

CHAPTER 5

THE RESTRUCTURING OF LOCAL GOVERNMENT IN SOUTH AFRICA IN THE PRE-INTERIM AND INTERIM PHASES

5.1. INTRODUCTION

The Local Government Transition Act (LGTA), 1993 (Act 209 of 1993) determines that the first or the pre-interim phase was the period from the commencement of the Local Government Transition Act, (Act 209 of 1993) being 2 February 1994, to the commencement of the interim phase, which began on the first day after the elections were held for transitional councils as contemplated in Section 9 (Section 1 (xi)) of the Act). This phase is regulated in Part IV of the Act. During this period, regard was expected to be given to the Agreement (Local Government Transition Act, 1993: Part IV). The pre-interim phase commenced after the promulgation of the Local Government Transition Act, 1993 (Act 209 of 1993) (February 1994) and lasted until the elections in November 1995.

The Local Government Transition Act (Act 209 of 1993) determined that the second or interim phase commenced, as stated, on the day after the elections for transitional councils as contemplated in Section 9 of the Act and ends with the implementation of final arrangements to be enacted by a competent legislative authority. This phase is regulated in Part V of the Act and regard is also paid to the Constitution and the Agreement (Local Government Transition Act, 1993: Part V).

In terms of the provisions of Chapter 10 of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), the municipal councils established after the elections (now commencing to the interim phase) held on 1 November 1995 or afterwards (KwaZulu-Natal on 26 June 1996 and in the Western Cape on 2 May 1996) were to be metropolitan councils, urban councils (known as city or town councils) and rural area councils. In every metropolitan area there would be an overarching metropolitan council to perform specific functions for



the whole area and a number of councils for the substructures of the metropolitan area.

The Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), and the Local Government Transition Act, 1993 (Act 209 of 1993), have formally activated the restructuring of local government in South Africa, so that the country could embark on the final democratized dispensation for local government.

5.2. APPLICATION OF THE LOCAL GOVERNMENT TRANSITION ACT (ACT 209 OF 1993) IN THE PRE-INTERIM PHASE

Part I of the Local Government Transition Act (Act 209 of 1993), also referred to as the Act or LGTA, dealt with its application. The Act was only applicable to South African local government bodies. It was made applicable to self-governing territories (SGT). It did not apply to the Transkei, Bophuthatswana, Venda, Ciskei (TBVC) states until their reincorporation into South Africa.

5.2.1. APPOINTED COUNCILS

Part IV of the Local Government Transition Act (Act 209 of 1993) made provision for abolishing racially-based local authorities in urban areas and replacing them with non-racial Transitional Local Councils (TLC's). Furthermore, in metropolitan areas, a two-tier system was introduced. Transitional Metropolitan Councils (TMC's) replaced Regional Services Councils (RSC's). Primary Local Authorities (PLA's) in metropolitan areas were called Transitional Metropolitan Substructures (TMS's).

One of the most controversial features of the pre-interim phase was that councillors were appointed on a fifty-fifty basis from statutory and non-statutory components. The non-statutory side of the Local Government Negotiation Forum (LGNF) had proposed that the existing racially-based



structures were illegitimate and needed to be replaced without delay. On this side, there were problems in holding local elections before national elections.

Boundaries still had to be demarcated, voters' rolls had to be drawn up, wards had to be delimited and national agreement on the electoral system still had to be reached (Botha, 1993: 4). Furthermore, technical studies on the electoral process indicated that a period of at least twelve months would have to elapse after the national elections, in order to allow time to prepare for municipal elections (Local Government Negotiation Forum (LGNF), 1993b: 26-28).

There was also concern on the statutory side that, if no local government deal was reached, the new government would, after the 1994 national elections, simply abolish existing local authorities on the grounds that these racially-based structures were unconstitutional. The statutory side therefore acquiesced to the concept of nominated councillors on the condition that elections be held within a specific period after the national elections (Major Cities, 1993a). Another motivation for this deal was that it involved a commitment by the South African National Civic Organization (SANCO) to get its affiliates to start persuading township residents to begin paying rent again (Botha, 1993: 4-5).

It was therefore agreed that appointed councillors were to be nominated on a fifty-fifty basis due to the fact that:

- (a) this would facilitate participation by sectors of society which had in the past been excluded from the local government process; and
- (b) continuity of knowledge and experience would thereby be facilitated (Local Government Negotiation Forum (LGNF), 1993b: 23-24).



5.2.2. LOCAL NEGOTIATED FORUMS

The first stage of restructuring of local government involved the creation of forums. Schedule 1 of the Local Government Transition Act of 1993 (LGTA) made provision for the creation of local government forums for each “economically and historically” bound area, ranging from a stand-alone town with or without satellites to a complex metropolis. Criteria for the establishment of a forum included commercial and industrial linkages, daily commuting patterns, provision of services within the area, and the areas of jurisdiction of local government bodies, including areas of jurisdiction of such government bodies, if any, as existed before 1971. Before a forum could formally operate, it had to be formally recognized by the Administrator of the province concerned. When the Administrator received a proposal for a forum area, he could either confirm the proposed area or refer it to the relevant demarcation board, which would investigate and make written recommendations to the Administrator, who would then make a decision.

Forums had to be established that represented statutory and non-statutory organizations on a fifty-fifty basis between. The statutory component was comprised of members of existing local government bodies, or persons representing bodies or organizations, such as ratepayers’ associations approved by the forum as part of such a component. The non-statutory side was comprised of those who were not part of the statutory forum and had a vested interest in the political restructuring of local government. These included political organizations such as the ANC and the Pan Africanist Congress (PAC), as well as civic organizations such as SANCO. Membership of the forums had to be in accordance with the principles of inclusivity and representativity. Other bodies could be given observer status. This would include local chambers of commerce and industry and supplier bodies such as Eskom.

The definition of who precisely was statutory or non-statutory led to bad feeling in a number of forums and delayed the introduction of transitional councils in many areas. Loosely worded legislation enabled the National Party



(NP), Democratic Party (DP) and, in a few instances, the Afrikaner Weerstandsbeweging (AWB) to claim membership of non-statutory organizations (Motshekga, 1994: 16). There was also a proliferation of National Party (NP)-orientated civic organisations which attained seats in some areas on local negotiating forums. This led to complaints from the African National Congress (ANC) that the statutory side was trying to load the non-statutory side (Christianson, 1994:32). This was, however, counterbalanced by the fact that, in some towns, existing councillors defected to the African National Congress (ANC), which in turn bolstered the African National Congress (ANC) strength on the statutory as well as the non-statutory side. There were also complaints from some organisations that they were excluded from forums (De Beer & Lourens, 1995: 171).

It is realistic for political parties to attempt to maximise their voting strength in a situation like this, so the manipulation of forum membership was not entirely unexpected. However, the important point is that it led, as Cloete (1995: 12) points out, to tension and conflict in local communities. Such conflict over membership diverted forums away from their central objective of negotiating a new model for local government (De Beer & Lourens, 1995: 171).

The major functions of the forums included negotiating the following issues:

- (a) which transitional model was to be applied and its function;
- (b) the number of seats on the new transitional council, taking the existing number of seats as a departure point; and
- (c) which councillors were to be nominated to the new transitional council. This included looking at which incumbent councillors would be renominated and which councillors from the non-statutory side would be appointed on the basis of the fifty-fifty agreement.



5.2.3 TRANSITIONAL MODELS

A forum could establish:

- (a) a Transitional Local Council (TLC) for non-metropolitan areas;
- (b) a Transitional Metropolitan Council (TMC) with Transitional Metropolitan Substructures (TMS's) for metropolitan areas; and
- (c) Local Government Co-ordinating Committees (LGCC's), which could be negotiated for non-metropolitan areas.

Transitional Local Councils (TLC's) and Transitional Metropolitan Substructures (TMS's) replaced existing local authorities and assumed all of their functions. In the case of Local Government Co-ordinating Committees (LGCC's), their powers and functions had to include:

- (a) ensuring citizen access to certain basic services such as water, refuse removal, health services, roads and stormwater drainage;
- (b) receipt of not less than 10% of the rates of the individual local government bodies for the improvement and restoration of services;
- (c) the determination of the total number of seats in such a Local Government Co-ordinating Committee (LGCC); and
- (d) the nomination of persons as members of Local Government Co-ordinating Committees (LGCC's).

Local Government Co-ordinating Committees (LGCC's) continued to coexist with existing local authorities which were not abolished. This was a compromise reached in bilaterals between the African National Congress (ANC) and the right-wing Transvaal Municipal Association (TMA) and then between the African National Congress (ANC) and Conservative Party (CP). It was seen as a way of drawing the white right wing, which had previously threatened to disrupt the local government restructuring process because of



its opposition to racially integrated councils, into the interim phase (*Afrikaner Volksfront* 1993). The Transvaal Municipal Association (TMA) had questioned the legitimacy of the Local Government Negotiation Forum (LGNF), particularly the authority of the South African National Civic Organization (SANCO). The Local Government Negotiation Forum (LGNF) was said to be unrepresentative of all local decisions and consequently the right wing refused to implement the Local Government Negotiation Forum's (LGNF's) decisions in many towns (De Beer & Lourens, 1995: 120-121; Robinson, 1995: 14-15).

The Local Government Co-ordinating Committee (LGCC) may have been a sensible way of placating the right wing in late 1993. However, after the 1994 elections, when majority support for the African National Congress (ANC) had been expressed and the military threat from the right wing had receded, the Local Government Co-ordinating Committee (LGCC) looked increasingly like an own affairs/general affairs anachronism from the 1980's. The Local Government Co-ordinating Committees (LGCC's) were used in some provinces in the pre-interim phase but not introduced in the Western Cape.

Forums were obliged to notify the Administrator or provincial committee of the results of the negotiation for a pre-interim model within 90 days after the activation of the Local Government Transition Act (LGTA). If agreement was not reached within this time (or an allowed extension), the Administrator or provincial committee could, within 30 days, institute a process of independent mediation in order to reach an agreement. If this did not provide an agreement, the administrator had to appoint, in metro forums, a Transitional Metropolitan Council (TMC) and Transitional Metropolitan Substructures (TMS's); and in non-metro forums

- (a) in cases which were constituted of Grade 9 or higher level authorities, either a Transitional Local Council (TLC) or Local Government Co-ordinating Committee (LGCC) or



(b) in cases where such non-metro forums had a Grade 8 or lower local authority in their area, a Local Government Co-ordinating Committee (LGCC) only.

The Administrator could also refer disputed pre-interim model boundaries to the demarcation board for consideration. Forum decisions were supposed to be reached by consensus or, if this was not possible, by a two-thirds absolute majority of both statutory and non-statutory delegations.

What soon became clear was that the 90-day deadline for forums to reach negotiated settlements was unrealistic and very few areas managed to achieve it. The statutory/non-statutory conflict has already been mentioned as one reason for this delay. The Local Government Transition Act (LGTA) placed great emphasis on local negotiations to reach solutions, and if there was not goodwill or political will to achieve negotiated settlements, consensus could not be and was not reached. In addition, setting up forums involved a rather complex technical process which also led to delays.

Another reason for the slow progress was the delay in the transfer of powers from central government to the provinces after the elections. This meant that provinces did not have the powers to approve local government forum areas or Transitional Local Council (TLC) boundaries. It was only on 1 July 1994 that the administration of most of the provisions of the Local Government Transition Act (LGTA) was assigned to provinces (Cameron & Stone, 1995: 50). This meant provinces was initially unable to impose their authority upon towns which were not negotiating at all or not negotiating in good faith (De Beer & Lourens, 1995: 171).

This forced an amendment to the Local Government Transition Act (LGTA) extending the original deadline for the forums to reach negotiated settlements from 2 May until 30 November 1994. According to the then Minister of Provincial Affairs and Constitutional Development, by September 1994 some 443 potential forum areas had been identified and 329 had been established of which 274 were formally agreed. Some 151 had submitted agreements; of



these, Port Elizabeth was formally proclaimed (Republic of South Africa (RSA) 1994, Debates of National Assembly, 19 September: Col. 1624). By May 1995, 484 TLC's had been set up, of which 465 were functioning (Republic of South Africa (RSA) 1995, Debates of National Assembly: Col. 565-566). It also needs to be noted that not all promulgated Transitional Local Councils (TLC's) were non-racial. Robinson (1995: 20) points out that there are certain Natal stand-alone white towns without a black population. A similar situation exists in respect of certain Western Cape towns.

While appointed councils were perhaps a necessary evil accompanying a rather messy restructuring process, it was clear by the latter part of 1995 that they had reached the end of their lifespan. Part of the problem was that many councillors were temporary, in that they had little realistic chance of being elected. This contributed to their being

- (a) no long-term commitment to or vision of the future growth of local authorities in areas such as the promotion of Reconstruction and Development Programme (RDP) projects;
- (b) an unwillingness to take unpopular decisions; and
- (c) deliberate attempts to delay the elections by some councillors so that they could continue receiving allowances.

Furthermore, the statutory/non-statutory divide polarized many local authorities, making effective action impossible. This acrimony increased as the election date drew nearer. Finally, and perhaps fundamentally, many pre-interim councils were established largely on the basis of existing local boundaries. While the statutory/non-statutory distinction meant that councillors were more racially representative, many White Local Authorities (WLA) remained White Local Authorities, and many Black Local Authorities (BLA) remained black local authorities in areas of jurisdiction.



5.2.4 EXEMPTIONS FROM THE PRE-INTERIM PHASE

Part III of the Local Government Transition Act (LGTA) dealt with exemptions from the pre-interim phase. Exemptions could be granted if the Administrator or provincial committee was satisfied that such a local government body was non-racial and inclusive and had brought about stability of local government through effective government, orderly financial management and a single local government administration. The major reason for this provision was to preserve successful agreements reached under the Interim Measures of Local Government Act, which also made provision for non-racial local government but, as pointed out, for a variety of reasons was regarded as unsatisfactory by the African National Congress (ANC) and the South African National Civic Organization (SANCO) alliance.

The provision appears to have been abused. In the Western Cape some of the areas that were exempted were stand-alone white towns and not areas which had reached agreement under the Interim Measures Act. In some cases such decisions were taken against the recommendation of the Demarcation Board, which recommended that such areas be incorporated into non-racial authorities.

5.2.5 PROVINCIAL COMMITTEES

Part II of the Local Government Transition Act (LGTA) made provision for the establishment of Provincial Committees for Local Government in each province. Members were supposed to be broadly representative of major stakeholders in each province and have knowledge of matters concerning local government. They were there to supervise and implement the new local government system in conjunction with the Administrator. (In practice it was the provincial Members of the Executive Committees (MEC's) for Local Government who performed the Administrators' role.) All actions taken by the Administrator(s) in terms of the Act had to be in conjunction with the relevant provincial committee. Disputes between a provincial committee and an



Administrator had to be referred to the Electoral Court, established in terms of Section 4 of the Local Government Transition Act (LGTA), for consideration.

The non-statutory side of the Local Government Negotiation Forum (LGNF) had pushed for a system of provincial committees because of the concern that the National Party (NP)-appointed Provincial Administrator (prior to the 1994 national and provincial elections) would restructure local government unilaterally. Provincial committees were operational during the pre-interim and the interim phases, until they were abolished in 1996.

5.2.6. DEMARCATION BOARDS

The Interim Constitution made no specific provisions pertaining to demarcation. Demarcation of local government boundaries was regulated by the Local Government Transition Act (LGTA). Part VII of the Local Government Transition Act (LGTA) made provision for the establishment of a local government demarcation board in each province. The board's functions were:

at the request of the Administrator, to investigate and make recommendations in writing to him or her regarding any demarcation, redemarcation, or withdrawal of the demarcation of any areas pertaining to local government affairs, including the area of any negotiating forum and the area of jurisdiction of any local government body, transitional council or transitional metropolitan substructure and the delimitation of wards within the area of jurisdiction of any local government body, transitional council or transitional metropolitan substructure and the delimitation of wards within the area of jurisdiction of any local government body, transitional council or transitional metropolitan substructure (Section 11(6)(a)).

The board was comprised of a chairperson, vice-chairperson and ordinary members of the board. The board members were appointed by the



Administrator (in conjunction with the relevant provincial committee) and in accordance with the criteria listed in Schedule 5 of the Local Government Transition Act (LGTA) (Sections 11(2) and (3)). Schedule 5 stated the following:

- (a) The chairperson of the board shall be a person with extensive experience in law or matters relating to local government.
- (b) The other members of the board shall jointly have knowledge of
 - 1. rural, town and regional planning
 - 2. development economics, including development needs of local communities
 - 3. municipal finance
 - 4. municipal services and administration
 - 5. other disciplines and skills as may be necessary.
- (c) The membership of the board shall be structured in such a manner as to be balanced, representative, non-racial and gender inclusive.

All demarcation boards were established in the first half of 1994, with the exception of KwaZulu-Natal where the Boards became operational in September 1994 (Election Task Group 1996: 65).

Section 11(6)(b) states that, when a board makes recommendations to the Administrator, it should take into account the criteria listed in Schedule 6. These criteria are as follows:

- (a) topographical and physical characteristics of the area concerned;
- (b) population distribution within the area concerned;
- (c) existing demarcation of the areas pertaining to local government affairs and services, including existing areas of local government bodies and areas existing before 1971 as areas of such local government bodies (if



any), as well as areas of regional services councils and joint service boards;

- (d) existing and potential land usage, town and transport planning, including industrial, business, commercial and residential usage and planning;
- (e) economy, functionality, efficiency and financial viability with regard to the administration and rendering of services within the area concerned;
- (f) development potential in relation to the availability of sufficient land for a reasonably foreseeable period to meet the spatial needs of the existing and potential residents of the proposed area for their residential, business, recreational and amenity use;
- (g) interdependence of and community of interest between residents in respect of residency, work, commuting and recreation; and
- (h) the integrated urban economy as dictated by commercial, industrial and residential linkages.

The principle of a demarcation board was not a new one. A single National Demarcation Board for Local Government Areas had been established in November 1985. The Minister of Constitutional Development and Planning appointed the members. The main function of the National Demarcation Board for Local Government Areas was to advise the Provincial Administrators on the demarcation of the area of jurisdictions of Regional Services Councils (RSC's) and Local Authorities (LA's) (De Beer and Lourens, 1995: 51-52; Cameron, 1991: 252).

5.2.7. CATEGORIES OF LOCAL GOVERNMENT

Section 174(2) of the Interim Constitution made provision for categories of metropolitan, urban and rural local governments with powers, functions and

structures differentiated according to considerations of demography, economy, physical and environmental conditions and other factors which justified or necessitated such categories. These categories were established in terms of legislation (the Local Government Transition Act).

The important point is that provision was made for three discrete types of local government – metropolitan, urban and rural. These categories of metropolitan, urban and rural government were not well-defined in the Constitution or the Local Government Transition Act (LGTA).

5.2.7.1. METROPOLITAN GOVERNMENT

The only type of metropolitan government that was seriously debated in both the Local Government Negotiation Forum (LGNF) and political circles was the two-tier system. The National Party (NP) government, supported by many smaller local white local authorities, promoted the concept of weak metropolitan government. This was apparent in the government's draft Local Government Bill of April 1993, which saw the proposed powers of metros approximating those of Regional Services Councils (RSC's). Furthermore, it was proposed that municipal authorities themselves ought to decide which functions would be performed jointly. As Minister Delport (1993: 20) noted, "The municipal authority as it developed traditionally ought to be retained as the basic and primary local government authority". The government's concern was that strong metros with extensive powers and functions could be controlled by the African National Congress (ANC), who were likely to adopt policies inimical to white suburbanites, such as extensive taxation and the locating of low-income housing in affluent areas. However, given past residential patterns, there was a fair chance that whites could control a not insubstantial number of local authorities, in particular the wealthier ones.

This model of strong local authorities/ weak metros was rejected by both the Major Cities Association and the African National Congress (ANC). The Major Cities (1993a) rejected any attempt to forestall possible metropolitan options

by providing for a weak model only. It rejected the primary emphasis on lower-tier councils. The Major Cities were progressive, partly because of the strong Democratic Party (DP) influence in both the Cape Town and Johannesburg municipalities. This led to Major Cities supporting the African National Congress (ANC) on some issues. While equity was part of the Major Cities' motivation, another major concern was that the negative externalities were borne mainly by its constituent members. Experience has shown that smaller suburbs in metropolitan areas have been reluctant to pay their full share of metropolitan costs. For example, in the Western Cape, the Cape Town City Council (CTCC) provided regional facilities such as the maintenance of mountains, beaches, museums and the Central Business District (CBD). Citizens from other local authorities derived the benefit of these without paying their way. Also, the Cape Town City Council (CTCC) heavily subsidized low-income housing, while other local authorities derived the benefit thereof, as the Cape Town City Council (CTCC) tenants both worked and shopped in the areas of such municipalities and contributed to their economic growth.

The Major Cities also felt that a co-ordinated metropolitan approach was needed for city-wide issues such as transport, land-use planning and urbanization. Previous attempts to co-ordinate these on a voluntary basis among local authorities had floundered because of the reluctance of smaller bodies to surrender their sovereignty. It was therefore clear that the voluntary measures proposed in the Act were not acceptable to the Major Cities, whose members institutionally bore the brunt of the costs of metropolitan fragmentation. Weak metropolitan authorities were also clearly unacceptable to the African National Congress (ANC), which favoured strong metropolitan government. The African National Congress (ANC) policy document in May 1992 stated:

The key issues facing our cities – disparities in service provision, rapid urban growth, the housing crisis and inefficient apartheid city structure – cannot be effectively addressed by lower-tier authorities, whose focus is too small. The African National Congress (ANC) believes that the metropolitan tier would be an appropriate tier to address these issues.



This tier will control primary sources of urban finance and be responsible for allocating funds for development and services. It will coordinate the provision of city-wide services and allow democratic control over broader development decisions. It will set the policy framework for that metropolitan area, within which the lower tier(s) will operate (African National Congress (ANC), 1992: 6).

Although favouring a strong metropolitan government, the African National Congress (ANC) was still, nevertheless, committed to a two-tier system, albeit with weak lower-tier structures. The government's April 1993 Bill was drawn up independently of the Local Government Negotiation Forum (LGNF), which led to fierce opposition from the Forum. This led to the Forum accepting the principle of a differentiated approach to metropolitan councils at its plenary on 30 June 1993 (Local Government Negotiation Forum (LGNF) 1993b: 20). However, greater detail was still needed in this regard. The Local Government Negotiation Forum (LGNF) subsequently appointed a task team on metropolitan government. Representatives of the Major Cities Association put forward a memorandum entitled *Towards a national approach towards metropolitan government* (1993b) to the task team. It was argued in this document that the Local Government Transition Act (LGTA) should provide specifically for metropolitan government and clearly define metropolitan and local powers, functions and duties. A metropolitan area was defined as follows:

- (a) The area is extensively developed/urbanized. It has more than one central business district, industrial area and concentration of employment.
- (b) Economically, the area forms a functional unit, which comprises various smaller units, which are interdependent economically and in respect of services.
- (c) The area is densely populated, and there is intense movement of people, goods and services within the area.

(d) The area has multiple local government jurisdictions.

(e) The area is generally perceived as being separate from nearby rural areas.

The report stated that the size, structure, composition, functions and powers of the metro council and administration of the metro were issues that needed to be discussed by the Local Government Negotiation Forum (LGNF), as did the question of finance and, in particular, the question of redistribution.

The only type of metropolitan government that was considered was a two-tier system. The Major Cities framework was accepted by the task team and ultimately the Forum (Local Government Negotiation Forum (LGNF) 1993a; Non-statutory Report).

After further negotiations, provision was made for the negotiation of the powers of the Transitional Metropolitan Councils (TMC's) in the pre-interim period in the 11 October 1993 draft of the Bill, provided that the powers, duties and functions of such structures should at least be the powers, duties and functions of the Regional Services Councils (RSC's). This was clearly an advance on the government's previous position that all metropolitan functions should be negotiated. This had been unacceptable to the non-statutory forum, which argued that the minimum powers, duties and functions of Transitional Metropolitan Councils (TMC's) and Transitional Metropolitan Substructures (TMS's) should be defined by legislation, and not by local negotiating forums (Local Government Negotiation Forum (LGNF) 1993b; Non-statutory Report).

Another interest group in the metropolitan debate consisted of representatives of cities and towns situated on the periphery of major cities. Such municipalities lived in the constant shadow of "Big Brother", and the fear that they would be swallowed up by their larger neighbours was a constant concern. In September 1993, representatives of these peripheral areas met as a Working Group to discuss metropolitan government. Powerful support was expressed for a "bottom-up" approach: metropolitan governments should be appointed from the ranks of constituent local authorities and the functions and



powers of such governments should be decided upon by member local authorities. It was also felt that the metro should provide fewer rather than more functions and that local negotiating forums of constituent local authorities, and not metropolitan forums, should be involved in the appointment of members to the metropolitan councils (Lourens, 1993: 50-52).

This response was unacceptable to both the Major Cities and the African National Congress (ANC) which, as has been pointed out, favoured strong metropolitan government and also wanted metropolitan, and not local, forums deciding on the appointment of members to Transitional Metropolitan Councils (TMC's). In fact, an agreement had already been reached in this regard. Nevertheless, there was a last-minute attempt by certain Western Cape suburban authorities to push the "bottom-up" approach into legislation. An eleventh-hour meeting with Minister Delport saw an attempt to change the Bill in accordance with the "bottom-up" approach. The African National Congress (ANC), however, rejected what it perceived to be an underhand approach (local government negotiations had already been concluded and some of the African National Congress (ANC) negotiators were already on holiday), and the original deal stood (Lourens, 1993: 50-52).

Section 174(2) made provision for metropolitan government. Part I of the Local Government Transition Act (LGTA) defined the "metropolitan area" as any area:

- (a) comprising the areas of jurisdiction of multiple local governments;
 - (b) which is densely populated and has an intense movement of people, goods and services within the area;
 - (c) which is extensively developed or urbanized and has more than one central business district, industrial area and concentration of employment;
- and



(d) which, economically, forms a functional unit comprised of various smaller units that are interdependent economically and in respect of services.

This definition was virtually identical to the Major Cities definition which had been proposed to the Local Government Negotiation Forum (LGNF) (Major Cities, 1993b). The only difference was that the clause “the area is generally perceived as being separate from nearby rural areas” was in the Major Cities definition but was not included in the Local Government Transition Act (LGTA) definition.

Furthermore, in the Local Government Transition Act (LGTA), provision was made for Transitional Metropolitan Councils (TMC's) with at least the powers and duties of Regional Services Councils (RSC's). However, this was not mandatory – it depended upon the Transitional Metropolitan Council (TMC) concerned, as this had the discretion to decide which functions it would adopt. This was to ensure that Transitional Metropolitan Councils (TMC's) were not overloaded with new functions which they might lack the capacity to perform. Such metro activities would replace Regional Services Councils (RSC's) and assume their two levies. They would also have the power to claim levies and tariffs from Transitional Metropolitan Substructures (TMS's) in respect of any of their functions. Finally, provision was made for an equitable contribution from any constituent Transitional Metropolitan Substructure (TMS) based on the gross or rates income of such Transitional Metropolitan Substructures (TMS's). Furthermore, metropolitan forums would decide on the appointment of members to metropolitan and local forums. In fact, local forums in metropolitan areas had no legal status and were only advisory to metropolitan forums.

It was clear that the thorny issue of metropolitan-local relationships had not been resolved at national level in the pre-interim phase, but it was left to the discretion of the local negotiating forums. The metropolitan government legislation can best be described as a combination of a “top-down” and “bottom-up” approach. The official Local Government Negotiation Forum (LGNF) information brochure described the process as follows: “A



simultaneous approach will be followed, with the metropolitan forum negotiating all relevant matters pertaining to the metropolitan council and its substructures as a package deal” (Local Government Negotiation Forum (LGNF), 1994a: 8-9).

5.3. INTERIM PHASE: ELECTED COUNCILS

The interim phase commenced with elections for the Transitional Metropolitan Councils (TMC's), Transitional Metropolitan Substructures (TMS's), Transitional Local Councils (TLC's) and rural local government structures. Section 179(1) of the Interim Constitution stated that local government elections had to take place at intervals of not less than three and not more than five years, provided that the first local government elections took place on the same day. However, the Constitution was amended to allow for staggered elections as KwaZulu-Natal and Western Cape provinces were not ready because of demarcation disputes.

For these first elections, 40% of the councillors were elected by proportional representation, while the remaining 60% were elected on a ward basis. The 60% ward representation was further divided: half of these councillors (50%) represented traditional white local authority areas, including coloured and Indian areas, whereas the other half (50%) represented areas outside the jurisdiction of white local authorities, which were in mainly black local authority areas.

At a metropolitan level, the 40% proportional representation provision also applied. However, the other 60% had to be nominated by Transitional Metropolitan Substructures (TMS's) from within their own ranks on a *pro rata* basis, according to their respective number of registered voters. This formula was one of the compromises reached between the National Party (NP) government and the African National Congress (ANC) in bilaterals. The National Party (NP) originally wanted power-sharing arrangements based on property ownership and the financial loading of wards.



While the African National Congress (ANC) was not opposed to minority overrepresentation in principle, it was against financial criteria being used in this regard. The formula was a power-sharing agreement reached to overrepresent whites on a non-financial basis, particularly in the erstwhile Transvaal and Orange Free State provinces, where, in some areas, they formed only 5-10% of the local electorate (Cameron 1994: 25-28). According to Cloete (1994: 15), this was one of the “most difficult settlements to achieve”.

It also needs to be stressed that the emphasis was on protecting minorities, not racial groups. For example, the provision ended up overrepresenting whites in many city councils in most provinces. However, in the Western Cape, where black people are in the minority, they were the beneficiaries of this clause and accordingly were overrepresented on local councils.

A major complaint against this provision was that it enshrined racism in the constitution. No racial provision existed at central government level, so why should such a provision exist at local government level? It was argued that this provision would exacerbate relations between coloureds and Indians on the one hand and black people on the other. All these groups had suffered under apartheid, so why should coloureds and Indians be lumped with whites, as part of the “oppressor camp”? (Republic of South Africa (RSA) 1993b; Debates: 2 December: Col. 15907).

The other major complaint was that it distorted voting representation within transitional local councils. For example, for the elections the category ratio of white local authority to black local authority voters was 4 to 1 in Beaufort-West, in Oudtshoorn 9 to 1, and in Robertson 5,5 to 1 (Western Cape Demarcation Board, 1995d).

5.3.1. VOTER QUALIFICATIONS

To vote in the local government elections one had to be:



- (a) a natural (as opposed to a juristic) person;
- (b) eligible to vote in terms of Section 6 of the Interim Constitution, that is a South African citizen (or franchised in terms of the Act), over the age of 18 and not subject to normal statutory disqualifications (such as being criminal or insane);
- (c) ordinarily resident within the area of jurisdiction of a local government, or under law liable for the payment of rates, rent, service charges or levies to the local government concerned; and
- (d) registered on the voters' roll of the local government concerned (Section 179(3) of the Interim Constitution, Schedule 4 of the Local Government Transition Act (LGTA)).

A voter was only entitled to one vote per local government (Section 179(4)). If people owned properties in different local governments, they were entitled to a vote in each of those local jurisdictions, with the proviso that they could exercise only one vote for any one local government. One vote could, however, entail the marking of two or three ballot papers, representing the proportional and ward components of a vote.

There was no reference to the juristic vote (which had previously existed in the Cape Province) or qualified franchise (as proposed by the National Party (NP)). As Cloete (1994: 15) points out, the local franchise was a "victory" for the South African National Civic Organization (SANCO), which had fought very hard to normalize voting qualifications in line with global trends.

No person was qualified to become a local government councillor if he or she was not eligible as a local government voter, was a member of the National Assembly or the Senate, was not qualified to become a member of the National Assembly, was an employee of local government (although provincial executive councils could, under certain circumstances, exempt an individual

from this last disqualification) or was disqualified in terms of any other law (Section 179 (5)).

5.3.2. POWERS AND FUNCTIONS OF LOCAL GOVERNMENTS

In terms of the Interim Constitution, local governments could be assigned powers and functions which were necessary to provide services for the maintenance and promotion of the well-being of all persons within their areas (Section 175(2)). Section 175(3) stated:

Local governments shall, to the extent determined in any applicable law, make provision for access, by all persons residing within their boundaries, to water, sanitation, transportation facilities, electricity, primary health care, education, housing and a secure environment, provided that such services and amenities are rendered in a sustainable manner and are physically practicable.

This provision must be regarded as a legal commitment for local governments to provide services to their constituencies, although it was still subject to the question of affordability.

Section 175(1) stated that the powers, functions and structures of local government should be determined by law of a competent authority. Section 175(4) gave local government the power to make by-laws not inconsistent with the Constitution, parliament or applicable provincial law. These provisions indicated that the hierarchical intergovernmental system had been retained in the Interim Constitution. Local government remained the lowest cog of the intergovernmental system, and was subject to national and provincial control.



5.3.3. DECISION-MAKING

Provision was made for weighted majorities in decision-making in Section 176 of the Interim Constitution. Such provisions were a watered-down compromise between the power-sharing proposals of the National Party (NP) and the African National Congress (ANC). Such provisions also appeared in the Local Government Transition Act (LGTA), which meant that these power-sharing clauses covered both the pre-interim and the interim periods. These power-sharing arrangements involved the following:

- (a) Budgetary decisions had to be taken by a two-thirds majority of all council members.
- (b) Town planning decisions had to be taken by an absolute majority of all council members.

Section 177 made provision for power-sharing in the composition of the executive council which had to be constituted on a proportional basis. Decisions had to be taken by consensus or, failing that, by two thirds of all its members.

The non-statutory group in the Local Government Negotiation Forum (LGNF) agreed to these power-sharing arrangements because of its belief that special majorities were a more effective way of power-sharing than provisions based on wealth or the ownership of property (African National Congress (ANC), 1993).

5.3.4. ADMINISTRATION

Section 178 of the Interim Constitution stated:

A local government shall ensure that its administration is based on sound principles of public administration, good government and public



accountability, so as to render efficient services to persons within its area of jurisdiction and effective administration of its affairs.

However, there was little clarity in either the Constitution or the Local Government Transition Act (LGTA) on how the restructuring of local government would lead to efficient administration, particularly in black areas which had been characterized by maladministration and corruption (Heymans & White, 1991: 12-20).

5.3.5. WARD COUNCILS

Provision was made in Section 175(6) of the Interim Constitution for the delegation of specified functions to submunicipal entities within municipal boundaries. Such entities were commonly known as ward councils. The aim of ward councils was to facilitate the provision or administration of services, the adherence to municipal by-laws and, more generally, the promotion of good governance. The assignment of such functions should not be inconsistent with an Act of parliament or an applicable law, nor should it diminish the accountability of such local governments.

The National Party (NP) pushed strongly for ward councils with extensive functions, powers and taxing powers during the negotiation phase. Its strategy was that whites' interests could be protected through decentralization to such councils. Even within the context of integrated local authorities, most ward councils, given past residential patterns, would be primarily white. With their own budgets and sources of revenue, whites could continue living in exclusive areas and not contribute significantly to the upliftment of poorer black areas in cities and towns (Cameron, 1994: 36).

This model was unequivocally rejected by the non-statutory grouping of the Local Government Negotiation Forum (LGNF) because it was obviously seen as a way of preserving white privilege (Local Government Negotiation Forum (LGNF) (Non-statutory 1993(c)).



The concept of stronger ward councils was dropped after the National Party and African National Congress (NP/ANC) bilaterals in late 1993. A much weaker version of ward councils appeared in the Constitution. They did not have taxing powers, nor exclusive functions.

5.3.6. RURAL LOCAL GOVERNMENT

The principle of separate rural local government was accepted in the Interim Constitution. The Local Government Transition Act (LGTA) was initially silent on the issue of rural local government. Section 10(3)(1) did state that existing Regional Services Councils (RSC's) and Joint Services Boards (JSB's) could be replaced by a body known as a service council, subregional council or district council.

Most rural areas have traditionally not had local government structures. The resultant absence of negotiating forums made the central government decide that the pre-interim phase should not be applied strictly in rural areas (Republic of South Africa (RSA), 1994; Debates of National Assembly: 19 September 1994 Col. 1591). Some Transitional Local Councils (TLC's) did include rural areas within their boundaries but this was the exception rather than the norm (McIntosh, 1995: 418).

It was however, decided that the entire country would be served by local government in the interim phase. Accordingly, a 1995 amendment to the Local Government Transition Act (LGTA) made provision for the establishment of rural local government structures. Provision was made for a two-tier structure. The upper-tier would be the district council (regional councils in KwaZulu Natal). It consisted of indirectly elected representatives of Transitional Local Councils (TLC's), Transitional Representative Councils (TRC's), Transitional Rural Councils (TRC's) and directly elected representatives from so-called remaining areas. District councils largely conformed to the boundaries of Regional Services Councils (RSC's) (except that some of the independent homelands that had been reincorporated into South Africa were previously not



covered by Regional Services Councils (RSC's)). This meant Transitional Local Councils (TLC's) would fall within the geographical jurisdiction of district councils. District councils did not, however, have any authority over the functioning of Transitional Local Councils (TLC's). District councils also assumed taxing powers in the form of the regional services levy.

At a lower tier level, provision was made for a menu of options. A Transitional Rural Council was a fully-fledged local government structure elected on the 60% ward and 40% proportional representation formula. A Transitional Representative Council had political representation only and had no executive powers. It was elected on a proportional representation formula only. "Remaining areas" were areas that were not covered by any primary local government structure. They were elected on a proportional representation formula at district council level only. Provinces had the discretion to decide on which of these local government models they wish to adopt.

In Transitional Representative Councils and "remaining areas" options, provision was made for nominated interest-group representation at district council level, with the proviso that there would be a maximum of 10% seats per group and on condition that interest groups did not exceed 20% of the total number of seats. The four interest groups were farmers, landowners or levy payers; farm labourers; women; and traditional leaders. Section 182 of the Interim Constitution also made provision for traditional leaders of communities who observed a system of indigenous law and resided on land within the area of jurisdiction of an elected local government to be members of that local government. Traditional leaders were also eligible for election to any office of such elected local government.

The tradition of weak rural local government and the lack of revenue-raising capacity in rural areas (particularly at primary levels) has led to observers being sceptical of whether the national and provincial government's commitment to strong rural local government will be sustained (McIntosh, 1995: 413).

5.3.7. THE CONSTITUTIONAL STATUS OF LOCAL GOVERNMENT

The National Party (NP) argued during the Multi-Part Negotiating Forum (MPNF) deliberations that local government should become an exclusively provincial function. This was consistent with the National Party's (NP's) policy of maximum devolution of power and would form part of the checks and balances of central government powers (National Party (NP), 1991).

The African National Congress (ANC) on the other hand, favoured local governments becoming a concurrent function, shared between central and provincial government. The African National Congress (ANC) in exile had a traditionally centralised view of the state. While they softened this view during the negotiating phase, they still believed that central government should have the power to intervene in local authorities' affairs directly, to ensure that such structures conformed to national development policy and did not become "islands of privilege in a sea of poverty" (African National Congress (ANC), 1993).

The Minister of Provincial Affairs and Constitutional Development (PACD) from 1994 to 1996 was Roelf Meyer, who was a National Party (NP) representative in the Government of National Unity (GNU). He viewed his role as being to co-ordinate, facilitate and oversee local government (Republic of South Africa (RSA), 1994; Debates of National Assembly: 19 September 1994 Col. 1024). The African National Congress (ANC), on the other hand, viewed this as being too restrictive and argued that central government should have the right to intervene in local government, a concurrent function, in order to ensure that the national interest was served (Col. 1647). The Portfolio Standing Committee on Constitutional Affairs was concerned about the limited resources devoted to local government and recommended the creation of a new branch of local government within the Provincial Affairs and Constitutional Development Department (Col. 1671). This expressed a more general concern that perhaps insufficient attention had been given to local government as a national priority (McIntosh, 1995: 415). This branch was subsequently established.



Section 174(5) of the Interim Constitution made provision for central and provincial legislation which fundamentally affected local government to be put to organized local government for comment. As has been pointed out, even White Local Authorities (WLA's), which had been far more powerful than Black Local Authorities (BLA's), had had their powers eroded by central and provincial governments in the past. However, concern was expressed that these provisions were too vague to protect local government. Section 174(3), which stated "that a local government shall be autonomous and within the limits prescribed by or under law shall be entitled to regulate its affairs" came under similar attack. It was alleged that it was contradictory to say that a legislative body should be autonomous, but give it freedom only in so far as laws made by other bodies allowed. Also the question had been posed as to how local government could be an autonomous level of government, yet also a Schedule 6 (provincial) power (Free State Municipal Association, 1995; Christianson, 1994: 28-29).

The reasons for these contradictory clauses are partly to be found in the compromise reached at Kempton Park between the National Party (NP), which was pushing for maximum devolution of power, and the African National Congress (ANC), which wished to see central control over local authorities. The haste with which the Interim Constitution was put together also led to poorly framed legislation. In reality, the Interim Constitution did not substantially improve the constitutional position of local government.

5.4. EVALUATING THE LOCAL GOVERNMENT NEGOTIATION FORUM AND THE LOCAL GOVERNMENT TRANSITION ACT (ACT 209 OF 1993)

In evaluating the Local Government Negotiation Forum and the Local Government Transition Act (Act 209 of 1993) certain areas of concern have been identified. They include:



5.4.1. REPRESENTATIVITY

Both the then Minister Delport, and his South African National Civic Organization (SANCO) counterpart, Thozamile Botha, conceded that the Local Government Negotiation Forum (LGNF) was not fully representative. The absence of important stakeholders such as the Democratic Party (DP), Inkatha Freedom Party (IFP) and Pan Africanist Congress (PAC) was recognized as an important stumbling block (Cloete, 1994: 16; Cameron, 1994: 67-68).

5.4.2. ACCOUNTABILITY

There were complaints that there was insufficient report-back to constituencies about progress at the Local Government Negotiation Forum (LGNF). Both statutory and non-statutory constituencies complained that the speed of the negotiations at the Local Government Negotiation Forum (LGNF) was too fast and that constituencies were not being carried with them (Cameron, 1994: 68-69).

5.4.3. LACK OF GUIDELINES

The Local Government Negotiation Forum (LGNF) was kept at arm's length by the government. A Local Government Negotiation Forum (LGNF) adviser, asserted that, for various reasons, the Cabinet was unable or unwilling to approve the progress in the Local Government Negotiation Forum (LGNF) and to issue policy guidelines to negotiators. This delayed the process for considerable periods, as the statutory representatives could not commit themselves without authorization from their principals (Cloete, 1995: 32). This led to another problem, namely a lack of direction and consensus among the various component members of the statutory delegation. This forced officials to take the lead, and even exceed their mandates in order to make progress (Cloete, 1994: 16).

5.4.4. HETEROGENEITY *VERSUS* HOMOGENEITY OF DELEGATIONS

The heterogeneity of the statutory delegation was identified as a major problem when it came to providing a common policy position (Cloete, 1994: 16). There were representatives from central, provincial and local governments as well as members of the National Party (NP), Conservative Party (CP) and Democratic Party (DP).

Conversely, the South African National Civic Organization (SANCO) was a more homogeneous caucus, with fewer interests to please. Cloete (1994: 16) suggests that it was, in every respect, better prepared for negotiating sessions. Indeed, the non-statutory delegation had excellent research back-up such as the Johannesburg-based non-governmental (NGO), Planact. The rather fissiparous statutory delegation had no comparable research back-up.

5.4.5. THE LOCAL GOVERNMENT TRANSITION ACT (LGTA) – POORLY FRAMED LEGISLATION

The Local Government Transition Act (LGTA) has turned out to be a difficult piece of legislation to implement. There were cumbersome and ambiguous clauses which made local government practitioners' lives very difficult. This was partly due to the fact that the legal and constitutional framework for local government was a product of last-minute effort (Christianson, 1994: 28).

Local government was only dealt with at a relatively late stage of the multiparty negotiations. A senior Local Government Negotiation Forum (LGNF) (non-statutory) negotiator, Thozamile Botha, remarked that local government was forgotten when discussions at the World Trade Centre took place. It was not addressed in the earlier constitutional discussions. As late as September 1993, the Technical Committee on the Constitution reported that no contact had been made with the Local Government Negotiation Forum (LGNF) (*Cape Times*: 29 September 1993).



5.4.6. METROPOLITAN GOVERNMENT

Besides these general criticisms, one can also express specific concerns that metropolitan government was not dealt with adequately at the Local Government Negotiation Forum (LGNF). There are cogent criticisms suggesting that the Local Government Transition Act (LGTA) was aimed primarily at stand-alone urban areas where the problem was to combine single white local authorities and black local authorities. The complexity of metropolitan areas and the issue of rural areas were not covered adequately by the Act. For example, Simkins (1993) states that the Local Government Negotiation Forum (LGNF) approach seemed more or less workable in a relatively short time for smaller places, but not cities.

5.5. CONCLUSION

In evaluating the Local Government Negotiating Forum and the application of the Local Government Transition Act (Act 209 of 1993) in the pre-interim and interim phase, one must accept that this process was flawed, but one must not lose sight of the fact that over 80 years of municipal apartheid needed to be negotiated. This process led to momentous decisions that fundamentally altered the shape of South African local government between 1994 and 1996.

What also needs to be stressed is that the demarcation process took place in highly-politicized circumstances. The pre-interim process involved the creation of local government negotiating forums and transitional local government models. Party political fighting bedevilled the creation of functioning pre-interim local government models. Likewise, the interim phase was about the demarcation of boundaries for election purposes. Temperatures began to rise as political parties began pushing particular boundary configurations which they thought would be to their electoral advantage.

The system of metropolitan government was also, in many respects, an unsatisfactory political compromise. The definition of a metropolitan area and

the nature of metropolitan-local relationships were amongst the issues which became areas of serious political contestation.

Chapter 6 focuses on the main local government features of the Final Constitution which was certified and signed in December 1996. Certain provisions of the Final Constitution came into effect on 4 February 1997, and a preliminary analysis of the operation of these new provisions will be undertaken. While both Constitutions had chapters on local government, there were significant differences between them which will be discussed. The chapter will also examine the relevant provisions of the Local Government Transition Act Second Amendment Act which was promulgated in November 1996 and the eminence of the Local Government Municipal Structures Act, 1998 (Act 117 of 1998).