

The new institutional models in local government and the formal establishment of municipalities

10.1 Introduction

It was indicated earlier that the Constitution of the Republic of South Africa, 1996 requires local governments to be established for the whole territory of the Republic of South Africa.¹ Every part of the territory of the state will therefore be included within the jurisdiction of a specific municipal government. However, depending on their location and the specific needs of their local communities, municipalities have different challenges and responsibilities. In this regard it is important to note that local communities in South Africa are often very diverse and thus pose different challenges to their local authorities. In general, all communities are in need of local governments that are people driven and are equipped and positioned to achieve optimal social and economic development. Rural municipalities are especially in need of assistance. In the past, most attention was given to metropolitan local governments, while rural municipalities were neglected. In the formation of a new institutional model for local governments specific attention has been afforded to municipal institutions outside of metropolitan areas. The new local government system is therefore based on two important requirements. These requirements are discussed briefly below.

- *To create a flexible and effective two-tier system of local governments across the whole country.* It is important for local democracy that all people's interests are represented in their local authority. The new system is therefore directed at ensuring that every person will be governed by a primary or local tier of government. Such local governments are known as Metropolitan Councils and Local Councils. Primary councils must be viable and capacitated to perform and fulfil basic municipal functions and

¹ See the Constitution s 151(1).

responsibilities. Communities do not exist in total isolation of one another, however, and often need to share scarce resources and expertise with each other. To accommodate such needs, the new system is also committed to a strong secondary or regional tier of local government structures. Such structures are also referred to as "District Councils".² It is envisaged that District Councils will play a vital role in the integration of big regions and that they will be best positioned to ensure that services and resources are distributed equitably between all municipal districts.

- *To define clearly the roles and responsibilities of all three spheres of government.* Various spheres of government are often involved in the rendering or delivery of the services in one community. This can easily lead to confusion in respect of who is finally responsible for such services. In an effort to prevent such problems, the new local government system specifically requires local governments to co-ordinate all local activities in their respective areas.

In light of the above, it becomes clear that municipal institutional arrangements cannot and should not be assessed in the abstract. There are no universally ideal systems or institutional models for local governments, and every state must create its own unique and effective system. The choice of specific institutional arrangements is a key policy issue, and it impacts on all people and the well being of the nation in general. Various factors that have influenced the final choices of municipal institutions for the new local government system in South Africa have been identified. Some of these factors are:

- the legacy of separation of different people
- the uneven distribution of municipal capacity and resources between urban and rural municipalities
- the need for speedy intervention and supervision in municipal affairs and
- vast social divisions between people of various communities.

During the transitional process, and more specifically after the local government elections of 1995/1996, it was found that the system then in place was bureaucratic and slow. In many instances, important decisions within

² See the Local Government Information Series (LGIS) no 2 "Local Government for the 21st Century" (1999) at 12.

local governments were taken by senior unelected officials, and the often uninterested politicians merely endorsed such decisions without meaningful debate and consideration. It became clear that the whole institutional structure of local governments also required change in order to provide for strong political leadership, effective decision-making procedures and an overall democratic and accountable government. In order to achieve such a system the Constitution provided for the establishment of different categories of municipality as well as various types of municipality that may be established within each category. National legislation was further obligated to define the different types of municipality.³ In order to comply with the constitutional requirements, the Local Government: Municipal Structures Act⁴ was enacted by parliament. The Structures Act specifically provides for five different systems of municipal government and allows for different combinations of these five systems in order to meet the wide range of needs and requirements of municipalities across South Africa. The objectives of the new systems are to allow powers and functions to be delegated and shared among councillors and officials in such a way as to ensure effective decision-making procedures with clear lines of responsibility. They also allow for committed community participation and support. Both the different categories and municipal types are discussed in detail below.

10.2 Important requirements regarding the functioning and roles of local governments

In chapter 7 of this work, mention was made of the fact that a local government consists of a municipal council represented by politicians who are democratically elected by the local residents, a municipal administration that is composed of many different officials employed by the municipal council and which is headed by a Municipal Manager⁵ and, finally, the local community. Because of community involvement, municipal councils play a central role in local democracy. Although there are often many different leaders and influential people in local communities, the municipal council is the only

³ See the Constitution s 155(1) and (2).

⁴ 117 of 1998 as amended. Hereafter referred to as the Structures Act.

⁵ Previously called the Chief Executive Officer/CEO or Town Clerk of a municipality.

institution that is elected by the entire local community.⁶ Municipalities have further various wide-ranging functions and responsibilities, and the following should be specifically emphasised:⁷

- Municipalities must ensure the provision of essential services to communities in a sustainable manner. In order to deliver such services, municipalities must hire staff and pay for infrastructure. If a municipality does not have adequate income, it will not be able to afford the continuous provision of services. All local authorities thus need financial and administrative systems that are effective, accountable and efficient in order to secure service delivery in a sustainable manner.
- All municipalities must promote social and economic development combined with a safe and healthy environment and a local community that is involved and committed to the matters involving their local area.
- It is also essential for municipalities to provide for a democratic and accountable government acceptable to their local communities. Local governments take important decisions on behalf of their local communities, and they are responsible for determining priorities that are needed and should benefit their local area. In this regard municipalities must be accountable to local residents for their decisions and the manner in which public funds are spent.

In light of the abovementioned objectives and responsibilities, all local governments must be structured and institutionally arranged in such a manner that optimal compliance and fulfilment of such objectives and responsibilities are achieved. It is submitted that the new institutional models of local government as mandated by the Constitution and the Municipal Structures Act, if combined and managed correctly, will indeed allow for flexibility in special circumstances and overall constitutional compliance and consistency.

One must also remember that Municipal Councils have both legislative and executive authority in their areas.⁸ Municipalities are therefore responsible both for formulating legislation⁹ and for developing programmes to implement or execute such legislation. However, no municipal council can fulfil all its

⁶ See Local Government Information Series no 2 "Types of Municipalities" (1999) at 2.

⁷ Refer to the objectives of local government set out in the Constitution s 152.

⁸ This aspect has been confirmed in the Constitution s 151(2).

⁹ Also called municipal by-laws.

powers and duties without delegating at least some of its powers and duties.¹⁰ All local governments therefore need to develop municipal systems that are capable of ensuring that delegated powers and functions are properly performed. It must further be noted that not all powers can be delegated. The Constitution specifically disallows certain powers or functions to be delegated.¹¹ The new institutional model for local government specifically provides for different systems that should each provide different possibilities in the way in which powers and responsibilities are allocated or delegated to individual councillors or specifically designated committees. These different systems and institutional models are identified and explained below.

10.3 Categories of municipal government

10.3.1 *The different categories of municipality*

Within the new system of local government provision has been made for different categories of municipality. The Constitution specifically identifies three categories of municipality and further requires that national legislation define the different types of municipality that may be established within each category.¹² The Constitution is thus of paramount importance regarding not only the different categories of municipality but also the different types that may be established within each category. It is therefore significant to distinguish between categories and types of municipality. In this respect the Constitution determines the following:¹³

- (1) There are the following categories of municipality:
 - (a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area.

¹⁰ Through delegating a power or duty a municipality is giving authority to either a substructure of that council or even an individual the power to exercise or perform that function on the council's behalf. The municipal council, however, remains fully responsible for all its powers and functions.

¹¹ According to s 160(2) of the Constitution, the following functions may not be delegated by a municipal council: (a) the passing of by-laws; (b) the approval of budgets; (c) the imposition of rates and other taxes, levies and duties; and (d) the raising of loans.

¹² See the Constitution s 155. The division of the three categories of municipalities was required in terms of the interim Constitution, constitutional principle XXIV. See also *In re: Certification of the Constitution of the RSA 1996* 1996 (4) SA 744 (CC). The court held *inter alia* that the very least CP XXIV necessitated the setting out in the new text of the different categories of local government that could be established by the provinces and a framework for their structures. In the new text, the only type of local government and local government structure referred to was the municipality, which was insufficient to comply with the requirements of the CP.

¹³ The Constitution s 155(1)-(7).

- (b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.
 - (c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.
- (2) National legislation must define the different types of municipality that may be established within each category.
- (3) National legislation must–
- (a) establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;
 - (b) establish criteria and procedures for the determination of municipal boundaries by an independent authority; and
 - (c) subject to section 229, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.
- (4) The legislation referred to in subsection (3) must take into account the need to provide municipal services in an equitable and sustainable manner.
- (5) Provincial legislation must determine the different types of municipality to be established in the province.
- (6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must–
- (a) provide for the monitoring and support of local government in the province; and
 - (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

- (6A) If the criteria envisaged in subsection (3)(b) cannot be fulfilled without a municipal boundary extending across a provincial boundary–
- (a) that municipality boundary may be determined across the provincial boundary, but only–
 - (i) with the concurrence of the provinces concerned; and
 - (ii) after the respective provincial executive has been authorised by national legislation to establish a municipality within that municipal area; and
 - (b) national legislation may–
 - (i) subject to subsection (5), provide for the establishment in that municipal area of a municipality of a type agreed to between the provinces concerned;
 - (ii) provide a framework for the exercise of provincial executive authority in that municipal area and with regard to that municipality; and
 - (iii) provide for the re-determination of municipal boundaries where one of the provinces concerned withdraws its support of a municipal boundary determined in terms of paragraph (a).
- (7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).”

The wording of the Constitution clearly indicates that a category A municipality, which has exclusive municipal executive and legislative authority, is also the only municipal council in that area. Category A municipalities thus stand alone. The best term for a category A municipality is a Metropolitan Municipality/Council. Within a metropolitan area there is only one municipal council, namely the metropolitan council. As indicated, category B municipalities are municipalities that share municipal executive and legislative authority in a specific area with a category C municipality within whose area such category B municipalities fall. A category B municipality is also referred to as a Local Municipality/Council. Lastly, the Constitution determines that category C municipalities are municipalities which have

municipal executive and legislative authority in areas that include more than one municipality.¹⁴ The general term for a category C municipality is a District Municipality/Council. Three distinct categories of municipality are therefore identified within the new local government system as: metropolitan councils, district councils and local councils. Metropolitan councils and local councils are often referred to as primary local governments, while district councils, on the other hand, are regarded as secondary local governments, because they comprise representatives from primary local governments. Within the new local government system, district councils are comparable to the former regional services councils, which were created in terms of the Regional Services Council Act of 1995.¹⁵

It is important to remember that municipal councils often differ from each other in many different ways. Because municipalities are different, they need to be organised differently so as to ensure that they operate effectively and efficiently. This requirement has resulted in the fact that municipal councils are of varying sizes and are also elected and composed in different ways.¹⁶ The Municipal Structures Act specifically takes into account the fact that not all municipalities/municipal councils are the same. The purpose of the Structures Act is *inter alia* to provide for the establishment of municipalities in accordance with the requirements relating to the different categories and types of municipality.¹⁷

The Structures Act furthermore confirms the different categories of municipality that are required in terms of section 155(1) of the Constitution.¹⁸

¹⁴ Category C municipalities are distinguished from other categories because they *do not function alone* in an area and they *do not have exclusive executive and legislative authority* in that area (own emphasis added). The principal objectives of district councils are to render cost-effective services through co-operation between adjacent municipalities, to provide for IDP planning for the whole region and to ensure equitable distribution of resources. See the Structures Act s 83.

¹⁵ 109 of 1995. See also Rautenbach and Malherbe (1999) 314.

¹⁶ It must be emphasised at this point that notwithstanding the category or name of a municipality, it is the relevant municipal council in which the municipal executive and legislative authority is vested. This aspect is confirmed in the Constitution s 151(2).

¹⁷ Other purposes are: to establish criteria for determining the category of municipality to be established in an area; to define the types of municipality that may be established within each category; to provide for an appropriate division of functions and powers between categories of municipality; to regulate the internal systems, structures and office-bearers of municipalities; to provide for appropriate electoral systems and to provide for matters in connection with such purposes. Refer to the long title of the Structures Act.

¹⁸ The Act determines that a district council, a local council and a metro council refer to the municipal council of a district municipality, local municipality or metropolitan municipality

In compliance with the Constitution,¹⁹ the Structures Act also establishes the criteria for determining when an area should have a single category A municipality or when it should have both category B and C municipalities.

10.3.1.1 Areas which must have category A municipalities

According to the Structures Act, an area must have a single category A municipality if that area can reasonably be regarded as:²⁰

- a conurbation featuring²¹
 - (a) areas of high population density
 - (b) an intense movement of people, goods and services
 - (c) extensive development and
 - (d) multiple business districts and industrial areas
- a centre of economic activity with a complex and diverse economy
- a single area for which integrated development planning is desirable and
- having strong interdependent social and economic linkages between its constituent units.

A closer evaluation of the abovementioned criteria reveals strong similarities between these and the elements that comprise the definition of a “metropolitan area” as defined in the Local Government Transition Act of 1993.²² Although the Structures Act is not entirely clear on this point, it is suggested that all four main features²³ should be distinguishable before a single category can be determined and a municipality decided upon.²⁴ When the criteria set out in section 2 of the Structures Act have been met, the Act specifically requires the establishment of a category A or metropolitan municipality.

respectively. A *District Municipality* is defined as a municipality that has municipal executive and legislative authority in an area that includes more than one municipality and which is described in s 155(1) of the Constitution as a category C municipality. A *Local Municipality* is a municipality that shares municipal executive and legislative authority in its area with a district municipality within whose area it falls and which is described in the Constitution s 155(1) as a category B municipality. Lastly, a *Metropolitan Municipality* refers to a municipality that has exclusive executive and legislative authority in its area and which is described in the Constitution s 155(1) as a category A municipality.

¹⁹ See the Constitution s 155(3)(a).

²⁰ See the Structures Act s 2.

²¹ Conurbation also means a conglomeration of urban areas.

²² See the definition of a metropolitan area as set out in Act 209 of 1993 as amended by s 1.

²³ The Structures Act s 2(a)–(d).

²⁴ This submission seems to be supported in terms of the Structures Act s 3, which refers to the overall criteria as set out in the Act s 2.

10.3.1.2 Explaining a category A/metropolitan municipality

(a) Introduction

Metropolitan areas are large urban settlements with high population densities, often complex and diversified economies, high levels of functional integration over a large geographic area and many economic and social activities that transcend certain municipal boundaries.²⁵ According to the Constitution, a metropolitan local government is a municipality with exclusive municipal, executive and legislative authority in a particular area.²⁶ In general, three main reasons have been put forward for metropolitan councils' being needed in modern local government systems:²⁷

- Metropolitan governments are seen to create the basis for equitable and socially just municipal government. All residents are treated equally and fairly. Municipal funds are distributed across the municipal jurisdiction or where needed. A metropolitan government ensures that everyone that contributes to the municipality also benefits from it. It must also be pointed out that metropolitan areas are large urban areas with dense populations which are directly and indirectly connected to each other. These areas cannot be governed properly in isolation, and therefore should be integrated as a unit.
- Metropolitan governments promote strategic and integrated land-use planning and help to co-ordinate public investment in both physical and social infrastructure. Planning is done for the whole metro jurisdiction and not in isolation, and services are shared across the metropolis.
- Metropolitan governments are better equipped and positioned to develop city-wide economic and social development and to enhance economic competitiveness and overall prosperity for their areas of jurisdiction. A metro council is regarded as a single functional entity for purposes of investment attraction and does not compete with other local municipalities for scarce financial investment.

As was explained in the definition above, metropolitan areas have more than one business district and industrial area and their economies are complex and

²⁵ Eg, some people may live in one locality of the Metropolitan area but work in a different one.

²⁶ The Constitution s 155(1)(a).

²⁷ See the White Paper on Local Government (1998) at 79-80.

diversified.²⁸ Because of their size, most metropolitan governments are important contributors to the national economy of the country. Metropolitan areas are therefore key centres in the global economy and should be governed accordingly. It is furthermore important for metro governments to accommodate the intense movement of people and goods in their areas, and they must function as integrated units.²⁹

(b) Creating the new metropolitan government system

The local government dispensation before 1994 was substantially distorted by the former government's policies of segregation. Cities were seen as existing for the benefit of white communities only. Planning laws ensured mostly that businesses and industries were located near white residential areas, which had good infrastructures and services. Poorly serviced townships for black people were located far from the city centres, thus forcing the residents to travel long distances and incur high transport costs. Although township residents contributed significantly to the building of former white municipal areas, the money raised by white municipalities was spent predominantly within their own area. Township residents thus did not benefit from the tax base which they helped to build.

With the introduction of the Local Government Transition Act,³⁰ metropolitan government appeared for the first time in South African local government history. This was an important step towards changing the inequitable pattern of urban development that had been inherited from the past. Six metropolitan areas were proclaimed,³¹ and each metro area had a two-tier local government system which consisted of a Metropolitan Council (MC) and some Metropolitan Local Councils (MLC). Unfortunately the LGTA did not specify clearly which powers and functions were divided between the MC and MLC. The Act in fact allowed for a local negotiation process to determine which functions and powers would rest in MCs and in MLCs respectively.³² A further

²⁸ This means *inter alia* that a metropolitan economy does not depend for its survival on any single location or sector such as mining or a certain manufacturing sector.

²⁹ Eg, all transport networks must allow for people to travel from one part of the metropolis where they live to other parts where they work or use recreational facilities.

³⁰ 209 of 1993.

³¹ They were the Greater Pretoria Metro, Greater Johannesburg Metro, Greater Lekoa/Vaal Metro, Khayalami Metro, Greater Durban Metro and Cape Metropolitan Area.

³² This was one of the major deficiencies of the LGTA and necessitated later amendments.

problem that was experienced during the transitional period within metropolitan areas was the fact that the establishment of separate administrations for MCs and each MLC led to considerable duplication of functions, and such efforts were both wasteful and inefficient. A final issue that hampered effective and efficient service delivery in the interim system was the fact that each MC and MLC was an employer body in its own right. This caused many inequalities between personnel and led to poor administrative support.³³

(c) Establishing new metropolitan governments

During the interim phase as determined by the LGTA, the national government consulted widely on the design of the final local government system. Many workshops and conferences were held to discuss and debate the advantages and disadvantages of the interim system. On the basis of these discussions, consultations and research reports, national government was confronted with two main models for future metropolitan governments. The two possible models were:

- A strong two-tier model of metropolitan government, which required both a metropolitan council and certain metropolitan local councils to function together as the local governments for a particular area. All municipal powers and functions had to be divided between the Metro Council and its Local Councils.
- A single city model,³⁴ which suggested a single metropolitan council vested with all the municipal powers and functions alone.

Based on the various discussions and public hearings, the White Paper on Local Government which was published in March 1998 proposed that a single tier of metropolitan government system should be introduced for all metropolitan areas in the country. Certain trial projects were launched, which later confirmed that a single tier of metropolitan government seemed to be the most effective system for metropolitan areas.³⁵ Accordingly, national

³³ Ideally all municipal workers in a metropolitan area should have the same conditions of service and work for the same employer. This would ensure fair labour practices and workers that are paid equally for the same job performed. Staff redeployment would also be easier to implement.

³⁴ So-called "unity city".

³⁵ See the LGIS no 2 "Metropolitan Government" (1999) at 7.

government enacted the Local Government: Municipal Structures Act³⁶ to provide for a single tier of municipal government in metropolitan areas.³⁷

Apart from the single tier metropolitan government, and in compliance with the constitutional requirements,³⁸ the Structures Act also established the criteria to determine when an area should have a category A or metropolitan municipality.³⁹ The Act contains criteria that describe the specific characteristics of a metropolitan area and specifies how these criteria are to be applied.

As metropolitan councils can consist of up to 270 councillors and because of their size, it is often very difficult for them to conduct their business effectively if every issue has to be decided in a full meeting of the council. To overcome this practical difficulty, metropolitan councils must elect either an executive committee or an executive mayor and then delegate executive powers as appropriate.

During the transitional process, all transitional metro councils established executive committees, as the mayoral executive system was not known to South Africa. Only with the local government elections of December 2000 was the creation of a mayoral executive system legally possible. In the national and provincial executive systems the president or premier is vested with executive authority, which is exercised together with members of cabinet or a provincial executive council.⁴⁰ Although the mayoral executive system is very similar to these systems, there are certain differences that should be noted. Firstly, the Constitution confirms that municipal executive authority is vested in the municipal council and not in a mayor. Secondly, the executive mayor and his mayoral committee can exercise only such executive powers as are delegated to him/her by the municipal council.⁴¹ Thirdly, the Structures Act does not proclaim the mayoral committee to be handled and treated differently from the other types of committee possible in local government. This viewpoint was not shared by the majority of justices in the Constitutional

³⁶ 117 of 1998.

³⁷ Refer to the Act s 2.

³⁸ See the Constitution s 155(3)(a).

³⁹ Refer to the Structures Act s 2.

⁴⁰ For more on the national and provincial executive provisions, refer to the Constitution ss 85 and 125.

⁴¹ See the Structures Act s 56.

Court. In the case of *DA v Masondo No*⁴² the court held that the mayoral committee was not a committee of the Municipal Council as contemplated in section 160(8) of the Constitution and therefore did not require minority representation in such a committee.⁴³

(d) Administrative transformation in metropolitan areas

Within the public sector in general, many government functions are increasingly being decentralised to local government level. Examples of such functions are: certain health services, municipal police forces, local housing programmes and transport authorities, to name but a view. Often these functions are decentralised to local governments, without the necessary funds for them to exercise and perform such functions effectively. These functions are then referred to as “unfunded mandates”. Unfunded mandates must be guarded against, as such mandates may be regarded as unconstitutional.⁴⁴ In certain instances unfunded mandates and ill-considered decentralisation of functions can be regarded as being against the constitutional requirements to help and assist local governments. Decentralisation has its advantages, however, and there is a general realisation in modern governments that functions should be decentralised to the level where they can best be exercised effectively and efficiently.⁴⁵

There seems to be a worldwide technological move towards private sector service providers’ rendering traditional municipal services, especially in metropolitan service provision. This tendency is very positive, in the sense that it ensures market competition, use of modern technologies, better operational efficiency, lower unit costs, better overall quality and more customer-orientated services. Notwithstanding the fact that private service

⁴² 2003 (2) SA 413 (CC).

⁴³ See para 33 at 424C-E. See, however, the minority judgment of O’Regan J at 429-439, which supports this writer’s viewpoint.

⁴⁴ The Constitution requires that national or a provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions. See s 151(4) of the Constitution. By legislative or other measures provincial governments must *inter alia* promote the development of local government capacity to enable municipalities to perform their functions and to manage their affairs. See the Constitution s 155(6)(b).

⁴⁵ Decentralisation goes hand in hand with the principle of subsidiary. Subsidiary is a specific form of decentralisation based on the principle that decisions should be taken at the lowest possible level in a state. Higher levels/spheres of government should provide support only insofar as lower levels are unable to perform certain functions and they therefore perform a subsidiary function in such cases. Refer to Rautenbach and Malherbe (1999) 93.

providers are used, metropolitan councils still have the final responsibility for ensuring that such services are provided according to certain minimum standards. The outsourcing of services means that the core business of municipalities is less focused on managing trading services and more focus on contract and performance management and supervision. Such a position has both advantages and disadvantages, however, and must be managed with care.

Parallel with the changes in operational conduct, metropolitan governments must ensure a sound metropolitan-wide fiscal framework, a uniform property rating system and equitable sharing of resources. Such changes need a more flexible skilled municipal labour force that is organised across a metropolitan jurisdiction. In this regard, it is submitted that the new model of metropolitan government as set out in the Structures Act has enough built-in flexibility to allow for the effective accommodation of the changes mentioned above.

10.3.1.3 Areas which must have municipalities of both category B and C

When an area does not comply with the criteria set out in section 2 of the Structures Act, the Act requires such an area to have municipalities of both category B and C.⁴⁶ According to the Act, the determining requirements for the establishment of particular categories of municipality in different areas are those that are set out in section 2 of the Structures Act.

10.3.1.4 Category B local municipalities and category C district municipalities

The new system of local government in South Africa promotes a vision of a two-tier system of local councils and region-wide district councils throughout the entire territory of the state, excluding metropolitan areas. It is hoped that this two-tier system will address the many problems facing municipalities outside metropolitan areas. To a large extent the local government dispensation pre 1994 and even under the LGTA was silent on rural local government aspects, and this created a wide range of problems in rural

⁴⁶ In principle this means that in areas outside of metropolitan areas both category C and B municipalities must be established. See the Structures Act s 3.

municipal areas.⁴⁷ Like all municipalities, the new district local government system had to build municipal institutions that are geared towards meeting the social and economic needs of citizens in an economically feasible, efficient and democratic manner. Together with the White Paper on Local Government, the Municipal Structures Act and the Municipal Demarcation Act provide the new tools whereby local government outside metropolitan areas are created to provide district governments that are strong, decentralised governments with enough powers to fulfil their constitutional obligations. It is submitted that without a combination of municipal institutions in district areas, it will not be possible for one single authority to address all the development challenges and at the same time be responsive to the needs and demands of local residents.

In the new dispensation there is a clear need for an institution that can address challenges that affect the entire region, such as bulk water supply and integrated development planning. For this reason district councils are very important. At the same time the levels of municipal governments that are closer to home require a more decentralised system that provide citizens with a full range of municipal services and enable them to exercise their basic civil, socio-economic and political rights. Local councils are more suitable in such instances.⁴⁸ In general the new district council model is a combination of big and small governments that operate in a single space. Generally speaking, all local councils that fall within the area of the district council have the normal municipal powers and functions, apart from the functions of the district council.⁴⁹

Within the new system envisaged by the Constitution, it is foreseen that some parts of district areas, will not be viable and suitable for local councils to

⁴⁷ An example of such a problem is that the institutional relationship between district and local councils was often characterised by conflict. Furthermore, the relationship between provincial administrations and district councils had not clearly been defined, and the financial base of rural councils was weak. See LGIS no 2 "District Government" (1999) at 5-7.

⁴⁸ See LGIS no 2 "District Government" (1999) at 10.

⁴⁹ Although bulk services are normally provided by the district council, it is possible for a local municipality to perform such functions on behalf of the district council which, eg, might lack the necessary capacity. It must also be emphasised at this point that the Structures Act specifically provides for the division of functions and powers between district and local municipalities. See the Act s 84. See also the ch on the powers and functions of municipalities.

be established. In such areas so-called District Management Areas (DMA) have and can be declared.⁵⁰ In a District Management Area, the relevant district council is responsible for all municipal powers and functions in that area. According to the new framework for local government in non-metropolitan areas, a unique opportunity is created to improve the relations between local and district councils. To a large extent, the new rationalisation of municipalities and the re-demarcation of boundaries, have made this interaction much stronger and easier.⁵¹

10.3.2 The application of the relevant criteria

In the past it was often difficult to determine who was responsible for the application of the criteria and the subsequent determination of the categories of municipality. This uncertainty has led to a specific legal dispute between the national government and some provincial governments. In the case of *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and another* and *Executive Council Kwazulu-Natal v President of the RSA and others*⁵² two provincial governments instituted proceedings in the Constitutional Court challenging the constitutional validity of certain sections of the Local Government: Municipal Structures Act 117 of 1998. The constitutional challenges fell into two categories: (a) that certain provisions of the Act encroached on the powers of the provinces, more specifically the power to establish municipalities in their provinces in terms of section 155(6) of the Constitution, and (b) that the Act encroached on the constitutional power of municipalities *inter alia* to elect executive committees or other committees in terms of section 160(1) of the Constitution and to regulate their own internal affairs in terms of section 160(6) of the Constitution. The national government contended that although the Constitution in chapter 7 allocates powers to the provinces and municipalities, it does not deprive parliament of the power to legislate on such matters and that parliament in terms of section 44(1)(a) of the Constitution

⁵⁰ See the Structures Act ss 1 and 6 for the definition of a District Management Area.

⁵¹ The rationalisation of the number of local councils, have created a more viable and effective local government structures. Many rural and urban areas, as well as areas surrounding such urban areas previously known as peri-urban areas – which have been separated by municipal boundaries but were linked economically – have now been amalgamated.

⁵² 2000 (1) SA 661 (CC).

has concurrent powers over such matters. It was also contended by the applicants that the Act was inconsistent with the Constitution in that section 155(3)(b) of the Constitution required municipal boundaries to be determined by an independent authority and in that the empowerment of the national government to apply the criteria to determine which area should have a category A municipality was usurping a function of the Demarcation Board. The minister's discretion to decide whether to accept the recommendations of the Demarcation Board in terms of municipal boundaries was also impermissible. After weighing up all the circumstances of the case, the court held that:

- The submission that parliament has concurrent powers together with provincial legislatures in terms of chapter 7 of the Constitution was inconsistent with the language of chapter 7 and could not be reconciled with section 164 of the Constitution.⁵³
- Section 155(6) of the Constitution conferred only executive powers on the provinces in relation to the establishment of municipalities; no legislative powers were conferred. Section 155 further contemplated that the Demarcation Board should determine the boundaries of municipalities in terms of the criteria and procedures prescribed by national legislation without being constrained by national or provincial governments.⁵⁴
- Section 155(6) meant that the provincial governments had to establish municipalities in terms of the boundaries determined by the Demarcation Board. The establishing powers of the provinces entailed nothing more than the power to set up municipalities under existing legislation. It did not comprehend the power to apply the criteria for both national/provincial governments. By authorising the minister to apply the criteria, section 2 of the Structures Act was rendered invalid.⁵⁵
- It was confirmed that a district management area was neither a category nor type

⁵³ See the *Executive Council (WC)* case *supra* fn 52 para 28 at 682A-B.

⁵⁴ *Ibid* para 55 at 690-691.

⁵⁵ *Ibid* para 59 at 692A-B.

of municipality; it was, however, a geographical area governed by only one municipality. District management areas were thus not separate municipalities, but rather part of the district municipality by which they were governed. Such areas were not a fourth category of municipality. It was also confirmed that a district municipality was a category C municipality and that such a category had to include only more than one municipality in that area.⁵⁶

- The Constitution conferred only executive powers on the provinces in terms of section 155(6) and stated that such powers had to be exercised within a framework of legislation. Because of the constitutional silence on such legislative regulation, national legislation could be prescribed in terms of section 164 of the Constitution. The court made it clear that the power to establish municipalities had to be distinguished from the power to determine the types of municipality. The power on municipal types vested in the provinces according to section 155(5) of the Constitution.⁵⁷ In relation to the establishment of municipalities⁵⁸ the provinces had only executive powers, but in relation to establishing the types of municipality⁵⁹ the provinces had both legislative and executive powers. National government could not legislate on matters which fell outside its competence.⁶⁰

Because of this decision, the Structures Act was amended in 1999.⁶¹ According to the amendment Act, section 5 of the Structures Act was repealed and section 4 was amended and now states the following:⁶²

- The Demarcation Board must
 - (a) apply the criteria set out in section 2 of the Act and determine whether an area must have a single category A municipality or municipalities of both category C and B
 - (b) determine the boundaries of the area in terms of the Demarcation Act.⁶³

⁵⁶ The *Executive Council (WC) case supra* fn 52 at paras 59, 65 and 66.

⁵⁷ *Ibid* paras 72 and 73 at 694-695.

⁵⁸ The Constitution s 155(6).

⁵⁹ The Constitution s 155(5).

⁶⁰ *Ibid* paras 82 and 83 at 696-697.

⁶¹ See the Local Government: Municipal Structures Amendment Act 58 of 1999.

⁶² Refer to the Municipal Structures Amendment Act s 4(1) and (2).

- The Demarcation Board may determine that an area must have a category A municipality only after consultation with the minister responsible for local government, the MEC for local government in the province concerned and SALGA.⁶⁴ It must be pointed out that the Demarcation Board does not need the minister's or the MEC's or SALGA's concurrence with its decision. The Structures Act requires the board to make its determination only *after consultation*.⁶⁵ The Demarcation Board must therefore consult with the other parties, but it is not obliged to follow their advice.⁶⁶

10.3.3 Parts of category C areas in which category B municipalities are not viable

The Structures Act further determines that if a part of an area that must have both category C and B municipalities is declared a district management area, that part does not have a category B municipality.⁶⁷ A district management area is an area that is part of a district municipality, but which has no local municipality for that area and is subsequently governed by that relevant district municipality alone.⁶⁸ Although the Constitution requires that municipalities be established for the whole of the territory of the Republic,⁶⁹ some areas are not viable and not in need of a local municipal institution for various reasons. To accommodate such areas, the Structures Act provides for the establishment of district management areas which are to fall under the control of a district municipality. Strictly speaking the district management area is therefore not without a local government for that area and should not be inconsistent with the obligation set out in section 151 of the Constitution. However, district management areas may be declared by the Demarcation

⁶³ According to the Constitution, national legislation must establish criteria and procedures for the determination of municipal boundaries by an independent authority. See the Constitution s 155(3)(b). In compliance with this constitutional obligation, the national legislature has enacted the Local Government: Municipal Demarcation Act 27 of 1998, in terms of which the Municipal Demarcation Board was established by the Act s 2 to function as the independent authority required by the Constitution.

⁶⁴ SALGA is the South African Local Government Association, an association that is recognised in terms of the Organised Local Government Act 52 of 1997 s 2(1)(a). See the definition of SALGA in the Structures Act as well as in ch 8 above.

⁶⁵ Own emphasis added.

⁶⁶ If the Act had referred to the term *in consultation with* it would have required the parties to concur with the final determination. See also Rautenbach and Malherbe (1999) 212-216.

⁶⁷ Refer to the Structures Act s 6(1).

⁶⁸ See the definition of district management area as set out in the Structures Act s 1.

⁶⁹ The Constitution s 151(1).

Board only after consultation with the minister and the MEC for local government in the province concerned. District management areas should be declared only if the establishment of a category B⁷⁰ municipality in a particular area will not be conducive to the fulfilment of the objects of such a municipality, as is required in section 24 of the Demarcation Act.⁷¹

After consulting with the minister and relevant MEC for local government in the province concerned, the Demarcation Board may also withdraw a declaration of an area as a district management area. If such a declaration of a district management area is withdrawn, the MEC for local government must either establish a new local municipality for that area in terms of section 12 of the Structures Act or include that area within the jurisdiction of another local municipality in terms of section 17 of the Structures Act, in accordance with any boundary determinations or re-determinations received from the Demarcation Board and with effect from the date of the next elections of municipal councils.⁷²

10.3.4 Special provisions for cross-boundary municipalities

Apart from the three categories of municipality mentioned above, the Constitution also provides for the establishment of so-called “cross-boundary municipalities”.⁷³ Cross-boundary municipalities are municipalities that have been established across provincial boundaries. The Constitution states that if the criteria envisaged in subsection 155(3)(b), which is to be found in the Demarcation Act,⁷⁴ cannot be fulfilled without a municipal boundary’s extending across a provincial boundary, the particular municipal boundary may be determined across the provincial boundary, but only (i) with the concurrence of the provinces concerned and (ii) after the respective provincial executives have been authorised by national legislation to establish a municipality in that municipal area. In this regard and subject to subsection

⁷⁰ Local Council.

⁷¹ See the Structures Act s 6(2), read together with the Demarcation Act s 24. When the Demarcation Board determines a municipal boundary, its objective must be to establish an area that would enable the municipality to fulfil its constitutional and other legislative obligations.

⁷² See the Structures Act s 6(3)(a)–(b).

⁷³ See the Constitution s 155(6A). Note that at the time of going to press Parliament was considering an amendment to the Constitution which could result in a deletion of s 155(6A). If the amendment is approved, all cross-boundary municipalities will fall away. Refer to the Constitution Twelfth Amendment Bill 2005.

⁷⁴ See the Demarcation Act s 24.

155(5), national legislation may provide for the establishment in that area of a municipality of a type agreed to between the provinces concerned. The mentioned national legislation may also provide a framework for the exercise of provincial executive authority in that area and for the re-determination of municipal boundaries where one of the provinces concerned withdraws its support of a municipal boundary as has been determined by the Demarcation Board.⁷⁵

In compliance with the constitutional requirements, the Municipal Structures Act specifically addresses the further aspects regarding cross-boundary municipalities.⁷⁶ According to the Act and if the Demarcation Board has demarcated a municipal area across a provincial boundary with the concurrence of the legislatures of the provinces involved, the relevant MECs for local government in those provinces must, subject to the authorisation of an Act of parliament, do the following:⁷⁷

- Establish in that area, in accordance with section 12 of the Structures Act, a municipality of a type mentioned in section 8, 9 or 10 as agreed to between the provincial legislatures concerned.
- Exercise their executive authority in terms of the Structures Act and any other legislation jointly with regard to that municipality, except when the provincial governments concerned have entered into an agreement which provides for an alternative arrangement envisaged in subsection 90(3) of the Structures Act. The subsection states that the governments of the provinces concerned may enter into an agreement providing for an arrangement which may include:
 - (a) The exercise of their executive authority with regard to that municipality or in that municipal area by functionaries of one of those provincial governments on a delegation or agency basis.
 - (b) The provision of financial and other assistance to the municipality.
 - (c) The suspension of all or any legislation of the one province and the application of all or any of the other province's legislation in that municipal area. It is important to note that an agreement that provides

⁷⁵ See the Constitution s 155(6A)(b)(i)–(iii).

⁷⁶ Refer to the Structures Act s 90(1).

⁷⁷ Both the Demarcation Act and the Structures Act.

for the application of one province's legislation in a municipal area that falls in another province is enforceable only if the provincial legislature of that other province has passed legislation that provides or allows for such application.⁷⁸

Lastly, it is also confirmed that if a provincial legislature no longer supports the continuation of a cross-boundary municipality and subsequently passes a resolution calling for the disestablishment of that municipality, the Demarcation Board must re-determine the boundaries of that municipal area in such a way that no boundary extends across a provincial boundary.⁷⁹

In further compliance with, and to give effect to, section 155(6A) of the Constitution, national government passed the Local Government: Cross-Boundary Municipalities Act⁸⁰ in 2000, whereby affected provincial executives are authorised to establish cross-boundary municipalities and to provide for the re-determination of the boundaries of such municipalities under certain circumstances. The preamble of the Act states that this Act was enacted by parliament because the Demarcation Board indicated the desirability for certain municipal boundaries to extend across provincial boundaries and because national legislation must authorise the respective provincial executives to establish a municipality within a municipal area that extends across a provincial boundary. According to the Act, the MECs in the provinces indicated in the annexed schedule to the Act are authorised to establish cross-boundary municipalities as set out in the schedule.⁸¹

Provision is also made for the re-determination of boundaries of cross-border municipalities, which may be re-determined under circumstances other than those provided for in section 90(5) of the Structures Act only if the legislatures of the provinces involved so concur and if the re-determination is authorised by national legislation.⁸² In light of the above it is submitted that any re-determination of the boundaries of a cross-boundary municipality must be done in terms of section 90(5) of the Structures Act, unless section 2 of the Cross-boundary Municipalities Act is complied with. In compliance with the

⁷⁸ See the Structures Act s 90(4).

⁷⁹ See the Structures Act s 90(5).

⁸⁰ 29 of 2000.

⁸¹ See the Cross-boundary Act s 1.

⁸² See the Cross-boundary Act s 2.

requirement that national legislation must authorise the re-determination of the boundaries of cross-boundary municipalities, national government enacted the re-determination of the Boundaries of Cross-boundary Municipalities Act in 2000.⁸³

10.4 Systems and types of municipal government

10.4.1 *Why different types of municipality are created*

Apart from defining the different categories of municipality, the Structures Act also defines the different types of municipality that may be established within each category. This provision is in compliance with the constitutional obligations.⁸⁴ The provision of different types of municipality places emphasis on the fact that not all municipal councils are the same and that different ways should be open to municipal councils whereby they can organise themselves to perform their powers and duties effectively. Some flexibility is thus needed to establish the different types of municipality that should be the most effective and efficient in particular circumstances. There is no standard way to organise all municipal councils, and the provision of different municipal types should afford most municipalities the opportunity to establish the system that will be most effective for specific local needs.

10.4.2 *The different systems of municipal government*

Many different types of municipality can be established within the new local government structure. Each municipal type is made up of a combination of five specific systems of municipal government. Before a municipal type is established, therefore, one must identify and examine the different systems of municipal government that have been created, in order to combine them into specific municipal types. In this regard, five different systems of municipal government must be distinguished.⁸⁵

According to the Structures Act, the different types of municipality that may be established within each category of municipality are defined in accordance with five different systems of municipal government or combinations of such systems. It is not mandatory that the different systems be combined to form a

⁸³ 69 of 2000.

⁸⁴ The Constitution s 155(2) requires national legislation to define the different types of municipality.

⁸⁵ The different systems of municipal government are explained in the Structures Act s 7.

particular type. In some instances an individual system can also be used to establish a specific type of municipality, as long as it is one of the five executive systems.⁸⁶ These systems are:

- *A collective executive system*, which allows for the exercise of executive authority through an executive committee. Executive leadership of the municipality is collectively vested in the executive committee.
- *A mayoral executive system*, which allows for the exercise of executive authority through an executive mayor. Executive leadership of the municipality is vested in the mayor, who is assisted by a mayoral committee.
- *A plenary executive system*, which limits the exercise of executive authority to the municipal council itself.
- *A sub-council participatory system*, which allows for delegated powers to be exercised by sub-councils that are established for/in parts of the municipality.
- *A ward participatory system*, which allows for matters of local concern within the different wards of a particular municipality to be dealt with by the specific committee that has been established for such wards.

A closer investigation of the different systems of municipal government as mentioned above reveals a clear and important distinction between the different systems. Some systems are called “executive systems”, while others are “participatory systems”. In this regard, it must be remembered firstly that every municipal council has certain executive powers and duties which also allow for the exercise of certain legislative powers.⁸⁷ The Constitution further specifically vests both executive and legislative authority of a municipality in its Municipal Council.⁸⁸ This vesting of powers in the Municipal Council has very important implications for the different systems and types of municipality. The executive system of government describes the structure through which

⁸⁶ Such types are identified in the Structures Act ss 8, 9 and 10.

⁸⁷ According to the Constitution s 156(1) and (2), a municipality has executive authority in respect of, and the right to administer the local government matters listed in, Part B of Schs 4 and 5 of the Constitution, as well as in respect of any other matter assigned to it by national or provincial legislation. A municipality may make and administer by-laws for the effective administration of the matters, which it has the right to administer and thus exercise executive authority over.

⁸⁸ Refer to s 151(2) of the Constitution.

that government exercises its executive powers and performs its executive duties. Thus the municipal executive system describes the structure through which a particular municipal council must exercise its executive authority. As mentioned above, the Structures Act provides for three systems of executive local government, and it goes without saying that every municipal government must be based on one of the three systems.⁸⁹

In addition to the three executive systems, the Structures Act also provides for two so-called “participatory systems” of municipal government. The provision of the two participatory systems aims to ensure and enhance public participation within the formal executive functioning of municipalities and also to provide for more accountable democratic local governance. The two participatory systems cannot function on their own, however, and must be combined with one of the three executive systems. Various combinations of the executive systems and participatory systems are possible. In some instances certain executive systems will function on their own, while in other cases they will be combined with one or even both the participatory systems.⁹⁰ The type of municipality that has been established can be determined according to the particular executive municipal system or combination of executive systems with one or both of the participatory systems. In order to determine the best executive system or combination of systems for a particular municipality, each of the systems should be explained briefly.

10.4.2.1 The collective executive system

In a collective executive system, the municipal council elects an Executive Committee from among the members of the council and then delegates some of the council’s executive responsibilities to that executive committee. The executive committee is then empowered to take decisions on matters that fall within its delegated powers and is thus vested with executive leadership responsibilities for that municipality. Most municipal councils existing before

⁸⁹ If a council were not based on one of the three executive systems of local government, it could not exercise its executive powers and duties and could therefore not operate as a local government.

⁹⁰ See the Structures Act ss 8, 9 and 10.

the December 2000 local government elections⁹¹ established executive committees to increase the efficiency of their decision-making processes. In essence, the establishment of a separate executive structure enables a small group of councillors who have been elected to the executive committee to deal with the day-to-day business of running the municipality. Without a smaller executive structure, the whole council would be required to meet every time a decision is to be taken. In instances where a municipal council is very large or has many decisions to contemplate, the taking of decisions in plenary would result in a slow decision-making process. A collective executive system with an executive committee should be much more effective and efficient to ensure a more speedy decision-reaching process. The Structures Act specifically provides for the internal structuring and functioning of executive committees, the features of which will be discussed in later chapters of this work.⁹²

It is important to note that in the collective executive system the relevant council delegates certain powers to the whole executive committee and not to any individual member of that committee. This therefore means that the executive committee must exercise its powers collectively as a unit, and no individual person can take decisions on behalf of the committee. The collective or team approach is often regarded as one of the key strengths of the collective executive system. The committee has the benefit of being able to draw on the collective experiences and insights of all the members of the committee. The particular system also ensures that proper checks and balances occur in terms of executive decision making. Because no member can take decisions individually, there is a far smaller chance that decisions will be taken in a biased or self-interested manner. Lastly, the collective approach is also beneficial to facilitate problem solving, as it may generate innovative solutions which individual members may not have thought of on their own.⁹³ Suffice it to say that in instances where a municipal council is very large or has a wide range of responsibilities, such a council should consider the

⁹¹ The date on which the final phase of the restructuring process commenced and municipalities embarked on a new vision and system of democratic and developmental local government.

⁹² See the Structures Act ch 4 Part 1.

⁹³ Refer to the LGIS no 2 "Types of Municipalities" (1999) at 10–11.

delegation of some of its executive powers to a smaller group of councillors in order to facilitate fast and effective decision making.

10.4.2.2 The mayoral executive system

In a mayoral executive system, the exercise of executive authority is provided for through an executive mayor.⁹⁴ The executive leadership of the municipality is thus vested in the executive mayor in his or her personal capacity and not in a collective committee, as is the case in a collective executive system. However, the executive mayor may be assisted by a so-called “mayoral committee”.

In a mayoral executive system, a municipal council elects one member of that council as the executive mayor and then delegates certain executive powers and duties to that person. If this is approved by the MEC for local government of the province concerned, the municipal council may also elect a deputy executive mayor. The specific details of the mayoral executive system is specifically explained in the Structures Act, and this will be discussed in full detail in some of the chapters that follow.⁹⁵

As was mentioned above, the mayoral executive system differs from the collective executive system in two important ways:

- In the mayoral executive system the relevant municipal council delegates executive powers and duties to an individual councillor: the executive mayor.

⁹⁴ See the Structures Act s 7(b).

⁹⁵ See the Structures Act ch 4 Part 2.

lective executive system the municipal council delegates executive powers to the whole executive committee. Although in certain instances an executive mayor must appoint a mayoral committee and may delegate responsibilities to the members of the mayoral committee, the executive mayor still remains accountable and responsible to the municipal council for all the powers and duties allocated to him or her.⁹⁶

- In the mayoral executive system the mayoral committee is appointed by the executive mayor. In a collective executive system the executive committee is elected by the municipal council on a proportional basis.

A closer investigation of the two executive systems mentioned above reveals several advantages of having a mayoral executive system. Some of these advantages are:

- The election of an individual executive leader puts a “face” in local government. Many local residents do not know who is responsible for governing a specific municipal area. Local government is often experienced as a faceless bureaucratic institution. It is not always clear who is accountable for the final decisions and political leadership of a municipal council. In this regard, an executive mayor gives a human face to local government and thereby makes it easier for ordinary residents to relate to the particular leadership of their local area. More certainty is provided to residents as to where final accountability and responsibilities are vested.
- A mayoral executive system should also provide for decisive leadership and rapid decision-making processes. Such positive attributes are particularly useful in larger and more complex municipalities. On the international front, many “international” cities such as London and New York are moving to a mayoral executive system of municipal governance.⁹⁷ Many such large metropolitan cities are often home to a diversity of strong local, national and international interests. In dealing effectively with such issues, a charismatic and respected executive mayor can play an important role in inspiring business confidence, attracting foreign investment and

⁹⁶ Refer to the Structures Act s 60(1)(a).

⁹⁷ See LGIS no 2 “Types of Municipalities” (1999) at 16.

building strong relationships between the local municipality and community interest groups.⁹⁸

- The mayoral executive system can sometimes also have positive advantages in rural jurisdictions with large geographical areas. In cases where councillors have to travel long distances to attend committee or council meetings, the election of an executive mayor could minimise the need for the council or a committee to meet and provide for faster and more effective decision making.

10.4.2.3 The plenary executive system

The plenary executive system is often regarded as the simplest system of municipal government. In a plenary system, the executive powers are exercised by a full meeting of the municipal council.⁹⁹ The municipal council takes all executive decisions regarding the business of the municipality and is also responsible as a council in general for the political guidance and leadership. According to the provisions in the Structures Act, a plenary executive system limits the exercise of executive authority to the municipal council itself.¹⁰⁰ A municipal council that has established a plenary executive system may thus not delegate its executive responsibilities to any individual councillor or to any of its committees.¹⁰¹ Similar to all other municipal councils, a municipal council with a plenary executive system must also elect one of its members as a chairperson of that council. Such a chairperson is also called a mayor.¹⁰² Plenary executive systems are best suited to small municipal councils or to councils that have only a limited range of powers and responsibilities. A municipal council that has a small number of councillors should be able to reach decisions quickly and effectively by discussing and debating such issues in a plenary session of that council.

⁹⁸ A good example in this regard is the significant role the mayor of New York, mayor Giuliani, played after the 11th of September 2001 terrorist attacks on the USA. His executive leadership not only mobilised the local community but also received national and international praise for the manner in which the situation was dealt with.

⁹⁹ The word plenary means "full" or "complete".

¹⁰⁰ See the Structures Act s 7(c).

¹⁰¹ In this regard one should distinguish between the delegation of executive authority and the general authority to delegate powers or functions. It is submitted that the Structures Act in this regard does not prohibit the general authority to delegate powers or functions, but that the Act confirms that in a plenary executive system it is the council in full, and not a specific person or smaller committee, that bears the brunt of final executive responsibility.

¹⁰² See LGIS no 2 "Types of Municipalities" (1999) at 9.

10.4.2.4 The two participatory systems

The three executive systems of municipal government described above should enable effective and efficient decision making in local government.

Each municipal council must have one of these executive systems to ensure

that it can exercise its

executive authority. It is also very important, however, for municipalities to ensure that residents and community interest groups are able and motivated to participate in the municipal decision-making processes. As institutions that are regarded as service providers from the cradle to the grave, local governments form the sphere of government which interacts directly with the ordinary residents, and community involvement must be encouraged.¹⁰³ In order to provide for structured community participation, the new local government structure provides that the different executive systems can be combined with either of the two participatory systems, namely the ward participatory system and the sub-council participatory system.¹⁰⁴ It is submitted that community participation in the matters of local government will be enhanced through these two participatory systems.

(a) The ward participatory system

The ward participatory system of municipal government allows for the establishment of ward committees within the municipal jurisdiction in order to facilitate community participation in local matters. Ward committees have no original powers, as their powers and functions are delegated to them by the metro or local councils. They act as advisory committees with the aim of insuring and facilitating community participation, and as such they provide for a structural channel of communication, a local point of access to the municipal government and a foundation of accountability of municipal councillors. Apart from their role of enhancing community participation, the ward committees should also improve communication between the local municipal council and the local community. Through this communication system a municipal council should be able to identify community needs quickly and accordingly fine-tune its municipal policies and programmes to accommodate local circumstances and needs.

Most municipal areas were divided into wards for the purposes of the local government elections that took place during December 2000 and the elections that are to be held in the future.¹⁰⁵ In a ward participatory system, matters of local concern are addressed by the various committees that are established in

¹⁰³ See the objects of Local Government set out in the Constitution s 152(1)(a)-(e).

¹⁰⁴ The Structures Act S 7(d) and (e).

¹⁰⁵ It should be noted that where a municipal council has less than seven members, there will be no wards demarcated for that council.

the wards. These committees allow residents a direct voice in the governance of their neighbourhoods. Participatory democracy is enhanced through a system that provides a vehicle for local communities to make their views and needs known to the municipal council. Because wards have a wide range of needs and interests, the Structures Act makes specific provision for the diversities of different areas to be represented in the relevant ward committees.¹⁰⁶

If a municipal council decides to have ward committees, it must establish a ward committee for each ward in that municipality. Each ward committee consists of the councillor who represents that ward and a maximum of 10 other people from within the ward area.¹⁰⁷ It should be noted that ward committee members participate in the ward committee on a voluntary basis and are not remunerated for their involvement. When ward committees are managed and controlled properly, they should play a significant role in the enhancement of community participation in local government affairs.

(b) The sub-council participatory system

In order to enhance democratic participation further and also to enable a decentralised form of municipal management in usually large metropolitan areas, the new local government system provides for the so-called “sub-council participatory system” through the provisions of the Structures Act.¹⁰⁸ Metropolitan municipalities cover a large urban area and often have to deliver services to a large local population. Because they are so extensive, some metropolitan governments cannot effectively and efficiently provide and sustain quality service provision, and more often than not such services and functions can be better managed through a system of decentralised structures within the relevant municipal area. The sub-council participatory system provides for exactly such a decentralised system: services and functions are managed through so-called “sub-councils”, established for parts of the municipal area.

Sub-councils are committees of the metropolitan council and have such powers and duties that have been delegated to them by the Metro Council.

¹⁰⁶ Refer to the Structures Act ch 4 Part 4.

¹⁰⁷ See the Structures Act s 73.

¹⁰⁸ See the Structures Act s 7(d).

Depending on the extent of the powers and duties that have been delegated to sub-councils, they usually range from being merely consultative in nature to having extensive delegated powers and significance.¹⁰⁹

If a metropolitan council wishes to establish sub-councils, it should first determine how such sub-councils would promote effective and efficient government in its area. Some aspects should be carefully considered in this regard. The metro council must consider the size of the sub-councils, the specific powers and duties that will be delegated to them and also the financial framework within which the sub-councils will be required to operate. Sub-councils can easily become financial burdens and ineffective structures if proper initial planning has not been done.¹¹⁰

The boundaries of sub-councils are further determined by a process of clustering wards together. When wards are clustered together to determine the boundaries of a sub-council, the metro council must consult the Demarcation Board and as far as possible apply the criteria set out in sections 24 and 25 of the Demarcation Act.¹¹¹ The number of sub-councils will vary from one metropolitan municipality to another and will depend mostly on how decentralised a municipality wants its administration to be. Because of its specific composition, metropolitan sub-councils or the sub-council participatory system should contribute significantly to the success of a Metropolitan Local Government in achieving the local government objectives required by the Constitution.¹¹²

10.5 Combining the different systems of municipal government to form municipal types

10.5.1 Introduction

As was explained above, the different systems of municipal government or combinations of such systems are used to define the various types of municipality that may be established within each category of municipality. It

¹⁰⁹ It should be noted that sub-councils have no original powers and are allowed to perform only the functions delegated to them.

¹¹⁰ The Structures Act states certain provisions and requirements with regard to metropolitan sub-councils. See the Structures Act ch 4 Part 3.

¹¹¹ See the Structures Act s 62(2)(a) and (b).

¹¹² Sub-councils consist of councillors representing each ward in that sub-council area as well as additional councillors as determined by the metropolitan council in order to ensure political proportionality. See the Structures Act s 63(1)(a) and (b).

was always the intention of the constitutional drafters not to prescribe the types of municipality in each category, but to leave such determination in part to the national government and provincial governments.¹¹³ In all, five different systems were identified. At first, three executive systems which describe the structures through which municipal councils exercise their executive powers and perform their executive duties were mentioned. The last two systems are participatory systems which again describe the structures to which the relevant municipal council may delegate the powers and duties that are then to be exercised in part by the participatory system of the municipal area.

The five systems of municipal government form the building blocks for all possible municipal types. All municipal types are made up of either an executive system alone or a combination of an executive system and the participatory systems. In forming the different types of municipality, the following aspects must be taken into account:

- All municipalities must have one of the executive systems of municipal government. It is important to note that the executive systems may not be combined with one another. If a municipality has decided on one of the executive systems but has no participatory system, the municipal type will be the same as the executive system.¹¹⁴
- The various executive systems can be combined with one or both of the participatory systems to form new municipal types.¹¹⁵
- It is important to note that the participatory systems cannot function on their own; they can be used only in combination with one of the mentioned

¹¹³ See *In re: Certification of the amended text of the Constitution of the RSA, 1996* 1997 (2) SA 97 (CC). The court held that the CP V did not require a description of the types of municipality that could be established in each of the three categories described in s 155(1) of the Constitution. Such a requirement would import too great a specificity to a phrase of such general and imprecise import as a “framework for local government . . . structures”. A structural framework should convey an overall design or scheme and should indicate how local government executives are to be appointed, how local governments are to take decisions and the formal legislative procedures demanded by CP X. The amended constitutional text identified three categories of local government (s 155(1)), identified how local government executives were to be appointed (s 160(1)(b), (c) and (d)), how local governments were to take decisions (s 160(2), (3) and (4)), and the formal legislative procedures to be followed (s 160(2), (3) and (4)). In the context of the overall scheme this was sufficient to meet the requirements of CP XXIV. See paras 80-82 at 129-130.

¹¹⁴ Eg, if a municipality has a collective executive system and no participatory system, the municipality will be defined as a collective executive type.

¹¹⁵ If a municipality has a collective executive system combined with a ward participatory system, the municipality is defined as a collective executive combined with ward participatory type.

executive systems. The main reason for this is that every municipality has certain executive powers and duties, which can be exercised or performed only through an executive structure. As is suggested by the name, participatory systems are established to facilitate and enhance participation within the new local government structure.

10.5.2 *The relationship between categories of municipality and types of municipality*

According to the Structures Act, different types of municipality may be established within each category of municipality.¹¹⁶ It is important to note that the way in which executive systems can be combined with the participatory systems in order to form municipal types is different for each category of municipality. The Structures Act specifically identifies the different types of municipality within each category.¹¹⁷ The types of municipality in each category are explained as follows:

10.5.2.1 Types of category A (metropolitan) municipality

The following types of category A municipality can be established:

- a municipality with a collective executive system
- a municipality with a collective executive system combined with a sub-council participatory system
- a municipality with a collective executive system combined with a ward participatory system
- a municipality with a collective executive system combined with both a sub-council and a ward participatory system
- a municipality with a mayoral executive system
- a municipality with a mayoral executive system combined with a sub-council participatory system
- a municipality with a mayoral executive system combined with a ward participatory system and
- a municipality with a mayoral executive system combined with both a sub-council and a ward participatory system.

It must be noted that the Structures Act does not allow for the plenary executive system either to stand alone or to be combined with one or both of

¹¹⁶ See the Structures Act s 7.

¹¹⁷ See the Structures Act ss 8, 9 and 10.

the participatory systems of municipal government within category A (Metropolitan) municipalities. Because metropolitan councils are very large, the plenary executive system is not appropriate and is therefore not an option in metropolitan areas. Category A or Metropolitan municipalities may therefore have either the collective executive system or the mayoral executive system on its own or one of these combined with one or both of the participatory systems. It must be emphasised again that the sub-council participatory system has been specifically designed for metropolitan areas. It allows metropolitan councils with large areas of jurisdiction to delegate powers and duties to sub-councils established for certain parts of the metropolitan area. In circumstances where a metropolitan municipality has both a ward participatory system and sub-council participatory system, the council should consider ways in which the ward committees and sub-councils can interact and complement one another in order to achieve effective and efficient local democracy.

10.5.2.2 Types of category B (local) municipality

Category B municipalities must have any one of the three executive systems, either alone or combined with a ward participatory system.¹¹⁸ The Structures Act specifically identifies the different types of category B municipality.¹¹⁹ The following options are available:

- a municipality with a collective executive system
- a municipality with a collective executive system combined with a ward participatory system
- a municipality with a mayoral executive system
- a municipality with a mayoral executive system combined with a ward participatory system
- a municipality with a plenary executive system and
- a municipality with a plenary executive system combined with a ward participatory system.

¹¹⁸ It was mentioned earlier that the sub-council participatory system has been designed specifically for category A or Metropolitan municipalities and is thus not an option in non-metropolitan areas.

¹¹⁹ See the Structures Act s 9.

10.5.2.3 Types of category C (district) municipality

The Structures Act allows for the following types of category C municipality:¹²⁰

- a municipality with a collective executive system
- a municipality with a mayoral executive system and
- a municipality with a plenary executive system.

Because of their specific composition and role, category C municipalities may not combine their executive system with either one or both of the participatory systems. Participatory system options in category C municipalities are excluded because such municipalities do not have any wards and local community input and representation is already ensured through the representation of councillors from the relevant local municipalities within the area of the district municipality. However, all category C municipalities should ensure that they have mechanisms in place to enable and provide for public participation in their affairs. This is particularly important because district councils govern vast rural areas where participation and consultation have often in the past been neglected or totally ignored.

10.6 Application of municipal types to individual municipalities

In the new local government structure all three spheres of government play a role in the establishment of the new local government system and municipal types. National government has defined the different types of municipality that may be established within each category of municipal government and has also established the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and C.¹²¹ Provincial governments are involved in introducing the new system of municipal types when they establish new municipalities.¹²² Lastly, local governments themselves must be consulted before the MEC for local government of a province determines which municipal type will apply to each municipality. It must be noted that since the new system of types was introduced after the local government elections in December 2000, the MEC for local government in a specific province has had the power to change the

¹²⁰ See the Structures Act s 10.

¹²¹ This was in accordance with the Constitution s 155(2) and (3) and is fulfilled in the Municipal Structures Act ch 1.

¹²² Again the Constitution s 155(5) and the Structures Act s 11 provide for each category of municipality that provincial legislation must determine the different types of municipality that may be established per province in that category.

type of a municipality at any time. Such a change can be affected only through an amendment to the relevant section 12 notice whereby the municipality was established.¹²³ If a MEC wants to change the type of a municipality, he or she must again consult with the affected municipalities and organised local government structure in the province.

It is submitted, therefore, that the new systems of municipal government and the types of municipality which they have formed should significantly strengthen political leadership, should establish clear systems for decision making and should encourage proper democratic participation of local communities. In the new approach, specific flexibility has been built in which allows for various combinations of the different systems and which should have the result that municipalities will have established structures which are best suited to their specific circumstances. With the new types of municipality established after the 2000 local government elections, South Africa completed its journey of local government transformation to a truly democratic local government. What remains to be done is for all local role players – councillors, politicians, officials and local residents – to participate positively within the new structures and to ensure that local government in the 21st century will bring about a prosperous and better society for all in the country.¹²⁴

10.7 Establishing new municipalities – procedures and requirements

10.7.1 Introduction

The establishment of new municipalities throughout South Africa is a key factor in building a new viable and developmental local environment. Such a move was needed to welcome in the new transformed system of local government according to the new constitutional mandate. When an urban area is in need of a local authority, one of two approaches may be decided upon. The area may either be added to or included in the jurisdiction of an already existing municipality, or a totally new municipal institution can be established.¹²⁵ According to the establishment process, all existing

¹²³ See the Structures Act s 12 as well as the discussion on the establishment of municipalities explained in this ch.

¹²⁴ See LGIS no 2 “Types of Municipalities” (1999) at 29.

¹²⁵ In *Fedsure Life Assurance v Greater JHB TMC* 1998 (2) SA 1115 (SCA) the court held that while the interim Constitution s 174 and the Constitution s 151 created the

municipalities have been replaced with newly established municipalities in terms of the provisions of the Municipal Structures Act. All municipal boundaries were re-determined and re-demarcated by the Demarcation Board in accordance with the requirements of the Demarcation Act.¹²⁶ From a practical point of view, it was not possible to facilitate the establishment procedure in a short period of time, and long preparations took place. In general, the establishment procedures had three primary aims:¹²⁷

- The first aim was to create a stable legal environment for the third sphere of government. A new legal foundation for individual municipalities which could clearly define the powers, functions, structures and responsibilities of such municipalities had to be established.
- Through the establishment process, many legal and administrative uncertainties which had been created during the transitional process were reduced. Every new municipality had to be established in terms of a specific establishment notice, which had basic requirements in terms of general information and details of transfers of assets and staff.¹²⁸
- A firm foundation was laid through the establishment process for building the capacities of municipalities to deliver services and to fulfil their constitutional obligations. The establishment process provided for new streamlined systems of delegation and decision making and new structures suitable for enhancing public participation and community support. A further advantage of the new establishment process was the fact that all municipal databases, staff numbers, assets and liabilities as well as municipal by-laws were in some instances re-evaluated and updated. The establishing procedures therefore provided new opportunities to municipalities to address technical and administrative deficiencies and to reassess current procedures, conditions of service and other administrative functions. Consequently, the information that was required for the establishment procedures has given

machinery for the establishment of local authorities through legislation, the respondents had actually been created by the LGTA s 8 and not the Constitution.

¹²⁶ See the Municipal Demarcation Act 27 of 1998. According to the interim Constitution s 174(2), provision had to be made for metropolitan, urban and rural local governments, with differentiated powers, functions and structures.

¹²⁷ See LGIS no 2 "Establishing New Municipalities" (1999) at 2.

¹²⁸ See the Structures Act s 14.

all local governments a new updated database that should prove to be very useful in future years.

10.7.2 The establishment of new municipalities and the so-called "section 12 notices"

The document that describes and establishes each new municipality is called the "establishment notice". The establishment notice is the founding document for each municipality. It is a detailed and complex document and must be read carefully by all local politicians, municipal administrators and local community members. Most of the provisions of the establishment notice are legally binding on all role players, and strict requirements are set before the notice can be altered or amended.

According to the Constitution, each provincial government must establish municipalities in its province in a manner consistent with the Structures Act.¹²⁹ In this regard the Structures Act states the following regarding the establishment of municipalities:¹³⁰

- The MEC for local government in a province must establish a municipality in each municipal area by notice in the Provincial Gazette. All municipal areas were demarcated by the Demarcation Board according to the provisions of the Demarcation Act.¹³¹
- The establishment of a municipality must be consistent with the provisions of the Structures Act, and the notice of establishment took effect at the commencement of the first elections of that council, which was generally 5 December 2000. In order for the notice to be consistent with the provisions of the Structures Act, it may not contain powers or functions for that municipality in contrast to what the Structures Act allows for.¹³²
- The establishing notice must set out specifically required information. The minimum aspects that must be contained in the notice according to the Structures Act and which form the founding legal provisions of the new municipality are the following:
 - (a) The category of the municipality.

¹²⁹ Refer to the Constitution s 155(6).

¹³⁰ See the Structures Act s 12(1)–(4).

¹³¹ 27 of 1998.

¹³² This entails that no municipality could be established outside the new legal framework created by the Municipal Structures Act.

- (b) The type of municipality as determined in terms of provincial legislation.
 - (c) The name of the municipality. Deciding on a new name can sometimes be a difficult issue. This is especially the case in instances where a new municipality is an amalgamation of two or even more existing municipalities with different names. It should also be taken into account that a change in name will also have an impact on such things as the bank account details, debit accounts, consumer billing and payment procedures, as well as stationary changes, which can be very costly in some instances.
 - (d) In the case of metropolitan or local municipalities, the number of wards in that relevant municipality.
 - (e) The number of councillors that have been determined in terms of section 20 of the Structures Act.
 - (f) In the case of a district municipality, the number of councillors, as determined by section 23 of the Structures Act.
 - (g) An indication as to which councillors of the municipality (if any) may be designated as fulltime according to section 18 of the Act.
 - (h) Any provisions of the Structures Act from which the municipality has been exempted in terms of section 91.
 - (i) Any other relevant details, which could include aspects regarding the status of traditional leaders on the relevant council.
- At the commencement of the process to establish a municipality, the relevant MEC must give written notice of the proposed establishment to Organised Local Government in the province and also to any existing municipalities that may be affected by the establishment. Before a notice is published, the MEC must further consult with OLG and the existing municipalities that may be affected. After the consultations have been conducted, the MEC must publish the particulars of the proposed notice for public comment.

As was mentioned above, the establishment notice takes effect only on the day of the commencement of the first election of a particular council, and only then is the new municipality established. The new municipality becomes the legal successor of the disestablished municipality if there was one – within the specified municipal jurisdiction. The establishment notice in terms of section

12 of the Structures Act serves as a legal document and founding charter for each new municipality in South Africa. Many aspects of municipalities that existed before the establishment process were drastically affected by the process. Accordingly, the Structures Act also had to provide for the regulation of the effects of the establishment of municipalities on existing municipalities. In this regard the Municipal Structures Act provides for the following:¹³³

- A municipality established in terms of section 12 in a particular area supersedes the existing municipality or municipalities to the extent that such existing municipality or municipalities fall within the area.¹³⁴ The superseding municipality becomes the successor in law of the existing municipality, subject to certain requirements. Where a district municipality and one or more local municipalities within the area of the district municipality supersedes the existing municipality(ies) in that area, the district and local municipalities become the successors in law to the existing municipality(ies) depending on the specific assets, liabilities, rights and obligations allocated to the district and local municipalities respectively in terms of the relevant section 12 notice or notices.¹³⁵
- If a municipality established in terms of section 12 supersedes an existing municipality(ies), the relevant section 12 notice, or any amendment of that section 12 notice, must:

¹³³ See the Structures Act s 14, as amended by the Municipal Structures Amendment Act 33 of 2000.

¹³⁴ The Local Government: Municipal Structures Amendment Act 33 of 2000 specifically distinguishes between the terms “existing municipality”, “new municipality” and “superseding municipality”. An *existing municipality* means a municipality established in terms of legislation other than the Structures Act before the date of the first elections of municipal councils in terms of the Act. A *new municipality* refers to a municipality established or to be established in terms of the Structures Act and a *superseding municipality* means a new municipality which wholly or partially supersedes an existing municipality in accordance with the Structures Act s 14. See also Act 33 of 2000 s 1 definitions.

¹³⁵ See the Structures Act s 14(1)(b) and (c). See also the case of *ABSA Bank Ltd v Boksburg TLC* 1997 (2) SA 415 (W). In this case the plaintiff had instituted action in a Local Division against a city council in respect of the amount due on an overdrawn cheque account. The city council was dissolved by Gauteng Proc 46 of 15 December 1994 issued by the Premier of the Gauteng province in terms of the LGTA s 10, and a transitional local council (the present defendant) was established in its place and all its assets, liabilities, rights and obligations were transferred to the present defendant. The defendant issued a third party notice against the national government claiming indemnity in terms of s 8(3) of Proc 46 of 1994, which provided that the devolvement of liabilities, debts and obligations in terms of the proclamation would be subject to the “right of the national government to assume such liabilities, debts or obligations in terms of assurances made by the national government”.

- (a) Provide for the disestablishment of the existing municipality or, if only part of the existing municipality's area is affected, the disestablishment of the existing municipality in that affected area.¹³⁶
- (b) Regulate the legal, practical and other consequences of the total or partial disestablishment of the existing municipality. Such consequences will include:
- (i) The vacation of office by councillors of the existing municipality.
 - (ii) The transfer of staff from the existing municipality to the superseding municipality or, if there is more than one superseding municipality, to any of the superseding municipalities. Municipal staff must formally be transferred to a new municipality when their existing municipality is disestablished. In some cases staff are even divided among new succeeding municipalities. In short, the transfer of staff must be regulated by detailed legal provisions, and these must protect their conditions of employment and job security. It should also be noted that the responsibility for staff transfers and other related matters rests with the relevant municipal trade unions and the municipalities themselves and not with the MEC of the province. Staff and labour-related disputes are regulated by the Bargaining Council at both national and regional levels.
 - (iii) The transfer of assets, liabilities, rights and obligations and administrative records from the existing municipality to the superseding municipality or municipalities, as the case may be. When the transfer of assets, liabilities, rights, obligations and administrative records are considered, the interests of creditors of the existing municipality must be taken into account.
 - (iv) The continued application of any by-law(s) and resolutions of the existing municipality to or in that area, as well as the extent of such application.¹³⁷ All existing by-laws, regulations and resolutions are transferred to the superseding municipality(ies) or specifically rescinded by the establishing notice. Where existing municipalities are amalgamated, the geographical extent of their by-laws and

¹³⁶ See the Structures Act s 14(2)(a).

¹³⁷ See the Structures Act s 14(2)(a) and (b).

resolutions have to be re-evaluated. In cases of conflict between by-laws or resolutions, specific provision is needed to confirm which by-laws would still be applicable and which would be rescinded. The determination of which by-laws and resolutions would apply and which not requires extensive evaluation and oversight and also provides a unique opportunity for all new municipalities to review and tidy up all existing legislative and executive decisions, many of which were inconsistent with the Constitution. The Structures Act specifically provides for the review and rationalisation of existing municipal by-laws. The Act states that if an existing municipality is wholly or partially superseded by another municipality, the by-laws, regulations and resolutions¹³⁸ of the existing municipality *must* be reviewed and where necessary rationalised by the superseding municipality, to the extent that such by-laws, regulations and resolutions continue to apply in the area or part of the area of the superseding municipality.¹³⁹ If the superseding municipality is a district or local municipality, any transfer referred to in (ii) or (iii) above must be effected in a way that would enable the superseding municipality to perform the functions and powers assigned to it in terms of section 84 of the Systems Act.¹⁴⁰

- According to the Structures Act, the transfer of staff in terms of a section 12 notice must/have to be on conditions of service not less favourable than those under which that staff member served in the existing municipality and must also be in accordance with the provisions of the Labour Relations Act of 1995.¹⁴¹ It is further provided that a section 12 notice that transfers staff of an existing municipality to a superseding municipality *may* determine that the staff transferred form an administrative unit that functions as such until the superseding municipality has established a staff structure and has appointed staff to positions on that staff structure. Such an administrative

¹³⁸ Including standing delegations.

¹³⁹ See the Structures Act s 15.

¹⁴⁰ Refer to Act 33 of 2000 s 2(b) and (c).

¹⁴¹ 66 of 1995.

unit will function under the control of the municipal manager or acting municipal manager of the superseding municipality.¹⁴²

- On the production of a certificate by a municipality that any asset was transferred to it in terms of a section 12 notice, the relevant registrar of deeds must make such entries or endorsements in or on any relevant register, title deed or document in order to register that asset in the name of that municipality. No duty, fee or charges is payable for such a registration.¹⁴³
- The MEC in a province, by notice in the Provincial Gazette, may also make provision for transitional measures to facilitate the disestablishment of an existing municipality and the establishment of a new municipality. The MEC must consult with the existing municipality before publishing such a notice.¹⁴⁴

From the provisions discussed above, it becomes clear that the establishment notice is a very important document in the new local government system and that all new municipalities are based on their respective establishment notices. It is important to note, however, that not all areas in the country fall under the provisions of an establishment notice. Areas that have been declared District Management Areas do not require an establishment notice.

10.7.3 Aspects regarding the amendment, repeal or replacement of section 12 notices

It is understandable that although the section 12 establishment notices are regarded as the new founding documents of all municipalities in South Africa, such a foundation should not be cast in stone and must be amendable in order to change with local circumstances and to enhance new initiatives. Should any provision of a particular establishment notice be in need of change,¹⁴⁵ a formal process of amendment of the notice is required. As was stated above, amendments may be necessary from time to time to accommodate changing conditions affecting municipalities or to insert further measures to regulate the new local government system. Again the Structures

¹⁴² Refer to the Structures Act s 14(3)(a) and (b).

¹⁴³ See the Structures Act s 14(4).

¹⁴⁴ See the Structures Act s 14(5).

¹⁴⁵ Eg, to change the name or executive structure of a municipality.

Act provides for the requirements that must be complied with in order to amend a section 12 notice. Section 16(1)–(3) of the Structures Act states the following:

- The MEC, by notice in the provincial gazette, *may* amend a section 12 notice to change the type of the existing municipality, to alter the name, to alter the number of councillors subject to section 20 and with effect from only the next election of that municipal council, to specify which councillors may be designated as fulltime, to specify any provisions of the Structures Act from which the municipality has been exempted, to give effect to any change in boundaries or to further regulate matters mentioned in section 14 of the Structures Act, after all affected municipalities have been consulted.
- Any amendment of a section 12 notice must be consistent with the provisions of the Structures Act.
- At the commencement of a process to amend a section 12 notice, the MEC *must* give written notice of the proposed amendment to OLG in the province and also to any existing municipalities that may be affected by the amendment. Before the amendment notice is published, the MEC must consult with both OLG in the province and all the existing municipalities that are affected by the amendment. After the consultations have been held, the MEC must publish the particulars of the proposed notice for public comment.¹⁴⁶

As was indicated above, a section 12 notice can also be repealed, amended or replaced in instances when the existing municipal boundaries are altered or re-determined. When in terms of the Demarcation Act the Demarcation Board re-determines a municipal boundary which affects the area of an established municipality, the provisions of section 12 and 14 of the Structures Act are applicable to the extent necessary to give effect to the re-determination. In such cases the MEC concerned must repeal, amend or replace the relevant section 12 notice and he or she *must* consult with the affected municipalities. Any repeal, amendment or replacement of a section 12 notice takes effect on

¹⁴⁶ See the Structures Act as amended by s 16 of Act 33 of 2000 s 16(3)(a)–(c). The mentioned requirements are again mandatory with regard to the MEC and must be complied with. Any non fulfilment would render the proposed amendment unlawful without any legal binding force.

a date mentioned in the notice, subject to section 16 of the Structures Act.¹⁴⁷ Only in one instance is a municipality allowed to perform powers and functions that are not specifically granted to it in terms of its establishment notice: where the MEC has determined that a municipality is likely to collapse or cannot fulfil its functions. The MEC may then reassign any power and function of that municipality to another category of municipality without amending the establishment notice. In such cases the MEC will simply inform the affected municipalities of his/her decision, in writing.¹⁴⁸

10.7.4 Transitional arrangements in respect of the new local government dispensation

During 2000, national government enacted the Local Government: Municipal Structures Amendment Act.¹⁴⁹ The purpose of the Act was *inter alia* to provide for certain transitional arrangements to accommodate the new local government dispensation. As was indicated elsewhere, the new dispensation commenced on the date of the new local government elections that were held during early December 2000. The Structures Amendment Act specifically stated that the transition meant the process

¹⁴⁷ Refer to the Structures Act s 17(1)–(3). According to s 16(1)(c) an amendment of the number of councillors takes effect only from the next election of the municipal council.

¹⁴⁸ It must be remembered that such an assignment of powers and functions is merely a temporary arrangement and that the MEC must re-allocate those powers and functions once the situation has normalised or formally allocate such powers or functions to the other municipality by a formal amendment of the establishment notice. For more details see the Structures Act s 87(1)–(4).

¹⁴⁹ 33 of 2000.

of putting into operation the new local government dispensation as set out in the Structures Act, read together with chapter 7 of the Constitution. It was further provided that the transition was to end two years from the date of the elections held in December 2000, unless the minister determined a shorter period by notice in the Government Gazette.¹⁵⁰ If aspects of the Structures Act were disputed during the transitional period, special attention to the provisions of the Structure Amendment Act were to be taken into account.¹⁵¹

10.7.5 The relevant role players during the establishment process or subsequent amendment of the establishment notices

From the discussions above, it would seem that the establishment process required different role players to work together in order formally and lawfully to establish the new municipalities in South Africa. It is submitted that the role players would almost all be involved in instances where an establishment notice was to be amended, or even repealed. The relevant role players are summarised as follows:

- the MEC for local government of a province
- the municipal demarcation board
- the minister responsible for local government
- organised local government
- individual municipalities and
- so-called “other role players”, which include municipal trade unions, community organisations and even creditors of a municipality.

10.8 Conclusion

With the local government elections that were held during December 2000, local government moved into the final phase of the transitional process. On the day of the elections many new municipalities were formally established, these municipalities varying in type and falling within the three categories mentioned in the Constitution.¹⁵² Without the re-establishment of all municipalities according to the legal foundation of the new local government system, it would not be possible for municipalities to achieve and fulfil their constitutional objectives and obligations. As was mentioned at the beginning

¹⁵⁰ The transitional arrangements in respect of the new local government dispensation cannot extend beyond the 5th of December 2002.

¹⁵¹ See the Structures Amendment Act 33 of 2000 ch 2.

¹⁵² The Constitution s 155(1).

of this work, the Constitution contains very few detailed instructions with regard to the local sphere of government. The Constitution has left it mostly to national government to provide for a more detailed framework of the new local government system. Accordingly, the Structures Act¹⁵³ has facilitated the establishment of all new municipalities and further regulates various future aspects regarding municipalities. After all the municipalities were legally established in December 2000, the new legal requirements and establishment provisions were formally implemented. Such implementation will require, *inter alia* the introduction of new leadership and management structures for all municipalities; developing co-operative relations between municipalities, especially between district and local municipalities; transferring staff to the new municipal structures and assigning them to their new offices; and also reviewing and rationalising all by-laws, regulations and standing delegations inherited from the old municipalities. It is clear that the process of implementing the provisions of the new legal foundation and the establishment notice will take considerable time and will be an ongoing process.

The establishment of new municipalities has brought many advantages to the new local government dispensation,¹⁵⁴ and suffice it to say that it has laid a sound basis for the new constitutionally envisaged sphere of local governance in South Africa.

¹⁵³ 117 of 1998 as amended.

¹⁵⁴ Some of these advantages can be summarised as follows: the restructuring of municipal administrations, the streamlining of personnel, the re-evaluation and review of municipal by-laws, the formal confirmation of the identity of municipal councils and the provision of information which should give provinces an understanding and insight into the capacity and possible needs of municipalities that they have established. There are, however, some writers who argue that the new structure of local government leaves very little room for structural manoeuvres of individual municipalities to meet specific local conditions. See Chaskalson *et al* (1999) 5A 37-38.