, the court confirmed that the applicable zoning scheme regulations, qualifies as 'any other applicable law', and said that the building plans submitted for approval would have to comply with both the provisions of the "National

17 National Building Regulations and Building Standards Act 103 of 1997. (hereinafter referred to as the "NBR").

Buildings Act” and the relevant zoning scheme regulations. At paragraph 28, the court said that

“[28] If, upon considering the building plans and any recommendation made by the building control officer, the local authority is satisfied that the application in question complies with the requirements of the National Buildings Act and ‘any other applicable law’, the local authority shall grant approval in respect thereof. However, if the building plans do comply with the requirements of the National Buildings Act and ‘any other applicable law’, that does not signify the end of the process. The local authority is still required to consider the contextual effect the erection of the proposed building will have on the adjoining or neighbouring properties when erected, and that is, whether the area in which such building is to be erected will probably, or in fact, be disfigured thereby; whether such building will probably, or in fact, be unsightly or objectionable or whether it will probably, or in fact, derogate from the value of adjoining or neighbouring properties...”

At paragraph 68, the court said that the adjoining owners, being Muller should have been afforded an opportunity to object or comment to the building plans as is required by the Land Use Planning Ordinance,¹⁸ in that the building exceeded the permissible height as per the zoning scheme regulations. In this instance, the court clearly stated that interested parties must have an opportunity to object to and comment on the plans. Therefore, a public participation process must be followed where the approval of the proposed building plan will affect the rights of persons aggrieved thereby. Such an aggrieved person will therefore be able to satisfy the threshold requirement of section 62 that he/she is a person whose rights are affected. Section 62 should therefore be available in instances where interested and affected parties, such as objectors’ rights have been affected by the approval of building plans.

The difference between the *Reader* cases and *Muller v City of Cape Town*,¹⁹ case is important, in so far as there is a clear distinction between a decision taken where public participation is not required and one where public participation is required. Where no public participation is required, the only persons to whom the section 62 appeal seems

18 Land Use Planning Ordinance 15 of 1985 (hereinafter referred to as “LUPO”)

19 *Muller v City of Cape Town* 2006(5) SA 415(C).

to be available, as an alternative remedy, are the applicant(s) and the municipality as they are the parties who are involved in the decision. Where public participation is required, and interested and affected parties object to the proposed application and subsequent decision, they become parties to the decision, and section 62 therefore becomes available to them as an alternative remedy.

The decision in *City of Cape Town v Reader SCA (2008)* now seems to bring section 62 in line with section 44, of LUPO and section 54(a) of the Local Government : Municipal Property Rates Act.²⁰ Section 44 of LUPO and section 54(a) of the Property Rates Act, states that only a valid objector is entitled to appeal.²¹ In tender matters the position is slightly different. Every person who submitted a tender is an interested and/or affected party, to whom section 62 should be available as an alternative remedy. The jurisdiction of the section 62 appeal is, however, limited and/or confined to decisions only, whether the appellant should have succeeded with his/her/its tender application or not. In the matter of *Groenewald v M5*,²² the court found that although section 62 can be regarded as a wide appeal, the tender of an unsuccessful bidder, who did not appeal, could not be revisited by a section 62 appeal authority in considering the appeal. The discretion of the appeal authority is limited to the extent, that it may only consider whether the appellant is entitled to succeed in his/her/its appeal, based on the grounds of the appeal submitted.

It was stated earlier herein that the appeal mechanism in terms of section 62 is part of the checks and balances to a system of delegations, which support the model of separation of powers as it applies to local government. It was also said that members of communities must be encouraged to participate in local government affairs. Because of

20 Local Government : Municipal Property Rates Act 6 of 2004 (hereinafter referred to as the "Property Rates Act").

21 See also the judgement of *Syntell (Pty)Ltd v City of Cape Town and another (17780/2007) [2008] ZAWCHC 120 (13 March 2008)* (hereinafter referred to "Syntell v City ofCape Town") par 54(1)c. (Source www.saflii.org.za)

22 *Groenewald N.O. and others v M5 Developments (2010)(5) SA 82 (SCA)* (hereinafter referred to as "*Groenewald v M5.*") par 23 to 24.

this it is of vital importance to know and understand that “a person” in the context of section 62 is not an unqualified reference to anybody who is aggrieved by a decision taken in terms of delegated authority, but indeed only a reference to persons who qualify as interested and/or affected parties to a decision taken in terms of delegated authority.

3.2.2.3 What rights are referred to in the context :“Whose rights are affected.”

It is a known fact that decisions in local government deals with various matters affecting people's lives, it is generally not difficult, for an aggrieved person to make the allegation that a municipal decision taken in respect of delegated authority detrimentally affected his/her rights. The question, however, in the context of section 62, should be, what did the legislator intend when it referred to rights that were affected? Bekink argues that both the substantive and procedural requirements must be complied with in order for a decision to be lawful.²³

To decide whether a right of an interested and/or affected party is affected could be problematic. It must be clear from the outset, that any allegation of rights which are adversely affected, must be dealt with by the section 62 appeal authority. It should never be so that an appeal is dismissed by the administration simply because the administration decides that rights are not affected and that the appeal should therefore not be entertained. The rights referred to here can be procedural rights,²⁴ or any other rights which are infringed upon by the merits of the decision taken. The courts recently gave us some direction in this regard.

In the case of *City of Cape Town v Reader*,²⁵ with regards to the approval of a building plan, it was said that the applicant to the approval of the building plan has a clear right,

23 Bekink (2006) 213 footnote 3.

24 In terms of s33(1) of the Constitution, everyone has the right to “lawful” administrative action. It flows from this that, stated in the negative, unlawful administrative action constitutes an infringement of rights which, in the ordinary meaning of Section 62, does fulfil one of the fundamental threshold requirements.

25 *City of Cape Town v Reader SCA (2008)* See the judgement of Jaftha JA par 15 to 18.

but that the dissatisfied neighbours who are regarded as third parties, do not have rights in this instance. The court held that it was not the approval of the building plans that infringed the rights of Reader, but indeed the building works itself.²⁶ It seems from this judgement that if the ensuing building works detrimentally affect the rights of the neighbouring owners, where no right of public participation exist, then the infringement of such rights falls outside the ambit of section 62 and such owners may approach the high court to protect their rights.

In the matter of *Actaris South Africa (Pty) Ltd v Sol Plaatjie Municipality and Another*,²⁷ Actaris submitted a tender to the municipality. When its tender was unsuccessful, it made enquiries to the municipality, and thereafter took the decision of the accounting officer to award the tender to another tenderer, on review. Actaris was of the opinion that proper procedure was not followed in terms of the municipality's supply chain management policy. The court found in favour of Actaris and found that the proper procedure was indeed not followed. The Court said, amongst others, that Actaris "had the right to have its tenders properly evaluated and adjudicated".²⁸

In a different case, the matter of *Syntell v City of Cape Town*,²⁹ Syntell and four other companies competed for a tender invited by the electricity services directorate of the municipality of Cape Town in the last quarter of 2006. On 15 January 2007, the tender was awarded to Actaris by the municipality's supply chain management bid adjudication committee. By letter dated 19 January 2007, Actaris was advised by the municipality, that its tender had been accepted. Actaris was also informed in that letter that it should

26 See again par 3.2.2.2 herein. It is submitted that the court seems to disregard the possibility that the approval of a building plan is such an integral part of lawfully proceeding with building works, that it is difficult to fathom how the court came to draw this distinction, because without approved building plans, there can be no lawful building works.

27 *Actaris South Africa (Pty) Ltd v Sol Plaatjie Municipality and Another (1357 / 2007) [2008] ZANHC 73 (12 December 2008)* (hereinafter referred to as "Actaris v Sol Plaatjie"). (Source www.saflii.org.za)

28 See Actaris v Sol Plaatjie par 41

29 *Syntell v City of Cape Town (17780/2007) [2008] ZAWCHC 120 (13 March 2008)* (Source www.saflii.org.za)

"please note that the award of this tender is subject to a 21 day appeal period in terms of the Municipal Systems Act and no rights will accrue for 21 days from date of this notification or until any such appeal has been finalized". Syntell was advised by the municipality that its tender had been unsuccessful. Syntell appealed to the city manager in terms of section 62. The municipality interpreted the judgment of *Reader v Ikin*,³⁰ that the unsuccessful tenderers should be regarded as "third parties" in relation to the successful tenderer, and therefore had no right of internal appeal. Syntell subsequently applied to the Cape Town high court, as a matter of urgency in early December 2007 for an interim interdict. In essence what Syntell asked for was an order confirming its right to appeal in terms of section 62 and that the court direct the municipal manager of the municipality of Cape Town to determine the appeal lodged by Syntell and to interdict Actaris from taking steps to implement the tender award pending the determination of the appeal. With regard to the unsuccessful tenderer's rights, the court,³¹ at paragraph 51(c), it seems, did not dismiss the arguments of Adv. Binns-Ward, who said the following :

"(c) The nature of the unsuccessful tenderer's right and interest in the circumstances has been expressly described by the SCA in Transnet v Goodman Bros, supra, at paragraph [11].⁶ The right that falls to be protected is the right to administrative action that is lawful, reasonable and procedurally fair. It is precisely the same legal right *that an objector* to a building plan application has: cf. Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another 1999 (1) SA 104 (SCA) (more particularly the reference to the approval of building plans as administrative *action* and the acknowledgment of the court of first instance recorded by the appeal *court*, without demur from the appeal court, that a neighbour had a right to be heard in the process); and Muller NO and Others v City of Cape Town 2006 (5) SA 415 (C) at paragraph [76]."

The arguments of Bekink and the court judgements referred to above confirm that the rights referred to herein that stands to be protected are the right(s) to administrative action which is lawful, reasonable and procedurally fair.³²

30 *Reader v Ikin* CHC (2008) .

31 See again *Syntell v City of Cape Town* par 51(c)

32 Refer also to par 2.7.2 herein, where it is said that not all unlawful decisions lead to an

Lawful administrative action briefly means that the decision-taking body must be duly authorised by enabling legislation to act.³³ If a municipality does something not authorised by enabling legislation, its act will be unlawful. The requirement to act lawful was also

considered in the *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*,³⁴ case and later in the matter of *M5 v Groenewald*,³⁵ as follows:

“It is a fundamental principle of the rule of law that the exercise of a public power is only legitimate where it is lawful. It is central to our constitutional order that the legislature and the executive are in every sphere constrained by the principle that they may exercise no power and perform no function beyond those conferred on them by law.”

The requirement of “reasonableness” purports to determine how a reasonable person will act under similar circumstances.³⁶ Although reasonable conduct can mean to arrive

infringement of rights in the context of Section 62.

- 33 Cora Hoexter *Administrative Law in South Africa* (2007) (hereinafter referred to as “Hoexter (2007)”) 227 to 246. The writer states that “Lawful administrative action means in essence that administrative actions and decisions must be duly authorized by law and that any statutory requirements or preconditions that attach to the exercise of the power, must be complied with”.
- 34 *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374(CC), (hereinafter referred to as “*Fedsure v Greater Johannesburg Metropolitan Council*”) as referred to by Cora Hoexter *The New Constitutional & Administrative Law* (Volume Two) (2002) (hereinafter referred to “Hoexter (2002)”) 84 footnote 83 to 84 “the Court identified the principal of legality and described it as part of the doctrine of the rule of law, but separate from the administrative justice clause itself. The principle it said was not written down anywhere in particular. Rather in relation to action that did not constitute administrative action, such as legislation and executive acts, it was necessarily implicit in the constitution. It was not necessary to consider its exact ambit, such as whether the rule of law had greater content than the principle of legality. The principle generally expressed the idea that the exercise of public power is only legitimate where lawful, and in this particular case, it implied that the local authority had to act within the powers lawfully conferred upon it. However, the Court was evenly divided on whether the local authority had in fact acted within its powers in resolving to levy a certain rate”. The principle of Legality as stated in the *Fedsure* case was recently followed in the decision of *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* (2009) ZASCA 85 at Par 29.
- 35 *M5 Developments (Cape) (Pty) Ltd v CC Groenewald and others* 2010 (5) SA 82 (C) (hereinafter referred to as “*M5 v Groenewald*”) par 25.

at a specific result in more ways than one, the word “reasonable” per definition indicates that the functionary should have sound reasons for its conduct, therefore simply put, any decision taken could only conform to the principle of legality, if it was not taken arbitrarily or capriciously. In the case of *Pepkor Retirement Fund v. Financial Services Board*,³⁷ Cloete AJ said that the doctrine of legality requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, i.e. on the basis of the true facts. It follows that the constitutional requirement of legality, based on reasonableness, would only be satisfied when all relevant information, which may influence the decision to be taken, was considered by the decision-taking body, and that the decision so taken is a reasonable outcome, supported by the information considered.³⁸ In other words, it should be the decision that any reasonable person would reach if confronted by the same question and under similar circumstances, and considering the same information. Therefore, there must be sound reasons for the decisions taken, even though, for every given question, there may be more than one reasonable answer.³⁹

With regard to fairness, section 33 of the Constitution, created a shift from the rules of natural justice to procedural fairness, which has a more general application and must be “tailored to the specific circumstances of each case.”⁴⁰ The principle of procedural

36 Hoexter (2007) 315

37 *Pepkor Retirement Fund v. Financial Services Board* 2003 (6) SA 38 (SCA) (hereinafter referred to as “*Pepkor v Financial Services Board*”).

38 *Body Corporate of the Laguna Ridge Scheme no 152/1987 v Dorse* 1999 (2) SA 512 (D) The Trustees taking account of irrelevant considerations and ignoring relevant circumstances. The court held that the decision is so grossly unreasonable as to warrant an inference that the Trustees did not apply their minds to the matter.

39 Hoexter (2002) 183 - “It does not suggest that a decision is reasonable only when it is correct or perfect. On the ordinary dictionary meaning of “reasonable”, in fact, S 33 captures exactly the right standard. To require less than reasonableness so defined would allow capricious decision-making. To require more, to require correctness or perfection, would be to allow the courts to substitute their own views for those of the Administrator”.

40 Hoexter (2002) 189.

fairness did not replace the rules of natural justice, it included these rules and went even further. This requirement now places a duty on decision taking bodies to act fairly under any given circumstances. The rules of natural justice, consists of two components: Firstly, the *nemo iudex* rule,⁴¹ on the one hand, and the *audi alteram partem* rule,⁴² on the other. In the new constitutional era the principle of fairness also consists of two components, namely the rule against bias and the *audi alteram partem*. Therefore fairness, as a constitutional principle of legality, includes the rules of Natural Justice, in that the erstwhile concept of the *nemo iudex* rule is included in the rule against bias. It is submitted that whenever legislation determines that the rules of natural justice must apply, it is an indication that the constitutional principle of legality applies, specifically that there is a duty to apply the principles of procedural fairness.

It seems therefore, that apart from personal rights that may be detrimentally affected by a decision of a municipal functionary, the right to administrative action which is lawful, reasonable and fair, also qualifies as rights in the context of section 62. An allegation that these rights were infringed by a previous decision may be sufficient to unlock section 62 as an alternative remedy. As explained earlier herein,⁴³ this must be distinguished from unlawful decisions taken where no delegation exist. For example, if an executive mayor decides to finally approve a by-law. This will not qualify as a “decision” as intended by section 62, because a municipal council is prohibited from delegating such function.⁴⁴ As such, the infringement falls outside the ambit of the system of delegations.

3.2.2.4 A decision taken by a political structure, political office-bearer, councillor or staff member of a municipality.

41 You may not be the judge and jury in your own case.

42 To hear the other side.

43 See par 2.7.2 herein.

44 Refer to s160(2) of the Constitution.

When a functionary takes a decision which affects the rights of a person, that person should be entitled to rely upon such a decision.⁴⁵ It would otherwise be untenable if such a decision can be amended unilaterally at any time. The very purpose of an appeal is to reconsider whether a previous decision was correct under the circumstances. When considering the merits afresh, the need may arise to vary or revoke the previous decision. It must be noted that this could only become possible if no rights have accrued in terms of the previous decisions. In the matter of *Mzimkulu Jeremiah Jikijela and one other v Mhlonto Local Municipality Council and Others*,⁴⁶ the court seems to have interpreted section 62 incorrectly. The court in a review application, considered an application for condonation in that the applicant failed, respectively to institute proceedings within the required 180 days, and/or to exhaust internal remedies in terms of section 7(1) and 7(2)c of PAJA.⁴⁷ The court found that section 62 was available as an internal remedy,⁴⁸ but that it was justified “in the interest of justice that the exemption sought by the applicants be granted.” The court failed to recognize that section 62 only operates within the system of delegations and that it was not necessary to condone the non compliance with section 62 in this instance, as section 62 was in any event not an

45 Lawrence Baxter *Administrative Law* (1984) (Juta) (hereinafter referred to as Baxter (1984) 372 “In the instance where decisions of public authorities “affect the rights of individuals”, such individuals should be “entitled to rely upon such decisions. Intolerable uncertainty would result if such decisions could be reversed at any moment”; and further that “once an administrative decision making body has made a decision which affects the rights or interests of individuals, such decision maker has discharged his office or is *functus officio*”. “...the ability of the public authority to revoke the previous decision is qualified and the following situations must be distinguished:

- Unfavourable decisions
- Favourable decisions
- Decisions based on error or fraud
- Variation or revocation is expressly authorised
- Procedure for variation or revocation”.

46 *Mzimkulu Jeremiah Jikijela and one other v Mhlontlo Local Municipality Council and others* (Eastern Cape Case Number 1698 / 10) Judgment delivered 9.05.11 (Unreported) (hereinafter referred to as “*Jikijela vs Mhlonto Municipality*”). (Source www.saflii.org.za).

47 *Jikijela v Mhlonto Municipality* par 8 to 9.

48 The court failed to recognize that s62 never applies to a decision of a municipal council.

internal remedy available to the applicant that had to be exhausted prior to approaching the high court.

a) Decisions reserved for council, are never subject to an appeal in terms of Section 62.

As stated before, the Structures Act and Systems Act and the MFMA anticipates that a division of powers model will be established through a system of delegation of powers. A clear distinction should be made between what is regarded as legislative powers and what is regarded as executive powers. This is important in the context of this study, because different principles of law apply to decisions taken in terms of respectively legislative powers and executive powers. For example, the principles of administrative justice only applies to executive acts, and legislative powers may not be delegated. It follows that the distinctions between legislative powers and executive powers is also important when a municipal council decides that it does not want to exercise or perform all of its powers and functions itself, but would rather delegate it to someone else. In the matter of *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*,⁴⁹ the constitutional court explained this issue as follows:

"[45] It seems plain that 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 that under our Constitution is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation... It does not seem to us that such action of the municipal legislatures, in resolving to set the rates, to levy the contribution and to pay a subsidy out of public funds, can be classed as administrative action as contemplated by Section 24 of the interim Constitution".

It seems that the matters mentioned in section 160(2) of the Constitution, which may not be delegated, should be regarded as legislative powers. There are also further powers and functions in terms of other legislation that a municipal council may not delegate. Save for the powers and functions which may not be delegated, the exercise of all other

49 *Fedsure v Greater Johannesburg Metropolitan Council* par 45.

powers are regarded as the exercise of executive powers which may be delegated to political structures, political office bearers, individual councillors and the administration. In some instances, a council may wish to reserve specific executive powers for itself. All of these powers and functions, whether it is legislative or executive in nature falls outside the scope of section 62. As such no appeal may lie against a decision of a municipal council. The specific decisions that may not be delegated are dealt with in more detail below.

(i) Decisions in terms of the Constitution of the RSA 1996 which may not be delegated by a municipal council.

Section 160(2) of the Constitution determines the functions that may not be delegated by a municipal council. These functions are as follows:

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

Because the Constitution reserves the right to decide on these items to none other than a municipal council, it may not be delegated to any other body. If an appeal is lodged on the mistaken assumption that a decision should have been taken on the basis of delegated authority, such an appeal will fail because section 62(1) clearly indicates that the appeal authority in terms of section 62 will not be available. The applicant will consequently fail to meet this threshold requirements of section 62

(ii) Decisions in terms of the MFMA which may not be delegated by a municipal council.

Section 14 and section 90 of the MFMA determines that a municipality or a municipal entity may not transfer ownership of capital assets, unless certain matters were considered by a municipal council. It is submitted that section 62 is not available as an appeal authority in this instance, because the decision taken in this instance falls

outside the system of delegations. Section 32 of the MFMA also determines amongst others that the person who has incurred expenditure,⁵⁰ or who has instructed another to incur expenditure, “knowingly or negligently”, is liable for such expenditure. Section 32 of the MFMA further determines that a municipality must recover unauthorized, irregular or fruitless and wasteful expenditure from the person found to be liable, unless such expenditure was certified by the relevant municipal council to be irrecoverable, after an investigation was done by a committee of council. The committee referred to here is created in terms of section 79 to the Structures Act. The purpose of this committee is therefore to investigate an alleged contravention in terms of section 32 of the MFMA,⁵¹ and to make a recommendation to the municipal council.⁵² The decision of this committee is an interim decision, and will only become final once it is adopted by a

50 Political office bearer or employee of the municipality

51 See also s171(3) of the MFMA.

52 In the context of fruitless and wasteful expenditure, the phrase “reasonable care” defined in s1(1) of the MFMA, indicates that the test to be applied is that of negligence. Therefore would the “reasonable person”, under similar circumstances, have acted in the same way, if not, there should be a strong indication that the act taken gave rise to financial misconduct. (See s171(3) of the MFMA). The MFMA, s171(4) is prescriptive in that the municipality must investigate financial misconduct, and read with s32 of the MFMA, make recommendations to council as to how it should be dealt with. With regard to unauthorised expenditure, the investigation is aimed at determining whether the expenditure was in contravention of the definition, in s1 of the MFMA or not. With regard to “irregular expenditure”, the investigation is once again aimed at determining whether the conduct was in contravention of the definition. The investigation into any one of these categories is aimed at determining whether the expenditure was made in contravention of legislation and/or the policies as mentioned in the definition. S32 of the MFMA further indicates that if an expenditure is found to be unauthorised, irregular, fruitless or wasteful, then the enquiry should continue to include an investigation to try and determine who is liable for such an expenditure. Once it is clear that the expenditure adheres to the definition of a specific category, and the responsible person/persons were identified, then the committee “must” recommend to the municipal council that such expenditure be recovered from such person. Further steps as required in s32 should also be taken. If the investigation(s) cannot positively identify the category within which the contravention falls and/or who is responsible for the conduct, then the expenditure must be found to be “irrecoverable”, and it must be recommended to the municipal council that the amount in question be written off.

municipal council. Section 62 is not available as an appeal authority in this instance, because the decision taken in this instance falls outside the system of delegations.

Section 64(2)g of the MFMA determines that a municipal council may grant an exemption to the accrual of interest on amounts in arrear. Section 48(1) of the MFMA determines that a municipal council may provide security for a debt or for a contractual obligation. In that the decisions in this regard are reserved for a municipal council, as it falls outside the system of delegations, and as such are not subject to an appeal in terms of section 62

(iii) Decisions in terms of the Municipal Systems Act which may not be delegated by a municipal council.

The following matters may not be delegated by a municipal council, and as such fall outside the system of delegations.

The Systems Act section 59(1)a

- The power to set tariffs.
- To decide to enter into a service delivery agreement in terms of section 76(b) of the Systems Act.
- To approve or amend the Integrated Development Plan.

The Systems Act section 39(c)

- The adoption of the performance management system.

The Systems Act section 54A(1)

- The appointment of a municipal manager, acting municipal manager.

The Systems Act section 56(1)g

- Appointment of managers accountable to the municipal manager.

The Systems Act Schedule 1

- Decisions pertaining to disciplinary matters against councillors. Councillors are not employees of the municipality.⁵³ They are referred to as councillors or political office-bearers, elected by the electorate, who have a fiduciary duty towards the municipality and the members of the public whom they serve in a specific municipal area. As such, their relationship is not governed by the private law rules of contract, or the Basic Conditions of Employment Act,⁵⁴ or the Labour Relations Act,⁵⁵ or any other bargaining council agreement or determination, as is the case with an employee. The relationship between a councillor and the municipality is governed by schedule one to the Systems Act, (hereinafter referred to as the "code of conduct"). Section 13 of the code of conduct obliges the Speaker to deal with contraventions of the code. The decisions of this committee is an interim decision, and as such, not subject to an appeal in terms of section 62 of the Systems Act. Decisions in this instance is/are reserved for a municipal council and may not be delegated. As such, it falls outside the system of delegation and could therefore not be subject to an appeal in terms of section 62.

(iv) Decisions in terms of the National Building Regulations and Building Standards Act that may not be delegated by a municipal council.

The National Building Regulations and Building Standards Act,⁵⁶ determines in section 5, read with section 28 of the NBR that the appointment of a building control officer, may not be delegated by the council of a local authority. As such, a decision to appoint a building control officer is not subject to an appeal in terms of section 62.

53 See *Motholwa v Mahuma and Others* 2009 All SA 238 (hereinafter referred to "*Motholwa v Mahuma*")

54 Act 75 of 1997 (hereinafter referred to as "The Basic Conditions of Employment Act")

55 Act 66 of 1995 (hereinafter referred to as the "LRA")

56 Act 103 of 1977 (hereinafter referred to as the "NBR".)

(v) Decisions in terms of the Local Government : Municipal Property Rates Act that may not be delegated by a municipal council.

- The adoption of a property rates policy.⁵⁷
- The determination of a special rating area.⁵⁸

(vi) Decisions reserved for a municipal manager, which is/are not subject to an appeal in terms of Section 62.

The Systems Act, section 62(4)b states that the executive mayor is the appeal authority over decisions taken by the municipal manager. This should not be read in isolation, but rather in the context of section 62 as a whole. When the municipal manager therefore acts as a delegating authority,⁵⁹ his/her decisions so taken is not subject to an appeal in terms of section 62. Examples of such decisions are the appointment of employees,⁶⁰ and instances where a municipal manager takes part in the approval of a tender. See also the discussion of the case *Lohan Civil – Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit*,⁶¹ later herein.⁶²

It is apparent from section 59(4) of the Systems Act, that a power conferred on a municipal manager may only be delegated or sub-delegated to a staff member if approved by a municipal council. Any decision taken by a staff member in terms of a delegation conferred on a municipal manager, which was not approved by a municipal council, falls outside the system of delegations and as such, may not be appealed. In this instance, a municipal manager is not a delegating authority. This will result therein

57 See the Property Rates Act s3(1).

58 See the Property Rates Act, s222(1).

59 As opposed to "in terms of delegated authority".

60 Other than appointments in terms of ss56 or 57 of the Systems Act.

61 *Lohan Civil – Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* [2009] ZAFSHC 21 (27 February 2009), (Unreported), (hereinafter referred to as "*Lohan v Mangaung Munisipaliteit*"). (Source www.saflii.org.za).

62 Refer to par 3.2.2.5 herein.

that the threshold requirement of section 62 will not be satisfied. As such, section 62 is not available as an alternative remedy in this instance.

3.2.2.5 In terms of a power or duty, delegated or sub-delegated by a delegating authority.

It was mentioned earlier herein,⁶³ that the general right of an aggrieved person that stands to be protected is the right to administrative action that is lawful, reasonable and procedurally fair. The determination of whether a decision was taken in terms of a power or duty delegated or sub-delegated by a delegating authority is different. A distinction should be drawn between instances where the right of an aggrieved person that stands to be protected is based on administrative action which is lawful, reasonable and/or fair, and/or whether the decision was taken in terms of a power or duty delegated by a delegating authority.

A municipal council makes decisions concerning the exercise of all the powers and the performance of all the functions of a municipality.⁶⁴ Apart from the matters reserved for council by legislation,⁶⁵ council may delegate all its powers and functions to any of the municipality's political structures, councillors, or to the administration.⁶⁶ The term delegating authority is defined in section 1 of the Systems Act as being a municipal council. It is important to distinguish between the terms delegation or sub-delegation. With relation to sub-delegation, section 59(2)(c) of the Systems Act is important as no power or function may be sub-delegated, unless specifically authorised by a municipal council in its capacity as a delegating authority. It therefore follows, for example that when a municipal council delegates a function and/or power to an executive mayor without the authority to sub-delegate, then only the executive mayor is entitled to take a

63 See paragraph 3.2.2.3.

64 Refer to the Constitution s160(1).

65 See the Constitution s160(2); See also ss12 and 59(1)a and 60(2) of the Systems Act, and ss14 and 90 of the MFMA.

66 Refer to s11 of the Systems Act. ; See also Bekink (2006) 229 par 14.4.

final decision in terms of such power and/or function delegated to the executive mayor. With regard to matters delegated to the executive mayor, section 59 of the MFMA becomes important, as it authorises the executive mayor to sub-delegate. The ultimate responsibility, however, still lies with the executive mayor, pertaining to the matters so sub-delegated.⁶⁷ Should for example, the executive mayor delegate authority to a member of his/her mayoral committee without express authorisation by a municipal council to do so, then a decision taken by such mayoral committee member will not have been taken lawfully in terms of delegated authority, and as such, no appeal in terms of section 62 can lie against such decision. Likewise, when a municipal manager delegates a power which the law confers personally on him/her to some other person and that person takes a decision in terms of such delegation, no appeal lies in terms of section 62 against such decision. The reason for this is simply, that the act of the executive mayor and/or the municipal manager is not that of a delegating authority as defined in the act, and as such, the requirements of section 62 are not met.

The last mentioned instance was recently considered by the Free State High Court, in the matter of *Lohan v Mangaung Munisipaliteit*,⁶⁸ at paragraph 24 to 27. The court held that the ordinary interpretation of the language of section 62(1), indicates that an appeal in terms of section 62 is aimed at the decision that was taken pursuant to a delegation of authority. The facts of this case are briefly as follows. Lohan Civils submitted a tender to Mangaung municipality to do certain roadworks. In total 17 tenders were received by the municipality. In terms of a scoring system, Lohan Civils scored the most points. On or about 24 November 2008, the tender evaluation committee made a recommendation to the bid adjudication committee of the municipality that the tender be awarded to Lohan Civils. The matter served before the adjudication committee on 12 December 2008, which committee decided to refer the matter back to the tender evaluation committee for re-determination. On 17 December 2008, the tender evaluation committee once again recommended that the tender be awarded to Lohan Civils. On 9 January 2009, the bid adjudication committee decided not to follow the

67 Note the MFMA s59(2)(c).

68 [2009]ZAFSHC 21 (27 February 2009).

recommendation of the tender evaluation committee and recommended that the tender be awarded to the fourth respondent, a one Moletsi. This decision was confirmed, alternatively approved by the municipal manager on 19 January 2009. It is this decision by the municipal manager that was taken on review. The first to third respondents took the point *in limine* that Lohan Civils could not approach the court prior to exhausting internal remedies with reference to section 7(2)(a) of PAJA. The court was therefore called upon to determine whether the appeal in terms of section 62 was an effective alternative remedy that had to be exhausted prior to taking the matter on review. The court held that the approval of the award of the tender to one Moletsi was done in terms of an inherent authority derived from regulation 29(5)(b)(i) of the municipal supply chain management regulations. If this is read with section 60 of the MFMA, which determines that the municipal manager is the accounting officer of the municipality, then it is clear that the decision of the municipal manager to approve the award of the tender to one Moletsi was not exercised in terms of delegated authority but indeed in terms of an original authority and as such section 62 did not apply.

The investigation in this regard is aimed at determining whether the rights of the aggrieved person that was detrimentally affected, flows from a decision which was taken in terms of delegated authority. If not, then the appeal mechanism created in terms of section 62 can not come to the assistance of the aggrieved person.

If the decision appealed against was taken by a person or functionary, who had no delegated authority to take that decision, his/her/its act falls outside the scope of section 62. It can be argued that such action gives rise to an infringement of rights on the basis that the decision was unlawful, but due thereto that such decision falls outside the scope of the system of delegations, the appeal mechanism created in terms of section 62, do not assist such aggrieved person. In this instance, the aggrieved person may approach a competent court to review the previous decision.

3.2.2.6 What is meant with “reasons” in the context of Section 62.

The giving of reasons is a fundamental requirement because these reasons form the basis of the appellant's grievance. In other words, these reasons constitute the grounds for appeal, upon which the appellant relies to prove his/her case. Without these reasons it would be impossible for the respondent (municipality) as the other party to the appeal, to know what the case is that they have to meet. It is submitted that these reasons should also satisfy the threshold requirements of section 62(1) in order to indicate that the grievance of the appellant is indeed indicative that an existing right of the appellant would be adversely affected, should the previous decision be allowed to stand. It must be noted, however, that in administrative appeals the appellant is not confined to the grounds set out in his/her notice of appeal. These grounds may be supplemented during the hearing of the appeal.⁶⁹

The giving of reasons does not require more from the appellant than to allege that specific existing rights were adversely affected by the previous decision, and that the appellant is indeed an interested and/or affected person in the context of section 62. The allegations, however, becomes the burden that the appellant must prove during the hearing of the appeal, and as such, it should be carefully stated in precise terms, so as not to create an insurmountable object for the appellant during the hearing of the appeal. In other words, should the reasons be stated loosely and in general terms, the appellant may find that it might become impossible to convince the appeal authority during the hearing stage, that his/her rights were adversely affected by the previous decision and that the appeal should succeed.⁷⁰

It is submitted that, if the appellant fails to provide reasons in his/her notice of appeal, it will not disqualify the appeal. The obligation to provide reasons must be regarded as a component of a fair procedure, to allow the municipality to know, early in the process, exactly what the reasons for the appellant's grievances are. If the appellant fails to

69 Seen in this regard *Groenewald v M5* at par 83 to par 84

70 *Groenewald v M5* at par 24. The court found that the ambit of the appeal is limited to the extent that the appeal authority may only evaluate whether the appellant is entitled to succeed in his/her/its appeal, for the reasons it has provided to the appeal authority.

provide reasons then the municipality must request the reasons and proceed with the appeal. The appellant will stand or fall by the reasons so advanced to the appeal authority, especially if the appeal is determined on the documents instead of allowing the appellant to present oral arguments. In the latter instance, the reasons may be amplified during oral argument.

3.2.2.7 Within 21 days from date of notification of the decision.

The notice of appeal must be submitted to the relevant municipal manager within 21 days from date of notification, failing which the ability to amend the previous decision on appeal will lapse. The method for calculation of the period must adhere to section 4 of the Interpretation Act 33 of 1957, which determines that the first day is excluded and the last day is included, unless the last day is a Sunday or Public Holiday, which will then be excluded. The notice by the relevant municipality must inform the applicant that no rights will accrue for a period of 21 days, alternatively until the appeal (if any) was finalized, failing which the rights will accrue. Should the aggrieved person fail to appeal within the 21 day period, the power of the appeal authority will be limited by section 62(3) to the extent that the previous decision must be confirmed.⁷¹

Further to the aforesaid, the wording of the Act pertaining to the 21 day notice period, gives rise to difficulty as it is uncertain whether "date of notification" determines the date upon which a letter is despatched from the relevant municipality, alternatively the date upon which the letter was received by the appellant. Both the aforesaid scenarios are problematic. In the first instance, it could easily happen that a municipality drafts a letter and only despatches such letter 7 days after the date mentioned in the letter, effectively diminishing the 21 days appeal period apparently afforded to the appellant by the Act. If the wording should be construed to the extent that the 21 day period starts to run on the day that the notice is received by the appellant, it can give rise to great uncertainty as to when the rights vest, because a municipality will never know when the notice is received by the appellant. In an instance where the appellant is not at home and only

71 *Syntell v City of Cape Town* Par 65.

receives the letter upon his return, it can give rise to an absurdity which it is submitted could not have been the intention of the legislature.

In the matter of *Sebola and another v Standard Bank*,⁷² the constitutional court gave direction as to the determination of the date that may be regarded as the date upon which the notice was received. The facts of this case are briefly as follows. The appellants defaulted on a mortgage loan agreement with Standard Bank. Standard Bank sent to the appellants a notice of default in terms of section 129 of the National Credit Act.⁷³ The notice apparently was diverted by the South African Post Office to the incorrect post office, causing the appellants not to receive the notice. When the statutory time period for delivery of the section 129 notice expired, the bank proceeded to issue summons and obtained a default judgement. The appellants only became aware of the judgement when the warrant in execution of judgement was served on them. This matter escalated all the way to the constitutional court. The court ruled that "where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of a contrary indication constitute sufficient proof of delivery."⁷⁴ It is submitted therefore that the 21 day period will commence on the date upon which the South African Post Office certifies that the relevant notice was delivered and reached the appropriate post office for delivery to the consumer. In practice, this information is obtained by means of doing a "track and trace" search. After 21 days from this day, if no appeal had been received, the rights will vest and the ability to amend the previous decision on appeal will lapse.

The word "notification" suggests that, although the ability to appeal is a legislative right, that the ability to amend the previous decision through an appeal in terms of section 62,

72 *Sebola and another v Standard Bank*, (2012)(5)SA142(CC) (hereinafter referred to as "Sebola v Standard Bank").

73 Act 34 of 2005 (hereinafter referred to as the "NCA").

74 See par 87 of the judgment.

is not a legislative right,⁷⁵ but indeed a contractual right. This also complicates matters. The obligation to give notice flows from section 5(1)(c) of the Systems Act which determines that members of a local community have the right to be informed of decisions that which may affect their rights, property or reasonable expectations. The purpose of the notice is therefore not merely to convey a message of a decision that was taken, but also to inform the applicant that a specific decision was taken, which may affect existing rights, but that no rights will accrue for a period of 21 days, alternatively until an appeal (if any) is finalized.⁷⁶ If the municipality made a mistake and the notice is delivered to the incorrect address, resulting in the accrual of rights to the applicant, then the power of an appeal authority in terms of section 62 is limited, in terms of section 62(3). It can be argued that the section 62 appeal, in such an instance is no longer a viable alternative remedy available to an aggrieved person. The notice referred to by the word “notification” in section 62(1) is therefore important. In the matter of *City of Cape Town v Reader SCA (2008)*,⁷⁷ the municipality did not give notice as intended by section 62(1), most probably because the municipality held the view that the decision to approve the building plans did not affect the rights of the neighbour. The court considered the importance of the notice and confirmed that the failure to give notice is inconsistent with section 62(1). The supreme court of appeal also dealt with the responsibility to give notice and narrowed it down to the effect that notice only needs to be given to people whose rights are affected by the decision. In practice, this could mean only people who were part of the previous decision, such as, the applicant or the noted objectors.⁷⁸

75 *Loghdey v City of Cape Town and Others, Advance Parking Solutions CC and another vs City of Cape Town and Others (100/09) [2010] ZAWCHC 25 (20 January 2010)* (hereinafter referred to as “*Loghdey v City of Cape Town*”) at par 27 to 31. (Source www.saflii.org.za).

76 See also paragraph 3.2.3.3 herein for a discussion on the importance of the notice.

77 *Municipality of The City of Cape Town v Reader SCA (2008)* Jafta JA at par 23.

78 See again the Systems Act s5(1)(c).

In the matter of *Syntell v City of Cape Town*,⁷⁹ which dealt with rights that flow from the acceptance of a tender, the requirement and effect of the notice by the municipality to the aggrieved persons, informing them of their right of appeal in terms of section 62 was dealt with extensively.⁸⁰ The respondent (Actaris) was notified by the municipality in a letter dated 19 January 2007 that its tender was accepted. In the same letter Actaris was informed that the award of the tender is subject to a 21 day appeal period in terms of the Systems Act, and that no rights will accrue pending the finalization of any such appeal. This was in accordance with the supply chain management policy of the municipality, and the court said that it was clear that it was the intention that although the tender was accepted, it will only be awarded once the 21 day period has lapsed, or an appeal has been finalized. The municipality of Cape Town argued on the basis of the *Reader v Ikin CHC (2008)* judgement that the applicant (Syntell) was a third party and as such, does not enjoy a right of appeal in terms of the Systems Act. The court was not swayed by this argument and held that the notice suspended the accrual of rights. From this judgement, it is now clear that, if the aggrieved persons were not notified by the municipality that the decision was subject to the 21-day appeal period, that rights accrue to the applicant when the decision is taken by the functionary.⁸¹ Section 62(3) is then invoked to the extent that the decision-taking powers of the section 62 appeal committee is limited.⁸²

79 [2008] ZAWCHC 120 (13 March 2008).

80 *Syntell v City of Cape Town* Par 13, 40, 46, 58 and 64 .

81 *Syntell v City of Cape Town* par 58.

82 *Syntell v City of Cape Town* par 65 ; *Reader v Ikin CHC (2008)*. The full bench read s62(1) with s62(3) and found that although s62(1) may create the mechanism to appeal, it is disqualified by s62(3) which determines that any rights which have accrued as a result of the previous decision, cannot be reversed by the appeal authority. Therefore, if the right to erect a building was granted on the approval of building plans, and the building was indeed erected, then the s62 appeal authority may in terms of s62(3) find that the building should not be demolished, even if the previous decision was incorrect. As such, the court found that s62(1) read with s62(3) does not provide a viable internal remedy to aggrieved third parties.

In the matter of *Loghdey v Advanced Parking Solutions*,⁸³ which dealt with tender matters, the municipality of Cape Town included in their supply chain management policy the ability to appeal in terms of section 62. When the tenderers were notified of the outcome of the tender, the letter did not notify the tenderers that the accrual of rights were suspended for 21 days, alternatively until an appeal (if any) had been dealt with. The court was approached to consider an urgent application by Loghdey seeking an order that Advanced Parking Solutions had no right to appeal against a tender awarded to Loghdey. The court found that, notwithstanding the fact that the tender documents included a clause that stipulated that the award of the tender is conditional and subject to an appeal process, or that the supply chain management policy of the municipality included the possibility of appeal in terms of section 62, that rights have accrued in that no notice was issued. The effect thereof is that in terms of section 62(3), the previous decision cannot be varied or revoked “effectively rendering the appeal nugatory”.⁸⁴

It seems that the notice plays an integral part in determining whether the appeal mechanism created in terms of section 62 is available to an aggrieved person to amend a previous decision, or not. As was stated earlier herein, the right to appeal, is a legislative right, afforded by the Act, but the ability to amend the previous decision only becomes available if notice was properly given.⁸⁵ In the matter of *Syntell v City of Cape Town*,⁸⁶ at paragraph 64 to 66, it was said that the right of a tenderer in the instance of that matter exists as a matter of law, by virtue of section 62(1), and that the notification letter merely served as the purpose to disqualify section 62(3), which if not disqualified effectively renders the appeal nugatory. It is submitted that in order to give proper notice, the municipal notice must be delivered to the correct P.O. Box of the interested and/or affected person, and the notice of appeal must be received by the relevant

83 *Loghdey v Advanced Parking Solutions CC and others* [2009] ZAWCHC 15 (25 February 2009) (hereinafter referred to as “*Lochdey v Advanced Parking Solutions*”). (Source www.saflii.org.za).

84 *Syntell v City of Cape Town* par 33.

85 See *Syntell v City of Cape Town* par 41 and par 45.

86 [2008] ZAWCHC 120 (13 March 2008).

municipality, not later than 21 days, not including the day upon which the notice was delivered by the post office to the P.O. Box of the interested and/or affected person. It is now clear that if notice was not properly given, then rights will accrue when the decision is taken, which in turn will result therein that the appeal authority must confirm the previous decision.

3.2.3 Disecting section 62(3).

3.2.3.1 Introduction.

In the matter of *Syntell v City of Cape Town*,⁸⁷ at paragraph 45, the court said that “s 62 was no more than a codification of the common law doctrine of *functus officio*.” It is therefore important that the section 62 appeal authority determines whether rights have accrued prior to considering the merits of the appeal. If rights have accrued, then further evaluation is required before it can be said that section 62(3) becomes operative to the extent that the previous decision must be confirmed. This further evaluation requires that the appeal authority considers whether an error was made, when the previous decision was taken, either in fact or in law, even though the decision-making body has “discharged its office”.⁸⁸ If so, the appeal authority, if requested to reconsider the decision, may then vary or revoke the previous decision in order to rectify the error.⁸⁹ Where the decision-making body simply expressed itself incorrectly, the false impression created may be corrected by the appeal authority.⁹⁰ Where the decision-making body came to its decision on the basis of “perjured or fraudulent information supplied” by the applicant,⁹¹ the appeal committee may revoke the decision.⁹²

87 [2008] ZAWCHC 120 (13 March 2008).

88 Baxter (1984) 372.

89 Baxter (1984) 376.

90 Baxter (1984) 376.

91 Baxter (1984) 376.

92 Baxter (1984) 376.

3.2.3.2 Must consider the appeal and confirm, vary or revoke the decision.

The appeal authority “*must*” consider all relevant information pertaining to the matter before it. The appeal authority must therefore “apply its mind”,⁹³ and is not confined to the record and documents that were served before the previous decision making body. The section 62 appeal is a wide appeal,⁹⁴ and it follows that the principle of legality must apply and the parties concerned must have a fair opportunity under the prevailing circumstances to state their case.

In the matter of *M5 v Groenewald*,⁹⁵ the matter of section 62 as a wide appeal was considered. Le Grange J at paragraph 41 confirmed that section 62 of the Systems Act is a wide appeal but emphasised that the rehearing and/or fresh determination by the appeal authority must rationally be relevant to the subject of the appeal. He went further to say that only the parties involved in the appeal may “adduce new or further evidence and no one else”. In the matter of *Groenewald v M5*,⁹⁶ it was said that a section 62 appeal is a wide appeal in the sense of a rehearing, but that such rehearing related to the limited issue of whether the party appealing should have been successful.

In the matter of *Muller v City of Cape Town*,⁹⁷ the appeal pertaining to the decision to approve building plans was considered and decided on the documents only, by the municipal manager, on the same day as the relevant documents were received by the municipal manager from the administration. It was later held by the court, that the “City Manager” had considered the appeal on the basis of the building plans which incorrectly reflected the geographical orientation of the building and, as such, the “City Manager”

93 *Muller v City of Cape Town* par 58.

94 *M5 Developments (Cape) (Pty) Ltd v Groenewald NO and Others 2010 (5) SA 82 (C)*
(hereinafter referred to as “*M5 v Groenewald*”) par 41.

95 2010 (5) SA 82 (C).

96 *Groenewald v M5* par 25.

97 *Muller v City of Cape Town* par 17.

had failed to properly apply his mind in making his decision to dismiss the appeal. The decision of the "City Manager" was set aside on review.

It is conceivable that the information that served before a functionary may not be complete and that the applicant may bring further information to the attention of the appeal committee, which if it was initially available to the previous functionary, would most probably have influenced the previous functionary to the extent that it may have come to a different decision. In an instance where a decision has gone against an applicant, it follows that no rights could have accrued to the applicant. The appeal committee is therefore not prohibited from revoking the previous decision and coming to a new decision. It is hardly likely that any applicant will object if a decision which is unfavourable to him/her is changed to his/her benefit.⁹⁸ Should such an unfavourable decision result in the accrual of rights to interested and/or affected parties, then the position is slightly different. In the event of an allegation that rights have accrued, the appeal committee must first consider whether there is sufficient substance to the allegation of accrual of rights, and if so, the decision may only be varied or revoked with the consent of all interested and affected parties. If the allegation of accrual of rights to third parties is well founded, and the interested and/or affected parties do not consent to the amendment thereof, then the previous decision must be confirmed,⁹⁹ even if it was incorrect. The value of this decision then lies therein that the applicant has exhausted his/her internal remedies and may now approach the judiciary.

In certain instances, a decision taken would only become a final decision, pending the execution of a suspensive condition. This would result therein that the functionary will not have "discharged its office",¹⁰⁰ and the decision may be revisited by the functionary once new information becomes available. No appeal can lie against such a decision

98 Baxter (1984) 373.

99 *City of Cape Town v Reader SCA (2008)* Par 10.

100 Baxter (1984) 72.

until the previous decision-taking body has discharged its office, to the effect that its previous decision has become final.¹⁰¹

The ability to “vary or revoke” only arises once it is determined that the previous decision was indeed a final decision and that no rights accrued. If the previous decision was an interim decision, then there is no decision against which an appeal can lie. The obligation to confirm the previous decision arises when rights have accrued and the person who benefits from such accrual of rights does not consent to the amendment of the previous decision. In this instance, the powers of the appeal authority is limited to the effect that it must confirm the previous decision.

3.2.3.3 No such variation or revocation may detract from any rights that may have accrued .

Chambers 20th Century dictionary defines the word “detract” to mean “to take away, to abate, to reduce in degree or to diminish”.¹⁰² Any decision taken by the appeal authority may not take away or diminish any rights that have accrued as a result of the previous decision.¹⁰³ The appeal authority must evaluate whether the threshold requirements laid down in section 62(1) were complied with, and whether the decision appealed against gave rise to the accrual of rights.¹⁰⁴

The accrual of rights does not disqualify the appeal. The effect it has is to limit the power of the appeal body, in that its decision may not detract from any rights that may

101 Baxter (1984) 375.

102 Thomas Davidson Chambers's Twentieth Century Dictionary (1950) W.&R. Chambers, Ltd London (hereinafter referred to as “Chambers's 20th Century Dictionary) 252

103 *City of Cape Town v Reader SCA (2008)*. The supreme court said that s62(1) in some cases May be disqualified by s62(3) in that, even if a neighbour can prove that he/she had a right to take part in the approval of a building plan as an interested and affected party and could therefore prove in terms of s62(1) that his/her rights were adversely affected by the decision to approve a building plan, that s62(3) prohibits the appeal authority to order that the building be demolished.

104 *Loghdey v City of Cape Town* par 32; see also *Syntell v City of Cape Town* par 39.

have accrued.¹⁰⁵ In this instance, the notice by a municipality to aggrieved parties is very important. In this context see paragraph 3.2.3.2 herein. In the matter of *Loghdey v City of Cape Town*,¹⁰⁶ at paragraph 30 Bins Ward J said as follows:

"...as I understand the judgement of the Full Bench in *Reader and another. vs Ikin and another* 2008 (2) SA 582(C), it held that s62 of the Systems Act is nothing more than a codification of the limited circumstances in which a decision-maker can, at common law, withdraw or alter its own decision without infringing the doctrine of *functus officio* (which determines that once a decision has been made, the decision-maker cannot revisit it)".

The first thing to consider is whether the functionary has "discharged his office" and become "functus officio". If the decision taken was an interim decision, or the decision was subject to certain conditions being met, then such conditions must have been met, before it can be said that the decision is final and the decision-taking body has "discharged his/her office". A decision-taking body can never be *functus officio* in terms of an interim or in-principle decision. Once it is clear that the decision was final, the committee must determine whether these rights have been suspended, pending the finalization of the appeal. If the rights were not suspended by notice, the appeal committee may find that its powers to vary or revoke the previous decision is so limited in terms of section 62(3), that the appeal may not provide the appellant with an adequate alternative remedy.¹⁰⁷

3.2.4 Disecting section 62(6).

3.2.4.1 Introduction.

This provision qualifies section 62 to apply, within the system of delegations, not only for decisions taken in terms of the Systems Act, but also for decisions in terms of other legislation. Therefore, something like an umbrella appeal authority, which can be an alternative remedy to an aggrieved person in instances where another Act does not provide such a remedy.¹⁰⁸ This provision also applies where the possibility exists to

105 See the Systems Act s62(3).

106 *Loghdey v City of Cape Town* par 30.

107 *Loghdey v City of Cape Town* par 27 to 31.

108 *M5 v Groenewald*. The municipality did not have a supply chain management policy, and the

appeal to a higher body.¹⁰⁹ The word 'detract' determines that section 62, does not affect the right of a further appeal to such a higher body. Such right is fully reserved. It is only when the section 62 internal appeal process has been completed, that it can be said that a final decision was taken and that the matter is ripe for a further appeal. The period for lodging such further appeal starts to run at this point.

3.2.4.2 The provision of this section do not detract from any appropriate appeal procedure provided for in any other applicable law.

Section 62(6) which was later added to the Act as an amendment, clearly intends that the appeal authority created in terms of section 62 does not replace existing statutory appeal authorities. In this regard one must take note of certain limitations on the section 62 appeal authority.

- a) **The limited application of section 62 with regard to other applicable law.**
(i) **Tenders.**

Whether section 62 is a competent appeal authority with regard to tender matters was discussed in various cases. It seems that there are various factors to be taken into account when deciding whether section 62 is indeed the competent appeal authority available to an aggrieved person with regard to the award of a tender. A factor which should also be taken into account is who the functionary is that takes the final decision in certain circumstances.

Section 111 and section 112 of the MFMA determines that each municipality and municipal entity must have implemented a supply chain management policy which gives effect to the provisions of the Act, pertaining to the awarding of tenders. Regulations 49 and 50 which was promulgated and published in Government Notice 868 of 30 May 2005, provides for the resolution of disputes, objections, complaints and queries in

court confirmed that s62 was the correct appeal authority in that instance to deal with tender matters.

109 S44 of LUPO, which is an appeal to the provincial authorities.

tender matters. The supply chain regulations, but more specifically the supply chain management policy, must provide for a committee system which should include an evaluation committee and an adjudication committee for the evaluation of the tenders in accordance with the specifications of the tender document which evaluation is then submitted to the bid adjudication committee who awards the tender. In some instances, the bid adjudication committee makes the final award, whereas in other instances, the bid adjudication committee only makes a recommendation to the municipal manager who makes the final award. This is determined by a system of delegation of a municipality. The inherent authority to finally approve a tender lies with the municipal manager, but in terms of supply chain regulation 29(1)(b)(i) this authority may be sub-delegated to the bid adjudication committee. If the power to make a final award is indeed sub-delegated by the municipal manager to the bid adjudication committee, then in terms of regulation 29(6) of the supply chain regulations, the municipal manager is divested from the ability to interfere with such final decisions, other than on appeal.

In the matter of *Groenewald v M5*,¹¹⁰ the municipality had not yet adopted a supply chain management policy and the final decision in terms of its system of delegation was taken by the bid adjudication committee. The court therefore held that the appeal mechanism created by section 62 of the Systems Act was a competent appeal mechanism and that the municipal manager, in that instance, was the competent appeal authority.

In the matter of *Loghdey v Advanced Parking Solutions*,¹¹¹ the municipality of Cape Town adopted a supply chain management policy in which it was expressly stated that tender awards are subject to appeals in terms of section 62.¹¹² It seems however that these clauses do not afford a right to appeal, "it merely purports to record an understanding (by the municipality) as to the effect of section 62".¹¹³ In this instance, the

110 2010 (5) SA 82 (SCA).

111 [2009] ZAWCHC 15 (25 February 2009).

112 See the supply chain management policy for the City of Cape Town clauses 210 to 214.

113 *Loghdey v City of Cape Town* par 28.

notice to the unsuccessful bidders plays an integral part.¹¹⁴ In this matter, the bid adjudication committee of the municipality awarded the tender to Loghdey to provide a curbside parking management service to the municipality. The municipality subsequently concluded a contract with Loghdey to that effect. Advanced Parking Solutions who was unsuccessful in its bid, appealed against the award in terms of section 62 of the Systems Act. It was common cause between the parties that the municipality did not issue a notice to inform the tenderers that the award was made subject to an appeal period of 21 days, alternatively until the appeal was heard. It seems that the municipality relied on its supply chain management policy and the tender documents which stipulated that the award of the tenders were subject to an appeal in terms of section 62. When an unsuccessful bidder appealed against the award in terms of section 62, the municipality, on the basis of the Reader judgement informed all parties that the unsuccessful tenderers were regarded as third parties, and as such, the appeal in terms of section 62 was not available to them. Notwithstanding this notice, the municipality then subsequently decided to hear the appeal. Loghdey then approached the court for an order that the appeal mechanism in terms of section 62 was not available under the current circumstances. Loghdey argued that rights had already accrued due to the unconditional award of the tender and that section 62(3) now renders the appeal nugatory.¹¹⁵ Advanced Parking Solutions argued that the appeal mechanism in terms of section 62 does apply in that the supply chain management policy and the tender documents clearly provide therefore. The court found that section 62 does not provide for an automatic right of appeal, but that notice had to be given to the interested and affected parties that the rights were suspended pending an appeal. The court found that the unconditional award of the tender to Loghdey and the subsequent conclusion of the contract invoked section 62(3), which

114 The Municipality in the instance of *Loghdey v City of Cape Town*, however did not issue the notice and as such the decision was not suspended. The Court held that s62 was not available as an alternative remedy.

115 *Loghdey v Advanced Parking Solutions* par 28.

means that although an appeal in terms of section 62(1) is available, section 62(3) was invoked to the effect that it rendered the appeal nugatory.¹¹⁶

In the matter of *Syntell v City of Cape Town*,¹¹⁷ which also pertained to a tender award by the municipality for the City of Cape Town, a notice was indeed sent to all tenderers after the award of the tender, that the award is subject to a 21 day appeal period and that no rights will accrue before the expiry of such period and/or until an appeal was dealt with. In this instance, the court confirmed that section 62 is the competent appeal authority and that the appeal is to be heard by the municipal manager.

In the matter of *Lohan v Mangaung Munisipaliteit*,¹¹⁸ the bid adjudication committee disagreed with the recommendation of the bid evaluation committee and referred the recommendation back to the bid evaluation committee who made the same recommendation again to the bid adjudication committee. The bid adjudication committee then made a different recommendation to the municipal manager who it seems in terms of the system of delegations of the Mangaung local municipality was the competent authority to take a final decision. One of the unsuccessful tenderers then took the award to court by means of an application for an interim interdict to prevent the execution of the tender pending the finalisation of a review application to set aside the award of the tender to the successful tenderer. The municipality and some of the other respondents then raised the argument that the applicant had not exhausted all internal remedies amongst others, the appeal authority in terms of section 62. The court held that it was clear from section 62(1) that this appeal authority operates within the system of delegations and that the municipal manager in this instance was not exercising her delegated power, but instead an original power and that section 62 of the municipal systems act was accordingly not available to Lohan.¹¹⁹

116 *Loghdey v Advanced Parking Solutions* par 33.

117 [2008]ZAWCHC 120 (13 March 2008).

118 [2009] ZAFSHC 21 (27 February 2009).

119 See also the discussion of this case in paragraph 3.2.2.6 herein.

Although section 62 of the Systems Act provides for a general appeal mechanism which operates within the system of delegations, the supply chain regulations only makes provision for the resolution of disputes. In this instance, a person aggrieved by the decision to award a tender may lodge a written objection or complaint against the decision within 14 days. In this regard regulation 50 provides for the appointment of an independent and impartial person not directly involved in the supply chain management process of the municipality to act as a mediator to deal with objections, complaints or queries arising from the awarding of the contract. It seems that this person will not act as an appeal authority but instead as a mediator. If after 60 days the dispute remains unresolved, the matter must be reported to the relevant provincial treasury, and if the matter further remains unresolved, it may be referred to national treasury for a resolution. In terms of supply chain regulations 50(3) to 50(7), such aggrieved person may however at any time approach a competent court to resolve the dispute. It flows from this that there is a significant difference between an appeal in terms of section 62 and/or dispute resolution in terms of the supply chain management regulations.

In the matter of *Total Computer Services v Potchefstroom Municipality*,¹²⁰ the municipality called for tenders for the provision and implementation of a system to process and enforce road traffic violations within its municipal area. The bid evaluation committee and the bid adjudication committee recommended that the tender be awarded to a one Inyanga. It seems that the system of delegations of that municipality provided that the municipal manager was the competent authority to make the final award. After it learned that it was not successful in its tender, Total Computer Services lodged an appeal in terms of section 62. The appeal was lodged approximately 20 days after the notification and was dismissed by the municipality as it contended that the appeal was out of time. The municipality based its decision thereon that regulation 49 of the supply chain regulations provides for a 14 day appeal period. The municipality then proceeded to conclude a contract with Inyanga. Total Computer Services applied

120 *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008(4)SA346(T) (hereafter referred to as *Total Computer Services v Potchefstroom Municipality*)

to court for the review and setting aside of the award. Total Computer Services argued that its appeal was not out of time in terms of section 62 of the municipal Systems Act. The municipality argued that the 14 days period in terms of its supply chain regulations applied. The municipality based its argument on section 3(2) of the MFMA, which stipulates that in the event of any inconsistency between the provisions of the MFMA and any other legislation, then the MFMA enjoys preference over such other legislation. The court found that the municipality's procurement policy allowed for a 21 day appeal period, and in doing so, participating bidders had a legitimate expectation that a tender in question would be awarded in accordance with the time period stipulated in the municipality's procurement policy. In this instance, the court failed to recognise that the grievance procedure in terms of regulation 49 and 50 of the supply chain regulations, is distinctly different than the appeal mechanism in terms of section 62 of the Systems Act. The appeal mechanism in terms of section 62 provides for a proper appeal procedure which is recognised by PAJA as an internal remedy that has to be exhausted prior to approaching the court on review, whereas the grievance procedure in terms of regulation 49 and 50 only provides for a mediation mechanism that does not have to be exhausted prior to approaching the court. This was most probably because the court in this instance was only called upon to consider the question of conflict between clause 49 of the municipality's procurement policy and regulation 49 of the supply chain regulations. The conflict with section 62 of the Systems Act did not arise and was therefore not dealt with by the court.

From the aforesaid, it is now clear that section 62 is available as a competent appeal authority in tender matters, however, its application is not without difficulty. In the event that a municipality has not adopted a supply chain management policy, section 62 will be available as a proper appeal authority to sit in judgement over tender matters.¹²¹ In the event of an unconditional award made to a successful bidder, rights will accrue which may result therein that although section 62 is available, it will in effect be disqualified by section 62(3), in that the previous decision must be confirmed. Furthermore, if section 62 is available as an appeal authority, in that proper notice was

121 *M5 v Groenewald* Par 34..

given,¹²² the appeal authority is limited to consider the appeal for the reasons given and although it is a wide appeal, the consideration could only be whether the appellant should have been successful in its tender or not. The appeal authority has no power to revisit all the tenders and to award the tender to a bidder who did not submit a valid appeal.¹²³ Furthermore, if the final decision was taken by the municipal manager in terms of inherent authority, it falls outside the system of delegations and is not subject to an appeal in terms of section 62. An appeal in terms of section 62 will only be possible if the final award was made by the bid adjudication committee in terms of delegated authority.

(ii) Local Government : Municipal Property Rates Act.

Section 56 of the Local Government : Municipal Property Rates Act,¹²⁴ determines that the provincial member of the executive council for local government ('MEC') must, by notice in the provincial Gazette, establish a valuation appeal board to hear appeals instituted in terms of the Property Rates Act. Section 62 is therefore not available as an appeal authority to hear matters pertaining to the valuation of properties. The valuation appeal board will be the proper authority. If an appeal is submitted to the municipality, pertaining to any matter other than the valuation of a property, for example when an application for a rebate is denied, then the section 62 appeal authority will be the competent authority to hear appeals of aggrieved persons in terms of the Property Rates Act, subject thereto, that such persons can satisfy the threshold requirements of section 62.

(iii) Contravention of By-Laws.

Contravention of legislation such as a by-law falls within the sphere of the criminal justice system and should be dealt with through that system. This, however, is not

122 *Loghdey v City of Cape Town* par 25. S62 could still be available if the policy provided therefore and proper notice was given.

123 See again *Groenewald v M5*

124 Act 6 of 2004.

always the case as the by-law itself will determine the grievance procedure to be followed, should there be contraventions of the by-law. It may well be that the by-law does not determine criminal sanctions, but indeed creates an appeal authority to deal with contraventions instead of referring contraventions to the criminal justice system. The by-law itself should determine whether section 62 is available as an appeal authority or not.

(iv) Labour Related Matters : Employees: Administrative Personnel.

Although it is conceivable that a decision by a member of the administration taken in terms of delegated authority may infringe upon the rights and/or interests of another employee, such rights and/or interests would be derived from labour legislation, such as The Basic Conditions of Employment Act,¹²⁵ and/or the Labour Relations Act.¹²⁶ The grievance procedure determined by labour legislation should be followed. It is submitted that section 62 is not available to employees in this instance.

(v) Disciplinary matters : Councillors.

It is conceivable that a decision by one councillor may infringe upon the rights and/or interests of another, or other councillors. The infringement of such rights and/or interests are regulated by schedule 1 to the Systems Act (the code of conduct). Section 14 of the code of conduct determines how a violation of the code should be dealt with and even provides for an appeal authority in section 14(3)(a) being the MEC for local government in that province. Section 62 is not available as an alternative internal remedy to a councillor in this instance. With regard to a decision taken by a disciplinary committee, it should further be noted that this decision is an interim decision which will only become final when it is adopted by council, and a decision of council is not subject to an appeal in terms of section 62, because it falls outside the system of delegations.

(vi) The municipal manager as the appeal authority.

125 Act 75 of 1997.

126 Act 66 of 1995.

Section 62(4)(a) of the Systems Act, determines that the appeal authority pertaining to a decision taken by an official will be the municipal manager. Will it then, in terms of section 62(4)(b), entail that a person who is aggrieved by the decision so taken, by a municipal manager, on appeal, may then appeal once again in terms of section 62(4)b to the executive mayor? It is submitted that the decision of the municipal manager as the appeal authority will not be taken in terms of delegated authority, by a delegating authority, in terms of an inherent statutory authority. As such, the threshold requirement of section 62 that the decision appealed against should have been taken in terms of delegated authority, by a delegating authority, could not be satisfied. Therefore, a further appeal in terms of section 62(4)(b) will not be valid. It is also submitted that the term “other applicable law” in the context of section 62, disqualifies a further section 62 appeal on the same merits.

(vii) The approval of building plans

The Building Standards Act,¹²⁷ specifically section 9, of the National Building Regulations (hereinafter referred to as the “NBR”) creates an appeal authority, available to any person who is, amongst others, aggrieved at a local authority to grant approval of a building plan. This was confirmed in the judgement delivered by Davis J on 16th August 2007 in the matter of *Reader v Ikin*.¹²⁸ The appeal tribunal in terms of section 9 of the NBR must in terms of the Act be instituted by the relevant MEC for local government. It is submitted that in the event that the relevant MEC has failed to institute such appeal tribunal, then the appeal tribunal in terms of section 62 is available to such an aggrieved person.

In the matter of *Camps Bay Ratepayers and Residents Association v Harrison and another*,¹²⁹ it was confirmed that zoning scheme regulations constitute “other applicable

127 The Building Standards Act 103 of 1977, (hereinafter referred to as the “BSA”)

128 *Reader v Ikin* par 17.

129 *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* [2010] ZACC 19 (4 November 201) par 9. (Source www.saflii.org.za)

law” within the meaning of section 7(1)a of the BSA.¹³⁰ This is important when deciding whether a building plan can be approved without giving notice to interested and/or affected third parties. It flows from this that a building plan may not be approved without public participation, if such approval will affect existing rights of third parties.¹³¹

In the case of *Muller v City of Cape Town*,¹³² the court dealt with an infringement of rights of third parties. The court held that the approval of the building plans and the subsequent building that was erected later revealed certain deviations from the plans requiring a number of departures. The interested and affected parties, notwithstanding request thereto, were refused a request to scrutinize the amendments to the building plans, and as such, public participation was refused. It was later held on review in this matter that a local authority must refuse building plans if interested parties were denied the opportunity to object to and comment on the plans. It should be noted that the approval of the building plans in this instance included a deviation from the zoning scheme regulations in order to exceed the permissible height, and should therefore be distinguished from the finding in the Reader SCA (2008) case.

In the Reader v Ikin judgement,¹³³ delivered by Davis J on 16th August 2007 in the Cape high court, dealt with the question, whether section 62 was an internal remedy which had to be exhausted before an applicant could approach the High Court for an interdict. The court held that section 62 was not an internal remedy which had to be exhausted, because third parties are not parties to the application for the approval of a building plan. In terms of this judgement, section 62 is only available to the applicant for the approval of a building plan. This was confirmed by the supreme court of appeal in *City of Cape Town v Reader SCA (2008)*.¹³⁴ As mentioned earlier, it is submitted that the judgements in the Reader cases should be distinguished to apply only to matters where

130 See also the judgement in *Muller v City of Cape Town* par 26 to 27.

131 See in this regard the obligation to give notice in terms of s5(1)(c) of the Systems Act.

132 2006(5) SA 415(C)

133 2008 (2) SA 582 (C).

134 2009(1) SA 555 (SCA).

an applicant to the approval of a building plan does not infringe on the rights of third parties. This is best explained by means of an example as follows below.

A landowner applies to the municipality for the approval of a building plan, and pays the requisite fee for such approval. Upon scrutiny of the plan, the municipal official notes that the applicant adheres to all building requirements and regulations and public participation is therefore not necessary. The municipal official consequently endorses the approval of the building plan. It was not necessary for the official to exercise discretion. The approval of the building plan in fact gave the applicant no more rights than he already had. The approval of the building plan was merely a confirmation of existing rights. In this instance, the only affected and/or interested party to the decision is the applicant. The second landowner submits his building plan for approval and pays the requisite fee. Upon scrutiny of the plan, the municipal official notes that there is a contravention of a prevailing land use right, which requires that the applicant submits, simultaneously with the building plan, an application for a rezoning or departure or waiver, etc. Because the applicant now seeks more rights than he currently has, the application may impact on his/her neighbours' rights over their respective properties. Therefore, a process of public participation must now follow. The municipal official takes a decision,¹³⁵ in exercising discretion, and informs the applicant accordingly, upon which he then submits his land use application and proceeds to inform his neighbours of his intended application. Some of the neighbours object and some support the application. The valid objections now become affected and/or interested parties, in the context of section 62 of the Systems Act. All the relevant information is gathered and sent to the portfolio committee to debate the matter and formulate a recommendation to the executive mayor. The matter is now referred to the executive mayor for consideration and a final decision.¹³⁶ During the next cycle, the executive mayor considers the

135 The decision so taken is in the exercise of a discretion without consideration of evidence, but through application of rules and regulations. The Act will be administrative in nature and regarded as administrative action. The principle of legality will apply.

136 The executive mayor exercises his/her discretion and considers evidence before he/she comes to a finding, which is regarded as a final decision which could confer rights. The decision so taken

applicant's application and is convinced by the comments of the objectors to reject the application. The applicant is informed of his right of appeal in terms of section 62 of the Systems Act and section 44 of LUPO.¹³⁷ The applicant submits his appeal to the section 62 appeal committee, who deals with it and comes to a decision,¹³⁸ to approve the application. The decision of the appeal committee is reported back to the full council to be noted. The building control officer is now in a position to approve the building plans. In the instance where the appellant is one of the noted objectors and the appeal is dismissed, the appellant may now revert to an appeal in terms of section 44 of LUPO to the relevant MEC in the province. In that the appeal suspends all rights, the building control officer may not approve the building plans pending the outcome of the appeal in terms of LUPO. In the event where the appellant is the applicant for the approval of the building plan, and the appeal is dismissed, the applicant may also appeal to the relevant MEC in terms of section 44 of LUPO, as the approval of the building plan is denied due to non compliance with town planning principles.¹³⁹

(viii) Land use planning matters.

An appeal tribunal is created in terms of section 44 of LUPO.¹⁴⁰ Section 62 is stated wide enough to create an internal appeal authority to hear grievances in land use planning matters. Should an aggrieved party appeal in terms of section 62 and simultaneously lodge an appeal in terms of section 44 of LUPO, the appeal in terms of section 44 of LUPO is suspended, pending the outcome of the appeal in terms of section 62. Only once the section 62 appeal committee comes to a finding, will there be a final decision against which an appeal in terms of section 44 of LUPO can lie.¹⁴¹

is of a quasi judicial nature and is regarded as administrative action.

137 Ordinance 15 of 1985.

138 The s62 appeal committee considers the application as well as the evidence presented (written and/or oral). The decision of this committee is a final decision.

139 See again s44 of LUPO. See also par 3.2.4.2(a)(viii) herein.

140 Ordinance 15 of 1985.

141 Weclogo Circular (2003-12-11).

3.3 Conclusion

It seems that the obligation to provide for "adequate checks and balances" to a system of delegations must serve the purpose not only to assist a delegating authority in its oversight function, but also to be available to members of communities, to hold an executive authority accountable.

The ability of councillors and/or a municipal manager to review decisions, respectively in terms of section 59(3) of the Systems Act and/or in terms of section 79(4) of the MFMA, is limited. If the ability to review is considered against a similar provision found in section 62(3) of the Systems Act, it seems that, when rights have accrued in terms of a previous decision, such councillors and/or municipal managers have no "adequate checks and balances" to review the previous decision, as this decision must be confirmed.

With regard to section 62 as an adequate check and/or balance, the appeal authority is available also to members of communities and it is more cost effective and speedier than courts of law. If this appeal authority functions effectively, it will inspire confidence in the political as well as the administrative decision-taking processes in municipalities, in that it will give the assurance to all aggrieved persons that the decision was considered at least twice. An effective section 62 appeal authority must provide an aggrieved person with an opportunity to have his/her application evaluated by a second decision-taking body which is impartial and empowered by section 62 to fulfil that specific function in a manner which is lawful, reasonable and procedurally fair. Only then will the section 62 appeal authority be regarded as a credible institution in the eyes of the public.

CHAPTER 4: CONCLUDING REMARKS.

4.1 Introduction

Since 1994, the Republic of South Africa became a constitutional democracy. The Constitution of the Republic of South Africa 1996,¹ as the supreme law stipulates amongst others that all organs of state are bound by the Constitution and other legislation.² It is trite that the legal framework within which South African government operates determines the rights and obligations of the different organs of state, as well as how checks and balances should be created through a system of separation of powers between the legislative, executive and judiciary arms of government. The legal framework further provides therefore that government is divided into three independent spheres of government, being national, provincial and local government, who operate independently yet who are inter-related through a system of co-operative government. This system of co-operative government includes an obligation by one sphere of government to monitor and support another sphere of government without undermining the autonomous identity of such sphere of government. Bekink,³ argues that the new constitutional democratic system in South Africa “has moved closer to a so-called *integrated model of federalism*.” In an integrated model of federalism, the different spheres of government are separate yet inter-related through principles of co-operative government, and each sphere has exclusive competencies to exercise certain powers and functions which are allocated by a Constitution. An integrated model of federalism also provides, therefore, that powers and functions may be devolved between the different spheres of government and that there must be procedures to deal with intergovernmental disputes. The current South African model of government provides for exclusive and concurrent competencies between the different spheres of government,⁴ which in turn authorizes the delegation and

1 The Constitution of the Republic of South Africa 1996 (hereinafter referred to as the “Constitution”)

2 Refer to the Constitution ss1(c) and 2

3 Bekink B *Principles of South African Local Government Law* (2006) Lexis Nexis Durban p8 par 1.3.2.9.

4 See again schedules 4 and 5 of the Constitution.

assignment of powers and functions by one sphere of government to another.⁵ The ability to delegate powers and functions by one sphere of government to another, creates the need to exercise oversight whilst observing the autonomous identity of such government sphere.

With regards to local government in South Africa, the exclusive competencies,⁶ and objects for local government, indicates that local government must focus its attention on matters which affect the everyday lives of the ordinary citizen in the street.⁷ National legislation goes further and expands on the constitutional framework, that members of a community is part of a municipality.⁸ It is therefore submitted that one of the key functions of local government is to serve members of the community, without differentiation,⁹ in the specific geographical area of each municipality throughout the territory of South Africa. Section 2 of the Systems Act in fact determines that a municipality consists of the legislature, the executive and the community. For a community to be involved in the affairs of local government is also a carefully protected constitutional right.¹⁰ Section 152(1)(e) of the Constitution determines that it is one of the objects of local government to involve communities in the affairs of local government. National legislation recognizes this constitutionally protected obligation that rests on local government, and even goes further to determine that members of a local community have the right to contribute to the decision making process of a municipality and also to submit written or oral recommendations, representations and complaints.¹¹ Members of a local community further have the right to be informed of decisions of a municipal council, or other political structure which affect their rights, property and reasonable expectations.¹² It is submitted that this statutory right to receive notice, is aimed at elevating members

5 Refer to the Systems Act ch2 of the guidelines on allocation of additional powers and functions to municipalities.

6 Refer again to part B of ch 4 to the Constitution and part B to ch 5 of the Constitution.

7 See again the Constitution s152.

8 See the Systems Act s2.

9 Refer to the preamble to the Constitution.

10 Note again s152(1)(e) of the Constitution.

11 See the Systems Act ss4 and 5 and ch4.

12 Refer to the Systems Act s5(1)(c).

of a community to become part of the checks and balances to the system of delegations in local government, through which the executive authority is held accountable for its actions. It is in this context that the purpose of the appeal mechanism created in terms of section 62 must be understood. It is submitted that the appeal mechanism created in terms of section 62 is the only mechanism through which members of a community can be seen to be part of the checks and balances to the system of delegation in local government. It is further submitted that in the absence of the appeal mechanism in terms of section 62 being available to members of a community, such members can be nothing more than spectators, to decision making processes of the municipality.¹³ In order to ensure that members of communities remain a component/roleplayer of the checks and balances to the system of delegations in local government, members of a community must be informed as to the proper working of the appeal mechanism in terms of section 62. Only then will the appeal mechanism created in terms of section 62 become an adequate check and/or balance to the systems of delegations in local government.

4.2 The section 62 appeal mechanism as part of the structure of adequate checks and balances available to members of a community to hold an executive authority in local government accountable.

Due to the important role that communities play within local government, specifically with regard to decisions being taken in local government, it is important for national legislation to provide therefore that members of a community can enforce participation through checks and balances to a system of delegations. The appeal mechanism in terms of section 62 is the mechanism through which such participation may be enforced. The appeal mechanism in terms of section 62, however, cannot be considered in isolation, as it operates as part of a structure of checks and balances to a system of delegations, which in turn is the very foundation upon which the model of separation of powers as it applies to local government, is built.

13 This statement refers to section 62 as an internal remedy available to members of a community through which such members can enforce participation in order to influence a decision taken in terms of delegated authority. It is submitted that there is no other internal remedy available to members of communities to enforce participation in decisions taken in terms of delegated authority.

It is important in this context to note, as was pointed out throughout this study that the model of separation of powers as it applies to local government is a unique and a somewhat flexible system. In terms of the Constitution,¹⁴ a municipal council takes all the decisions and exercises all the functions within a municipality. It is, however, envisaged that a municipal council will create an executive structure through a system of delegations, including a structure of checks and balances to such system of delegations. It is submitted that if there is no adequate system of checks and balances, it could create chaos in local government as the executive authority will not be held accountable by a functionary distinct from it. In this context, Bekink refers to an old saying that “power corrupts and absolute power corrupts absolutely.”¹⁵

As indicated above in chapter 2, a municipal council is vested with the authority to exercise all legislative and executive functions in a municipality.¹⁶ Certain matters may not be delegated by a municipal council and a municipal council may also determine in its sole discretion, in some instance, not to delegate certain matters, save for those legislative assignments which a municipal council is obliged to delegate.¹⁷ The matters which are not delegated to other functionaries are to be executed by a municipal council itself or through functionaries who report directly to a municipal council. In this regard, section 79 of the Structures Act authorises a municipal council to establish committees to assist it to effectively and efficiently perform any of its functions, or to exercise any of its powers. These committees includes committees such as the committee on unauthorised, irregular or wasteful and fruitless expenditure, the disciplinary committee against councillors, and the municipal public accounts committee. The decisions of these committees falls

14 Refer to the Constitution s160(1)(a).

15 B Bekink *Principles of South African Constitutional Law* (2012) lexis Nexis Durban (hereinafter referred to as Bekink (2012)),p47 par 3.4.

16 See again s160(1) of the Constitution.

17 See in this regard the Systems Act s55 with regard to a municipal manager as head of the administration and the Local Government Municipal Finance Management Act 56 of 2003 (hereinafter referred to as the “MFMA”) s60 with regard to a municipal manager as the accounting officer and the MFMA ch7 with regard to an executive mayor.

outside the ambit of the system of delegations, and as such, should not be subject to an appeal in terms of section 62.

A municipal council is authorised to delegate most of its executive functions to different functionaries within a municipality who collectively form the executive authority in a municipality. A municipal council therefore acts as a delegating authority within the system of delegations in a municipality. As a delegating authority, a municipal council is obliged to exercise oversight over the proper execution of the executive functions so delegated. In this regard, section 59(1) of the Systems Act instructs a municipal council, not only to maximise administrative and operational efficiency through a system of delegations, but also to provide for adequate checks and balances to such system of delegations. The executive structure of a municipality created in terms of the system of delegations, consists of two separate yet inter related divisions, being a political division under the executive leadership of an executive mayor and on the other hand, the administrative division under the administrative leadership of a municipal manager. A municipal manager is not only the administrative head of the administrative division, but is also accountable for the actions of the administration. The appeal mechanism in terms of section 62 operates throughout the total spectrum of such executive structure within a municipality, subject to certain limitations.¹⁸

It was mentioned earlier herein that checks and balances support the model of separation of powers as it applies to local government.¹⁹ In the recent decision of *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry & Fisheries*,²⁰ the court stated that there is "no universal model of separation of powers and in systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no

18 Refer to par 2.5.2 and par 3.2 herein.

19 See par 2.9 herein.

20 *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry & Fisheries and others* ZACC26(11 July 2013) (hereinafter referred to as "*National Society for the Prevention of cruelty to Animals v Minister of Agriculture, Forestry & Fisheries*") par 13.

separation that is absolute". It goes further to say that,²¹ "our Constitution does not provide for a total separation of powers among the legislature, the executive and the judiciary". It flows from this that the model of separation of powers is flexible and "is given expression in many different forms and made subject to checks and balances of many kinds."²² This position was confirmed in previous cases such as *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*,²³ and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*.²⁴

The model of separation of powers, and specifically the implementation thereof in local government, it seems, is directly influenced by the manner in which a municipal council delegates executive powers and functions to the executive authority within a municipality, because every member of the political executive in a municipality, is also a member of the legislator in the municipality. It is most probably for this reason that section 59 of the Systems Act includes the obligation to create checks and balances to the system of delegations. This is done in a structured manner, through functionaries who report directly to a municipal council. There is an argument to be made that the checks and balances to a system of delegations, should not only enable a legislature to oversee decisions of an executive authority, but members of a community should have an equal opportunity to hold an executive authority accountable.²⁵ It was mentioned before in this study that the only mechanism available to members of a local community to achieve this goal is the appeal mechanism created in terms of section 62. If the appeal mechanism created in terms

21 *National Society for the Prevention of cruelty to Animals v Minister of Agriculture, Forestry & Fisheries* par 13(d).

22 *National Society for the Prevention of cruelty to Animals v Minister of Agriculture, Forestry & Fisheries* par 13(c).

23 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (hereinafter referred to as the "First Certification" case) par 108.

24 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (hereinafter referred to as "SARFU") par 141.

25 See again the Systems Act s2.

of section 62 is not an effective and/or adequate check and balance, then it is hardly possible to envisage how it could be said that the local community is anything more than a silent partner to a municipality. There is a further argument to be made that if checks and balances to the system of delegations is only adequate for a legislature to hold an executive authority accountable, but is not equally adequate for a local community, then such checks and balances cannot be adequate, because, as alluded to earlier herein, in local government, all the members of the political executive is also members of the legislature. The community therefore is the only body of persons that is truly distinct from the executive authority in local government. It is furthermore submitted that adequate checks and balances and the separation of powers goes hand in hand. If there is no adequate checks and balances, and as such no or limited separation of powers, then an executive authority does not have to account for their actions. Surely this cannot be what the Constitution and subsequent national and provincial legislation envisaged for local government.

Due to the importance of the appeal mechanism created in terms of section 62, it was necessary in this study to analyse and discuss the application of section 62 against the background of the framework within which it operates and which was to some extent explained in case law. From this critical analyses, it became apparent that section 62 in its current form is to some extent problematic, and it is doubtful whether it can be said that this appeal mechanism available to members of a community is adequate as a check and balance to a system of delegations. It was mentioned earlier herein that members of a community are a very important component to hold an executive accountable, and that it is the only mechanism available to members of a community to enforce this is the appeal mechanism created in terms of section 62. The application of section 62, however, is so complicated, and subject to so many limitations that it is doubtful whether it can be said that this appeal mechanism, generally assists members of a community to hold a municipal executive accountable. In certain specific instances, it may well be adequate. This study, however, indicates that the appeal mechanism in terms of section 62, in some instances has limited application and to some extent the executive authority within a municipality can by its own volition decide whether it will allow an appeal in terms of

section 62 to influence a previous decision or not.²⁶ This is problematic as it may disqualify section 62 as an adequate check and balance to the system of delegations and in turn may undermine the model of separation of powers as it applies to local government.

4.3 Conclusion.

The purpose of this study is, in the first instance, to critically analyse section 62 of the Systems Act and more importantly, in the second instance, to determine whether the appeal mechanism created in terms of section 62 is an adequate measure as a check and balance available to members of a community through which such members can hold an executive authority accountable in specific instances. As such, to determine, what the role and function is of the appeal mechanism created in terms of section 62, in local government. This study indicates that the appeal mechanism created in terms of section 62 is of vital importance as a check and balance to a system of delegations in local government, and in turn to the application of the model of separation of powers, as it applies to local government in South Africa. Section 2 of the Systems Act determines that communities form an integral part of a municipality. Apart from the judiciary, the appeal mechanism created in terms of section 62 is the only check and balance available to interested and affected members of a community, through which such members of a community can hold an executive authority in local government accountable. It is submitted that to deny members of a community access to the appeal mechanism created in terms of section 62, is tantamount to an infringement by local government of one of its very important objects,²⁷ namely to involve members of a community in local government affairs. This study points out that this constitutional right of members of a community to take part in local government affairs with regard to the appeal mechanism created in terms of section 62 can be manipulated by the administration within a municipality, to the extent that the section 62 appeal authority has no other choice than to confirm the previous decision.²⁸ It is thus submitted that this could never have been the intention of the

26 See again the importance of the notice at par 3.2.2.7 and par 3.2.3.2 and par 3.2.3.3.

27 See the Constitution s152(1)(e).

28 See again par 3.2.2.7 and par 3.2.3.2 and par 3.2.3.3 herein.

legislature. The study further indicates that the application of Section 62 is limited. There are certain requirements which as a matter of law must be met, in order to determine whether the appeal authority in terms of section 62 is available as an appeal authority in specific circumstances. These requirements must be dealt with by a section 62 appeal committee, prior to dealing with the merits of the relevant matter.²⁹ Some of these requirements are as follows :

- a) It must be determined whether the Appellant is "a person" in the context of section 62.³⁰ It is now clear from this study that section 62 is available to :
 - (i) An applicant for the approval of the building plan where no public participation is required.
 - (ii) An interested and affected party to an application where public participation is required, only if such person is a noted objector.
 - (iii) An unsuccessful tenderer where a municipality has not adopted a supply chain management policy, or where it has adopted a supply chain management policy and the policy indicates that section 62 applies to tender processes in that specific municipality. In this regard, the appeal is limited to decide whether the appeal must succeed on the grounds of appeal submitted.

- b) It must be determined whether the previous decision appealed created an infringement of the appellant's rights. What are the 'rights' referred to in the context of section 62.³¹
 - (i) The rights that stand to be protected flow from section 33(1) of the Constitution. The right to administrative action that is lawful, reasonable and fair.

29 See in this regard addendum 1 herein.

30 Refer to par 3.2.2.2 herein.

31 Note again par 3.2.2.3 herein.

- c) It must be determined whether the appeal lies against a decision as contemplated by section 62.³²
- (i) It must be determined whether the decision referred to in this instance is a final decision by a functionary who acts in terms of delegated authority.
- d) It must be determined whether the decision was taken "in terms of a power or duty, delegated or sub-delegated by a delegating authority".³³
- (i) The section 62 appeal mechanism only operates within the system of delegations. Therefore only final decisions taken in terms of delegated authority by a delegating authority can be subject to an appeal in terms of section 62.
- (ii) In order to determine whether the functionary acted lawfully in terms of a delegation or sub-delegation can be determined by researching the relevant terms of reference document of the specific municipality.³⁴
- (iii) A further determination should be made whether the decision so taken could legitimately be delegated, as certain functions may not be delegated by a municipal council. Decisions by a municipal council fall outside the systems of delegations and can therefore not be appealed in terms of section 62.
- (iv) The determination as to whether the decision was taken "in terms of a power or duty" is more difficult. The ordinary meaning of the words in section 62(1) indicates that the decision must have been taken in terms of a power or duty. As such, it must have been *intra virus* empowering

32 Refer to par 3.2.2.4 herein.

33 See again par 3.2.2.5 herein.

34 See the Systems Act s53.

legislation. It is submitted that this is a contradiction as to the meaning of the word 'rights' in section 62(1), which determines that the rights that stands to be protected is amongst others the right to lawful administrative action. This position is still open to interpretation and needs to be clarified.

- e) It must be determined whether the appeal was submitted within 21 days from date of notification of the decision.³⁵
- (i) The computation of the 21 day period is calculated as indicated in paragraph 3.2.1.6 of this study.
- (ii) The word 'notification' is problematic.³⁶ It indicates by implication that the notice will determine whether the section 62 appeal mechanism is available to an aggrieved person or not, as an adequate check and/or balance. If no notice was given, the rights flowing from the decision accrues, which invoke section 62(3), effectively rendering the appeal nugatory.³⁷ Section 5(1)(c) of the Systems Act makes it compulsory for a municipality to notify interested and/or affected persons of decisions, which may affect such person's rights, property and/or reasonable expectations. If an interested and/or affected person is not notified of such decision, it will amount to an infringement of rights in the context of section 62(1). It will, however, not influence the accrual of rights, which may render the appeal nugatory. This is a matter that needs to be clarified by the legislature or the judiciary, because the implication hereof renders section 62 inadequate as a check and balance to the system of delegations and directly undermines the model of separation of powers as it applies to local government. It is submitted that it empowers the executive authority to decide whether it wants to allow an appeal mechanism the ability to amend its previous decision or not.

35 See par 3.2..2.7 herein for a full discussion as to the calculation of the 21 day period.

36 Refer to par 3.2.2.7 at p3-29.

37 Note what is said in par 3.2.3.3 herein.

Surely this places too much power in the hands of the executive authority in local government.

- f) It must be determined whether the rights have accrued.³⁸
- (i) If it is clear that the rights have accrued either by the effluxion of time (21 day period) or the failure to give notice, that the accrual of rights are suspended, then the previous decision must be confirmed. It is submitted that the *functus officio* rule is of paramount importance in this context.³⁹ The accrual of rights, although of paramount importance in the context of section 62, does not disqualify the appeal, but merely limits its application. For instance, if the previous decision was reached in a fraudulent, manner there is an argument to be made that rights did not accrue.⁴⁰ Furthermore, if the person who obtained the rights is also the appellant, then such person may waive its rights in order for the appeal to proceed and reach a different decision.
- g) It must be determined whether section 62 is the competent appeal authority under the circumstances.⁴¹
- (i) Section 62(6) determines that section 62 does not detract from any other applicable appeal procedure, provided for in any other applicable law. It is submitted that section 62(6) does indeed limit the application of section 62 to some extent.⁴²

One expects that the ordinary meaning to the words of section 62, if interpreted in a purposive manner, would indicate when section 62 is available to an aggrieved person as an alternative remedy. The interpretation of section 62, however, is not that

38 Refer to par 3.2.3.3 herein.

39 Note par. 3.2.3.3 at p 3-36 and par 3.2.3.2 at p 3-33 herein.

40 See again par 3.2.3.2 at p3-33 herein.

41 Refer to par 3.2.4 herein.

42 See in this regard again par. 3.2.4.2 at p 3-38.

simple. It was stated above that section 62 was “ineptly drafted”,⁴³ and further that the construction of section 62 gives “rise to great difficulty and confusion”.⁴⁴ It further seems as if the appeal authority in terms of section 62 is a general appeal authority which is available to any person who can allege that his/her rights were detrimentally affected by a decision taken in terms of delegated authority. The direct opposite is in fact true. The interpretation of section 62 is problematic to the extent that it is difficult to determine exactly when this appeal authority is available to an aggrieved person as an alternative remedy. It was mentioned earlier herein that section 62 is nothing less than a codification of the limited instances in which a decision taken in terms of delegated authority may be amended. In this regard, it could be considered to be a “check and balance”, but whether it is “adequate”, is doubtful. To determine when the appeal mechanism created in terms of section 62 of the Systems Act is available to an aggrieved person, refer to addendum 1 attached hereto, which provides a practical test, which if applied to a set of facts, will indicate whether section 62 is available or not.

43 Loghdey v City of Cape Town and Others, advanced parking solutions CC and another v City of Cape Town and others 2009 (5) SA 595 (C) (hereinafter referred to as “Loghdey v City of Cape Town”) par 34.

44 Loghdey v City of Cape Town par 34.

It is submitted, that in order to determine whether Section 62 is available as an appeal authority in a specific instance, one must ask the following questions :

Question : Is Section 62 a competent appeal authority in this instance ?¹

No : Section 62 does not apply.

Yes : Next Question.

Question : Were the appellant's rights affected by the previous decision?²

No ; Section 62 does not apply.

Yes : Next Question.

Question : Was the appellant a party to the previous decision?³

No : Section 62 does not apply.

Yes : Next Question.

Question : Was the previous decision taken in terms of delegated authority?⁴

No : Section 62 does not apply.

Yes : Next Question.

Question : Was the authority to take the decision delegated by a delegating authority?⁵

No : Section 62 does not apply.

Yes : Next Question.

1 Refer to paragraph 3.2.1.3 herein.

2 Refer to paragraph 3.2.1.2 herein.

3 Refer to paragraph 3.2.1.1 herein.

4 Refer to paragraph 3.2.1.4 herein.

5 Refer to paragraph 3.2.14 herein.

Question : Was the decision of the functionary a final decision?⁶

No : Section 62 does not apply.

Yes : Next Question.

Question : Did the municipality give notice that the decision of the functionary was suspended for 21 days pending an appeal?⁷

No : Section 62 does not apply.

Yes : Next Question.

Question : Was the notice of appeal submitted within 21 days from date of notification?⁸

No : Section 62 does not apply.

Yes : Next Question.

Question : Did rights accrue to any person who was involved in the previous decision?⁹

No : Section 62 is available.

If yes, then : Next Question.

Question : Did such person waive his/her/its rights that accrued?¹⁰

No : Section 62 does not apply.¹¹

Yes : Section 62 is available.

6 Refer to par 3.2.1.7 herein.

7 Refer to par 3.2.1.6 herein.

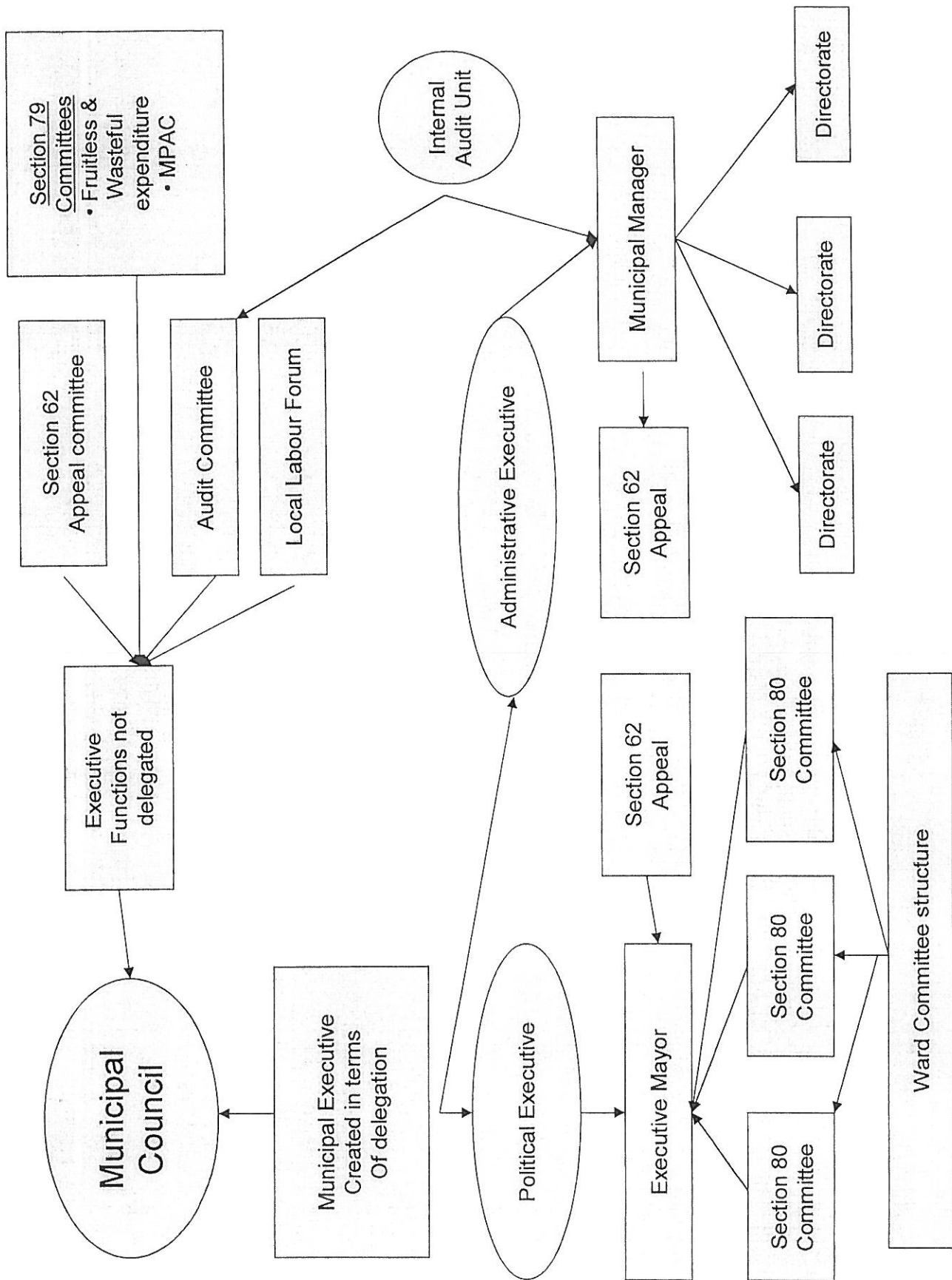
8 Refer to par 3.2.1.6 herein.

9 Refer to par 3.2.1.8 herein

10 Refer to par 3.2.1.7 herein

11 This statement should be qualified. Section 62, strictly speaking, does apply, but Section 62(3) limits the power of the appeal authority to the extent that the appeal authority may only confirm the previous decision. Therefore, by implication, the Section 62 appeal authority is not available as an alternative remedy.

Addendum 1 page 3



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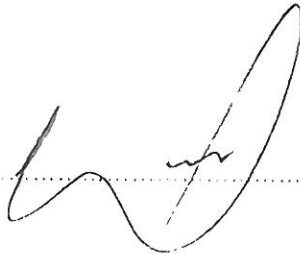
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