

The composition, election and term of municipal councils

12.1 Introduction

According to the new constitutional foundation, various requirements regarding the composition, election and terms of municipal councils have been laid down. In broad terms, the new system has to be designed to achieve overall compliance with the new founding ethos and values of a revamped constitutional framework and a truly democratic government.¹ Many new changes had to be introduced in the new system to ensure a truly non-racial democratic local government structure. In such a favourable local democracy, all residents should be permitted and encouraged to take part in municipal decision-making processes. However, direct participation of all community members in their relevant local authorities is unachievable and unpractical. To address this impracticality, a system of representative democracy has been established in instances where direct democracy cannot be achieved.²

It is commonly accepted that one of the main ideals of the new local government dispensation is to create and ensure democratic elections within all local government jurisdictions and to achieve truly representative and accountable governments. The electoral system and its functioning is therefore something that affects every person in the country either directly or indirectly, and its importance should not be underestimated. In this regard there seems to be general agreement that current and future representative and accountable governmental structures should be seen to form

¹ Especially the founding values of universal adult suffrage, a national common voters roll, regular elections on all three spheres of government and a multi party system of democratic government should be emphasised. See the Constitution s 1(d).

² In basic terms the system of representative democracy is synonymous with the relevant electoral system of a particular legislature. This again emphasises the important need for all municipal councils to be headed by truly representative and elected local councils with the support and acceptance of their local communities.

some of the most important building blocks for a newly transformed local government dispensation in South Africa.³

Similar to other local government aspects, the final Constitution again provides only a basic framework regarding the composition, election and terms of municipal councils. The complete legal framework is to be found in a variety of national legislative provisions.⁴ Before the new constitutional framework and other national legislative requirements are investigated and discussed, it is necessary briefly to evaluate the relevant transitional requirements that were applicable during the transitional phases and also to identify some of the problems that were experienced during such phases in particular.

12.2 The composition and election of municipal councils during the local government transitional phases

As was stated earlier, the first truly democratic local government elections were held during 1995 and 1996 and were transitional in nature. Two distinct electoral systems were combined into one. The first of these, the previously well-established and so-called "first-past-the-post" electoral system, was specifically directed at municipal wards.⁵ The second was directed at achieving proportionality and was thus referred to as a system of proportional representation combined with a party list system.⁶

³ South African history vividly reiterates the fact that our country has a short track record of true democratic government on all spheres of government. For many decades many people were excluded from voting and electing their own representatives, which should in turn have resulted in acceptance and accountability from political structures. One can thus conclude that the most important component of any electoral system should be the voters on the ground. Every eligible citizen has a responsibility to take part in election processes and to ensure an accountable government. In this sense, voters are the true guardians of any democratic system. See Local Government Information Series no 2 'Elections' (1999) at 1.

⁴ It is important to note that with regard to municipal elections, only national legislation is envisaged by the Constitution and that provincial legislation does not play a role in the composition, election or terms of municipal councils. It is specifically left to parliament to complete and fulfil the basic constitutional structure. Again, reference must be made to the Constitution s 239, where national legislation is defined to include (a) subordinate legislation made in terms of an Act of parliament and (b) legislation that was in force when the Constitution took effect and that is administered by the national government.

⁵ In the first-past-the-post system, different candidates run against one another and the voters vote for a candidate of their choice. The candidate who obtains the most votes wins the ward seat. This particular system has encouraged personal accountability of elected councillors and has also allowed for a mix of independence and party influences. The single important disadvantage of the system is its failure to account for proportional representation of non-elected political support. Eg, if three candidates contested a particular ward and candidate A received 40% of the votes, and candidates B and C each 30% of votes, then candidate A would win the seat, but 60% of voters' support is excluded from representation in the ward of that municipal council. The majority of voters are thus denied representation.

⁶ The system functioned through political parties' arranging their own candidates in a preferential list order and a percentage of seats being allocated to the candidates of that party depending on

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Both systems ran parallel with one another in urban areas, with both ward candidates and proportional representative candidates contesting seats in the election. Ward councillors made up 60% of seats in all local councils, while proportional representative councillors accounted for the other 40%. The position in metropolitan areas was very similar.⁷ In those transitional local councils that were too small to have wards, citizens voted only for political parties, and thus only the proportional representation system applied. This was also the position in so-called Transitional Representative Councils. (TRep Cs) and Transitional Rural Councils (TRur Cs). District councillors were appointed by and from among the councillors of transitional local councils, Transitional Representation Councils or Transitional Rural Councils. In certain rural areas where a primary tier of local government was not possible – so-called “remaining areas” – voters had to vote for councillors on the basis of proportional representation, who then served directly on the relevant district council.⁸

During the transitional period under the LGTA problems were already encountered regarding the proportional list system of representation. Such problems were directed not at the particular system *per se*, but rather at technical aspects regarding the system. Where the Durban High Court held that the forfeiture provisions of section 75(4) of the Local Government Election Regulations 28 of 1996 as published in terms of section 9 of the LGTA resulted in a situation where the will of the electorate was totally disregarded and the proportional representation system was substantially distorted we have an example of such problems. Such forfeiture provisions were regarded as inconsistent with the right to vote and thus unconstitutional and invalid.⁹

12.3 The composition and election of municipal councils under the final Constitution

With the follow-up local government elections in December 2000, the transitional process was completed and the final phase of the new local government dispensation in South Africa initiated. In this regard the final Constitution determines the fol-

the support the party has received. In such a system all parties that received support were represented in the exact proportion to the support received within the relevant municipal jurisdiction.

⁷ Voters in metro areas voted both for ward candidates – 60% of seats – and for political party representatives – 40% of seats. These elected councillors of metropolitan local councils then in turn elected representatives/councillors from among themselves to represent the relevant substructures (local councils) at metropolitan council level. Such councillors subsequently became known as metropolitan councillors.

⁸ For more information refer to LGIS no 2 ‘Elections’ (1999) at 3 and also the LGTA parts I and IA.

⁹ See *Democratic Party v Miller NO and Others* 1997 (1) SA 758 (D) at 762–763.

lowing aspects on the composition and elections of the various municipal councils in South Africa:¹⁰

- (1) Subject to Schedule 6B, a Municipal Council consists of -
 - (a) members elected in accordance with subsections (2) and (3); or
 - (b) if provided by national legislation
 - (i) members appointed by other Municipal Councils to represent those other Councils; or
 - (ii) both members elected in accordance with paragraph (a) and members appointed in accordance with subparagraph (i) of this paragraph.
- (2) The election of members to a Municipal Council as anticipated in subsection (1)(a) must be in accordance with national legislation, which must prescribe a system
 - (a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or
 - (b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll.
- (3) An electoral system in terms of subsection (2) must result in general, in proportional representation.
- (4) (a) If the electoral system includes ward representation, the delimitation of wards must be done by an independent authority appointed in terms of, and operating according to, procedures and criteria prescribed by national legislation.
 - (b) Where a municipal boundary has been determined in terms of section 155(6A), a ward delimited within that municipal boundary may not extend across the provincial boundary concerned.
- (5) A person may vote in a municipality only if that person is registered on that municipality's segment of the national common voters roll.
- (6) The national legislation referred to in subsection (1)(b) must establish a system that allows for parties and interests reflected within the Municipal Council

¹⁰ Refer to the Constitution s 157.

making the appointment, to be fairly represented in the Municipal Council to which the appointment is made.

From the wording of section 157, various comments and conclusions can be submitted. First, it is clear that a municipal council consists only of members that are elected.¹¹ Two election possibilities are identified. On one hand members or councillors can be elected in terms of the requirements of section 157 subsections (2), (3), (4) and (5). The second procedure allows for members that have been elected to be further appointed by a municipal council to represent that council in another council. However, this appointment of members is permissible only if national legislation provides for such a process.¹²

It is important to note that the South African electoral laws in general have been fundamentally changed during 2002 and 2003. Before the new constitutional amendments were implemented, South Africa followed the so-called “imperative mandate” of representation. The imperative mandate required that members of legislatures which were elected under a particular political party had to vacate their seats if they lost their membership to that party. After intense political debate and even legal action, new amendments to the Constitution were implemented which now allow for a free mandate or representation. However, the free mandate, which allows for floor crossing between parties, is not without limits. In the case of the *UDM v President of the RSA (No 2)*¹³ such laws were challenged on constitutional grounds. It was argued on behalf of the applicant that the that the right to vote and proportional representation were part of the basic structure of the Constitution and, as such, were not subject to amendment at all. It was also submitted that the amendments were inconsistent with the founding values in section 1 of the Constitution, more particularly that they were inconsistent with the values of a multi-party system and the rule of law. The applicant further contended that the proportional representation system was an integral part of the Constitution and that the purpose of the anti-defection provision was to protect this system; that by changing the system during the term of the legislatures infringed the voters' rights in terms of section 19 of the

¹¹ This can either be directly or indirectly elected members.

¹² The best example of such an appointment of members is with regard to District Councils, whose members are appointed by the various local councils in their area of jurisdiction. The Local Government: Municipal Structures Act 117 of 1998 specifically provides for the election and *appointment* (own emphasis added) of district councils. See the Act s 23. The constitutional requirement set out in s 157(b) is therefore complied with.

¹³ 2003 (1) SA 495 (CC).

Constitution and that the purpose of the disputed legislation was to cater for a particular, immediate, political situation. Item 23A of Annexure A to Schedule 6 to the Constitution, which contained the anti-defection provision relevant to the national and provincial legislatures could be amended by ordinary legislation “within a reasonable period after the new Constitution took effect” to make it possible for a member of the legislature who ceased to be a member of the party which nominated that member to retain membership of such legislature.

The court held *inter alia* that the Constitution as amended contemplated that floor-crossing would be permissible, including on the local sphere of government. It was further held that section 157(1) provided that council members were to be elected in accordance with subsections 157(2) and (3), but subject to Schedule 6A. This did not subordinate the Constitution to the schedule. It simply required section 157(3) to be read consistently with section 157(1) and Schedule 6A. If this were done, then in the light of the reference to Schedule 6A, the reference in subsection (3) to the need for the electoral system to result in general in proportional representation had to be construed as a reference to the voting system and not to the conduct of elected members after the election. Accordingly, the Constitution of the Republic of South Africa Amendment Act¹⁴ and the Local Government: Municipal Structures Amendment Act¹⁵ were not unconstitutional.¹⁶ Members of legislatures representing political parties can lawfully cross the floor to another party without forfeiting their seats. In 2002, when the ruling government of the day decided to provide for floor-crossing legislation, the Constitution already envisaged such legislation as a possibility in future.¹⁷ At local government level, all that was needed to allow for floor-crossing were amendments to the Structures Act.¹⁸ In the national and provincial spheres,

¹⁴ 18 of 2002.

¹⁵ 20 of 2002.

¹⁶ See at 523-524. See also *Caluza v IEC and Another* 2004 (1) SA 631 (Tk) where the court with reference to the Constitution Sch 6 and the LG: Municipal Structures Amendment Act 20 of 2002 stated that it is clear from the two statutes that only two window periods for floor-crossing exist and that a councillor may change membership of a party only once. Such change is effected by informing the IEC thereof. A councillor's decision to cross must be endorsed by the new party. The IEC is not a party to a floor-crossing move. It merely keeps record of such moves. The decision to cross the floor is thus a unilateral act, and once the new party has accepted such an act and the decision has been given through to the IEC, the act to cross is binding on the councillor in terms of the provisions of the Amendment Act.

¹⁷ However, see the Constitution Sch 6. National legislation had to be enacted to allow for such a position. Refer in this regard to the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

¹⁸ These amendments were implemented during 2002. See the LG: Municipal Structures Amendment Act 20 of 2002.

constitutional amendments and the enactment of national legislation were required. In an effort to ensure legal certainty, further changes to the overall constitutional scheme were introduced, with the result that floor-crossing over all three spheres of government is today constitutionally protected and regulated.¹⁹

Schedule 6A specifically regulated the position regarding the retention of membership of the national assembly or provincial legislatures after a change of party membership, mergers between parties, subdivision of parties and the subdivision and merger of parties. Schedule 6B in turn regulates the loss or retention of membership of municipal councils after a change of party membership, mergers or subdivision of parties and the filling of vacancies.

The impact and consequences of Schedule 6B for future composition of municipal councils can be summarised as follows:

- A councillor of a municipal council who is not representing a ward (thus a proportional representative councillor) ceases to be a member of that council if that councillor, other than in accordance with item 2, 3 and 7 of Schedule 6B of the Constitution, ceases to be a member of the political party which has nominated him/her as a member of that council. This is also the position for a ward councillor who ceases to be a member of the party which has nominated him/her as a candidate in the ward election or who was not nominated by any party as a candidate (thus an independent candidate) and who then became a member of a party.²⁰
- A councillor who is not representing a ward and who is a member of a party represented in a municipal council (the so-called original party) and who becomes a member of another party (the new party), whether the new party participated in an election or not, remains a councillor of that council. Similarly, a ward councillor remains that ward councillor if he/she was nominated by a party in the ward election and ceases to be a member of that party and becomes a member of another party, whether such new party participated in an election or not, or ceases to be a member of his/her original party and does not become a member of any other party or if he/she was not nominated by a party as a candidate in the ward elec-

¹⁹ See the Constitution Schs 6A and 6B as provided for by the Constitution Tenth Amendment Act of 2003.

²⁰ See the Constitution Sch 6B Item 1. Changes in accordance with Item 2, 3 or 7 will not result in the loss of the particular seat or seats.

tion and now becomes a member of a party.²¹ These provisions are subject to item 4 of this Schedule, however, and depend on whether the ward councillor on his or her own or together with one or more other councillors who ceased to be members of the original party during a specified period represent not less than ten percent of the total number of seats held by the original party in that council. If a councillor changes parties, the seat held by that councillor must be regarded as having been allocated to the new party of which he or she has become a member, or to the councillor in person if he/she becomes an independent councillor.²²

- Subject to item 4, any political party which is represented in a municipal council may merge with another party, whether that party participated in an election or not, or may subdivide into more than one party or subdivide and merge with another party. This may be done only if the members of a subdivision leaving the original party represent not less than ten percent of the total number of seats held by the original party in that council. In cases of mergers or subdivisions, the seats of such councillors must be regarded as having been allocated to the new party.²³
- The provisions of item 2 and 3 apply only during two so-called window periods. The first period extends for a period of 15 days, calculated from the *first to the fifteenth day of September* in the second year following the date of an election of all municipal councils, and the second period is calculated for a period of 15 days from the first to the fifteenth day of September in the fourth year following the date of an election of all municipal councils.²⁴ It is further also determined that during a window period, as was mentioned above, a councillor may only once change membership of a party, become a member of another party or cease to be a member of a party.²⁵ Emphasis should be placed on the provision that during the floor-crossing periods the Constitution requires that without the written consent of the councillor concerned no party represented in a municipal council may suspend

²¹ It is thus possible for a party representative to become an independent councillor or for an independent councillor to become a party representative.

²² See the Constitution Sch 6B Item 2.

²³ See the Constitution Sch 6B Item 3.

²⁴ A year means a period of 365 days, and the application of the window period did not apply during the year ending on 31 December 2002.

²⁵ See the Constitution Sch 6B Item 4(2)(a)(i)-(iii). When a councillor changes party or a merger or subdivision of parties take place, then an officer designated by the Electoral Commission must be notified in writing thereof. Written confirmation is also needed from the party that has accepted the new members. Parties may merge, subdivide or subdivide and merge only once during the window periods. See Sch 6B Item 4(2)(b). Notice must be given of the names of all councillors involved in the merger and the fact that the merger has been accepted.

or terminate the party membership of a councillor representing that party in that council or perform any act which may cause such a councillor to be disqualified from holding office as such in that council.²⁶

- After the expiry of a period mentioned in item 4, the composition of a municipal council which has been reconstituted is to be maintained until the next election of all municipal councils or until the composition is again reconstituted during the next window period, or until a by-election is held in the municipal council.²⁷
- Lastly, within 15 days of the expiry of the relevant window period a municipal council that has been reconstituted and which appoints members of another municipal council must again apply the procedure provided for in national legislation for the appointment of such members to represent the appointing council. Furthermore, all structures and committees of a category A and B or C municipality must be reconstituted in accordance with applicable law within a period of 30 days calculated from the date of the expiry of a window period mentioned in item 4 of the Schedule.²⁸

Apart from the two election procedures mentioned above, the Constitution further allows for a combination of the two election procedures.²⁹ With regard to the election of members, the Constitution requires such election processes to be in accordance with national legislation, which legislation must then prescribe a system of proportional representation based on the lists of party candidates or the combination of such a system with a system of ward representation which is based on that municipalities segment of the national common voters role.³⁰ This combination between direct elections/ward representation and indirect elections/proportional representation is unique to local government elections. In general, the overall electoral system prescribed by the Constitution is a system that should generally result in proportional representation.³¹ In contrast, the combination between a ward system and a system

²⁶ Refer to the Constitution Sch 6B Item 4(c)(i)-(ii).

²⁷ See the Constitution Sch 6B Item 5.

²⁸ See the Constitution Sch 6B Item 6 and s 157, as well as the relevant provisions in the Structures Act. It should be noted also that councillors or parties were allowed to cross the floor or merge or subdivide during the first 15 days immediately following the date of the commencement of this Sch, which was the 20th of March 2003. Refer to the Constitution Tenth Amendment Act of 2003.

²⁹ See the Constitution s 157(1)(b)(ii).

³⁰ See the Constitution s 157(2)(a)-(b).

³¹ This is specifically confirmed on the national and provincial spheres of government. See the Constitution ss 46 and 105 respectively. The Constitution requires that the electoral system should be prescribed by national legislation. On national and provincial spheres, this is done in terms of the Electoral Act 73 of 1998 as amended, read together with the Electoral Commission Act 51 of 1996.

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of proportional representation has many advantages. While a ward system gives a face to local government and ensures democratic and accountable government through the elected representatives, proportional representation adds the factor of various political parties that are often committed to national policies and allows for all parties that have received support during an election to be represented in that municipal council.

In relation to the principle of proportional representation, it is of interest to note that neither the Constitution nor other legislation provide a clear definition of what a system of proportional representation means. For more on this point, refer to the case of *Louw v Matjila and Others*³². The case concerned the election of executive committees of TLC or TMC in accordance with a system of proportional representation, under section 16(6) of the LGTA. The court held that the underlying purpose of a system of proportional representation is to ensure the equitable representation of minorities in the organs of government.³³ According to some commentators, the particular system under the LGTA was a majority system. The rule was that the two lists (one statutory and the other non-statutory) which receive a (relative) majority of the votes cast are to be adopted. On their own, the results of a specific "election" cannot determine the classification of the electoral system. Even if the lists were compiled in such a manner that all parties were proportionately represented on the list(s) and accordingly in the executive committee, this would not make the system a "system of proportional representation". The degree of proportionality attained was affected only by means of the informal political agreement between the participating parties, not the electoral system.³⁴

It is submitted that this inclusive approach should significantly contribute to the stability and acceptance of municipal structures. A further important feature of a di-

On local government level the relevant national legislation is the Structures Act, read with both the other legislative enactments, where applicable. It should be noted at this point that the Constitution does not require that the same national legislation prescribe the electoral systems for all spheres of government.

³² 1995 (11) BCLR 1476 (W).

³³ See para D-E at 1482.

³⁴ See De Ville and Chohan-Khota "What is a system of proportional representation?" (1998) SALJ 406. See also De Ville and Chohan-Khota "Local Government elections: an exercise in proportional representation" (1996) 11 *SAPL* 30 *et seq*. The writers mentioned that electoral systems are usually discussed in the context of the choice of legislature for the population of a country. Such systems serve the function of determining how votes cast in an election should be translated into seats in a particular legislature. They concluded that a 50:50 division between wards of different ethnic groups conflicts with notions of fairness and that its application in future elections should be reconsidered.

rect/ward system is that it also allows for individuals who do not belong to a specific political party but who are competent and resourceful to stand as independent candidates. This possibility allows for municipalities to utilise the skills and expertise of people who want to serve their communities and who have obtained support from their communities although they do not favour a specific political manifesto.³⁵ Although the combination of a ward system³⁶ and system of proportional representation has been included in the final electoral structure of local governments, the position has changed somewhat from the combined system that was used during the transitional period. Seats are now divided equally between ward seats and proportional representative seats.³⁷

In the new electoral system for local governments both the ward and proportional representation components work together in a so-called “mixed” system, rather than the parallel system that was in use during the local government transition. Citizens that live in large metropolitan areas are directly responsible for the election of ward metropolitan councillors. The former two-tier system where elected councillors chose representatives among themselves to serve on the metro council have fallen away.³⁸

Subsection 157(3) of the Constitution further requires that the electoral system that is finally decided upon ensure that the total number of members elected from each party reflects the total proportion of votes recorded for those parties. This requirement has the important impact that within a mixed system of elections all votes that have been cast for a political party be taken into account to determine the overall

³⁵ According to studies by the South African government, it has been positively established that the inclusion of independent candidates has many advantages for local government. It brings in urgently needed expertise and also helps to balance out the negative effects of strong inter-party political thinking, to name but two. For more details see LGIS no 2 ‘Elections’ (1999) at 4.

³⁶ Also known as a constituency-based system.

³⁷ One very important reason to introduce a 50/50 split rather than a 60/40 split is to allow and encourage more women to become community representatives, and to become involved in local government. About 50% of the South Africa population consists of women. During the transitional period, only about 20% of municipal councillors were women. International research has shown that the electoral system of proportional representation is best suited to allowing for the increased participation and incorporation of women within municipal structures. Party lists can be compiled specifically to allow for more women to be elected/appointed to municipal councils. In the past it was proposed that gender inequities could in future be addressed through the introduction of a quota system within the proportional representative component of political parties. A certain minimum of women candidates could thus be prescribed to be included on a party’s list and thus enhance women’s representation. During the 1995/1996 elections, 29% of councillors elected to proportional seats were women, while only 11% of ward seats were filled by women. See the White Paper on Local Government (1998) at 108–109.

³⁸ According to some commentators, this mixed system is based on the German additional-number electoral system, in which each voter has two votes: one for the candidate of his/her choice and one for the political party of his/her choice. See Devenish (1998) 209-210.

proportional support and position a party has achieved, including those votes that were cast for a ward candidate who was affiliated to a political party.³⁹

The Constitution also specifically requires that if ward representation is included in municipal elections, the delimitation of such wards must be done by an independent authority that is appointed and operated according to the requirements set out in national legislation.⁴⁰ In compliance with this constitutional prerequisite, the Municipal Demarcation Board was established in terms of the Local Government: Municipal Demarcation Act.⁴¹ The main function of the Demarcation Board is to determine all municipal boundaries.⁴² However, to comply with constitutional requirement 157(4)(a) the Municipal Structures Act also includes certain requirements regarding the delimitation of wards.⁴³ The Structures Act determines that after consultation with the Electoral Commission the Demarcation Board must delimit all metropolitan municipalities and all other local municipalities that must have wards, into wards. The number of wards in a metropolitan or local municipality must be equal to the number of ward councillors that have been determined for that municipality in terms of section 22(2) of the Structures Act. When the Demarcation Board is delimiting a municipality in wards it must do so in a manner that each ward has approximately the same number of voters. The Board must also take the following delimitation criteria into account when wards are delimited:⁴⁴

- (a) The number of registered voters in each ward, may not vary by more than 15% from the norm, where the norm is determined by dividing the total number of registered voters on the municipality's segment of the national common voters roll by the number of wards in the relevant municipality.
- (b) The need to avoid as far as possible the fragmentation of communities.⁴⁵

³⁹ The effect thus created is that although a party may have lost a particular ward election by a few votes, the party will still benefit from the mixed system because all the votes it has received *must* be taken into account when the relevant proportional representation seats are determined. Only those votes that were casted for independent candidates without any political affiliation will be excluded from the equation when proportional seats are determined.

⁴⁰ See the Constitution s 157(4)(a).

⁴¹ See Act 27 of 1998 and ch 10 of this work.

⁴² See the Demarcation Act ss 4 and 21.

⁴³ On this point one should distinguish between the terms "demarcation" and "delimitation". Demarcation generally refers to the drawing of outer boundaries of a municipal area. Delimitation on the other hand refers to the internal drawing of ward boundaries. See the Structures Act Sch 1 Part 1.

⁴⁴ See the Structures Act Sch 1 Part 1 Item 4.

⁴⁵ This criterion further enhances the Constitution s 157(4)(b), which requires that in circumstances of a cross-boundary municipality, a ward may not extend across the provincial boundary of

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- (c) The object of a ward committee as set out in section 72(3) of the Structures Act, which is mainly to enhance participatory democracy in local government, must be considered.
- (d) The availability and location of a suitable place or places for voting and counting if appropriate, must be taken into account. In this regard the following aspects should be taken into consideration:
 - (i) communication and accessibility;
 - (ii) density of population;
 - (iii) topography and physical characteristics;
 - (iv) the number of voters that are entitled to vote within the required time-frame.
- (e) The safety and security of voters and election material.
- (f) The need that ward boundaries are identifiable.”

When the Board has delimited the wards of a municipality, the Board must publish its delimitation in the relevant *Provincial Gazette*. Any person that is aggrieved by a delimitation determination may submit objections in writing to the Board within 14 days of publication of the Board’s delimitation. The Board is then obliged to consider such objections and to confirm, vary or withdraw its determination(s). It should also be pointed out that the overall size of a municipality is set out in its notice of establishment, which notice also indicates the total number of wards in the municipality.⁴⁶

It goes without saying that the delimitation process is of extreme importance to the outcome of municipal elections and finally the success of the new structure. Any delimitation must therefore be done independently and after careful consideration of the mentioned criteria. From the criteria mentioned above one can conclude that in more densely populated areas there will be more wards in comparison with areas that are not so densely populated. The delimitation processes should guarantee that:

- the spread of votes is fairly and equitably distributed
- the voting process is not disrupted
- residents of a particular community are able to vote together and to participate together in municipal affairs.

that relevant municipality. This aspect was included in the Constitution in terms of a constitutional amendment in 1998.

⁴⁶ Refer to the Structures Act as amended s 12(3)(dA). One must again remember that in the final structure of local government, seats on the municipal council are split 50/50 between ward councillors and proportional representative councillors.

Subsection 157(5) of the Constitution reiterates a similar position with regard to national and provincial spheres of government. A person may vote in a municipal election only if that person is registered on that municipality's segment of the national common voters roll.⁴⁷ This requirement must not be looked at in isolation but must be read together with other constitutional and national legislative requirements. Arguably the most important protection of people's right to vote is entrenched in section 19 of the Bill of Rights, which protects the following political rights:

- (1) Every citizen is free to make political choices, which includes the right
 - (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party;
 - and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right
 - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.

Subsection 19(3) of the Constitution thus affords every *adult citizen*⁴⁸ the right to vote in elections for *any* legislative body established in terms of the Constitution, and to do so in secret. This would obviously also include municipal elections. Furthermore every adult citizen has the right to stand for public office and, if elected, to hold such office.⁴⁹ As is the case with all the other fundamental rights that are guaranteed in the Bill of Rights, the right to franchise is not an absolute right and can be limited in certain circumstances. Many prescriptions regarding the right to franchise are recorded in the Constitution itself or other national legislation.⁵⁰ Apart from the requirements of adulthood and citizenship, the Constitution also provides for other electoral requirements in the national and provincial spheres of government. For

⁴⁷ This requirement is applicable to regular municipal elections or a by-election.

⁴⁸ Own emphasis added.

⁴⁹ The term "citizenship" is prescribed and defined in the South African Citizenship Act 88 of 1995 as amended. It is also important to note that the Constitution itself defines an adult person as someone over the age of 18 years. See the Constitution s 28(3) and indirectly s 46.

⁵⁰ In respect of municipal elections, such other national legislation would be the Electoral Act 73 of 1998, the Electoral Commission Act 51 of 1996 and the Municipal Structures Act 117 of 1998.

example, it is required that the national or provincial legislatures are elected in terms of an electoral system that

- is prescribed by national legislation
- is based on the national common voters' roll
- provides for a minimum voting age of 18 years
- generally results in proportional representation.⁵¹

Although the right to franchise is not an absolute right, any limitation or voting qualifications may not derogate from the rights guaranteed in the Constitution, unless such deviation or limitation complies with the requirements of the general limitation clause.⁵²

In order to understand fully the new local government electoral system, the relevant provisions of the applicable national legislation must be evaluated together with the provisions of the Constitution. In this regard, the requirements of the Municipal Structures Act that follow are of significant importance.

12.3.1 The composition and establishment of municipal councils

The Structures Act requires that each municipality must have a municipal council, and that such a council meet at least quarterly, which translates into at least four meetings a year.⁵³ The specific number of councillors of a municipal council is determined by the MEC for local government in the province by notice in the *Provincial Gazette*.⁵⁴ All municipalities have the power to designate councillors that have been

⁵¹ See the Constitution ss 46 and 105. In provincial spheres, the only difference from the national sphere is that the provincial electoral system should be based on that province's segment of the national common voters' roll. The position of local government level is significantly different from the position on the two higher spheres. The Structures Act provides more details, however, but such requirements are not part of the Constitution and therefore not so strongly protected.

⁵² Refer to the Constitution s 36. See also *New National Party of South Africa v Government of the RSA* 1999 (3) SA 191 (CC); *August v Electoral Commission* 1999 (3) SA (CC) and *DP v Minister of Home Affairs* 1999 (3) SA 254 (CC). In essence, the Constitutional Court confirmed that voting requirements such as voter registration with barcoded identity documents are not necessarily an unconstitutional limitation to the basic right to vote. Even though the Constitution itself does not require voter registration, such registration is prescribed in terms of the Electoral Act 73 of 1998, and it is an important requirement in many democratic countries. In the NNP case the Constitutional Court held that the right to vote could be prescribed in terms of a electoral system prescribed by national legislation under the Constitution. The requirement of a SA citizen to register and obtain a barcoded identity document was a constitutional requirement and thus not a limitation of the right to vote. At 202 E-G.

⁵³ See the Structures Act s 18(1)–(2). The establishment of a municipal council is a natural consequence of the Constitution's confirmation that the legislative and executive authority of a municipality be vested in its municipal council. Refer to the Constitution s 151(2). Without a municipal council, no local government sphere would be able to exercise its authorities.

⁵⁴ This requirement should be read together with the Structures Act s 20.

determined by the MEC as full-time councillors.⁵⁵ It is furthermore required that the MEC's determination of full-time councillors be done in accordance with a policy framework, as may be determined by the minister responsible for local government after consulting all the MECs for local governments in the nine provinces.⁵⁶

When a municipality has established its municipal council, such council is obliged to strive within its capacity to achieve the local government objectives set out in section 152 of the Constitution. In order to further enhance the constitutional objectives, each municipal council must annually review certain aspects that are community orientated.⁵⁷ It is also mandatory for all municipal councils to develop mechanisms to consult with their communities and community organisations in performing their functions and exercising their powers.⁵⁸

12.3.2 The determination of the number of councillors of a municipal council

The Structures Act specifically requires that the number of councillors of a municipal council must be determined in accordance with a formula determined by the minister of Local Government by notice in the *Government Gazette*. The formula must be based on the number of voters registered on that municipality's segment of the national common voters roll on a date specified in the notice.⁵⁹ It is further required that the number of councillors may not be fewer than 3 or more than 90, if it is a local or district municipality, and not more than 270 if it is a metropolitan municipality. The Structures Act also allows the MEC for local government to deviate from the number of councillors by either: (a) increasing the number of councillors if extreme distances, lack of effective communication or other exceptional circumstances render it necessary or (b) decreasing the number if it is necessary to achieve the most effective size for active participation, good and timely executive and legislative decision-taking, responsiveness and accountability and lastly the optimum use of municipal funds for councillor allowances and administrative support facilities.⁶⁰ The deviation allowed in

⁵⁵ Note that there is no obligation on a municipality, through its municipal council, to designate full-time councillors. See the Structures Act s 18(3)–(4).

⁵⁶ The Structures Act s 18(4).

⁵⁷ In this regard the Structures Act s 19 obligates an annual review of (a) the needs of the community, (b) its own priorities in order to meet such needs, (c) its own processes for involving the community, (d) its own organisational and delivery mechanisms for meeting the needs of their communities and (e) its overall performance in achieving the constitutional objectives.

⁵⁸ See the Structures Act s 19(3).

⁵⁹ The specific date determined for the 2000 local government elections was 31 March 2000. See the Structures Act as well as Amendment Act 33 of 2000.

⁶⁰ See the Structures Act s 20(1)–(4). It must also be noted that different formulae for different categories of municipality may be determined. See the Act s 20(2).

terms of section 20(3) of the Structures Act may be no more than 3 from the initial number of councillors, if 30 or fewer councillors have been determined. No council with fewer than 7 councillors may be decreased.⁶¹ If a council has more than 30 councillors, a deviation may be no more than 10% of the number initially determined for that municipality.

12.3.3 The election procedures of metropolitan, local and district councils

It was explained earlier in this work that the Constitution provides for three distinct categories of municipality.⁶² Within the final structure of Local Government, categories of municipality are elected differently from one another. Accordingly, the Municipal Structures Act determines the different election requirements as follows.

12.3.3.1 The election of metropolitan and local councils

The municipal council of a metropolitan or local council consists of councillors that are elected in accordance with Schedule 1 of the Structures Act. The councillors are elected by voters registered on that municipality's segment of the national common voters' roll, to (a) proportionally represent the parties (political) that contested the election in that municipality and (b) to directly represent the voters in the respective wards in that municipality.⁶³

According to Schedule 1, the electoral system for metro and local councils encompasses the following aspects:

(a) The electoral system for metro and local councils with wards:

Any metro council or local council that has wards must be elected by directly electing a number of councillors equal to the number of wards in that municipality. Such election must be in accordance with *Part 2* of this schedule.⁶⁴ The rest of the councillors of the municipal council must be elected from party lists in accordance with *Part 3* of Schedule 1, to represent such parties proportionally in the council. Item 6 of Schedule 1 of the Structures Act is in compliance with section 22(2) of the Act, which requires that the number of ward councillors in a metro or local council must be equal

⁶¹ The Structures Act does not prohibit an increase in the number of councillors of a council of fewer than 7 councillors, which should subsequently be increased by only an additional three councillors. See the Structures Act s 20(4)(a).

⁶² The Constitution s 155 identifies category A, B and C municipalities, which are also referred to as Metropolitan, Local and District Municipalities respectively.

⁶³ As was explained earlier, the new structure introduces a so-called mixed electoral system in local government, where both wards and proportional systems are combined. Refer to the Structures Act s 22(a)–(b). The overall objective of the mixed system is designed to enhance local democracy and stability through ensuring party political and direct representation.

⁶⁴ See the Structures Act Sch 1 Item 6.

to 50% of the number of councillors determined for that municipality in terms of section 20 of the Act.⁶⁵ Part 2 of Schedule 1 of the Structures Act deals with only ward elections. It states that in an election of a councillor for a ward, each voter in that ward, has one vote only, and a voter may vote for one candidate only. The candidate in each ward who receives the most votes is the elected councillor for that ward. However, if two or more candidates receive an equal number of votes, the result will be determined by lot.⁶⁶

It is further provided that if only one candidate is duly nominated in a ward, an election is not held in that ward and the uncontested ward candidate is deemed to have been elected.⁶⁷ A uncontested ward candidate mentioned above is deemed to have been elected with effect from the date set for the election if the election is called in terms of section 24(2) of the Act or from the date stated in the time table for the by-election as the final date on which nominations for the by-election may be submitted.⁶⁸ Part 3 of Schedule 1 of the Structures Act again deals with proportional representation elections. It states that in an election for a metro or local council that has wards each voter has two votes and may vote (a) for not more than one ward candidate and (b) for not more than one (political) party. In elections for local councils that have no wards, each voter has one vote for one party only.⁶⁹

(b) The submission of lists of candidates and party lists

According to Schedule 1 item 10, a list of candidates may be submitted by a party (political) only.⁷⁰ If a party has gained representation in a municipality as a result of the provisions of item 2, 3 or 7 of Schedule 6B to the Constitution, that party may

⁶⁵ This is confirmation that according to the new structure, ward seats and proportional seats are divided equally 50/50 and not 60/40 as was the case under the LGTA. It should also be noted that if the number of councillors determined in terms of s 20 is an uneven number, the fraction must be rounded off upwards. Eg, if the number is 25.25 it should be rounded off to 26. Furthermore, the number of proportionally elected councillors in a metro or local municipality is determined by subtracting the number of ward councillors from the total seats of the council. See the Structures Act s 22(2) and (3).

⁶⁶ Eg, if there are three candidates and candidate A receives 520, candidate B 510 and candidate C 500 votes, candidate A will be the elected ward councillor.

⁶⁷ See the Structures Act as amended by Act 51 of 2002 s 22 Sch 1 Part 2 item 8A.

⁶⁸ See the Structures Act s 8A(a)–(b).

⁶⁹ See the Structures Act Sch 1 Part 3 Item 9. This item must be read in conjunction with the Act Sch 1 Item 7 and s 22(4). Both s 22(4) and Item 7 confirm that if a local municipality has no wards, all its councillors must be elected from party lists in a proportional representation manner. In this regard it must be pointed out that local municipalities with fewer than seven members have no wards. On the other hand, all metro councils must have wards.

⁷⁰ On this point Sch 1 also defines an independent ward councillor and a ward candidate representing a party. The former term refers to a councillor who was not nominated by a party as a can-

continued on next page

submit a list of candidates within 7 days after the expiry of a period referred to in item 4(1)(a)(i) or (ii) of Schedule 6B to the Constitution.⁷¹ Furthermore, the number of candidates on a list submitted by a party may not exceed double the number of seats in the metro or local council that are to be filled from party lists.⁷² All candidates' names must appear on the party list in the order of the party's preference, commencing with the first in order of preference and ending with the last. Every party must further seek to ensure that 50% of candidates on the list are women and that women and men are evenly distributed through the list.⁷³

(c) The quota to determine a seat in metro or local council

Schedule 1 of the Structures Act also determines the quota for a seat in a metro or local council and the procedure for allocating seats in such councils. The quota of votes for a seat in a metro or local council must be determined in accordance with a specific formula. Any fractions are to be disregarded. The formula is the following:⁷⁴

$$\frac{A}{B + 1} \div C$$

If a ward candidate representing a party is elected unopposed, a vote cast by a voter registered in that ward for the party of which the candidate is a representative must for the purpose of factor A be counted as two votes.⁷⁵

(d) The allocation of seats

In the determination of seats on a metro or local council the total number of valid votes cast for each party on the party vote and votes cast for the ward candidates

didate in a ward election, while the later refers to a ward candidate who was indeed nominated by a party as a candidate in a ward election. See the definitions in the Structures Act Sch 1 Item 1.

⁷¹ See the Structures Act Sch 1 Item 10(2).

⁷² In actual fact, this means that party lists may not exceed the total number of councillors of a metro or local council. This is so because ward seats and proportional representation seats are divided equally 50/50 between the total number of seats in the council. If a council thus has 60 seats, 30 must be ward seats and 30 proportional seats. The number of candidates on lists of political parties may not exceed double the number of proportional seats, thus they may not be more than 60, which is the overall number of seats of the council.

⁷³ See the Structures Act Sch 1 Item 11(2)–(3). These provisions have been included particularly to enhance women's participation and incorporation into the new structure of local government.

⁷⁴ A = represents the total number of valid votes cast for all parties, consisting of those votes cast on the party vote and those votes cast for ward candidates representing parties. This requirement seems to be in compliance with the Constitution s 157(3), which requires that the electoral system ensure that the total number of members elected from each party reflects the total proportion of the votes recorded for those parties. Thus only votes casted for independent ward councillors are to be excluded. B = represents the number of seats in the relevant metro or local council and C = represents the number of independent ward councillors elected in the election.

⁷⁵ See the Structures Act Sch 1 Item 12(2).

representing the party must be divided by the quota of votes for a seat. The result would then be the total number of seats to which each party is entitled before any adjustments are made. The following fictitious example of a mixed electoral system should help to explain the manner in which seats are to be allocated. Imagine a municipality named M is divided into 10 wards. There are 20 seats on the council of M that must be split 50/50 between ward seats and proportional representation (PR) seats. There are thus 10 ward seats and 10 PR seats. First one should evaluate the manner in which ward elections are held. Let us take, for example, ward 10 of the municipality. Imagine that there were three ward candidates.

- Candidate A, who is affiliated to party A, has received 200 votes.
- Candidate B, affiliated to party B, has received 500 votes.
- Candidate C, affiliated to party C, has received 300 votes.

Candidate B has received the most votes in the ward and has thus been elected. This voting process is then repeated in all the other 9 wards of the municipality. Eventually 10 ward councillors must be elected. For the purposes of this example, imagine that

- party A won 3 ward seats
- party B won 4
- party C won 3 ward seats.

The second step is then to determine the total number of seats that each party has won. In order to determine or calculate a party's overall representation in the council,⁷⁶ each party's proportional (PR) votes and all their ward candidate votes are added together. Let us say that

- party A received 1000 PR votes and 1000 ward votes, equalling 2000 votes.
- Party B received 3000 PR votes and 2000 ward votes, a total of 5000 votes.
- Party C received 3000 PR votes and 3000 ward votes, a total of 6000 votes.

All in all, 13 000 votes were cast for all parties together. When the total votes of each party have been determined, the seats formula should then be applied to determine the seats that each party should have on the council. The seats formula is A (total of valid votes) divided by B (number of seats), minus C (number of independent wards councillors elected) plus 1. In this example it would equate to:

⁷⁶ Thus the total number of seats that party has won.

$$\begin{aligned}
 & \frac{A}{B} = \frac{2000}{5000 - 6000} + 1 \\
 & = \frac{13}{20} + 1 \\
 & = 650 + 1 \\
 & = 651 = \text{thus the number of votes needed to win a seat.}
 \end{aligned}$$

The result is that

- party A obtained 2000 votes divided by 651 = 3.072
- party B obtained 5000 votes divided by 651 = 7.680
- party C obtained 6000 divided by 651 = 9.216.

The seat allocation would be as follows:

- Party A must have 3 seats
- Party B must have 7 seats
- Party C must have 9 seats.

This totals 19, but there should be 20 seats according to the determination. In order to determine the outstanding seats, the fractions of the calculations compete for the seat(s) left. The highest fraction is afforded the seat, thus party B receives another seat. In order to finally determine how many PR seats a party has won, the ward seats must be subtracted from the total number of seats each party is entitled to.

- Party A is entitled to 3 seats, but it has already won 3 ward seats. Thus 3 minus 3 equals zero, so no PR seats are afforded to party A.
- Party B is entitled to 8 seats (7 + 1 for highest fraction) minus the 4 ward seats it has won, which equals 4 PR seats.
- Party C is entitled to 9 seats minus 3 ward seats, equalling 6 PR seats.

All ward seats and PR seats of metro and local councils are to be determined in this way. The method of allocating seats explained above was specifically incorporated into the new structure for local government elections.⁷⁷

If a ward candidate representing a party is elected unopposed, a vote cast by a voter registered in that ward for the party of which the candidate is a representative must be counted as two votes for that party for the purposes of determining the total number of valid votes cast for each party. In cases where the calculation of the total number of valid votes cast for a party yields a surplus not absorbed by the seats awarded to a party, that surplus must compete with similar surpluses accruing to any other party or parties, and any undistributed seat or seats must be awarded to the party or parties concerned in sequence of the highest surplus (or surpluses). If the surplus for two or more parties is equal, the seat must be awarded to the party that has obtained the highest number of valid votes.⁷⁸

It is also further required that in an election for a metro council or local council that has wards, the chief electoral officer must deduct from the total number of seats to which each party is entitled the number of ward candidates representing that party who were declared elected. The remaining result is then the number of seats which each party is entitled to fill from its list of party candidates.⁷⁹ If no party is awarded a seat, the votes for each party must be treated as if they are surpluses. Such an occurrence would be very unusual. The chief electoral officer is further obligated to determine which party candidates are elected by selecting from the party's list, in order of preference, the number of candidates that is equal to the number of seats to which the party is entitled, beginning with the first candidate on the list and ending with the lowest-ranking candidate.⁸⁰

(e) Uncontested elections and no party applications

In instances where only one party has submitted a list to contest the election, an election according to PR must not be held for the metro or local council. The number of seats to which the party is entitled is the total number of seats on the council that are to be filled by proportional representation. The chief electoral officer must select

⁷⁷ See the Structures Act Sch 1 Item 13(1)–(5).

⁷⁸ See the Structures Act Sch 1 Item 13(2)(a)–(b).

⁷⁹ See the Structures Act Sch 1 Item 13(3)(a)–(b).

⁸⁰ See the Structures Act Sch 1 Item 13(5). According to the definitions set out in Sch 1 Item 1, the chief electoral officer is defined to mean the chief electoral officer appointed in terms of the Electoral Commission Act 51 of 1996 s 12(1), and it includes a person designated by the chief electoral officer for the purposes of the Structures Act Sch 1.

the number of candidates from the party's list, in order of preference.⁸¹ If no party has submitted a list, a by-election must be held within 90 days of nomination day and the MEC must determine a date of the election after consultation with the IEC.⁸²

(f) Excessive seats and insufficient party lists

If through the election of ward candidates a party has obtained a number of seats that is equal or greater than the total number of seats in the council to which it is entitled under item 13, that party must not be allocated any seats from its list. Thus no further PR seats are allocated to that party.⁸³ However, it is important to note that the seats of the elected ward candidates are not affected in such instances.

In circumstances where a party list contains fewer candidates than the party is entitled to, the chief electoral officer must immediately notify the party in writing of the exact shortfall and request the party to deliver a list supplemented by the name or names of eligible candidates. Immediately upon receipt of the supplemented list, the Electoral Commission must allocate the number of representatives, in the order of preference on the list, to which the party is entitled. If the party that has supplied an insufficient list has ceased to exist, the seat or seats must remain unfilled. Similarly, if a party does not deliver a supplemented list, the seat or seats remain unfilled until it delivers the requested list. If an inadequate supplemented list is provided which contains fewer names than the number of seats to be filled, the unallocated seat or seats remain unfilled to the extent of the shortfall until the party delivers a further list.⁸⁴

In cases where seats are unfilled and such vacancies render a quorum for that municipal council impossible, the party concerned forfeits the unfilled seats, and the unfilled seats must be filled within 14 days in accordance with a new quota of votes for seats.⁸⁵ In the sub-items it is stated that if a party forfeits seats, a new quota of votes for a seat must be determined in accordance with the following formula:

$$\frac{A - B}{C - (D + 1)} + E$$

⁸¹ See the Structures Act Sch 1 Item 14.

⁸² See Sch 1 Item 15 as amended by Act 27 of 2000 s 93.

⁸³ Refer to the example discussed above. See also the Structures Act Sch 1 Item 16.

⁸⁴ See the Structures Act Sch 1 Item 17(1)–(3).

⁸⁵ See the Structures Act Sch 1 Item 17(4)–(10).

A represents the total number of valid votes cast for all parties, including PR votes and votes cast for ward candidates representing parties. B represents the total number of valid votes cast for the party that has forfeited seats, including also both PR and ward candidate votes for that party. C represents the number of seats in the council, D represents the number of seats awarded to the forfeiting party and E represents the number of independent ward councillors elected in the election.

By using the fictitious example discussed above, one can see more clearly how the new formula operates. In the example, party A has obtained 2000 votes, party B 5000 votes and party C 6000 votes of the total number of valid votes, namely 13 000 votes. If party A, for example, has forfeited certain unfilled seats, the new quota of votes for a seat will be as follows:

$$\begin{aligned} & \frac{A (13\ 000) - B (2\ 000)}{C (20) - (D (3) + E (0))} + 1 \\ &= \frac{11\ 000}{17} + 1 \\ &= \frac{11\ 000}{17} + 1 \\ &= 648.05 \text{ is thus the new quota of votes} \\ & \text{for seats.}^{86} \end{aligned}$$

After the new quota of votes has been determined, the total number of valid votes cast for each party⁸⁷ *excluding* the party that has forfeited seats, must be divided by the quota. The result is then the total number of seats to which each party is entitled.⁸⁸ Any surplus not absorbed by the seats awarded must compete with similar surpluses of other parties, and any undistributed seat or seats must be awarded to the party or parties in sequence of the highest surplus. If the surplus for two or more parties is equal, the seat must be awarded to the party receiving the highest number of valid votes. If a ward candidate representing a party is elected unopposed, for the purposes of factors A and B and sub-item (5) a vote cast by a voter for that candi-

⁸⁶ Note that fractions are to be disregarded at this stage.

⁸⁷ Both ward and PR votes.

⁸⁸ If no party is awarded a seat in terms of this procedure, the votes for each party must be treated as if they are surpluses. See the Structures Act Sch 1 Item 17(8).

date (party) must be counted as two votes. In elections for councils with wards, the chief electoral officer must deduct from the total number of seats to which each party is entitled the number of ward candidates representing such party who were declared elected. In the event that a party is entitled to an additional number of seats and its list of candidates does not contain a sufficient number of candidates, subject to sub-item 17(1) the party must forfeit the unfilled seats and the process must be repeated until all seats have been filled or until all listed candidates have been allocated to a vacant seat.⁸⁹

(g) The filling of vacancies

If a councillor elected from a party list ceases to hold office and a vacancy thus occurs, subject to item 20 of Schedule 1 the chief electoral officer must declare in writing the person whose name is at the top of the applicable party list to be elected in the vacancy. Whenever a councillor ceases to hold office, the municipal manager concerned must inform the chief electoral officer of such an occurrence within seven days after the councillor has ceased to hold office.⁹⁰ Where a party's list has become exhausted, item 17 applies to the supplementation of the list, and if the party fails to supplement its list, or if the party has ceased to exist, the vacancy must remain unfilled.⁹¹ According to item 19 of Schedule 1, there are various ways in which a vacancy on party lists can be caused. Accordingly, a person who is a candidate on a party list ceases to be a candidate and a vacancy arises in the list when the party withdraws the person's name by written notice to the chief electoral officer. A candidate also ceases to be a candidate when that person:⁹²

- assumes office as a councillor
- resigns from the list by written notice to the chief electoral officer
- becomes ineligible to be a candidate
- is disqualified or removed from the list in terms of any legislation
- ceases to be a member of the party for which that person was listed as a party candidate
- ceases to be an ordinarily resident in the municipality to which the list relates.

⁸⁹ See the Structures Act Sch 1 Items 17(5)–(10).

⁹⁰ Originally the law determined that a candidate who crosses the floor from one party to another will lose his or her seat on the council. During 2002 national government enacted constitutional amendments in order to allow party representatives to cross the floor to another party without losing their seats. See the Constitution Sch 6B as amended.

⁹¹ Refer to the Structures Act Sch 1 Item 18.

⁹² See the Structures Act Sch 1 Item 19(a)–(f).

Lastly, a party may supplement, change or increase its list at any time, provided that if a councillor elected according to a party list ceases to hold office, the party may supplement, change or increase its list by not later than 21 days after the councillor has ceased to hold office. The vacancy must then be filled within 14 days after the expiry of the 21 day period. When a party has supplemented, changed or increased its list, it must provide the chief electoral officer with an amended list. Although the Act does not prescribe a timeframe for providing the new list, it is submitted that this must be done expeditiously.⁹³

12.3.3.2 The election and appointment of district councils

Because of their nature, district councils are elected differently from metro and local councils. In this regard, the Municipal Structures Act provides for a special election procedure.⁹⁴ Section 23 determines that the council of a district municipality consists of:

- councillors elected in accordance with Part 1 of Schedule 2 of the Structures Act by voters registered on that municipality's segment of the national common voters' role to proportionally represent the parties that contested the election in that district municipality
- councillors appointed in accordance with Schedule 2 by the councils of the respective local municipalities within that district municipality to directly represent those local municipalities
- if the district municipality has a district management area, councillors elected in accordance with Part 1 of Schedule 2 by voters registered on that district municipality's segment of the national common voters roll in that area to proportionally represent the parties that contested the election in that area.⁹⁵

The number of councillors representing local municipalities and district management areas in a district council must be (a) equal to 60% of the number of total councillors determined for that municipality in terms of section 20 of the Act before any increase in terms of section 20(5) plus the increase and (b) allocated to the respective local councils and district management areas in accordance with Part 2 of Schedule 2. The number of proportionally elected councillors referred to in section 23(1)(a) is then determined by subtracting the number determined in terms of subsection (2)(a)

⁹³ See the Structures Act Sch 1 Item 20.

⁹⁴ See the Structures Act s 23 and Sch 2.

⁹⁵ See the Structures Act s 23(1)(a)–(c).

from the number of councillors determined for that municipality in terms of section 20 or any increase in terms of section 20(5) of the Act.⁹⁶ A local council is further obligated to appoint its representatives to the district council within 14 days after the result of the election of the local council has been declared.⁹⁷

Within the new structure of local government, Schedule 2 of the Structures Act now specifically deals with the electoral system for district councils. The schedule is divided into two parts. Part 1 deals with proportional elections,⁹⁸ while Part 2 deals with the allocation and election of representatives of local councils and district management areas to district councils. Both parts are discussed briefly below.

(a) Proportional elections in district councils

Councillors of a district council that must be elected in terms of section 23 must be elected as follows: (a) a number of councillors determined for the municipality in terms of section 23(3) must be elected from the party lists to proportionally represent parties in the council and (b) a number of councillors allocated in terms of section 23(2)(b) to any district management areas in the municipality must be elected from party lists to proportionally represent parties in those areas.⁹⁹ In an election for a district council each voter registered in the area of a local municipality within the district municipality has one vote and may vote for one party only. Each voter registered in a district management area within a district municipality has two votes and may vote for: (i) not more than one party that submitted a list for the district council and (ii) not more than one party that submitted a list for the district management area. Only parties may submit a list of candidates.¹⁰⁰ Similar to the election of metro and local councils, the number of candidates on a party's list may not exceed double the number of seats in the district council. Candidate's names must appear on the list in order of party preference, and all parties must seek to ensure that 50% of can-

⁹⁶ See the Structures Act s 23(3).

⁹⁷ See the Act s 23(4) and Sch 2 Part 2.

⁹⁸ It should be noted that the reference to election in this regard means an election called in terms of s 24 and, where appropriate, also a by-election called in terms of the Structures Act s 25. Read also the Structures Act Sch 2 Item 1.

⁹⁹ See the Structures Act Sch 2 Item 2.

¹⁰⁰ See Sch 2 Items 3 and 4 as amended. A party that has gained representation in a municipality as a result of the provisions of the Constitution Sch 6B Item 2, 3 or 7 may submit a list of candidates within seven days after the expiry of the period referred to in the Constitution Sch 6B Item 4(1)(a)(i) or (ii). Item 4 was amended by the Constitution Tenth Amendment Act of 2003 s 9.

didates are women and that women and men are evenly distributed through the list.¹⁰¹

The quota of votes for a seat in a district council or for a seat in a district council as a representative of a district management area must be determined in accordance with the following formula. Fractions are initially to be disregarded.¹⁰²

$$\frac{A}{B} + 1$$

A represents the total number of valid votes cast for all parties, B represents either (1) the number of seats in the district council allocated in terms of section 23(1)(a) or (2) the number of seats allocated to a district management area in the district council, as the case may be.¹⁰³ Seats are then allocated as follows: The total number of valid votes must be divided by the quota for a seat. The result is then the total number of seats to which each party is entitled. The process is similar to the allocation of PR seats in metro or local councils set out in Schedule 1 of the Act.¹⁰⁴

If only one party has submitted a list, an election *must not* be held for the district council or district management area. The number of seats to which the party is entitled is the total number of seats on the council that are to be filled by the election concerned.¹⁰⁵ If no party has submitted a list, a by-election must be held within 90 days of nomination day and the MEC must determine the date of the election after consultation with the Independent Electoral Commission.¹⁰⁶ Items 10-13 deal with

¹⁰¹ Read the Structures Act Sch 2 Item 5.

¹⁰² See the Structures Act Sch 2 Item 6.

¹⁰³ *Ibid* Sch 2 Item 6.

¹⁰⁴ If the calculation of seats yields a surplus not absorbed by the seats awarded to a party, that surplus must then compete with similar surpluses, and any undistributed seat(s) must be awarded to the party(s) concerned in sequence of the highest surplus. In instances where the surplus for two or more parties is equal, the seat must be awarded to the party that obtained the highest number of valid votes. If no party is awarded a seat, the votes for each party must be treated as if they are surpluses. Finally, the chief electoral officer must determine which party candidates are elected. This is done by selecting from the party's list the number of candidates that is equal to the number of seats to which the party is entitled. According to the Structures Act Sch 2 Item 1, the chief electoral officer means the officer appointed in terms of the Electoral Commission Act 51 of 1996 s 12(1). This definition includes a person designated by the chief electoral officer.

¹⁰⁵ See the Structures Act Sch 2 Item 8. The chief electoral officer must again determine which party candidates are elected.

¹⁰⁶ See Act 27 of 2000 Item 9 and s 93. S 25 of the Act dealing with by-elections applies to this item, to the extent that s 25 can be applied. According to the definitions set out in Sch 2 Item 1, the term "nomination day" means the day determined in terms of the Electoral Act for the announcement of the nominated candidates and parties for an election.

insufficient party lists, the filling of vacancies, causes of vacancies on lists and the filling of vacancies and changing the order. The provisions in these items are again very similar to the position in metro and local council elections, as was discussed above.¹⁰⁷

(b) The allocation and election of representatives of local councils and district management areas to district councils

According to section 23(2), members of a district council must be (a) appointed by the councils of the local municipalities in the area of the district council from among the members of such local councils and (b) if there is a district management area, must be elected in terms of Part 1 of Schedule 2 of the Structures Act to represent that area on the district council.¹⁰⁸ The quota of registered voters that a local council or district management area must have to be entitled to a seat on the district council must be determined in terms of the following formula:¹⁰⁹

$$\frac{A}{B} + 1$$

A represents the total number of voters registered on the district council's segment of the national common voters' roll, and B represents the number of seats on district council determined in terms of section 23(2)(a) for representatives of local councils and district management, but disregarding any increase in terms of section 20(5). Each local municipality and each district management area is entitled to a number of seats on the district council determined by dividing the total number of voters registered on the segment of the national common voters role for the local municipality or district management area by the quota of votes for a seat on the district council determined in terms of subitem 15(1) of Schedule 2. If the calculation to determine a seat on the district council gives a figure that is a fraction of the figure 1, for example 0, 78, the local council or district management area must be awarded one seat and must not participate in any further calculation or award. If the mentioned calculation yields a surplus, for example 5.32, that surplus must compete with similar surpluses of other local councils or district management areas, and any seat or seats not

¹⁰⁷ See the Structures Act Sch 2 Items 10–13.
¹⁰⁸ See the Structures Act Sch 2 Item 14.
¹⁰⁹ Again, fractions are disregarded at first.

awarded in terms of subitem 15(2) or (3) must be awarded in sequence of the highest surplus.¹¹⁰

It was mentioned above that some members of a district council must be appointed by the councils of local council in the area of the district council. Each local council must thus elect the allowed number of representatives to the district council. The chief electoral officer must manage the election of such representatives of a local council to the district council. If a local council has been awarded one seat, the process will be as follows: any councillor may nominate a candidate and each councillor has one vote for his/her candidate of choice. The candidate who receives the most votes is elected.¹¹¹ However, if a council has been awarded more than one seat, the council must elect that number of members according to a system of proportional representation.¹¹² The procedure to elect such members proportionally can be summarised as follows:

- Every party or independent ward councillor may submit a candidate's list containing the names of (nominated) councillors, accompanied by a written acceptance by each listed candidate. A party or independent ward councillor may not submit more than one list. The lists must show the candidate's names in order of preference. A councillor's name may appear on only one list. All parties or independent ward councillors must seek to ensure that 50% of the candidates are women and that men and women candidates are evenly distributed through the list.¹¹³
- Each member of the local council may cast one vote for one list only.
- In a local council, the quota of votes for a seat to the district council must be determined in terms of the following formula:¹¹⁴

$$\frac{A}{B} + 1$$

¹¹⁰ See the Structures Act Sch 2 Item 15(1)–(4).

¹¹¹ In practice this means that although one party has an overwhelming majority in a local council, it is possible for a minority party's nominated councillor to be elected to represent the local council on the district council. Because there is only one seat available, there is no proportional representation possible. Refer to the Structures Act Item 16(2)(a)–(c).

¹¹² See the Structures Act Sch 2 Item 16(3).

¹¹³ See the Structures Act Sch 2 Item 17(1)–(5). An independent ward councillor means a councillor who was not nominated by a party as a candidate in a ward election. See the Act Sch 2 Item 1.

¹¹⁴ The Structures Act Sch 2 Item 19.

A represents the number of members of the local council and B the number of seats that the local council has been awarded on the district council in accordance with item 15.

- The number of votes cast in favour of each list must then be divided by the quota of votes for a seat, and the result is the number of seats allocated to that list. If the calculation gives a surplus, that surplus must compete with other surpluses of any other lists, and seats not allocated must be awarded in sequence of the highest surplus.¹¹⁵
- After seats have been allocated, the chief electoral officer, in terms of the order of preference on a list, must select the number of candidates from the list that is equal to the number of seats allocated to that list.¹¹⁶

It should be noted that the members that are representing a district management area are elected differently. The councillors that are representing a district management area must be elected in terms of the proportional electoral system set out in Part 1 of Schedule 2 of the Structures Act.¹¹⁷

In summary, the following important changes should be noted within the new local government electoral system. First, the new system distinguishes between municipalities that are big enough to have wards and those who don't.¹¹⁸ In so-called "secondary" cities or towns, cities or towns with more than 7 councillors, each voter will have three votes. Two votes will be for their local council¹¹⁹ and a third vote will be for the political party that is to represent them proportionally on the relevant district council.¹²⁰

¹¹⁵ See the Structures Act Sch 2 Item 20. If the surplus on one list is equal to the surplus on any other list, then the seat or seats must be awarded in sequence of the highest number of votes cast for those lists. See Act 51 of 2002 s 32. Note that according to the election of Municipal office bearers and representatives to district council's regulations published under GN 84 in GG 22088 of 22 January 2001, if at the election of the representatives in terms of item 16 of Sch 2 or item 20(2) of Sch 2, two or more candidates each receive the most votes or the highest surplus for one remaining seat, then the MEC may direct that the result must be determined by lot.

¹¹⁶ Insufficient lists or the filling of vacancies on lists are determined respectively by the Structures Act Sch 2 Part 1 Items 10 and 11, to the extent that such item can be applied. Refer also to the Act Sch 2 Part 2 Items 22 and 23.

¹¹⁷ Refer to the Structures Act Sch 2 Item 24.

¹¹⁸ According to the Structures Act, only those councils entitled to more than seven councillors/seats are entitled to have wards. This requirement will always include metro councils; councils must thus always have more than seven members.

¹¹⁹ One vote for ward councillors and one vote for their political party of choice which represents the proportional representative system.

¹²⁰ Note again that in all areas outside metropolitan areas there must be both category B and C municipalities, thus a combination of both local councils and district councils. In essence, the new system entails two elections at the same time in areas outside metropolitan areas. Voters will cast

continued on next page

In those municipalities too small to have wards, each voter will have two votes. One vote is for the political party of their choice to represent them on the relevant local council and one vote is for the political party to represent them on the district council. This electoral system is similar in metro councils, although the voter is exercising only his/her vote for one municipal council. Each voter has two votes. One vote is for a ward councillor of choice and one vote is for the political party of choice to represent them proportionally on the metro council.¹²¹ However, district councils are elected differently. 40% of the members of a district council must be elected directly in terms of a proportional system by all voters living in the district council area (thus within the local councils which fall within jurisdiction of district councils). The other 60% of seats are allocated to councillors appointed by local councils or district management areas, where applicable. Although the Constitution aims to ensure that every area falls under a primary local government structure,¹²² some areas are not viable to sustain and justify a local municipality. Such areas are then designated as district management areas.¹²³ In district management areas voters have two votes. Both votes are for political parties of their choice. One vote is for the political party to represent the district management area on the relevant district council, while the other vote is for the political party to control or form the district council itself.¹²⁴

12.4 Membership of municipal councils and the qualifications of councillors

The final Constitution specifically sets certain requirements regarding the membership of all municipal councils. Membership requirements are set to ensure accountability and responsiveness and to prevent councillors from having various conflicts of interests. In order to ensure the membership of municipal councils is controlled, the Constitution requires the following:¹²⁵

their votes for two municipalities in which they have a stake. See also LGIS no 2 'Elections' (1999) at 8.

¹²¹ The new system requires such votes to be distributed 50/50 between ward representatives and proportional representatives.

¹²² See the Constitution s 151(1), which requires that municipalities be established for the whole of the territory of the Republic of South Africa.

¹²³ Refer to the Structures Act ss 1 and 6.

¹²⁴ This second vote was included in the new electoral system for local government to protect those voters who don't have a primary local government structure in their area by affording them their own direct representative choices on the relevant district council rather than only one proportional vote which then goes into the pot with all other proportional votes from the other local councils and thus dilutes their interests severely.

¹²⁵ See the Constitution s 158(1)-(2).

- (1) Every citizen who is qualified to vote for a Municipal Council is eligible to be a member of that Council, except
 - (a) anyone who is appointed by, or is in the service of, the municipality and receives remuneration for that appointment or service, and who has not been exempted from this disqualification in terms of national legislation;
 - (b) anyone who is appointed by, or is in the service of, the state in another sphere, and receives remuneration for that appointment or service, and who has been disqualified from membership of a Municipal Council in terms of national legislation;
 - (c) anyone who is disqualified from voting for the National Assembly or is disqualified in terms of section 47(1)(c), (d) or (e) from being a member of the Assembly;
 - (d) a member of the National Assembly, a delegate to the National Council of Provinces or a member of a provincial legislature; but this disqualification does not apply to a member of a Municipal Council representing local government in the National Council; or
 - (e) a member of another Municipal Council; but this disqualification does not apply to a member of a Municipal Council representing that Council in another Municipal Council of a different category.
- (2) A person who is not eligible to be a member of a Municipal Council in terms of subsection (1)(a), (b),(d) or (e) may be a candidate for the Council, subject to any limits or conditions established by national legislation.

From the wording of section 158 it is clear that only a citizen who is qualified to vote for a municipal council can be a member of that council. Non-citizens and people not qualified to vote in municipal elections cannot be councillors of municipalities.¹²⁶

Apart from the general requirements of citizenship and qualifications to vote, section 158 identifies 5 different categories of people who are disqualified from being members of a municipal council. People who fall into these categories of disqualification are described below:

- Anyone who is appointed by or in the service of a municipality and receives remuneration for that appointment or service may not be a member of that council. The

¹²⁶ Citizenship and the general qualifications to be able to vote were explained earlier in this ch. Both the Constitution and other national legislation have specific requirements that must be met
continued on next page

Constitution is unfortunately not very clear on the aspects of appointment or service. It is uncertain if appointment also includes part-time or sub-contractual appointments. It is submitted, however, that if there is a formal appointment or service agreement of whatever nature, together with the payment of remuneration, that person will be disqualified from being a member of that council. The main objective of this requirement is to prevent a conflict between people's official responsibilities and their private interests.¹²⁷ It is important to note that the Constitution allows for people to be exempted from this disqualification in terms of national legislation. In this regard, section 21 of the Structures Act states that:

- (a) Every citizen who is qualified to vote for a particular Municipal Council has the right:
 - (i) to stand as a candidate in an election for that council, except if disqualified in terms of section 158(1)(c) of the Constitution and
 - (ii) if elected, to become and remain a councillor, except a person disqualified in terms of section 158(1)(a), (c), (d) or (e) of the Constitution.
 - (b) The MEC for local government in the province may except a person from a disqualification mentioned in section 158(1)(a) by notice in the Provincial Gazette only when there is no substantial conflict of interest or any irreconcilable conflict between the duties of the person in his/her capacity as described in section 158(1)(a) and the person's mandate or duties as a member of the Municipal Council. If a person is designated as a full-time councillor in terms of section 18(4) of the Structures Act, however, then the exemption lapses.¹²⁸ It is clear that an objective determination of all the relevant circumstances is to be made. Each case will have to be considered according to its own set of facts.
- Anyone who meets the requirements of Section 158(1)(b) of the Constitution. This section contains two requirements that must exist before a person is disqualified from voting for a municipal council. Firstly, the person must be appointed to or in the service of the state in either the national sphere or provincial spheres of government and must receive remuneration for such appointment or services. Sec

before a person is qualified to vote in municipal or other elections. See the Constitution ss 19 and 46 and the Electoral Act.

¹²⁷ The position is similar on national and provincial spheres. See the Constitution ss 96 and 136.

¹²⁸ See the Structures Act as amended by Act 51 of 2002 s 21(2).

only, such person must be disqualified from membership of a municipal council in terms of national legislation. A good example of such a disqualification was recorded in the case of *Van Dyk v Maithufi NO en Andere*.¹²⁹ The applicant in the case was a member of the South African Police Service (SAPS). In the municipal elections held in December 2000 the applicant was a candidate for a political party, participated in the usual campaign activities and was subsequently elected to the applicable municipal council. The SAPS however contended that the applicant had contravened section 46(1)(a) of the South African Police Services Act,¹³⁰ which stated that no member shall express support for or associate him/herself with a political party. The applicant was charged before a disciplinary proceeding, found guilty of contravening section 46(1)(a) and was dismissed. On review, the court held that the wording of the Police Services Act was unambiguous and that members of the SAPS could not openly show support for a political party. The SAPS could not condone conduct in contravention of such a legal provision and its subsequent action against the applicant did not amount to an unfair labour practice. The application was thus dismissed.¹³¹

- Anyone who is disqualified to vote for the National Assembly or who is disqualified in terms of section 47(1)(c), (d) or (e) and therefore may not be a member of a municipal council. In this regard the Constitution determines the following:¹³²
 - (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except
 - (a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than
 - (i) the President, Deputy President, Ministers and Deputy Ministers; and
 - (ii) other office-bearers whose functions are compatible with the functions of a member of the Assembly, and have been declared compatible with those functions by national legislation;
 - (b) permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council;
 - (c) unrehabilitated insolvents;
 - (d) anyone declared to be of unsound mind by a court of the Republic; or

¹²⁹ 2004 (1) SA 441 (T).

¹³⁰ 68 of 1995.

¹³¹ See pages 448-450.

(e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

(2) A person who is not eligible to be a member of the National Assembly in terms of subsection (1)(a) or (b) may be a candidate for the Assembly, subject to any limits or conditions established by national legislation.

(3) A person loses membership of the National Assembly if that person

(a) ceases to be eligible; or

(b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership.

(4) Vacancies in the National Assembly must be filled in terms of national legislation.

- A member of the NA or a delegate to NCoP or a member of a provincial legislature.
- Lastly, a member of another municipal council. However, this disqualification obviously does not apply to a member of a municipal council that is representing that council in another council of a different category.¹³³

In comparison with the old electoral requirements for local government representatives, one can conclude that the new system is stricter and more extensively regulated. Qualifications of public representatives are regarded as such an important element of an effective local governance that even the highest law of the state is involved in ensuring significant standards. The maintenance of these requirements should ultimately result in an effective and accountable local government dispensation.

¹³² Refer to the Constitution s 47.

¹³³ This refers specifically to members of local councils that are representing such councils on the district council of that area.

12.5 The terms of municipal councils and councillors

12.5.1 *Terms of municipal councils*

According to the Constitution, the term of a municipal council may not be more than five years. This aspect must be determined by national legislation.¹³⁴ In compliance with the constitutional directive that national legislation should determine the exact term of a municipal council, the Structures Act determines that the term of municipal councils is five years.¹³⁵ The Structures Act also determines that, whenever it is necessary and after consulting the EC, the minister responsible for local government must by notice in the *Government Gazette* call and set a date for an election of all municipal councils, which election must be held within 90 days of the date of the expiry of the current term of such municipal councils.¹³⁶

The Constitution also confirms the fact that municipal councils can be dissolved even before their terms have been completed. If a municipal council is dissolved, which subsequently must be done in terms of national legislation, or when its term normally expires, an election must be held within 90 days of the date that council was dissolved or its term expired.¹³⁷ In furtherance of these provisions, the Struc-

¹³⁴ See the Constitution s 159(1) as substituted by Act 65 of 1998 s 1. See also *Executive Council, Western Cape v Minister of Provincial Affairs* 2000 (1) SA 661 (CC), where the Constitutional Court held that the Constitution s 159(1) made it clear that all municipal councils would have a uniform term of office, subject to a maximum of five years. It required national legislation to determine such term of office by using the expression "as determined by legislation". The term so established was subject to the prescribed maximum of five years. S 159(2) required that a municipal election be held within 90 days of the date that the previous council was dissolved or its term expired. The term of office of an elected legislative body such as a municipal council was a crucial aspect of the functioning of that council. The court further concluded that s 159(1) did not permit the determination of the term of municipal councils to be delegated by parliament; parliament had to determine the term itself. All that was required was for parliament to fix a term which would apply to all councils. The delegation of such a determination was impermissible. See para 126 at 711. The Constitution states that: (1) The term of a Municipal Council may be no more than five years, as determined by national legislation. (2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired. (3) A Municipal Council other than a Council that has been dissolved following an intervention in terms of s 139 remains competent to function from the time it is dissolved or its term expires until the newly elected Council has been declared elected. S 159 substituted by Act 65 of 1998 s 1. The position regarding the term of municipal councils is somewhat different from the two higher legislative spheres of government. Both the terms of the national parliament and provincial legislatures are normally set at a specific term of five years. See ss 49(1) and 108(1) of the Constitution. The terms of municipal councils are not specifically set at five years and can be less than five years. All that the Constitution requires is that the term of municipal council be not more than five years. They may be five years or less.

¹³⁵ This term is calculated from the day following the date set for the previous election of all municipal councils. See the Structures Act s 24(1) as substituted by Act 58 of 1999 s 5.

¹³⁶ Note that such notice may be published either before or after the term of municipal council has expired. See the Structures Act s 24(2) as amended by the LG: Municipal Electoral Act 27 of 2000 s 93.

¹³⁷ See the Constitution s 159(2).

tures Act determines that a municipal council may dissolve itself at a meeting called by the council specifically for such purpose. A resolution to dissolve must be adopted by the council with a supporting vote of at least two thirds of the councillors.¹³⁸ It is also determined that a municipal council may dissolve itself only when two years have passed since the council was last elected.¹³⁹

A municipal council may also be dissolved by the MEC for local government in a province by notice in the *Provincial Gazette* if: (a) the Electoral Commission in terms of section 23(2)(a) of the Demarcation Act is of the view that a boundary determination affects the representation of voters in that council and the remaining part of the existing term of the council is more than one year or (b) an intervention in terms of section 139 of the Constitution has not resulted in the council's being able to fulfil its obligations in terms of legislation. The MEC may dissolve a council mentioned above only with the concurrence of the minister of local government and after notice of that dissolution has been tabled in the National Council of Provinces (NCoP) which has subsequently approved such a dissolution.¹⁴⁰ When a municipal council is dissolved or does not have enough members to form a quorum for a meeting, the MEC for local government in the province *must* appoint one or more administrators to ensure the continued functioning of that municipality until a new council is elected or until there is sufficient members to form a quorum. When the MEC appoints one or more administrators, he/she must determine the functions and powers of the administrator(s) by notice in the *Provincial Gazette*.¹⁴¹ When a municipal council other than a council that has been dissolved following an intervention in terms of section 139 has been dissolved, the council remains competent to function from the time it has dissolved or its term has expired until such time as a newly elected council has been declared elected.¹⁴²

¹³⁸ See the Structures Act s 34. The two-thirds majority mentioned above is called a special majority, and refers to two-thirds of all the councillors of a council. If a council has 150 councillors, for example, at least 100 + 1 councillors (two-thirds of 150) must vote in favour of the resolution.

¹³⁹ See the Structures Act s 34(2). The position is relatively the same regarding the national or provincial legislatures, although a three-year period is prescribed by the Constitution. See the Constitution ss 50(1)(b) and 109(1)(b).

¹⁴⁰ See the Structures Act s 34(3)-(4).

¹⁴¹ Refer to the caretaker provisions set out in the Structures Act s 35.

¹⁴² See the Constitution s 159(3). This provision has been included to ensure that a municipal area is not without a decision-making body after the expiry of its term or decision to dissolve. In instances where a dissolution followed a s 139 intervention, the appointed administrator(s) should have enough powers to take decisions for that municipal jurisdiction.

12.5.2 *The term of office of councillors and the vacation of office by a councillor*

The Constitution does not directly address the term of office of councillors, and it is left to the Structures Act to regulate such issues.¹⁴³

12.5.2.1 The term of office of councillors

Section 26 of the Structures Act states that a person is elected as a member of a municipal council for a period ending when the next council is declared elected or when a person is appointed as a representative of a local council to a district council for a period ending when the next local council is declared elected.¹⁴⁴ However, there is an exception to this position. Where a person is replaced as a result of the provisions of item 6(a) of Schedule 6B to the Constitution, the newly appointed representative is appointed for the remainder of the replaced representative's term.¹⁴⁵ It is further stated that a person assumes office or starts his or her term of office as a councillor of a municipal council when he or she has been declared elected or appointed as such.¹⁴⁶

12.5.2.2 Vacation of office by municipal councillors

Similar to the position on the national or provincial spheres, members of municipal councils may also vacate their office as councillors through various means. In this regard the Structures Act determines the following:¹⁴⁷

A councillor vacates his or her office during a term of office if that councillor:

- resigns in writing

¹⁴³ It must be pointed out that although the Constitution in respect of reform issues does not directly require national or provincial legislation to be enacted in order to regulate certain local government matters, the Constitution still covers regulation in terms of national or provincial legislation. This over-arching authority is provided in the Constitution s 164, which states that any matter concerning local government not dealt with in the Constitution may be prescribed by national or by provincial legislation. If provincial legislation deals with such matters, it may only do so within the framework of national legislation.

¹⁴⁴ See the Structures Act s 26(1)(a)-(b). Because a municipal council can dissolve before its normal term has expired, it is not possible to determine an exact term of office of municipal councillors. One can safely say, however, that the term of office may not be more than 5 years and 90 days. This is so because the Constitution requires that the term of a municipal council may not be more than 5 years and that when its term has expired an election must be held within 90 days of the date that the council was dissolved or its term has expired. As soon as the new council is elected, the term of office of the councillors of the previous council would have come to an end. See the Constitution s 159. The term of a municipal council and the term of office of municipal councillors are thus closely related.

¹⁴⁵ Refer to the Structures Act s 26(1)(b) as amended.

¹⁴⁶ See the Structures Act s 26(2).

¹⁴⁷ See the Structures Act s 27.

- is no longer qualified to be a councillor¹⁴⁸
- contravenes a provision of the Code of Conduct for councillors set out in Schedule 1 of the LG: Municipal Systems Act, 2000 and is removed from office in terms of such code¹⁴⁹
- is a representative of a local council in a district council and ceases to be a member of that local council which appointed him/her to the district council or if he/she is replaced by the local council as its representative in the district council.

Originally the Structures Act also required a councillor to vacate his or her office during a term when the councillor was elected from a party list and then ceased to be a member of that party or when he/she was elected to represent a ward and was nominated by a party as a candidate but after the election ceased to be a member of that party. The position was similar in cases where an independent ward councillor was elected and thereafter became a member of a political party. This position was altered substantially by Schedules 6A and 6B of the Constitution, however, and was subsequently repealed. Councillors are now constitutionally permitted to cross the floor to another party or for an independent councillor to join a political party, but specific requirements exist that must be adhered to before a councillor can legally change party affiliations.¹⁵⁰

12.6 Municipal by-elections

Many of the requirements mentioned above are applicable to not only regular municipal elections, but also to by-elections.¹⁵¹ Under the new legislative framework, a by-election must be held in the following instances:

- if the Electoral Commission does not declare the result of the election of a municipal council or the results of an election in a district management area or a ward within the time period as is specified in terms of the Electoral Commission Act¹⁵²

¹⁴⁸ In this regard the various legislative requirements regarding the competency of people to be municipal councillors come into play. It must be pointed out that the requirements to be a municipal councillor apply not only when councillors are to stand for election as either ward or proportional representative councillors, but for their whole term in office. If a councillor thus does not qualify in terms of the qualification requirements to be a councillor, he/she should vacate his/her office. See the Structures Act ss 27(b) and 21 read together with the Constitution s 158.

¹⁴⁹ The referred Code of Conduct is discussed elsewhere. See also Act 32 of 2000 s 121.

¹⁵⁰ Although the Structures Act does not use the word "must" vacate office on the above grounds, it is submitted that the intention of the legislator was indeed obligatory and that a councillor that is failing on or not complying with one or more of the mentioned grounds must vacate his/her office and does not have a choice in this regard.

¹⁵¹ According to the Structures Act, a by-election refers to an election that is held between the regular elections called in terms of the Act s 24. See s 1 definitions.

¹⁵² 51 of 1996.

- if a court sets aside the election of a council or an election in a district management area or a ward
- if a council is dissolved or
- if a vacancy in a ward occurs.¹⁵³

If the election in a specific ward is the reason for the Electoral Commission's not declaring the result of a metro or local council, then a by-election must be held in that ward. The municipal manager of the municipality concerned must call and set a date for the by-election. The specific date of the by-election is determined after the municipal manager has consulted the Electoral Commission. Notice of the date of the by-election must be published in a local newspaper that is widely read in that jurisdiction. It is also required that the by-election be held within a 90-day period calculated of the date of the voting day of the previous election or when the election was set aside by the court, or from the date on which the vacancy occurred.¹⁵⁴

It is of importance to note that the term of a municipal council is not interrupted by a by-election. Even if a council dissolves and a new council is elected, such new council will serve only until the next scheduled elections for all municipal councils.¹⁵⁵ Furthermore, it is prohibited for a municipal manager to call a by-election if the next election of all municipal councils must be held within nine calendar months calculated from the applicable date which necessitated a by-election, or within six calendar months if it is a by-election in a ward. The MEC may also decide that a by-election must stand over until the next election of all municipal councils.¹⁵⁶ In the last instance, it is also determined that a by-election in a ward does not affect the representation of parties by councillors elected from party lists. It was discussed above that both votes for candidates of wards that represent a political party as well as direct party/proportional representative votes are taken into account to determine a

¹⁵³ Vacancies can occur for many reasons. A councillor can, eg, resign, be removed from office or die. For more details on instances where vacancies can occur, see the Structures Act s 27.

¹⁵⁴ See the Structures Act s 25(2) and (3). If the municipal manager does not call and set a date for the by-election within 14 days of the applicable date, then the MEC, after consultation with the EC, must by notice in the *Provincial Gazette* call and set a date for the by-election. Again the by-election must be held within 90 days of the applicable date. See the Act s 25(4).

¹⁵⁵ See the Structures Act s 25(5).

¹⁵⁶ Refer to the Structures Act s 26(6)(a)-(b). It is not clear on what basis the MEC can decide that a by-election should stand over. Such a decision can cause various practical and political problems. It is thus submitted that the MEC should carefully consider all relevant circumstances and should base his/her decision on legitimate reasons. A decision based on political grounds should not be allowed. Eg, if the MEC is convinced that a particular party will or will not win a by-election, and therefore decides that a by-election should stand over, such a decision should not be permitted.

party's proportional representation on a particular municipal council. In instances of a by-election, the votes cast in such by-election do not affect the proportional representation on the municipal council.¹⁵⁷

12.7 General legislative provisions relevant to the local government electoral process and procedures

It was explained above that the new local government electoral processes are determined and regulated by various different legislative provisions. In the first instance, the Constitution sets the basic framework within which the election and composition of all municipalities must be conducted. The basic constitutional framework is then expanded upon by mainly the Local Government: Municipal Structures Act. Both the Constitution and the Structures Act establish the new basis for all local government elections. Apart from this new basis, there are, however, many other legislative requirements that have either a direct or indirect impact on local government elections and more specifically the electoral procedures.¹⁵⁸ No investigation of the new local government electoral dispensation can therefore be complete without a brief evaluation of such laws.

12.7.1 The provisions of the Electoral Commission Act

The Electoral Commission Act (ECA) was enacted in 1996. The main purpose of the Act is to make provision for the establishment and composition of an Electoral Commission (EC) which in turn is mandated to manage elections for national, provincial and *local legislative* bodies and referenda.¹⁵⁹ The ECA is also aimed at making provision for the establishment, composition, powers, functions and duties of an Electoral Court. Within the new constitutional legislative framework of South Africa, special provision has been made for various state institutions which have the overall responsibility and task to strengthen constitutional democracy in the Republic. One such institution is the Electoral Commission,¹⁶⁰ which is thus constitutionally entrenched and protected. All the state institutions mentioned in chapter 9 of the Constitution, including the EC, must be independent and are subject only to the

¹⁵⁷ See the Structures Act s 25(7).

¹⁵⁸ In this respect reference must be made to the Electoral Commission Act 51 of 1996, the Electoral Act 73 of 1998 and also the Local Government: Municipal Electoral Act 27 of 2000. These legislative enactments together with the Constitution and the Structures Act complete the overall legal system in respect of municipal elections and election procedures.

¹⁵⁹ Refer to the Electoral Commission Act long title and s 2. Own emphasis is added to highlight the EC role with regards to municipal elections.

¹⁶⁰ See the Constitution s 181(1)(f).

Constitution and the law. They must all be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

The IEC is established as a legal person with all the powers and privileges associated with such status. At this point the Constitutional Court has confirmed the following:¹⁶¹

- The IEC, established pursuant to section 190 in chapter 9 of the Constitution, exercises public powers and performs public functions in terms of the Constitution and is therefore an organ of state as defined in section 239 of the Constitution. It is not part of government, however, in that, as an organ of state, it does not fall within the national sphere of government contemplated by chapter 3 of the Constitution. In the first place, the Commission cannot be said to be a department or administration within the national sphere of government in respect of which the national executive has a duty of co-ordination in accordance with section 85(2) of the Constitution. Secondly, in effect the Constitution describes the Commission as a state institution that strengthens constitutional democracy, and nowhere in chapter 9 is there anything from which an inference may be drawn that it is a part of the national government. The term "state" is broader than "national government" and embraces all spheres of government. Thirdly, under section 181(2) the Commission is independent, subject only to the Constitution and the law. It is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government.
- Furthermore, independence cannot exist in isolation, and it is clear that the chapter intends to make a distinction between the state and government, and the independence of the Commission is intended to refer to independence from the government, whether local, provincial or national. The Commission cannot be independent of the national government yet be part of it, although the Commission must manage the elections of national, provincial and municipal legislative bodies in accordance with national legislation. This legislation cannot compromise the independence of the Commission, however; the Commission is clearly a state structure. The fact that a state structure has to perform its functions in accordance with

¹⁶¹ See *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC).

national legislation does not mean that it falls within the national sphere of government.

- The very reason the Constitution created the Commission – and the other chapter 9 bodies – was that they should be and manifestly be seen to be outside government. The Commission is not an organ of state within the national sphere of government. The dispute between a local authority and the Commission concerning voting stations cannot therefore be classified as an intergovernmental dispute. There might be good reason for organs of state not being able to litigate against the Commission except as a last resort. However, an organ of state suing the Commission does not have to comply with section 41(3) of the Constitution.¹⁶²

Other organs of state must assist and protect the institutions so as to ensure their independence, impartiality, dignity and effectiveness. No person or organ of state may interfere with the functioning of such institutions.¹⁶³

In more direct terms, the Constitution, apart from the establishment of the EC, requires that the EC has the following functions:¹⁶⁴

- the EC must manage elections of national, provincial and *municipal* legislative bodies in accordance with national legislation
- it must ensure that those elections mentioned above are free and fair and
- it must declare the results of those elections within a period that must be prescribed by national legislation. Such a period must be as short as reasonably possible.¹⁶⁵

In order to ensure that the EC is empowered to fulfil and achieve its powers and functions, the Constitution further confirms that the EC has the additional powers and functions prescribed by national legislation.¹⁶⁶ In compliance with the Constitution,

¹⁶² Paras 22-31 at 936-940.

¹⁶³ Although independent and impartial, the different institutions are accountable to the NA and must report on their activities and the performance of the functions to the NA at least once a year. See the Constitution s 181(2)-(5). The EC is thus finally under the supervision of the national legislative authority.

¹⁶⁴ See the Constitution s 190(1)(a)-(c).

¹⁶⁵ It should be self evident, that the EC has an important role to play in all electoral proceedings in our state, inclusive of electoral processes on the third sphere of government. One should also consider the founding values of the new democratic state of the RSA which *inter alia* protects the values of regular elections, a system of democratic government and accountability and openness. See the Constitution s 1(d). It is submitted that included in such values are the principles of free and fair elections, which indirectly are required by the Constitution s 190(1)(b) and which are very important in all modern democratic governments.

¹⁶⁶ See the Constitution s 190(2). Such additional powers are not as strongly protected, as are the powers and functions set out in the Constitution s 190(1), as they do not form part of the supreme law of the state, but are only normal national legislative enactments.

the ECA thus establishes the EC and further expands on the powers, duties and functions of the EC.¹⁶⁷

Apart from the establishment/creation of the EC, the Constitution also determines other more general provisions that are also important to the EC. In this regard, it is required that the EC be composed of at least three persons. The exact number as well as the terms of office of the members of the EC must be prescribed by national legislation.¹⁶⁸

The Constitution further requires the members of the EC to be South African citizens, to be fit and proper persons to hold the particular office and to comply with any other requirements prescribed by national legislation.¹⁶⁹ The composition of the EC should reflect broadly the race and gender composition of South Africa, and members of the EC must be appointed by the president on the recommendation of the National Assembly. The National Assembly must also recommend persons that are nominated by a committee of the Assembly to be appointed as members of the EC. The recommendation of persons to be members of the EC must be approved by the NA by a resolution adopted with a supporting vote of a majority of the members of the Assembly.¹⁷⁰ Members of the EC may also be removed from office. However, the Constitution determines only three grounds for such removal.¹⁷¹ If a ground or grounds for removal exists, then it is further required that a committee of the NA find that such ground(s) indeed exist, and thereafter the NA needs to adopt a resolution that calls for the person(s) to be removed from office. Again, a majority of the NA must support the request for removal of a member of the EC.¹⁷²

In light of the constitutional foundation, it is clear that the EC has a determining role to play in all elections inclusive of municipal elections. In order to strengthen constitutional democracy and to promote electoral processes, the EC has been estab-

¹⁶⁷ See the Electoral Commission Act (ECA) ss 3 and 5 respectively.

¹⁶⁸ Again the ECA advances on the Constitution and determines that the EC shall consist of five members that are appointed by the president. See the Constitution s 191 and the ECA s 6 respectively.

¹⁶⁹ In this respect the ECA requires that members of the EC should not have a high party political profile. The ECA s 6(2)(b).

¹⁷⁰ Refer to the Constitution s 193(1)-(5). As the NA consists out of 400 members, an absolute majority of the members would be 200 + 1. At least 201 members must thus support the recommendation of nominees to the EC.

¹⁷¹ See the Constitution s 194(1)(a)-(c). The grounds are: misconduct, incapacity or incompetence.

¹⁷² Refer to the Constitution s 194(1) and (2). The removal is indeed done by the president and not the NA. However, the president is obligated to remove a person from the EC upon the adoption by the NA of the resolution calling for such removal. See the Constitution s 194(3)(b).

lished as an independent institution subject only to the Constitution and the law.¹⁷³ In order to fulfil its constitutional objectives, the EC has been given various additional powers and duties.¹⁷⁴ In order to fulfil its obligations and duties, the EC shall acquire the necessary staff and facilities. One of the five members of the EC must be a judge. In light of recent constitutional jurisprudence the constitutionality of this requirement is somewhat in doubt.¹⁷⁵ The term of office of members of the EC is seven years. Reappointments are allowed, but only for one further term of office.¹⁷⁶ Because the independence and impartiality of members of the EC are vital to the role and functions of the institution, strict requirements regarding the conduct of commissioners/members are laid down.¹⁷⁷ According to the ECA, the commission shall appoint a suitably qualified and experienced person as chief electoral officer. The CEO shall be not only the head of the administration but also the accounting officer of the commission.¹⁷⁸ Most importantly, the EC is funded by parliament, but it may receive additional funding from other sources. Such sources could be foreign countries or overseas donor institutions. At the end of each financial year, the commission is required to submit to the National Assembly an audited report of all income and expenditure, as well as a report with regard to the functions, activities and affairs of the commission.¹⁷⁹

One of the most relevant aspects concerning elections in any sphere is the registration of political parties. In this respect the EC has several functions to fulfil. It is the responsibility of the chief electoral officer to register parties upon application by a party. Any application for party registration shall provide for the name, distinguishing mark, symbol, abbreviation and the constitution of the party. If a party is not represented in a legislature, then it should also submit its deed of foundation and pay a prescribed registration amount.¹⁸⁰ Once a party has been registered, the chief electoral officer shall issue a registration certificate to the party concerned. All parties not

¹⁷³ See the ECA ss 3 and 4.

¹⁷⁴ In this regard see the ECA s 5. Some of these powers and duties include managing any election, ensuring all elections are free and fair, compiling and maintaining voters' rolls by means of a system of registering eligible voters, compiling and maintaining a register of parties, undertaking and promoting research into electoral matters and declaring the results of elections for national, provincial and municipal legislative bodies within 7 days after such elections.

¹⁷⁵ Refer to the ECA s 6(1) and the case of *SAAPIL v Heath* 2001 (1) SA 883 (CC).

¹⁷⁶ See the ECA s 7.

¹⁷⁷ For more detail see the ECA s 9.

¹⁷⁸ See the ECA s 12.

¹⁷⁹ Refer to the ECA ss 13 and 14.

¹⁸⁰ See the ECA s 15(1)-(4).

represented in a legislative body shall annually renew their registration. The ECA specifically provides for the registration of parties for municipal elections. The registration procedure is identical to the procedure mentioned above.¹⁸¹ If a party has been registered for a particular municipality, it may participate only in the elections for such a municipal council. In special circumstances, the chief electoral officer is prohibited from registering a party.¹⁸² A party aggrieved by a decision either not to register or to register a party may *appeal* against the decision to the EC within 30 days after the official notification of such aspect.¹⁸³ If certain circumstances exist, then a party can also be deregistered.¹⁸⁴

In an effort to resolve electoral disputes, the ECA specifically establishes an Electoral Court for the Republic, which court has a similar status as a supreme court.¹⁸⁵ The court may review *any* decision of the EC relating to an electoral matter. Any review shall be conducted on an urgent basis. The Electoral Court may further hear and determine an appeal against any decision of the EC, but only insofar as such decision relates to the interpretation of any law or any other matter for which an appeal is provided for by law.¹⁸⁶

Under the heading of general provisions, the ECA provides that certain non-compliance with the provisions of the Act is regarded as an offence and may be punishable with a fine or even imprisonment for a period not exceeding five years. Lastly, the EC is also authorised to make various regulations.¹⁸⁷

12.7.2 The provisions of the Electoral Act

All democratic states in the world have their own specific rules to regulate the elections of the various legislative bodies relevant to such a state. The modern South African state is no different in this regard. The Electoral Act¹⁸⁸ was enacted to regulate elections of the National Assembly, provincial legislatures and municipal coun-

¹⁸¹ See the ECA s 15A.

¹⁸² Refer to the ECA s 16.

¹⁸³ Note that the appeal lies to the EC and not the Electoral Court. The court should thus not be approached before internal remedies have been exhausted.

¹⁸⁴ See the ECA s 17.

¹⁸⁵ The Constitution s 166 confirms the judicial system in South Africa. The Constitution no longer refers to the Supreme Courts. Such courts are now referred to as the High Courts. S 166(e) allows for any other court to be established or recognised in terms of an Act of parliament, including any court of a status similar to either the High Courts or the Magistrate Courts. It is submitted that the Electoral Court is an example of a court mentioned in the Constitution s 166(e).

¹⁸⁶ See the ECA s 20(1)-(8). The court may determine its own practice and procedures and have many related powers.

¹⁸⁷ Refer to the ECA s 23.

¹⁸⁸ 73 of 1998.

cils.¹⁸⁹ It is important to note that the Electoral Act must be interpreted in a manner that gives effect to the declarations, guarantees and responsibilities contained in the Constitution. In recent years parliament has been investigating the possibility of changing the electoral system in South Africa, which would consequently require changes to the Electoral Act. A new Electoral Act could be considered future general elections in South Africa. Currently the Electoral Act of 1998 provides for the following:

- The registration of voters and the voters roll.
- The proclamation and preparations for elections, which includes provisions regarding the parties that contest an election and also lists of candidates. The Act also provides for issues relevant to the elections of municipal councils.

Accordingly, when it may be necessary to regulate elections or by-elections for municipal councils further, the EC, subject to the provisions of chapter 7 of the Constitution and other applicable national or provincial legislation, may make regulations regarding various issues:¹⁹⁰

- The election procedures, such as voting, the counting of votes and the declaration of the final results.
- The appointment and powers and duties of agents.
- The administration of elections, which includes voting districts, voting stations, voting materials and other related aspects.
- General provisions relevant to elections. Such provisions include prohibited conduct, offences and penalties and also additional powers and duties of the EC.
- Election timetable, code of conduct and formulae for the determination of the number of members of the NA and provincial legislatures.¹⁹¹

12.7.3 The Local Government: Municipal Electoral Act, 2000

During 2000, the president signed and assented to the Local Government: Municipal Electoral Act (MEA). The main objective of the Act is to regulate municipal elections and to provide for matters that are connected therewith. The MEA is directed to regulate only municipal elections, contrary to the Electoral Act of 1998, which deals with the election of all legislative bodies. Although specifically aimed at local government

¹⁸⁹ See the long title of the Electoral Act as well as s 1 definitions. An election also means an election of a municipal council or a by-election for a municipal council. Read s 3 of the Act.

¹⁹⁰ See the Electoral Act s 32. Such provision seems to be in line with the provisions set out in the ECA that were mentioned above.

¹⁹¹ See the Electoral Act Chs 2-7 as well as Schs 1 and 2.

elections, the MEA must be read in conjunction with the Constitution, the ECA, the Electoral Act and also the Local Government: Municipal Structures Act. Apart from the Constitution, all other Acts are equal in status, and it is somewhat uncertain how inconsistencies between the Acts should be addressed.

The MEA addresses broadly the following:

- aspects concerning the voters' roll applicable to municipal elections and election dates
- aspects concerning the preparations for elections, which includes election timetables, parties, ward candidates, voting stations and materials and also elections of officers
- aspects on election observers and voter education providers
- voting procedures
- the counting of votes
- general provisions including prohibited conduct, offences and penalties as well as an electoral code of conduct.¹⁹²

The requirements of both the Electoral Act and the Municipal Electoral Act are not new. Previously applicable electoral legislation and even the LGTA provided for similar aspects.¹⁹³

12.8 Conclusion

It is clear that the provisions of the Constitution have a fundamental impact on the election and composition of all local government structures in the modern South African constitutional state. All legislative bodies, including municipal councils, must be elected and composed in such a manner as to fulfil our new constitutional ideals and values. Since local government bodies are the spheres of government closest to

¹⁹² See the MEA Chs 2-7.

¹⁹³ For more on such aspects see the LGTA and the following case law: In *NP v Jamie NO and Another* 1994 (3) SA 483 (E) the court ruled that electoral tribunals are bound by electoral regulations. Such tribunals are creatures of statute and have no inherent jurisdiction. It was further mentioned that a member or supporter of a political party is bound by the applicable electoral code of conduct, and a political party is not usually vicariously liable for the acts committed by members or supporters. Such liability will have to be proved under the existing common law rules. At 494C-E. In *Tumisi and Others v ANC* 1997 (2) SA 741 (O) which concerned alleged irregularities in respect of nomination forms, the court held that the returning officer had to serve a written notice of any defect on the other party; failing which, the returning officer should not be allowed to discard the applicable nomination. Finally in *Mketsu and others v ANC and Others* 2003 (2) SA 1 (SCA) the court held that the procedure in the Municipal Electoral Act s 65, which provides for the selection process by which candidates were chosen for inclusion on a party's list for election was mandatory and that only the Electoral Court has jurisdiction to hear such matters.

the ordinary inhabitants of our state, it is in such spheres where acceptance and support of the new electoral processes and procedures are to be nurtured.

Participation and support of municipal electoral processes and procedures are essential aspects of ensuring an overall prosperous local government dispensation. It is submitted that the new electoral and composition requirements for local governments have been so devised that public support and participation are encouraged and that the new system, as is protected by the supreme law of the state, should indeed facilitate and ensure a true democratic local governance.