

**The Restructuring (Systemization) of Local Government  
under the  
Constitution of the Republic of South Africa, 1996**

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## Abstract

In recent years South Africans have become accustomed to the fact that the local sphere of government is part and parcel of the new democratic structure of government in the Republic. Today, all local governments are clothed with a new status, a new autonomy and a distinctive character with specifically entrenched constitutional powers and objects. Notwithstanding its newfound importance, all local government institutions had to be transformed and restructured to fit into an entirely new constitutional framework. Such a restructuring process was an often arduous and time consuming process. The restructuring furthermore required an entire overhaul of all municipal authorities since the new Constitution requires mainly parliament to add substance to a simple constitutional framework. Parliament has recently completed its constitutional obligations in respect of the restructuring of local government and a completely new legal order regulating and managing all local government structures in South Africa has been developed and enacted. All municipal role players must now constructively and purposefully implement and enforce the various new legal requirements.

This new research under the title, The restructuring of Local Government under the Constitution of the Republic of South Africa, now seeks to systemize and structure the new local government legal dispensation. Spanning over 22 chapters, this work covers almost all legal aspects of the new local government dispensation and addresses, *inter alia*, aspects such as the new status of local governments, the impact of the Constitution on municipal affairs, the various objectives and challenges facing all municipalities, the new legal nature of local government institutions, a discussion of the principles of co-operative government relevant to the local sphere of governance, a look at the new models of local authorities, the demarcation of municipal boundaries, the composition and functioning of local government structures, the role and importance of traditional leadership in municipal decision making, an overview of the entrenched powers and functions of municipalities, aspects concerning municipal services and sustainable service delivery, as well as the important principles relating to municipal finances and fiscal management.

**Key Terms/ Words**

- Autonomy
- Agency
- Authority
- Bill of Rights
- Budget
- By-laws
- Capital
- Committee
- Community
- Constitution
- Co-operation
- Debt
- Delegation
- Demarcation
- Election
- Finance
- Government
- Levies
- Mayors
- Municipalities
- Organs of state
- Parliament
- Political
- Rates
- Revenue
- Service
- Ward

## Preface

Local government, being the sphere of government that exists the closest to the people of a state, has often been described as the most important sphere of government. Since municipal institutions affect the life's of all people living within the territory of a state, they are rightly regarded as the backbone of a balanced democracy and as essential service provides, from the cradle to the grave. An effective and efficient local government system is therefore of obvious importance. If the local sphere of government does not work properly then the state in general will not work. Furthermore, all municipal authorities are inextricably linked to the people of the state. If a sound and stable local democracy is not ensured, then the state itself is in danger of collapsing.

With the birth of a new constitutional order for South Africa, the entire local government dispensation had to be restructured and transformed. Contrary to the restructuring of the two higher spheres of government, the Constitution of the Republic of South Africa 1996 only incorporated a simple framework for local government and mainly left the completion of new local government dispensation to parliament. Parliament, mandated by the Constitution, was tasked to enact various new laws in order to facilitate the new municipal dispensation. All new laws however had to comply with the new constitutional requirements and supreme constitutional demands. Over the last decade all local government institutions in South Africa were totally restructured and transformed into a single uniformed system of local governance in which all municipalities were afforded a new status, new powers and functions and a new constitutionally entrenched vision of achieving specific municipal objects and to be generally developmental in nature. This new legal and political system essentially requires a re-appraisal of the manner and effectiveness in which local governments fulfil and achieve their constitutional and other related legal duties and responsibilities.

In the new legal dispensation, local government institutions cover the entire territory of the South African state. This phenomenon is generally referred to as a system



of wall-to-wall municipal governance. Since municipalities are mainly tasked with providing essential services to their local residents, they directly affect the lives of all South African inhabitants. If essential services are provided in a sustainable and affordable manner, municipalities will facilitate the creation a sound foundation for economic development, poverty upliftment and the overall creation of a better future for all. Local governments can however not achieve their new goals on their own and the support and assistance of the two higher spheres of government is a *sine qua non* for any successful local government dispensation. All spheres of government must work hand in hand to ensure an overall government which fosters a system of truly cooperative governance, as is constitutionally required. As a whole, local government forms an important link between the people of the state and the highest political decision-makers. In essence, local governments create a nationwide network that not only links the three spheres of government together but also creates a laboratory for truly democratic governance and grassroots democracy.

This research was undertaken in an effort to help explain the new legal dispensation regarding local government in South Africa. The work explains the new legal requirements and also evaluates the extent to which the new system complies with the general constitutional obligations. The work further underpins the new partnership between the three spheres of government and sets out the local sphere's duties and responsibilities. It also aims to systemise and structure the new local government legal dispensation. The work is presented in simple and plain language, which in turn should facilitate a better understanding of the legal rules and participation of all role players in the new legal order.

B Bekink

February 21, 2006

## **Dedication / Acknowledgements**

This research is dedicated in loving recognition, to my wife Mildred Bekink and my two children Gerrit-Jan and Anne-Mart, for their never-ending love, support and encouragement. I acknowledge my family in general, close friends and genuinely interested colleagues. A special mention is made of Ms Juanita Larkin for all her assistance and patience. Without her typing-inputs, this work would probably not have materialised. My final praise and appreciation is given to my Heavenly Father for His endless blessings and undeserving love.

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## Introduction

### 1.1 Introduction

It is generally accepted that the interim Constitution<sup>1</sup> and the Final Constitution<sup>2</sup> of the Republic of South Africa were milestones in the development of constitutional law in South Africa. The new constitutional order represents a radical change from a system of parliamentary sovereignty in the hands of a minority government to a truly democratic constitutional state. The Constitution is now entrenched as the supreme law of the South African state, and any law or conduct inconsistent with it is invalid.<sup>3</sup>

Within this new constitutional dispensation, the government of the Republic has been divided into three spheres. The Constitution determines that the government be constituted as national, provincial and local spheres, which are distinctive, interdependent and interrelated.<sup>4</sup> Each of the three spheres has been accorded specific constitutional powers, duties and responsibilities. The text of the Constitution deals mainly with the powers and functions of both the national and provincial spheres however. The third sphere, or local government sphere, is to a large extent neglected in the constitutional text, since the constitutional drafters have opted to include only a simple framework for local government. The completion of the legal framework of the local government sphere was left mainly to the national legislature and, in some instances, the provincial legislatures.

With the commencement of the interim Constitution on 27 April 1994, local government embarked on a process of transformation from administrative institutions under the control of provincial authorities in the former apartheid state to a non-racial

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<sup>1</sup> 200 of 1993, hereafter referred to as the interim Constitution (IC).

<sup>2</sup> Previously the "final" Constitution (FC) was referred to as Act 108 of 1996. It should however be noted that according to the Citation of Constitutional Laws Act 5 of 2005 any reference to the Constitution of the RSA must be construed as a reference to the Constitution of the Republic of South Africa, 1996. No act number is to be associated with the Constitution or any law amending the Constitution. This change to the reference of the Constitution of the RSA was already pointed out by constitutional scholars in 1998. Refer to Malherbe EFJ "Die nommering van die Grondwet van die RSA 1996: Vergissing of onkunde?" 1998 *TSAR* 140. For purposes of this work, any reference to the Constitution should be construed as a reference to the Constitution of the RSA, 1996.

<sup>3</sup> Refer to s 2 of the Constitution.

<sup>4</sup> See s 40(1) of the Constitution.



and democratic sphere of government. Although the transformation was initiated under the interim Constitution and the Local Government Transition Act<sup>5</sup> of 1993, the restructuring was to be completed under the Final Constitution of 1996 and the subsequent national legislation enacted under the Constitution.

The transformation and restructuring initiative was a long and sometimes difficult process. Since local government is operational throughout the territory of the state and affects the lives of all people in a direct and ongoing way, the old dispensation could not be changed overnight, and provision had to be made for phases of gradual transformation. The Local Government Transition Act provided for three phases, during which the new system of local government had to be implemented. The *pre-interim phase* lasted until the first elections for local government were held in 1995. The interim phase commenced after the local elections, held in November 1995 and in March 1996.<sup>6</sup> The elections took place in terms of existing laws, but the premiers of the provinces could promulgate additional regulations. The final phase started with the local government elections held in December 2000, although not all local government matters mandated by the Constitution were in place. National government still had to enact various national laws, such as the Property Rates Act<sup>7</sup> and the Municipal Finance Management Act<sup>8</sup>. These Acts were completed and enacted only during 2004.

Within the broad constitutional framework, Local Government law is probably one of the most uncertain and difficult fields of law with which to work. Local Government law not only encompasses municipal legislative and executive actions, it also operates within a legal framework where there are national, provincial and local legal requirements. An aspect that makes this field of law even more complex is the fact that many of the so-called “old order” laws that were in place before the new constitutional transition was initiated are still in place and still have the force of law. Although the broad constitutional framework relating to local government law has been finalised, it is anticipated that legal reforms will continue to dominate the local government legal scene for many years to come.

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<sup>5</sup> 209 of 1993.

<sup>6</sup> It should be noted here that although all local government elections were to be held in November 1995, political unrest in certain provinces resulted in the postponement of the election until March 1996.

<sup>7</sup> 6 of 2004.

<sup>8</sup> 56 of 2003.

## **1.2 Research questions and research methodology**

In light of the above, it becomes obvious that the Constitution has had a conclusive impact on and significance for all three spheres of government, particularly for the various new local government structures. However, the question remains as to what extent the new legal dispensation of local government complies with the various constitutional demands and requirements.

In an effort to answer this question, the aim of this research is twofold:

- Firstly, to provide a systematic and clear exposition of the various constitutional and other national legislative provisions that relate and structure the new local sphere of governance. The objective is not only to systemise the legal provisions but also to subdivide the particular field of law so that it becomes more user friendly and accessible.
- Secondly, to evaluate the extent to which the various constitutional demands and requirements relevant to the new local government legal dispensation have been complied with.

In order to achieve these goals, it was deemed necessary to distinguish between the broad principles or values of the South African constitutional law and the specific key principles that underpin the new local government legal dispensation. This distinction is made in this chapter, and both the general principles of the South African constitutional law and the key principles relating to local government are systematically presented, analysed and explained. Finally, an effort has been made to reconcile and link all the relevant principles and to create a unified structure for the research as a whole.

## **1.3 Founding principles of the new South African constitutional order**

### **1.3.1 Introduction**

As was stated above, the new constitutional dispensation of South Africa has changed the legal and governmental system radically.<sup>9</sup> For the first time in South African legal history, the country has adopted a Constitution which not only is entrenched as the highest law of the state but which also manifests itself as the foundation of a new South African legal order. In general, the new Constitution is regarded as an autochthonous constitution which incorporates both universal and uniquely

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<sup>9</sup> See ss 1 and 2 of the Constitution.

home-grown features. Some uniquely defined features include an expansive and modern Bill of Rights, institutions to enhance democracy, principles of co-operative government and a separate constitutional court with the necessary judicial authority to oversee constitutional compliance and protection. The text of the Constitution furthermore reflects the history of the South African society and therefore provides an important tool for constitutional interpretation and social development.<sup>10</sup>

Broadly speaking, the main aim of the Constitution is twofold. In the first instance, it explains and creates the various state or government bodies that operate and exercise state powers within the state. It allocates such powers to such bodies and also determines how such powers must be exercised. Secondly, the constitution protects individual rights and freedoms and thereby guards against excessive and abusive state powers. It is important to note at this point that the Constitution not only protects against unlawful limitation of certain rights but also demands positive state action to ensure the fulfilment of socio-economic rights. The various state bodies are divided into three branches, namely a *legislative* branch, an *executive* branch and a *judicial* branch. Each branch of government has its own powers and functions. Such powers are generally defined as *government authority*. Since the new constitutional dispensation has moved closer to an integrated model of federalism,<sup>11</sup> government authority has further been divided amongst three spheres of government. The Constitution specifically states that the South African government is constituted as a national, provincial and local sphere of government which are distinctive, interdependent and interrelated.<sup>12</sup> The judicial authority is vested in a national court hierarchy, and both the legislative and executive authorities have been divided amongst the three spheres mentioned above. In some instances certain powers or competencies are concurrent, and in others they are exclusive.<sup>13</sup> A specific determination of where and in whom a specific authority is vested is required constitutionally. Of all three types of government authority, legislative authority is generally regarded as the

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<sup>10</sup> Refer for example to the preamble of the Constitution.

<sup>11</sup> An integrated model of federalism refers to a system where although powers are divided, there is still an overarching integration between the various role players.

<sup>12</sup> See s 40(1) of the Constitution.

<sup>13</sup> Refer specifically to sch 4 and 5 of the Constitution.

most important.<sup>14</sup> Such authority influences and impacts on all aspects of the law and is thus more influential.<sup>15</sup>

Suffice it to say that in order to understand and exercise the various authorities within the state, a sound understanding and study of the Constitution is necessary. The Constitution not only constitutes a nation state or body politic, it also determines the internal functioning of all state bodies (also known as organs of state), and it entrenches the rights and freedoms of the entire citizens corps. The South African Constitution is a written law which establishes the state itself. In *Attorney-General v Dow*<sup>16</sup> it was mentioned that a constitution paints in broad strokes on a large canvas all the institutions of the state. It allocates powers, defines relationships between government institutions *inter se* and also regulates the relationship between the government and the citizens of the state. The constitution concerns itself with political authority and the exercise of governmental powers. It involves matters of both substance and procedure.

In order to understand and interpret the text of a constitution, two approaches have been identified. The first approach, also known as the *descriptive approach*, regards a constitution as a codification of constitutional information. No critical or normative evaluation is done. In contrast, the *value-orientated or normative approach* entails the law/constitutional law of a state being studied critically and is compared against higher (legal) values within the overall legal dispensation. These values are not created by the state at will, but are basic values that have been founded on the will of the general population. South Africa follows the value-orientated approach to constitutional law. Constitutional law is studied critically and is tested against various values that have been constitutionally entrenched.<sup>17</sup> In a value-orientated system, the government is bound by the underlying values incorporated in the constitution, and therefore the exercise of government authority can generally be justified.<sup>18</sup> The underlying values not only create substantive requirements, they also demand specific

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<sup>14</sup> Refer to Rautenbach and Malherbe (1999) 124.

<sup>15</sup> This is not necessarily true for the third sphere or local sphere. According to s 156(1), it would seem that executive authority is of more importance than local legislative authority. At local level, legislative authority is dependent on the authorisation of local executive authority. See s 156(2) of the Constitution.

<sup>16</sup> 1994 (6) BCLR 1 T.

<sup>17</sup> See the founding provisions of s 1 and also the values set out in ch 2 of the Constitution.

<sup>18</sup> South Africa is generally regarded as a (social) constitutional state. The Constitution is the supreme law, and the government is also bound by the law/Constitution.

procedural requirements.<sup>19</sup> Finally, and since the state comprises people with diverse political views and ideals, the constitution can be fully explained and understood only within the broad political context, its unique history and the particular needs and social demands of its people.

### **1.3.2 Basic constitutional features and principles**

In view of the fact that the state is in a much stronger position of authority vis-à-vis the people living in its territory, various mechanisms have been constitutionally created and entrenched in order to protect the individual against excessive or abusive state actions or conduct and to ensure that the state fulfils its constitutional responsibilities. These principles thus have important implications for all branches exercising government authority, and are briefly identified below.

#### **1.3.2.1 Constitutional Supremacy**

The Constitution proclaims itself as the supreme law of the Republic of South Africa and also states that any law or conduct inconsistent with the Constitution is invalid. Furthermore, all obligations imposed by the Constitution must be fulfilled.<sup>20</sup> Both substantive and procedural requirements of the constitution relevant to all government authority must therefore be complied with or fulfilled.

#### **1.3.2.2 Constitutional Entrenchment**

The contents of the Constitution are also specifically protected or entrenched. Entrenchment refers to the manner in which the Constitution is protected against uncontrolled future amendments. In general, the South African Constitution is regarded as an *inflexible constitution*. Such inflexibility means that although the Constitution can be amended, such amendments are not easy and require special procedures and special majorities.<sup>21</sup>

#### **1.3.2.3 Justiciability**

Constitutional supremacy and entrenchment would mean very little if the provisions of the Constitution were not justiciable. In order for a supreme constitution to be effective and valuable, the judicial authority of the state must have the power to enforce the provisions and obligations of the constitution. Under the 1996 Constitution, the South African courts have been afforded significant powers to enforce the provi-

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<sup>19</sup> Compare ss 9 and 35, for example.

<sup>20</sup> See s 2 of the Constitution.

<sup>21</sup> Refer to s 74 of the Constitution. The result of s 74 is that the South African Constitution is more entrenched in comparison with other legislative enactments.

sions of the Constitution. According to section 172, a court with appropriate jurisdiction “must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency”.<sup>22</sup> Section 172 also provides for various other powers that a court may exercise when it makes an order that is just and equitable in constitutional matters. Appropriate courts also have special inherent powers.<sup>23</sup>

Apart from the abovementioned invalidation authority, the Constitution also determines that: “[a]n order or decision by a court [with appropriate jurisdiction] binds all persons to whom and organs of state to which it applies”.<sup>24</sup> Finally, the Bill of Rights states that it applies to all law and binds the legislature, the executive, the judiciary and all organs of state. When applying the Bill of Rights, a court must apply or, if necessary, develop the common law to the extent that legislation does not give effect to a right in the Bill. Courts are also obligated, when interpreting any legislation and when they develop the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.<sup>25</sup>

It should be noted on this point that any law or conduct which ostensibly is inconsistent with the Constitution does not become invalid merely because of such apparent inconsistency. An appropriate court must first determine such inconsistency with the Constitution, whereafter such inconsistency is automatically constitutionally invalidated.<sup>26</sup> It is part of the principles of judicial authority and justiciability that a determination of constitutional inconsistency can be made only by a judicial body with the necessary legal jurisdiction.

#### **1.3.2.4 Constitutionalism and a Constitutional State**

Since the concepts of constitutionalism and a constitutional state are closely related to one another, they are grouped and discussed together. Constitutionalism symbolises a state that is founded on the basic principles of the law. The government should derive its powers from the law, and these powers are limited to those powers determined by the law. Government powers are mostly defined in the form of a writ-

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<sup>22</sup> This section should be read in conjunction with s 2 of the Constitution.

<sup>23</sup> Read also s 173 of the Constitution.

<sup>24</sup> See s 165(5) of the Constitution. Special provision for the independence of the courts is also provided for.

<sup>25</sup> See ss 8 and 39 of the Constitution respectively.

<sup>26</sup> Read ss 172 and 2 of the Constitution respectively.

ten constitution.<sup>27</sup> A constitutional state expands on the concept of constitutionalism, as it entails that the law is supreme and that even the state is bound by the law. It should be clear that the South African constitutional dispensation incorporates both concepts.<sup>28</sup>

### 1.3.2.5 The rule of law principle

The rule of law principle is attributed to the English constitutional writer and lawyer AV Dicey. The rule of law requires a government to act in accordance with pre-announced, clear and general rules. Oversight of compliance with the law is provided by impartial courts according to fair procedures. The rule of law therefore stipulates that no person may be deprived of his or her basic rights through the exercise of arbitrary and wide discretionary powers of the state; only courts may limit such rights. Government actions or conduct must be exercised in terms of the law, and the state is bound by the law. No-one, not even the state, is above the law, and no power, including state power, may be exercised, unless so authorised by the law. Actions or conduct without lawful authorisation is unlawful and invalid.

The rule of law principle as incorporated in the South African Constitution thus requires all actions or conduct of the government to be lawfully or legally authorised. This is often referred to as the *legality principle*. In order for conduct or actions to comply with the legality principle, two further aspects must be complied with. Firstly, there must be a rational relationship between the law and the achievement of a legitimate governmental purpose. Since the state may not act capriciously or arbitrarily, state action without a rational connection is contrary to the rule of law. Secondly, no state action may infringe on basic fundamental rights, unless such infringement is authorised in terms of the law itself.<sup>29</sup> The principle of the rule of law is specifically entrenched in the South African Constitution.<sup>30</sup>

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<sup>27</sup> Government may not exercise any power or perform no function beyond those powers and functions conferred upon them by law. In the set context, see *Minister of Correctional Services v Tobani* 2003 (5) SA 126 ECD.

<sup>28</sup> The Constitution is supreme, the state is bound by the constitutional provisions and state powers and functions are defined by the law, including the Constitution itself.

<sup>29</sup> See for example the cases of *NNP v Government of the RSA* 1999 (3) SA 191 (CC) and also *Pharmaceutical Manufacturers Association of SA v In Re: Ex parte President of the RSA* 2000 (2) SA 674 (CC).

<sup>30</sup> See s 1(c) of the Constitution, which states that: "The Republic of South Africa is... founded on the following values: ... (c) Supremacy of the constitution and the rule of law".



### 1.3.2.6 Principle of Democracy

South Africa prides itself as a modern democratic state. It is generally accepted that democracy is universally regarded as an essential element or principle of a true constitutional state. Democracy in its original sense means that a government can be legitimate only if it has the consent of the majority of its citizens. Democracy thus relates to the power of the people. However, the principle does not mean that the majority has unfettered powers. Majority decision-making only is not democracy. Even the majority may not limit or take certain rights or principles away. Democracy thus translates into majority decision-making within a system of predetermined rights, procedures and principles.<sup>31</sup> Since the principle of democracy is specifically protected in the South African Constitution, any law or conduct inconsistent therewith will be invalid.<sup>32</sup> Three forms of democracy are specifically recognised by the Constitution.<sup>33</sup> Finally, one must also look at the principle of *constitutional democracy*. Constitutional democracy means that elected representatives in government cannot adopt legislation freely and without control. The particular constitutional system allows for various checks and balances. Such checks and balances include: free and fair elections, regular elections, universal suffrage, protection of minority interests, accountability, openness and judicial oversight. These principles are all present under the new South African constitutional dispensation.

### 1.3.2.7 The Bill of Rights and other founding values

It was mentioned earlier that South Africa follows a value-orientated approach to constitutional interpretation. These values are particularly enumerated in the Bill of Rights, as well as under the founding provisions of section 1. The South African Bill of Rights protects various universally accepted fundamental rights, and it specifically affirms the values of *human dignity, equality and freedom*. These values are also emphasised in section 1 and the preamble to the Constitution.<sup>34</sup> Apart from the three core values, the Constitution further incorporates the values of non-racialism, non-sexism, adult suffrage, a national common voters' roll, regular elections and a multi-

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<sup>31</sup> Refer to *Numsa and others v Bader Bop (Pty) Ltd and another* 2003 (3) SA 513 (CC). People are protected through certain basic rights, such as the prohibition against slavery, to such an extent that not even the majority is entitled to allow for such a practice again.

<sup>32</sup> Read the preamble, ss 1, 2 and 7 of the Constitution.

<sup>33</sup> The forms are representative democracy, participatory democracy and direct democracy. See also ss 57, 59, 66, 67, 19 and 19 of the Constitution.

<sup>34</sup> Refer to ss 1, 7, 36 and 39 of the Constitution.



party system of democratic government that should ensure *accountability, responsiveness and openness*. All powers and state bodies must exercise their respective powers and functions in a way that complies with such values.<sup>35</sup>

Finally, the South African Constitution also indirectly incorporates the African principle or value of *Ubuntu*. In the case of *S v Makwanyane*<sup>36</sup> the constitutional court confirmed that the concept of *Ubuntu* underlies the new South African constitutional dispensation. *Ubuntu* is synonymous with the values of humaneness, social justice, fairness, rehabilitation and the abolition of victimisation, crime and cruel inhuman treatment.

### 1.3.2.8 The Principle of separation of powers

The principle or doctrine of separation of powers is fundamental to almost all constitutional systems. The *trias politica*, as it is also known, requires that governmental powers be divided into three categories, namely *legislative* powers, *executive* powers and *judicial* powers. Each power or authority is then exercised by specific bodies of state (also known as organs of state). These bodies are then referred to as legislative bodies, executive bodies and judicial bodies. The chief objective of the doctrine of separation of powers is to prevent the excessive concentration of governmental powers in one person or body. Separation of powers is specifically provided for in the new South African constitutional dispensation. Legislative authority is vested in parliament, the nine provincial legislatures and also in 284 municipal councils.<sup>37</sup> Executive authority again vests in the president, the nine premiers and the 284 municipal councils.<sup>38</sup> Judicial authority for the entire Republic of South Africa is vested in the courts.<sup>39</sup> It should be noted that the division of authority is not done on an absolutely rigid basis, and overlaps between the different branches of government do occur.<sup>40</sup> Overlaps provide an important check and balance on the exercise of a particular power or authority.

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<sup>35</sup> See the founding values set out in s 1(a)-(d) of the Constitution.

<sup>36</sup> 1995 (3) SA 391 (CC).

<sup>37</sup> See ss 43, 44, 104 and 156 of the Constitution respectively.

<sup>38</sup> Refer to ss 85, 125 and 151(2) of the Constitution.

<sup>39</sup> S 165(1) of the Constitution.

<sup>40</sup> Refer to *In re: Certification of the Constitution of the RSA* 1996 (4) SA 744 (CC). The court confirmed that an absolute separation was not required.

### 1.3.2.9 Devolution of power and the principle of co-operative government

The new South African constitutional dispensation has evolved into a unique multi-tiered governmental order. The pre-1994 governmental structure of South Africa provided for different levels of government, but the lower levels, especially the local government level, were at the mercy of the national level. No integration or co-ordination was provided for. The Constitution now provides for spheres of government and for specific constitutional principles, ensuring co-operation and intergovernmental relations.<sup>41</sup> Such provisions enhance features of co-operative federalism and intergovernmental co-ordination, rather than competitive political conduct. It is also accepted that the new system has moved closer to a so-called *integrated model of federalism*.<sup>42</sup> Such a model provides for not only principles of co-operative government, procedures to settle intergovernmental disputes and provincial participation in the national parliament, it also provides for the *devolution of powers or functions* between the various spheres of government.<sup>43</sup> The devolution of powers or functions is especially important to the different legislative authorities, since a particular authority can exercise only such authority as is constitutionally allocated to it.<sup>44</sup> Particular care must be exercised to ensure that a particular legislator acts within its authority, as is determined by the Constitution. From the provisions of chapter 3 of the Constitution, it becomes clear that all spheres of government in South Africa are constitutionally obligated to assist and support one another. Especially the national sphere should assist and support the lower spheres.<sup>45</sup> Whereas exclusive powers should not cause problems between spheres, concurrent powers could more easily lead to internal conflicts. To address such disputes, the Constitution specifically provides for a mechanism to settle them.<sup>46</sup>

Co-operation among spheres is further promoted via the authorisation of spheres to *delegate and assign* their powers or functions to other spheres. The Constitution provides for a general authorisation to delegate executive and legislative functions

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<sup>41</sup> See ss 40(1)-(2) and 41(1) respectively.

<sup>42</sup> For more on this topic refer to De Villiers (1997) "Intergovernmental relations in SA" SAPL 198 and De Villiers (1994) "Intergovernmental relations: Bundestreue and the duty to co-operate from a German perspective" SAPL 430. See also Devenish (1998) 109.

<sup>43</sup> In this regard, the South African Constitution provides specifically for exclusive and concurrent legislative competencies. Refer to Sch 4 and 5 of the Constitution respectively.

<sup>44</sup> Encroachment by one sphere on the authority of another is unconstitutional, unless the Constitution allows otherwise.

<sup>45</sup> See ss 125 and 154 of the Constitution.

from one government to another and also to perform agency services for other governments.<sup>47</sup> Such authorisation is not without limits and must be exercised within the constitutional mandate. Parliament may, for example, delegate to other spheres any legislative power, except the power to amend the Constitution.<sup>48</sup> Provincial governments may also assign legislative powers to local governments.<sup>49</sup> Lastly, intervention into and supervision of the affairs of a lower sphere by a higher sphere is also provided. Since such interventions can have serious consequences, they must be strictly controlled.<sup>50</sup>

### **1.3.2.10 Miscellaneous Aspects**

The Constitution furthermore incorporates other provisions that have important implications for the exercise of government authority within each of the three spheres of government. Such aspects or provisions include the courts and the administration of justice,<sup>51</sup> state institutions supporting constitutional democracy,<sup>52</sup> security services,<sup>53</sup> principles governing the public administration<sup>54</sup>, the recognition of traditional leaders<sup>55</sup>, aspects relating to governmental finance<sup>56</sup> and certain general provisions which *inter alia* deal with aspects of international law and provide for specific definitions.<sup>57</sup> Especially the definitions of agency and delegation, diligent performance of obligations, national and provincial legislation and organs of state are of particular importance.<sup>58</sup>

## **1.4 Key principles underpinning the new local government legal dispensation**

### **1.4.1 Introduction**

Mention was made above that apart from the totally revised constitutional system in South Africa, the entire local government dispensation had to be transformed and restructured under constitutional instructions. Notwithstanding the fact that all local

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<sup>46</sup> See s 146 of the Constitution.

<sup>47</sup> See for example s 238 of the Constitution.

<sup>48</sup> See s 44 of the Constitution.

<sup>49</sup> S 104 of the Constitution. Note that not only legislative powers can be assigned, executive powers can too. See ss 99 and 126 of the Constitution respectively.

<sup>50</sup> See ss 44, 100 and also 139 of the Constitution.

<sup>51</sup> Ch 8 of the Constitution.

<sup>52</sup> Ch 9 of the Constitution.

<sup>53</sup> Ch 11.

<sup>54</sup> See ch 10 of the Constitution.

<sup>55</sup> See ss 211 and 212 of the Constitution.

<sup>56</sup> Refer to ch 13 of the Constitution.

<sup>57</sup> See ch 14 of the Constitution.

<sup>58</sup> See ss 236, 237, 238 and 239 of the Constitution.

governments form part of the governmental system in the new state and thus must comply with the overall constitutional requirements mentioned above, municipal governments have also been invested with unique features and principles that underpin the new local government legal dispensation. The unique features and principles have been specifically designed to facilitate a restructured and transformed local government dispensation that would achieve constitutionally defined objects and that would adhere to certain constitutional demands. In order to evaluate the extent to which the new local government legal order complies with the constitutional requirements, it is essential to identify and articulate the various principles and norms and then to assess the extent of compliance to such principles or norms. Consequently, the various principles and norms that underpin the new local government dispensation are systematically set out below and are briefly examined. Reference is then made to the relevant chapters of the research where such principles and norms are discussed and explained more fully. The final chapter then seeks to reconcile the principles and norms and provides an overall assessment and conclusion.

#### **1.4.2 *The creation of a non-racial and democratic local government dispensation***

It is a specific aim of the new constitutional order to create spheres of government where people of all races would have equal rights and opportunities and where every citizen has a vote for his or her political representative of choice. The previous local government system did not allow for such a system, and people were divided because of colour and race and did not share the same political and civil entitlements. As the government closest to the people, local government had to establish what is regarded as the backbone of a new democratic order, where all people of South Africa are united and are granted equal treatment as human beings. Constitutionally, no distinction on racial or other grounds is permitted, and the general elements of a democratic order are promoted. (See chapters 1, 3, 4 and 5 of this work together with Constitutional Principle (CP) I as set out in Schedule 4 of the interim Constitution.)

#### **1.4.3 *The nature, rights and duties of restructured municipal governments***

In the legal system prior to 1994, the legal nature and also the rights and duties of municipal governments were shrouded in doubt and uncertainty. The new dispensa-

tion had to rectify such uncertainties and had to clarify the legal nature of a municipal government as well as its general rights and duties. (Refer to chapter 8 of this work.)

#### **1.4.4 *Local government within a system of co-operative governance***

In light of the constitutional confirmation that the government of the Republic of South Africa is constituted as national, provincial and local spheres, local government institutions are now undoubtedly part and parcel of the overall governmental structure of the South African state. The Constitution further demands that all three spheres are obligated to observe and adhere to certain principles that govern the envisaged system of co-operative government. Notwithstanding the fact that local governments are part of the governmental structure, they are often dependent on the two higher spheres, and thus the principles of co-operative government are of particular importance to them. (Read chapter 9 of this work.)

#### **1.4.5 *The new structure and internal framework for local government***

It was integral to South Africa's constitutional reform that the final Constitution had to provide for a proper framework for the structures of local government. Since the entire constitutional dispensation was subject to change, this meant that a new structure and framework for local government had to be created. The Constitution provides for only a basic framework for the new structures of local government, and it was envisaged that national legislation would complete the fuller content of the framework. Various national laws were indeed enacted, and a new structure and internal framework for all local government structures was created. The new structure and framework is of particular importance in ensuring the fulfilment of the objects and duties of all municipal governments. (Refer to chapters 10, 12 and 15 of this work.)

#### **1.4.6 *New boundaries for local government institutions***

The Constitution demands that the whole of the territory of the Republic of South Africa had to be incorporated within a municipal jurisdiction. This constitutional obligation resulted in both the external re-demarcation of municipal areas as well as the internal delimitation of municipal wards. Various legal requirements were laid down in order to facilitate and co-ordinate the establishment of new municipal jurisdictions. Apart from complying with the legal requirements, municipal boundaries also significantly impact on all municipal institutions regarding the effective exercise of their powers and duties and the fulfilment of their core municipal objectives. (For more on this point, see chapter 11 of this work.)

#### **1.4.7 Compliance with the founding values of the Constitution and the obligations under the Bill of Rights**

It is trite law post 1994 that the Constitution of the Republic of South Africa has been entrenched as the supreme law of the state. It thus follows that all constitutional obligations or requirements are of particular importance to all spheres of government. This is particularly true of municipal governments, which exist and function closest to the people living within the state as a whole. It therefore comes as no surprise that municipal governments should pay close attention to the founding values of the new legal order and also the fulfilment, protection, promotion and common respect for the fundamental rights that are incorporated in the Bill of Rights as part of the Constitution. (Read chapter 6 of this work.)

#### **1.4.8 The role and importance of the institution of traditional leadership in local government**

An issue that is somewhat unclear is the precise role and importance of the institution of traditional leadership in local government structures. Although constitutionally recognised and protected, the precise role of such institutions has not properly been defined. It was again left to the national government to expand upon the basic protection and recognition given to traditional leaders under the Constitution and to identify their role and importance more clearly. (More details and discussions are provided for in chapter 13 of this work.)

#### **1.4.9 The allocation of specific powers and functions to municipal governments**

As part of the certification process of the final Constitution, constitutional principles XX and XXIV respectively required that under the final Constitution, each sphere/level of government had to have appropriate and adequate legislative and executive powers and functions in order to fulfil their duties and to function effectively. A clear division of powers and functions between all three spheres was thus required. It was further also required that a framework for local government powers, functions and structures had to be set out in the Constitution and that the more detailed provisions regarding such powers or functions had to be determined within either parliamentary statutes or in provincial laws, or both. Extensive national laws have been enacted to comply with the abovementioned requirements. (See chapter 14 of this work.)

#### **1.4.10 *Internal functioning and new leadership requirements for local government***

Modern municipal governments are becoming more and more complex in their nature and functioning. Such complexities create new and demanding challenges on both the internal functioning and the leaders within such government structures. The new legal framework for local government was specifically tasked with creating effective and sufficient internal procedures and with ensuring and establishing an effective municipal administration with a strong and visionary political leadership. (Refer to chapter 15 of this work.)

#### **1.4.11 *Sustainable municipal service delivery***

One of the core objectives of the new local government legal order is to create a system of sustainable municipal service delivery. Without the sustained and effective delivery of municipal services, municipal settlements will not be able to grow and to provide for the basic needs of municipal communities. Services and also service delivery must be accessible, simple and, most of all, affordable. Various legal provisions have been included in the new legal order to ensure and facilitate such a system of service delivery to local communities. (Read chapter 16 of this work.)

#### **1.4.12 *A new personnel corps for local government***

No local government will be able to function properly or to achieve its overall objectives and obligations without a dedicated and properly trained municipal personnel corps. The Constitution thus specifically determines that all municipal governments are entitled to employ as many personnel as is necessary to ensure the effective performance of municipal functions and duties. Under the final responsibility of a municipal manager, each municipality must therefore employ the required personnel to fulfil its functions. Many different requirements and legal provisions must be adhered to, however. (See chapter 17 of this work.)

#### **1.4.13 *Municipal fiscal management and the exercise of fiscal powers***

The proper financial management and the diligent exercise of financial powers are essential elements of any effective and progressive government institution. Of course this is also the case within the new local government dispensation. Even under the interim Constitution it was constitutionally envisaged that the financial powers of all three spheres of government had to be clearly defined and entrenched within the constitutional text. Specific provision for appropriate fiscal powers and functions for the different categories of municipality had also been provided for. Equi-



table share in mainly national revenue and proper financial management and fiscal procedures had to be ensured. A comprehensive system has been put in place to address such important issues. (Refer to chapter 18 of this work.)

#### **1.4.14 *Municipal governance and core principles of a new public administration***

The new constitutional order also impacts directly on the manner on which the public administration in general functions. Since municipal governments are part of the overall public administration of the South African government, such constitutional requirements are of particular importance. Apart from basic values and principles governing the public administration that are entrenched in the Constitution, the new legal order also determines various other requirements that must be fulfilled within the new transformed municipal administrations. (Read chapter 19 of this work.)

#### **1.4.15 *Principles of municipal development planning, performance management, capacity building and public participation***

The new municipal dispensation incorporates and emphasises the core constitutional principles of development planning, performance management, capacity building and the enhancement of public participation in local government affairs. With reference to the principle of development planning, it will become evident that various aspects of local/municipal planning requirements have been decentralised to municipal governments. Proper municipal planning is essential to ensure effective and efficient municipal governments. Because of its importance, integrated development planning has become a core component of the new legal order.

Performance management and capacity building in turn relate to both the municipal staff and political components. If performance of municipal role players is not managed and controlled and if the internal capacity of municipal structures are not continuously strengthened, then municipal governments will hardly be able to fulfil and comply with their overall constitutional objectives and duties. Municipalities do not exist or function apart from their respective local communities, however. The main reason for the existence of local governments is to provide basic services to their local residents. In order to create and facilitate mutual respect and support, municipalities must work hand in hand with their communities to fulfil their obligations. However, such a relationship can be achieved only if local residents feel that they are consulted on important issues and that they are included in decision-making processes. The enhancement of governmental accountability and strengthening of



public participation in municipal processes and decisions are therefore constitutionally protected principles and must be provided for within a framework of certain minimum standards. (Compare chapter 19 and 20 of this work.)

#### **1.4.16 *The new status and relative autonomy of local governments***

It was mentioned above that under the new constitutional dispensation all local governments have been confirmed as distinctive, interrelated and interdependent spheres of government. This new inclusion within the overall structure of the state has significantly enhanced the status and autonomy of all local government institutions. Government spheres are not isolated from one another, however, and are compelled to function within a broader system of co-operative government. Apart from the fact that the Constitution distinguishes between the powers and functions of each sphere, the local sphere is still subjected to the control and supervision of both national and provincial governments. In many instances local governments are still lower in rank than their national and provincial counterparts. Such relative autonomy is mandated by the Constitution itself and is not as a result of a control-hungry national or provincial government. The relative autonomy of local governments is seen in the light of ultimately ensuring an effective and efficient third sphere of government. (See chapter 7 of this work.)

#### **1.4.17 *The essential objects of local governments***

The new constitutional dispensation specifically identifies five (5) core objects of local government in general. The objects are:

- to provide for a democratic and accountable government for local communities
- to ensure sustainable provision of services
- to promote social and economic development
- to promote a safe and healthy environment
- to encourage public involvement in the affairs of local government.

All municipalities are obligated, within their financial and administrative capacities, to achieve the abovementioned objects. In view of the nature of the objects, it is clear that they cannot be achieved or addressed in one particular chapter, but rather they are evident throughout the various chapters of this work.

#### **1.4.18 *Developmental duties of local government***

Apart from striving to achieve the core objects of local government, all municipalities are constitutionally obligated to fulfilling certain developmental duties. The principle of developmental local government basically means that a municipality must manage

and structure its internal functioning and planning processes in such a way as to enhance and ensure the basic needs of its community. The provision of basic and essential services, as well as the promotion of social and economic development are generally regarded as the core pillars of a generally developmental local government. It should, however, be emphasised that local developmental duties cannot be achieved by municipalities alone and that both higher spheres must be actively involved in creating proper programmes and initiatives that will enhance developmental progress. (Read chapter 7 of this work.)

### **1.5 Conclusion**

In the chapters that follow, all of the abovementioned constitutional prerequisites, as well as the extent to which the national government has fulfilled and complied with its constitutional obligations towards local governments are assessed. Some chapters deal with more than one constitutional requirement, whilst others with only one. In each chapter, specific reference is made to the extent of constitutional compliance. The concluding chapter aims at tying all the chapters together and at providing a general assessment of the extent to which the entire new local government dispensation complies with the mentioned constitutional imperatives.

**Legal developments within the domain of local government law are taking place so rapidly that a complete and up-to-date reference source is unattainable. For this reason, a cut-off date of 30 June 2005 has been decided upon. Developments and especially legislative amendments after the mentioned cut-off date are not necessarily included.**

## **A brief introduction to local government in South Africa**

With the introduction of a new constitutional order for South Africa on 27 April 1994<sup>1</sup> the former South African government had to undergo fundamental changes and reforms on all levels. Not only did the national and provincial governments have to be revised but, more specifically, the whole of the local sphere had to be transformed in compliance with the new constitutional mandate.

Both the interim Constitution and its successor, the final Constitution,<sup>2</sup> replaced the former system of parliamentary sovereignty with a new system of constitutional supremacy. Both constitutions contained comprehensive bills of rights in which the rights of all people in the country were enshrined.<sup>3</sup> All spheres of government were bound by the Bill of Rights, and the Bill of Rights also applied to all law.<sup>4</sup> A newly restructured judiciary, with the inclusion of a specialised Constitutional Court, was given the power and duty to oversee and control full compliance with the new constitutional standards and requirements. The former centralised government was furthermore replaced by a system of government with federal elements in which significant powers and functions were devolved to provincial and local authorities. The final Constitution, which completed the negotiated framework of transformation, established a new governmental structure on three spheres, which are distinctive, interdependent and interrelated.<sup>5</sup> The constitutional text further incorporated many basic principles and features which underlie the new order and with which all spheres of government and other organs of the state had to comply in future.<sup>6</sup> The basic principles and values embodied in the Constitution have a broad effect and

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<sup>1</sup> The date on which the interim Constitution came into force.

<sup>2</sup> The Constitution of the Republic of South Africa, 1996 which became the supreme law on 4 February 1997.

<sup>3</sup> See the Constitution s 7(1).

<sup>4</sup> See the Constitution s 8(1).

<sup>5</sup> See the Constitution s 40(1).

<sup>6</sup> Some of the basic features are the principle of constitutionalism, the rule of law, democracy and a system of co-operative government.

influence on many other provisions in the Constitution, which are thus important to all government structures, including local governments. The Constitution thus forms the foundation for all law within the state.

It is generally accepted that the pre-1993 constitutional dispensation had seriously damaged the spatial, social and economic environments in which people have lived, worked and raised their families. This was specifically evident within all municipal jurisdictions where people's lives and living standards were affected directly. Arguably the most critical functions of the new local government structure and reform process are to rebuild local communities and environments and, further, to establish a new foundation for a democratic, integrated, prosperous and non-racial society.

As was mentioned above, local government within the new constitutional order has been afforded specific status and is protected as a distinctive sphere of government. Local authorities are no longer a mere function of national or provincial governments. Apart from this entrenched status, the Constitution and other relevant legislation vest local government with specific functions and responsibilities in the process of building a new democracy and promoting socio-economic development and upliftment.

In light of the above, the importance of local government in the new structure is self evident. It serves as a counterweight to the concentration of powers on other levels, it brings the decision-making process closer to the local people, and it is thus better suited to ensuring public involvement. Local government has often been described as the cornerstone of ensuring an overall democratic government. It serves as the level of government that functions the closest to local residents and is involved in the rendering of essential services that are needed in all walks of life. One can truly regard a local government as an essential service provider "from the cradle to the grave".<sup>7</sup>

Within the abovementioned framework of the Constitution, local government had to be transformed into a service delivery-orientated sphere of government, committed to working with all interest groups and directed at achieving sustainable human settlements with enhanced quality of life. The framework of such transformation was set out in the White Paper on local government, which was published during March 1998. The White Paper, together with the constitutional requirements, provided the

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<sup>7</sup> Most local authorities provide for clinics and basic health services and also for the creation and maintenance of cemeteries.

basis on which the new system of local government had to be established. Within this framework new legislation was proposed and enacted in order to complete the overall structure and to achieve the constitutional requirements and objectives. In retrospect the White Paper was a unique document: it dealt with an entire sphere of government and served as a mini Constitution for the reform process.

The implementation and achievement of the goals and objectives of the reformed local sphere of government will require a supreme and constructive effort on the part of all people in our country. This responsibility is placed not only on the elected representatives and other political functionaries but also on the administrative personnel of local authorities and local residents themselves. Constructive participation on the part of all is of fundamental importance.

It is submitted that local government within the overall governmental structure of South Africa is of fundamental importance for stability and success of the state as a whole. Local government forms the backbone of the newly established democratic foundation and is also the part of government closest and most directly involved in people's day-to-day lives. Every person living within the territory of the state will fall within the jurisdiction of a local authority and will be directly and indirectly influenced through the powers and functions of such local authority. A full understanding of the role, powers, functions, objectives, developmental duties and provisions of services are thus of great importance for the politicians and local administrators, but they are more so for the local electorate and inhabitants. The Constitution provides only the framework for understanding and studying the legal system of local government; the completion of the system is to be found in various national and provincial laws.

## **The origins of urban development and the early establishment of local authorities**

### **3.1 Introduction**

For most of human history and development, human beings have lived a nomadic existence. People stayed in one place only for as long as shelter, food and safety were available. However, with the acquisition of knowledge in agriculture and farming, many people started constructing shelters or houses of a more permanent nature. This development caused people to move around less frequently, and the first informal settlements started to develop. In these early settlements almost all people were concerned with farming activities. With the gradual expansion of these settlements, not all people were needed for farming, and many started rendering other services within their respective communities. These services quickly became an important part of a community's existence and quality of life, and residents of communities soon became dependent on such services. In later developments these services became so important that communities devised various reliable arrangements to ensure regular and uninterrupted provisions of such services or provision of goods. These community-based institutions that protected and controlled the provision of basic and necessary services to the whole of the community led to the formation of the first informal local authorities.<sup>1</sup>

During the latter part of the 20th century, people became even more strongly community based, and the first signs of the enormous urbanisation that was to come became noticeable. During the main upsurge of urbanisation, many villages, towns and cities were created. It was generally the responsibility of the various local authorities established within each city or town to ensure the quality of life and also the provision of sustainable and essential services to the local residents.

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<sup>1</sup> For more detail, see Cloete (1997) 1.

### 3.2 The general development from farmland into urban settlements

Initially, all land in the world could be regarded as farmland, and urban areas thus originated from farmland. In order to establish urban developments, farmland had to be rezoned for residential purposes and had to be subdivided into smaller pieces.<sup>2</sup> When a particular piece of land had been subdivided into smaller pieces and after the construction of a small number of houses, the settlement became known as a village. With the subsequent increase of people and new developments, some villages transformed into towns and eventually into modern-day cities. When an urbanised area became so big that it comprised a core city together with a number of satellite towns, such a city became known as a “metropolitan area”. A metropolitan area is therefore the most expansive form of modern urban development.<sup>3</sup>

With the creation of the various forms of urban area<sup>4</sup> it became essential for each area to establish and manage a specific local authority for that area. Over time these local authorities became known as “municipalities”, a term that is synonymous with local institutions created to manage and control urban settlements. The word “municipality” originated from the Latin word *municipalis*. The term *municipalis* referred to a city<sup>5</sup> with some measure of self government and its own decision-making authority, but which was ultimately still subject to the control of a central government.<sup>6</sup> In many modern systems in the world, this final control over municipal authorities is still in existence within the overall governmental structure of such states.<sup>7</sup>

### 3.3 The origin, creation and importance of local authorities

The urban areas of the developing world that were established early provided mainly an environment where people could live in peace and harmony with one another and where they felt safe from outside threats. As human settlements expanded over time, not all people living within that community could make a living out of farming activi-

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<sup>2</sup> Generally these smaller pieces of land are today known as building stands or residential erven.

<sup>3</sup> Note that in the new demarcated local government system in South Africa, there are six specifically demarcated metropolitan areas. These areas are discussed and identified later.

<sup>4</sup> Towns, cities, villages, etc.

<sup>5</sup> Urban development of a certain proportion.

<sup>6</sup> See Cloete (1997) 2.

<sup>7</sup> The position is no different in South Africa. Although local governments have been given distinctive and autonomous status with their own powers and functions, they often still fall under the final control of higher governmental institutions.

ties, and therefore they started providing other needed services or goods.<sup>8</sup> It is of interest to note that early cities or towns existed long before the creation of empires or states. The early local authorities were therefore to some extent the forerunners of the many democratic governments that were to follow in later years.<sup>9</sup> It is also generally accepted that, depending on the relevant services, local authorities are in the best position to address and satisfy the needs and expectations of a local community.

In comparison with European cities, some dating back hundreds of years, South African cities and urban developments are young. The oldest urban settlement in South Africa dates back to 1652, when Jan van Riebeeck established the first port on the Cape coast.<sup>10</sup> After this first step in colonising the Cape, the area known as Cape Town gradually developed from a small village into a town, then into a city and finally into the metropolitan area it is today. The development was sparked in 1657, when a few soldiers of the East Dutch Indian Company were released from their official services and were allowed to become farmers in the region.<sup>11</sup> Many of them settled in the surrounding areas of Cape Town and established various farming activities. In 1682 the then Governor of the Cape appointed some of the free burgers as so-called *heemraden*. The main function of the *heemraden* was to settle disputes amongst the people of the local community. A few years later, in 1685, the first *landdrost*<sup>12</sup> was appointed, with similar functions to those of the *heemraden*. During 1779 a group of free burgers living near Cape Town submitted a written petition to the Council of Seventeen,<sup>13</sup> in which they requested a larger say and participation in the government of the settlement. As a result of this petition, a committee of the high court of justice was established in 1786 to serve as the first local authority for Cape Town. This committee was indeed the first official urban local authority created in South Africa.<sup>14</sup>

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<sup>8</sup> An indispensable linkage developed between the different services and goods people provided for one another. Most goods or services could not be maintained and provided for without the support and availability of many other goods or services. For example, a farmer could not plough or deliver his produce without a marketplace, roads, or even skilled labourers to maintain or repair his essential farming instruments.

<sup>9</sup> See Cloete (1997) 46.

<sup>10</sup> This is also the reason why Cape Town is referred to as the "mother city".

<sup>11</sup> They became known as *free burghers*.

<sup>12</sup> Also known as a Magistrate.

<sup>13</sup> The council was the controlling body of the Dutch Indian Company.

<sup>14</sup> Cloete (1997) 10.



After the establishment of the early local authorities the country underwent radical expansion and, when the Union of South Africa was formed in 1910, all four provinces of the Union<sup>15</sup> developed similar systems of municipal administration based on the early system that had been established in the Cape. Local authorities were not autonomous government institutions, however, but were placed under the control and supervision of the four provincial administrations.

In the early days of local government development in South Africa, the indigenous people were mainly nomadic in their existence. Some tribal villages of a more permanent nature were established, but not to the same extent as in Western urban settlements. Most of the local tribes were self sufficient, but with the increase in population there were inadequate work opportunities and basic services available. Many ethnic Africans started to move to the developing colonial settlements in the hope of creating a better life for themselves and their families. However, Native Africans were not treated equally and, depending on his or her racial background, a person was treated according to a particular system and according to specific rules applicable to only that race.<sup>16</sup> In order to understand and meet fully the challenges of the new local government structure of South Africa and the demands that the transformation process had to address, it is important to keep the segregation history of South Africa in mind. Two systems with regard to local authorities were developed: one for white people and another for non-whites. This policy was responsible for many of the problems and challenges that face local governments of today and requires redress.

### **3.4 Conclusion**

It is evident that the creation of local governments/authorities was necessitated through the development of concentrated urban settlements; the rendering of essential services, and the management of an urban area could then be conducted by a separate local authority. There are, however, significant differences to the roles, powers and functions of modern local governments in comparison with those of years gone by. Modern local governments are much more complex in nature and function, especially as they form part of the overall governmental structure of a mod-

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<sup>15</sup> The Transvaal, the Free State, Natal and the Cape Province.

<sup>16</sup> Refer to the case of *Fedsure Life Assurance v Greater JHB TMC* 1999 (1) SA 374 (CC) where the constitutional court provided a brief background description of the history of local government in SA.

ern 21st century state. Many of these challenges and complexities will be highlighted and discussed in the chapters that follow.

## A brief history of local government in South Africa

### 4.1 Introduction

A race-based municipal dispensation and the unequal access to and provision of services and resources to local inhabitants have for many decades been part of South African constitutional history. The segregation and later more defined apartheid policy of the National Party government has left a negative imprint on the country's human settlement patterns and municipal institutions. In order to understand, evaluate and contribute to the new transformation that local government is currently undergoing, a basic understanding is required of the historical role and background of local government.

The implementation of a system of segregation on racial grounds was already a policy of the government of the day at the time when the formal policy of apartheid was introduced in 1948. It was, however, the Group Areas Act<sup>1</sup> which instituted strict residential segregation and the compulsory removal of black people to so-called "own group" areas that formally confirmed the apartheid policy. Through a process of spatial separation, various influx control measures and a policy of own management for own areas, two separate local government systems were introduced.<sup>2</sup> The policy of racial segregation was aimed at limiting the extent to which financially and infra-structurally strong white municipalities would be responsible for bearing the brunt of the financial burden of servicing and maintaining disadvantaged black local authorities. In achieving this goal, the Group Areas Act restricted the permanent presence of African people in many urban areas through a pass system and further reserved a viable municipal revenue base for white areas by separating black and white townships from one another and by permitting industrial and commercial development

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<sup>1</sup> 41 of 1950 and later amended by Act 36 of 1966.

<sup>2</sup> See the White Paper on Local Government March 1998. Government Notice 423 of 1998 at 21.

only in certain areas. Furthermore, many black people were removed from land on which they lived and relocated to “non-white” residential properties.

The system of creating separate living areas for different racial denominations ultimately created a fragmented, dysfunctional and unequal system of local government in the country. A clear distinction thus developed between many well-serviced and financially sustainable local authorities in white areas and underdeveloped, under-serviced and financially poor “non-white” areas.<sup>3</sup>

Various attempts were made under the apartheid policy to introduce so-called “own management structures” for black residents at local level. This was done mainly to try and compensate for the restriction of the rights to which such residents were entitled and also to try and maintain some measure of political tolerance and law and order. Some of these attempts are briefly summarised as follows in the White Paper on Local Government:<sup>4</sup>

- In certain Bantustans, a limited form of local government was established. Traditional leaders were given powers over land allocation and development matters in areas with communally owned land. Some small rural townships were given their own administrations,<sup>5</sup> but these administrations were characterised by a lack of real power.
- During the 1960s “coloured” and Indian management committees were established as advisory bodies to white municipalities.
- The Bantu Affairs Administration Act<sup>6</sup> established appointed Administration Boards, which removed the responsibility for townships from white municipalities.
- In 1977 Community Councils were introduced. They were elected bodies, but again had no meaningful powers and only limited resources. As such they never gained political acceptance and credibility.
- In 1982 the Community Councils were replaced by Black Local Authorities. These authorities not only lacked a significant revenue base, but from the outset were seen mostly as politically illegitimate institutions. Most of these institutions were thus rejected by popular community mobilisation, often peacefully but sometimes through violent actions.

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<sup>3</sup> See *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC).

<sup>4</sup> See the White Paper on Local Government (1998) at 21-22.

<sup>5</sup> Also known as so-called R293 towns.

<sup>6</sup> 45 of 1971.

In reality the system of own local government was designed only to reinforce the policies of segregation and economic exclusion. None of the institutions had any real powers or resources to advance the quality of life of their respective constituents.

#### **4.2 Financial constraints of former local government institutions**

From an historical point of view, almost all local government revenue in urban South Africa was self generated. This was achieved mainly through property taxes and levies on the delivery of services to residents and local business. This practice of revenue collection specifically suited and benefited white municipalities, which had only a small area and small population to serve but a large concentration of wealth and economic resources to tax. On the other hand almost all black local governments were financially unsustainable from the start. The segregation policy of the state barred most retail and industrial developments in such areas. This caused many black areas to have only a very limited tax base on which to depend and forced black residents and retailers to spend most of their money in white municipal areas. Black municipalities were thus deprived of providing for their own income and could not sustain the needs of their local communities. Equally influential was the fact that white areas benefited from the existence of proper infrastructure and services, while black areas were severely neglected. These inequalities and unfair discrimination led to the mobilisation of many communities against the separate local government system.<sup>7</sup>

#### **4.3 Mobilisation against the former local government system**

The unequal and unfair system of local government caused many communities in the early 1980s to mobilise themselves into action against the system. From the beginning of these protest actions local governments all over the country were in deep crisis. During 1983 the United Democratic Front (UDF) was launched and it specifically targeted the Black Local Authorities (BLAs). The BLAs served to provide cosmetic reform and further imposed rent and service charges on townships to increase revenue. This did nothing but anger communities and ultimately resulted in the rejection of the BLAs in the mid 1980s. During 1984 the uprising gathered momentum, and civic and other community-based bodies started to organise themselves. The main reason for the uprising was the appalling social and economic conditions and

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<sup>7</sup> Refer to the White Paper on Local Government (1998) at 22.

living standards prevalent in the black townships and rural communities. The chief weapons of the uprising were widespread rent and service-charge boycotts and specifically targeted consumer boycotts. As the pressure systematically built up, the government of the day attempted to calm the political tensions by redirecting some funds to disadvantage areas. A system of ad-hoc intergovernmental grants was developed to channel resources to collapsing local townships and communities. The channelling and distribution of these grants was handled by Regional Service Councils (RSCs) and Joint Services Boards (JSBs), which were established specifically for such purposes. However, these interventions were seen as too little too late, and many townships and homeland rural areas effectively became ungovernable.<sup>8</sup>

The crises that had emerged eventually led to the realisation that a new dispensation and structure was needed, and this further led to a gradual process of negotiations. Many white-based municipalities started to experience severe financial constraints and, in order to soften the impact of the organised consumer and services boycotts, started to enter into negotiations with township representatives and civic organisations. Out of these discussions and negotiations it quickly became apparent that in order to resolve problems many legal constraints had to be addressed and total transformation of the entire system was needed on a national basis. The realisation of a system of “one city, one tax base” could be achieved only through a national legislative reform process. For this reason, many local forums collectively pushed for the establishment of a national forum to address and debate local government reforms and issues.<sup>9</sup>

It is not always realised that it was the crises in local government that contributed significantly to the overall constitutional reform process which began in 1990 with the releasing of political prisoners and the unbanning of former banned political organisations. During 1992 the South African National Civics Organisation (SANCO) began talks with the then National Party Government in order to start a process of overall restructuring and transformation of local governments in general. These discussions led to the establishment of the Local Government Negotiating Forum (LGNF) in March 1993, which served in principal as the main forum for the further negotiations

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<sup>8</sup> See the White Paper on Local Government (1998) at 23.

<sup>9</sup> White Paper *ibid* 23. This was also the first step in creating the Local Government Negotiating Forum (LGNF) which was to follow later.

of a new local government system.<sup>10</sup> The LGNF will be remembered particularly for the agreements that were reached on writing off the arrear accounts of many black local authorities, but will also be remembered for the negotiations and the reaching of consensus on the Local Government Transition Act (LGTA) of 1993<sup>11</sup> and the contents of chapter 10 of the interim Constitution (IC) of 1993.<sup>12</sup> The LGTA and the IC indeed formed the initial starting point for the reform process of local government. It should be pointed out that the LGTA did not provide for a complete blueprint of the new proposed local government system but only sketched out the basis on which the transformation had to take place.<sup>13</sup>

The LGTA envisaged three phases of the transition process of local government. These phases were:

- The *pre-interim phase*, which started with the negotiations of the transformation process and lasted until the first municipal elections.
- The *interim phase*, which began with the first municipal elections and lasted until a new local government system had been designed and legislated.
- The *final phase*, which began with the election of new local government structures under the newly designed local government system<sup>14</sup> set out in the Constitution of the Republic of South Africa 1996.

#### 4.4 Conclusion

With hindsight, it is obvious from the abovementioned background that the segregation policy of the past, which led to the development of two separate systems of local governance, was not only unacceptable from a political point of view but was also unsustainable with regard to the provision of services and social upliftment. Many of the challenges facing municipalities today are directly attributable to the undemocratic system of the past. The core content of the new constitutional dispensation is specifically aimed at addressing and correcting the negative legacies of the

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<sup>10</sup> The LGNF comprised sixty representatives, equally divided between statutory (from national, provincial and local government institutions) and non-statutory delegations. Technical working groups were also established and tasked with debating and reading agreements on various local government issues.

<sup>11</sup> 209 of 1993.

<sup>12</sup> 200 of 1993.

<sup>13</sup> In essence the process that was forwarded by the LGTA can be regarded as a locally negotiated transition.

<sup>14</sup> See the White Paper on Local Government (1998) at 24.

past. The extent and success to which such rectification has taken place will be explained in chapters that follow.



## **The process of transformation and restructuring of local government**

### **5.1 Introduction**

For most of South Africa's history the final control and management of local authorities has fallen under higher government institutions. Apart from this lack of proper autonomy, local governments were also racially divided between white local authorities and "non-white" local authorities. This policy ultimately resulted in a political uprising and drive towards a radical transformation. As was explained in the previous chapter, many attempts were made during the apartheid system to construct separate local governments for different racial groups. These various systems could not be sustained, however, and the total local government system fell apart. After the positive outcome of a referendum held in 1989, in which white voters voted overwhelmingly in favour of political and constitutional reforms, the restructuring and democratisation process of the whole country was fully set in motion. This process also set the scene for the restructuring and transformation of local governments throughout the country.

The initial process of transformation was set in motion by the Local Government Negotiating Forum (LGNF) in 1993. The LGNF identified the important goal of local authorities to provide equal and acceptable services to all local communities. It thus called on all local structures to resume and improve services and to establish the principle of one municipality, one tax base.<sup>1</sup>

Despite the general agreement that all local governments and the system as a whole had to be transformed, such transformation would take considerable time and effort and could not be achieved overnight. Furthermore, it would have been impractical and impossible to dismantle the system and institutions that were in place at the

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<sup>1</sup> See Chaskalson et al (2000) 5A-3.

time.<sup>2</sup> Provision therefore had to be made for a gradual and properly planned process of reform.<sup>3</sup> In order to achieve this progressive restructuring process, the LGNF had reached agreement between all participants on a specific transformation programme. The programme was initiated by agreement in the LGNF on the content of the Local Government Transition Act (LGTA).<sup>4</sup> The main objective of the LGTA was to facilitate local government matters during the transition from the formerly racially based system to a new reformed system of sustainable, uniform and fully democratic local government.<sup>5</sup> From the wording of the Act, three distinct phases of the transition of local governments were identified.<sup>6</sup> While the LGTA had structured the transitional process of local government in the country, it was mostly up to parliament and the Constitutional Assembly, elected under the interim Constitution,<sup>7</sup> to complete and enact the final Constitution of 1996<sup>8</sup> and also to enact all other national legislation that was envisaged in the Constitution. This would then complete the interim phase and enable the final phase to commence.

In light of the above, three important legislative stages could be identified during the restructuring process. The first stage was applicable under the provisions of the LGTA itself. Thereafter, the second stage commenced on 4 February 1997 and was

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<sup>2</sup> It should be remembered that local governments are directed to provide essential services to local residents, and such services could not be suspended while a process of transformation was being implemented.

<sup>3</sup> See Rautenbach and Malherbe (1999) 315-316.

<sup>4</sup> 200 of 1993. See the LGTA as well as the content of the chapter on local government as set out in the interim Constitution of 1993.

<sup>5</sup> The aim of the LGTA can be found in the long title of the Act, which states as follows: "To provide for revised interim measures with a view to promoting the restructuring of local government, and for that purpose to provide for the establishment of Provincial Committees for local government in respect of the various provinces; to provide for the recognition and establishment of forums for negotiating such restructuring of local government; for the exemption of certain local government bodies from certain provisions of the Act; for the establishment of appointed transitional councils in the pre-interim phase; for the establishment of transitional rural local government structures; for the issuing of proclamations by the MECs of the various provinces; for the establishment of Local Government Demarcations Boards in the various provinces; and for the repeal of certain laws; and to provide for matters connected therewith" – the long title was substituted by proclamation no R.65 of 1995 and by s 18(1) of Act 89 of 1995.

<sup>6</sup> These phases were the *pre-interim* phase, which would commence on the date of the commencement of the LGTA itself and end with the commencement of the interim phase; the *interim phase*, which would commence on the day after the elections were held for transitional councils as contemplated in s 9 of the Act and end upon the implementation of final arrangements enacted by a competent legislative authority; and the *final phase*, which would commence on the date of the last local government elections, to be held in terms of the provisions of the Constitution of the Republic of South Africa 1996 and the new national and provincial laws applicable to local government, as mandated by the Constitution. These elections were held during December 2000.

<sup>7</sup> See again the interim Constitution of 1993.

<sup>8</sup> Hereafter referred to as the Constitution.

controlled by the LGTA, the IC and also the FC. The third and final stage was controlled in terms of the provisions of the FC as well as the new national, provincial and even local government laws enacted in accordance with the provisions of the Constitution. Each of these three stages will be referred to in more detail later in this work.

## 5.2 The restructuring of local government under the Local Government

### Transition Act

The LGTA commenced on the 2nd of February 1994, almost two months before the introduction of the IC. As was stated above, the primary role of the Act was to re-integrate and provide the basis for local government structures during the transformation of the previously race-based municipal system.<sup>9</sup> From the outset it is important to remember that the Act was applicable for the entire territory of the Republic of South Africa, which also included the former TBVC states and other Bantustans.<sup>10</sup>

In terms of section 3 of the LGTA, many provincial committees were appointed by the Transitional Executive Committee (TEC) in order to facilitate further discussions and negotiations during the transitional phases. The TEC was again established as a control body over the powers of the former administrators of the provinces.<sup>11</sup> All powers of the provincial administrators could be lawfully exercised only in concurrence with the relevant provincial committee.<sup>12</sup> Any disputes that the parties could

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<sup>9</sup> See also *Gcali No v MEC for Housing of Local Government*, EC 1996 (4) SA 456 (Tks).

<sup>10</sup> See the case of the *ANC v Minister of Local Government and Housing* 1998 (3) SA 1 (CC) where the court held that the restructuring of local government could be effected in terms of the LGTA only and the import thereof was that only the national Parliament would be competent to direct the transformation of local government until the time period identified in s 245(1) had elapsed. The section and the process of transition in local government did not mean that for other purposes the provisions of ch 10 of the Constitution had no effect. The argument that local government established in terms of the LGTA after elections had been held was not local government contemplated by ch 10 was therefore misconceived. See para F-H at 12.

<sup>11</sup> The TEC was established in terms of Act 151 of 1993. Later the reference to administrator was substituted with the MEC responsible for local government in each province. See also the case of *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC).

<sup>12</sup> For more on this refer to the case of *Gardener v East London Transitional Local Council* 1996 (3) SA 99 (E). The background to the case in terms of the Act is that the Greater East London Local Government Negotiating Forum ("the forum") had been established, comprising statutory local government bodies, political parties and other interested organisations. On 4 November 1994 the forum reached agreement ("the agreement") on the establishment of the East London Transitional Local Council (the first respondent). Clause 11(iii) of the agreement provided that the post of town clerk of the Transitional Local Council had to be advertised and filled in accordance with the provisions of the Profession of Town Clerks Act 75 of 1988, and the Municipal Ordinance 20 of 1974 (C). The salary and fringe benefits of the town clerk would be in accordance with directions issued by the Board on Remuneration and Service Benefits of town clerks. Clause 11(iv) stipulated that "until such time as the post of town clerk is filled, the Transitional Local Council shall appoint the town clerk of the former Municipality of East London as acting town clerk and he shall be remunerated on the same basis as he was prior to the establishment of the Transitional Local Council or in accor-

*continued on next page*

not resolve themselves were referred to a special Electoral Court for final adjudication.<sup>13</sup>

According to the LGTA, the National Minister, which the Act defined as the Minister for Provincial Affairs and Constitutional Development,<sup>14</sup> was empowered to issue regulations concerning any matter referred to in terms of the Act.<sup>15</sup> However, regulations could be issued only after consultation between the Minister and administrator of a province.

Part IV of the Act contained provisions directed at the pre-interim phase specifically. The goal was to achieve a 50/50 statutory/non-statutory formula for the nomination of members to the various transitional structures that were envisaged by the Act. In compliance herewith, many previously excluded representatives of local communities and other interest groups were for the first time involved in the processes of local government affairs.<sup>16</sup> In general, the different negotiating forums served as vehicles for the creation of transitional local structures which were to function prior to the holding of the first democratic local elections planned for November 1995. Many different functions and powers were afforded to the negotiating forums and if a decision of a forum was taken in compliance with the requirements of the

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dance with the matter prescribed by the Board on Remuneration and Service Benefits of town clerks". The second respondent (the Administrator) exercised the powers vested in him by s 10 of the Act and gave effect to the agreement by Proc 79 of 1994 (EC). The Court held that in terms of clause 11(i) the employees of the disestablished local government bodies were transferred to the service of the first respondent on conditions of service not less favourable than those previously enjoyed and that, since the agreement contained no specific provision regarding the executive officers and other employees of the East London Municipality, it was implicit that they should retain their corresponding positions in the first respondent, that was with the exception of the town clerk whose post had to be advertised and filled in accordance with paras (iii) and (iv) of clause 11. As to (a), the Court held that in terms of s 10(3) of the Act "a proclamation" could provide for the dissolution of any local government body, including the transfer or admission of persons to or in the service of any transitional council, subject to conditions not less favourable than those under which they served and applicable labour law. S 10(3)(i) stipulated further that "a proclamation" could provide for "the protection of the rights and benefits, including the remuneration, allowances and pension benefits, of employees of a local government body, subject to applicable labour law and due consultation between employer and employee bodies". This protection did not extend to the guarantee of the status of any executive officer in any of the affected local government bodies as it would be incompatible with the objects of the Act. The applicant had lost his status of town clerk but his employment was otherwise firmly protected by applicable labour law and, as to his conditions of service (apart from status). This conclusion accorded with the objectives of the Act, viewed in the light of the relevant socio-economic and political considerations which had given rise to the legislation.

<sup>13</sup> See Chaskalson *et al* (1999) 45 A-4.

<sup>14</sup> See the definitions in the Act in s 1. The definition of the term minister was amended in 1995 to refer to the minister of Constitutional Development and Local Government.

<sup>15</sup> See s 12 of the Act.

<sup>16</sup> See the case of *Munisipale Raad van Bainsvlei v Premier of Province of OVS* 1995 (1) SA 772 (OPA).

LGTA, the administrator was bound to adhere to such a decision. If disputes arose between an administrator and a forum they were referred to independent mediation, which was later substituted by a process of arbitration.<sup>17</sup>

Part V of the LGTA was again directed at the interim phase. Transitional structures were now in place and were named as transitional local councils or transitional metropolitan councils in local or metropolitan areas respectively. In every metropolitan area there was an overarching metropolitan council which had to perform specific functions for the whole area and a number of substructures of that metropolitan area, which, in turn had specific functions in that area.<sup>18</sup> The LGTA also specifically defined a metropolitan area as follows:

“Metropolitan area – means any area –

- (a) comprising the areas of jurisdiction of multiple local governments;
- (b) which is densely populated and has an intense movement of people, goods and services within the area;
- (c) which is extensively developed or urbanized and has more than one central business district, industrial area and concentration of employment; and
- (d) which, economically forms a functional unit comprising various smaller units which are interdependent economically and in respect of services.”<sup>19</sup>

The LGTA also established a specific demarcation board for each of the provinces of the country. These demarcation boards had specific functions, namely to investigate and make recommendations regarding the demarcation of any area of a local government.<sup>20</sup> After the consideration of all written representations from the demarcation board and other role players, the administrator/MEC was empowered to delimit specific areas and to predetermine powers or functions through the issuing of proclamations.<sup>21</sup> The Act further provided a broad framework for the first local government elections for the transitional metropolitans, councils and sub-councils. These elec

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<sup>17</sup> See *Town Council of Lichtenburg v Premier of North West Province* 1995 (8) BCLR 959 (B).

<sup>18</sup> See Cloete (1997) 32. The writer refers to the example of Pretoria where four separate councils were established. Firstly there was the Greater Pretoria Metropolitan Council (the Metro Council) and then there were three other substructures known as the Northern Pretoria Metropolitan Substructure (Akasia-Soshanguve), the Central Pretoria Metropolitan Substructure (Pretoria) and the Southern Pretoria Metropolitan substructure (Centurion).

<sup>19</sup> See the definition in s 1 of the LGTA. See also the case of *Fedsure v Greater Johannesburg Metro Council* 1999 (1) SA 374 (CC).

<sup>20</sup> See s 11 of the LGTA.

<sup>21</sup> Refer to s 8 of the LGTA.

tions were scheduled to take place at the end of 1995 and in fact were held during November 1995 and May and June 1996. The administrators/MECs were empowered to make various regulations with reference to the electoral process and procedures, but such regulations had to be consistent with the LGTA and also the provisions of the interim Constitution.<sup>22</sup>

As can be expected of an Act that is aimed at regulating a transitional process, the LGTA was in certain instances unclear and imprecise. To address these shortcomings the Act was amended in 1994 in order to empower the president of the country to further amend the Act by specific proclamations.<sup>23</sup> Various proclamations were indeed issued in terms of this amendment;<sup>24</sup> however some of them were challenged by the Western Cape provincial government and were found to be unconstitutional.<sup>25</sup>

Apart from the abovementioned proclamations the LGTA was amended a further four times during 1995 until 1996.<sup>26</sup> The Second Amendment Act of 1995 was directed to create the basic framework for rural local government, which was at the time not properly addressed. With the Second Amendment Act of 1996, a new Part VI A was inserted in the LGTA to deal with post-electoral aspects, to repeal the Local Government Demarcation Boards and to substitute the term "Administrator" with the term "Member of the Executive Council (MEC)". Principles of development and co-operative government were also introduced which served to bring the role of local governments within the ambit of the requirements of the FC.<sup>27</sup> Many extensive changes were also included in section 10 of the Act.<sup>28</sup>

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<sup>22</sup> See, eg, *Democratic Party v Miller No 1997 (2) BCLR 223 (D)*; *Tumisi v ANC 1997 (2) SA 741 (O)*; *O'Meara No v Padayachi 1997 (2) BCLR 258 (D)*; *Frans v Munisipaliteit van Groot Brak 1998 (2) SA 770 (C)* en *De Villiers v Munisipaliteit van Beaufort-Wes 1998 (9) BCLR 1060 (C)*.

<sup>23</sup> See s 16A of the LGTA Amendment Act 34 of 1994.

<sup>24</sup> See Proclamations nos R35, R54, R58, R59 and R65 of 1995.

<sup>25</sup> See *Executive Council of the Western Cape supra* fn 11.

<sup>26</sup> See the LGTA Amendment Act 61 of 1995; the LGTA Second Amendment Act 89 of 1995; the LGTA Amendment Act 12 of 1996 and the LGTA Amendment Act 97 of 1996.

<sup>27</sup> Note that the "final" Constitution was only in draft form at the time.

<sup>28</sup> These included three objects of metro councils, namely to promote integrated economic development, equitable redistribution of resources and the equitable delivery of services; to alter municipal jurisdictions and names and the recognition of organisations representing the majority interests in municipalities on both national and provincial levels. These organisations were the forerunners of so-called organised local government, the establishment of national and provincial demarcation boards and finally the introduction of co-operation between local governments and other spheres of government and horizontal co-operation between municipalities *inter se*. See also Chaskalson *et al* (1999) 5A 13.



### 5.3 The role and impact of the interim Constitution on the transition process

The interim Constitution came into effect after the commencement of the LGTA in April 1994. The IC required that the transitional phases of the restructuring of local government had to be done in terms of the LGTA.<sup>29</sup> According to the amended section 245(2) of the IC, provision was made that the post-election restructuring of local governments was to be affected in terms of the principles set out in chapter 10 of the IC specifically, and the whole of the IC and LGTA in general. On a broad reading of sections 245(1) and (2) of the IC, the enforcement of chapter 10 of the IC could be excluded from the transitional restructuring process until the first elections within local government were held. This did not mean exclusion of the Constitution until the end of the overall transitional process, however, as this would have excluded the IC from the restructuring process for its entire existence.<sup>30</sup> After commencement of the IC, some uncertainty existed about the status of the LGTA. Some people held the view that the LGTA was indeed incorporated in the text of the IC. The court clarified the position in two cases, however, and clearly distinguished between the IC and the LGTA.<sup>31</sup>

A close investigation of chapter 10 of the IC reveals that the chapter was written very basically and contains many vague and uncertain provisions. Notwithstanding its uncertainties, the inclusion of chapter 10 in the IC had a profound effect and provided local government with constitutional recognition and a range of original powers.<sup>32</sup> Thus for the first time in South African constitutional history local government was recognised as an autonomous part of the overall governmental structure, with its own powers, functions and constitutional importance. The IC further required that the powers, functions and structure of local government had to be determined by law.<sup>33</sup>

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<sup>29</sup> See interim Constitution s 245 and also the Constitution of Republic of South Africa Second Amendment Act 44 of 1995. Refer also *Premier of KwaZulu v President of the RSA* 1996 (1) SA 769 (CC).

<sup>30</sup> Refer to Chaskalson *et al* (1999) 5A/15 fn 2. See also *Beukes v Krugersdorp* 1996 (3) SA 467 (W); *ANC v Minister of Local Government and Housing* 1998 (3) SA 1 (CC) and *Executive Council of Western Cape* *supra* fn 11.

<sup>31</sup> In *Executive Council of the Western Cape*, the court regarded the operation of the interim Constitution ch 10 as constitutionally delayed, rather than the LGTA being incorporated in the interim Constitution itself. Later in *In re: Certification of the Constitution of RSA* 1996 (4) SA 744 (CC) the Constitutional Court again confirmed that the interim Constitution did not incorporate the LGTA or any portion thereof.

<sup>32</sup> This recognition and entrenchment as part of the highest law of the state was later confirmed in *Fedsure v Greater Johannesburg Metropolitan Council* *supra* fn 19.

<sup>33</sup> See the interim Constitution s 174.

Even financial powers were delegated to local authorities, as long as such powers were exercised in terms of a uniform structure for each municipal area.<sup>34</sup> Lastly, the IC also confirmed the commitment to establish democratic institutions at local government level and also to include traditional authorities in such processes.<sup>35</sup>

#### **5.4 The importance of the 34 constitutional principles included in the interim Constitution and the certification process of the final Constitution**

It was a unique feature of South Africa's new constitutional dispensation that the FC of the Republic had to be certified by the Constitutional Court for compliance with all the constitutional principles set out in the IC. Many of these constitutional principles were very important to the new local government structure that had to be established. Some of the constitutional principles that were applicable to local government can be summarised as follows:

- The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.<sup>36</sup>
- Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in chapter 3 of the IC. The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.<sup>37</sup>
- The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.<sup>38</sup>
- The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that

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<sup>34</sup> The different financial powers of local governments were often the cause of legal disputes. See, eg, *Beukes v Krugersdorp Local Council supra* fn 30; *Frans v Municipality of Groot Brak supra* fn 22; *East London Transitional Local Council v Tax Payers Action Organisation* 1998 (10) BCLR 1221 (E); *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T); *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) and *Fedsure Life Association v Greater Johannesburg Metro Council supra* fn 19.

<sup>35</sup> See *DP v Miller No supra* fn 22; *ANC v Minister of Local Government supra* fn 30.

<sup>36</sup> See the interim Constitution CP I in Sch 4.

<sup>37</sup> See the interim Constitution CP II and III.

<sup>38</sup> CP IV.



have as their object the amelioration of the conditions of the disadvantageded, including those disadvantageded on the grounds race, colour or gender.<sup>39</sup>

- There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.<sup>40</sup>
- There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll and, in general, proportional representation. Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government. Formal legislative procedures shall be adhered to by legislative organs at all levels of government.<sup>41</sup>
- The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.<sup>42</sup>
- Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy. Government shall be structured at national, provincial and local levels. At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.<sup>43</sup>
- Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.<sup>44</sup>
- A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features

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<sup>39</sup> CP V.

<sup>40</sup> CP VI.

<sup>41</sup> See CP VIII, IX and X.

<sup>42</sup> CP XIII.

<sup>43</sup> See CP XIV, XVI and XVIII.

<sup>44</sup> See CP XX.

of local government shall be set out in parliamentary statutes or in provincial legislation or in both.<sup>45</sup>

- The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.<sup>46</sup>
- Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.<sup>47</sup>

In the first certification judgement,<sup>48</sup> the Constitutional Court refused to certify the first submitted text of the FC because the text did not comply with all of the above-mentioned constitutional principles. Some of the reasons for non-compliance were specifically related to local government matters. In this regard the Constitutional Court concluded as follows:

- Chapter 7 of the new text failed to comply with CP XXIV in that it did not provide a framework for the structures of local government, with CP XXV in that it did not provide for appropriate fiscal powers and functions for local government, and with CP X in that it did not provide for formal legislative procedures to be adhered to by legislatures at local government level.
- Section 229 failed to comply with CP XXV in that it did not provide for appropriate fiscal powers and functions for different categories of local government.
- As to the provisions relating to the powers and functions of the provinces, the text failed to comply with CP XVIII.2 in that such powers and functions<sup>49</sup> were substantially less than and inferior to the powers and functions of the provinces under the IC.<sup>50</sup> As to the powers and functions of the provinces, which were substantially diminished in the text, the court stated the following:
  - (a) The new text did not comply with CP XXIV, CP X and CP XXV. At the very least CP XXIV necessitated the setting out in the new text of the different categories of local governments that could be established by the provinces

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<sup>45</sup> CP XXIV.

<sup>46</sup> CP XXV.

<sup>47</sup> CP XXVII.

<sup>48</sup> *In re Certification of the Constitution of the RSA 1996 supra* fn 31.

<sup>49</sup> Specifically with regard to local government matters.

<sup>50</sup> Refer to para 482 at 910-911.

and a framework for their structures. In the new text, the only type of local government and local government structure referred to was the municipality, which was insufficient to comply with the CP. In addition, a structural framework should indicate the formal legislative procedures demanded by CP X that have to be followed by a local government structure. The failure to make provision for appropriate fiscal powers and functions in respect of the different categories of local government was in breach of CP XXV.<sup>51</sup>

- (b) As to the Local Government Transition Act,<sup>52</sup> the effect of the LGTA on the powers and functions of the provinces in respect of local government in the IC had to be ignored for the purpose of the certification exercise. The transitional provisions of the IC were not relevant to this exercise.<sup>53</sup>
- (c) As to the relevant provisions of the IC and the new text, while local government structures were given more autonomy in the new text than they were given in the IC, it had to be borne in mind that the IC contemplated that local government would be autonomous, though it did not delineate the boundaries of such autonomy as clearly as the new text. Whereas in the IC the potential concurrency of powers in parliament and provincial legislatures was in respect of the whole field of local government, in terms of the new text power this would be allocated to specific areas of competence. It was in this process that the local authorities were afforded greater autonomy at the expense of both parliament and provincial legislatures. There was a corresponding diminution of the powers in respect of local government with regard to both national and provincial legislatures. CP XVIII.2 related only to the diminution of provincial powers and functions and not of those of parliament.<sup>54</sup>
- (d) As to the source and ambit of provincial powers and functions, section 155 placed a substantial constraint upon the general provisions which vested legislative authority in the provincial legislatures. Section 155 had the consequence that the ambit of provincial powers and functions in respect of local government was largely confined to the supervision, monitoring and support of municipalities. What the new text sought to realise was a structure for local

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<sup>51</sup> See paras 299-302 at 861A-H.

<sup>52</sup> 209 of 1993.

<sup>53</sup> See paras 357-358 at 876F-877A/B.

<sup>54</sup> Par 364 at 879B-E.

government that revealed a concern for the autonomy and integrity of local government and a desire to prescribe a hands-off relationship between local government and other levels of government on one hand and a need to acknowledge the requirement that higher levels of government monitored local government functioning and could intervene where such functioning was deficient or defective in a manner that compromised this autonomy on the other.<sup>55</sup>

- (e) Under the IC, the provincial government could have assumed powers and functions beyond the areas of supervision, support and monitoring of local government. The extent of such powers afforded to the provinces in the new text was substantially less. Under the new text the provinces could not assume powers outside of these areas or certainly could not assume them to the same extent permissible under the IC. Accordingly, there had been a diminution of provincial powers and functions in some areas.<sup>56</sup>
- (f) As Schedule 6 of the IC granted provinces a broad functional area of legislative competence, the new text detailed specific functional areas in relation to local government in schedules 4 and 5. Notwithstanding that the lists of local government matters in Part B of Schedules 4 and 5 were extensive, it had to be recognised that the enumerated list approach had to be more restrictive than a loosely defined area of competence to some extent. This meant that the new text attenuated the manner in which the legislative powers was exercised and to that extent diminished provincial powers.<sup>57</sup>
- (g) To the extent that provincial legislative powers had been diminished or increased, executive powers of the provinces were also diminished or increased. This followed since both the IC and new text provided that a province had executive authority over all matters in respect of which it had exercised its legislative competence.<sup>58</sup>
- (h) As to the powers of national legislature and executive to regulate and control the exercise of provincial powers regarding local government matters set out in sections 139, 155, 159, 160(3), 161, 163 and 164, it precluded or circum-

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<sup>55</sup> See paras 366, 367, 371, 373 at 879-882.

<sup>56</sup> Par 374 at 882E-G.

<sup>57</sup> See paras 375-377 at 882-883.

<sup>58</sup> Par 379 at 883-884.

scribed provincial legislative competence and as such diminished provincial legislative and executive powers and functions.<sup>59</sup>

In light of the objections the court refused to certify the text of the FC submitted for certification. In accordance with the procedures set out in the IC, the Constitutional Assembly redrafted the FC and later resubmitted the text for certification. The second time round the court found the revised text to comply with the constitutional principles of the IC and thus certified and approved the FC. The FC came into effect on 4 February 1997.<sup>60</sup>

Notwithstanding the enactment of the FC and its specific requirements regarding local government,<sup>61</sup> the provisions of the LGTA as amended had to remain in force until 30 April 1999 or until the Act had been repealed by new legislation, whichever occurred first.<sup>62</sup> The intention was thus to maintain the transitional arrangements of the LGTA and the IC until such time as parliament had passed new legislation to give effect to the provisions/requirements set out in chapter 7 of the FC and until provincial and local governments had completed the new scheme by enacting provincial laws and municipal by-laws to regulate local conditions.

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<sup>59</sup> Para 379 at 883-884.

<sup>60</sup> See *In re: Certification of the amended text of the Constitution of the RSA, 1996, 1997 (2) SA 97 (CC)*. The court held *inter alia* that a number of the grounds for non-certification in the first certification judgment had clearly been eliminated in the amended text (AT). There was accordingly no longer any sustainable ground for objection to the constitutional provisions relating to the legislative procedures of local government. Furthermore that ch 7 of the amended text dealing with local government complied with CP XXIV (requiring a framework for the structures of local government), CP XXV (requiring provision for appropriate fiscal powers and functions in respect of different categories of local government) and CP X (requiring provision for formal legislative procedures to be adhered to by legislatures at local government level), and that in terms of CP XXIV the Constitution had to provide a "framework for local government powers, functions and structures", while the details of the local government system were a matter for legislation. See p 127-130.

<sup>61</sup> See the Constitution ch 7.

<sup>62</sup> The Constitution Item 26 of Sch 6. See also the second certification judgment *supra* fn 60 where the court held that item 26(1)(a) of Sch 6, which preserved certain sections of the LGTA 209 of 1993 from repeal until 30 April 1999, complied with CP IV (constitutional supremacy). The item did not immunise the LGTA from constitutional review. The Act remained subject to constitutional review, but was not subject to the framework provisions of ss 151, 155, 156 and 157 until 30 April 1999. All other provisions of the amended constitutional text applied to it, and any amendment of its provisions had to be consistent with the AT. The item was a transitional provision designed to enable an orderly transition to be made from the existing system of local government to a system which conformed with the requirements of the AT. It was implicit in CP XXIV that this could be done. There was nothing in the language of CP XXIV that required the framework provisions to come into force immediately. On the contrary, the CP contemplated that legislation would be needed to make provision for the comprehensive powers, functions and other features of local government that would be required. The drafting and implementation of such legislation were likely to present difficulties and to require time. A decision as to the period of grace allowed for local government transition was within the authority of the Constitutional Assembly. In view of the complexities of a

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The FC supported the abovementioned position by confirming that all laws that were in place when the new Constitution took effect would continue to be in force subject to any amendment or repeal and subject to consistency with the new Constitution. It was further confirmed that old-order legislation that continued in force:

- (a) did not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have wider application and
- (b) continued to be administered by the authorities that had administered it when the new Constitution took effect, subject to the new Constitution.<sup>63</sup>

### **5.5 The impact of the final Constitution and the commencement of the new local government legal dispensation**

It is evident from the background information provided above that local government has been undergoing profound changes since 1994. These changes were regulated mostly in terms of the LGTA and, to a lesser degree, in terms of the IC. The final phase of the transition process commenced on 5 December 2000 with the general elections that were held on local government level according to the requirements of the FC and new legislative framework mandated by that Constitution.<sup>64</sup> The vision and framework of new local government systems as set out in the FC had originally been established by the White Paper on Local Government, which had served as the founding platform of the restructuring of local government that had to follow. It was important that the new system of local authorities would be able to ensure service delivery, the eradication of poverty and the improvement of social and economic living conditions for all. The FC and new local government laws that were enacted in terms of the Constitution now form the new building blocks of a post-transitional local government system in South Africa. It should be emphasised, however, that at the time of the writing of this work, not all newly proposed local government laws have been enacted, as was authorised by the FC.

Although the transition process has entered into its final phase, the final restructuring process has not been finalised yet, and it is envisaged that this restructuring

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transition to a new order, it could not be said that the period until April 1999 was unreasonable or that the Constitutional Assembly had exceeded its authority in fixing this period.

<sup>63</sup> See the Constitution Item 2(1) and (2) of Sch 6.

<sup>64</sup> It should again be emphasised that the Constitution only provided the vision and basic framework for the new system of developmental local government, and that such vision and structure had to be completed by various national and provincial laws.

process will be a continuous process over many years to come.<sup>65</sup> The final system of a restructured local sphere of government is thus to be founded mainly on the two following fundamentals:

- (a) to provide new local governance that is directed at working with all local residents and communal interests in order to establish sustainable mechanisms to fulfil needs and improve overall quality of life
- (b) to find and maintain solutions for the acceleration and continuous provision of essential services.

The newly transformed local sphere of government in a post constitutional dispensation in South Africa is directed at achieving the following goals and objectives:

- to establish and maintain an effective system and structure
- to enhance service delivery and development
- to ensure representation, participation and accountability
- to maintain high professional administrations
- to ensure and provide effective political leadership and
- to ensure financial support and sustainability.

These goals and objectives mentioned above have been incorporated into the final text of the Constitution<sup>66</sup> and can be achieved only through proper restructuring. In order to adhere to and achieve the constitutionally required objectives and duties, the restructuring/transformation process essentially focused on the following aspects:

- (a) to establish a new institutional framework
- (b) to create newly demarcated municipal jurisdictions and establishments and
- (c) to formulate and execute new operational requirements for all local governments.<sup>67</sup>

The establishment of new municipalities required a legal process during which all municipalities were renamed, redefined and restructured. This was necessary to recreate a stable legal framework for each local authority. Under the Municipal Structures Act<sup>68</sup> all municipalities were formally re-established through a notice of establishment procedure, which was intended to define the structural framework of each

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<sup>65</sup> At the time of writing, many national and provincial laws have not been enacted.

<sup>66</sup> Refer to the Constitution ss 152 and 153.

<sup>67</sup> See the LGIS No 2: Local Government for the 21st century (1999) at 5-8 and 24-28.

<sup>68</sup> 117 of 1998 as amended.



municipality and also to address the transfer of staff and assets.<sup>69</sup> Municipalities also had to be newly demarcated because of the uneven and racially fragmented system of the past. New boundaries were needed to ensure development and sustainability. The main process was finally completed in terms of the Municipal Demarcation Act,<sup>70</sup> and the areas of the 843 former local authorities were re-demarcated and reduced to 284 new local governments. The most important aspects of the demarcation process were laid down in terms of the Local Government: Municipal Structures Act and will be discussed elsewhere.

## 5.6 Conclusion

In retrospect it is safe to say that the restructuring and finalisation of new local government dispensation, which required both national and provincial legislation, was a long and often difficult process. In order for the final process to be successful, all role players such as municipal councillors, officials and local community members had to play their part. Most municipalities all over South Africa were severely constrained by financial difficulties, which was and still is a difficult obstacle in the overall process. All spheres of government must play an active role in ensuring the financial viability and sustainability of municipalities. This can be achieved through the implementation of three distinctive initiatives, namely:

- (a) A drive to improve the financial management of local governments. All municipalities should have a well-balanced budget, strong monetary control measures and must adjust expenditure to revenue income. All revenue sources should be effectively and efficiently utilised and strengthened by a system of political support where the local community is informed and committed to the payment for services rendered.
- (b) Co-ordination and communication within the public financial sphere must be improved. Local governments must be provided with their respective equitable share of national revenue.
- (c) The creditworthiness of municipalities must be developed and strategic investment programmes should be introduced.

In order to achieve success in the restructuring process a so-called Local Government Transformation Programme (LGTP) has been developed by all three spheres

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<sup>69</sup> Thus indicating its boundaries, type, category and powers. See Act 117 of 1998.  
<sup>70</sup> 27 of 1998.



of government. The LGTP has been made up of representatives from local government institutions, provincial governments, national governments, SALGA, the National South African Local Government Bargaining Council (NSALGBC), the National Department of Finance and also some Non-Governmental Organisations (NGOs). Apart from the LGTP, a new local government training system has also been developed with a specific aim at strategic and career-orientated training programmes for councillors and officials alike.<sup>71</sup> Current local government training boards are in the process of being replaced by the Local Government: Sector and Training Authority (LGSETA), which is to be formally established in terms of the Skills Development Act.<sup>72</sup> Again, the LGSETA will have to follow the guidelines for training and qualifications, as is set out in the South African Qualifications Authority Act.<sup>73</sup> The SAQA has introduced standard methods and qualifications for training within the local government sphere.

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<sup>71</sup> See LGIS No 2: Local Government for the 21st century (1999) 27.

<sup>72</sup> 97 of 1998.

<sup>73</sup> 58 of 1995.

## **The current state of local government and the general impact of the Constitution of 1996**

### **6.1 Introduction**

Local government has been given a new face within the new constitutional system of South Africa. Since the local elections that were held during December 2000, local government has entered into the final phase, according to the restructuring process set out in the Local Government Transition Act. During this final phase, all local government matters will be regulated according to the provisions of the Constitution of the Republic of South Africa, 1996<sup>1</sup> and by the newly enacted local government laws, as is envisaged and required by the Constitution. Within the new legal framework, all local governments have been given a special status as a distinctive sphere of the government, together with specific objects and developmental duties that must be achieved.<sup>2</sup> The Constitution has further also identified certain specially entrenched powers and functions of municipalities, which are to be exercised in a system comprising different categories of municipal authority and according to specific procedures.<sup>3</sup>

Apart from the abovementioned changes, many new institutional, membership and procedural requirements have been established, which are all ultimately protected in the highest law of the state.<sup>4</sup> Although the Constitution has created the new legal framework for local government, this framework has been complicated by various external factors such as financial, administrative and legislative difficulties. To under

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<sup>1</sup> Hereafter referred to as the Constitution of the RSA, 1996.

<sup>2</sup> See the Constitution ss 152 and 153.

<sup>3</sup> See the Constitution ss 155 and 156.

<sup>4</sup> According to the Constitution s 2, the Constitution is the supreme law of the Republic, and the obligations imposed by the Constitution must be fulfilled.

stand fully the challenges of the local governments of the future, it is very important to investigate the current state of local government in the country and also to evaluate some of the problems facing such governments.

## **6.2 Current financial constraints in local government**

The restructuring process and, more specifically, the amalgamation of the previously divided local government jurisdictions, has altogether massively increased the population figures for which municipal authorities are responsible. This sudden expansion in numbers of local residents and the accompanying responsibility over a bigger area of jurisdiction have not been counterbalanced by a balancing increase in taxes and financial capabilities. Because of the inherited system with serious service backlogs, a general collapse in infrastructure and a noticeable deterioration in creditworthiness and borrowing capacity, many current local authorities are experiencing distressing and alarming financial crises. These crises are often fuelled by ever-increasing demands and expectations on service delivery by local residents, combined with a decline in national and international economic growth. The position is further hampered by inadequate financial management capabilities and poor staff training programmes.<sup>5</sup> Apart from the financial constraints, many new administrative changes have been introduced, which in practice are often very difficult to implement.

## **6.3 New administrative challenges**

The amalgamation process of local governments has also resulted in drastic administrative changes that have to be implemented. However, many municipalities are still characterised by hierarchical line departments, poor co-ordination between departments, many untrained workers and an unequal representation of women in senior management positions. These factors contribute largely to the inefficiency that often occurs in service delivery. Because of the changed mandate within local governments, new capacities, attitudes and approaches are urgently required. It is of importance that the relations between municipal councils and their administrations, management and workforce as well as between such councils and the local community are to be improved. A new focus on training should be introduced, together with a programme of systematic evaluation and support.

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<sup>5</sup> Refer to the White Paper on Local Government (1998) at 28.

#### **6.4 Legislative complexity of the new system**

Since the start of the restructuring and transformation process in 1993, many new legislative changes within the local government sector have been introduced.<sup>6</sup> The new legal framework was complicated, however, by the fact that many of the so-called old-order laws and regulations, which had supported the previous model of local government, were still in force and effect. This situation often caused legal uncertainty, which impacted negatively on the operation of many new municipal councils. The problem was compounded by the fact that some of the inherited old-order legislation was often applied differently in different jurisdictions and thus resulted in not only confusion and uncertainty but also in the creation of different legal norms and standards. In order for the transformation to be effective and the new systems ultimately to be successful, legislative uniformity was urgently needed. In the time prior to the beginning of the final phase of the restructuring process, many such uniform laws were enacted. These laws were also needed to ensure compliance with the overall constitutional mandate requiring such laws.<sup>7</sup>

#### **6.5 Global and national trends**

In modern times, it has become unimaginable for local governments to ignore the economic changes that are taking place not only in their immediate surroundings but also on a national and international basis. It is generally accepted that the rise and decline of industrial developments have a severe impact on local markets, local income and expenditure, employment possibilities and finally on the quality of life of people. It is thus true to say that globalisation and internationalisation of capital have a major impact on all spheres/levels of governments in all countries, and even more so in developing countries. Usually the lowest government level of a state is affected most by these factors.

The creation of transnational corporations, economic transactions and the integration of systems of production on a worldwide scale, which are supported with a system of rapid development of information technologies and knowledge-sharing, have resulted in the emergence of the so-called global economy. These developments are

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<sup>6</sup> Refer not only to the constitutional requirements but also the LGTA, the Demarcation Act 27 of 1998, Systems Act 32 of 2000 and Structures Act 117 of 1998.

<sup>7</sup> In the Constitution ch 7, many references are made to national and provincial laws that had to be enacted to complete the constitutional framework of the new local government system of the country. Refer to the Constitution ss 154, 155 and 156 respectively.

very important for local authorities, especially if they want to compete and enlarge their revenue possibilities. Many large cities or metropolitan areas have become nodes or points of development and trade, which serve as connections between various economic structures across the globe.<sup>8</sup>

The importance of the global economy is also very important to the central government of South Africa in its strategies and policies for developing the country.<sup>9</sup> In support hereof the government has put in place the so-called Government Growth, Employment and Redistribution strategy (also called GEAR), which places more emphasis on an export-orientated economy. The aim is to achieve international competitive industries and to enhance economic growth. In this context, many municipalities will have to manage and absorb the consequences of globalisation.

Furthermore, local governments have not only the opportunity, but indeed the responsibility to attract foreign investments. This can be achieved through the promotion of systems which allow for competitive industrial development and a strong support for local enterprises. Municipalities throughout the country are challenged to find a balance between competition and co-operation between themselves. Co-operation is necessary to enhance performance and to uplift the economy as a whole.<sup>10</sup>

## **6.6 The influence of settlement patterns and trends**

Settlement patterns and trends play an important role for local governments of the future and must be taken into account to ensure the effective delivery of services. It is generally accepted that settlement dynamics have severe influences on the resources of local authorities. The importance of proper planning in respect of future settlement patterns can thus not be overemphasised. Settlement patterns and trends have also been important during the process of demarcation of the new local government areas; the boundaries had to account for population figures within certain jurisdictions.

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<sup>8</sup> One can take the area of the Eastern Cape as an example. With the motor industry settled in that area, it has become a central node for that industry and provides not only for many job opportunities but has a strong financial and economic importance both locally and also internationally. Many products are exported to other countries in the world.

<sup>9</sup> This is especially important for the RDP programme of the national government.

<sup>10</sup> Refer to the White Paper on Local Government (1998) at 31.

In the White Paper on Local Government, various settlement types have been identified. These types are discussed briefly below, as they are important in understanding the many diversities that are present in the various settlements.<sup>11</sup>

- *Urban core settlements* Such a settlement refers to a formal city or town with a high population density, high levels of economic activity and usually higher land values.
- *Urban fringe settlements* These are settlements outside the urban core of a city or town and often include areas of low income.
- *Dense rural settlements* These types of settlement are divided into two groups. There is the so-called “Betterment settlement”, which has a high density of people. Such settlements are mostly pre-planned and former homeland areas. The second group is called “Informal settlements”. Such settlements are unplanned, un-serviced and mostly relatively poor.
- *Villages* Villages are rural settlements with a active population of more than 500 people but fewer than 5 000. Villages are often unplanned and include traditional African settlements.
- *Argri-villages* Such settlements are planned, densely populated settlements in rural/agricultural areas.
- *Dispersed/Scattered settlements* These are unplanned settlements of fewer than 500 people. Most such settlements are the first step in the creation of an informal settlement.

The importance of the various types of settlement lies within the diverse composition of their communities. Over 20 million people in modern day South Africa live in urbanised areas. It is further estimated that the process of urbanisation is to continue in the foreseeable future, with a dramatic increase in the proportion of urbanised citizens. Metropolitan areas and secondary cities are expected to absorb the most of this urban growth. Recent studies of the Department of Constitutional Development and Local Government have revealed profound changes in the migration trends of people in South Africa, which will have major consequences on local government institutions and their respective programmes for compliance with the new constitutional demands and objectives.

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<sup>11</sup> See the White Paper on Local Government (1998) at 31-32.

## **6.7 General impact of the Constitution**

It goes without saying that the Constitution as the highest or supreme law of the South African state has a profound and decisive impact on local governments.<sup>12</sup> From the wording of section 2 it is clear that not only legislative actions<sup>13</sup> but also the conduct of executive or legislative bodies must comply with the Constitution. In many instances the Constitution also requires positive state action in order for the obligations set out in the Constitution to be fulfilled. If law or conduct does not comply with the Constitution, such law or conduct is unconstitutional and thus invalid.

Many constitutional requirements are applicable to all spheres of government<sup>14</sup>, while others are directed specifically and exclusively at local government.<sup>15</sup> This distinction can be classified under general constitutional principles important to local government and specific constitutional principles for local government. In this chapter the focus will be on the general principles. The specific aspects relevant to local governments will be discussed extensively in later chapters.

### ***6.7.1 Founding constitutional requirements and principles important to local government structures***

#### **6.7.1.1 The preamble and founding provisions**

Both the preamble and founding provisions contain important aspects and insights into the constitutional text as a whole, and such principles/provisions have an important role and significance for the constitutional system. Such provisions are usually the basis/foundation upon which the total constitutional and legal system is founded. Both the preamble and the founding provisions are important to local government institutions and local government law: they contain background information regarding our history and they confirm certain fundamental values on which the new constitutional order is based. The preamble also gives one insight into the text of the Constitution that is to follow and explains the aspirations and goals of the citizens of the state. Both the preamble and founding provisions have important value and significance with regard to future local government developments and the overall

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<sup>12</sup> The Constitution s 2 states that the Constitution is the supreme law of the state and that any law or conduct inconsistent with the Constitution is invalid. The section also requires that the obligations imposed by the Constitution be fulfilled.

<sup>13</sup> Eg, municipal by-laws.

<sup>14</sup> Eg, compliance with the Bill of Rights (ch 2) or the basic values and principles governing the public administration (ch 10).

<sup>15</sup> See the Constitution ch 7 under the heading: Local Government.

achievement of the broad constitutional objectives and goals set out for local governments. In respect of future disputes or local government issues, the preamble and founding provisions can be used as a guide as to how such disputes/issues should be addressed. In this respect the preamble specifically recognises and identifies the following aspects:<sup>16</sup>

- It recognises the injustices of the past and honours those who have suffered for justice and freedom in our land
- It honours those who have worked to build and develop our country and believe that South Africa belongs to all who live in it.
- It is directed at healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights.
- It wants to lay the foundation for a democratic and open society in which the government is based on the will of the people and every citizen is equally protected by the law.
- It wants to improve the quality of life of all citizens and free the potential of each person.
- It wants to build a united and democratic South Africa which should be able to take its rightful place as a sovereign state in the family of nations.

Because local government institutions are part of the overall governmental structure, all of the abovementioned goals and objectives are relevant to them. The goals must thus be read in conjunction with the specific constitutional objectives and duties for local government.<sup>17</sup> All local government institutions must strive to address and heal the injustices/inequalities of the past, especially with regard to unequal provision of services, to ensure democratic values and fundamental rights protection and, even more importantly, to improve the quality of life of local South African residents. Although strictly speaking the preamble is not a specific section of the Constitution, it contains very important directives aimed at ensuring a new democratic and acceptable local government system and should be used to that end.<sup>18</sup>

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<sup>16</sup> Refer to the preamble of the Constitution.

<sup>17</sup> See the Constitution ss 152 and 153.

<sup>18</sup> In *S v Mhlungu* 1995 (3) SA 867 (CC) at para 112 where the Constitutional Court confirmed that the preamble of the Constitution is of interpretative importance as it connects up, reinforces and underlies all of the text of the Constitution that is to follow. It further helps to establish the basic design of the Constitution and it indicates its fundamental purpose.



In contrast with the preamble, the founding provisions of the South African Constitution are entrenched directly within the constitutional text.<sup>19</sup> It is clear from the Constitution itself that the founding provisions are of extreme importance, as they enumerate the fundamental values on which the new constitutional order is founded. These values are stated thus:<sup>20</sup>

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- Human dignity, and the achievement of equality and the advancement of human rights and freedoms.
- Non-racialism and non-sexism.
- The supremacy of the Constitution and the rule of law.
- Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, which is to ensure accountability, responsiveness and openness.”

Many of these values are just as important to local government as they are to the others spheres of government and the state in general, and every effort must be made to achieve and maintain them.

#### **6.7.1.2 The supremacy clause**

The importance of the Constitution is specifically emphasised through the supremacy clause.<sup>21</sup> According to this clause, the Constitution is the supreme law of the Republic, and any law or conduct inconsistent with the Constitution is invalid. Furthermore, all the obligations imposed by the Constitution must be fulfilled. With reference to local government, the supremacy clause is important for *inter alia* the following reasons:

- All the constitutional requirements (direct or indirect) and obligations regarding local government are protected in the Constitution as part of the highest and most

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<sup>19</sup> S 1 of the Constitution, in which the founding provisions are set out, is the most firmly entrenched of all the sections of the Constitution. In s 74(1) the Constitution states that s 1 and also ss 74(1) in its protection of s 1 may be amended only by a Bill passed by the National Assembly with a supporting vote of at least 75 per cent of its members and by the National Council of Provinces with a supporting vote of at least six of the nine provinces.

<sup>20</sup> See the Constitution s 1.

<sup>21</sup> See the Constitution s 2.

important law of the state. Such requirements and obligations can be altered/amended only through special procedures and special majorities.<sup>22</sup>

- Any legislative or executive conduct or law-making actions by a local government, for example the making of a by-law or the acceptance of a new policy, must be consistent with the Constitution; otherwise it will be invalid. Strict compliance with both the procedural and substantive requirements of the Constitution must be ensured.
- Local governments, like all other spheres of government, are also tasked with specified positive obligations that must be fulfilled. The Constitution is mandatory in this regard, and all efforts should be made to achieve and fulfil such obligations.<sup>23</sup>

It is thus clear that the supremacy clause is important to both the direct requirements set out for local government in chapter 7 of the Constitution and also the other indirect or consequential provisions applicable to municipal authorities in general. Any dispute regarding the constitutionality of a law or conduct will depend on the facts and circumstances of each case and will require a process of interpretation in determining possible inconsistency with the Constitution. According to the Constitution it is the function of the judicial authority to resolve such constitutional disputes and to declare laws or conduct to be inconsistent with the Constitution.<sup>24</sup> It is thus clear that the decisions of our courts are thus of profound significance and are an indispensable source of the law.

### **6.7.1.3 Official languages**

South Africa is a multilingual country and the Constitution protects eleven official languages.<sup>25</sup> The state must further take the necessary practical and positive measures to elevate the status and advance the use of the official languages. The protection and use of the official languages are thus also important to local government

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<sup>22</sup> See the Constitution s 74. See also *In re: Certification of the RSA 1996*, 1996 (4) SA 744 (CC).

<sup>23</sup> See s 7 of the Bill of Rights which states that the state must fulfil, promote, respect and ensure the rights set out in the Bill of Rights.

<sup>24</sup> The Constitution s 165(1) determines that the judicial authority of the Republic of South Africa is vested in the courts. S 166 again determines the judicial system. The judicial system is of importance, as only certain courts have the jurisdiction to adjudicate constitutional disputes. South Africa also follows the system of *stare decisis*, which requires the lower courts to follow the decisions of the higher courts.

<sup>25</sup> See the Constitution s 6.

institutions as part of the overall governmental structure of the state. The Constitution sets the following requirements regarding the use of the official languages:<sup>26</sup>

- National and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance and the needs and preferences of the population as a whole or in a relevant province. However, both national and each provincial government must use at least two official languages.
- All municipalities must take into account the language usage and preferences of their respective local residents.

The use of languages is particularly important for the purposes of official communication, the proclamation and wording of laws and the issuing of directives. All official languages enjoy equal protection, although this is not absolute. For the practical reasons mentioned above, certain languages may be preferred for public purposes. This is important, as the public must be able to take cognisance of the rules of law applicable to them and must therefore be informed in a language which they can understand.

It was indicated above that, unlike national and provincial governments, municipalities are not compelled to choose two official languages. They must, however, take the language usage and preferences of their residents into account. Again, it is mandatory in terms of the Constitution that all available demographic statistics be taken into account before a municipality chooses to use a particular language as its official language. It is unclear why the requirement to use at least two official languages is mandatory for only national and provincial governments; it is submitted that it is more important to establish an acceptable and effective system of communication between local authorities and their residents than it is to establish such a system on a national or provincial level. The reasoning of the constitutional drafters for not compelling local governments to use at least two official languages seems unclear and unfortunate. Be that as it may, at present municipalities can decide to use only one official language which, as argued above, could negatively hamper communications and also participation of certain sections of a local community. Before a decision is taken on the use of an official language, an investigation into the language usage and preferences of the local inhabitants is mandatory. It is submitted that a decision of a

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<sup>26</sup> See the Constitution s 6(3)(a)-(b).

municipality to use only one official language will be hard to justify in terms of the constitutional provisions without a proper investigation and in an area where there are also other language users.<sup>27</sup>

It is important to remember that aside from the constitutional requirements set out above, members of the public are still permitted to use any official language of their choice in their communications with government structures. Local governments should position themselves to deal with and answer such communications even though the language used by a private person is not the official language of that municipality. For confirmation of this viewpoint one should look at not only the provisions of section 6 of the Constitution but also the various sections in the Bill of Rights, which protect an individual's right to use a language of choice. The following reasons are submitted as to why a local resident can use any official language to communicate with the local authority of that area:

- All official languages must enjoy parity of esteem and must be treated equitably. No one language is more important than another.<sup>28</sup>
- Only government institutions are restricted or subject to conditions in terms of language usage.
- The Bill of Rights prohibits unfair discrimination on, *inter alia*, the ground of language.<sup>29</sup>
- The Bill of Rights also provides that everyone has the right to use the language of his or her choice, but may not do so in a manner inconsistent with any provision of the Bill of Rights.<sup>30</sup>
- Language is also protected where education is concerned and during criminal proceedings.<sup>31</sup>

With reference to the Bill of Rights, it should be emphasised that any limitation of a right set out in the Bill of Rights can be limited only according to the requirements and provisions of the limitation clause.<sup>32</sup> Languages are further also protected by the Pan South African Language Board which was established in compliance with sec-

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<sup>27</sup> Refer to *Louw v Transitional Local Council of Greater Germiston* 1997 (8) BCLR 1062 (W).

<sup>28</sup> See the Constitution s 6(4).

<sup>29</sup> See the Constitution s 9(3).

<sup>30</sup> See the Constitution s 30.

<sup>31</sup> Refer to the Constitution ss 29(2), 35(3)(k) and 35(4).

<sup>32</sup> See the Constitution s 36.

tion 6(5) of the Constitution. A dispute regarding language issues can also be referred to this board for investigation.

#### **6.7.1.4 The importance of the Bill of Rights**

In the paragraph above, mention was made of the protection of language in the Bill of Rights. However, The Bill of Rights as a whole has a far larger impact on all governmental institutions' Before one investigates such impact, it is important to discuss briefly the general aspects of the Bill of Rights, which are summarised as follows:

- The Bill of Rights is part of the Constitution and as such is a tool in the process of transforming the South African society and legal system within the broad constitutional framework. Most of the constitutional principles are fundamental to understanding the Bill of Rights in its constitutional context.<sup>33</sup>
- A Bill of Rights usually imposes substantive limitations on the exercise of state power. It sets certain standards or rights, which the state may not violate or limit unreasonably. Should the state fail to protect or even limit these pre-determined rights, it will act unconstitutionally and thus unlawfully. Such unconstitutional or unlawful conduct will thus be invalid.<sup>34</sup>
- Many of the rights or duties in a Bill of Rights impose duties not only on the state, but on natural or juristic persons who must comply or protect such rights. Overall, however, the Bill of Rights is concerned mostly with protecting the individual against the excessive powers of the state.

With regard to the purpose of the Bill of Rights, one can clearly identify its value and importance within the new local government structure of South Africa. However, the sections set out in the Bill of Rights can be divided into procedural/operational provisions/rights and also substantive provisions/rights. It is not the focus of this work to explain and investigate fully the functioning of the Bill of Rights and the substantive provisions that are contained therein. There are many legal textbooks available which specifically deal with such issues in great detail.<sup>35</sup> However, it is necessary to refer to some aspects in more detail:

- Rights in general

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<sup>33</sup> Principles such as the idea of constitutionalism, the rule of law and constitutional supremacy.

<sup>34</sup> See the Constitution ss 2, 38 and 172.

<sup>35</sup> See for more information the various chapters in Chaskalson *et al* (1999) and also in De Waal, Currie and Erasmus (2001).

The Bill of Rights proclaims itself as a cornerstone of democracy in South Africa, and it enshrines the rights of all people in our country.<sup>36</sup> Again the importance of democracy within the new South African state is emphasised. The protection of the rights of *all people* (own emphasis added) in our country has important implications for non-citizens who, but for a few exceptions, are also entitled to many of the rights protected in the Bill of Rights.

The Bill of Rights further states that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. This undoubtedly has severe implications for all spheres of government and specifically also for local governments. Normally the state is required only to respect and protect fundamental rights.<sup>37</sup> However, we see here that the Constitution requires the state to act both negatively<sup>38</sup> and positively.<sup>39</sup> The determination of instances when the state must act in a positive manner will strongly depend on the type and nature of the right that is relevant to a particular issue.<sup>40</sup>

Lastly, the Constitution determines that the rights in the Bill of Rights are subject to limitations. Such rights are not absolute and can be limited. However, any limitations must comply with the requirements of the specific limitation clause provided for in the Constitution.<sup>41</sup> If a local authority limits or threatens to limit a right or rights set out in the Bill of Rights through its laws or conduct, special attention must be given to the contents of the limitation clause before such laws or actions are indeed implemented. This obligation requires all government institutions to ensure proactively that their laws, actions or policies do not unreasonably and unjustifiably limit one or more of the rights that are protected in the Bill of Rights.

- Application of the Bill of Rights

A Bill of Rights has normally specific rules regarding its application. In this regard the South African Bill of Rights is no different and the following aspects are of im

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<sup>36</sup> See the Constitution s 4(1).

<sup>37</sup> It is better to refer to the rights set out in the Bill of Rights as fundamental rights rather than human rights, because many of the rights are also applicable to legal persons.

<sup>38</sup> Not limiting or breaching rights.

<sup>39</sup> Acting proactively to achieve or fulfil a right.

<sup>40</sup> Fundamental rights can be divided into three categories, namely civil political rights or so-called first generation rights; socio-economic rights or second generation rights and also third generation rights. Positive state action is often required in cases involving 2nd or 3rd generation rights, such as the right to housing, health care and the environment.

<sup>41</sup> See the Constitution s 36.

portance:

- (a) At first, the Bill of Rights applies to *all law* (own emphasis added) and it binds the legislative, executive and judicial authorities and all organs of state.<sup>42</sup> The reference made to all law should be widely interpreted to include all legislation, be that original or subordinate legislation, the common law and also customary law. All authority in the state – legislative, executive or judicial – together with all organs of state, are bound by the provisions of the Bill of Rights. The Constitution specifically defines organs of state and also the terms “national legislation” and “provincial legislation”.<sup>43</sup> From the above wording of the Constitution it is clear that local governments are undoubtedly bound by the Bill of Rights, both in its capacity as a legislature and as an executive organ of state on the local level of government.<sup>44</sup>
- (b) Taking into account the nature of a right and also the nature of any duty imposed by the right, a provision of the Bill of Rights binds a natural or a juristic person if it is applicable and to the extent that it is applicable.<sup>45</sup> This subsection of the Constitution confirms without uncertainty that the Bill of Rights has both vertical and horizontal application, depending on the nature of the right and the nature of any duty imposed by a right.<sup>46</sup> It should be noted that some rights specifically explain who carries the responsibility to comply with duties imposed by such rights.<sup>47</sup>

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<sup>42</sup> See the Constitution s 8(1).

<sup>43</sup> In this regard see the Constitution s 239. National legislation includes subordinate legislation made in terms of an Act of parliament (eg, regulations issued by a minister) and also legislation that was in force when the Constitution took effect and that is administered by the national government. Provincial legislation includes also subordinate legislation in terms of a provincial Act, and legislation in force when the Constitution took effect and that is administered by a provincial government. “Organ of state” means any department of state or administration in the national/provincial/or local sphere of government; or any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial Constitution; or exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

<sup>44</sup> Again reference must be made to the Constitution s 2, which determines that both law or conduct must be consistent with the Constitution. It is also important to note that on the local sphere of government, municipal councils act in both legislative and executive capacities. S 151(2) states that legislative and executive authority is vested in the relevant municipal council. See also *S v Mercer* 2004 (2) SA 598 (CC).

<sup>45</sup> Refer to the Constitution s 8(2).

<sup>46</sup> Some rights, eg, the right to life or human dignity are applicable only to natural persons, while rights such as access to court or privacy are also applicable to juristic persons.

<sup>47</sup> Many rights place a duty on government as a juristic entity and not on private individuals. It is for government to take reasonably legislative measure to achieve progressive realisation of the rights to housing or health care, food, water and social security. Other rights, eg, the right that no

*continued on next page*



(c) Juristic persons are bound by the Bill of Rights only to the extent that they are required to be bound by the nature of the rights and the nature of that juristic person.<sup>48</sup> Many rights set out in the Bill of Rights are applicable only to natural persons.<sup>49</sup> The nature of such rights disqualifies juristic persons from their protection, because juristic entities do not live or have human features. It is further important to determine whether a juristic person has a private or public nature. When it has a public nature the state cannot simultaneously be bound and entitled to the rights set out in the Bill of Rights.<sup>50</sup> The nature of a local government in its role as a juristic institution excludes it from the protection of the rights contained in the Bill of Rights. It is not entirely certain what the position would be when two organs of state or different spheres of government are involved in a dispute between one another, however, and where one organ/sphere is supposedly discriminating against the other. It is submitted that the Bill of Rights cannot be enforced in such instances, however, but that other provisions in the Constitution can be called upon to protect and address the dispute.<sup>51</sup>

- Limitation, enforcement and the interpretation of the Bill of Rights

It was stated above that the rights contained in the Bill of Rights are not absolute and can be limited. Any limitation must comply with the requirements set out in the limitation clause of the Constitution.<sup>52</sup> Any limitation of a right which does not comply to the limitation clause requirements will not be reasonable and justifiable and will thus be unconstitutional and invalid. All local authorities must thus ensure that they do not fall foul of provisions of the limitation clause through either legislative actions or executive conduct.

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person may unfairly discriminate against anyone, applies also horizontally between private individuals or institutions. See s 9(4) of the Constitution.

<sup>48</sup> Refer to the Constitution s 8(4).

<sup>49</sup> The rights to life and human dignity for example.

<sup>50</sup> Fundamental rights have been developed to protect against excessive state powers.

<sup>51</sup> Eg, when a provincial government is withholding financial grants to a particular local authority on the basis of the political composition/control of that authority while other local authorities are treated much more favourably, the relevant local authority should not base its claim on unfair discrimination in terms of the Constitution, but rather on the protection given elsewhere in the Constitution. They should rather use the protection given in the Constitution Chs 10 and 13.

<sup>52</sup> See the Constitution s 36.



The protection of the rights of the Bill of Rights is further enhanced through the specific enforcement clause.<sup>53</sup> Various categories of people or institutions can approach a competent court in instances where rights of the Bill of Rights have been infringed or are under threat of being infringed.<sup>54</sup> The Constitution also provides directives for the purposes of interpreting the extent and content of the rights of the Bill of Rights.<sup>55</sup> These interpretative directives should be applied together with various other directives that were developed by the courts.<sup>56</sup>

- The substantive rights protected in the Bill of Rights:

The rights explained in (a)–(c) above are regarded as procedural rights. Most rights in the Bill of Rights are so-called “substantive rights”, however, and should be studied extensively. With the exception of a few, almost all of the substantive rights are important and applicable to local government in one way or another.<sup>57</sup> It is thus imperative for all local governments, as part of the government in general, to familiarise themselves with the content and extent of the rights of the Bill of Rights and to adhere to the constitutional obligation that the state must respect, protect, promote and fulfil the rights where applicable.<sup>58</sup>

Since the commencement of the IC and the FC, many legal disputes have been decided that have involved local governments and fundamental rights protected under the constitutions. Examples of such disputes are briefly mentioned as follows:

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<sup>53</sup> See the Constitution s 38 .

<sup>54</sup> See the Constitution s 38(a)–(e). In the case of *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC) the court doubted whether a local government could act on its own behalf in a Bill of Rights issue and do so in the interest of others. See para 15 at 933-934. See also *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T). In the case the applicant, a voluntary association, instituted proceedings against the municipality for having, according to them, unlawfully terminated the water supply to the residents’ township. The court *inter alia* held that s 38 required the words “an association” in s 38(1)(e) to be interpreted so as to be compatible with the overarching spirit, purport and objects of the Bill of Rights. Since an “association” did not require legal personality for it to sue or be sued in its own name, *ex facie* the text there were no restrictions on the *locus standi* of an association. To hold that the common law restrictions applied would be contrary to the constitutional context against which s 38 stood to be interpreted and would make the common law an unjustifiable obstacle to constitutional rights, particularly in view of the Constitution ss 39(2) and 173. See para 25 at 78B-E. The court also held that the conduct of the respondents could indeed constitute reviewable administrative action.

<sup>55</sup> See the Constitution s 39.

<sup>56</sup> See, eg, the interpretation guidelines laid down in the case of *S v Makwanyane* 1995 (3) SA 391 (CC).

<sup>57</sup> Arguably the rights to citizenship, freedom of movement and access to courts are enforceable against only national government and not local governments. See ss 20, 21 and 34 of the Constitution.

<sup>58</sup> See the Constitution s 7(2).

- (a) The cases that follow reflect the courts' decisions under the equality clause.<sup>59</sup> In *Beukes v Krugersdorp Transitional Local Council*<sup>60</sup> the court held that the present instance invoked a claim of indirect unfair discrimination: the first respondent did not levy the 'flat rate' from only black residents, nor did it levy the higher, service-based charges from white persons only, but based its charges on locality. However, its differential charges stemmed precisely from the racial history that divided those localities and confined members of various racial groups to different areas which were still largely, albeit not exclusively, racially divided. The consequence was that differential charges had an undeniable, though indirect, racial impact. The question was whether or not the differences could be historically, socially or economically justified. If they could not, they would constitute unfair discrimination and the applicant would have a valid complaint on the grounds of race.<sup>61</sup>

The first respondent's answer to the applicant's complaint regarding non-collection and waiver of arrears in townships but not in "white" areas was that it had collected moneys due to it from township residents and, to the extent that it might have waived what those residents owed, it had done so for reasons which were 'sound and businesslike'. The court held that this seemed amply warranted within the latitude which had necessarily to be permitted a public authority in exacting compliance in regard to debts owed to it from those subject to its jurisdiction. The court pointed out, however, that if a local authority were to follow a sustained locality-directed policy of non-collection or waiver which had a direct or indirect racially discriminatory impact, that policy would be unfair and open to challenge under section 8(2). However, the applicant could not claim in the present proceedings to have made out such a case.<sup>62</sup>

Finally the court held that the first respondent had stated that the "flat rate" charged in the townships had been adopted only as an interim measure and for practical reasons which included inadequate metering facilities, the long-standing boycott by black township residents of local authorities' levies and

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<sup>59</sup> The Constitution s 9, which states that everyone is equal before the law and has the right to equal protection and benefit of the law, and also that the state may not unfairly discriminate against anyone on certain grounds.

<sup>60</sup> 1996 (3) SA 467 (W).

<sup>61</sup> At 480F-H.

<sup>62</sup> At 481G/H-I, read with 481F.

the fact that municipal facilities and services in the formerly white areas were far superior to those in the townships and that that amounted to an economic and social justification for the differentiation of which the applicant complained. The differences of which the applicant complained were not based on racial discrimination, but were warranted by the localities' differing circumstances.<sup>63</sup> These cases were followed by a Constitutional Court decision in the case of *Pretoria City Council v Walker*<sup>64</sup>. In this case the applicant (appellant) successfully sued the respondent in a magistrate's court for arrear service charges for the period July 1995 to April 1996. The respondent's defence, which was not upheld by the magistrate, was that he was entitled to withhold payment by reason of the fact that the applicant's conduct had constituted a violation of his constitutional right to equality in terms of section 8 of the Constitution. The applicant had charged the residents of the former municipal area of Pretoria on the basis of a tariff for the actual consumption of water and electricity supplied, which was measured by means of meters installed on each property in that area, whereas it had charged residents in the former Mamelodi and Atteridgeville municipal areas (where no meters had been installed) a flat rate based on the amount of water and electricity supplied to such areas divided by the number of residences therein. It was the applicant's intention to install meters on each property in Mamelodi and Atteridgeville, after which residents there would be charged on the basis of water and electricity actually consumed. The court held that the differentiation in the present case was rationally connected to legitimate governmental objectives, however; not only were the measures of a temporary nature but they were designed to provide continuity in the rendering of services by the applicant while phasing in equality in terms of facilities and resources during a difficult period of transition.<sup>65</sup> With regard to the policy of the selective enforcement of the charges for municipal services, the court held further that the burden of rebutting the presumption of unfairness was on the applicant. Action had been taken against

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<sup>63</sup> See also *Port Elizabeth Municipality v Prut* No 1996 (4) SA 318 (E). In this case the respondents argued that the writing off of R63 million in outstanding services charges owed by residents of certain areas, but not their area, unfairly discriminated against them.

<sup>64</sup> 1998 (2) SA 363 (CC).

<sup>65</sup> See para 27 at 378 B-C.

defaulters in old Pretoria but not in Mamelodi and Atteridgeville, thus singling out white defaulters for legal action while at the same time consciously adopting a benevolent approach which exempted black defaulters from being sued.<sup>66</sup> In the circumstances it had to be held that the presumption of unfairness had not been rebutted and that the course of conduct of which the respondent had complained amounted to unfair discrimination within the meaning of section 8(2) of the IC. Finally, the court held that the debt that was owed by the respondent remained and that the only question was whether its payment should be enforced; the finding that the conduct of the applicant's officials amounted to unfair discrimination was an intimation that the applicant had acted incorrectly and that it should put its house in order; it was not a vindication of the respondent's refusal to pay for services rendered.<sup>67</sup>

- (b) Local governments are also confronted with the right to freedom of religion.<sup>68</sup> In the case of *Garden Cities Incorporated Association not for gain v Northpine Islamic Society*<sup>69</sup> the court held that the prohibition in a written sale agreement that the respondent may not install sound amplification equipment on the property bought from the applicant for religious usage did not infringe the respondent's right to freedom of religion. The court held that the sanctity of the agreement which the applicant had concluded with the respondent should prevail.<sup>70</sup>
- (c) With reference to the right of freedom of expression<sup>71</sup> various disputes can occur in which municipalities can have an interest. In the case of *City of Cape*

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<sup>66</sup> See para 80 at 396 A-B.

<sup>67</sup> See para 94 at 400 E-G. The court thus reversed the decision in *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T). See also the case of *Lotus River, Oltery, Grassy Park Residents Association v South Penninsula Municipality* 1999 (2) SA 817 (C), in which the court, dealing with a dispute which focussed on whether the municipality's decision to increase rates across the board by 19% for a financial year had contravened the applicant's rights to equality protected under s 9. The court held: That the respondent had discharged the *onus* of justification; it had been placed in an invidious financial position as a result of the restructuring of local government; its reliance on external subsidies was no longer available; the valuation roll was outdated and could not be updated in time for the 1998/1999 financial year; and it had a limited range of viable options and had chosen to increase rates only after careful consideration. Accordingly, even though the applicants' right to equality in terms of s 9 had been breached by the 19% increase in rates, viewed from the short-term perspective of the 1998/1999 financial year, the respondent had supplied sufficient justification for the limitation.

<sup>68</sup> See the Constitution s 15(1).

<sup>69</sup> 1999 (2) SA 257 (C).

<sup>70</sup> See 272A-H.

<sup>71</sup> The Constitution s 16.

*Town v Ad Outpost (Pty) Ltd*,<sup>72</sup> a case concerning the display of billboards in contravention with a particular by-law of the relevant municipality, the Cape High Court held that that particular advertising was a form of expression and hence stood to be protected under section 16(1) of the Constitution. The by-law further breached the respondent's right to freedom of expression by prohibiting any form of a particular mode of advertising and could not be justified under the Constitution. A similar dispute concerning the right to freedom of expression against advertising requirements was heard in the case of *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd*.<sup>73</sup> The case concerned an outdoor advertising billboard which violated the relevant municipality's by-law. Ratepayers had objected to the billboard on the grounds that it was an eyesore and a traffic hazard in a purely residential area. The first respondent resisted the application on the grounds that the by-law was unconstitutional in that it infringed their right to freedom of expression as entrenched in section 16 of the Constitution. The applicant municipality contended that the by-law was justifiable according to criteria prescribed in section 36(1) of the Constitution. Contrary to the *City of Cape Town v Ad Outpost* case above, the court held that although advertising was a constitutionally protected form of commercial speech, the applicant had adopted the measures in question in the interests of traffic safety and the appearance of the city. The applicant had a substantial interest in the regulation of the location of billboards, and the measures in question were, contrary to the respondents' contentions, rationally connected to a legitimate, substantial and pressing purpose of promoting public service and welfare. They directly advanced that purpose and were the least restrictive means available to the applicant to achieve its purpose. The court also held that the limitation of the respondents' rights was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>74</sup>

- (d) Municipalities are also regularly involved in property-related matters as well as other so called "socio-economic rights", such as the rights to access to ade-

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<sup>72</sup> 2000 (2) SA 733 (C).

<sup>73</sup> 2002 (2) SA 625 (D).

<sup>74</sup> See 636A-C.

quate housing, health care, food and water.<sup>75</sup> Not only are municipalities obliged to participate in housing schemes in order to fulfil the right to housing but they must also ensure that any eviction from land belonging to them is authorised under the Constitution and other applicable laws.<sup>76</sup>

Various land/property related disputes have already emerged under the new constitutional dispensation. In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*,<sup>77</sup> the appellant municipality owned a piece of land which it had earmarked for development in terms of a scheme which would entail the surveying of the land, its division into approximately 680 erven, the installation of water reticulation, rudimentary road networks and storm water facilities. Provision would also be made for refuse removal and a bucket system for sewerage. The intention was to allocate these erven to the very poor who were most in need of accommodation. Beneficiaries would then apply for first homeowners' subsidies, to be utilised for the erection of dwellings. During the latter half of 1998 a small group of people moved onto the land and erected shacks on it. The appellant conceded that this had been a result of a desperate need for housing in the area. It agreed to allow a limited number of families to remain on the land. Thereafter, however, increasing numbers moved onto the land. By June 1999 at least 340 structures had been erected and were occupied. The appellant served formal notice to vacate on these occupants (the further respondents), but to no avail. Their occupation made it impossible for the appellant to proceed with its proposed development. The court held *inter alia* that the deliberate and premeditated manner in which the further respondents had occupied the land had to weigh heavily against them. While it was common knowledge that the shortage of housing was a huge problem throughout the country, it could be addressed only if the relevant organs of state were allowed to plan and implement developments methodically. The premeditated and wanton occupation of land in order to blackmail municipalities into giving occupiers preferential treatment could not be countenanced.

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<sup>75</sup> Refer to the Constitution ss 25, 26 and 27.

<sup>76</sup> In this respect refer to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. Under s 1 of the Act an owner of land includes an organ of state which includes a municipal council.

<sup>77</sup> 2001 (4) SA 759 (E).

There was therefore no doubt that the public interest demanded that the courts intervene effectively to avert such conduct.<sup>78</sup>

A further and very significant case concerning socio-economic rights relating to land was the case of *Government of the RSA v Grootboom*.<sup>79</sup> In this case the respondents had been evicted from their informal homes situated on private land earmarked for formal low-cost housing. They applied to a High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The High Court held that section 28(1)(c) of the Constitution of the Republic of South Africa Act 108 of 1996 obliged the state to provide rudimentary shelter to children and their parents on demand if the parents were unable to shelter their children, that this obligation existed independently of and in addition to the obligation to take reasonable legislative and other measures in terms of section 26 of the Constitution and that the state was bound to provide this rudimentary shelter irrespective of the availability of resources. The appellants were accordingly ordered by the High Court to provide the respondents who were children and their parents with shelter. The appellants appealed against this decision. The respondents based their claim on two constitutional provisions: section 26 of the Constitution, which provides that everyone has the right of access to adequate housing, thereby imposing an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources, and section 28(1)(c) of the Constitution, which provides that children have the right to shelter.

In this landmark decision the Constitutional Court held *inter alia* the following:

- (i) The state was obligated to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing<sup>80</sup>
- (ii) Section 26 as a whole placed, at the very least, a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The manner in

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<sup>78</sup> See para D at 772A-F.

<sup>79</sup> 2001 (1) SA 46 (CC).

<sup>80</sup> Para 24 at 62D-E.



which the eviction in the present circumstances had been carried out had resulted in a breach of this obligation. Section 26(2) made it clear that the obligation imposed upon the state was not an absolute or unqualified one. The extent of the state's obligation was defined by three key elements which had to be considered separately: the obligation (i) to take reasonable legislative and other measures, (ii) to achieve the progressive realisation of the right and (iii) within available resources.<sup>81</sup>

(iii) Reasonable legislative and other measures (such as policies and programs) had to be determined in the light of the fact that the Constitution created different spheres of government and allocated powers and functions amongst these different spheres emphasising their obligation to cooperate with one another in carrying out their constitutional tasks. A reasonable housing program capable of facilitating the realisation of the right therefore had to clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources were available to implement it. Furthermore, the formation of a program was only the first stage in meeting the state's obligations. The program also had to be reasonably implemented, as failure to do so would not constitute compliance with the state's obligations;<sup>82</sup>

(iv) The national government bore the overall responsibility for ensuring that the state complied with the obligations imposed by section 26. However, the court confirmed that section 26 did not entitle the respondents to claim shelter or housing immediately on demand.<sup>83</sup> In light of the background the court reversed, in part, the decision in *Grootboom v Oostenberg Municipality*.<sup>84</sup>

A further reference to the right of property was made in the case of *Ex Parte Optimal Property Solutions CC*.<sup>85</sup> In this case the applicant had applied for the removal of a title deed restriction registered in the title deed of three erven. In

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<sup>81</sup> See pages 66-67 and 84-85.

<sup>82</sup> Refer to paras 39 and 42 at 67-69.

<sup>83</sup> Paras 66-69, 93-95 at 79-80 and 86.

<sup>84</sup> 2000 (3) BCLR 277 (C).

<sup>85</sup> 2003 (2) SA 136 (C).



terms of section 3(6) of the Removal of Restrictions Act,<sup>86</sup> service of such application had to be given to affected property owners in both official languages and had to be published once in the Provincial Gazette. With reference to such title conditions the court held that a restrictive condition imposed in the title deed of every lot in a township subdivision that "not more than one house shall be erected on any one lot" created a reciprocal praedial servitude imposing contractual rights and obligations on all the owners of the affected erven. The registration of those servituted rights and obligations resulted in the creation of real rights in property. It followed that any alteration to or removal of such title deed conditions altered or terminated the rights and obligations of the affected property owners *inter se* and altered or expunged, as the case may be, real rights in property. The courts would not, therefore, assume the power at common law to alter or remove title deed conditions of this nature without the consent of every affected property owner.<sup>87</sup> The court concluded that for purposes of section 25(1) of the Constitution of the Republic of South Africa Act 108 of 1996, "property" included a registered praedial servituted right [restrictive condition] and removal or deletion of such rights was *pro tanto* a deprivation of property.<sup>88</sup>

- (e) Arguably the most applicable right protected in the Bill of Rights for local governments is the right to access to information and just administrative action.<sup>89</sup> As a sphere of government, municipalities are mostly involved in executive processes which are directly relevant to the principles of administrative law. A good and sound knowledge of administrative law is essential to every municipal council or other functionaries of such a municipality. The following cases are indicative of the wide variety of administrative disputes that local authorities face regularly. In *Cape Metropolitan Council v Metro Inspection Services CC*<sup>90</sup> the court held that section 33 of the Constitution was not concerned with every act of administration performed by an organ of state, but was designed to control the conduct of the public administration when it exercised a public

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<sup>86</sup> 84 of 1967.

<sup>87</sup> See paras 4, 5 and 6 at 139C-G.

<sup>88</sup> Para 19 at 143-144.

<sup>89</sup> See the Constitution ss 32 and 33.

<sup>90</sup> 2001 (3) SA 1013 (SCA).

power and that it followed that whether or not conduct amounted to "administrative action" depended on the nature of the power being exercised. Other relevant considerations were the source of the power, the subject-matter, whether it involved the exercise of a public duty and how closely it was related to the implementation of legislation.<sup>91</sup>

The court further concluded that the appellant derived its power to cancel the contract from the terms of the contract and the common law; when it had concluded the contract it did not act from a position of superiority or authority, nor did it, when cancelling, find itself in a stronger position than the position it would have been in had it been a private institution; and when it purported to cancel the contract, it did not perform a public duty or implement legislation. The court further held that different considerations applied where a contract between an organ of state and a private entity was preceded by purely administrative actions and decisions by officials in the sphere of the spending of public money by public bodies in the public interest; these amounted to administrative actions because section 217(1) of the Constitution specifically provided that, when an organ of state in the national, provincial or local sphere of government contracted for goods or services, it had to do so in accordance with a system that was fair, equitable, transparent, competitive and cost effective.<sup>92</sup> The municipality cancelled the contract, however, because of a material breach of the contract whose cancellation did not amount to administrative action under section 33 of the Constitution.<sup>93</sup>

In a further development the Supreme Court of Appeal held in the case of *Fedsure Life Assurance v Greater Johannesburg TM Council*<sup>94</sup> that it was common cause between the parties that in taking the resolutions to impose a general rate in the rand on the ratepayers in order to yield an excess of in-

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<sup>91</sup> See paras 16 and 17 at 1023B-H.

<sup>92</sup> See paras 18 and 19 at 1023-1024.

<sup>93</sup> Para 22 at 1025F-G. The court thus reversed in part the decision in *Metro Inspection Services (WC) CC v Cape Metropolitan Council* 1999 (4) SA 1184 (C). See also *Frans v Groot Brakrivier Munisipaliteit* 1998 (2) SA 770 (C).

<sup>94</sup> 1998 (2) SA 115 (SCA).

come over expenditure, the respondent municipalities had performed administrative acts.<sup>95</sup>

#### **6.7.1.5 General Constitutional requirements important to Local Government**

It was explained earlier that there are many other provisions set out in the Constitution that are important to local governments. These aspects/requirements are divided in two categories. The first category is all the requirements directed at local governments alone, while the second category refers to those requirements that are relevant to all spheres of government, thus including local governments. Chapter 7 of the Constitution, under the heading Local Government, contains the aspects that are mentioned in category one. Category two aspects can be summarised as follows:

- *Principles of co-operative government* These principles are applicable to all spheres of government and as such are also very important to the local sphere of government.<sup>96</sup>
- *Vesting of legislative authority* The Constitution specifically determines where the legislative authority of the Republic of South Africa is vested: on a national level it is vested in parliament, on a provincial level in provincial legislatures and at a local level in municipal councils.<sup>97</sup> Local governments are also entitled to participation in the proceedings of the National Council of Provinces and are therefore involved in the highest legislative level of the state.<sup>98</sup> It is of interest to note that in respect of executive authority the Constitution does not explain where such responsibility vested in one section specifically, as is the case with legislative authority. Executive authority is dealt with in three separate sections of the Constitution.<sup>99</sup>
- *Assignment and provincial supervision of local government* Any power or function that is to be exercised or performed in terms of an Act of parliament or a provincial

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<sup>95</sup> The court also held that it was further common cause that the interim Constitution had operated at the time the proceedings had been instituted but that the interim Constitution had been superseded by the Constitution of the Republic of South Africa, 1996 by the time judgment was given in the court *a quo*. Accordingly, in terms of the Constitution s 17 of Sch 6, the jurisdiction of the court to adjudicate on any challenge based on the lawfulness or not of administrative actions performed by the respondents had to be determined in terms of the interim Constitution, unless the interest of justice required otherwise.

<sup>96</sup> See the Constitution ch 3.

<sup>97</sup> See the Constitution s 43.

<sup>98</sup> See the Constitution ss 67 and 163.

<sup>99</sup> On the provincial levels, executive authority is vested in the premiers of the provinces, and on a local level such authority is vested in the different municipal councils. S 85(1) states that the executive authority of the Republic of South Africa is vested in the president. This refers to national executive authority.

Act can be assigned to a Municipal council.<sup>100</sup> Provincial authorities cannot assign powers or functions only to municipalities; they are also constitutionally entitled to intervene when a municipality cannot or does not fulfil an executive obligation.<sup>101</sup> Assignment of functions and provincial supervision are very important considerations for local authorities and can have serious implications in general.

- *State institutions in support of constitutional democracy* The Constitution specifically provides for various institutions that have been entrenched in the text of the Constitution and have the overall aim to support and enhance constitutional democracy. Local authorities within the structure of government must also adhere to the broad constitutional objectives in creating a democratic state. Therefore, all the state institutions mentioned in the Constitution will play an important role in supporting democracy on a local government level.<sup>102</sup>
- *Principles regarding the public administration* Public administration can broadly be defined as the administrative branch of the state; the public administration is thus divided between the different levels of government and must be governed by the democratic values and principles that are enshrined in the Constitution.<sup>103</sup> All local government administrations must therefore comply with the requirements governing the public administration in general.<sup>104</sup>
- *The role of the security services* The Constitution specifically sets down certain requirements and obligations in respect of the overall security services of the Republic of South Africa. Although these principles are applicable to mostly national government, there are aspects that are important to local governments and must be taken into account. It is specifically provided that the national police service must be structured to function in the national, provincial and, *where appropriate*, the local spheres of government.<sup>105</sup> These requirements are thus of importance to municipalities in certain instances. It will be explained and discussed later, but in the new local government structure the functioning of security services, especially new metropolitan police services, will play and provide important security roles

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<sup>100</sup> See the Constitution s 126.

<sup>101</sup> See the Constitution s 139(1).

<sup>102</sup> See the Constitution ch 9. Such institutions *inter alia* include the Public Protector, the Auditor General and the Human Rights Commission, to name but a few.

<sup>103</sup> See the Constitution s 195(1).

<sup>104</sup> In this regard see the whole of the Constitution ch 10.

<sup>105</sup> See the Constitution s 205(1).

and services in certain municipal areas in the future. Without the effective implementation of security services it is hard to imagine the overall success and attainment of the objectives set out for municipal governments.

- *Traditional leaders and local government* It is moot law that traditional leaders have played an important part in African development and customs. Taking the history and composition of our country into account, it is self evident that traditional leaders have and will have important roles and functions to fulfil. It is submitted that the new goals and objectives as well as effective functioning of local authorities will not be achieved without the proper and generally accepted inclusion of traditional leaders within local authorities. This aspect is specifically emphasised through the constitutional protection given to traditional leaders.<sup>106</sup>
- *Principles of public/government finance* The Constitution also contains many important financial requirements and principles that are of crucial importance to all spheres of government.<sup>107</sup> Without sound fiscal policies and strict management systems, no form of government will succeed in achieving growth and ensuring compliance to its constitutional objectives. The financial aspects are thus of fundamental importance to all municipalities.

## 6.8 Conclusion

In this chapter many of the challenges and problems that are facing the new local government structure have been identified. The overall role and importance of the Constitution has also been highlighted and a distinction between general constitutional requirements and specific local government matters has been made. Compliance with all of these aspects and requirements are of fundamental importance for the overall success and stability of the state as a whole.

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<sup>106</sup> See the Constitution ch 12.

<sup>107</sup> See the Constitution ch 13.

## The status, objects, challenges and developmental duties of local authorities

### 7.1 Introduction

In the new constitutional dispensation, local government has been confirmed as a sphere of government at which government authority is exercised. Although local authorities are the smallest governmental institutions in a state, they are often regarded as the cornerstone of modern democratic systems.<sup>1</sup> The role of local governments in democratic systems is multiple, and some important aspects can be summarised as follows:

- Local government is the branch of government that functions the closest to the inhabitants/constituents of a specific area and is involved with the rendering of wide variety of services that materially affects the lives of all the people residing in its jurisdiction.
- Local authorities serve as an effective counterweight to the over-concentration of governmental authority in the other levels/branches of government. This positive influence can be achieved only if local governments are afforded a certain measure of autonomy.<sup>2</sup>
- Local authorities are often seen as local community-based management and administrative institutions which involve both political and bureaucratic components. Through these institutions, community actions and needs are promoted and regulated. In this capacity local governments are the best positioned to provide and ensure the sustainable provision of essential services to their relevant communities.

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<sup>1</sup> See Rautenbach and Malherbe (1999) 299.

<sup>2</sup> Rautenbach and Malherbe state that it is generally accepted as a sound principle that the local level of government should be an autonomous level of government. *Abid* 300.

- Through the exercise of their powers and functions, local governments ensure access to and bring the decision-making processes closer to the local residents. This then allows for better participation and involvement by local residents in the local government processes and decisions that affect their lives on a daily basis. By its nature, local government is best suited to allow and encourage local participation in all democratic processes and to provide an important training ground for democracy and political experiences. After gaining experience in local government affairs, local political leaders are often taken into higher levels of government.

It must be emphasised, however, that the advantages of a third or local sphere/branch of government can be severely limited if such a sphere of government is not supported through specialised expertise, financial backing and administrative infrastructure. Without such support in place, most municipalities will not be able to perform their functions and fulfil their obligations.

Apart from the advantages mentioned above, a local or third level of government is also confronted with certain disadvantages. The following disadvantages are generally accepted:<sup>3</sup>

- Most local governments often have to compete with higher levels of government over scarce resources; for example, water resources and tourism-promoting environments.
- Small municipalities are often manipulated by wealthy and powerful private enterprises. This must be guarded against, as it could lead to decisions that are not in the interests of the general public of that area.
- Through the process of decentralisation, many functions of higher spheres of government can be decentralised/delegated to local authorities in an attempt to abandon their responsibilities. Such practices can have severe negative implications on both financial and social standards and must be avoided at all costs.<sup>4</sup>

With reference to the abovementioned information it is important to determine specifically the status and role of local authorities within South Africa's new constitutional

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<sup>3</sup> See Rautenbach and Malherbe (1999) 300.

<sup>4</sup> The Constitution specifically protects local government in this respect. National or provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or functions. See the Constitution s 151(4). National and provincial governments must support and strengthen the capacity of municipalities to manage their own affairs and exercise their powers and functions.



order. The relevant status of local authorities is very important with reference to the extent of autonomy that is afforded to such a level of government.

In general, almost all modern states provide for different levels of government within their governmental structures. The division of government functions between different levels provides for a mechanism whereby government authority is distributed. It is important that government authority be distributed and exercised at the specific level where it is to be the most effective and efficient. In this regard each system differs from another and each state usually determines a specific system that is most suitable for its own circumstances. In most states provision is made for at least two, but mostly three, levels or spheres of government. Most frequently, the decision to have two or three levels is determined after various factors have been taken into account.<sup>5</sup> Many of these factors differ from state to state, and therefore all states have developed their own unique structures.<sup>6</sup>

After the recent constitutional reform South Africa has developed a new government system according to the new constitutional requirements and has entrenched three specific spheres of government. The Constitution identifies and explains these three spheres as follows:<sup>7</sup>

- In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.
- All spheres of government must observe and adhere to the principles of co-operative government and must conduct their activities within the parameters of such requirements.
- The importance of this division specifically lies in the confirmation that all three spheres of government are distinctive, interdependent and interrelated. The word “distinctive” protects and confirms each sphere’s independence or autonomy and it influences the manner in which each sphere is to operate and fulfil its powers and functions. The words “interdependent” and “interrelated” in turn refer to the constitutional commitment to an overall system of co-operative government in the Republic. The Constitution confirms that all spheres of government are to a

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<sup>5</sup> These factors include historical, political, geographical, economical and administrative information as well as specific population figures.

<sup>6</sup> In some states, eg, in the Netherlands, local authorities are mere administrative organs. In Germany however, local authorities are afforded distinctive and autonomous powers and functions.

<sup>7</sup> The Constitution s 40.



greater or lesser degree interdependent and interrelated and that all spheres should work together to achieve the new constitutional obligations and objectives. Section 40 was included in the final Constitution in compliance with Constitutional Principle XVI which, under the final Constitution, required the government to be structured on a national, provincial and local level.<sup>8</sup> Under this division each sphere has its own constitutionally determined powers and functions, which must be exercised and fulfilled according to the newly established constitutional mandate. Before one is to investigate the implications of local government as a part of the overall governmental structure, it is important to consider the unique characteristics of the local sphere of government.

## 7.2 The characteristics of local governments

In essence the characteristics of a local authority are threefold. *At first* a local authority is an identifiable juristic entity which has been formed within a specific area of jurisdiction by the community of that area. The entity is then tasked and bonded together by the common interests of the people of that area. *Secondly*, all local authorities provide a forum for local community participation in the affairs of government, albeit on the local level. This protection to participation is often referred to as “grass-roots democracy”.<sup>9</sup> In the *last instance* local governments are local political institutions which have been empowered with executive and legislative powers and functions. The significance and importance of the fact that local authorities are part of the political structure of the state must never be overlooked or underestimated.<sup>10</sup>

## 7.3 The importance of being a sphere of government

It was shown above that local government as a distinctive, interdependent and inter-related part of the overall government of the Republic of South Africa has become a constitutional fact.<sup>11</sup> Gone are the days when local authorities were mere phenomena of applied administrative law.<sup>12</sup> It is, however, of interest to note that the final

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<sup>8</sup> 200 of 1993 and CP XVI.

<sup>9</sup> One must again remember that the Constitution requires an overall democratic state in which public participation is of fundamental importance. See ss 1 and 152(1)(a) and (e) of the Constitution.

<sup>10</sup> See Meyer (1997) 8.

<sup>11</sup> See the Constitution ss 40 and 43.

<sup>12</sup> Under the constitutional dispensation in South Africa prior to 1994, parliament was supreme, and local authorities were mere administrative units under mostly the control of provincial administrations. Traditionally municipalities were regarded as mere service delivery units of government. With the enactment of the interim Constitution and the final Constitution, an important paradigm

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Constitution refers to a sphere of government and not a level of government.<sup>13</sup> This new reference to sphere is not unimportant and should be carefully considered.

In the first place the term sphere of government refers to a specific area of jurisdiction or territory. Many constitutional and local government scholars believe that the reference to sphere and not level of government in the final Constitution is aimed at emphasising a new relationship between the different branches of government. It is argued that the reference to sphere, as opposed to level or tier of government, indicates a radical shift away from the hierarchical division of government structures and powers of the past. It also signals a new era of co-operative, distinctive, governmental structure that is afforded constitutional recognition and protection.<sup>14</sup> In such a relationship each sphere of government has its own distinctive status, powers and functions, which are entrenched in the Constitution. The higher government institutions are not automatically permitted to encroach or intervene in the powers or functions of lower government institutions. Disputes between the various spheres of government are to be resolved through co-operation and interaction rather than through legal battles and animosity. The reference to sphere of government thus refers to a government of distinctiveness and cooperation in contrast with a government of subordination.<sup>15</sup>

The reference to sphere rather than level is also important with regard to local government autonomy. No government institution can really be autonomous if it doesn't have a say in or isn't permitted participation in the governmental processes that have a direct or indirect influence on its own powers and functions. It is submitted that the reference to sphere of government specifically enhances not only the autonomy of the different spheres but also strengthen and advance inter-governmental participation and support.<sup>16</sup> Suffice it to say that the reference to spheres of government truly affords each sphere distinctive status and protection and also gives government constitutional guidance on how inter-governmental relations and cooperation are to

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shift took place, and local governments are now afforded autonomous status within the overall structure of government.

<sup>13</sup> See the Constitution ss 40(1), 43 and 151(1).

<sup>14</sup> See Chaskalson *et al* (1999) 5A – 26.

<sup>15</sup> Refer to the ch on co-operative government for a more detailed discussion on all the principles regarding cooperation between the different spheres of government.

<sup>16</sup> Good examples of local government participation in higher levels of government can be found in the Constitution ss 67, 154(2) and 163.

be developed. Through the term "sphere of government" all three divisions of government are treated independently. Although the Constitution provides the basic framework for this structure of co-operation, the total system should ultimately be completed by other national legislation.<sup>17</sup>

#### **7.4 The status of municipalities**

The status of municipalities is significantly linked to the reference to sphere of government and not level of government. The new constitutionally entrenched status of municipalities is so important to the new government structure that the Constitution includes a section specifically protecting and explaining such status. In this regard the Constitution states the following:<sup>18</sup>

- The local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic.
- The executive and legislative authority of a municipality is vested in its Municipal Council.
- A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
- The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

A few important aspects of section 151 should be emphasised:

- Through section 151, the Constitution confirms the distinctive nature of the local sphere of government, which consists of municipalities.<sup>19</sup> The Constitution further sets the obligation<sup>20</sup> that the local sphere of government must be established for the whole territory of the Republic of South Africa. It is thus envisaged that no area in the state will be excluded from the jurisdiction of a local government in one form or another.<sup>21</sup>

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<sup>17</sup> See the Constitution s 41(2).

<sup>18</sup> Refer to the Constitution s 151.

<sup>19</sup> It should be noted here that there are three categories of municipality and various types of municipality within each category. These different categories and types will be discussed later in more detail.

<sup>20</sup> See the word "must" in the Constitution s 151(1).

<sup>21</sup> This aspect also confirms the importance of local government to all legal scholars. No matter where people find themselves in South Africa they will always fall under the jurisdiction of a particular local authority.

- The Constitution also confirms that all authority, be that executive or legislative, is vested in the Municipal Council of that local authority.<sup>22</sup>
- A limited measure of autonomy is further confirmed in section 151(3) of the Constitution. Municipalities have the right to govern all local government affairs on their own initiative. This right is, however, restricted and subjected to national and provincial legislation that is provided for in the Constitution itself. One can thus conclude that local governments do not have a comparable autonomy to what national or even provincial spheres have.<sup>23</sup> Although the autonomy and status of municipalities have been improved, these are still subjected to intervention by the two higher spheres. The subjection to higher intervention is curtailed by the constitutional text itself, however.<sup>24</sup> Once again it is of importance to note that national or provincial legislation also includes subordinate legislation and legislation that was in force when the Constitution took effect and that is administered by national or provincial governments respectively.<sup>25</sup>
- National or provincial intervention or control over local government affairs is further restricted by the Constitution in its determination that such governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.<sup>26</sup> *Prima facie* this looks like a contradiction in terms. On one hand a municipality has the right to govern on its own initiative, subject to national and provincial legislation, but on the other neither national or provincial governments may compromise or impede a municipality's ability or right to exercise its powers or perform its functions. Closer investigation of the text of the Constitution indicates that the right to govern is limited by the Constitution itself. The Constitution alone is but the framework for the new structure of government and, espe-

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<sup>22</sup> See the Constitution s 151(2). This important role of a Municipal Council will again be alluded to later.

<sup>23</sup> *In re: Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) the court held that local government structures were given more autonomy in the new text than in the interim Constitution and this autonomy was sourced in the new text and not derived from anything given to local government structure by the provinces. Further, it held that, whereas Sch 6 of the interim Constitution listed a broad functional area of provincial legislative competence which was termed "local government, subject to the provisions of ch 10", the new text specifically listed the particular areas of local government which in terms of Schs 4 and 5 of the new text fell within the legislative competence of provinces. To this extent there was some diminution in provincial legislative power. There was also a corresponding diminution in the executive power of the provinces that flowed from their diminished legislative powers. See paras 462 and 463 at 905-906.

<sup>24</sup> Refer to the Constitution s 151(3). A *carte blanche* intervention is not envisaged.

<sup>25</sup> See the Constitution s 239 for the complete definitions of national and provincial legislation.

<sup>26</sup> See the Constitution s 151(4).

cially with regard to local government, requires the enactment of national and provincial laws to complete the structure. To exclude municipalities from such national or provincial laws will be contrary to the text of the Constitution itself. However, where the Constitution has already determined a municipality's ability or right to exercise its powers or perform its functions, such constitutionally founded protection may not be compromised or impeded by national or provincial governments. It is also important to note that section 151(4) does not refer to national or provincial legislation, but rather to national or provincial governments. It is thus possible to conclude that neither the legislative authority nor the executive authority of the two higher spheres may compromise or impede the rights or abilities of municipalities that are protected in terms of the Constitution.

It seems that the Constitution provides local government with a significant measure of at least administrative autonomy against higher levels of government. On a legislative basis this autonomy is restricted to the extent that a municipal by-law that conflicts with national or provincial legislation is invalid.<sup>27</sup> This invalidation of municipal by-laws is subject to the provisions of section 151(4), however, as was explained above.

In summary of the status of municipalities, it is safe to say that the Constitution clearly entrenches local government as a distinctive and interdependent sphere of government. The concept of a sphere is often referred to in the Constitution.<sup>28</sup> This new constitutionally entrenched status should enable local governments to defend and resist attempts to intrude on their specific terrain and also to defy attempts from other government institutions to interfere or encroach on their powers and functions in an unconstitutional manner. Municipalities are afforded much more autonomy than they had before 1993 and are thereby more assured of real independent decision-making opportunities.<sup>29</sup> All the powers and functions of local authorities are protected

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<sup>27</sup> See the Constitution s 156(2).

<sup>28</sup> See the Constitution ss 40, 41, 43, 151, 205(1), 214(1), 215(2)(c), 238 and 239.

<sup>29</sup> With reference to local government autonomy the Constitutional Court in the case of *In re: Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) held that, while local government structures were given more autonomy in the new text than they were given in the interim Constitution, it had to be borne in mind that the interim Constitution contemplated that local government would be autonomous, though it did not delineate the boundaries of the autonomy as clearly as the new text. Whereas in the interim Constitution the potential concurrency of powers in parliament and the provincial legislatures was in respect of the whole field of local government, in terms of the new text power would be allocated to specific areas of competence. It was in this proc-

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in the Constitution, and higher spheres may intervene only if constitutionally mandated to do so. This protection of the autonomy of local governments is generally accepted to provide a system of effective and efficient government in the new constitutional state and to protect it. It is important, however, to emphasise that without proper financial support and the provision of infrastructure, local government autonomy can be negatively compromised.<sup>30</sup> It is in the last instance also of value to note that the Constitution does not stipulate that the field of local government *per se* is a functional area of provincial or national legislative authority.<sup>31</sup> This exclusion from national or provincial legislative competence further confirms and strengthens local government autonomy as an interdependent sphere of the government. Although both national and provincial governments may exercise powers in relation to local government matters, they may do so only if permitted to do so by the Constitution. Local governments must be aware of their constitutional protection, but should also not lose sight of the fact that their entrenched status also carries a substantial burden. As a part of the government, local authorities have various constitutional obligations that they are compelled to fulfil and to which they are compelled to adhere.

### **7.5 The objects of local government**

Apart from establishing local government as a specific sphere of government, the Constitution also directly sets specific objects for local governments that should be achieved within the lowest level of government operations. In this regard the Constitution states that:<sup>32</sup>

- The objects of local government are
  - (a) to provide democratic and accountable government for local communities
  - (b) to ensure the provision of services to communities in a sustainable manner
  - (c) to promote social and economic development
  - (d) to promote a safe and healthy environment and

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ess that the local authorities were afforded greater autonomy at the expense of both parliament and the provincial legislatures.

<sup>30</sup> See Devenish (1998) 203.

<sup>31</sup> The Constitution Schs 4 and 5 provides for the functional areas of concurrent and exclusive national and provincial legislative authority. Parts B of both Sch 4 and 5 have incorporated all the traditional local government functions, thus allowing either national, provincial or even local governments to legislate over such matters. The legislative competence to legislate over local government as an institution or sphere of government is not included in either of the Schs.

<sup>32</sup> Refer to the Constitution s 152.

(e) to encourage the involvement of communities and community organisations in the matters of local government.

- A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

The constitutional provision of specific objects of local governments is strongly linked and founded on the traditional purpose of local authorities and is in confirmation of its role and duties. In the Local Government Transition Act<sup>33</sup> it was stated that every municipal authority must conduct its affairs in an effective, economical and efficient manner to optimise the use of resources, to meet the needs of its respective community, to structure and manage its administration and financial management, to promote social and economical development and also to support and implement national and provincial programmes.<sup>34</sup> Section 152 now incorporates some of the provisions of the LGTA and sets the constitutional foundation for the objects of local government in general, thus creating an overarching set of obligations that are to be achieved.

In essence the specified objects are to confirm the new constitutional commitment to an overall democratic state and accountable government, to ensure the sustainable provision of services to the people of the country, to promote social and economic upliftment and development, to create a safe and healthy environment and finally to revitalise public participation and involvement. The different objects are thus clear and in no need of further explanation, but the systems and programmes that must be put in place in order to achieve these objectives present formidable challenges to all involved in local government, be they political leaders, municipal administrators or the relevant local communities themselves.

## **7.6 The new challenges and developmental duties facing municipalities**

Local government has been entrenched as part of the new structure with its commitment of a government founded on new constitutionally protected values.<sup>35</sup> The new local government system had to be built on some of the strengths and structures of the transitional system. This in itself presented local government with interesting challenges. Apart from these challenges, almost all local authorities the world

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<sup>33</sup> 200 of 1993.

<sup>34</sup> See the LGTA s 10G.

<sup>35</sup> See the Constitution s 1.



over are facing new demands, especially in providing viable and environmentally stable urban and rural developments. In the new South Africa many other unique challenges have also been identified. Some of these challenges are summarised as follows:<sup>36</sup>

- Addressing and transforming skewed settlement patterns. Many current patterns are functionally inefficient and costly.
- Redistribution of concentrations of taxable economic resources, which are founded mostly in former white settlements.
- To address the huge backlogs in service infrastructure in almost all historically underdeveloped areas. This challenge requires municipal expenditure far in excess of the revenue that is currently available.
- To create viable municipal institutions in areas with dense rural settlements. These areas have usually large population figures with minimal access to services and little or no economic tax base to support financial limitations.
- To integrate the spatial disparities between towns and townships. The spatial disparities are largely responsible for increased demands on service provision and high transport costs.
- To create municipal institutions which recognise the linkages between urban and rural settlements.
- To change the former modes of decision making and administrative systems in local authorities and to ensure sustainable delivery and provision of services to the broad community.
- To uplift and promote private sector involvement and the poor creditworthiness of many municipal councils. Administrative capacity in most municipalities must also be reformed. Some institutions have little or no pre-existing institutional foundation to build on.
- To rebuild the relationships between newly demarcated local authorities and their local communities. Municipalities should be particularly sensitive towards the needs of people who tend to be marginalised within their communities.<sup>37</sup>

As part of the government, all local authorities have been given a new constitutional mandate to uplift and sustain acceptable and viable human settlements. The chal-

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<sup>36</sup> See the White Paper on Local Government (1998) at 35.

<sup>37</sup> Such people should specifically include women and persons with disabilities.



lenges mentioned above are comprehensive in nature and difficult to achieve in practice. Local governments will have to reposition and re-equip themselves in order realistically to be in a position to fulfil these challenges. All possible efforts should be set in motion to achieve optimal success, but only time will tell if they have succeeded.

## **7.7 Developmental duties of municipalities**

### **7.7.1 Introduction**

Apart from the constitutionally founded objects of local government, all municipalities are also constitutionally obligated to fulfil certain developmental duties. It is the task of all local government institutions to work individually and in co-operation with their local communities to ensure sustainable ways to meet the needs and to improve the quality of life for all people of South Africa. In this regard it is of fundamental importance and in the interest of the nation as a whole that local government is capacitated and transformed to play a developmental role. In essence, a developmental local government is intended to have a major impact on the daily lives of all South Africans. Developmental duties cannot be achieved without the co-operation and constructive support of both national and provincial governments, however. In instances where local authorities are not successful in developing their own strategies to meet community needs, national and provincial governments may have to adopt a more prescriptive approach. In this regard it is important to note that developmental duties should not be seen on an individual basis within each sphere of government, but should be promoted on a collective basis within government as a whole.

### **7.7.2 The constitutional obligations**

The Constitution specifically entrenches the developmental duties of municipalities. In this regard section 153 states that a municipality must

- structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community and to promote the social and economic development of the community and
- participate in national and provincial development programmes.

The Constitution is clear on the fact that all municipalities must do their best to attend to the basic needs of people and to promote social and economic development. The Constitution is silent on how local authorities are to structure and manage their administrations, budgets and planning processes in order to fulfil their developmental duties, however. It is submitted that political policies and programmes combined with

community proposals should form the basis of most developmental plans. As a starting point such plans must give priority to people's basic needs and their social and economic upliftment. Development and upliftment should be regarded as synonymous in this regard. In a determination of whether or not priority is really given to the mentioned needs, an objective evaluation of the actions and steps taken by municipalities will be required. This will differ from case to case and will be influenced by the relevant circumstances of each situation.

It is further submitted that if the facts of a case indicate that a municipality has not given priority to the needs of its community and to promoting social and economic development, its actions or programmes will be contrary to the constitutional obligation in this regard and should be declared unconstitutional and invalid. This would further create a possible situation where the judicial authority of the country is called upon to adjudicate on the legislative or even executive powers of a local sphere of government. The judicial authority does not usually prescribe to the legislative or executive authority how it should structure and manage its administrations and how it should prioritise its programmes and policies. It is submitted, however, that the Constitution specifically allows for such judicial intervention when municipalities are not complying with their developmental duties.<sup>38</sup>

#### **7.7.2.1 The nature and characteristics of developmental local government**

In principle the idea of developmental local government refers to local governments that are committed to working with the people within their respective communities in an effort to find sustainable ways to meet their different social, economic and material needs and improve their overall quality of life. This commitment is indeed the foundation of the new constitutional vision for local government. The Constitution specifically enshrines the rights of all people in our country<sup>39</sup> and, depending on the availability of resources, it commits our government to taking all reasonable measures to ensure that all South Africans have adequate access to housing, health care, education, food, water and social security.<sup>40</sup> The reality in many towns and, more particularly, in many rural areas is far from this ideal. Millions of people live in dire poverty and without basic services and life-sustaining support. It is the task of the

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<sup>38</sup> For more detail on this point, refer to ss 2, 8 and 172 of the Constitution.

<sup>39</sup> See the Constitution s 7.

<sup>40</sup> See the Bill of Rights ss 26, 27, 28 and 29.

new developmental local government structures to ensure human upliftment and the provision of sustainable essential services. All efforts and resources must be directed carefully in order to achieve the overall developmental obligations.

#### **7.7.2.2 Interrelated characteristics of developmental local government**

According to the White Paper on Local Government, the nature of a system of developmental local government comprises four specific interrelated characteristics.<sup>41</sup> These characteristics are: maximising social development and economic growth, integrating and co-ordinating activities, democratising development and a process of leading and learning. These four characteristics form the basis on which the new developmental local structures are to be developed, and they are thus in need of further explanation.

##### **(a) Maximising social development and economic growth**

Social upliftment and economic growth are in the forefront of developmental local government. All powers and functions that are accorded to local governments should be exercised in such a way as to ensure maximum advancement of social development. Social development can be achieved only if the basic needs of people are provided for and if financial resources are available. Without continuous growth within local economies not enough funding will be available to ensure the basic provision of services. In this regard local authorities are dependent not only on the economic policies and success of the national government, but also on their own creative initiatives to secure investment and resources.

Without doubt local governments, through the exercise of their traditional responsibilities,<sup>42</sup> exert a great influence over the social and economic well-being of local communities. Local authorities collect large sums of rates and taxes, and they employ many people and pay many salaries. In some cases they are responsible for the pricing and quality of basic life necessities such as water, electricity and sanitation services, and they also control the direction of land-development projects. Local governments themselves often own substantial amounts of land, and they are frequently involved in the purchasing of goods and in other economic activities. In this regard they substantially contribute to the flow of money within their local economy. Furthermore, local governments are responsible for setting the agendas for local

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<sup>41</sup> See White Paper on Local Government (1998) at 38.

<sup>42</sup> Eg, the provision of basic services and a healthy and safe environment.

political issues and providing insight in future policies and programmes. The way in which local governments operate thus sends out important signals to their own residents and also to prospective investors. Their influence on the local economy is clearly of great significance. All municipalities should therefore have a clear vision for their local area and economy and should seek strong partnerships with business enterprises to ensure job creation and to maximise investment.

It should be noted that it is not the direct responsibility of local government to ensure job creation. Job creation falls within the ambit of mainly the national sphere of government. However, municipalities are responsible for ensuring local economic and social conditions that are conducive to the creation of employment opportunities. In this regard it is generally accepted that the provision of basic household infrastructure forms the central basis for ensuring social and economic development.<sup>43</sup>

Other initiatives such as changes to existing procedures, the speeding up of approval procedures and the proactive release of land for development purposes could provide further positive stimulus for social and economical progress. Social development can also be advanced through functions such as arts and culture and the provision of recreational and community facilities. Through its constitutionally entrenched powers local government has been given the strongest possible foundation to succeed in its developmental obligations.

#### **(b) Integrating and co-ordinating activities**

Within any local area there are many different agencies that contribute to development. These usually include various national and provincial government institutions, parastatals, community organisations and private-sector institutions. It is the responsibility of developmental local government to provide vision, leadership and strong co-ordination between these different role players. Poor co-ordination could severely undermine the new development effort. In this regard, it is important for all municipalities actively to develop mechanisms to ensure resources and investment initiatives from both public and private sectors in order to meet their developmental targets. An important method of ensuring better co-ordination and commitment is through the process of Integrated Development Planning. Integrated Development Planning is facilitated through the provision set out in the Development Facilitation

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<sup>43</sup> See White Paper on Local Government (1998) at 39.

Act<sup>44</sup> which provides powerful assistance to municipalities to facilitate and co-ordinate integrated development.

Although it is true that circumstances differ from one community to another, it is submitted that the establishment of sustainable and successful human settlements depends largely on proper co-ordination and integration between all possible role players and a wide range of services and regulations.<sup>45</sup> Local governments have a pivotal role to play in ensuring that this co-ordination and integration is attained.

### **(c) The importance of democratic local development**

It was stated earlier that Municipal Councils play a central role in promoting and establishing a system of local democracy.<sup>46</sup> One of the main objectives of local democracy is to ensure public involvement and participation.

In the previous local government dispensation, most municipalities made their presence felt through a process of abstract control and regulation of communal actions. Regulation still remains an important municipal function in the new system, but it should be supplemented with elements of leadership, accountability, support and public participation. All divisions within local communities must be encouraged and motivated to take an active part in the day-to-day functioning of their local authority. It is therefore important for municipalities to adopt inclusive approaches to community participation in all respects. This aspect is also promoted in various national programmes.<sup>47</sup> From its so-called “grass roots” position, developmental local government is uniquely placed to combine and ensure empowerment and redistribution of wealth through a number of specialised programmes. Examples of such programmes are:

- Specialised service subsidy schemes, which could provide low-income households with an opportunity to improve their circumstances.
- Simple technical and training courses, which should enable people to better themselves and to be less dependent on others.

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<sup>44</sup> 67 of 1995.

<sup>45</sup> These services and regulations would include land-use planning, provision of household infrastructure, environmental management, transport issues, health and education upliftment, as well as the insurance of safety, security and housing.

<sup>46</sup> Local government is defined as being a cornerstone of a democratic system.

<sup>47</sup> The importance of empowerment to poor people and marginalised communities is emphasised in the Reconstruction and Development Programme and also the Growth, Employment and Redistribution strategy.

- Carefully designed cross-subsidising programmes to ensure financial and infra-structural support to very poor areas; for example, a developmental levy that is imposed in fast-growing areas which is then used to subsidise services in other underdeveloped suburbs.<sup>48</sup> It must be noted, however, that cross-subsidising is a very contentious matter and should be approached very carefully. Ill-considered cross-subsidising schemes can quickly alienate certain groups within a community. These groups are usually the more wealthy inhabitants or institutions, and their sudden opposition/dissatisfaction with the local policies can have a severe impact on local financial support, development and involvement. It is of cardinal importance that open and constructive communication and participation be introduced before any such schemes are implemented. Emphasis must also be drawn to the fact that because of the negative results of the pre-1993 local government system it will not be possible to achieve social development and upliftment without a measure of controlled cross-subsidising. It is also important to take cognisance of the fact that cross-subsidising is not in principle contrary to constitutional requirements and that such a system has indeed been allowed by our courts.<sup>49</sup>

#### **(d) Moving ahead through processes of leading and learning**

The many changes and challenges of modern local communities are forcing local communities and institutions to re-evaluate the manner in which they organise themselves and the way in which they are governed by their local authorities. Most local communities the world over are facing the challenges of sustaining their economies in order to uplift their societies, to protect their environments, to eradicate poverty and to provide personal safety and security. Although support by higher levels or spheres of government is essential, such support alone is not enough. Municipal communities are increasingly forced to find within themselves new ways to secure sustainable development and the continuous provision of services. In this regard municipalities must take a leading role within their jurisdictions and should learn from the failures and successes of other local authorities. Municipalities must become visionary and strategic in the way in which they operate, and they have a crucial role

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<sup>48</sup> During the transitional phases of local government, many Transitional Metropolitan Councils introduced a so-called "development levy" which was introduced to obtain financial resources mostly from private enterprises in order to provide financial assistance to certain communities in need.

<sup>49</sup> See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) and *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC).

to play as policymakers, planners, innovators and providers of basic human necessities. There are many ways in which local authorities can provide for favourable development conditions.<sup>50</sup> Some of these steps are the following:

- Building the kind of political leadership that is able to bring together coalitions and networks of local interests that co-operate to realise a shared vision.
- Responsive problem solving and a commitment to working in open partnerships with business, trade unions and community-based organisations.
- Ensuring that knowledge and information are acquired and managed in a way that promotes continuous learning and that anyone can access easily and quickly.
- Enhancing local democracy through raising awareness of human rights issues and promoting constitutional values and principles.
- Building an awareness of environmental issues and how the behaviour of residents impacts on the local environment and encouraging citizens to utilise scarce natural resources in a prudent, careful manner.
- Investing in youth development as a key resource for the future and building on their creativity and motivation through involvement in civic and development programmes.
- Empowering ward councillors as community leaders who should play a pivotal role in building a shared vision and mobilising community resources for development.

### **7.7.2.3 The developmental outcomes of local government**

Local governments should guard against establishing a system of developmental local governance that looks good on paper but has no real success in terms of practical achievement. Ultimately, the success of all developmental programmes will be measured by their final results. It is safe to say that all citizens and community-based institutions are positively concerned about their local areas, not only in support of their own needs but also to ensure prosperity for future generations. The success and positive outcomes which developmental local government are obligated to achieve are thus extremely important. The White Paper on Local Government has identified certain key outcomes that are relevant to all municipalities in the new structure. These outcomes are as follows:

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<sup>50</sup> See White Paper on Local Government (1998) at 42.



### **(a) The provision of sustainable household infrastructure and services**

In principle, all local governments are responsible for the provision of household infrastructure and basic services. These services and infrastructures form the foundation of successful social and economic development. Basic services usually include the provision of water, sanitation, local roads, electricity, drainage and refuse collection. Apart from being a constitutional right, the provision of basic services is essential to enable people to support their families and to develop their skills and to support job creation.<sup>51</sup> The starting point for positive development must therefore be to prioritise the delivery of at least a basic level and minimum standard of services to all members of local communities. Again, this ideal depends on mostly financial capabilities and resources.<sup>52</sup> Local governments are also supported through the Municipal Infrastructure Investment Framework (MIIF) and the Consolidated Municipal Infrastructure Programme (CMIP). Furthermore, local government is constitutionally entitled to an equitable share of national revenue.<sup>53</sup> Generally, the allocations from national revenue sources should enable most municipalities to help in subsidising the operating costs of basic services.

### **(b) Creating integrated local areas**

Integrating the spatial disparities of urban and rural settlements in South Africa is of critical importance for the overall acceptance, success and prosperity of South African communities. Spatial parity will enhance economic growth to great extent and should facilitate more sustainability in the provision of services and a reduction in commuting costs of many households. All these aspects are beneficial in terms of overall social development. It is further of importance that the challenges facing urban areas and rural areas, although mostly similar, are sometimes different. Most of the challenges facing urban areas are those of integration of towns and townships. In metropolitan areas particular emphasis should be placed on future needs and infrastructure in response to the rapidly growing population figures in those areas.

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<sup>51</sup> The Constitution through the Bill of Rights protects the right of everyone to a safe and healthy environment, access to adequate housing, access to health care services, sufficient food and water, social security and appropriate social assistance. See the Constitution ss 24, 26 and 27.

<sup>52</sup> It was mentioned earlier that financial capacity could be gained through capital grants, local cross-subsidisation schemes or private investment initiatives.

<sup>53</sup> The equitable shares and allocations of revenue raised nationally must be provided for in an Act of parliament. See the Constitution s 214 as well as the Equitable Share of National Revenue Act. These aspects will be discussed in more detail in the ch on municipal finance.



Rural areas are concerned mostly with building liveable environments and service delivery. These areas are often densely populated, with an inadequate or indeed no sustainable economic base. Many rural residents commute for many kilometres from their homes to work and back on a daily basis. Such commuting costs involve high transport costs and expenditure. Innovative strategies and programmes are needed to address these issues successfully. Both urban and rural areas must also plan and implement environmental protection programmes.<sup>54</sup>

### **(c) Enhancing local economic development and providing special services**

Local governments should focus much of their developmental initiative on investing in basic services. Through the provision of good quality, cost-effective services and by making a local area a pleasant place in which to live and work, significant boosting of the local economy can be achieved. Municipalities should also strive to improve and simplify many of their procedures and rules in order to achieve effective and speedy decision making.<sup>55</sup> Many local authorities must also review their policies and by-laws in order to ensure compliance with the new constitutional obligations. Lastly, the establishment of user-friendly one-stop service centres should significantly increase efficiency and local support.

One should also not lose sight of the fact that the Constitution specifically requires local governments to take responsibility for promoting the social and economic development of local communities.<sup>56</sup> Municipalities are therefore mandated to provide special services and take extra-ordinary steps. Innovative marketing and investment initiatives as well as small business support services should be provided for. Continuous research and technology upgrading together with quality training programmes are also important mechanisms to ensure competitiveness and positive developmental progress. Without proper knowledge and administrative support, continuous economic growth and development will be unnecessarily restricted.<sup>57</sup>

#### **7.7.2.4 Mechanisms for local governments to achieve developmental goals**

In order to achieve the various developmental outcomes, significant changes in the way in which local governments function will have to be introduced. In an effort to

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<sup>54</sup> According to the Constitution s 24, everyone has the right to an environment that is not harmful to their health or well-being and also to have the environment protected.

<sup>55</sup> Rezoning applications, eg, those which are frequently delayed because of stringent bureaucratic approval processes, should be simplified.

<sup>56</sup> Refer to the Constitution s 152.

<sup>57</sup> See White Paper on Local Government (1998) at 46.

become more developmental, the government in its White Paper on Local Government has put forward three interrelated approaches. These approaches were directed not only at the transformation process but also at municipal developmental strategies of the future. The approaches can be summarised as follows:

**(a) Integrated development planning, budgeting and performance monitoring**

In order to meet the challenges of social and economic development, all municipalities are facing extensive difficulties to ensure sustainable and acceptable human settlements. Municipalities must investigate and understand their local circumstances, needs and dynamics and accordingly develop a concrete vision to address such needs and to provide for overall quality of life. Within the new structure of developmental local government, a process of Integrated Development Planning (IDP) has been initiated, through which municipalities must establish local development plans for the short, medium and long term. In producing an Integrated Developmental Plan (IDP), various steps are to be taken. These steps include the following:

- an assessment of the current social, economic and environmental reality in the municipal area – the current reality
- a determination of community needs through close consultation
- developing a vision for development in the area
- an audit of available resources, skills and capacities
- a prioritisation of these needs in order of urgency and long-term importance
- the development of integrated frameworks and goals to meet these needs
- the formulation of strategies to achieve the goals within specific time frames
- the implementation of projects and programmes to achieve key goals
- the use of monitoring tools to measure impact and performance.

In essence Integrated Developmental Plans are planning and strategic guidelines/frameworks that have been drafted to help and guide local authorities to fulfil their developmental mandate. The idea of such plans is to build up a comprehensive integrated framework, with specific focus on the advancement of development in a particular local area. There are many advantages if proper Integrated Development Plans have been established. Some of these advantages are:

- They enable municipalities to align their financial and institutional resources behind agreed policy objectives and programmes.

- They are a vital tool to ensure the integration of local government activities with other spheres of development planning at provincial, national and international levels by serving as a basis for communication and interaction.
- They serve as a basis for engagement between local government and the citizenry at the local level, and with various stakeholders and interest groups. Participatory and accountable government has meaning only if it is related to concrete issues, plans and resource allocations.
- They enable municipalities to weigh up their obligations and to prioritise programmes and resource allocations systematically. In a context of great inequalities IDPs serve as a framework for municipalities to prioritise their actions around meeting urgent needs while maintaining the overall economic, municipal and social infrastructure already in place.
- They assist municipalities to focus on the environmental sustainability of their delivery and development strategies. Sustainable development is development that delivers basic social and economic services to all without threatening the viability of the ecological and community systems upon which these services depend.
- They help municipalities to develop a holistic strategy for poverty alleviation. Poverty is about more than the inadequacy of a low household income: it includes other deprivation such as a lack of assets to help households cope with shocks and stresses; a lack of the resources or contacts necessary to secure political advantage; a lack of access to education, health care and emergency services and the lack of safe, secure, and adequately sized housing with basic services.

Integrated Development Plans should not be viewed as fixed inflatable frameworks but should rather be seen as incremental development plans which are regularly reviewed and subject to adaptations. In essence, all integrated development planning is a municipal function and should not be outsourced to consultants. After consideration has been given to all local inputs, municipalities should manage the development and amendment of IDPs themselves.

Within the new local government dispensation, many municipalities are required in

terms of the Development Facilitation Act<sup>58</sup> to produce Land Development Objectives (LDOs). LDOs should provide the basis for further strategic development in a specific area. LDOs fulfil a critical role. They are submitted to the provincial government of a province for approval. Once approved, they have legal status and become powerful instruments in directing and managing development initiatives in a particular area. Development planning will be discussed in more detail in later chapters.

In order to achieve service delivery, municipalities must develop and implement action plans to ensure continuous sustainability. Two types of plan should be considered. The first is institutional plans, which should be aimed at assisting municipalities with functioning and administration. The second plan should be directed at the financial and budgeting aspects of the local authority. These financial plans should involve medium- to long-term projections of capital and expenditure. Through capital planning and control a municipality should be able to manage infrastructure targets and enhance possible investment opportunities.

#### **(b) Municipal performance management**

Performance management is a crucial component of any successful private or public institution. The critical role of performance management in local government is to ensure that local objectives and duties are implemented, monitored and corrected if necessary. In the new system of local government, municipalities will set their own standards of performance. These measures or standards are often referred to as Key Performance Indicators (KPI). KPIs will vary from one municipality to another, depending on the relevant circumstances and requirements within each jurisdiction. KPIs can provide valuable assistance to local authorities in assessing the impact and effectiveness of their plans and ultimately their compliance with the constitutional obligations. Community involvement in setting KPIs is also very important. Priorities in communities differ from community to community. By involving the community, efficiency, accountability and local trust will be enhanced.

KPIs should also be developed in consultation with internal municipal stakeholders. Such stakeholders would include management, administrative personnel and also organised labour interests. The involvement of all such role players can entrench a shared organisational vision and in turn improve performance and delivery goals.<sup>59</sup>

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<sup>58</sup> 67 of 1995.

<sup>59</sup> See White Paper on Local Government (1998) at 51.

Without doubt performance management will play an integral and important part in the ultimate success of the new local government institutions. According to international experiences, a system of poorly designed performance indicators usually has a negative effect on delivery and efficiency.<sup>60</sup> It is of significant importance that KPIs should focus on outcomes specifically and not only on inputs and outputs.<sup>61</sup>

Performance management should also be implemented on a national level. Integrated performance management must be advanced to assess overall effectiveness. This could provide so-called “early warning indicators” in instances where local authorities are experiencing problems and could enable other spheres of government to provide assistance and support before a crisis situation has developed. Proper and controlled performance management is thus of great importance, not only within local government systems but within the overall governmental framework.

### **(c) Municipal co-operation with local citizens and private partners**

It was explained above that one of the strengths of integrated development planning is the fact that it recognises the linkages between development, service delivery, upliftment of quality of life and public participation and democracy. Again emphasis should be placed on the importance of local governments to ensure local democratic principles. This can be achieved only if citizens and private institutions are involved within all affairs of local government. The White Paper on Local Government has identified four levels/areas of public participation in municipal affairs.<sup>62</sup> These areas are the following:

- (a) *As voters*: As voters residents should ensure maximum democratic accountability of their elected political leadership. As is the position in all democratic systems, South African municipalities must ensure that voters are frequently informed about the need to vote and to participate in the local electoral procedures. If voter participation declines, democratic accountability is diluted. Voter participation can

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<sup>60</sup> See White Paper on Local Government (1998) at 52.

<sup>61</sup> To illustrate this principle the following example can be used. Imagine a municipality has a programme for cutting the grass verges in its care with the aim to maintain an orderly and clean appearance and to discourage rubbish dumping of garden refuse by residents. The municipality's original objective would be defeated, if the performance management system would only measure the frequency of cutting the grass (the output) and not its effect in relation to the aim/objective (the outcome). Such a performance management system would provide a misleading report on the effectiveness of the municipality's performance.

<sup>62</sup> See White Paper on Local Government (1998) at 53.

be enhanced through educational programmes, creative electoral campaigning and by ensuring that the electoral process is accountable and legitimate.

- (b) As participants in the policy process: Local residents should convey their views and preferences regarding local policies and development priorities. All municipalities should develop mechanisms to ensure citizen participation. This can be achieved through the creation of various public forums.
- (c) As consumers and end-service-users: The only contact most local citizens have with their local government is through the consumption and utilisation of municipal services. Municipalities should be responsive to the needs of local inhabitants and private businesses. People should demand value-for-money, affordable and effective services. It was stated elsewhere that improved customer management and service provision are critical in ensuring socio and economic development. Various principles have been identified to ensure participation and involvement of local customers. These principles include consultation initiatives, the establishment of basic service standards, easy access to services, the provision of accurate information, openness and transparency, mechanisms to redress mistakes efficiently and courteously and products that represent value for money.
- (d) Local partners in resource mobilisation: All local governments are expected to enhance service delivery within their available resources. In order to achieve more effective and efficient service delivery, local authorities will have to involve private institutions and enter into various types of partnership initiatives. Some of these initiatives could include, for example, community development corporations, public-private or public-public partnerships, community contracting for services, information and learning centres, training and capacity-building initiatives.

## **7.8 Conclusion**

It is safe to say that all South African municipalities are facing extensive challenges in promoting human rights, meeting basic needs, addressing past backlogs and spatial distortions and ensuring a sustainable and democratic local future. This can be achieved only through commitment, training and working hand in hand with all role players. The Constitution provides local government with a sound foundation as a distinctive sphere of government, with its own entrenched autonomy and specified powers and functions. Local government alone will not be able to fulfil and comply with its various objectives and duties without the constructive assistance of other spheres of government, the positive and committed support of administrators, a

purposeful and public-orientated, effective, efficient and accountable political leadership and a supportive, informed and fully committed local community.

## **The legal nature and general rights and duties of local government institutions**

### **8.1 Introduction**

In the previous chapter the specific status as well as the constitutionally entrenched objects of local government were identified and discussed. It must be remembered that apart from these objects and developmental duties, local governments have a specific legal nature with specific rights and duties that are statutorily confirmed. From earlier discussions it should be evident that the Constitution is the basic framework of the new local government structure and that this framework was to be completed in terms of various national or sometimes provincial legislation. Various pieces of legislation were enacted to complete and fulfil this constitutional requirement.<sup>1</sup> Together with the basic provisions in the Constitution, these Acts provide the core legislative basis of the new local government system in South Africa and should be studied in conjunction with one another. With reference to the specific legal nature and general rights and duties relevant to the local government sphere, the Municipal Systems Act is of importance. Before the sections of the Act are investigated, it is important to look at the specific purpose of the Act. The purpose of the Act is multi-fold and can be summarised as follows:

- to provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities and to ensure universal access to essential services that are affordable to all people

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<sup>1</sup> These national Acts are: The Local Government: Municipal Demarcation Act 27 of 1998; the Local Government: Municipal Structures Act 117 of 1998; the Local Government: Municipal Systems Act 32 of 2000; the Local Government: Municipal Electoral Act 27 of 2000 and the Local Government: Municipal Finance Management Act 56 of 2003.



- to define the legal nature of a municipality as including the local community within the municipal area that should be working in partnership with the municipality's political and administrative structures.
- to provide for the manner in which municipal powers and functions are exercised and performed
- to provide for community participation in the different processes of municipalities
- to establish a simple and enabling framework for the core processes of planning, performance management, resource mobilisation and organisational change which underpin the notion of developmental local government
- to provide a framework for local public administration and human resource development
- to empower the poor and to ensure that municipalities put in place service tariffs and credit control policies that take their needs into account by providing a framework for the provision of services, service delivery agreements and service districts
- to provide for credit control and debt collection
- to establish a framework for support, monitoring and standard setting by other spheres of government in order progressively to build local government into an efficient, frontline development agency that is capable of integrating the activities of all spheres of government in order to benefit the overall social and economic upliftment of all communities in harmony with their local natural environment
- to provide for legal matters pertaining to local government as well as for matters incidental thereto.<sup>2</sup>

As was explained elsewhere, the pre-1993 local government system failed to meet and sustain the basic needs of the majority of South African people. In the new local government dispensation, all municipalities are constitutionally obligated to provide services to all the people and to be fundamentally developmental in orientation. To achieve and fulfil these obligations, local government needs to identify some basic core principles that should provide a clear understanding of what local governments are required to achieve. These core values will help municipalities to move progres-

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<sup>2</sup> See long title of the Municipal Systems Act.

sively towards the social and economic upliftment of all communities in our country and to succeed in providing basic life sustaining services.<sup>3</sup>

From the purpose and preamble to the Municipal Systems Act, read within the context of the Constitution, it becomes clear that, apart from the provision of services, all local governments are actively to promote and engage their community's involvement in the affairs concerning their local area. These affairs particularly refer to aspects of planning, service delivery and performance management. The constitutional foundation requires an efficient, effective and transparent local public administration that conforms to the new principles of openness, transparency and effectiveness. These aspects could ensure a financially and economic viable local government system. In the light of these principles it is of importance to establish a strong system of local government that will be capable of exercising and fulfilling its powers and functions and will create a more harmonious interaction between all spheres of government, between local governments *inter se* and between municipalities and their local administrations, political leaders and local communities. To enable and protect local authorities to comply with the abovementioned objectives, the Municipal Systems Act specifically protects and explains not only the legal nature of municipalities but also the general rights and duties of municipal councils, of the local community and of the municipal administrations.<sup>4</sup> Before one investigates these provisions in detail, it is of value to look briefly at the character of local government according to the new legal framework.

## **8.2 The specific character of local government**

In order to understand the legal nature of a local government fully, it is necessary briefly to investigate the basic characteristics of such a sphere of government. Apart from being a constitutionally recognised and protected sphere of government, a municipality also has the following general characteristics:<sup>5</sup>

- It is a public institution.<sup>6</sup>

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<sup>3</sup> Reference to the word "progressively" is not unimportant in this context. It indicates that there should be a balance between financial and administrative capacity of a local government and its specific programmes of upliftment. The provision of all basic services is not attainable at once and is strongly linked to available resources, especially financial resources.

<sup>4</sup> See the Municipal Structures Act ss 4, 5 and 6.

<sup>5</sup> See Cloete (1997) 46.

<sup>6</sup> According to the Municipal Systems Act a municipality is an entity as is described in s 2 of the Act. Refer also s 1 definitions.

- It functions and performs its powers under the direction and control of an elected municipal council<sup>7</sup>
- It is a corporate body with legal personality, which exists separately and independently from the persons who head the municipal council.
- It is created to give the residents/local community of the area a say in the local government affairs that affect them. In this regard it is important to note that the Municipal Systems Act specifically distinguishes between the terms “local community”, “ratepayer” and “resident”.<sup>8</sup>
- It is vested with specific powers and functions.<sup>9</sup>
- It is also an institution/sphere of government that is constitutionally obligated to be a democratic entity.<sup>10</sup>

With reference to the mentioned characteristics the Systems Act then goes further and explains the legal nature of municipalities in specific terms.

### 8.3 The legal nature of a municipality

The legal nature of a municipality is explained in terms of the Municipal Systems Act as follows:<sup>11</sup>

- A municipality is an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the

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<sup>7</sup> The Systems Act defines political structure in relation to a municipality as the council of the municipality or any committee or other structure of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act. See s 1 of Municipal Systems Act.

<sup>8</sup> According to the Act s 1 *a local community or community*, in relation to a municipality means that body of persons comprising (a) residents of the municipality; (b) the ratepayers of the municipality; (c) any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality; and (d) visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality. The Act also states that local community includes, more specifically, the poor and other disadvantaged sections of such body of persons. This inclusion is somewhat unnecessary, as such people will automatically be included in the abovementioned categories. To argue that the poor or disadvantage groups in a specific community should be afforded stronger protection or should be given more emphasis than other people or organisations in that area is unfounded and could be contrary to the equality provision in the Constitution; *a ratepayer* in relation to a municipality means a person who is liable to the municipality for the payment of (a) rates on property in the municipality; (b) any other tax, duty or levy imposed by the municipality; or (c) fees for services provided either by the municipality or in terms of a service delivery agreement; lastly *a resident* means a person who is ordinarily a resident in the municipality.

<sup>9</sup> The provision and entrenchment of specific powers and functions is constitutionally protected and will be discussed elsewhere. See the Constitution s 156.

<sup>10</sup> See the Constitution ss 1, 40, 41 and 152(1)(a).

<sup>11</sup> See the Municipal Systems Act s 2.

Local Government: Municipal Demarcation Act.<sup>12</sup> The reference to the word “state” in this regard is often the basis of uncertainty, as the term “state” is not always clearly defined. However, two decisions are of importance in this regard. In the case of *Greater Johannesburg TMC v Eskom*<sup>13</sup> the court held that the expression “the state” as used in section 24 of the Eskom Act<sup>14</sup> was not limited to central and provincial government but covered the state in all of its manifestations, including bodies such as regional service councils and transitional metropolitan councils.<sup>15</sup> In the case of *Mateis v Ngwathe Plaaslike Munisipaliteit*,<sup>16</sup> where a judgment had been obtained against a municipality and execution steps were taken, the court held that in terms of the State Liability Act<sup>17</sup> the concept “state” was an amorphous juristic-political concept and had no fixed, general meaning in legislation. The meaning of the word “state” thus depended on every specific piece of legislation. For purposes of the State Liability Act, the word “state” did not include a municipality, and municipalities were not protected against liabilities to third parties.<sup>18</sup>

- A municipality consists of (i) the political structures and administration of the municipality; and (ii) the local community of the municipality.<sup>19</sup>
- A municipality functions in its area in accordance with the political, statutory and other relationships between its political structures, political office bearers and administration and its community.<sup>20</sup>
- A municipality has a separate legal personality which excludes liability on the part of its community for the actions of the municipality. This confirmation of the legal personality of a municipality allows a municipality to sue or be sued by other natural or legal persons. It is also important to note that although liability on the part of

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<sup>12</sup> 27 of 1998. Organs of state are defined in the Constitution s 239. Reference should also be made to the Constitution s 151(2) which confirms that the executive and legislative authority of a municipality is vested in its Municipal Council.

<sup>13</sup> 2000 (1) SA 866 (SCA).

<sup>14</sup> 40 of 1987.

<sup>15</sup> See paras 18, 22 and 23 at 877-879.

<sup>16</sup> 2003 (4) SA 361 (SCA).

<sup>17</sup> 20 of 1957.

<sup>18</sup> Paras 7-9 at 367-368.

<sup>19</sup> The constitutional objective of community involvement/public participation is specifically incorporated.

<sup>20</sup> The political dimension of local government as being part of the government structure in general must never be ignored. The various political interactions and tensions play a major role in local government affairs and must not be underestimated. As such, the political structures represent the local interests within each municipal council.

the local community for the actions of a municipality is excluded, such exclusion has not been given to either the political structures or administration component of a municipality.<sup>21</sup>

A clear understanding of the legal nature of local authorities is thus of great importance. It not only explains the basic composition of a municipality but also provides for significant responsibilities in terms of the political and administrative structures. Confirmation of these responsibilities is again in compliance with the constitutional foundation of a government based on the values of accountability, responsiveness and openness.<sup>22</sup> The extent of such political and administrative responsibility for the actions of local authorities will be discussed elsewhere.

### **8.3.1 General rights and duties of a local government**

The Municipal Systems Act specifically provides for various rights and duties that are vested in the municipal council, the local community or the municipal administration.<sup>23</sup> It is important, however, to distinguish between rights and duties on one hand and powers and functions on the other. The Constitution specifically refers to the powers and functions of municipalities,<sup>24</sup> but provides no direct reference to the rights and duties of municipalities. However, these rights and duties are incorporated in national legislation. This is explained below.

### **8.3.2 Rights and duties of municipal councils**

According to the Municipal Systems Act, a municipal council has the following rights and duties:<sup>25</sup>

- To govern on its own initiative the local government affairs of the local community.<sup>26</sup>
- To exercise the municipality's executive and legislative authority and to do so without improper interference.<sup>27</sup> Improper interference by the other sphere of gov-

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<sup>21</sup> This clearly indicates that the drafters of the legislation did not intend to excuse the political or administrative components of local governments from liability and responsibility for actions of the municipality. If a political or administrative structure of a municipality has caused harm/damages to that local authority, they could be held responsible and liable for such actions or decisions.

<sup>22</sup> See the Constitution s 1.

<sup>23</sup> See the Municipal Systems Act ss 4, 5 and 6.

<sup>24</sup> See the Constitution s 156.

<sup>25</sup> See the Act s 4.

<sup>26</sup> This seems to be in confirmation of the Constitution s 151(3), which states that a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

<sup>27</sup> See the Constitution s 151(3). Again the autonomy of local government is protected.

ernment is outlawed.<sup>28</sup>

- To finance the affairs of the municipality by (i) charging fees for services and (ii) by imposing surcharges on fees, rates on property and, to the extent that municipalities are authorised by national legislation, impose other taxes, levies and duties.<sup>29</sup>

Apart from these general rights, the Municipal Systems Act also confers certain duties on the council of a municipality. The Act states that the council of a municipality, within the municipality's financial and administrative capacity and after having regard to practical considerations, has the duty to<sup>30</sup>

- exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community
- provide, without favour or prejudice, democratic and accountable government
- encourage the involvement of the local community
- strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner
- consult the local community about (i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and (ii) the available options for service delivery
- give members of the local community equitable access to the municipal services to which they are entitled
- promote and undertake development in the municipality
- promote gender equity in the exercise of the municipality's executive and legislative authority
- promote a safe and healthy environment in the municipality and
- contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.

These duties are in compliance with the broad constitutional obligations and requirements and must be read in conjunction with such sections. Subsection (3) also

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<sup>28</sup> What will be interference is not altogether clear and will be interpreted according to the circumstances of each case as well as in context with the broad constitutional framework.

<sup>29</sup> These financial rights will be discussed in more detail in the chapter on finances that are to follow later.

<sup>30</sup> See the Municipal Systems Act s 4(2).

confirms a municipality's responsibility in the exercise of its executive or legislative authority to respect the rights of citizens and those of other persons that are protected by the Bill of Rights. With reference to the duties of municipalities in relation to their local residents, our courts have already confirmed this. In *Fedsure Life Assurance v Greater Johannesburg TMC*<sup>31</sup> the court held that there was an important element of trust in the relationship between municipalities and their ratepayers. The ratepayers therefore had a sufficient interest in seeking to impugn those decisions of the respondents impacting on the utilisation of ratepayers' funds which they contended to be unlawful. The appellants therefore had *locus standi* to seek an order against the respondents to set aside the resolutions.<sup>32</sup>

A similar view was expressed in *Kempton Park/Tembisa Metropolitan Substructure v Kelder*<sup>33</sup>. It was confirmed that in a broad sense there is a fiduciary relationship between a local authority and its ratepayers. Local government should be representative of the inhabitants of its area of jurisdiction, and its actions should be open and transparent. However, private law duties derived from the law of trusts cannot be attributed to a local authority. A local authority owes its existence to the provisions of the Local Government Transition Act<sup>34</sup> and the proclamations made in terms thereof, and its powers and duties are conferred by the Constitution (IC), by other statutes and the relevant principles of public and administrative law. Therefore, to impose upon it additional duties in accordance with the principles of private law negates its function as an organ of state and a branch of government.<sup>35</sup>

### **8.3.3 Rights and duties of members of local communities**

It was explained above that a municipality consists of the political structures, the administration and the community of the municipality. Community participation and involvement in local government matters are thus of significant importance. Contrary to what is generally accepted, the local community not only has rights with regard to its local authority and can make certain demands of that authority, it has specific statutory duties with which it must comply. In this regard the Municipal Systems Act provides that members of the local community have the right<sup>36</sup>

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<sup>31</sup> 1998 (2) SA 1115 (SCA).

<sup>32</sup> At 1122-1123.

<sup>33</sup> 2000 (2) SA 980 (SCA).

<sup>34</sup> 209 of 1993.

<sup>35</sup> See para 15 at 986A-G.

<sup>36</sup> See the Act s 5.



- to contribute to the decision-making processes of the municipality and to submit written or oral recommendations, representations and complaints to the municipal council or to another political structure or a political office bearer or to the administration of the municipality through mechanisms and in accordance with processes and procedures provided for in the act or other applicable legislation<sup>37</sup>
- to prompt responses to their written or oral communications, including complaints, to the Municipal Council or to another political structure or political office bearer or the administration of the municipality<sup>38</sup>
- to be informed of the decisions of the Municipal Council or another political structure or any political office bearer of the municipality that has an effect on their rights, property and reasonable expectations<sup>39</sup>
- to regulate disclosure of the state of affairs of the municipality, with inclusion of its financial affairs and status<sup>40</sup>
- to demand that the proceedings of the municipal council and those of its committees *must* be open to the public, subject to section 20; conducted impartially and without prejudice and untainted by personal self-interest<sup>41</sup>
- to the use and enjoyment of public facilities, including facilities such as parks and recreations facilities which were often in the past reserved for certain groups of people only
- to have access to municipal services which the municipality provides, provided that the duties set out in subsection (2)(b) are complied with.<sup>42</sup>

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<sup>37</sup> This not only confirms public participation in both legislative and executive functions of a municipality but it also indirectly requires a municipality to apply its attention to such recommendations or public comments.

<sup>38</sup> Through this protection the local community is ensured of accountable and responsive government and the municipal council is not only committed to comply to public request or complaints but more specifically municipal councillors as political office bearers are required to respond to requests from their local constituencies.

<sup>39</sup> This right is of particular importance to all local residents, as many decisions of municipalities will impact on their rights in one way or another. It is further also a drastic departure of the draconian exclusion of information by the previous local government system and if implemented as intended should foster strong, acceptable, open and accountable local government institutions.

<sup>40</sup> Local community members and ratepayers to a local authority must make use of these rights to ensure a measure of control over the internal political and administrative functions and financial management of their local governments. Even potential investors should satisfy themselves that the local authority in the area in which they consider to invest is in control of its financial and administrative functions.

<sup>41</sup> See the Municipal Systems Act s 5(e).

<sup>42</sup> According to s (2)(b) members of the local community have the duty to pay promptly for service fees, surcharges on fees, rates on property and other taxes, levies and duties that are imposed on them by their municipality.

Members of a local municipal community have rights not only against their municipality, they also have specific duties. These duties are the following:

- to observe the mechanisms, processes and procedures of the municipality When exercising their rights
- to pay promptly service fees, surcharges on fees, rates on property and other taxes levies and duties imposed by the municipality, where applicable and subject to section 97(1)(c)
- to respect the municipal rights of other members of the local community
- to allow municipal officials reasonable access to their property for the performance of municipal functions
- to comply with the relevant by-laws of their municipality.

#### **8.3.4 Duties of municipal administrations**

Municipal administrations must be seen as part of the public administration in general. In this regard and in compliance with the constitutional obligations toward the public administration in general, the Municipal Systems Act provides for the following:<sup>43</sup>

- A municipality's administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution.<sup>44</sup>
- The administrations of municipalities are further obligated to ensure and adhere to the following principles:
  - (a) to be responsive to the needs of the local community
  - (b) to facilitate a culture of public service and accountability amongst staff
  - (c) to take measures to prevent corruption
  - (d) to establish clear relationships, and facilitate co-operation and communication, between it and the local community
  - (e) to give members of the local community full and accurate information about the level and standard of municipal services they are entitled to receive
  - (f) to inform the local community of how the municipality is managed, of the costs involved and the persons in charge.

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<sup>43</sup> See the Act s 6(1) and (2).

<sup>44</sup> The Constitution s 195 is part of ch 10, and it provides the basic values and principles that must govern the public administration. S 195 should also be read in conjunction with the Constitution s 1(d), which requires a democratic government founded on *inter alia* the values of accountability, responsiveness and openness.

The rights and duties of municipal councils and the members of their local communities and the duties of the administrations of municipalities are subject to the Constitution as well as to the Municipal Systems Act and other applicable legislation. These rights and duties should therefore not be evaluated in isolation but within the context of the new system of local governance.

#### **8.4 Conclusion**

Within the new system of local government, municipalities have been afforded a specific statutory legal nature together with various rights and duties that must be fulfilled. Strong emphasis should also be placed on the fact that the municipalities are not mere political institutions but comprise political, administrative and local community components. Each component has its own rights and duties within that specific sphere of government, and strong interactions and co-ordination between the various components is a *sine qua non* for political stability, community participation, regular payment for services and a committed and effective local administration.

There can be no doubt that the new legal framework which not only explains the legal nature of all municipal authorities but also give statutory protection thereto has significantly advanced the requirements and objectives of the Constitution. Not only does the new legal framework give expression to the structural framework that had to be created, it also furthers values such as accountability and public participation, to mention but two. The nature and legal character of municipal governments are specifically entrenched as unique democratic public institutions with specific powers and functions in specific areas which involve not only political structures but also the local community and the administration of the particular authority. Each of the three distinct components has its own rights and duties which, when combined should result in a more effective and sufficient local sphere of governance. In this regard it is submitted that the entrenched legal nature and divided rights and duties of local government institutions significantly contributes to the system that is envisaged under the Constitution.

## **Local government within a system of co-operative governance**

### **9.1 Introduction**

The new constitutional order in South Africa states that the government is constituted as national, provincial and local spheres of government.<sup>1</sup> Local government is now a district sphere of government in its own right and is no longer a mere function of either the national or provincial government. In the new constitutional dispensation, local government is an integral component of the new democratic state.<sup>2</sup>

Within the new supreme constitutional framework, all spheres of government are obliged to observe the principles of co-operative government as put forward by the Constitution.<sup>3</sup> In essence co-operative government assumes and touches on the integrity of each sphere of our government. Apart from this, it also recognises the complex nature of a government functioning within a modern society. It is hard to imagine a country today that can effectively meet the challenges of our modern world, unless the various components of government function together as a cohesive unit.<sup>4</sup>

Co-operative government requires a system co-operation and constructive inter-governmental relations within each separate sphere and also across all spheres of government. Consequently, the principles and requirements of co-operative govern-

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<sup>1</sup> See the Constitution s 40(1).

<sup>2</sup> Refer to the Constitution s 1 which confirms that the Republic of South Africa is one sovereign, democratic state.

<sup>3</sup> See the Constitution ch 3.

<sup>4</sup> To function as a cohesive unit involves the following: to collectively harness all public resources behind common goals and with mutual support; to develop multi-sectoral perspectives on the interests of the country and to respect the discipline of national/uniform goals, policies and initiatives; to co-ordinate activities and avoid wasteful competition and costly duplication; to utilise human resources effectively; to settle disputes constructively without resorting to costly and time-consuming litigation and to identify and divide the roles and responsibilities of government between the three spheres so as to minimise confusion and to maximise efficiency and overall effectiveness. Refer to the White Paper on Local Government (1998) at 57.

ance in South Africa have been described as part of an ingenious and innovative process of harmonising the operation of all spheres of government in such a way that even the lowest sphere have a say and influence in matters that effect them.<sup>5</sup>

The new constitutional mandate places a strong emphasis on the important necessity of all spheres of government to ensure good and positive relationships between one another. This relationship is particularly influenced and controlled by the principles of co-operative government. It must be pointed out, however, that a system of co-operation can have important implications on the status of the lowest sphere within the overall relationship in particular. Within the new South African system, and notwithstanding the fact that local authorities can be controlled by the national or provincial governments, local authorities have together been afforded constitutional recognition as a fully fledged sphere of government. This protection means *inter alia* that local governments *per se* may not be abolished or discarded without compliance with the overall constitutional obligations.<sup>6</sup>

## 9.2 Local government and intergovernmental relations

The concept of co-operative government is closely related to the principle of intergovernmental relations. In general, intergovernmental relations can be described as a set of multiple formal and informal processes, structures and institutional arrangements for both bilateral and multilateral interaction within and between different spheres of government. In South Africa's new governmental system, the concept "intergovernmental relations" has emerged to give more meaning to the foundation of co-operative government that is protected in chapter 3 of the Constitution.

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<sup>5</sup> See Devenish (1998) 201.

<sup>6</sup> Any attempt by the national government to change the status, powers, functions or existence of local authorities must comply with the overall constitutional obligations, and only if a constitutional amendment is approved can such rights, powers or existence be limited or even taken away. The Constitution s 74(3) determines that any other provision of the Constitution, apart from the Constitution s 1 or ch 2, may be amended by a bill passed by the National Assembly with a supporting vote of at least two thirds of its members and also by the National Council of Provinces with a supporting vote of at least six provinces if the amendment relates to a matter that affects the Council, alters provincial boundaries, powers, functions or institutions or amends a provision that deals specifically with a provincial matter. Although local government as such is not a provincial matter – refer to the Constitution Sch 4 or 5 – it is submitted that a constitutional change in the powers, functioning or existence of local governments will affect the NCoP and can alter provincial powers or functions. According to the ch on local government, many powers regarding local governments have been given to provincial governments, and any change or amendment to the local government structure could impact on such powers. It is thus submitted that both the NA and the NCoP must approve a constitutional amendment in regard to local government matters.

According to the White Paper on Local Government, a system of intergovernmental relations has the following strategic purposes:<sup>7</sup>

- to promote and facilitate co-operative decision making
- to co-ordinate and align priorities, budgets, policies and activities between spheres of government
- to ensure the smooth, effective and accurate flow of information, not only within government institutions *inter se*, but also between government and the public
- to prevent and resolve intergovernmental conflicts and disputes effectively and efficiently.

During the transitional phase of local government the focus on the development of a framework for intergovernmental relations was on the relationship between national and provincial spheres of government.<sup>8</sup> With the establishment and recognition of local government and organised local government structures an important time has dawned whereby local government must be included and represented in all intergovernmental processes and forums.<sup>9</sup> It should also be noted that the Constitution further requires the development of an Act of parliament to establish and provide for the structures and institutions that should promote and advance intergovernmental relations.<sup>10</sup>

### **9.3 The constitutional foundation of co-operative government**

It was mentioned above that the Constitution specifically recognises and protects the principle of co-operative government.<sup>11</sup> The principles of co-operative government were regarded as having such important value and influence within a modern democratic government that the constitutional drafters had to ensure the inclusion of such principles within the supreme law of the Republic. In compliance with the con-

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<sup>7</sup> See White Paper on Local Government (1998) at 58.

<sup>8</sup> It was submitted that the role of local government should be defined as it develops in practice over time.

<sup>9</sup> The role of SALGA within some of the processes of the NCoP is an important example of such inclusion and representation.

<sup>10</sup> See the Constitution s 41(2)(a) and (b). At the time of going to print the Intergovernmental Relations Bill was still being considered by National Parliament. It should be noted that in late 2005 parliament enacted the Intergovernmental Relations Framework Act 13 of 2005. The aim of the act is to establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations and also to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes. The scope of the Act fell outside the cut of date for this work, and was thus not included.

<sup>11</sup> See the Constitution ch 3.

stitutional principles of the interim Constitution<sup>12</sup> the final Constitution states the following regarding co-operative government:<sup>13</sup>

- In the Republic, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated.
- All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

Apart from the obligation on all spheres of government to observe and adhere to the principles set out in chapter 3 of the Constitution and to conduct their activities within the parameters of this chapter, the Constitution also entrenches the basic principles of co-operative government and intergovernmental relations. It is important to note that such principles are applicable to not only all spheres of government but also all organs of the state within each sphere.<sup>14</sup> The South African courts have had significant opportunities to adjudicate on the principles of co-operative government. In *Van Wyk v Uys No*,<sup>15</sup> for example, it was expressed that section 41 of the Constitution enjoins the central, provincial and local tiers of government to foster the principle of co-operative government, to assist and support each other, to consult on matters of common interest and to co-ordinate their actions. This is the background against which Schedule 1 to the Local Government: Municipal Systems Act 32 of 2000 has to be interpreted.<sup>16</sup> With reference to the definition of organ of state the Constitutional Court mentioned in *National Gambling Board v Premier, KZN*<sup>17</sup> that while parliament, the President and the cabinet are organs of state in the national sphere of government, they do not fall within paragraph (a) of the definition of “organ of state” as set out in section 239 of the Constitution. Such institutions would rather fall under section 239(b) of the Constitution. The three mentioned organs are also not the only components of the national sphere of government.<sup>18</sup> In an earlier decision the same court concluded that although the Independent Electoral Commission is clearly a

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<sup>12</sup> 200 of 1993.

<sup>13</sup> See the Constitution s 40.

<sup>14</sup> Refer again to the definition of organs of state set out in the Constitution s 239.

<sup>15</sup> 2002 (5) SA 92 (C).

<sup>16</sup> See paras F-G at 99.

<sup>17</sup> 2002 (2) SA 715 (CC).

<sup>18</sup> Refer to para 21 at 724-725. There are other national bodies such as parliamentary committees or national commissions of enquiry.



state structure it does not fall under the definition of an organ of state within the national sphere of government.<sup>19</sup>

It is submitted that the inclusion of all organs of state further enhances and should help to facilitate and foster the type of interrelationships that are to ensure an effective and co-operative government. Organs of state are often so closely involved in governmental functions and practices that their exclusion would have impacted negatively on the overall success and effect of the constitutional principles. In respect of such principles, the Constitution states the following:<sup>20</sup>

- All spheres of government and all organs of state within each sphere must:
  - (a) preserve the peace, the national unity and the indivisibility of the Republic
  - (b) secure the well-being of the people of the Republic
  - (c) provide effective, transparent, accountable and coherent government for the Republic as a whole
  - (d) be loyal to the Constitution, the Republic and its people
  - (e) respect the constitutional status, institutions, powers and functions of government in the other spheres
  - (f) not assume any power of function except those conferred on them in terms of the Constitution
  - (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere
  - (h) co-operate with one another in mutual trust and good faith by
    - (i) fostering friendly relations
    - (ii) assisting and supporting one another
    - (iii) informing one another of, and consulting one another on, matters of common interest
    - (iv) co-ordinating their actions and legislation with one another

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<sup>19</sup> See *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC). See also *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC), where the court held that in interpreting the Schs to the Constitution there was no presumption in favour of either the national legislature or the provincial legislatures. The functional areas had to be purposively interpreted in a manner which would enable the national parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively. Para 17 at 511E-F.

<sup>20</sup> See the Constitution s 41(1), (2), (3) and (4).

- (v) adhering to agreed procedures
- (vi) avoiding legal proceedings against one another.
- An Act of Parliament must
  - (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations
  - (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
- An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose and must exhaust all other remedies before it approaches a court to resolve the dispute.
- If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

In *MEC for Health v TAC*<sup>21</sup> it was stated that the Constitutional Court will rarely grant direct access to the Constitutional Court to organs of state who have not duly performed their obligations to co-operative government. By the same token, the failure to perform those obligations is relevant when deciding whether or not it is in the interests of justice to grant an organ of state leave to appeal directly to the court.<sup>22</sup> See also *Uthukela District Municipality v President of the RSA*.<sup>23</sup> In the *Uthukela* case the Constitutional Court stated that organs of state have the constitutional duty to foster co-operative government, as provided for in chapter 3 of the Constitution. This means that organs of state must avoid legal proceedings against one another. The essence of chapter 3 is that, where possible, disputes should be resolved at a political level rather than through adversarial litigation. It is clear from section 41(4) of the Constitution that courts must ensure that such a duty is duly performed. If it is not satisfied that this duty has been performed, the court may refer a dispute back to the organs of state involved.<sup>24</sup> The court further stated that in view of the important requirements of co-operative government a court, including the Constitutional Court, will rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve the dispute at a political

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<sup>21</sup> 2002 (5) SA 717 (CC).

<sup>22</sup> See para 9 at 720 C.

<sup>23</sup> 2003 (1) SA 678 (CC).

<sup>24</sup> Paras 12 and 13 at 683D/E-684 B.

level. Finally, the court concluded that, apart from the general duty to avoid legal proceedings against one another, section 41(3) of the Constitution places a twofold obligation on organs of state involved in an intergovernmental dispute. First, they must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for. Second, they must exhaust all other remedies before they approach a court to resolve the dispute.<sup>25</sup>

On the basis of the wording of the Constitution and the case law mentioned above it is submitted that the drafters' intention clearly was to create a new form of intergovernmental co-operation in South Africa that would differ radically from the system that existed pre 1993. Many of the founding values of the Constitution are also important in order to establish such a governmental system.<sup>26</sup> However, the Constitution identifies itself as providing only the basic platform for co-operative government on which further structures, procedures and institutions are to be built in accordance with an Act of parliament.<sup>27</sup>

Within a constitutional context, the principles regarding co-operative government constitute a firm commitment to a legal design directed at co-operation, co-ordination and acceptable consensus. It is also notable that this commitment is not merely aspirational, but is a commitment that recognises the complexity of our modern government as well as the existence of possible intergovernmental power struggles and competition. Such a commitment is clearly illustrated in the case of *Hardy Ventures CC v Tshwane Metropolitan Municipality*,<sup>28</sup> where the court held that the principles of co-operative government embodied in section 41(1) of the Constitution and the basic values and principles governing public administration set out in sections 195(1) and (2) were applicable in instances where a municipal government is involved and needed to be adhered to by the respondent municipality in the relevant matter<sup>29</sup>. The court held that it was clear that the municipality had failed to adhere to the principles of good governance and sound administration contained in the Constitution. The undermining of the principles by organs of the state would lead to inefficiency and unfairness and ultimately result in a bureaucratic culture that was inimical to the

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<sup>25</sup> See paras 14 and 19 at 684-685.

<sup>26</sup> See the Constitution s 41(1)(c) and (d) particularly.

<sup>27</sup> Refer to s 41(2)(a) and (b).

<sup>28</sup> 2004 (1) SA 199 (T).

<sup>29</sup> Para 9 at 203E-E/F.

constitutional ethos. Erratic administration often resulted in arbitrariness and undermined qualitative administration in a democratic state.<sup>30</sup> Especially from a local government point of view, the protection given in terms of chapter 3 of the Constitution becomes more significant. The powers of local government are not as strongly protected as the powers of national or even provincial governments. In this weaker position, the provisions of chapter 3 provide significant protection against excessive control on the part of higher spheres of government over the matters of local government. In turn, this protection not only protects and entrenches the newly recognised status of the local sphere of government, it demands that:

- the functional allocation of powers and functions must be adhered to
- the collective harnessing of available and future government resources are done fairly
- the development of strong constitutional bonds between the three spheres is promoted.<sup>31</sup>

#### **9.4 The impact of co-operative government on local government structures**

It has been indicated above that the principles of co-operative government apply to all spheres of government as well as to all organs of state. A strong and mutual respect between the different spheres is to be fostered through the overall applicability of such principles.<sup>32</sup>

Despite the radical changes to the new South African constitutional order and the entrenchment of local government as a distinctive, interrelated and interdependent sphere of government, local authorities are still subjected to the overarching authority of the two higher spheres of government and are often under their final control.<sup>33</sup> In order to further enhance the role and importance of local governments within the overall system of co-operative government, the specific chapter on local government directly incorporates additional provisions regarding municipalities within such a system of co-operation. In this regard the Constitution determines that:<sup>34</sup>

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<sup>30</sup> See para 11 at 203-204.

<sup>31</sup> See also Chaskalson *et al* (1999) 5A–28.

<sup>32</sup> This relationship and obligation to mutual respect is also confirmed in other parts of the Constitution. Refer, eg, to s 154(1), which requires national and provincial governments to support and strengthen the capacity of municipalities to manage their affairs and to exercise their powers.

<sup>33</sup> Eg, a municipal by-law is subject to national or provincial legislation. If a by-law conflicts with either national or provincial legislation, it is invalid. See the Constitution s 156(3).

<sup>34</sup> See the Constitution s 154(1) and (2).

- the national government and provincial governments must support and strengthen by legislative and other measures the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.
- draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

From the abovementioned section it is clear that although the two higher spheres of government have wide powers in respect of local government affairs such powers are not excessive or limitless. Again the Constitution itself provides the circumstances or instances when an intrusion in the powers or functions of a local government by a higher sphere will be constitutionally allowed and when they will not.<sup>35</sup> The section further echoes the support and assistance that is especially needed on local government level in order to make the system of co-operative governance a practical reality and success.<sup>36</sup>

The Constitution also places an *onus* on provincial governments to monitor and support local governments in their provinces and further to promote the development capacity of local authorities to enable them to fulfil their functions and duties.<sup>37</sup> It is further confirmed that national and provincial governments have the legislative and executive authority to see to the municipalities' effective performance of their functions as is listed in parts B of schedules 4 and 5 of the Constitution and by regulating the exercise by municipalities of their executive authority.<sup>38</sup> Subject to the provisions of section 155(7) above, both parliament and provincial legislatures are generally empowered to make laws on all local government matters that are not specifically

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<sup>35</sup> Refer, eg, to s 151(3) and (4), which state that a municipality has the right to govern, subject to national and provincial legislation, but that neither the national government nor a provincial government may compromise or impede a municipality's ability or right to exercise its powers or to perform its functions.

<sup>36</sup> Note again the constitutional obligation in the words "*must support and strengthen*" as set out in the Constitution s 154(1).

<sup>37</sup> See the Constitution s 155(6).

<sup>38</sup> Refer to the Constitution s 155(7). See also *Van der Merwe v Slabbert No 1998 (3) SA 613 (N)*.

dealt with in the Constitution.<sup>39</sup> In light of the above one can say that the Constitution is more prescriptive with regard to the protection and regulation of the local sphere of government within the new system of co-operative governance. The vulnerability of local governments within such a system is not only recognised but is circumscribed. All the traditional local government functions are included in Parts B of Schedules 4 and 5 of the Constitution, and national and provincial governments have concurrent or exclusive legislative competence over such functional areas. Mention should again be made of the fact that local government itself is not a specific functional area that has been included in either Schedule 4 or 5. This significantly entrenches the status of local government, albeit not absolutely.<sup>40</sup>

By referring to the abovementioned provisions, one can clearly see that the principles and the concept of co-operative government are directed at establishing communications and co-ordination between all spheres of government. Such a system of co-operation and co-ordination can be achieved only through intergovernmental support and assistance. On the local sphere, these principles are further curtailed by the powers and duties of the higher spheres to promote, strengthen and oversee municipal fulfilment of their powers and duties.

In the first certification judgment,<sup>41</sup> the Constitutional Court has specifically reflected on some of the important aspects regarding co-operative government and intergovernmental relations. The court stated *inter alia* the following:

- The principles of co-operative government and intergovernmental relations introduce a new philosophy which obliges all organs of government to co-operate with each other and to discharge certain functions. As such the principles impose obligations on all spheres of government.<sup>42</sup>
- The requirements of section 41(1)(g) of the 1996 Constitution require that all spheres must exercise their powers and functions in a manner that do not encroach on the geographical, functional or institutional integrity of a government in

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<sup>39</sup> The Constitution s 164 states that any matter concerning local government not dealt with in the Constitution may be prescribed by national or provincial legislation within the framework of national legislation.

<sup>40</sup> Local governments do not have exclusive powers in this regard, as their powers are shared with both national and or provincial governments.

<sup>41</sup> See *In re: Certification of the Constitution of the RSA 1996*, 1996 (4) SA 744 (CC).

<sup>42</sup> See pages 907-908.

another sphere. This requirement was in accordance with Constitutional Principle XXII of the interim Constitution.

- The co-operative government system included in chapter 3 of the 1996 Constitution was not invasive of the autonomy of spheres of government. The court said that intergovernmental co-operation was implicit in any system where powers had been allocated concurrently to different levels of government.<sup>43</sup>
- Section 41(1) and (4), which provide that the different spheres of government should avoid legal proceedings against each other and should exhaust all other remedies before approaching a court to resolve a dispute, is not inconsistent with the system of co-operative government and does not oust the jurisdiction of the courts.<sup>44</sup>
- The court further explained that section 155 of the 1996 Constitution has the consequence that the ambit of provincial powers in respect of local government has been confined largely to the supervision, monitoring and support of municipalities. The powers of supervision are considerable and facilitate a measure of provincial control over the manner in which municipal administrations administer the matters set out in Part B of both Schedules 4 and 5.

The court furthermore confirmed that the monitoring powers did not bestow additional or residual powers of provincial intrusion on the domain of local government. What the 1996 Constitution seeks to realise is a structure of local government that on one hand reveals a concern for the autonomy and integrity of local government and thereby prescribes a so-called “hands-off” relationship between local governments and other levels of government and on the other acknowledges the requirement that higher levels of government have a monitoring function and can intervene in instances when local government is not complying to its functions. This is regarded as a “hands-on” relationship.<sup>45</sup> Based on the abovementioned conclusions of the Constitutional Court it is submitted that co-operation and intergovernmental relations not only give support and assistance between spheres of government but also involve aspects of supervision and sometimes intervention. For example, if a municipality does not fulfil an executive obligation, the relevant provincial government may intervene to ensure that such an obligation is indeed fulfilled. Within the context of

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<sup>43</sup> See pages 857-858.

<sup>44</sup> P 855.



the Constitution, such a power of provincial supervision has specifically been entrenched. In section 139 the Constitution determines as follows:

- When a municipality cannot or does not fulfil an executive obligation in terms of any legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including
  - (a) issuing a directive to the Municipal Council describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations
  - (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary
    - (i) to maintain essential national standards or meet established minimum standards for the rendering of a service
    - (ii) to prevent the Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole or
    - (iii) to maintain economic unity.
- If a provincial executive intervenes in a municipality in terms of subsection 139(1)(b)
  - (a) the intervention must end unless within 14 days of the intervention it is approved by the Cabinet member responsible for local government affairs
  - (b) notice of the intervention must be tabled in the provincial legislature and in the National Council of Provinces within 14 days of their respective first sittings after the intervention began
  - (c) the intervention must end unless it is approved by the National Council of Provinces within 30 days of its first sitting after the intervention began and
  - (d) the Council must review the intervention regularly and make any appropriate recommendations to the provincial executive.
- National legislation may regulate the process established by this section.

It would seem that the obligation of support and promotion of local government capacity could contribute considerably to restricting instances of drastic intervention by higher spheres. It is only logical that provincial failures to support and promote local authorities would result in municipal incapacity and thereby create a necessity for

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<sup>45</sup> See pages 879-881.

intervention. There is therefore a strong argument that support and promotion precedes intervention.<sup>46</sup>

In the first certification judgement mentioned above the Constitutional Court<sup>47</sup> compared the term “supervision” with a process of provincial review. The power or authority of supervision is normally exercised alongside the power of intervention. Supervision is a continuous process, however, while intervention is *ad hoc* and dependent on the existence of specifically defined circumstances. Intervention must also be conducted in compliance with specific procedures.<sup>48</sup> In light of the above it seems clear that the power to intervene is a considerable power and can be particularly important to local authorities, where administrative and executive structures are more likely to be in need of support and assistance.

### **9.5 The recognition and protection of the obligations to support, strengthen, consult and promote local government matters**

Apart from the provisions of co-operative government set out in chapter 3 of the Constitution, which are applicable to all spheres of government, the Constitution also provides for other instances where local governments must be consulted and informed. These additional provisions should be read in conjunction with the principles of co-operative government. Some of these provisions are summarised as follows:

- Municipalities have the right to govern, on their own initiative, the local government affairs of their communities, subject to national and provincial legislation.<sup>49</sup>
- Neither national nor provincial governments may compromise or impede a municipality’s ability or right to exercise its powers or to perform its functions.<sup>50</sup>
- Municipalities must participate in national and provincial development programmes.<sup>51</sup> This provides for support and strength to such programmes.
- Using legislative or other measures, national and provincial governments must support and strengthen the capacity of municipalities to manage their affairs, to exercise their powers and to perform their functions.<sup>52</sup>

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<sup>46</sup> This position is supported by some commentators. See Chaskalson *et al* (1999) 5A–30.

<sup>47</sup> *In re: Certification of the Constitution of the RSA, 1996 supra* fn 41.

<sup>48</sup> See the Constitution s 139(2)(a)-(d).

<sup>49</sup> Refer to the Constitution s 151(3).

<sup>50</sup> See the Constitution s 151(4).

<sup>51</sup> The Constitution s 153(b).

<sup>52</sup> The Constitution s 154(1).

- Draft national or provincial legislation that affects the status, institutions, powers or functions of local governments must be published for public comment before it is introduced in Parliament or a Provincial Legislature. Such publication must be performed in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to such draft legislation.<sup>53</sup>

The reference to Organised Local Government (OLG) in the Constitution is also of particular importance. The concept of OLG is specifically founded on the principles of co-operative government and intergovernmental participation. For this reason the Constitution specifically entrenches the creation of organised local government structures. The Constitution determines as follows:<sup>54</sup>

An Act of Parliament enacted in accordance with the procedure established by section 76 must:

- provide for the recognition of national and provincial organisations representing municipalities and
- determine procedures by which local government may:
  - (a) consult with the national or a provincial government
  - (b) designate representatives to participate in the National Council of Provinces and
  - (c) participate in the process prescribed in the national legislation envisaged in section 221(1)(c).

During 1997, the Organised Local Government Act (OLGA)<sup>55</sup> was enacted by parliament in compliance with the constitutional obligation of section 163. The purpose and requirements of the Act can be summarised as follows:

- to provide for the recognition of national and provincial organisations representing the different categories of municipalities
- to determine procedures by which local government may designate representatives to participate in the NCoP

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<sup>53</sup> See the Constitution s 154(2). The Constitution places a clear obligation on national and provincial legislatures to inform and provide opportunities for representations in such legislatures when laws are proposed.

<sup>54</sup> See the Constitution s 163.

<sup>55</sup> 52 of 1997.

- to determine procedures by which local government may consult with national and provincial governments and
- to determine procedures by which local government may nominate persons to the Financial and Fiscal Commission.

According to the definitions set out in the OLGA the responsible minister on national level is the minister for Provincial Affairs and Constitutional Development. The responsible members on the various provincial levels are the different MECs responsible for local government in each province.<sup>56</sup> The Act determines that the national minister must recognise one national organisation and nine provincial organisations to represent local government. The national organisation should in turn represent the majority of the provincial organisations. In respect of the provincial organisations, the minister with the concurrence of the MEC of that province must recognise one organisation in each province. The provincial organisation must be representative of the majority of municipalities in that province and should be inclusive of all the different categories of municipalities.<sup>57</sup> The Act further allows each provincial organisation to nominate in writing not more than six members of municipal councils for designation as representatives to participate in the proceedings of the National Council of Provinces (NCoP). When necessary and in accordance with criteria determined by it, the national organisation must then designate not more than 10 persons from the nominees to participate in the proceedings of the NCoP.<sup>58</sup>

Specific provision is also made in the Act for consultation procedures between the national and provincial spheres of government and the national and provincial organisations representing local governments. The national organisation may at any time approach any minister to consult with the national government. The position is similar between a provincial organisation and the provincial government. A provincial organisation may only consult the national government after consultation with the national organisation, however.<sup>59</sup> It would appear that the Act attributes a higher status to the national organisation than to its provincial counterparts, although no substantial basis for such a position is provided for. It is submitted that this marginalisation of the provincial organisations has more negative than positive implications

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<sup>56</sup> See the OLGA s 1.

<sup>57</sup> See the OLGA s 2(1)(a) and (b).

<sup>58</sup> Refer to the OLGA s 3(1) and (2) and also to the Constitution s 67.

<sup>59</sup> See the OLGA s 4(1)–(8).

for the overall co-operative and representative purpose than the Act aims to achieve and that it should be amended. The OLGA also provides for the nomination of persons to the Financial and Fiscal Commission (FFC). Only one person from each provincial organisation may be designated. Further issuing of regulations by the minister is also provided for.<sup>60</sup>

Historically, local government had a weak voice in the participation and development of government policy on national or provincial levels. This aspect has now been addressed to some extent, although the overall system of co-operation and representation is not perfect. All local government organisations must eagerly take part in the representation system and ensure the free flow of important information in respect of local government issues. According to the Organised Local Government Act both the National Minister and provincial MECs are responsible for achieving the purposes of the Act.<sup>61</sup> It should be noted also that Organised Local Government also constitutes the employer component of the South African Local Government Bargaining Council (SALGBC) and thus plays an important role in local government labour matters. Organised Local Government organisations further contribute significantly to the development of local governments by providing specialised services, training programmes and research projects. OLG is primarily funded by membership fees payable by each municipality. This funding arrangement also contributes to the accountability and responsiveness of the different organisations with regard to their respective municipal constituencies.

It is submitted that both the Constitution and national legislation recognise and protect the creation and participation of OLG. This is of particular importance for both the status and autonomy of local governments within the new constitutional system. This protection and recognition adds further spice to the general principles of co-operation and participation. Furthermore, it is important to note that section 163(b) of the Constitution also distinguishes between three instances where local government should play a role. In the first place, certain procedures must be provided for whereby local government may consult with national or provincial governments. This

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<sup>60</sup> See the OLGA ss 5 and 6. Note s 5 was substituted by s 6 of Act 25 of 2003.

<sup>61</sup> The national minister together with the nine MECs of the provinces is often referred to as MINMEC. MINMEC provides for a high degree of inter-provincial co-ordination and representation between the national and provincial spheres of government.

provision for consultation is currently provided and protected in the OLGA.<sup>62</sup> The Act specifically protects and recognises the participation of OLG in other spheres of government through the South African Local Government Association (SALGA). SALGA was established in 1996 to promote and protect the interests of local government, and the association has been recognised by national and provincial governments as the national representative and consultative body for all matters that concern local government.<sup>63</sup> Each provincial government has also established an organisation similar to SALGA on the provincial levels. In the second instance local government may designate representatives to participate in the NCoP. In this instance reference must be made to section 67 of the Constitution. The section states as follows:

Not more than ten part-time representatives designated by organised local government in terms of section 163, to represent the different categories of municipalities, may participate when necessary in the proceedings of the National Council of Provinces, but may not vote.

According to the Constitution the role of the NCoP is to represent the provinces and, by implication, also local governments and to ensure that provincial interests are taken into account in the national sphere of government. The NCoP is thus the most suitable house of the national legislature where provincial and local government interests should be represented.<sup>64</sup> The abovementioned participation by local government representatives in the national sphere of government indeed affords local governments a voice in a forum where it was never heard before.<sup>65</sup> A similar constitutional protection as is set out in section 67 is not afforded to local governments within provincial legislatures, however, which is regrettable. Local governments may also nominate persons to the Financial and Fiscal Commission (FFC). This provision entrenches the important role that local governments are to play with regard to general financial matters. In accordance with section 163(b)(iii) of the Constitution, the FFC had to comprise *inter alia* two persons nominated by OLG.<sup>66</sup> Furthermore, both the FFC and OLG had to be consulted before an Act of parliament which provides for

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<sup>62</sup> 52 of 1997.

<sup>63</sup> See Chaskalson *et al* (1999) 5A-32.

<sup>64</sup> In this regard see the Constitution s 42(4).

<sup>65</sup> Refer to the comments made by Meyer (1997) 14.

<sup>66</sup> See the Constitution s 221(1)(c). See also Financial and Fiscal Commission Act 99 of 1997.

the equitable shares and allocations of revenue could be enacted.<sup>67</sup> This provides a double consultative protection for local government interests, both as represented by the FFC and through OLG structures.<sup>68</sup> The overall importance of the abovementioned provisions regarding the FFC is ultimately to ensure that local government is provided with a voice in fiscal matters. Again this protection enhances and confirms the overall commitment to a new system of co-operation and consultation.

- National government is constitutionally obligated to define the different types of municipality, while provincial legislation must determine the different types of municipality to be established in a province.<sup>69</sup>
- By legislative or other measures, each provincial government must establish municipalities consistent with national legislation. Provincial authorities must further provide for the monitoring and support of local government and must promote the development of the capacity of municipalities in order to enable them to perform their functions and to manage their own affairs.<sup>70</sup> This obligation to monitor, support and promote development capacity is again a strong confirmation of the overall establishment of a co-operative system of governance with specific inter-governmental requirements.
- Municipalities are further supervised by both national and provincial governments to ensure the effective performance of their functions.<sup>71</sup>
- Co-operation is further enhanced through the obligation on national and provincial governments to assign to a municipality the administration of a matter which is listed in Part A of Schedule 4 or 5 and necessarily relates to local government. This must be done by agreement and subject to any conditions. However, this assignment is subjected to a determination of whether the local administration of

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<sup>67</sup> Refer to the Constitution s 214(2).

<sup>68</sup> See also the Constitution s 229(5) for a similar dual participatory role.

<sup>69</sup> The Constitution ss 155(2) and (5).

<sup>70</sup> See the Constitution s 155(6).

<sup>71</sup> According to the Constitution, national government has intervention authority subject to the provisions of the Constitution s 44. It must be remembered that local government competences are incorporated in the Constitution in Part B of Sch 4 and Part B of Sch 5. Sch 4 sets the legislative competences of both national and provincial governments, while Sch 5 proclaims the exclusive legislative competences of the provincial governments. In concurrent matters both national and provincial governments have legislative authority while only the provinces have legislative competence in exclusive matters. S 44(2) however allows parliament to intervene through legislative action in special circumstances. Refer to the Constitution s 44(2)(a)-(e).



such a matter would be most effective and whether or not the relevant municipality has the capacity to administer the matter.<sup>72</sup>

- In the last instance, many aspects of local governments are controlled and regulated in terms of legislative requirements from the two higher levels of government.<sup>73</sup>

From the examples mentioned above it is quite clear that mostly national, but sometimes also provincial, legislation is of significant importance to the functioning of local governments and that these pieces of legislation have an important impact on the relationship between the spheres of government. Legislation of higher spheres not only influences local government activities, but sometimes even elaborates and protects the general system of co-operation.

### **9.6 National legislative protection of the principles of co-operative government**

Specific provision to support the overall constitutional framework of co-operative government has been incorporated into the new legislative framework of local government. Such protection and advancement of the need for co-operation was already evident during the transformation and restructuring process.<sup>74</sup>

In support of the constitutional requirements and in an effort to broaden the provisions of the LGTA, both the Municipal Structures Act and the Municipal Systems Act encapsulate aspects of co-operation. The Municipal Systems Act requires that:

- municipalities must exercise their executive and legislative authority within the overall constitutional system of co-operative government as is envisaged in section 41 of the Constitution
- both national and provincial spheres of government must exercise their executive and legislative authority in a manner that does not compromise or impede a municipality's ability or right to exercise its executive and legislative powers or functions

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<sup>72</sup> See the Constitution s 156(4).

<sup>73</sup> The foundation of such legislative prescriptions is found in the Constitution itself. Refer to ss 157(1) and (6), 160(5) and 161. Even matters concerning local government that are not specifically dealt with in the Constitution may be prescribed by national or by provincial legislation within the framework of national legislation.

<sup>74</sup> According to the LGTA 209 of 1993 as amended, the MEC had to promote and support the development of local government in order to enable municipalities to exercise their powers and perform their duties in the management of their affairs, and the MEC had annually to provide information to the minister in this regard. The MEC and each municipality had to promote and support co-operation between municipalities in order to develop the capacity of each municipality to exercise its powers and perform its duties and thus manage its affairs.

- in furtherance of the purpose of effective co-operative government Organised Local Government must seek to:
  - (a) develop common approaches for local government as a district sphere of government
  - (b) enhance co-operation, mutual assistance and the sharing of resources among municipalities
  - (c) find solutions for problems relating to local government in general
  - (d) facilitate compliance with the principles of co-operative government and inter-governmental relations.<sup>75</sup>

Although the Systems Act does not provide further guidelines on co-operation between local governments themselves and other spheres of government, it particularly emphasises the importance of Organised Local Government to take positive steps in an effort to ensure effective co-operation in general.<sup>76</sup>

Building on the provisions of the Systems Act, the Municipal Structures Act specifically refers to the co-operation between municipalities *inter se*. The Act requires that district municipalities and local municipalities must co-operate with one another through assistance and support. At the request of a local municipality in the area a district municipality may provide financial, technical or administrative support to that local municipality. This provision of support is dependent on the capacity of such district council to provide the support as requested, however.<sup>77</sup> The Structures Act also envisages similar reversed support of a local municipality to a district municipality of a particular area. Mention is also made of the fact that the MEC of the relevant province must assist a district municipality to provide support services to other local municipalities. Provincial involvement and participation is thereby also drawn into the relationship between municipalities within the local sphere of government.

### **9.7 Exploring the roles and responsibilities of national and provincial governments towards municipalities in a system of co-operative governance**

It has been explained above that the Constitution in chapter 3 specifically requires a strong commitment of all three spheres of government to establish a new system of

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<sup>75</sup> See the Municipal Systems Act 32 of 2000 s 3.

<sup>76</sup> See the Municipal Systems Act s 3(a)-(d).

<sup>77</sup> See the Municipal Structures Act 117 of 1998 s 88.

horizontal and vertical co-operation amongst such spheres. All spheres are constitutionally mandated to observe and adhere to the principles and parameters specified in the Constitution. Furthermore, all spheres and all organs of state within each sphere must adhere to the principles of co-operative government and intergovernmental relations as determined by the highest law of the state.<sup>78</sup> According to these principles, all spheres must co-operate with one another in mutual trust and good faith and must foster friendly relations through assistance, support, information sharing, consultation and overall co-ordination. From these strong constitutional obligations various roles and responsibilities of both national and provincial governments can be identified in respect of local government. Most of these roles and responsibilities overlap between the national and provincial governments, while others may differ substantially because of special local circumstances. Some of these mentioned roles and responsibilities can be summarised as follows:

- *Strategic planning and developmental role* Both national and provincial governments are responsible for strategic planning and development. National government is mostly responsible for setting the overall strategic framework for the economic and social development of the nation and thus for all spheres of government. Provincial governments must tailor their strategies and developmental policies according to the specific conditions and needs that are prevalent in their areas. They should also ensure that municipal IDPs combine into a form of sustainable development that forms a framework across the province as a whole and that they are integrated as a unit. In turn, national government must ensure that local and provincial governments operate within the national enabling framework and are structured and capacitated to best promote development and growth as a whole.
- *Legislative/executive regulatory role* The Constitution affords both national and provincial governments the legislative and executive authority to see to the effective performance by municipalities of their functions in matters listed in both schedules 4 and 5 of the Constitution.<sup>79</sup> It is, however, national government that must provide the overall legislative framework for local government in general, which includes legislation regarding municipal demarcation, the division of powers

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<sup>78</sup> See the Constitution ss 40 and 41.

<sup>79</sup> See the Constitution s 155(7).

and functions between the categories of municipality, the electoral system applicable in local governments, the criteria for determining the size of municipal councils and, as was mentioned earlier, providing for the structures of Organised Local Government.<sup>80</sup> Both national and provincial governments are tasked with supporting and strengthening the capacity of municipalities.<sup>81</sup> As part of the process of establishing a new local government system, both national and provincial governments had to scrutinize old-order legislation and reformulate their policies and regulations in respect of local government to ensure that such policies and regulatory requirements are not only constitutional, but are in support of the new vision for local government.<sup>82</sup>

- *A fiscal and financial role* In modern society national governments plays an increasingly important role in local government financial matters. Examples of such roles are the managing of intergovernmental fiscal relations and the determination of each sphere's equitable share of nationally raised revenue.<sup>83</sup> Fiscal control and management of local government is also important to the various provinces, as they have an obligation to intervene in cases when necessary to ensure local financial viability.
- *A monitoring and intervention role* The Constitution envisages a clear role for both national and provincial governments in the monitoring of local government in order to ensure high standards and effective services. In this regard national government should develop and maintain an effective system of monitoring and oversight. It is of importance to note that many institutions that operate within the new constitutional dispensation require regular and accurate information to enable them to evaluate and measure effectiveness and progress.<sup>84</sup> In general, the monitoring and oversight of local governments should be directed at the functions allocated in terms of Schedules 4 and 5 of the Constitution and at those functions that have been assigned to municipalities. Provincial monitoring of the compliancy by municipalities with their specific objectives should also not be neglected. Any

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<sup>80</sup> See the Constitution ss 155(2), 157(2), 160(5) and 163.

<sup>81</sup> See the Constitution s 154.

<sup>82</sup> See White Paper on Local Government (1998) at 62.

<sup>83</sup> See the Constitution ch 13 on Finance.

<sup>84</sup> The Human Rights Commission is but one of such institutions that requires accurate information to assess the progress that municipalities have made towards the realisation of certain fundamental rights.

monitoring function must be supported by an information and communication system that would enable higher spheres of government to determine properly when and where to regulate or even intervene.<sup>85</sup> Intervention is the responsibility primarily of provincial governments, although national government may also intervene in special circumstances.<sup>86</sup> According to the White Paper on Local Government, the powers of intervention by provincial governments in the affairs of local government provide the following safeguards:<sup>87</sup>

- (a) to protect and promote minimum standards of local government delivery and democracy and ensure the compliance by municipalities of their constitutional mandate
- (b) to ensure and if necessary help restore the financial balance and sustainability of local government monetary basis
- (c) to promote accountability and public acceptance and faith in their local government bodies and
- (d) to prevent and detect local corruption and maladministration and to take crucial remedial steps to ensure effective actions are implemented.<sup>88</sup>

The White Paper has further identified the following guidelines, intended to regulate any intervention:

- From the outset, intervention should be avoided if possible. This can be achieved through proper training, support and funding. With good monitoring and communication many municipalities can be informed about potential problems and can take corrective measures.
- Clear responsibility and financial liability regarding cases of mismanagement, maladministration or even fraud must be established.
- National and provincial governments should exercise their powers in terms of section 155(7) of the Constitution to regulate municipal executive authority in or-

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<sup>85</sup> Reference should again be made to the fact that the constitutional requirements regarding co-operative government strongly suggests a new governmental system based on support and assistance, rather than intervention and subordination.

<sup>86</sup> These special circumstances are explained in the Constitution s 44(2).

<sup>87</sup> See White Paper on Local Government (1998) at 63-64.

<sup>88</sup> The powers of provincial intervention and supervision, as set out in s 139 of the Constitution, were discussed in earlier paragraphs. According to the White Paper, intervention powers should be enforced on a uniform basis and should be predictable. To achieve this will require national guidelines on the process of intervention. It is also important to establish a detailed framework to address instances when municipalities encounter financial problems such as bankruptcy. See the White Paper on Local Government (1998) at 65.

der to ensure that municipal functions are effectively performed. This should limit cases of intervention significantly.

- Any intervention that is required should be limited to the extent needed according to the circumstances of each case. To take away a municipality's executive power is a severe sanction and should only be permitted as a last resort and after all other mechanisms have failed.<sup>89</sup> However, one must not lose sight of the fact that municipalities must also contribute to working with the two higher spheres to ensure open and co-operative relations.

### **9.8 National support and assistance to local government through national policies and programmes**

Local government on its own cannot sustain or achieve its constitutional objectives without the support and assistance of especially the national sphere of government. Within the new overall governmental structure of South Africa there are many national departmental programmes and policies that relate and affect local government. In this regard it should be noted that the national policy environment within which municipalities must operate is becoming very complex. Local governments are increasingly seen as a point of integration and co-ordination for the effective implementation of the programmes of the two higher spheres of government. Some important national programmes that relate and affect local government are as follows:

- *The Department of Health* The national Department of Health has many significant functions decentralised to local governments. Local governments are known as District Health Authorities (DHA) and must integrate and co-ordinate health services at local level.
- *The Department of Transport* According to national legislation and policy, municipalities are sometimes regarded as Transport Authorities (TA) with *inter alia* the responsibilities of developing new local transport plans, implementing and co-ordinating national or provincial programmes, regulating and enforcing transport matters and promoting security in public transport instances.
- *The Department of Trade and Industry* Many initiatives of the Department of Trade and Industry have an important impact on the role of local government in

boosting local economies, enhancing local competitiveness and promoting small-scale enterprises and economic growth. Almost all local authorities are now actively drawn into small, medium and micro economic activities and enterprises.<sup>90</sup>

- *The Department of Arts and Culture* However, according to Schedule 4 of the Constitution, culture is listed as a concurrent legislative competence between both national and provincial governments. However, the Constitution also affords provinces exclusive competence over provincial cultural matters.<sup>91</sup> Concurrent competencies not only require the national government to take action, they also place some responsibility on provincial and local authorities to promote and develop such areas of competencies. Thus both provincial and local governments have certain responsibilities in promoting cultural affairs in their respective areas. From an international perspective, many municipalities are the biggest funders and organisers of arts and culture activities in their cities and thus some of the best development agencies of cultural events.<sup>92</sup> In South Africa, many community arts centres and libraries are the responsibility of local government.
- *The Department of Safety and Security* Traditionally, most safety and security matters were regulated by the highest level/sphere of government in the state. In modern South Africa, the position is similar: the provinces have no exclusive competence regarding safety and security matters and only very limited concurrent powers in that regard.<sup>93</sup> In instances where the Constitution does not specifically indicate where a certain legislative competency vests, the national sphere of government is generally empowered to legislate on such matters.<sup>94</sup> In the new local

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<sup>89</sup> In general the powers of intervention should be seen as a last option after the ordinary inter-governmental processes have failed. It is submitted that such exceptional exercise of interventional powers is in compliance with the co-operative principles set out in the Constitution s 41.

<sup>90</sup> Refer to the White Paper on Local Government (1998) at 68.

<sup>91</sup> See the Constitution Sch 5 Part A.

<sup>92</sup> See the White Paper on Local Government *ibid* at 68.

<sup>93</sup> See the Constitution Sch 4 and 5. The provinces have concurrent legislative competence regarding the police but only to the extent that the provisions of the Constitution ch 11 confers upon them a legislative competence.

<sup>94</sup> See s 44(1), which confirms that the national legislative authority, as vested in parliament, confers on the National Assembly the power *inter alia* to pass legislation *with regard to any matter* (own emphasis added), including a matter within a functional area listed in Sch 4, but excluding, subject to s 44(2), a matter within a functional area listed in Sch 5. In light hereof it is submitted that in cases where the Constitution does not specifically vest a functional area to either the national or provincial governments, national government is authorised to legislate on such matters. Attention should however be drawn to s 44(3), which states that legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Sch 4 is, for all purposes, legislation with regard to a matter listed in that Sch.



government structure national legislation will determine and enable municipalities to fulfil a role in maintaining law and order and to provide limited security services. One important new development in this regard is the establishment of so-called municipal police forces in certain municipal areas. In this regard municipalities are to some extent incorporated within the overall safety and security framework.<sup>95</sup> Aspects of disaster management also fall within the ambit of safety and security. Because of its nature, disaster management is important to all spheres of government. Good co-ordination and support is needed in disaster or emergency circumstances. Local governments must plan proactively for the prevention and management of disasters and should seek to minimise the vulnerability of communities and protect people that are at risk.<sup>96</sup> In almost all instances of disaster incidents, the department of safety and security will provide assistance and support, and local governments must work together with such agencies to address the problems as effectively and sufficiently as possible.

- *The Department of Mineral and Energy* This department has overseen and implemented far-reaching changes in South Africa, especially to the electricity industry. In many parts of the country both Eskom and various municipalities are reticulating electricity. New legislative changes regulate this important industry and play an important role in municipal revenue income and cash flow capabilities. It must be pointed out that many municipalities profit from electricity supply and use that profit to cross-subsidise other non-viable services. One can therefore not overemphasise the important impact electricity supply and income have on municipalities all over the country. Ill-considered removal of such a profitable income source from local government will most definitely affect overall municipal asset bases severely and could negatively impact on credit ratings and borrowing abilities.

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<sup>95</sup> For more details on municipal police forces, see South African Police Service Act 68 of 1995 as amended by the South African Police Service Amendment Act 83 of 1998 and also later chapters of this work.

<sup>96</sup> One important example in this regard is the frequent disaster incidents within especially informal settlements. Often many dwellings in informal settlements are totally destroyed by fire or water and many property and lives are at risk. Local governments should not only take preventative action in such cases but must according to their constitutional obligations develop such communities in order to minimise such dangerous circumstances. This type of problem poses severe challenges to local authorities and cannot be addressed in isolation by such governments alone.

- *The Department of Land Affairs* Mention has already been made of the important role that the Facilitation Development Act<sup>97</sup> and the required Land Development Objectives play within the new system of local government. In this regard close co-operation and co-ordination is required on all spheres of government. Apart from the FDA requirements, local governments must also work closely with the Department of Land Affairs in order to ensure that land reform and land redistribution processes are incorporated into local development planning and also that the overall commitment to land reform under the new Constitution is fulfilled.<sup>98</sup>
- *The Department of Public Works* The Department of Public Works has a number of important programmes which directly impact on local government affairs and economic development. Municipalities must ensure that such programmes are implemented and that they obtain the best possible advantages from such initiatives.
- *The Department of Housing:* Within the framework of national and provincial legislation and policy, all municipalities are required to ensure that inhabitants in their areas have access to adequate housing.<sup>99</sup> Housing is a concurrent functional area of legislative competence and can be achieved only through setting realistic housing delivery goals, solid co-ordination between spheres of government, provision of adequate financial support and through a process of identification and development of appropriate land. Municipalities are often required to participate directly in national housing programmes by acting as either developers or administrators. Such participation can also have substantial financial benefits for local authorities.<sup>100</sup>
- *The Department of Water Affairs and Forestry* Similar to most other national departments the Department of Water Affairs and Forestry has significant programmes that affect and influence local governments. Over the last five years many millions of rands have been invested in various programmes directed at supplying water directly to local communities. These programmes have already had a significant impact on the quality of life of many ordinary people of South Af-

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<sup>97</sup> 67 of 1995.

<sup>98</sup> For more on land reform processes see the Extension of Security of Tenure Act 62 of 1997.

<sup>99</sup> Mention has already been made of the fact that local governments, as part of the government in general, have important developmental duties and socio-economic obligations that must be fulfilled. See also s 26 of the Constitution.

<sup>100</sup> Refer to the White Paper on Local Government (1998) at 70.

rica and have contributed immensely to overall upliftment and the development of local circumstances.<sup>101</sup> One must always remember that the provision of safe drinking water is one of the essential services needed to sustain acceptable living conditions.

- *The Department of Environmental Affairs and Tourism* Another important national portfolio that impacts on local government is the department of Environmental Affairs and Tourism. Especially from an environmental point of view, national government has put forward many legislative requirements to ensure a healthy and non-harmful living environment. Local government must often ensure that these legal requirements are complied with and are indeed implemented and enforced.<sup>102</sup> Similar to the environment, tourism is also a concurrent competence and requires good co-ordination and mutual support between all spheres of government. Because of its diverse nature, tourism is strongly emphasised in local communities and all municipalities have important roles to play in developing local tourism, which will ultimately contribute to a better income and socio-economic upliftment.

### **9.9 Some comments on co-operative government in practice**

From the discussion above it is clear that national government and provincial government are increasingly looking to local government as the final institution to ensure the implementation of national/provincial policies and programmes. This aspect is further enhanced through the constitutional obligation that local government must participate in national and provincial development programmes.<sup>103</sup> Both national and provincial programmes have wide-reaching implications for local governments and will most definitely have an impact on municipal capacity and ultimate success. If the overall structure between the different spheres of government is to succeed, substantial support and provision of resources should be made available to municipal authorities. Municipalities are often working in parallel with a range of national or provincial authorities and could usually make good use of their infrastructure and competencies.

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<sup>101</sup> For more on this department's programmes see, eg, the Water Services Act 108 of 1997.

<sup>102</sup> Emphasis must be placed on the fact that although the environment is a concurrent functional area of legislative competence between national and provincial governments, it is also protected as a fundamental right in the Bill of Rights. See the Constitution Sch 4 and s 24.

<sup>103</sup> See the Constitution s 153(b).

According to the Constitution, both national and provincial governments are permitted to devolve powers and functions to local governments.<sup>104</sup> Although decentralisation of functions is often desirable to improve effectiveness, it must be thoroughly investigated and considered. Without proper financial and administrative support the devolution of functions to local government can easily cause more damage than good. Devolution without such support is often referred to as an “unfunded mandate”, which usually puts more strain on the already limited resources of municipalities and can finally result in a lack of proper delivery.<sup>105</sup> In order to avoid unfunded mandates, it is suggested that all legislation or executive actions that deal with the decentralisation or assignment of powers are timeously referred to the Organised Local Government structures for discussion and comment.<sup>106</sup>

### 9.10 Conclusion

It was discussed and explained above that the new constitutional order specifically incorporates and establishes an overall governmental structure based on principles of co-operation and intergovernmental relations.<sup>107</sup> All three spheres of government, which are distinctive, interdependent and interrelated to one another, and all organs of state within each sphere are obligated to comply with the principles set out in the Constitution. An Act of parliament is envisaged to promote and provide for further intergovernmental relations and mechanisms.<sup>108</sup> Although various national Acts provide for co-operation and intergovernmental support,<sup>109</sup> the legislation required in terms of section 41(2) has not been enacted up to date. Within the current system, not all requirements and obligations relating to co-operative government are properly addressed. Some writers argue that the current legislative provisions fall short of the requirements obligated in section 41(2) and that parliament should urgently design a

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<sup>104</sup> According to s 44(1)(iii), the national assembly has the power to assign any of its legislative powers, except the power to amend the Constitution, to any other legislative body in another sphere of government. Not only legislative authority but also executive authority may be assigned. In this regard s 99 states that a cabinet member may assign any power or function that is to be exercised or performed in terms of an Act of parliament to a member of a provincial Executive Council or even to a Municipal Council. The position is very similar on a provincial level. See the Constitution ss 104(1)(b) and 126.

<sup>105</sup> See the White Paper on Local Government (1998) at 73.

<sup>106</sup> For more on this see Malherbe R “The unconstitutionality of unfunded mandates imposed by one sphere of government on another” 2002 (3) *TSAR* 541.

<sup>107</sup> See the Constitution s 41.

<sup>108</sup> See the Constitution s 41(2)(a)-(b).

<sup>109</sup> See, eg, the Housing Act 107 of 1997, the Water Services Act 108 of 1997 and the Facilitation Development Act 67 of 1995.

more comprehensive inter governmental relations plan.<sup>110</sup> In this new plan specific care should be taken not to establish an unequal inter governmental system which would impact negatively on local government participation and acceptance. One must also question the current efficiency of Organised Local Government Structures, as they are often seen to be overshadowed by the two higher spheres of government. Not only should OLG be afforded a voice in governmental relations, that voice should be protected and listened to seriously. Currently the institutional workings regarding co-operative government seem unsatisfactory. In many relevant instances local governments are still excluded or marginalised, and there is a degree of confusion between SALGA and some provincial structures. SALGA is often perceived to be more willing to follow national proposals than to be too critical regarding local government matters.<sup>111</sup>

It should again be emphasised that for the first time in South African constitutional history local government has been afforded participation in the highest governmental structures of the state. This positive development must be exploited and utilised to its fullest potential. This inclusion is a significant constitutional development and should indeed contribute to the success and efficiency of the newly established co-operative system. There can be no doubt that strong local government institutions with adequate capacity will play a critical role in the enhancement and success of national and provincial policies and programmes. This in turn would help municipalities to build and achieve sustainable human settlements and to comply with their constitutional obligations. In the mandated spirit of co-operation and support, national and provincial governments should positively support and promote the developmental role of local governments. In reciprocation those governments should ensure municipal compliance and participation in national or provincial developmental programmes.

It is submitted that the overall constitutional demands regarding co-operative government and intergovernmental relations have significantly strengthened the autonomy of local government structures as a distinct sphere of government. Such autonomy is not without limits, however, and the Constitution itself requires national and provincial oversight and control over the powers and functions of municipal gov-

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<sup>110</sup> Refer to Chaskalson *et al* (1999) 5A–32.

<sup>111</sup> See Chaskalson *et al* (1999) 5A–32.

ernments. Strict requirements are determined if control or intervention is considered. Municipalities thus have a strong but not absolute autonomy. Protection of municipalities as fully flexed spheres of government seems unchangeable by the two higher spheres unless a constitutional amendment is passed and accepted. Furthermore, it would appear that the various national legislative provisions set out in both the Structures Act and the Systems Act go some way towards enhancing the basic constitutional framework regarding co-operation and intergovernmental relations. National government must go further, however, and complete the basic model through a more comprehensive legal measure which should *inter alia* ensure programmes of continuous training and effective communication.<sup>112</sup>

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<sup>112</sup> It should be noted that at the time of writing this chapter the Intergovernmental Relations Bill was still only a bill before parliament. If the bill is enacted, it would significantly enhance some of the areas of concern under the current legal system. Please again take cognacance of fn 10 of the ch. The Intergovernmental Relations Framework Act 13 of 2005 was indeed enacted during the later part of 2005.

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

### 10.1 Introduction

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

- *To create a flexible and effective two-tier system of local governments across the whole country.* It is important for local democracy that all people's interests are represented in their local authority. The new system is therefore directed at ensuring that every person will be governed by a primary or local tier of government. Such local governments are known as Metropolitan Councils and Local Councils. Primary councils must be viable and capacitated to perform and fulfil basic municipal functions and responsibilities. Communities do not exist in total isolation of one

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<sup>1</sup> See the Constitution s 151(1).



another, however, and often need to share scarce resources and expertise with each other. To accommodate such needs, the new system is also committed to a strong secondary or regional tier of local government structures. Such structures are also referred to as "District Councils".<sup>2</sup> It is envisaged that District Councils will play a vital role in the integration of big regions and that they will be best positioned to ensure that services and resources are distributed equitably between all municipal districts.

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

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

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

During the transitional process, and more specifically after the local government elections of 1995/1996, it was found that the system then in place was bureaucratic and slow. In many instances, important decisions within local governments were taken by senior unelected officials, and the often uninterested politicians merely endorsed such decisions without meaningful debate and consideration. It became

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

clear that the whole institutional structure of local governments also required change in order to provide for strong political leadership, effective decision-making procedures and an overall democratic and accountable government. In order to achieve such a system the Constitution provided for the establishment of different categories of municipality as well as various types of municipality that may be established within each category. National legislation was further obligated to define the different types of municipality.<sup>3</sup> In order to comply with the constitutional requirements, the Local Government: Municipal Structures Act<sup>4</sup> was enacted by parliament. The Structures Act specifically provides for five different systems of municipal government and allows for different combinations of these five systems in order to meet the wide range of needs and requirements of municipalities across South Africa. The objectives of the new systems are to allow powers and functions to be delegated and shared among councillors and officials in such a way as to ensure effective decision-making procedures with clear lines of responsibility. They also allow for committed community participation and support. Both the different categories and municipal types are discussed in detail below.

## **10.2 Important requirements regarding the functioning and roles of local governments**

In chapter 7 of this work, mention was made of the fact that a local government consists of a municipal council represented by politicians who are democratically elected by the local residents, a municipal administration that is composed of many different officials employed by the municipal council and which is headed by a Municipal Manager<sup>5</sup> and, finally, the local community. Because of community involvement, municipal councils play a central role in local democracy. Although there are often many different leaders and influential people in local communities, the municipal council is the only institution that is elected by the entire local community.<sup>6</sup> Municipalities have further various wide-ranging functions and responsibilities, and the following should be specifically emphasised:<sup>7</sup>

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<sup>3</sup> See the Constitution s 155(1) and (2).

<sup>4</sup> 117 of 1998 as amended. Hereafter referred to as the Structures Act.

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

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

<sup>7</sup> Refer to the objectives of local government set out in the Constitution s 152.

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

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

One must also remember that Municipal Councils have both legislative and executive authority in their areas.<sup>8</sup> Municipalities are therefore responsible both for formulating legislation<sup>9</sup> and for developing programmes to implement or execute such legislation. However, no municipal council can fulfil all its powers and duties without delegating at least some of its powers and duties.<sup>10</sup> All local governments therefore need to develop municipal systems that are capable of ensuring that delegated powers and functions are properly performed. It must further be noted that not all powers

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<sup>8</sup> This aspect has been confirmed in the Constitution s 151(2).

<sup>9</sup> Also called municipal by-laws.

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

can be delegated. The Constitution specifically disallows certain powers or functions to be delegated.<sup>11</sup> The new institutional model for local government specifically provides for different systems that should each provide different possibilities in the way in which powers and responsibilities are allocated or delegated to individual councillors or specifically designated committees. These different systems and institutional models are identified and explained below.

### **10.3 Categories of municipal government**

#### **10.3.1 *The different categories of municipality***

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

- (1) There are the following categories of municipality:
  - (a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area.
  - (b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.
  - (c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.
- (2) National legislation must define the different types of municipality that may be established within each category.

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

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

<sup>13</sup> The Constitution s 155(1)-(7).

- (3) National legislation must–
- (a) establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;
  - (b) establish criteria and procedures for the determination of municipal boundaries by an independent authority; and
  - (c) subject to section 229, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.
- (4) The legislation referred to in subsection (3) must take into account the need to provide municipal services in an equitable and sustainable manner.
- (5) Provincial legislation must determine the different types of municipality to be established in the province.
- (6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must–
- (a) provide for the monitoring and support of local government in the province; and
  - (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.
- (6A) If the criteria envisaged in subsection (3)(b) cannot be fulfilled without a municipal boundary extending across a provincial boundary–
- (a) that municipality boundary may be determined across the provincial boundary, but only–
    - (i) with the concurrence of the provinces concerned; and
    - (ii) after the respective provincial executive has been authorised by national legislation to establish a municipality within that municipal area; and
  - (b) national legislation may–

- (i) subject to subsection (5), provide for the establishment in that municipal area of a municipality of a type agreed to between the provinces concerned;
  - (ii) provide a framework for the exercise of provincial executive authority in that municipal area and with regard to that municipality; and
  - (iii) provide for the re-determination of municipal boundaries where one of the provinces concerned withdraws its support of a municipal boundary determined in terms of paragraph (a).
- (7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).”

The wording of the Constitution clearly indicates that a category A municipality, which has exclusive municipal executive and legislative authority, is also the only municipal council in that area. Category A municipalities thus stand alone. The best term for a category A municipality is a Metropolitan Municipality/Council. Within a metropolitan area there is only one municipal council, namely the metropolitan council. As indicated, category B municipalities are municipalities that share municipal executive and legislative authority in a specific area with a category C municipality within whose area such category B municipalities fall. A category B municipality is also referred to as a Local Municipality/Council. Lastly, the Constitution determines that category C municipalities are municipalities which have municipal executive and legislative authority in areas that include more than one municipality.<sup>14</sup> The general term for a category C municipality is a District Municipality/Council. Three distinct categories of municipality are therefore identified within the new local government system as: metropolitan councils, district councils and local councils. Metropolitan councils and local councils are often referred to as primary local governments, while district councils, on the other hand, are regarded as secondary local governments,

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

because they comprise representatives from primary local governments. Within the new local government system, district councils are comparable to the former regional services councils, which were created in terms of the Regional Services Council Act of 1995.<sup>15</sup>

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

The Structures Act furthermore confirms the different categories of municipality that are required in terms of section 155(1) of the Constitution.<sup>18</sup> In compliance with the Constitution,<sup>19</sup> the Structures Act also establishes the criteria for determining when an area should have a single category A municipality or when it should have both category B and C municipalities.

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<sup>15</sup> 109 of 1995. See also Rautenbach and Malherbe (1999) 314.

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

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

<sup>18</sup> The Act determines that a district council, a local council and a metro council refer to the municipal council of a district municipality, local municipality or metropolitan municipality respectively. A *District Municipality* is defined as a municipality that has municipal executive and legislative authority in an area that includes more than one municipality and which is described in s 155(1) of the Constitution as a category C municipality. A *Local Municipality* is a municipality that shares municipal executive and legislative authority in its area with a district municipality within whose area it falls and which is described in the Constitution s 155(1) as a category B municipality. Lastly, a *Metropolitan Municipality* refers to a municipality that has exclusive executive and legislative authority in its area and which is described in the Constitution s 155(1) as a category A municipality.

<sup>19</sup> See the Constitution s 155(3)(a).



### 10.3.1.1 Areas which must have category A municipalities

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

- a conurbation featuring<sup>21</sup>
  - (a) areas of high population density
  - (b) an intense movement of people, goods and services
  - (c) extensive development and
  - (d) multiple business districts and industrial areas
- a centre of economic activity with a complex and diverse economy
- a single area for which integrated development planning is desirable and
- having strong interdependent social and economic linkages between its constituent units.

A closer evaluation of the abovementioned criteria reveals strong similarities between these and the elements that comprise the definition of a “metropolitan area” as defined in the Local Government Transition Act of 1993.<sup>22</sup> Although the Structures Act is not entirely clear on this point, it is suggested that all four main features<sup>23</sup> should be distinguishable before a single category can be determined and a municipality decided upon.<sup>24</sup> When the criteria set out in section 2 of the Structures Act have been met, the Act specifically requires the establishment of a category A or metropolitan municipality.

### 10.3.1.2 Explaining a category A/metropolitan municipality

#### (a) Introduction

Metropolitan areas are large urban settlements with high population densities, often complex and diversified economies, high levels of functional integration over a large geographic area and many economic and social activities that transcend certain municipal boundaries.<sup>25</sup> According to the Constitution, a metropolitan local government is a municipality with exclusive municipal, executive and legislative authority in

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<sup>20</sup> See the Structures Act s 2.

<sup>21</sup> Conurbation also means a conglomeration of urban areas.

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

<sup>23</sup> The Structures Act s 2(a)–(d).

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

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

a particular area.<sup>26</sup> In general, three main reasons have been put forward for metropolitan councils' being needed in modern local government systems:<sup>27</sup>

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

As was explained in the definition above, metropolitan areas have more than one business district and industrial area and their economies are complex and diversified.<sup>28</sup> Because of their size, most metropolitan governments are important contributors to the national economy of the country. Metropolitan areas are therefore key centres in the global economy and should be governed accordingly. It is furthermore important for metro governments to accommodate the intense movement of people and goods in their areas, and they must function as integrated units.<sup>29</sup>

### **(b) Creating the new metropolitan government system**

The local government dispensation before 1994 was substantially distorted by the former government's policies of segregation. Cities were seen as existing for the

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<sup>26</sup> The Constitution s 155(1)(a).

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

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

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

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

With the introduction of the Local Government Transition Act,<sup>30</sup> metropolitan government appeared for the first time in South African local government history. This was an important step towards changing the inequitable pattern of urban development that had been inherited from the past. Six metropolitan areas were proclaimed,<sup>31</sup> and each metro area had a two-tier local government system which consisted of a Metropolitan Council (MC) and some Metropolitan Local Councils (MLC). Unfortunately the LGTA did not specify clearly which powers and functions were divided between the MC and MLC. The Act in fact allowed for a local negotiation process to determine which functions and powers would rest in MCs and in MLCs respectively.<sup>32</sup> A further problem that was experienced during the transitional period within metropolitan areas was the fact that the establishment of separate administrations for MCs and each MLC led to considerable duplication of functions, and such efforts were both wasteful and inefficient. A final issue that hampered effective and efficient service delivery in the interim system was the fact that each MC and MLC was an employer body in its own right. This caused many inequalities between personnel and led to poor administrative support.<sup>33</sup>

### **(c) Establishing new metropolitan governments**

During the interim phase as determined by the LGTA, the national government consulted widely on the design of the final local government system. Many workshops and conferences were held to discuss and debate the advantages and disadvan-

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<sup>30</sup> 209 of 1993.

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

<sup>32</sup> This was one of the major deficiencies of the LGTA and necessitated later amendments.

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

tages of the interim system. On the basis of these discussions, consultations and research reports, national government was confronted with two main models for future metropolitan governments. The two possible models were:

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

Based on the various discussions and public hearings, the White Paper on Local Government which was published in March 1998 proposed that a single tier of metropolitan government system should be introduced for all metropolitan areas in the country. Certain trial projects were launched, which later confirmed that a single tier of metropolitan government seemed to be the most effective system for metropolitan areas.<sup>35</sup> Accordingly, national government enacted the Local Government: Municipal Structures Act<sup>36</sup> to provide for a single tier of municipal government in metropolitan areas.<sup>37</sup>

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

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

During the transitional process, all transitional metro councils established executive committees, as the mayoral executive system was not known to South Africa. Only

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<sup>34</sup> So-called "unity city".

<sup>35</sup> See the LGIS no 2 "Metropolitan Government" (1999) at 7.

<sup>36</sup> 117 of 1998.

<sup>37</sup> Refer to the Act s 2.

<sup>38</sup> See the Constitution s 155(3)(a).

<sup>39</sup> Refer to the Structures Act s 2.

with the local government elections of December 2000 was the creation of a mayoral executive system legally possible. In the national and provincial executive systems the president or premier is vested with executive authority, which is exercised together with members of cabinet or a provincial executive council.<sup>40</sup> Although the mayoral executive system is very similar to these systems, there are certain differences that should be noted. Firstly, the Constitution confirms that municipal executive authority is vested in the municipal council and not in a mayor. Secondly, the executive mayor and his mayoral committee can exercise only such executive powers as are delegated to him/her by the municipal council.<sup>41</sup> Thirdly, the Structures Act does not proclaim the mayoral committee to be handled and treated differently from the other types of committee possible in local government. This viewpoint was not shared by the majority of justices in the Constitutional Court. In the case of *DA v Masondo No*<sup>42</sup> the court held that the mayoral committee was not a committee of the Municipal Council as contemplated in section 160(8) of the Constitution and therefore did not require minority representation in such a committee.<sup>43</sup>

#### **(d) Administrative transformation in metropolitan areas**

Within the public sector in general, many government functions are increasingly being decentralised to local government level. Examples of such functions are: certain health services, municipal police forces, local housing programmes and transport authorities, to name but a few. Often these functions are decentralised to local governments, without the necessary funds for them to exercise and perform such functions effectively. These functions are then referred to as “unfunded mandates”. Unfunded mandates must be guarded against, as such mandates may be regarded as unconstitutional.<sup>44</sup> In certain instances unfunded mandates and ill-considered decentralisation of functions can be regarded as being against the constitutional requirements to help and assist local governments. Decentralisation has its advan-

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

<sup>41</sup> See the Structures Act s 56.

<sup>42</sup> 2003 (2) SA 413 (CC).

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

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

tages, however, and there is a general realisation in modern governments that functions should be decentralised to the level where they can best be exercised effectively and efficiently.<sup>45</sup>

There seems to be a worldwide technological move towards private sector service providers' rendering traditional municipal services, especially in metropolitan service provision. This tendency is very positive, in the sense that it ensures market competition, use of modern technologies, better operational efficiency, lower unit costs, better overall quality and more customer-orientated services. Notwithstanding the fact that private service providers are used, metropolitan councils still have the final responsibility for ensuring that such services are provided according to certain minimum standards. The outsourcing of services means that the core business of municipalities is less focused on managing trading services and more focused on contract and performance management and supervision. Such a position has both advantages and disadvantages, however, and must be managed with care.

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

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

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

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

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

#### **10.3.1.4 Category B local municipalities and category C district municipalities**

The new system of local government in South Africa promotes a vision of a two-tier system of local councils and region-wide district councils throughout the entire territory of the state, excluding metropolitan areas. It is hoped that this two-tier system will address the many problems facing municipalities outside metropolitan areas. To a large extent the local government dispensation pre 1994 and even under the LGTA was silent on rural local government aspects, and this created a wide range of problems in rural municipal areas.<sup>47</sup> Like all municipalities, the new district local government system had to build municipal institutions that are geared towards meeting the social and economic needs of citizens in an economically feasible, efficient and democratic manner. Together with the White Paper on Local Government, the Municipal Structures Act and the Municipal Demarcation Act provide the new tools whereby local government outside metropolitan areas are created to provide district governments that are strong, decentralised governments with enough powers to fulfil their constitutional obligations. It is submitted that without a combination of municipal institutions in district areas, it will not be possible for one single authority to address all the development challenges and at the same time be responsive to the needs and demands of local residents.

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

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

<sup>48</sup> See LGIS no 2 "District Government" (1999) at 10.



district council have the normal municipal powers and functions, apart from the functions of the district council.<sup>49</sup>

Within the new system envisaged by the Constitution, it is foreseen that some parts of district areas, will not be viable and suitable for local councils to be established. In such areas so-called District Management Areas (DMA) have and can be declared.<sup>50</sup> In a District Management Area, the relevant district council is responsible for all municipal powers and functions in that area. According to the new framework for local government in non-metropolitan areas, a unique opportunity is created to improve the relations between local and district councils. To a large extent, the new rationalisation of municipalities and the re-demarcation of boundaries, have made this interaction much stronger and easier.<sup>51</sup>

### **10.3.2 The application of the relevant criteria**

In the past it was often difficult to determine who was responsible for the application of the criteria and the subsequent determination of the categories of municipality. This uncertainty has led to a specific legal dispute between the national government and some provincial governments. In the case of *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and another* and *Executive Council Kwazulu-Natal v President of the RSA and others*<sup>52</sup> two provincial governments instituted proceedings in the Constitutional Court challenging the constitutional validity of certain sections of the Local Government: Municipal Structures Act 117 of 1998. The constitutional challenges fell into two categories: (a) that certain provisions of the Act encroached on the powers of the provinces, more specifically the power to establish municipalities in their provinces in terms of section 155(6) of the Constitution, and (b) that the Act encroached on the constitutional power of municipalities *inter alia* to elect executive committees or other committees in terms of section 160(1) of the Constitution and to regulate their own internal affairs

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

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

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

<sup>52</sup> 2000 (1) SA 661 (CC).

in terms of section 160(6) of the Constitution. The national government contended that although the Constitution in chapter 7 allocates powers to the provinces and municipalities, it does not deprive parliament of the power to legislate on such matters and that parliament in terms of section 44(1)(a) of the Constitution has concurrent powers over such matters. It was also contended by the applicants that the Act was inconsistent with the Constitution in that section 155(3)(b) of the Constitution required municipal boundaries to be determined by an independent authority and in that the empowerment of the national government to apply the criteria to determine which area should have a category A municipality was usurping a function of the Demarcation Board. The minister's discretion to decide whether to accept the recommendations of the Demarcation Board in terms of municipal boundaries was also impermissible. After weighing up all the circumstances of the case, the court held that:

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

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

<sup>54</sup> *Ibid* para 55 at 690-691.

<sup>55</sup> *Ibid* para 59 at 692A-B.

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

- The Constitution conferred only executive powers on the provinces in terms of section 155(6) and stated that such powers had to be exercised within a framework of legislation. Because of the constitutional silence on such legislative regulation, national legislation could be prescribed in terms of section 164 of the Constitution. The court made it clear that the power to establish municipalities had to be distinguished from the power to determine the types of municipality. The power on municipal types vested in the provinces according to section 155(5) of the Constitution.<sup>57</sup> In relation to the establishment of municipalities<sup>58</sup> the provinces had only executive powers, but in relation to establishing the types of municipality<sup>59</sup> the provinces had both legislative and executive powers. National government could not legislate on matters which fell outside its competence.<sup>60</sup>

Because of this decision, the Structures Act was amended in 1999.<sup>61</sup> According to the amendment Act, section 5 of the Structures Act was repealed and section 4 was amended and now states the following:<sup>62</sup>

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

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

<sup>57</sup> *Ibid* paras 72 and 73 at 694-695.

<sup>58</sup> The Constitution s 155(6).

<sup>59</sup> The Constitution s 155(5).

<sup>60</sup> *Ibid* paras 82 and 83 at 696-697.

<sup>61</sup> See the Local Government: Municipal Structures Amendment Act 58 of 1999.

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

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

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

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

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

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

<sup>65</sup> Own emphasis added.

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

<sup>67</sup> Refer to the Structures Act s 6(1).

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

<sup>69</sup> The Constitution s 151(1).

B<sup>70</sup> municipality in a particular area will not be conducive to the fulfilment of the objects of such a municipality, as is required in section 24 of the Demarcation Act.<sup>71</sup>

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

#### **10.3.4 Special provisions for cross-boundary municipalities**

Apart from the three categories of municipality mentioned above, the Constitution also provides for the establishment of so-called “cross-boundary municipalities”.<sup>73</sup> Cross-boundary municipalities are municipalities that have been established across provincial boundaries. The Constitution states that if the criteria envisaged in subsection 155(3)(b), which is to be found in the Demarcation Act,<sup>74</sup> cannot be fulfilled without a municipal boundary’s extending across a provincial boundary, the particular municipal boundary may be determined across the provincial boundary, but only (i) with the concurrence of the provinces concerned and (ii) after the respective provincial executives have been authorised by national legislation to establish a municipality in that municipal area. In this regard and subject to subsection 155(5), national legislation may provide for the establishment in that area of a municipality of a type agreed to between the provinces concerned. The mentioned national legislation may also provide a framework for the exercise of provincial executive authority in that area and for the re-determination of municipal boundaries where one of the provinces

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<sup>70</sup> Local Council.

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

<sup>72</sup> See the Structures Act s 6(3)(a)–(b).

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

<sup>74</sup> See the Demarcation Act s 24.

concerned withdraws its support of a municipal boundary as has been determined by the Demarcation Board.<sup>75</sup>

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

- Establish in that area, in accordance with section 12 of the Structures Act, a municipality of a type mentioned in section 8, 9 or 10 as agreed to between the provincial legislatures concerned.
- Exercise their executive authority in terms of the Structures Act and any other legislation jointly with regard to that municipality, except when the provincial governments concerned have entered into an agreement which provides for an alternative arrangement envisaged in subsection 90(3) of the Structures Act. The subsection states that the governments of the provinces concerned may enter into an agreement providing for an arrangement which may include:
  - (a) The exercise of their executive authority with regard to that municipality or in that municipal area by functionaries of one of those provincial governments on a delegation or agency basis.
  - (b) The provision of financial and other assistance to the municipality.
  - (c) The suspension of all or any legislation of the one province and the application of all or any of the other province's legislation in that municipal area. It is important to note that an agreement that provides for the application of one province's legislation in a municipal area that falls in another province is enforceable only if the provincial legislature of that other province has passed legislation that provides or allows for such application.<sup>78</sup>

Lastly, it is also confirmed that if a provincial legislature no longer supports the continuation of a cross-boundary municipality and subsequently passes a resolution calling for the disestablishment of that municipality, the Demarcation Board must re-

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<sup>75</sup> See the Constitution s 155(6A)(b)(i)–(iii).

<sup>76</sup> Refer to the Structures Act s 90(1).

<sup>77</sup> Both the Demarcation Act and the Structures Act.

<sup>78</sup> See the Structures Act s 90(4).

determine the boundaries of that municipal area in such a way that no boundary extends across a provincial boundary.<sup>79</sup>

In further compliance with, and to give effect to, section 155(6A) of the Constitution, national government passed the Local Government: Cross-Boundary Municipalities Act<sup>80</sup> in 2000, whereby affected provincial executives are authorised to establish cross-boundary municipalities and to provide for the re-determination of the boundaries of such municipalities under certain circumstances. The preamble of the Act states that this Act was enacted by parliament because the Demarcation Board indicated the desirability for certain municipal boundaries to extend across provincial boundaries and because national legislation must authorise the respective provincial executives to establish a municipality within a municipal area that extends across a provincial boundary. According to the Act, the MECs in the provinces indicated in the annexed schedule to the Act are authorised to establish cross-boundary municipalities as set out in the schedule.<sup>81</sup>

Provision is also made for the re-determination of boundaries of cross-border municipalities, which may be re-determined under circumstances other than those provided for in section 90(5) of the Structures Act only if the legislatures of the provinces involved so concur and if the re-determination is authorised by national legislation.<sup>82</sup> In light of the above it is submitted that any re-determination of the boundaries of a cross-boundary municipality must be done in terms of section 90(5) of the Structures Act, unless section 2 of the Cross-boundary Municipalities Act is complied with. In compliance with the requirement that national legislation must authorise the re-determination of the boundaries of cross-boundary municipalities, national government enacted the re-determination of the Boundaries of Cross-boundary Municipalities Act in 2000.<sup>83</sup>

## **10.4 Systems and types of municipal government**

### **10.4.1 *Why different types of municipality are created***

Apart from defining the different categories of municipality, the Structures Act also defines the different types of municipality that may be established within each cate-

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<sup>79</sup> See the Structures Act s 90(5).

<sup>80</sup> 29 of 2000.

<sup>81</sup> See the Cross-boundary Act s 1.

<sup>82</sup> See the Cross-boundary Act s 2.

<sup>83</sup> 69 of 2000.



gory. This provision is in compliance with the constitutional obligations.<sup>84</sup> The provision of different types of municipality places emphasis on the fact that not all municipal councils are the same and that different ways should be open to municipal councils whereby they can organise themselves to perform their powers and duties effectively. Some flexibility is thus needed to establish the different types of municipality that should be the most effective and efficient in particular circumstances. There is no standard way to organise all municipal councils, and the provision of different municipal types should afford most municipalities the opportunity to establish the system that will be most effective for specific local needs.

#### **10.4.2 The different systems of municipal government**

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

According to the Structures Act, the different types of municipality that may be established within each category of municipality are defined in accordance with five different systems of municipal government or combinations of such systems. It is not mandatory that the different systems be combined to form a particular type. In some instances an individual system can also be used to establish a specific type of municipality, as long as it is one of the five executive systems.<sup>86</sup> These systems are:

- *A collective executive system*, which allows for the exercise of executive authority through an executive committee. Executive leadership of the municipality is collectively vested in the executive committee.
- *A mayoral executive system*, which allows for the exercise of executive authority through an executive mayor. Executive leadership of the municipality is vested in the mayor, who is assisted by a mayoral committee.
- *A plenary executive system*, which limits the exercise of executive authority to the municipal council itself.

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

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

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

- A *sub-council participatory system*, which allows for delegated powers to be exercised by sub-councils that are established for/in parts of the municipality.
- A *ward participatory system*, which allows for matters of local concern within the different wards of a particular municipality to be dealt with by the specific committee that has been established for such wards.

A closer investigation of the different systems of municipal government as mentioned above reveals a clear and important distinction between the different systems. Some systems are called “executive systems”, while others are “participatory systems”. In this regard, it must be remembered firstly that every municipal council has certain executive powers and duties which also allow for the exercise of certain legislative powers.<sup>87</sup> The Constitution further specifically vests both executive and legislative authority of a municipality in its Municipal Council.<sup>88</sup> This vesting of powers in the Municipal Council has very important implications for the different systems and types of municipality. The executive system of government describes the structure through which that government exercises its executive powers and performs its executive duties. Thus the municipal executive system describes the structure through which a particular municipal council must exercise its executive authority. As mentioned above, the Structures Act provides for three systems of executive local government, and it goes without saying that every municipal government must be based on one of the three systems.<sup>89</sup>

In addition to the three executive systems, the Structures Act also provides for two so-called “participatory systems” of municipal government. The provision of the two participatory systems aims to ensure and enhance public participation within the formal executive functioning of municipalities and also to provide for more accountable democratic local governance. The two participatory systems cannot function on their own, however, and must be combined with one of the three executive systems. Various combinations of the executive systems and participatory systems are possi-

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

<sup>88</sup> Refer to s 151(2) of the Constitution.

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

ble. In some instances certain executive systems will function on their own, while in other cases they will be combined with one or even both the participatory systems.<sup>90</sup> The type of municipality that has been established can be determined according to the particular executive municipal system or combination of executive systems with one or both of the participatory systems. In order to determine the best executive system or combination of systems for a particular municipality, each of the systems should be explained briefly.

#### **10.4.2.1 The collective executive system**

In a collective executive system, the municipal council elects an Executive Committee from among the members of the council and then delegates some of the council's executive responsibilities to that executive committee. The executive committee is then empowered to take decisions on matters that fall within its delegated powers and is thus vested with executive leadership responsibilities for that municipality. Most municipal councils existing before the December 2000 local government elections<sup>91</sup> established executive committees to increase the efficiency of their decision-making processes. In essence, the establishment of a separate executive structure enables a small group of councillors who have been elected to the executive committee to deal with the day-to-day business of running the municipality. Without a smaller executive structure, the whole council would be required to meet every time a decision is to be taken. In instances where a municipal council is very large or has many decisions to contemplate, the taking of decisions in plenary would result in a slow decision-making process. A collective executive system with an executive committee should be much more effective and efficient to ensure a more speedy decision-reaching process. The Structures Act specifically provides for the internal structuring and functioning of executive committees, the features of which will be discussed in later chapters of this work.<sup>92</sup>

It is important to note that in the collective executive system the relevant council delegates certain powers to the whole executive committee and not to any individual member of that committee. This therefore means that the executive committee must exercise its powers collectively as a unit, and no individual person can take decisions

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<sup>90</sup> See the Structures Act ss 8, 9 and 10.

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

<sup>92</sup> See the Structures Act ch 4 Part 1.

on behalf of the committee. The collective or team approach is often regarded as one of the key strengths of the collective executive system. The committee has the benefit of being able to draw on the collective experiences and insights of all the members of the committee. The particular system also ensures that proper checks and balances occur in terms of executive decision making. Because no member can take decisions individually, there is a far smaller chance that decisions will be taken in a biased or self-interested manner. Lastly, the collective approach is also beneficial to facilitate problem solving, as it may generate innovative solutions which individual members may not have thought of on their own.<sup>93</sup> Suffice it to say that in instances where a municipal council is very large or has a wide range of responsibilities, such a council should consider the delegation of some of its executive powers to a smaller group of councillors in order to facilitate fast and effective decision making.

#### **10.4.2.2 The mayoral executive system**

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

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

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

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

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<sup>93</sup> Refer to the LGIS no 2 “Types of Municipalities” (1999) at 10–11.

<sup>94</sup> See the Structures Act s 7(b).

<sup>95</sup> See the Structures Act ch 4 Part 2.

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

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

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

- The election of an individual executive leader puts a “face” in local government. Many local residents do not know who is responsible for governing a specific municipal area. Local government is often experienced as a faceless bureaucratic institution. It is not always clear who is accountable for the final decisions and political leadership of a municipal council. In this regard, an executive mayor gives a human face to local government and thereby makes it easier for ordinary residents to relate to the particular leadership of their local area. More certainty is provided to residents as to where final accountability and responsibilities are vested.
- A mayoral executive system should also provide for decisive leadership and rapid decision-making processes. Such positive attributes are particularly useful in larger and more complex municipalities. On the international front, many “international” cities such as London and New York are moving to a mayoral executive system of municipal governance.<sup>97</sup> Many such large metropolitan cities are often home to a diversity of strong local, national and international interests. In dealing effectively with such issues, a charismatic and respected executive mayor can play an important role in inspiring business confidence, attracting foreign investment and building strong relationships between the local municipality and community interest groups.<sup>98</sup>

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<sup>96</sup> Refer to the Structures Act s 60(1)(a).

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

<sup>98</sup> A good example in this regard is the significant role the mayor of New York, mayor Giuliani, played after the 11th of September 2001 terrorist attacks on the USA. His executive leadership not

*continued on next page*

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

#### **10.4.2.3 The plenary executive system**

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

#### **10.4.2.4 The two participatory systems**

The three executive systems of municipal government described above should enable effective and efficient decision making in local government. Each municipal council must have one of these executive systems to ensure that it can exercise its

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only mobilised the local community but also received national and international praise for the manner in which the situation was dealt with.

<sup>99</sup> The word plenary means "full" or "complete".

<sup>100</sup> See the Structures Act s 7(c).

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

<sup>102</sup> See LGIS no 2 "Types of Municipalities" (1999) at 9.

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

#### **(a) The ward participatory system**

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

Most municipal areas were divided into wards for the purposes of the local government elections that took place during December 2000 and the elections that are to be held in the future.<sup>105</sup> In a ward participatory system, matters of local concern are addressed by the various committees that are established in the wards. These committees allow residents a direct voice in the governance of their neighbourhoods.

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

<sup>104</sup> The Structures Act S 7(d) and (e).

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



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

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

#### **(b) The sub-council participatory system**

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

Sub-councils are committees of the metropolitan council and have such powers and duties that have been delegated to them by the Metro Council. Depending on the extent of the powers and duties that have been delegated to sub-councils, they

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<sup>106</sup> Refer to the Structures Act ch 4 Part 4.

<sup>107</sup> See the Structures Act s 73.

<sup>108</sup> See the Structures Act s 7(d).

usually range from being merely consultative in nature to having extensive delegated powers and significance.<sup>109</sup>

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

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

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

### **10.5.1 Introduction**

As was explained above, the different systems of municipal government or combinations of such systems are used to define the various types of municipality that may be established within each category of municipality. It was always the intention of the constitutional drafters not to prescribe the types of municipality in each category, but to leave such determination in part to the national government and provincial gov-

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

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

<sup>111</sup> See the Structures Act s 62(2)(a) and (b).

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

ernments.<sup>113</sup> In all, five different systems were identified. At first, three executive systems which describe the structures through which municipal councils exercise their executive powers and perform their executive duties were mentioned. The last two systems are participatory systems which again describe the structures to which the relevant municipal council may delegate the powers and duties that are then to be exercised in part by the participatory system of the municipal area.

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

- All municipalities must have one of the executive systems of municipal government. It is important to note that the executive systems may not be combined with one another. If a municipality has decided on one of the executive systems but has no participatory system, the municipal type will be the same as the executive system.<sup>114</sup>
- The various executive systems can be combined with one or both of the participatory systems to form new municipal types.<sup>115</sup>
- It is important to note that the participatory systems cannot function on their own; they can be used only in combination with one of the mentioned executive systems. The main reason for this is that every municipality has certain executive powers and duties, which can be exercised or performed only through an executive structure. As is suggested by the name, participatory systems are established to facilitate and enhance participation within the new local government structure.

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

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

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

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

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

### **10.5.2.1 Types of category A (metropolitan) municipality**

The following types of category A municipality can be established:

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

It must be noted that the Structures Act does not allow for the plenary executive system either to stand alone or to be combined with one or both of the participatory systems of municipal government within category A (Metropolitan) municipalities. Because metropolitan councils are very large, the plenary executive system is not appropriate and is therefore not an option in metropolitan areas. Category A or Metropolitan municipalities may therefore have either the collective executive system or the mayoral executive system on its own or one of these combined with one or both

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<sup>116</sup> See the Structures Act s 7.

<sup>117</sup> See the Structures Act ss 8, 9 and 10.

of the participatory systems. It must be emphasised again that the sub-council participatory system has been specifically designed for metropolitan areas. It allows metropolitan councils with large areas of jurisdiction to delegate powers and duties to sub-councils established for certain parts of the metropolitan area. In circumstances where a metropolitan municipality has both a ward participatory system and sub-council participatory system, the council should consider ways in which the ward committees and sub-councils can interact and complement one another in order to achieve effective and efficient local democracy.

#### **10.5.2.2 Types of category B (local) municipality**

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

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

#### **10.5.2.3 Types of category C (district) municipality**

The Structures Act allows for the following types of category C municipality:<sup>120</sup>

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

Because of their specific composition and role, category C municipalities may not combine their executive system with either one or both of the participatory systems.

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

<sup>119</sup> See the Structures Act s 9.

<sup>120</sup> See the Structures Act s 10.

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

### **10.6 Application of municipal types to individual municipalities**

In the new local government structure all three spheres of government play a role in the establishment of the new local government system and municipal types. National government has defined the different types of municipality that may be established within each category of municipal government and has also established the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and C.<sup>121</sup> Provincial governments are involved in introducing the new system of municipal types when they establish new municipalities.<sup>122</sup> Lastly, local governments themselves must be consulted before the MEC for local government of a province determines which municipal type will apply to each municipality. It must be noted that since the new system of types was introduced after the local government elections in December 2000, the MEC for local government in a specific province has had the power to change the type of a municipality at any time. Such a change can be affected only through an amendment to the relevant section 12 notice whereby the municipality was established.<sup>123</sup> If a MEC wants to change the type of a municipality, he or she must again consult with the affected municipalities and organised local government structure in the province.

It is submitted, therefore, that the new systems of municipal government and the types of municipality which they have formed should significantly strengthen political leadership, should establish clear systems for decision making and should encour-

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

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

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

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

## **10.7 Establishing new municipalities – procedures and requirements**

### **10.7.1 Introduction**

The establishment of new municipalities throughout South Africa is a key factor in building a new viable and developmental local environment. Such a move was needed to welcome in the new transformed system of local government according to the new constitutional mandate. When an urban area is in need of a local authority, one of two approaches may be decided upon. The area may either be added to or included in the jurisdiction of an already existing municipality, or a totally new municipal institution can be established.<sup>125</sup> According to the establishment process, all existing municipalities have been replaced with newly established municipalities in terms of the provisions of the Municipal Structures Act. All municipal boundaries were re-determined and re-demarcated by the Demarcation Board in accordance with the requirements of the Demarcation Act.<sup>126</sup> From a practical point of view, it was not possible to facilitate the establishment procedure in a short period of time, and long preparations took place. In general, the establishment procedures had three primary aims:<sup>127</sup>

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

<sup>125</sup> In *Fedsure Life Assurance v Greater JHB TMC* 1998 (2) SA 1115 (SCA) the court held that while the interim Constitution s 174 and the Constitution s 151 created the machinery for the establishment of local authorities through legislation, the respondents had actually been created by the LGTA s 8 and not the Constitution.

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

<sup>127</sup> See LGIS no 2 “Establishing New Municipalities” (1999) at 2.



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

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

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

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<sup>128</sup> See the Structures Act s 14.

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

- The MEC for local government in a province must establish a municipality in each municipal area by notice in the Provincial Gazette. All municipal areas were demarcated by the Demarcation Board according to the provisions of the Demarcation Act.<sup>131</sup>
- The establishment of a municipality must be consistent with the provisions of the Structures Act, and the notice of establishment took effect at the commencement of the first elections of that council, which was generally 5 December 2000. In order for the notice to be consistent with the provisions of the Structures Act, it may not contain powers or functions for that municipality in contrast to what the Structures Act allows for.<sup>132</sup>
- The establishing notice must set out specifically required information. The minimum aspects that must be contained in the notice according to the Structures Act and which form the founding legal provisions of the new municipality are the following:
  - (a) The category of the municipality.
  - (b) The type of municipality as determined in terms of provincial legislation.
  - (c) The name of the municipality. Deciding on a new name can sometimes be a difficult issue. This is especially the case in instances where a new municipality is an amalgamation of two or even more existing municipalities with different names. It should also be taken into account that a change in name will also have an impact on such things as the bank account details, debit accounts, consumer billing and payment procedures, as well as stationary changes, which can be very costly in some instances.
  - (d) In the case of metropolitan or local municipalities, the number of wards in that relevant municipality.

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<sup>129</sup> Refer to the Constitution s 155(6).

<sup>130</sup> See the Structures Act s 12(1)–(4).

<sup>131</sup> 27 of 1998.

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

- (e) The number of councillors that have been determined in terms of section 20 of the Structures Act.
  - (f) In the case of a district municipality, the number of councillors, as determined by section 23 of the Structures Act.
  - (g) An indication as to which councillors of the municipality (if any) may be designated as fulltime according to section 18 of the Act.
  - (h) Any provisions of the Structures Act from which the municipality has been exempted in terms of section 91.
  - (i) Any other relevant details, which could include aspects regarding the status of traditional leaders on the relevant council.
- At the commencement of the process to establish a municipality, the relevant MEC must give written notice of the proposed establishment to Organised Local Government in the province and also to any existing municipalities that may be affected by the establishment. Before a notice is published, the MEC must further consult with OLG and the existing municipalities that may be affected. After the consultations have been conducted, the MEC must publish the particulars of the proposed notice for public comment.

As was mentioned above, the establishment notice takes effect only on the day of the commencement of the first election of a particular council, and only then is the new municipality established. The new municipality becomes the legal successor of the disestablished municipality if there was one – within the specified municipal jurisdiction. The establishment notice in terms of section 12 of the Structures Act serves as a legal document and founding charter for each new municipality in South Africa. Many aspects of municipalities that existed before the establishment process were drastically affected by the process. Accordingly, the Structures Act also had to provide for the regulation of the effects of the establishment of municipalities on existing municipalities. In this regard the Municipal Structures Act provides for the following:<sup>133</sup>

- A municipality established in terms of section 12 in a particular area supersedes the existing municipality or municipalities to the extent that such existing municipi-

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

pality or municipalities fall within the area.<sup>134</sup> The superseding municipality becomes the successor in law of the existing municipality, subject to certain requirements. Where a district municipality and one or more local municipalities within the area of the district municipality supersedes the existing municipality(ies) in that area, the district and local municipalities become the successors in law to the existing municipality(ies) depending on the specific assets, liabilities, rights and obligations allocated to the district and local municipalities respectively in terms of the relevant section 12 notice or notices.<sup>135</sup>

- If a municipality established in terms of section 12 supersedes an existing municipality(ies), the relevant section 12 notice, or any amendment of that section 12 notice, must:
  - (a) Provide for the disestablishment of the existing municipality or, if only part of the existing municipality's area is affected, the disestablishment of the existing municipality in that affected area.<sup>136</sup>
  - (b) Regulate the legal, practical and other consequences of the total or partial disestablishment of the existing municipality. Such consequences will include:
    - (i) The vacation of office by councillors of the existing municipality.
    - (ii) The transfer of staff from the existing municipality to the superseding municipality or, if there is more than one superseding municipality, to any of the superseding municipalities. Municipal staff must formally be transferred to a new municipality when their existing municipality is disestab-

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

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

<sup>136</sup> See the Structures Act s 14(2)(a).

lished. In some cases staff are even divided among new succeeding municipalities. In short, the transfer of staff must be regulated by detailed legal provisions, and these must protect their conditions of employment and job security. It should also be noted that the responsibility for staff transfers and other related matters rests with the relevant municipal trade unions and the municipalities themselves and not with the MEC of the province. Staff and labour-related disputes are regulated by the Bargaining Council at both national and regional levels.

- (iii) The transfer of assets, liabilities, rights and obligations and administrative records from the existing municipality to the superseding municipality or municipalities, as the case may be. When the transfer of assets, liabilities, rights, obligations and administrative records are considered, the interests of creditors of the existing municipality must be taken into account.
- (iv) The continued application of any by-law(s) and resolutions of the existing municipality to or in that area, as well as the extent of such application.<sup>137</sup> All existing by-laws, regulations and resolutions are transferred to the superseding municipality(ies) or specifically rescinded by the establishing notice. Where existing municipalities are amalgamated, the geographical extent of their by-laws and resolutions have to be re-evaluated. In cases of conflict between by-laws or resolutions, specific provision is needed to confirm which by-laws would still be applicable and which would be rescinded. The determination of which by-laws and resolutions would apply and which not requires extensive evaluation and oversight and also provides a unique opportunity for all new municipalities to review and tidy up all existing legislative and executive decisions, many of which were inconsistent with the Constitution. The Structures Act specifically provides for the review and rationalisation of existing municipal by-laws. The Act states that if an existing municipality is wholly or partially superseded by another municipality, the by-laws, regulations and resolutions<sup>138</sup> of the existing municipality *must* be reviewed and where necessary rationalised by the superseding municipality, to the extent that such by-laws, regulations

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<sup>137</sup> See the Structures Act s 14(2)(a) and (b).

<sup>138</sup> Including standing delegations.

and resolutions continue to apply in the area or part of the area of the superseding municipality.<sup>139</sup> If the superseding municipality is a district or local municipality, any transfer referred to in (ii) or (iii) above must be effected in a way that would enable the superseding municipality to perform the functions and powers assigned to it in terms of section 84 of the Systems Act.<sup>140</sup>

- According to the Structures Act, the transfer of staff in terms of a section 12 notice must/have to be on conditions of service not less favourable than those under which that staff member served in the existing municipality and must also be in accordance with the provisions of the Labour Relations Act of 1995.<sup>141</sup> It is further provided that a section 12 notice that transfers staff of an existing municipality to a superseding municipality *may* determine that the staff transferred form an administrative unit that functions as such until the superseding municipality has established a staff structure and has appointed staff to positions on that staff structure. Such an administrative unit will function under the control of the municipal manager or acting municipal manager of the superseding municipality.<sup>142</sup>
- On the production of a certificate by a municipality that any asset was transferred to it in terms of a section 12 notice, the relevant registrar of deeds must make such entries or endorsements in or on any relevant register, title deed or document in order to register that asset in the name of that municipality. No duty, fee or charges is payable for such a registration.<sup>143</sup>
- The MEC in a province, by notice in the Provincial Gazette, may also make provision for transitional measures to facilitate the disestablishment of an existing municipality and the establishment of a new municipality. The MEC must consult with the existing municipality before publishing such a notice.<sup>144</sup>

From the provisions discussed above, it becomes clear that the establishment notice is a very important document in the new local government system and that all new municipalities are based on their respective establishment notices. It is important to

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<sup>139</sup> See the Structures Act s 15.

<sup>140</sup> Refer to Act 33 of 2000 s 2(b) and (c).

<sup>141</sup> 66 of 1995.

<sup>142</sup> Refer to the Structures Act s 14(3)(a) and (b).

<sup>143</sup> See the Structures Act s 14(4).

<sup>144</sup> See the Structures Act s 14(5).

note, however, that not all areas in the country fall under the provisions of an establishment notice. Areas that have been declared District Management Areas do not require an establishment notice.

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

It is understandable that although the section 12 establishment notices are regarded as the new founding documents of all municipalities in South Africa, such a foundation should not be cast in stone and must be amendable in order to change with local circumstances and to enhance new initiatives. Should any provision of a particular establishment notice be in need of change,<sup>145</sup> a formal process of amendment of the notice is required. As was stated above, amendments may be necessary from time to time to accommodate changing conditions affecting municipalities or to insert further measures to regulate the new local government system. Again the Structures Act provides for the requirements that must be complied with in order to amend a section 12 notice. Section 16(1)–(3) of the Structures Act states the following:

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

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<sup>145</sup> Eg, to change the name or executive structure of a municipality.



the consultations have been held, the MEC must publish the particulars of the proposed notice for public comment.<sup>146</sup>

As was indicated above, a section 12 notice can also be repealed, amended or replaced in instances when the existing municipal boundaries are altered or re-determined. When in terms of the Demarcation Act the Demarcation Board re-determines a municipal boundary which affects the area of an established municipality, the provisions of section 12 and 14 of the Structures Act are applicable to the extent necessary to give effect to the re-determination. In such cases the MEC concerned must repeal, amend or replace the relevant section 12 notice and he or she *must* consult with the affected municipalities. Any repeal, amendment or replacement of a section 12 notice takes effect on a date mentioned in the notice, subject to section 16 of the Structures Act.<sup>147</sup> Only in one instance is a municipality allowed to perform powers and functions that are not specifically granted to it in terms of its establishment notice: where the MEC has determined that a municipality is likely to collapse or cannot fulfil its functions. The MEC may then reassign any power and function of that municipality to another category of municipality without amending the establishment notice. In such cases the MEC will simply inform the affected municipalities of his/her decision, in writing.<sup>148</sup>

#### **10.7.4 Transitional arrangements in respect of the new local government dispensation**

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

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

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

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

<sup>149</sup> 33 of 2000.

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

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

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

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

#### **10.8 Conclusion**

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

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

<sup>151</sup> See the Structures Amendment Act 33 of 2000 ch 2.

<sup>152</sup> The Constitution s 155(1).

tailed instructions with regard to the local sphere of government. The Constitution has left it mostly to national government to provide for a more detailed framework of the new local government system. Accordingly, the Structures Act<sup>153</sup> has facilitated the establishment of all new municipalities and further regulates various future aspects regarding municipalities. After all the municipalities were legally established in December 2000, the new legal requirements and establishment provisions were formally implemented. Such implementation will require, *inter alia* the introduction of new leadership and management structures for all municipalities; developing co-operative relations between municipalities, especially between district and local municipalities; transferring staff to the new municipal structures and assigning them to their new offices; and also reviewing and rationalising all by-laws, regulations and standing delegations inherited from the old municipalities. It is clear that the process of implementing the provisions of the new legal foundation and the establishment notice will take considerable time and will be an ongoing process.

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

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<sup>153</sup> 117 of 1998 as amended.

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

## Demarcation of new local government boundaries

### 11.1 Introduction

In accordance with the new constitutional foundation, local governments had to be established for the whole territory of the Republic.<sup>1</sup> Before municipalities could be established, however, it was necessary specifically to determine, or in some cases re-determine, existing municipal boundaries. The Constitution demands that national legislation *inter alia* establish criteria and procedures for the determination of municipal boundaries by an independent authority. The relevant national legislation must further take into account the need to provide municipal services in an equitable and sustainable manner.<sup>2</sup> In order to comply with the constitutional requirements, national government enacted the Local Government: Municipal Structures Act<sup>3</sup> which, together with the Local Government: Municipal Demarcation Act,<sup>4</sup> provided for the establishment of an independent municipal demarcation board and for the criteria and procedures for the determination of municipal boundaries.<sup>5</sup>

The determination of municipal boundaries was, and still is, an important process in the successful transformation of local government. Although the demarcation of new municipal boundaries would not suddenly solve the many problems municipalities were facing, it indeed set the structural conditions within which other processes necessary for the transformation and development of local government could occur. Such processes would include the fulfilling of the constitutional objectives set out in section 152 of the Constitution. The way in which municipal boundaries are drawn will be important to ensure that municipalities meet their respective obligations.

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<sup>1</sup> See the Constitution s 151(1).

<sup>2</sup> See the Constitution s 155(3) and (4).

<sup>3</sup> 117 of 1998, hereafter referred to as the Structures Act.

<sup>4</sup> 27 of 1998, hereafter referred to as the Demarcation Act.

<sup>5</sup> For more details regarding the demarcation of local governments under the new constitutional dispensation refer to Bekink (1998) *De Jure* at 319-326.

## 11.2 The importance of local government boundaries

Municipal boundaries have important political, financial and social effects. This is so because municipal boundaries determine what each municipality is responsible for and the extent of such responsibility. Some of the important functions are as follows:

- A municipal boundary determines the size and character of a particular municipal voting population. Depending on the boundary, the electorate can be wealthy or poor, or the area can have good infrastructure or can be underdeveloped. Because political parties tend to appeal to different constituencies, this may also affect the political outcome of a specific local community.<sup>6</sup> It is therefore very important that the demarcation process should not be politically biased or manipulated. Politically motivated manipulation of municipal boundaries would compromise efforts to achieve the overall constitutional objectives.
- Often municipal boundaries determine if a municipal area is financially viable or sustainable. The extent of municipal boundaries therefore has an effect on both the potential income and expected expenditure of that municipality.<sup>7</sup>
- A further important aspect regarding municipal boundaries is the fact that boundaries also determined the size and extent of settlements that must be served. This in turn has important implications for municipal infrastructure and service provision.<sup>8</sup> In short, boundaries have an important influence on social and economic upliftment.
- Many local residents also identify themselves with a specifically demarcated area and its people. If boundaries are drawn in a way that disrupts the social and economic patterns of people's lives, many community members may find it difficult to feel part of a specific municipal entity, because they associate themselves or have interests in other municipal jurisdictions. Such community members may not participate in or commit themselves to the municipality and, by so doing, negatively impact on the effectiveness of that municipal government.<sup>9</sup>

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<sup>6</sup> It must be remembered that the Constitution requires that municipalities provide for democratic and accountable government.

<sup>7</sup> It is obvious that a municipality will have little potential income if most of the local residents are very poor and if the local economy is weak with almost no tax base to draw upon.

<sup>8</sup> Again the Constitution requires each municipality to provide equitable and sustainable services to local communities and also to promote economic development. See the Constitution s 152.

<sup>9</sup> One must remember that community participation is also a constitutional imperative. See the Constitution s 152(2).

- The demarcation of boundaries is also important with regard to the relationship between municipalities themselves. This is particularly true in a system of so-called “wall-to-wall” local government, which South Africa has introduced.<sup>10</sup> In a system of wall-to-wall local government, the way in which municipal boundaries have been demarcated can have very important consequences with regard to the effectiveness and efficiency of some municipalities.<sup>11</sup> Depending on how boundaries are demarcated, the positive and negative effects between neighbouring municipalities can be shared between them. It is therefore clear that the demarcation of boundaries can have a significant cross-boundary impact on neighbouring municipalities. It can play a decisive role in determining whether the relations between municipalities are competitive or co-operative.<sup>12</sup>

Although each municipality must have clearly demarcated boundaries, the incorrect determination of such boundaries may prevent some municipalities from performing their constitutional obligations effectively. In order to ensure that municipalities have a fair chance of achieving their constitutional obligations within the boundaries given to them, the demarcation process had to be carefully considered and many different factors had to be taken into account.<sup>13</sup> In this regard the Municipal Demarcation Act has played a pivotal role in ensuring that the demarcation process was efficient, fair and procedurally correct.<sup>14</sup>

### **11.3 Re-determination of the municipal boundaries of the transitional period**

During 1995, approximately 1260 local government bodies across South Africa were amalgamated into 843 municipalities. These municipalities spent a lot of time and money on adjusting to their new boundaries, organising staff transfers and integrating administrations. In spite of all these efforts, it soon became clear that because of

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<sup>10</sup> Wall-to-wall local government means that every part of the country is covered by a municipality, and every municipality thus shares a border with at least one other municipality. The Constitution s 151(1) confirms the establishment of wall-to-wall municipalities for the whole territory of the Republic of South Africa.

<sup>11</sup> Eg, the infrastructure of one municipality may be impacted by the residents of another municipality's enjoying its facilities. The way in which municipalities and their residents interact with one another can have either positive or negative effects on either or both of the municipalities. A municipality could experience higher traffic volumes and maintenance costs, for example, but benefit from more municipal revenue and local investment.

<sup>12</sup> See Bekink (1998) *De Jure* 319 at 320-321.

<sup>13</sup> Refer to LGIS no 2 “Demarcation” (1999) at 3.

<sup>14</sup> The purpose of the Act is to provide for the criteria and procedures for the determination of municipal boundaries by an independent authority, the Demarcation Board and to provide for other matters that are connected to the demarcation process.

boundary determinations many local governments could not meet their obligated objectives. Some of the problems that arose were the following:<sup>15</sup>

- Some district councils were too large and too removed from local councils to be able to understand and respond to their needs.
- Metropolitan governments were divided between metropolitan councils and metropolitan local councils. This led to the tax base of the metropolitan area being split across settlements rather than being budgeted for as a single integrated area.
- Many municipalities were not financially viable and effective. Often this was the result of municipal boundaries that were not drawn widely enough to include a tax base that could sustain and support a particular municipal authority.
- Many parts of the country have been demarcated under the authority of district councils. As district councils are not directly elected councils, such areas were denied their own democratic and accountable local governments.
- It was also established that many municipalities could not cope with their financial and administrative obligations and that there was an urgent need for further rationalisation within the broad system of local government in South Africa.

For the new structures of local government to be successful, more appropriate and efficient boundaries had to be established. District councils had to be strengthened and metropolitan councils had to be redefined as single local authorities. Outside the metropolitan areas and with the exception of District Management Areas, a two-tier combined system of district and local municipalities had to be introduced. There was also a strong need for the number of councils to be reduced, with an emphasis on some rural and urban municipalities being amalgamated to ensure effective planning and service delivery. In light of the abovementioned background, all municipal boundaries had to be re-evaluated and often re-demarcated before the local government elections in December 2000 could be held.

#### **11.4 The municipal demarcation board**

##### **11.4.1 *Establishment, functions and general powers of the Demarcation Board***

In compliance with the constitutional requirement that an independent authority had to be established by national legislation to determine municipal boundaries, the min-

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<sup>15</sup> See LGIS no 2 "Demarcation" (1999) at 4.



ister Demarcation Act established the Municipal Demarcation Board.<sup>16</sup> The Act affords the Demarcation Board statutory status as a juristic person which is independent and must be impartial. All functions of the board must be performed without fear, favour or prejudice.<sup>17</sup>

The main functions of the board are to determine municipal boundaries in accordance with the provisions of the Demarcation Act and any other appropriate legislation enacted in terms of chapter 7 of the Constitution and to render an advisory service in respect of matters provided for in legislation.<sup>18</sup>

According to the Demarcation Act, the board is given certain general powers. Such powers include all steps necessary or expedient for the board to perform its functions.<sup>19</sup> However, the board may not borrow money.<sup>20</sup> Municipalities should note that the board may require a municipality that may reasonably be affected by a boundary determination to provide the board or any of its committees with facilities for holding meetings.<sup>21</sup>

#### **11.4.2 Membership provisions of the Demarcation Board**

The Demarcation Board consists of no fewer than seven and no more than 10 members that are appointed by the President in accordance with specific requirements. The responsible for local government must determine the number of members of the board. The composition of the board must be broadly representative of South African society and must also represent a pool of knowledge concerning issues relevant to municipal demarcation in each province.<sup>22</sup>

A member of the board must be a South African citizen and must have a qualification or experience in, or knowledge appropriate to, local government matters in gen-

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<sup>16</sup> See the Demarcation Act s 2.

<sup>17</sup> See the Demarcation Act s 3. The independence of the board is a constitutional prerequisite and together with the confirmation of impartiality it should ensure that narrow political interests can be eradicated from the board's functioning. See the Constitution s 155(3)(b).

<sup>18</sup> Such other legislation will include the Structures Act as amended; the Local Government: Cross-boundary Municipalities Act 29 of 2000 as amended. See the Demarcation Act s 4 as substituted by Act 51 of 2002.

<sup>19</sup> See the Demarcation Act s 5(1). These powers of the board include *inter alia* the power to determine its own staff establishment, acquire or dispose of any right in or to property, open and operate its own bank account, insure itself, perform legal acts and also institute or defend any legal action.

<sup>20</sup> The Demarcation Act s 5(2).

<sup>21</sup> See the Demarcation Act s 5(3).

<sup>22</sup> See the Demarcation Act s 6(1)–(3) read with s 8 of the Act.

eral or aspects that are specifically relevant to almost all municipalities.<sup>23</sup> Persons disqualified by the Act from becoming or remaining members of the board are, for example,

- an unrehabilitated insolvent
- someone who is placed under curatorship
- someone who is declared by a court of law of the Republic to be of unsound mind
- a person who was convicted after 4 February 1997 of an offence and sentenced to imprisonment without the option of a fine for a period of not less than 12 months.<sup>24</sup>

Whenever it is necessary to appoint a person as a member of the Board, the minister must invite persons to apply, establish a selection panel to evaluate applications and finally appoint a person.<sup>25</sup> The term of office of a member of the Board is five years, and reappointment is possible.<sup>26</sup> Apart from appointing the members of the Board the President also appoints one member as chairperson and another as deputy chairperson.<sup>27</sup>

Conditions of appointment of members must be determined by the minister with the concurrence of the minister of finance, and members are appointed either as full-time members or part-time members.<sup>28</sup> All members are obliged to adhere to a code of conduct, and any contravention of the code of conduct is regarded as misconduct.<sup>29</sup> Membership of the Board ceases when a person is no longer eligible under section 7, resigns by giving three months' notice or is removed from office by the President.<sup>30</sup>

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<sup>23</sup> Such specialised areas of expertise are: economic development, integrated development planning, community development, traditional leadership, local government administration, municipal finance and services, town and regional planning, legal and constitutional matters affecting local governments; land surveying, public health and also transport planning. See the Demarcation Act s 7(1)(b)(i)–(xii).

<sup>24</sup> See the Demarcation Act s 7(2).

<sup>25</sup> See the Demarcation Act s 8(1)–(5) as amended by Act 51 of 2002.

<sup>26</sup> See the Demarcation Act s 9.

<sup>27</sup> Refer to the Demarcation Act ss 8(7) and 10.

<sup>28</sup> See the Demarcation Act s 11.

<sup>29</sup> See the Demarcation Act s 12.

<sup>30</sup> A member may be removed from the board on grounds of misconduct, incapacity or incompetence only. See the Demarcation Act s 13(4)(a). A decision to remove someone must be based on a finding to that effect by an investigating tribunal appointed by the President. See also s 13(4)(b).

### **11.4.3 Operating procedures of the Demarcation Board**

Meetings of the board are determined by the chairperson unless the majority of the members request the chairperson to convene a meeting. Normally the chairperson or deputy chairperson presides at meetings. The board is further also mandated to determine its own internal procedures.<sup>31</sup> A decision of the board is decided by a supporting vote of at least the majority of members.<sup>32</sup> If the board consists of, for example, ten members, then at least a supporting vote of six members<sup>33</sup> is needed to decide a particular question.<sup>34</sup> The board may further also establish one or more committees to assist it, and when the board is appointing members to a committee, the board is not restricted to board members.<sup>35</sup> In order to perform its functions properly, the board may delegate any of its powers to a board member, a committee or an employee of the board. However, the power to make a final decision on the determination of municipal boundaries may not be delegated.<sup>36</sup> When powers are delegated by the board, the board still retains final responsibility for such powers or performance of such duties.<sup>37</sup> Because of the board's restrictive means, it may conclude an agreement with the Department of Provincial Affairs and Local Government, a provincial department or even a municipality in order to provide administrative and secretarial assistance to the board or its committees.<sup>38</sup>

## **11.5 Requirements regarding municipal demarcation**

### **11.5.1 Specific boundary determinations**

According to the Demarcation Act, the Demarcation Board must determine municipal boundaries in the territory of the Republic and may also re-determine any municipal boundaries. The Board does not have absolute authority during a demarcation process. Any determination or re-determination of a municipal boundary must be consistent with the Demarcation Act and other appropriate legislation enacted in terms of

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<sup>31</sup> See the Demarcation Act ss 15 and 16.

<sup>32</sup> A majority of members in this regard refer to a so-called "absolute majority", which will be 50% + 1 of the total number of members of the board. See also Rautenbach and Malherbe (1999) 159.

<sup>33</sup> 50% of 10 + 1.

<sup>34</sup> See the Demarcation Act s 17.

<sup>35</sup> See the Demarcation Act s 18(1)–(5).

<sup>36</sup> See the Demarcation Act s 19(1)(a).

<sup>37</sup> Refer to the Demarcation Act s 19(2)(a)–(b).

<sup>38</sup> See the Demarcation Act s 20(1).

chapter 7 of the Constitution.<sup>39</sup> Any determination or re-determination of a municipal boundary must be published in the relevant *Provincial Gazette*. A very important aspect provided for in the Demarcation Act is that any person that is aggrieved by a determination or re-determination of a municipal boundary may submit objections in writing to the Board within 30 days of publication of that determination.<sup>40</sup> The Board is obligated to consider any objections and to confirm, vary or withdraw its determinations and publish its decision in the relevant *Provincial Gazette*.<sup>41</sup>

The functions of determining or re-determining municipal boundaries are performed by the board: on its own initiative, on request by the minister or an MEC of a province or on the request of a municipality, with the concurrence of any other affected municipality.<sup>42</sup> Once the Board has determined or redetermined a municipal boundary, it must without delay send such particulars to the Electoral Commission (EC).<sup>43</sup> If the EC is of the view that the boundary determination will affect the representation of voters in the council of any affected municipality, then the determination will take effect only from the date of the next election in that area concerned.<sup>44</sup> If the EC is of the view that a boundary determination will not materially affect the representation of voters in such a council, the determination takes effect from the date determined by the notice in the *Provincial Gazette*. Within 60 days after having received the particulars of the Demarcation Board, the EC must make known its view as set out in subsection 23(2) of the Demarcation Act, by notice in the *Provincial Gazette*.<sup>45</sup>

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<sup>39</sup> See the Demarcation Act s 21(2). Note that s 26 does not apply where the Board re-determines a municipal boundary in respect of which the MEC and all affected municipalities have indicated in writing that they have no objection to the redetermination. See s 8 of Act 51 of 2002.

<sup>40</sup> See the Demarcation Act s 21(4). The subsection does not mention re-determinations, but it is submitted that objections against any re-determinations of municipal boundaries are also included. Persons that may object include both natural and legal persons such as private residents, community groups, private companies and even municipalities themselves.

<sup>41</sup> See the Demarcation Act s 21(5)(a)–(c) as amended. Note that any person may, subject to the Promotion of Access to Information Act 2 of 2000, request the Board to provide reasons for its decisions. See s 21(6) as added by s 8 of Act 51 of 2002.

<sup>42</sup> Refer to the Demarcation Act s 22. The section confirms that municipal boundaries are determined or re-determined either on the initiative of the board self or on request by relevant role players. The instances when the board will act on its own initiative will be discussed below.

<sup>43</sup> The Electoral Commission is the commission established in terms of the Electoral Commission Act 51 of 1996 to oversee and monitor national provincial and local government elections in South Africa. See also s 23(1)–(2) of the Demarcation Act.

<sup>44</sup> See the Demarcation Act s 23(2)(a). This means that the *status quo* is maintained. It is submitted that the reference to the next election does not include any by-elections, as such elections impact on only a specific ward and not the council as a whole.

<sup>45</sup> See the Demarcation Act s 23(3). Note that the MEC in the province concerned must publish the notice within three months of the date of the notice published by the Electoral Commission (EC). See s 10(b) of Act 51 of 2002.

### 11.5.2 Demarcation criteria

When the Demarcation Board is considering whether to determine or re-determine a municipal boundary, it must have an overall objective in mind to establish an area that would adhere to certain requirements. These requirements are:

- to enable the municipality for that area to fulfil its constitutional obligations as set out in section 152 of the Constitution
- to enable effective local governance in that area
- to enable and provide for integrated development and
- to have a tax base as inclusive as possible of all users of municipal services in that municipal area.<sup>46</sup>

In order for the Board to attain the overall objective and to comply to the required criteria of section 24, the Board must take certain factors into account when it is determining a municipal boundary. These factors are the following:<sup>47</sup>

- (a) the interdependence of people, communities and economies as indicated by:
  - (i) existing and expected patterns of human settlement and migration;
  - (ii) employment;
  - (iii) commuting and dominant transport movements;
  - (iv) spending;
  - (v) the use of amenities, recreational facilities and infrastructure; and
  - (vi) commercial and industrial linkages;
- (b) the need for cohesive, integrated and unfragmented areas, including metropolitan areas;
- (c) the financial viability and administrative capacity of the municipality to perform municipal functions efficiently and effectively;
- (d) the need to share and redistribute financial and administrative resources;
- (e) provincial and municipal boundaries;
- (f) areas of traditional rural communities;
- (g) existing and proposed functional boundaries, including magisterial districts, voting districts, health, transport, police and census enumerator boundaries;
- (h) existing and expected land use, social, economic and transport planning;

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<sup>46</sup> See the Demarcation Act s 24(a)–(d). All the relevant requirements must be considered before the Board makes its determination.

<sup>47</sup> See the Demarcation Act s 25(a)–(e).

- (i) the need for co-ordinated municipal, provincial and national programmes and services, including the needs for the administration of justice and health care;
- (j) topographical, environmental and physical characteristics of the area;
- (k) the administrative consequences of its boundary determination on:
  - (i) municipal creditworthiness;
  - (ii) existing municipalities, their council members and staff; and
  - (iii) any other relevant matter; and
- (l) the need to rationalise the total number of municipalities within different categories and of different types to achieve the objectives of effective and sustainable service delivery, financial viability and macro-economic stability.

From the factors mentioned above one can see that the determination process of a municipal boundary is a very involved and often difficult process. In many instances specialised guidance, expert advice and thorough pre-conducted investigations are required. The Demarcation Act does not specify how the Board should go about ensuring that all of the factors have indeed been complied with. This is perhaps an unfortunate lacuna in the Act, which could enhance the chances of legal challenges to actions of the Board. Such challenges could be minimised if the Board took every possible precaution to ensure that all relevant criteria were taken into account before a decision was finalised.

### **11.5.3 Demarcation procedures**

The Demarcation Act determines specific demarcation procedures that must be followed by the Demarcation Board. The Act requires that before the Board considers any determination of a municipal boundary it must publish a notice in a relevant local newspaper stating the Board's intention and invite written representations and views from the public.<sup>48</sup> Written representations or views must be submitted within a specified period, which period may not be shorter than 21 days.<sup>49</sup> It is further required that when the Board publishes a notice referred to in subsection 1 it must convey the content of the notice by radio or another appropriate means of communi-

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<sup>48</sup> Note that only one notice in one newspaper is required. The Board should ensure that the language of the notice is in the official language that is most used in that area.

<sup>49</sup> See the Demarcation Act s 26(1)(a) and (b).

cation, in the area concerned.<sup>50</sup> The Board is further required to send a copy of the notice to

- the MEC in the province concerned
- each municipality affected by the matter
- the magistrate of the area if any magisterial district is affected
- the provincial house of Traditional Leaders.

This can be carried out by registered post, by electronic means or by hand, and all of these parties are then invited to submit written representations.<sup>51</sup>

As soon as the period for written representations has expired, the Board is obliged to consider all representations submitted to it and may take a decision on the determination. The Board is also permitted to hold a public meeting, to conduct formal investigations or to do both.<sup>52</sup> If the Board decides on holding a public meeting it must publish a notice in a newspaper circulating in the area stating the time, date and place of the meeting and invite the public to attend the meeting. During public meetings a Board's representative must explain the issues at hand, allow the public to air their views and answer relevant questions.<sup>53</sup> When the Board decides to conduct an investigation, however, it may conduct such an investigation itself or designate an investigating committee to conduct the investigation on its behalf. During formal investigations the Board or investigating committee has specific powers.<sup>54</sup> The Demarcation Act further specifically addresses the situation where a demarcation affects existing municipalities. In such cases the legal, practical or other consequences of a municipality's wholly or partially being incorporated into or combined with another municipality must be dealt with in terms of the Municipal Structures Act.<sup>55</sup>

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<sup>50</sup> It is important that the notice should be published as widely as possible to ensure that all interested parties have an opportunity to respond. In this regard it would be advisable for the Board to undertake not only radio publication of the notice but, eg, to send out flyers to all local residents via the relevant municipality concerned. See the Demarcation Act s 26(2).

<sup>51</sup> See the Demarcation Act s 26(3).

<sup>52</sup> Refer to the Demarcation Act s 27.

<sup>53</sup> These aspects are confirmed in the Demarcation Act s 28(1)–(3).

<sup>54</sup> See the Demarcation Act ss 29 and 30. Such powers include to (a) summon by written notice a person who in the Board or committee's opinion has information which is material to the investigation to appear before the Board or committee and to give evidence or to produce specified documents; (b) call a person present at a Board or committee meeting to give evidence or produce documents; (c) administer the oath or solemn affirmation; (d) question that person or have such person questioned by a person designated by the Board or committee; and (e) retain for a reasonable period a document produced at a meeting.

<sup>55</sup> The Demarcation Act s 31.



## **11.6 General administrative and other matters regarding the Demarcation Board**

### **11.6.1 *Manager of the Board***

The Demarcation Board must appoint a person as the Manager of the Board. Apart from having certain responsibilities, the Manager is also the accounting officer of the Board.<sup>56</sup>

### **11.6.2 *Aspects regarding the finances of the Board***

The Demarcation Board is funded mainly by money appropriated annually by Parliament to enable it to perform its functions. Money from other sources may be received through the National Revenue Fund. During each financial year the Board must submit an estimation of the Board's income and expenditure for the next financial year to the minister of Provincial Affairs and Local Government, as well as to the Minister of Finance. Any money paid to the Board that has not been used at the end of a financial year must be refunded to the National Revenue Fund, unless otherwise agreed by the two Ministers mentioned above.<sup>57</sup> As accounting officer, the Manager of the Board must comply with certain accountability requirements, and the financial statements and records of the Board must be audited annually by the Auditor-General.<sup>58</sup> Lastly the Act confirms that the Board is accountable to Parliament and must annually submit to both houses of Parliament a written report on its activities during a financial year. A copy of the report must also be submitted to each provincial legislature.<sup>59</sup>

### **11.6.3 *Miscellaneous matters concerning the Demarcation Board***

The Demarcation Board is protected against civil liability, as the State Liability Act<sup>60</sup> applies in respect of the Board.<sup>61</sup> No member of the Board is further liable for anything done or omitted in good faith when performing a duty or exercising a power in terms of the Demarcation Act.<sup>62</sup> According to section 41 of the Act, the minister may make regulations under the Demarcation Act if such regulations are not inconsistent

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<sup>56</sup> The responsibilities of the Manager are set out in the Demarcation Act s 33.

<sup>57</sup> See the Demarcation Act s 36(1)–(4).

<sup>58</sup> The Demarcation Act ss 37 and 38.

<sup>59</sup> Refer to the Demarcation Act s 39.

<sup>60</sup> 20 of 1957.

<sup>61</sup> Any reference to minister in the State Liability Act must be construed as a reference to the chairperson of the Board.

<sup>62</sup> See the Demarcation Act s 40.

with the Act or any other Act of Parliament. The Act also makes it an offence if people disrupt, hinder or do not co-operate with the Board in instances where they are legally required to.<sup>63</sup> Lastly, the Act also provides for a transitional arrangement, in that the boundaries of municipalities which existed before the Act took effect would continue to exist until superseded by new boundaries determined under the Act.<sup>64</sup>

### 11.7 Conclusion

During the transitional process of local government in South Africa, the Local Government Transition Act<sup>65</sup> allowed for the establishment of separate Demarcation Boards for each province.<sup>66</sup> Within the new structure of local government there is only one national independent Demarcation Board, which makes independent determinations.<sup>67</sup> The Demarcation Board gets its powers from not only the Demarcation Act, but also from other national legislation.<sup>68</sup>

The demarcation process of the new municipal boundaries was by no means a simple task. Many of the previous boundaries were drawn in a way that divided settlements irrationally and thus prohibited municipalities from providing effective services. In order for municipalities to operate efficiently and effectively, the most appropriate geographical municipal area had to be determined. In general, municipal boundaries should surround a functional area and should not be fragmented.<sup>69</sup> The demarcation process was difficult in many regards, but the process and functions of the Board are far from over. It is submitted that the process of re-demarcation and re-evaluation of existing municipal boundaries is continuous. There can be no doubt that in the new local government system the process of re-determining municipal

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<sup>63</sup> For more on the offence and penalties, see the Demarcation Act s 42.

<sup>64</sup> See the Demarcation Act s 44. According to s 45, the Demarcation Act took effect on the date on which the Municipal Structures Act came into effect.

<sup>65</sup> 207 of 1993.

<sup>66</sup> See the LGTA ss 10E, 10I(3) and 10K. Note that these sections were repealed by a schedule to the Demarcation Act.

<sup>67</sup> During 1999 a total of 11 members were appointed to the Demarcation Board by the President. The Board consists of a chairperson, a deputy chairperson and nine other members, each representing a province. Only the chairperson and deputy chairperson have been appointed on a fulltime bases. See the Demarcation Act and also LGIS no 2 "Demarcation" (1999) at 8.

<sup>68</sup> See, eg, the Structures Act as well as the Cross-boundary Municipalities Act and the Local Government: Municipal Electoral Act 27 of 2000.

<sup>69</sup> See the White Paper on Local Government (1998) at 98–100.

boundaries is a dynamic and ongoing feature of the overall development of local government.<sup>70</sup>

It is also important to remember that it is extremely difficult for the Demarcation Board to determine municipal boundaries that will address all problems in municipal areas; constant monitoring and performance evaluation is needed. In this regard, boundaries are important to ensure financial and administrative prosperity. Often people argue that towns that function well and are financially strong should be left alone when the demarcation of boundaries is considered. It is argued that such towns should not be burdened with the debt or incapability of other nearby towns. Other commentators suggest that such exclusion is unfair and is detrimental to poor areas or towns. It is submitted that after the overall demarcation process has been completed, flourishing municipalities should not be penalised with the burden of struggling and poorly managed municipalities unless the problems are closely linked to the manner in which municipal boundaries have been drawn.

The demarcation process under the Demarcation Act also targeted the total number of municipalities that were to be established. The total number of municipalities had to be reduced. Reality has shown that local democracy is best served by local governments that are effective and sufficient in delivering services and not by the total number of municipalities. In order to achieve a more rationalised system of local government, national government has envisaged a smaller number of municipalities with larger areas to serve. It is hoped that such rationalisation should bring more savings and efficiency if managed properly. The amalgamation process had a considerable impact on municipal administrative structures, and in many cases there is a significant over-capacity of staff with regard to certain expertise while other skills are urgently needed.

It must be remembered that municipal boundaries are not the only important boundary determinations in South Africa. Many other boundary determinations such as provincial boundaries and magisterial jurisdictions are also of significant importance. According to the principle of co-operative government, the different bounda-

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<sup>70</sup> The three broad principles/objectives of the demarcation process are to ensure integration of all areas that belong together, to ensure all municipalities are financially viable and capable of performing their functions and to ensure effective local democracy and local governance.

ries should not be determined independently from each other, and all relevant role players should be included in such processes in the future.<sup>71</sup>

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<sup>71</sup> According to research done in 1998, a total of 777 traditional authorities, 48 health regions, 180 health districts and 4700 magisterial jurisdictions were considered in the demarcation process of local government boundaries. See LGIS no 2 "Demarcation" (1999) at 23.

## **The composition, election and term of municipal councils**

### **12.1 Introduction**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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<sup>10</sup> Refer to the Constitution s 157.

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

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

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

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<sup>11</sup> This can either be directly or indirectly elected members.

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

<sup>13</sup> 2003 (1) SA 495 (CC).

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

The court held *inter alia* that the Constitution as amended contemplated that floor-crossing would be permissible, including on the local sphere of government. It was further held that section 157(1) provided that council members were to be elected in accordance with subsections 157(2) and (3), but subject to Schedule 6A. This did not subordinate the Constitution to the schedule. It simply required section 157(3) to be read consistently with section 157(1) and Schedule 6A. If this were done, then in the light of the reference to Schedule 6A, the reference in subsection (3) to the need for the electoral system to result in general in proportional representation had to be construed as a reference to the voting system and not to the conduct of elected members after the election. Accordingly, the Constitution of the Republic of South Africa Amendment Act<sup>14</sup> and the Local Government: Municipal Structures Amendment Act<sup>15</sup> were not unconstitutional.<sup>16</sup> Members of legislatures representing political parties can lawfully cross the floor to another party without forfeiting their seats. In 2002, when the ruling government of the day decided to provide for floor-crossing legislation, the Constitution already envisaged such legislation as a possibility in future.<sup>17</sup> At local government level, all that was needed to allow for floor-crossing were amendments to the Structures Act.<sup>18</sup> In the national and provincial spheres,

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<sup>14</sup> 18 of 2002.

<sup>15</sup> 20 of 2002.

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

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

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

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

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

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

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

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

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

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

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

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

<sup>22</sup> See the Constitution Sch 6B Item 2.

<sup>23</sup> See the Constitution Sch 6B Item 3.

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

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

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

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

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

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

<sup>27</sup> See the Constitution Sch 6B Item 5.

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

<sup>29</sup> See the Constitution s 157(1)(b)(ii).

<sup>30</sup> See the Constitution s 157(2)(a)-(b).

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

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

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

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

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

<sup>32</sup> 1995 (11) BCLR 1476 (W).

<sup>33</sup> See para D-E at 1482.

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



rect/ward system is that it also allows for individuals who do not belong to a specific political party but who are competent and resourceful to stand as independent candidates. This possibility allows for municipalities to utilise the skills and expertise of people who want to serve their communities and who have obtained support from their communities although they do not favour a specific political manifesto.<sup>35</sup> Although the combination of a ward system<sup>36</sup> and system of proportional representation has been included in the final electoral structure of local governments, the position has changed somewhat from the combined system that was used during the transitional period. Seats are now divided equally between ward seats and proportional representative seats.<sup>37</sup>

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

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

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

<sup>36</sup> Also known as a constituency-based system.

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

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

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

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

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

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

<sup>40</sup> See the Constitution s 157(4)(a).

<sup>41</sup> See Act 27 of 1998 and ch 10 of this work.

<sup>42</sup> See the Demarcation Act ss 4 and 21.

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

<sup>44</sup> See the Structures Act Sch 1 Part 1 Item 4.

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

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

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

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

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

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

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

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

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

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

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<sup>47</sup> This requirement is applicable to regular municipal elections or a by-election.

<sup>48</sup> Own emphasis added.

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

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

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

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

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

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

### **12.3.1 The composition and establishment of municipal councils**

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

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

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

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

<sup>54</sup> This requirement should be read together with the Structures Act s 20.

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

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

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

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

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

<sup>56</sup> The Structures Act s 18(4).

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

<sup>58</sup> See the Structures Act s 19(3).

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

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



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

### **12.3.3 The election procedures of metropolitan, local and district councils**

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

#### **12.3.3.1 The election of metropolitan and local councils**

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

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

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

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

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

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

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

<sup>64</sup> See the Structures Act Sch 1 Item 6.



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

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

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

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

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

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

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

<sup>68</sup> See the Structures Act s 8A(a)–(b).

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

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

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

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

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

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

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

**(d) The allocation of seats**

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

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

<sup>71</sup> See the Structures Act Sch 1 Item 10(2).

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

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

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

<sup>75</sup> See the Structures Act Sch 1 Item 12(2).

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

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

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

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

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

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

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

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<sup>76</sup> Thus the total number of seats that party has won.

$$\begin{aligned}
 & A \quad (13 \\
 & \quad 000) \\
 & = \frac{B(2) - C}{(0)} + 1 \\
 & \\
 & \quad 13 \\
 & = \frac{000}{20} + 1 \\
 & \\
 & = 650 + 1 \\
 & = 651 = \text{thus the number of votes needed to} \\
 & \quad \text{win a seat.}
 \end{aligned}$$

The result is that

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

The seat allocation would be as follows:

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

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

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

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

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

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

#### **(e) Uncontested elections and no party applications**

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

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<sup>77</sup> See the Structures Act Sch 1 Item 13(1)–(5).

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

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

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

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

**(f) Excessive seats and insufficient party lists**

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

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

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

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

<sup>81</sup> See the Structures Act Sch 1 Item 14.

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

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

<sup>84</sup> See the Structures Act Sch 1 Item 17(1)–(3).

<sup>85</sup> See the Structures Act Sch 1 Item 17(4)–(10).

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

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

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

After the new quota of votes has been determined, the total number of valid votes cast for each party<sup>87</sup> *excluding* the party that has forfeited seats, must be divided by the quota. The result is then the total number of seats to which each party is entitled.<sup>88</sup> Any surplus not absorbed by the seats awarded must compete with similar surpluses of other parties, and any undistributed seat or seats must be awarded to the party or parties in sequence of the highest surplus. If the surplus for two or more parties is equal, the seat must be awarded to the party receiving the highest number of valid votes. If a ward candidate representing a party is elected unopposed, for the purposes of factors A and B and sub-item (5) a vote cast by a voter for that candi-

<sup>86</sup> Note that fractions are to be disregarded at this stage.

<sup>87</sup> Both ward and PR votes.

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



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

### **(g) The filling of vacancies**

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

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

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<sup>89</sup> See the Structures Act Sch 1 Items 17(5)–(10).

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

<sup>91</sup> Refer to the Structures Act Sch 1 Item 18.

<sup>92</sup> See the Structures Act Sch 1 Item 19(a)–(f).

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

#### **12.3.3.2 The election and appointment of district councils**

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

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

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

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<sup>93</sup> See the Structures Act Sch 1 Item 20.

<sup>94</sup> See the Structures Act s 23 and Sch 2.

<sup>95</sup> See the Structures Act s 23(1)(a)–(c).

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

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

### **(a) Proportional elections in district councils**

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

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<sup>96</sup> See the Structures Act s 23(3).

<sup>97</sup> See the Act s 23(4) and Sch 2 Part 2.

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

<sup>99</sup> See the Structures Act Sch 2 Item 2.

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

didates are women and that women and men are evenly distributed through the list.<sup>101</sup>

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

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

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

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

<sup>101</sup> Read the Structures Act Sch 2 Item 5.

<sup>102</sup> See the Structures Act Sch 2 Item 6.

<sup>103</sup> *Ibid* Sch 2 Item 6.

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

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

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

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

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

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

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

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

<sup>107</sup> See the Structures Act Sch 2 Items 10–13.

<sup>108</sup> See the Structures Act Sch 2 Item 14.

<sup>109</sup> Again, fractions are disregarded at first.

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

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

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

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

<sup>110</sup> See the Structures Act Sch 2 Item 15(1)–(4).

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

<sup>112</sup> See the Structures Act Sch 2 Item 16(3).

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

<sup>114</sup> The Structures Act Sch 2 Item 19.

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

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

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

In summary, the following important changes should be noted within the new local government electoral system. First, the new system distinguishes between municipalities that are big enough to have wards and those who don't.<sup>118</sup> In so-called "secondary" cities or towns, cities or towns with more than 7 councillors, each voter will have three votes. Two votes will be for their local council<sup>119</sup> and a third vote will be for the political party that is to represent them proportionally on the relevant district council.<sup>120</sup>

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

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

<sup>117</sup> Refer to the Structures Act Sch 2 Item 24.

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

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

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

*continued on next page*



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

#### **12.4 Membership of municipal councils and the qualifications of councillors**

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

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

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

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

<sup>123</sup> Refer to the Structures Act ss 1 and 6.

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

<sup>125</sup> See the Constitution s 158(1)-(2).

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

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

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

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

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

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

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

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

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

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

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

- Anyone who is disqualified to vote for the National Assembly or who is disqualified in terms of section 47(1)(c), (d) or (e) and therefore may not be a member of a municipal council. In this regard the Constitution determines the following:<sup>132</sup>

- (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except
  - (a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than
    - (i) the President, Deputy President, Ministers and Deputy Ministers; and
    - (ii) other office-bearers whose functions are compatible with the functions of a member of the Assembly, and have been declared compatible with those functions by national legislation;
  - (b) permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council;
  - (c) unrehabilitated insolvents;
  - (d) anyone declared to be of unsound mind by a court of the Republic; or

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<sup>129</sup> 2004 (1) SA 441 (T).

<sup>130</sup> 68 of 1995.

<sup>131</sup> See pages 448-450.

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

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

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

(a) ceases to be eligible; or

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

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

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

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

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<sup>132</sup> Refer to the Constitution s 47.

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

## 12.5 The terms of municipal councils and councillors

### 12.5.1 *Terms of municipal councils*

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

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

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

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

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

<sup>137</sup> See the Constitution s 159(2).

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

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

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

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

<sup>140</sup> See the Structures Act s 34(3)-(4).

<sup>141</sup> Refer to the caretaker provisions set out in the Structures Act s 35.

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



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

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

#### **12.5.2.1 The term of office of councillors**

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

#### **12.5.2.2 Vacation of office by municipal councillors**

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

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

- resigns in writing

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

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

<sup>145</sup> Refer to the Structures Act s 26(1)(b) as amended.

<sup>146</sup> See the Structures Act s 26(2).

<sup>147</sup> See the Structures Act s 27.

- is no longer qualified to be a councillor<sup>148</sup>
- contravenes a provision of the Code of Conduct for councillors set out in Schedule 1 of the LG: Municipal Systems Act, 2000 and is removed from office in terms of such code<sup>149</sup>
- is a representative of a local council in a district council and ceases to be a member of that local council which appointed him/her to the district council or if he/she is replaced by the local council as its representative in the district council.

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

## 12.6 Municipal by-elections

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

- if the Electoral Commission does not declare the result of the election of a municipal council or the results of an election in a district management area or a ward within the time period as is specified in terms of the Electoral Commission Act<sup>152</sup>

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

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

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

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

<sup>152</sup> 51 of 1996.

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

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

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

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

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

<sup>155</sup> See the Structures Act s 25(5).

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

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

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

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

### **12.7.1 The provisions of the Electoral Commission Act**

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

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<sup>157</sup> See the Structures Act s 25(7).

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

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

<sup>160</sup> See the Constitution s 181(1)(f).

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

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

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

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<sup>161</sup> See *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC).

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

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

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

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

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

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

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<sup>162</sup> Paras 22-31 at 936-940.

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

<sup>164</sup> See the Constitution s 190(1)(a)-(c).

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

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



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

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

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

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

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<sup>167</sup> See the Electoral Commission Act (ECA) ss 3 and 5 respectively.

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

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

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

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

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



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

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

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<sup>173</sup> See the ECA ss 3 and 4.

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

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

<sup>176</sup> See the ECA s 7.

<sup>177</sup> For more detail see the ECA s 9.

<sup>178</sup> See the ECA s 12.

<sup>179</sup> Refer to the ECA ss 13 and 14.

<sup>180</sup> See the ECA s 15(1)-(4).

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

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

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

### **12.7.2 The provisions of the Electoral Act**

All democratic states in the world have their own specific rules to regulate the elections of the various legislative bodies relevant to such a state. The modern South African state is no different in this regard. The Electoral Act<sup>188</sup> was enacted to regulate elections of the National Assembly, provincial legislatures and municipal coun-

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<sup>181</sup> See the ECA s 15A.

<sup>182</sup> Refer to the ECA s 16.

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

<sup>184</sup> See the ECA s 17.

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

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

<sup>187</sup> Refer to the ECA s 23.

<sup>188</sup> 73 of 1998.

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

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

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

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

### **12.7.3 The Local Government: Municipal Electoral Act, 2000**

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

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

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

<sup>191</sup> See the Electoral Act Chs 2-7 as well as Schs 1 and 2.

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

The MEA addresses broadly the following:

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

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

## 12.8 Conclusion

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

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<sup>192</sup> See the MEA Chs 2-7.

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

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

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

## The role and importance of the institution of traditional leadership in local government affairs

### 13.1 Introduction

During the overall restructuring and transformation of the South African constitutional dispensation, strong arguments were forwarded to include and protect the institution of traditional leadership and traditional law (also known as customary law). Following various discussions and consultations, both the interim Constitution of 1993 and the final Constitution of 1996 have made provision for the recognition and the role of traditional leaders.<sup>1</sup>

Although constitutionally recognised and protected, the exact role and involvement of traditional leaders and their participation in the three spheres of government, especially in local government, are unclear and have already caused some conflicts between traditional leaders and government structures.<sup>2</sup> In order to address some of these disputes and to clarify the position, national government has embarked on a process of investigation and consultation, with a final objective being to rationalise legislation and implement new policies pertaining to the role and participation of traditional leaders in official governmental structures.<sup>3</sup> From an African, and more

<sup>1</sup> See the interim Constitution of 1993 ch 11 and the Constitution ss 211 and 212.

<sup>2</sup> Refer to *Contralesa v Minister of Local Government*, EC 1996 (2) SA 898 (TkS). In this case the applicant's essential complaint was that the application of the LGTA to rural areas in the Eastern Cape would deprive traditional leaders of their powers. The court disagreed with the argument and held that the applicant did not have *locus standi* to bring the particular application. See para E-G at 905. See also *ANC v Minister of Local Government and Housing KZN* 1998 (3) SA 1 (CC), where the court held that transition to democratic local government was to take place in terms of the LGTA, which recognised that in the interim phase of transition, areas over which traditional leaders had had authority could be included within the areas of jurisdiction of elected local authorities. This had given rise to a potential tension between democratic local government and traditional leaders in the interim Constitution had sought to resolve this tension in part through the mechanism of s 182. See para A-C at 12.

<sup>3</sup> See the draft discussions document: *Towards a White Paper on Traditional Leadership and institutions: a publication of the department of Provincial and Local Government* April 2000 Pretoria.

specifically a South African perspective, it would be irresponsible and unfortunate if the importance of traditional leadership and traditional law were to be overshadowed by political short-sightedness or the failure to provide for their proper recognition and inclusion. This importance is particularly relevant in the new local government structures, where traditional leaders could have significant influence over their local communities. In order to understand the role and importance of the institution of traditional leadership, it is necessary to examine briefly the historical background of such institutions, and thereafter to evaluate the current legislative protection given to such institutions in the new governmental structure.

### **13.2 A brief historical overview of traditional leadership in South Africa**

Traditional leadership is an institution that has developed over hundreds, if not thousands, of years in Africa. Prior to the introduction of colonialism, social organisation in South Africa was characterised by many tribal regimes that existed and operated within certain areas of jurisdiction. Such tribal regimes were primarily based on the principles of patriarchy and inscriptive norms. Each tribe was led by a particular traditional or tribal leader, who was the central figure in that tribe.<sup>4</sup> The tribal leader or traditional leader was further vested with the highest authority in a particular territory. He had various functions, which he did not exercise as an autonomous individual but rather in collaboration with a so-called “tribal council”, which was representative of the ordinary people of that tribe. The traditional leader played a very important role within tribal customs. He was seen not only as a link between the people of the tribe and their ancestors, but also as a spiritual, cultural and judicial leader and the custodian of the values of his community. The traditional leader was often regarded as the co-ordinator of many aspects of everyday life of his people, the curator of community dreams and aspirations and the protector of harmony between the members of his community in respect of their natural, spiritual, social, physical and economical environment. The traditional leader had the final authority to rule over his tribe, and he was considered by that tribe to be functioning in the role of both father and son.<sup>5</sup> Often his leadership and traditional authority served as a bonding factor for the community, as he was responsible for the common good of all.

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<sup>4</sup> This is still applicable today.

<sup>5</sup> He was father to his people and son of the ancestors of his people.



Traditional leaders ruled over their tribes in accordance with the principles of African democracy and accountability. Their reign was similar to that of a king in council.<sup>6</sup>

With the dawn of colonialism in Africa, the traditional African government was systematically weakened, and the strong and influential bond between traditional leaders and their tribe members was gradually eroded. Many African people were displaced and were evicted from their properties, which in turn caused severance between tribal members and tribal leadership. Another factor which also impacted severely on the tribal relationship, especially between members and leadership, was the rise of urbanisation. Many people, mostly men, left their tribal villages for bigger cities in a quest for work and ultimately a better life.<sup>7</sup> Under colonial rule in South Africa and later National Party domination, new legislation increasingly strengthened tribal divisions and provided traditional leaders with powers and roles they had not possessed before. The institution of traditional leadership was sidetracked to a form of indirect government. General governmental affairs vested in the ruling government of the day, while traditional authorities had control over only predefined traditional or customary affairs.<sup>8</sup> In essence, the laws mentioned above created a system of local self-government which placed traditional leaders in a bureaucratic role. Chieftainship became reduced to a public office which was a mere creature of statute and which made the appointment, suspension or removal of chiefs subject to political manipulation.<sup>9</sup>

### **13.3 Important considerations relating to traditional leadership from a South African perspective**

In order to understand the importance and special role traditional authorities can and should play within government structures, some important considerations should be noted, as outlined below.

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<sup>6</sup> See the draft discussion document on Traditional Leadership and Institutions (2000) at 10 hereafter referred to as the discussion document on Traditional Leadership. The principles of African democracy are of significant importance to the South African legal system. For more on this see *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

<sup>7</sup> It is submitted that not only the colonial policies but also modern urbanisation trends combined caused ancient Southern African societies to be disrupted.

<sup>8</sup> See, eg, the Black Administration Act 38 of 1927, the Black Authorities Act 68 of 1951 and various pieces of legislation of black independent states or self-governing territories.

<sup>9</sup> See the discussion document at 11 and 13. It is safe to say that the successive colonial and later NP governments eroded Traditional Leadership as an institution and compromised its traditional values within the African concept. Although modern South Africa cannot go back to pre-colonial times, there are still definite advantages for the institution of Traditional Leadership in the 21st century South Africa.

### **13.3.1 *The structure of traditional leadership***

Originally traditional leadership was rooted in the notion of a kingship or kingdom. During colonial rule a tendency developed to refer to African rulers as chiefs rather than kings. This tendency obscured the hierarchy of leadership that existed in pre-developed African communities and led to the demise of the formerly strong traditional practices and customs. History indicates that the king in the African context was in principle not an autocrat. He ruled by popular mandate and took decisions after consultation with his councillors.<sup>10</sup> The king's council comprised the headmen and elders, who were normally notable leaders in the respective communities.<sup>11</sup> With the introduction of various legislative reforms, most notably the Black Administration Act,<sup>12</sup> the African system of governance was changed and transformed, and new structures were put in place of old ones.<sup>13</sup> Under the Union of South Africa, the Governor-General became something of a supreme chief over all tribal entities, which position gave him the power to create and divide tribes and to appoint or dismiss any person he wished as a chief or headman. In 1961 this role of "supreme chief" was assumed by the president of the Republic of South Africa.<sup>14</sup>

### **13.3.2 *The appointment/recognition of traditional leaders***

According to customary law, the appointment or recognition of a traditional leader was done mostly through various laws of succession. In principle there were strong hereditary customs along only male lines.<sup>15</sup> In modern South Africa there are many sets of legislation and procedures that are still applicable and used by the different provincial authorities to appoint traditional leaders to different positions of power.<sup>16</sup> As was stated above, the original power to appoint traditional leaders, which was vested in the supreme chieftaincy, was later assigned to the Governor-General by the Black Administration Act and reassigned to the President of South Africa in 1961

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<sup>10</sup> However, there are certain kings that acted autocratically and ruled as dictators.

<sup>11</sup> Headmen were usually members of the extended royal family and were each assigned a section of the tribe to rule on behalf of and with the assistance of the king. The royal family thus extended its power vertically and horizontally. The concept of democratic elections was foreign to a system of traditional rule.

<sup>12</sup> 38 of 1927.

<sup>13</sup> See, eg, the tribal authorities in the former Qwaqwa.

<sup>14</sup> Under the 1993 and 1996 Constitutions, these powers were assigned to the premiers of the nine provinces. See the discussion document on Traditional Leadership at 14.

<sup>15</sup> Females were appointed as regents for their male sons until they have reached the age of maturity. These practices are still followed today. See the discussion document at 25.

and lastly to the homeland governments upon their attainment of self-governing status and to the TBVC states upon receiving independence. Outside self-governing territories and TBVC states, traditional leaders were still being appointed by the South African president. It is commonly accepted that a traditional leader begins his term of office upon official appointment, which is then followed by a customary inauguration.<sup>17</sup> During 1994, under the IC, the power to appoint traditional leaders was assigned to the relevant premiers of six provinces in South Africa, where the institution of traditional leadership was relevant.<sup>18</sup>

Three institutions play a role in the appointment of a traditional leader:

- the customary institutions, which are normally the various royal families
- administrative institutions, for example the provincial government concerned
- statutory institutions, which are responsible for the official appointment.

As indicated above, succession to traditional leadership was, and still is, gender specific. Succession is hereditary in the male lines only, with the exception of the so-called Modjadjis, where succession is hereditary in the female lines. Ordinarily, the identification of the successor is determined by the relevant customary laws of the tribe or the community concerned. If the identified successor is still a minor, an acting chief, who can be a male or female, is appointed to rule, until the minor has reached maturity and can take over the reign himself. With regard to retirement of traditional leaders, it is interesting to note that customary law does not make provision for voluntary retirement.<sup>19</sup>

It is clear from the abovementioned that there are no uniform procedures in the appointment and recognition of traditional leaders. This situation is attributed largely to different norms, values, customs and legislative requirements in different provinces. A much clearer and uniform policy is needed. Apart from a new policy, many com-

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<sup>16</sup> As was indicated above, most powers concerning traditional authorities were assigned in 1994 to the various premiers of the nine provinces in South Africa. For more details on the provisions in each province see the discussion document at 25-28.

<sup>17</sup> It should be pointed out that according to current legislation in South Africa traditional leadership is divided into three categories. There are kings or so-called "paramount chiefs", and then there are chiefs and lastly headmen. These titles sometimes have a different meaning in the different provinces.

<sup>18</sup> The six provinces are: The Eastern Cape, Free State, KwaZulu-Natal, Mpumalanga, Limpopo and the North West Province. See the discussion document on Traditional Leaders at 25-28.

<sup>19</sup> However, in some provinces, eg the Eastern Cape and North West, legislation makes provision for the retirement of traditional leaders.

munities have expressed a strong wish to retain their customary practices; since such practices have a very valuable role to play in modern South Africa.<sup>20</sup>

### **13.3.3 The role of women and children in traditional leadership**

Traditionally South African societies were defined along patriarchal lines, which means that the head of the household was a man, and that his family – wife/wives and children were subordinate to his authority.<sup>21</sup> In tribal relationships, the wives were responsible for the general welfare of the family, which included the upbringing of children. Furthermore, women were responsible for the co-ordination of family rituals and functions.<sup>22</sup>

The colonial and National Party regimes as well as the unprecedented challenges and demands of urbanisation in the 21st century significantly altered the role that women played in traditional communities. The creation of African reserves and, more particularly, migrant labour practices left many women on their own and with many of the responsibilities formerly carried by their husbands. This state of affairs has caused many women in traditional communities to challenge modern practices, which still hinge on discrimination between women and men.<sup>23</sup>

Apart from male domination, age and seniority also played an important part in African traditional culture. The youth were raised knowing that they must respect and honour their seniors. Apart from performing small household tasks, most children were left to fend for themselves. In traditional communities minors were seen to belong to their families firstly, but secondly also to the community as a whole. If parents were unable to care for their children, the community would take over such responsibilities.<sup>24</sup> Customary law also prohibited children from succeeding in posi-

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<sup>20</sup> See the discussion document on traditional leaders at 29.

<sup>21</sup> For many years the position in western countries was very similar to this position.

<sup>22</sup> Refer to the discussion paper on traditional leaders at 33.

<sup>23</sup> Probably the best-known example of such a challenge is directed at the traditional succession laws and customs which discriminates towards women. Accordingly, both the Constitution s 9 and the Promotion of Equality and Prevention of Unfair Discrimination Act prevent any discrimination based on sex or gender. The province of KwaZulu-Natal was the first province where women were acknowledged officially as leaders in predominantly patriarchal traditional communities. During 1990 the AmaKhosi and Iziphakanyiswa Act 9 of 1990 was passed, which provided for any person – including women – to be appointed as an inkosi or siiphakanyiswa.

<sup>24</sup> This practice prevented homeless and orphaned children in traditional communities. This has changed radically and is one of the most concerning issues in the social balance of the broad South African community.

tions of traditional leadership, and often regents were appointed to act on the minor's behalf until he reached maturity.<sup>25</sup>

#### **13.3.4 Party political affiliation and the remuneration of traditional leaders**

Prior to the Union of South Africa in 1910, the former colonial governments had tried to reconstruct the chieftainship and make it conform to colonial rule.<sup>26</sup> Military actions took place in some areas, while in others treaties with tribal authorities were concluded, which allowed for limited tribal autonomy in certain areas. In 1910 and according to the terms of the South African Act of 1909, the Governor-General was conferred as a supreme chief over all African tribes. This led to a gradual reduction of traditional leaders to merely one element in an overall bureaucratic hierarchy.<sup>27</sup> In response to the formation of the Union, black Africans began to express certain political demands, and the formation of the African National Congress (ANC) in 1912 represented the first political instrument by which these new demands were articulated. Although the ANC was organised across ethnic and tribal lines, it nonetheless maintained respect for traditional leadership as an institution.<sup>28</sup> Suffice it to say that in modern South Africa the participation and inclusion of traditional leadership is strongly rooted in South African political history, and the final Constitution affords every citizen the right to make free political choices, which includes the right to form a political party and to participate in political activities.<sup>29</sup>

Apart from their early political inclusion, traditional leaders also enjoyed a position of unique privilege and authority regarding their own remuneration. A traditional leader was regarded as a repository of wealth and a dispenser of gifts. The traditional leader and his family normally took precedence in tribal affairs such as rituals or feasts. The traditional leader also had first choice of land to build his house and graze his cattle. All things considered, the traditional leader was the richest man in

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<sup>25</sup> Today the Constitution prohibits unfair discrimination based on age, and customary law must ensure compliance to the supreme law of the state. See also the discussion document on Traditional Leaders at 35.

<sup>26</sup> Often this objective was pursued through military conquest. The so-called "frontier wars" were good examples of such military actions.

<sup>27</sup> See the discussion document on Traditional Leaders at 36.

<sup>28</sup> When the ANC adopted its first Constitution in 1919 it provided for a forum within its congress known as the Upper House of Chiefs. Through this forum, traditional leaders would have access or representation in the highest political decision-making structure. Apart from showing respect and honouring the status of traditional leaders, the Upper House of Chiefs also served as a mechanism to obtain political consent of all ethnic groupings represented in the political organisation. Refer to the discussion document on Traditional Leaders at 36.

<sup>29</sup> See the Constitution s 19(1)(a)-(c).

his tribe.<sup>30</sup> The most important source of wealth of a traditional leader was his cattle. Through the introduction of new political structures, traditional customs were reformed, and some of the traditional leaders' powers were taken away. To a large extent traditional leaders became instruments in the hands of the governing administrations, for which role they were also remunerated. Thus, with the new democratic developments, the manner of remuneration of traditional leaders has assumed new dimensions. Traditional leaders are now paid by government on a uniform basis without recognition of the size or respect of the tribe.<sup>31</sup>

#### **13.4 The new legislative framework and requirements regarding traditional leadership**

In light of its historical background, traditional leadership as a traditional institution has an important role to play in many rural communities in South Africa. With the complete restructuring of South Africa's constitutional system, traditional leaders insisted on inclusion and protection of not only customary law but also traditional leadership itself. Accordingly, the final Constitution specifically accords constitutional recognition to the institution, status and role of traditional leadership.<sup>32</sup> Although the institution, status and role of traditional leadership are recognised, such aspects are subject to the Constitution in general. However, the Constitution is not clear on exactly what role traditional leaders should play within the overall governmental structure. In debating the role of traditional leaders, two viewpoints have emerged. According to the so-called modernistic view, traditional leaders should play only a ceremonial and advisory role in governmental structures. Traditionalists, on the other hand, argue that traditional leaders should participate directly in all activities of government.<sup>33</sup> Closer investigation of the constitutional text reveals that the Constitution favours the modernistic view and that, although traditional leadership is recognised and protected, it is subject to the Constitution and plays only an advisory role in the new democratic structures.

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<sup>30</sup> Because of his privileged position, traditional leaders were also punished more severely than ordinary tribesmen, when they committed certain offences.

<sup>31</sup> See the Remuneration of Public Office Bearers Act 20 of 1998, which determines the remuneration of *inter alia* traditional leaders. It is important to note that generally only kings and chiefs are paid remuneration, and not headmen. See the discussion document on traditional leaders at 38.

<sup>32</sup> See the Constitution ss 211 and 212.

<sup>33</sup> Refer to Devenish (1998) 295.



### 13.4.1 *The basic constitutional foundation regarding traditional leadership*

As was stated above, the final Constitution specifically recognises aspects of traditional leadership. In this regard, section 211 of the Constitution provides for the following:

- The institution, status and role of traditional leadership according to customary law are recognised, subject to the Constitution.<sup>34</sup> Not all aspects regarding traditional leadership are included; only the aspects that are recorded or part of customary law are recognised. A full investigation or evaluation of customary law principles regarding traditional leadership is therefore needed. Furthermore, the Constitution is very clear that the recognition of the institution, status and role of traditional leadership is not *cart blanche*, but is subject to the Constitution itself.<sup>35</sup>
- The Constitution further determines that a traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which legislation and customs would also include amendments or repeal of such legislation or customs.<sup>36</sup> The Constitution in this instance thus allows for the functioning of a traditional authority which is subject to legislative and customary regulations.<sup>37</sup>
- When disputes arise with regard to traditional leadership, the Constitution obligates the courts to apply customary law when that law is applicable.<sup>38</sup> Traditions

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<sup>34</sup> See the Constitution s 211(1).

<sup>35</sup> This is of course a further outflow of the already accepted and confirmed supremacy principle of the Constitution. See the Constitution s 2. No principles or requirements regarding traditional leadership will be acceptable and enforceable if they are not included in customary law and in complete compliance with all relevant constitutional principles. This would be inclusive of all constitutional requirements, including the Bill of Rights. Any conduct or law that is inconsistent with the Constitution is invalid.

<sup>36</sup> See the Constitution s 211(2).

<sup>37</sup> As the Constitution is silent on what type of legislative regulation is supposed, it is assumed and submitted that both national and provincial legislation can be applicable in these instances. It must also be pointed out that indigenous law and customary law, cultural matters and traditional leadership, subject to the Constitution ch 12, are all matters of functional areas of concurrent national and provincial legislative competence. Thus, both national and provincial governments can legislate over such matters. See the Constitution Sch 4 Part A. See also the case of *Ex parte Speaker of the KZN Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa amendment bill, 1995 1996 (4) SA 653 (CC)*. The case concerned the re-enactment and amendment of the KwaZulu Amakhosi and Iziphakanyiswa Act of 1990. The Act made provision for *inter alia* the payment of a monthly salary, allowances and other privileges to the King of the Zulus. The court held that such payments and allowances to traditional leaders fell within the competence of the provincial legislature. At para 21 at 663F. Refer also to the case of *President of Bophuthatswana v Milsell Chrome Mines (Pty) Ltd 1996 (3) SA 831 (BS)* in which it was confirmed that under the interim Constitution areas such as indigenous law and traditional authorities fell under Sch 6 functional areas of provincial legislative competence. See paras D-F at 844.

<sup>38</sup> See the Constitution s 211(3).



and practices of customary law regarding traditional leadership are therefore specifically protected by the Constitution. However, such customary law must be relevant to the circumstances and must be in compliance with the Constitution as supreme law and any other legislation that specifically deals with customary law. The Constitution hereby allows for customary law to be less valued than new legislative prescriptions, be they constitutional or other legislative requirements.

Apart from recognising the role of traditional leadership, the Constitution also determines that national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.<sup>39</sup> It must be pointed out that the Constitution provides for the possible role for traditional leadership only at local level and on matters affecting local communities; such constitutional possibilities are not envisaged for national or provincial spheres of government. In compliance with this constitutional provision, the Local Government: Municipal Structures Act provides for the participation of traditional leaders in municipal councils.<sup>40</sup>

The Constitution further states that in order to deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities that still observe a system of customary law, national or provincial legislation may provide for the establishment of houses of traditional leaders, and only national legislation may establish a council of traditional leaders.<sup>41</sup> Within the authority given in the Constitution, a national house and various provincial houses of traditional leaders have been established.<sup>42</sup>

#### **13.4.2 The formal recognition and establishment of traditional leadership**

In furtherance of the constitutional mandate, national parliament enacted the Traditional Leadership and Governance Framework Act<sup>43</sup> during 2003. The purposes of the Act are to provide for the recognition of traditional communities, the establishment and recognition of traditional councils, the establishment of a statutory frame-

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<sup>39</sup> See the Constitution s 212(1). The Constitution does not allow provincial legislation to provide for the role of traditional leadership. Through national legislation, a uniform role for traditional leadership is to be established.

<sup>40</sup> See the Structures Act s 81.

<sup>41</sup> See the Constitution s 212(2)(a)-(b).

<sup>42</sup> For more detail see the Council of Traditional Leaders Act 10 of 1997, as well various provincial Acts such as The House of Traditional Leaders Act 1 of 1995 (Eastern Cape), The House of Traditional Leaders Act 6 of 1994 (Free State), The House of Traditional Leaders Act 4 of 1995 (Mpumalanga), The House of Traditional Leaders Act 12 of 1994 (North-West) and The House of Traditional Leaders Act 7 of 1994 (KwaZulu-Natal).

<sup>43</sup> 41 of 2003, hereafter referred to as the TLGFA.

work for leadership positions within the institution of traditional leadership and for aspects such as the general recognition, functions and roles, remuneration, dispute resolution and a code of conduct for traditional leaders.<sup>44</sup> In general, the Act seeks to fulfil and enhance the broad constitutional protection of the institution of traditional leadership. Apart from the confirmation that the institutions of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights, the Act also envisages that such institutions must:

- promote freedom, human dignity and the achievement of equality and non-sexism
- derive their mandates and primary authority from applicable customary law and practices
- strive to enhance tradition and culture
- promote nation building and harmony and peace amongst people
- promote the principles of co-operative governance in their interaction with all spheres of government and organs of state and
- promote an efficient, effective and fair dispute-resolution system, and a fair system of administration of justice, as envisaged in applicable legislation.

The Act specifically provides for aspects concerning traditional communities and traditional councils, leadership positions within the institution of traditional leadership, houses of traditional leaders, the roles and functions of traditional leadership and also aspects relating to dispute resolution and the commission on traditional leadership disputes and claims. Although the Act is of relevance to all three spheres of government, the following aspects are of particular importance for all local government institutions:

- *Partnerships between municipalities and traditional councils* The Act specifically determines that the national government and all provincial governments must promote partnerships between municipalities and traditional councils through legislative or other measures.<sup>45</sup> Any such partnership between a municipality and a traditional council must be based on the principles of mutual respect and the recognition of the status and roles of the respective parties. The partnership must also be guided by and based on the principles of co-operative governance. It is further permitted for a traditional council to enter into a service delivery agreement

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<sup>44</sup> See the long title of the TLGFA.

<sup>45</sup> Refer to s 5(1) of the TLGFA.

with a municipality in accordance with the Local Government Municipal Systems Act and any other applicable legislation.<sup>46</sup> The obligation that any partnership between a municipality and a traditional council should be guided and based on the principles of co-operative governance is somewhat confusing. According to the Constitution, the principles of co-operative government are applicable to all spheres of government and all organs of state within each sphere.<sup>47</sup> Municipalities have been confirmed as a distinctive sphere of government and undoubtedly fall under the obligations set out in section 41 of the Constitution. Although institutions of Traditional Leadership or a traditional council could be classified as an organ of state under the Constitution, they are arguably not organs of state within a sphere of government.<sup>48</sup> In light of the above, it is submitted that the extension of the principles of co-operative government to the partnership between a municipality and a traditional council could well be misguided and unconstitutional. It is also this writer's submission that the constitutional directive incorporated in section 41(2) of the Constitution, does not allow for the extension of the principles of co-operative government to partnerships between municipalities and traditional councils.<sup>49</sup>

- *Referral of Bills to the National House of Traditional Leaders* Under the Act, any parliamentary Bill pertaining to customary law or customs of traditional communities must, before it is passed by the house of parliament where it was introduced, be referred to the National House of Traditional Leaders for its comments. A provincial legislature or a municipal council may adopt the same procedure in respect of the referral of a provincial Bill or a draft by-law to a provincial house of traditional leaders or a local house of traditional leaders.<sup>50</sup>
- *Guiding principles for the allocation of roles and functions of traditional leadership* According to the new legislative provisions, the national government or a provincial government may through legislative or other measures provide a role for traditional councils or traditional leaders. A role may be provided in respect of

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<sup>46</sup> Read ss 5(2)-(3) of the TLGFA together with Act 32 of 2000 as amended.

<sup>47</sup> See s 41(1) of the Constitution.

<sup>48</sup> Read s 239 of the Constitution together with the case of *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC).

<sup>49</sup> S 41(2) of the Constitution determines that an Act of parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations and to provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. Traditional councils are not part of the hierarchy of governmental institutions.

the following issues: arts and culture; land administration; agriculture; health; welfare; administration of justice; safety and security; the registration of births, deaths and customary marriages; economic development; environment; tourism; disaster management; the management of natural resources and the dissemination of information relating to government policies and programmes.<sup>51</sup> The Act further requires that whenever an organ of state within the national government or a provincial government considers allocating a role for traditional councils or traditional leaders, that organ of state must:<sup>52</sup>

- seek the concurrence of either the minister responsible for traditional leadership matters or the MEC responsible for traditional affairs in the province concerned;
- consult with the relevant structures of traditional leadership and SALGA;
- ensure that the allocation of a role or function is consistent with the Constitution and applicable legislation;
- take the customary law and customs of the respective traditional communities into account;
- strive to ensure that the allocation of a role or function is accompanied by resources and that appropriate measures for accounting for such resources are put in place;
- ensure, to the extent that it is possible, that the allocation of roles or functions is implemented uniformly in areas where the institution of traditional leadership exists; and
- promote the ideals of co-operative governance, integrated development planning; sustainable development and service delivery through the allocation of roles and functions.

When an organ of state has allocated a role or function to a traditional council or traditional leaders, that organ of state is obligated to monitor the implementation of the function or role and must also ensure that the implementation of the function is consistent with the Constitution and is indeed performed.<sup>53</sup>

(d) *Code of conduct for traditional leaders and traditional councils* Every traditional leader and members of a traditional council must adhere to a specific code of

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<sup>50</sup> Read s 18 of the TLGFA.

<sup>51</sup> See s 20(1)(a)-(n) of the TLGFA.

<sup>52</sup> See s 20(2)(a)-(g) of the TLGFA.

<sup>53</sup> See s 20(3)-(4) of the TLGFA.

conduct. A provincial code may also be prescribed to complement the national code.<sup>54</sup>

### **13.4.3 Legislative requirements regarding traditional leadership under the Local Government Transition Act**

From the beginning of the restructuring process of Local Government, the importance and role of traditional leadership was never overlooked. The LGTA was enacted mainly to facilitate the restructuring of the then existing municipal government system. During 1995, proclamation R 65 was issued to describe the role of traditional authorities in local government. Both transitional local councils and transitional representative councils provided for *inter alia* the inclusion of traditional authorities within such councils.<sup>55</sup> It should again be noted that a transitional council was deemed to be the successor-in-law of the disestablished local authority and that all existing regulations, bylaws, resolutions etcetera of such authorities remained in force until amended or repealed by the TC.<sup>56</sup> It should also be pointed out that provincial constitutions may also provide for the institution, role, authority and status of a traditional monarch.<sup>57</sup> Provinces are further afforded concurrent legislative competencies together with national government in respect of traditional authorities.<sup>58</sup>

Before the introduction of the 1996 Constitution, the Black Administration Act,<sup>59</sup> the Black Authorities Act<sup>60</sup> and legislation issued in the various former “independent” states and self-governance territories described the various functions of traditional authorities. Some of these functions were similar to local government functions. The various so-called “independent states” and “self-governing territories” also issued their own legislation in this regard. Due to a lack of funding and infrastructure and being unaware of these functions, few traditional authorities were able to exercise their powers in this regard. New local government legislation was issued after the 1993 Constitution to *inter alia* provide for different forms of local government. The pre-1993 legislation was never repealed, however, and exists alongside the 1996

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<sup>54</sup> Read s 27(1)-(2) of the TLGFA together with the schedule to the Act which determines the general conduct of a traditional leader and of a traditional council. See items 1 and 2 of the schedule.

<sup>55</sup> See the LGTA ss 8 and 9.

<sup>56</sup> Refer to the LGTA s 14.

<sup>57</sup> Refer to the Constitution s 143(2).

<sup>58</sup> In this regard the Constitution Sch 4 Part A refers to indigenous law and customary law and traditional leadership. However, these competencies are subject to the Constitution ch 12.

<sup>59</sup> 38 of 1927.

<sup>60</sup> 68 of 1951.

constitutional provisions and the Local Government Transition Act.<sup>61</sup> Under the Black Administration Act traditional leaders had to ensure the enforcement of laws, orders and the government's instructions relating to the administration within their areas. They were therefore "in control" of the people in their area. Various typical local government functions were identified and regulated by the Act.<sup>62</sup>

The Black Authorities Act again provided for the institution of tribal communities and also regional and territorial authorities. Regional authorities had the general function of advising and making representations to the government on all matters affecting the general interests of Blacks within specific jurisdictions, such as maintenance and running of educational institutions.<sup>63</sup> The transition to a new constitutional order changed the old position substantially, and it determined that the main functions of local governments were to provide essential services such as access to water, sanitation, electricity, primary health services, housing and a safe and health environment to all people in their areas. The inclusion of traditional leadership was attributed mainly to the interim Constitution,<sup>64</sup> which stated that:<sup>65</sup>

- (1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.
- (2) Indigenous law shall be subject to regulation by law.

The interim Constitution also confirmed that a traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government referred to in chapter 10 shall *ex officio* be entitled to be a member of that local government and shall be eligible to be elected to any office of such local government.<sup>66</sup> This constitutionally recognised entitlement of traditional leaders signalled important protection for such leaders. In the case of

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<sup>61</sup> 209 of 1993.

<sup>62</sup> Scheepers *et al* "Constitutional provisions on the role of traditional leaders and elected local councillors at rural level" (1998) *Obiter* at 67.

<sup>63</sup> See the Act s 5.

<sup>64</sup> 200 of 1993.

<sup>65</sup> See the Constitution ss 181 and 182.

<sup>66</sup> See the interim Constitution s 182.

the *ANC v Minister of Local Government and Housing, KZN*<sup>67</sup> the Constitutional Court was confronted with exactly such protection of the role of traditional leaders in local structures. The court held that section 182 was an important constitutional entitlement for traditional leaders, whose customary authority and role were being affected by the transition to democracy.

Construed purposively, therefore, section 182 meant that traditional leaders were entitled to *ex officio* representation on local government in their areas. This entitlement arose once elections had been held for local government and once the procedural requirements contained in section 182 had been met. It further ensured that traditional leaders were entitled to representation on a council without having to stand for election. It also ensured that for the period of transition the traditional leaders who had previously been exercising the powers and performing the functions of local government would be represented on the newly established institutions which would now be responsible for those functions.<sup>68</sup> The court also held that the very purpose of including traditional leaders in local government bodies in areas where they lived was to ease the transition from one form of local government to another. Furthermore, the reference to “elected local government” meant that such traditional leaders could be included in a local government only after such government had been elected. The phrase “elected local government” was adopted to make it plain that traditional leaders did not have a constitutional entitlement to membership of local government until after the first elections had been held. Traditional leaders were to be given an *ex officio* entitlement to membership of local government bodies only in the interim phase contemplated by the Local Government Transition Act and not in the pre-interim phase, when elections had not yet been held. Given the restrictions on the number of nominees and the fact that the majority of members of the local government bodies would still be determined by elections, the fact that there were some nominees on those local government councils who were not “elected” did not result in such councils’ not qualifying as elected local governments.<sup>69</sup>

When the interim Constitution was repealed by the final Constitution on 4 February 1997, the final Constitution’s provisions replaced those of the IC. Apart from sections 211 and 212, the final Constitution under its transitional arrangements also deter-

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<sup>67</sup> 1998 (3) SA 1 (CC).

<sup>68</sup> See para 19 at 11-12.

<sup>69</sup> Refer to para 30 at 15.



mined that a traditional leader of a community who is observing a system of indigenous law and who is residing on land within the area of a transitional local council, transitional rural council or a transitional representative council, as was referred to in the LGTA, 1993, and who has been identified as set out in section 182 of the IC, is *ex officio* entitled to be a member of that council until 30 April 1999, or until an Act of parliament provides otherwise.<sup>70</sup> These provisions thus effectively allow for the participation of traditional leaders in the transitional structures of local governments. With the local government elections in December 2000 and the completion of the new national legislative framework concerning local government, the transitional legislative requirements came to an end. The role and inclusion of traditional leaders, especially within the new local government structures, must therefore be determined in terms of the provisions of the Constitution of 1996 and the Municipal Structures Act, which allows for the participation of traditional leaders in the new local government dispensation. In anticipation of the final inclusion of traditional leadership in local government structures, the White Paper on Local Government also identified certain aspects of importance. The White Paper emphasised the fact that chapter 7 and chapter 12 of the final Constitution had to be reconciled with one another. On one hand chapter 7 provides for the establishment of elected local governments across the country, but on the other chapter 12 again recognises traditional leadership as an institution.<sup>71</sup> The White Paper also identified various functions of traditional leaders. Such functions include the following:<sup>72</sup>

- acting as head of the traditional authority, and thus exercising limited legislative powers and certain executive and administrative powers
- presiding over customary law courts and maintaining law and order
- consulting with traditional communities through imbizo/lekgotla
- assisting members of the community in their dealings with the state
- advising government on traditional affairs through the Houses and Council of Traditional Leaders
- convening meetings to consult with communities on needs and priorities and providing information

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<sup>70</sup> See the Constitution Sch 6 Item 26(1)(b).

<sup>71</sup> The Constitution ss 151(1) and 212.

<sup>72</sup> See the White Paper on Local Government (1998) at 95-96.

- protecting cultural values and providing a sense of community in their areas through a communal social frame of reference
- being the spokespersons generally of their communities
- being symbols of unity in the community
- being custodians and protectors of the community's customs and general welfare.

Their role in the development of the local area and community includes:

- making recommendations on land allocation and the settling of land disputes
- lobbying government and other agencies for the development of their areas
- ensuring that the traditional community participates in decisions on development and contributes to development costs
- considering and making recommendations to authorities on trading licences in their areas in accordance with law.

After a thorough evaluation of the various functions of traditional leaders as identified in the White Paper, one comes to realise that traditional leadership as an institution has an important role to play in the new local government system of our country. In this new structure, both traditional and elected local government representatives will be combined into a unique co-operative governance model. The role of traditional leaders also includes attending and participating in council meetings and advising their councils on the needs and interests of their communities. In order to fulfil their responsibilities, traditional leaders must be informed and consulted regarding municipal programmes and projects within their traditional areas.<sup>73</sup> These aspects are now more clearly addressed in terms of the Municipal Structures Act.

The White Paper took a minimalistic approach to traditional leaders in local government matters. Other issues such as customary courts, customary law, communal tenure and land trusteeship were left to national government to regulate.<sup>74</sup> The White Paper finally indeed recognised that although there would be elected local governments in all areas, including traditional authority areas, the traditional leaders, being closest to the people, still have important roles to play. Not all questions on the issue of traditional leaders were addressed by the White Paper. Issues such as the struc-

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<sup>73</sup> See LGIS no 2 'District Councils' (1999) at 25.

<sup>74</sup> See Scheepers *et al* (1998) *Obiter* fn 62 at 84.

ture and role of traditional leadership, remuneration, tribal courts, land tenure and the role of women, to name but a few, should be dealt with under other legislation.<sup>75</sup>

#### **13.4.4 Participation of traditional leaders according to the Municipal Structures Act**

In compliance with the constitutional mandate that national legislation may provide for a role of traditional leadership as an institution at local level on matters affecting their local communities, the Municipal Structures Act determines the following:

- Traditional authorities that observe a system of customary law in the area of a municipality may participate through their leaders in the proceedings of the council of that municipality, and those traditional leaders must be allowed to attend and participate in any meeting of the council.<sup>76</sup> It is also of importance to note that traditional leaders must be allowed attendance and participation *in any meeting*<sup>77</sup> of the council. Because traditional authorities, when properly identified and after compliance with all the legislative requirements, are afforded constitutional protection to participate, such institutions are regarded as part and parcel of the relevant municipal council, and they may not be excluded from any council meeting. This will surely also include special meetings of the council which might not necessarily be open for other interest groups.

Before traditional authorities may participate through their leaders, such leaders must first be properly identified. In this regard, the Structures Act determines that the MEC for local government in the province must identify the traditional leaders who may participate in the proceedings of that municipal council. Such identification must be in accordance with Schedule 6 of the Act and should be published by notice in the relevant *Provincial Gazette*.<sup>78</sup>

It is further also a requirement that the number of traditional leaders that may participate may not exceed 20% of the total number of councillors in that council.

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<sup>75</sup> Such other legislation was enacted by Parliament during 2003. See the Traditional Leadership and Governance Framework Act 41 of 2003.

<sup>76</sup> See the Structures Act s 81(1)-(2). Although the Structures Act is mandatory on attendance and participation in any meeting of an applicable municipal council if the relevant traditional authority so decides, the Act is not mandatory on traditional leadership to actually participate in such affairs. By using the words 'may participate' the legislator seems to have left the decision on participation open for traditional authorities to decide for themselves. This is an aspect of concern, as some traditional leaders might choose not to participate and by doing so could prejudice the interests of their communities. It is submitted that mandatory legislative participation would better serve in the interests of all parties concerned.

<sup>77</sup> Own emphasis added.

<sup>78</sup> Refer to the Structures Act s 81(2).

In instances where a council has fewer than 10 councillors, only one traditional leader may participate in that council. If the number of traditional leaders that have been identified in a municipal area exceeds the limit of 20% of the total number of councillors, the MEC may determine a system for the rotation of participation of the traditional leaders concerned.<sup>79</sup>

- A further important requirement of the Structures Act is that before a municipal council takes a decision on any matter directly affecting the area of a traditional authority the council must give the leader of that authority the opportunity to express a view on that matter. Participation is thus not only a silent attendance to council affairs, but includes an opportunity to express views and address other councillors on issues that affect a traditional area under a traditional authority.<sup>80</sup>
- The Structures Act further provides that, after consulting the Provincial House of Traditional Leaders, the MEC may by notice in the relevant *Provincial Gazette* (a) regulate the participation of traditional leaders in the proceedings of a municipal council and (b) prescribe a role for traditional leaders in the affairs of a municipality.<sup>81</sup>
- A final important requirement regarding the participation of traditional leaders in municipal affairs is the fact that when a traditional leader is participating in the proceedings of a municipal council, such traditional leader is subject to the appropriate provisions of the Code of Conduct set out in Schedule 1 of the Local Government: Municipal Systems Act.<sup>82</sup>
- Under the Structures Act, traditional leaders are definitely more marginalised than before, since either district or local councils exercise legislative and executive powers in areas where traditional authorities have been exercising such authorities. Special efforts to ensure and protect the important role and functioning of traditional authorities should thus be made.

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<sup>79</sup> See the Structures Act s 81(2)(a)-(c).

<sup>80</sup> See the Structures Act s 81(3).

<sup>81</sup> Two aspects are important in this regard. Firstly, the relevant MEC is required to consult with the Provincial House of Traditional Leaders but is not obliged to follow the House's suggestions and, secondly, the MECs have decisive functions to fulfil regarding the role for traditional leaders in municipal affairs. See s 81(4)(a)-(b).

<sup>82</sup> In this regard, s 81 has been amended by s 121 of Act 32 of 2000 and s 18(b) of Act 31 of 2002. Note that a traditional leader who participates in the proceedings of a municipal council is entitled to the payment of out-of-pocket expenses in respect of such participation.

### 13.5 Conclusion

It is submitted that despite colonial, political or constitutional changes to the governmental structure in South Africa, traditional authorities have played a significant role in regulating and maintaining traditional African customs and should continue to play such a role in the future of our country. The exact role and manner of participation are somewhat controversial, however, and need to be determined with more clarity within our new democratic system. Notwithstanding the uncertainties, both the White Paper on Local Government and the new legal framework emphasise the relationship between traditional leadership and local governments. Both institutions are constitutionally recognised. Each institution has its own powers and functions, which differ in some respects but overlap in others. This then demands a new model whereby the roles of both institutions should be harmonised and described.

Some commentators have already expressed the view that there is definitely a need for both institutions to co-exist, even though there are differences in their legal nature and leadership functions.<sup>83</sup> Apart from constitutional recognition and protection, traditional leadership as an institution needs to be accorded its rightful place in the new constitutional dispensation. Irrespective of the 21st century developments, many South Africans, especially those living in rural areas of South Africa, continue to support and owe allegiance to their traditional customs and institutions. The importance of harmonising such customs and institutions with the constitutional foundation is self-evident. The Constitution is very clear on this point: although traditional leadership is protected and should play a role in governmental affairs, the Constitution is still the supreme law of our state and therefore any role or functioning of traditional authorities must comply with the overall constitutional requirements. Traditional leadership is therefore not an autonomous institution that functions separately from the general governmental structure of South Africa.<sup>84</sup> In actual fact, traditional institutions are not directly part of the government structure created by the Constitution. In

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<sup>83</sup> See Scheepers *et al* (1998) *Obiter* fn 62 at 61-62. The writers propose that a specific model for co-operation between local government officials and traditional authorities should be established.

<sup>84</sup> According to the Constitution s 40, the government is constituted as national, provincial and local spheres. S 43 indirectly states that in the Republic of South Africa, the national sphere of government is parliament, the provincial sphere is the nine provincial governments and the local sphere is the different municipal councils.

local areas the legislative and executive powers are vested in municipal councils, and traditional authorities fall under the municipal council's jurisdiction.<sup>85</sup>

In order to facilitate the participation and inclusion of traditional authorities, the Structures Act, mandated by constitutional authority, provides for a basic protection and inclusion of traditional authorities in local government affairs.<sup>86</sup> It is uncertain if such protection and inclusion is adequate and sufficient, and only time will indicate practical success. In this regard it is also important to remember that although traditional leadership is protected, its role and participation is not cast in stone and should be evaluated and adapted through legislative measures, if the need indeed arises.

The importance and co-existence of elected local councils and recognised traditional leaders should be protected. There are indeed differences and also similarities between municipal governments and traditional leaders, but they should not be in competition with one another. The differences in function and nature are heavily outweighed by the positive strengths resulting from this diversity in leadership. Much value can be added through a partnership between local government councillors and traditional leaders, and even more so in rural areas of South Africa.<sup>87</sup> Africa, and South Africa in particular, depend on local leaders to successfully implement and ensure local development. As a creature of history and part of a developing African society, traditional leadership is not a part of the government structure but is rooted in civil society itself. Such leaders are custodians of the values of their people and communities and co-ordinators of various aspects of their communities' dreams and aspirations.

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<sup>85</sup> Because all areas of South Africa fall under the jurisdiction of a municipal government, all traditional areas will also fall under a municipal council. Any disputes and decisions should be addressed through good co-operation, communication and consultation.

<sup>86</sup> See the Structures Act s 81.

<sup>87</sup> See Scheepers *et al* (1998) *Obiter* fn 62 at 88-89.

## The powers and functions of municipal governments

### 14.1 Introduction

Within the new constitutional dispensation, local governments are not only recognised as a distinctive and autonomous sphere of government, but are also accorded specific powers and functions that are unique and appropriate to the lowest sphere of government in the state. Similar to the position with regard to national and provincial spheres, local government powers and functions are constitutionally entrenched and protected and cannot unilaterally be taken away by a higher sphere of government without a constitutional amendment.<sup>1</sup> Notwithstanding the fact that LG is constitutionally protected, the powers and functions of municipalities are not absolute and are subject to both constitutional and national legislative requirements.<sup>2</sup> In essence, there are two broad requirements to which municipal powers and functions are subjected. The first is that municipalities can perform only such powers or functions that are legally permissible for them to perform or exercise. This requires a substantive evaluation of the law – constitutional or otherwise – to determine if a municipal council indeed has a certain power or may exercise a particular function. The second requirement stipulates that if it has been established that a local government indeed has a specific power or may perform a certain function, such power or function must be performed or exercised according to predetermined and procedurally correct legal requirements. This entails a procedural evaluation of the manner in which powers or functions are or were indeed exercised or performed.<sup>3</sup>

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<sup>1</sup> See the Constitution s 156 and Sch 4 and 5 Part B.

<sup>2</sup> Eg, the Constitution requires that municipal legislative actions must conform with national or provincial legislation. See the Constitution s 156(3). Both national and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions as listed in Sch 4 and 5. See also the Constitution s 155(7).

<sup>3</sup> Both the substantive and the procedural requirements are mandatory and must be complied with in order for a municipal council to exercise a power or perform a function lawfully.



Before one begins to investigate the various substantive and procedural requirements regarding the powers and functions of municipal councils, it is important to consider a few background principles. In general, all local governments in the new local government structure are obliged to perform their functions and to exercise their powers in such a manner as to achieve their objectives and fulfil their developmental duties.<sup>4</sup> In essence, the general objectives of local government and the mentioned developmental duties project the basic rationale of local government existence. These objects and duties provide for an overarching set of obligations or sweeping duties that must be achieved, depending on the capacity of municipal councils only. Upon a closer evaluation of the constitutional chapter on local government, one is confronted by other provisions in the Constitution that circumscribe the power and functions of municipalities and thus have a restrictive impact on the fulfilment of the sweeping duties and objectives.<sup>5</sup> A further and equally important fact is that although local governments have their own powers and functions, they ultimately exercise such powers under the watchful eyes of the national and provincial governments.<sup>6</sup>

Similar to all other aspects regarding local governments, the Constitution provides only a basic foundation regarding the power and functions of municipalities. Both the Municipal Structures Act and the Municipal Systems Act further elaborate on this constitutional foundation. Before the Constitution and other relevant national legislative requirements are evaluated it must be pointed out that municipal powers and functions are divided into two categories: executive and legislative. Simply put, legislative authority is the power to make, amend and repeal rules of law, while executive authority is the power to implement and enforce legislation, to manage the administration and to develop policy. Both legislative and executive authority is distributed between all three spheres of government. Contrary to the position on national and provincial spheres, where legislative and executive authorities are vested in different

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<sup>4</sup> According to the Constitution ss 152(2) and 153(a), all municipalities must strive, within their financial and administrative capacities, to achieve the objectives laid down for local governments in general, and must also structure and manage their administrations, budgeting and planning processes to give priority to the basic needs of their communities.

<sup>5</sup> Some commentators have argued that this constitutional curtailment of the duties of local governments is an 'unhappy' position, as it suggests a predominantly more administrative role for local governments in contrast with its newly protected and recognised original and distinctive character with accompanying powers and functions. See Chaskalson *et al* (1999) 5A-34.

<sup>6</sup> See the Constitution s 155(7).

governmental bodies, both executive and legislative authority on the local sphere of government are vested in a municipal council. Only one body is responsible for the proper exercise and performance of municipal legislative and executive authority.<sup>7</sup> The rationale for only one body to exercise both legislative and executive powers is based on greater effectiveness, quicker decision making and performance of functions, as well as money saving. The biggest negative impact of a municipal council's having both executive and legislative powers is the fact that the built-in checks and balances of one government body over the other is lost. For example, in both the national and provincial spheres the executive authority is responsible to the relevant legislatures for the proper performance of its powers and functions. This is not the case at local government level, where the body that exercises executive powers is also the same body responsible for legislative powers. It is suggested, however, that the negative impact of the loss of internal control over the powers and functions of municipalities could be sufficiently countered by other oversight mechanisms such as the control and supervision of both national and provincial governments over the exercise and performance of municipalities of their powers and functions.<sup>8</sup> Before one considers the new constitutional framework concerning the powers and functions of local government, one should note that the exercise of municipal powers and functions is not without challenges. Many local governments face certain key issues regarding the exercise and fulfilment of their powers and functions. Some of these key issues are *inter alia* the following:

- Municipalities are facing a rapid increase in their responsibilities as many issues are assigned or delegated to them.
- Functions are often vaguely defined, especially where services are vertically integrated or shared by other spheres.
- Municipalities are often ignored when decisions are taken by the higher spheres of government and mostly lack the required capacity to perform their functions.

Speedy solutions to the abovementioned issues are of critical importance in order to ensure an effective system of municipal performance and constitutional compliance.

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<sup>7</sup> According to the Constitution s 151(2), both the executive and legislative authority of a municipality are vested in the municipal council.

<sup>8</sup> Again refer to the Constitution s 155(7), which specifically entrenches such power of control and supervision.

## **14.2 The constitutional basis of municipal powers and functions**

In light of the aspects mentioned above, the Constitution of the Republic of South Africa now specifically entrenches specific powers and functions applicable to all municipalities in the state. This position was confirmed in the Constitutional Court in the case of *Fedsure Life Assurance v Greater JHB TMC*.<sup>9</sup> The court stated that the constitutional status of local government is thus materially different from what it was when Parliament was supreme and when not only the powers but the very existence of local government depended entirely on superior legislatures. Although the detailed powers and functions of local governments have to be determined by laws of a competent authority, this does not mean that the powers they exercise are “delegated” powers and does not prevent the powers from being regarded as “original” and not “delegated”.<sup>10</sup> It should be pointed out that the Constitution addresses aspects of municipal powers and functions in two categories. On one hand the Constitution directly provides for the powers and functions of municipalities, while on the other the Constitution also indirectly incorporates and mandates certain aspects that are also of importance to municipal powers and functions. For clarification purposes, the various direct and indirect requirements will be discussed separately.

### **14.2.1 Direct constitutional directives regarding municipal powers and functions**

According to section 156 of the Constitution, municipal powers and functions are now addressed and protected directly in the Constitution. The section states the following:

- (1) A municipality has executive authority in respect of, and has the right to administer
  - (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
  - (b) any other matter assigned to it by national or provincial legislation.
- (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
- (3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or

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<sup>9</sup> 1999 (1) SA 374 (CC).

<sup>10</sup> See paras 35-39 at 393-394.

provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

- (4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if
  - (a) that matter would most effectively be administered locally; and
  - (b) the municipality has the capacity to administer it.
- (5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

On close evaluation of the text of section 156 one can make several comments. The Constitution starts off by confirming and referring to the executive authority of a municipal government without including legislative authority in the same instance. Some commentators see this confirmation of municipal executive authority as placing more emphasis on the executive authority than on municipal legislative authority. It is argued that the Constitution still echoes something of the previous dispensation, when local governments were mere administrative institutions under the control of predominantly the provincial authorities and when their executive and administrative functions were regarded as more important than their legislative authorities.<sup>11</sup> Apart from the constitutional confirmation of municipal executive authority, the Constitution also confirms that all municipalities have the right to administer such executive matters.<sup>12</sup> It is of importance to note that the Constitution distinguishes between executive authority on one hand and the administration of such matters on the other.<sup>13</sup> On this point, it is of interest to note that in national and provincial spheres of government, legislative authority is often perceived to be of more importance than executive authority. Legislative power is stronger and more important than executive powers because legislative powers entail the creation of new laws or the amendment or

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<sup>11</sup> See Chaskalson *et al* (1999) 5A-35, where the writer states that the legislative authority is subsidiary to its executive or administrative functions.

<sup>12</sup> The Constitution s 156(1).

<sup>13</sup> Executive authority has been explained as the power to implement and fulfil legislative requirements and to perform certain related executive functions.

repeal of existing legal rules. To a large extent executive authority is thus subjected to legislative authority unless such executive authority is protected against manipulation by the Constitution. This seems not to be the constitutional intention on local government level, however. It would seem that more emphasis is directed at executive and administrative functioning.

The Constitution also specifically clarifies the matters on which a municipality has executive and administrative authority. Two sources of such authority are identified. The first source is the various local government matters that are listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution. These sources indicate a pre-determined list that encapsulates executive and administrative powers and functions, which cannot be reduced or expanded upon without constitutional amendment. It thus provides an exact indication of such powers and functions. The functional areas of municipal executive and administrative authority as determined by the Constitution are the following:

**Schedule 4**

FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE

PART B

The following local government matters to the extent set out in section 155(6)(a) and (7):

Air pollution

Building regulations

Child care facilities

Electricity and gas reticulation

Fire fighting services

Local tourism

Municipal airports

Municipal planning

Municipal health services

Municipal public transport

Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law

Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto

Storm water management systems in built-up areas

Trading regulations

Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

### **Schedule 5**

#### FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE

##### PART B

The following local government matters to the extent set out for provinces in section 155(6)(a) and (7):

Beaches and amusement facilities

Billboards and the display of advertisements in public places

Cemeteries, funeral parlours and crematoria

Cleansing

Control of public nuisances

Control of undertakings that sell liquor to the public

Facilities for the accommodation, care and burial of animals

Fencing and fences

Licensing of dogs

Licensing and control of undertakings that sell food to the public

Local amenities

Local sport facilities

Markets

Municipal abattoirs

Municipal parks and recreation

Municipal roads

Noise pollution

Pounds

Public places

Refuse removal, refuse dumps and solid waste disposal

Street trading

Street lighting

### Traffic and parking

A striking difference between Part B of Schedule 4 and Part B of Schedule 5 of the Constitution is that the matters listed in Part B of Schedule 4 are areas falling under concurrent national and provincial legislative competence. As such, these matters require a degree of intergovernmental cooperation and coordination. All three spheres of government have certain powers relating to such matters. On the other hand, the matters listed in Part B of Schedule 5 are the functions typically associated with local governments. The provincial authorities have exclusive legislative competence over such matters, and national government may not exercise legislative authority over such matters unless constitutionally authorised to do so under its “emergency powers”.<sup>14</sup> One can thus conclude that the matters mentioned in Part B of Schedule 5 require mainly a strong cooperation and coordination between municipalities and their applicable provincial governments.

The second reference to municipal executive and administrative authority is found in section 156(1)(b) of the Constitution. According to this section, municipalities have authority over any matter that is not included in Part B of Schedule 4 or Part B of Schedule 5 of the Constitution and that has been *assigned* to them in terms of national or provincial legislation. The Constitution thus does not cast the powers and functions of municipalities in stone, but allows the two higher spheres of government to assign certain matters to them when appropriate. It is suggested that such assignment can be a general one, for example national legislation assigning a function to all municipalities, or a specific assignment where a function or matter is assigned to only one or a few municipalities either in a province or in the country as a whole. On this issue, the provisions of section 156(4) are specifically important. National and provincial governments are obligated to assign the administration of one or more matters listed in Part A of Schedule 4 or Part A of Schedule 5, which necessarily relates to local government to municipalities. There are two further requirements that must both be met before such an assignment can take place, however. Firstly, the relevant matter must be of a nature that could be most effectively administered locally and, secondly, the municipality concerned must have the capacity to administer

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<sup>14</sup> Refer to the Constitution s 44(2).



such matter or matters.<sup>15</sup> Emphasis should also be placed on the fact that any assignment in terms of subsection 156(4) must be done by agreement between the assignor and assignee and is subject to any conditions set out in such an agreement. It thus seems possible for a municipality to agree to such an assignment only if certain conditions, for example financial support, are provided for by the assigning higher sphere of government. The Constitution also protects municipalities against unilateral decisions of higher spheres to assign the administration of matters which municipalities cannot or do not want to perform.<sup>16</sup>

A somewhat uncertain aspect in the Constitution is whether subsection 156(4) also affords a municipality executive authority over matters listed in Part A of Schedules 4 and 5 and which have been assigned to it. On one hand the subsection refers only to the administration of such matters and not to the exercise of executive authority related to such matters.<sup>17</sup> A counter argument in this regard is the fact that, apart from matters listed in Part B of Schedules 4 and 5, the Constitution indeed allows for municipal executive authority over any other matter assigned to it by national or provincial legislation.<sup>18</sup> The Constitution further affords a municipality the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. Essentially, this gives municipalities a residual or implied power – either executive or legislative – in order to perform their functions effectively. If Part A matters have been assigned to a municipality, therefore, and the municipality has certain obligations to meet or functions to perform

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<sup>15</sup> It is submitted that an independent evaluation of not only the relevant matter but also the capacity of a municipality concerned should be undertaken. All relevant circumstances should be considered carefully before an assignment is concluded. The higher spheres of government must guard against so-called “unfunded mandates”, where the lowest sphere is burdened with the administration of matters for which they do not have the capacity or the financial support. The assignment of functions specifically relates to the principle of decentralisation, which requires that functions should be allocated to the lowest spheres of government, where such functions can be exercised most effectively. For more detail see Rautenbach and Malherbe (1999) 93 with reference to the principle of subsidiarity.

<sup>16</sup> In this instance it is submitted that if no agreement is reached no assignment can take place. National or provincial government should not be able to force municipalities unwillingly to accept such assignments. In this regard the importance of the principles of cooperative government, as set out in the Constitution ch 3, must not be overlooked.

<sup>17</sup> The distinction between executive authority and the right to administer, as referred to in s 156(1) was mentioned above. It would thus seem possible that if the constitutional drafters also intended to accord executive authority over Part A matters that have been assigned, they would have specifically provided for this in the text of the Constitution.

<sup>18</sup> Refer to the Constitution s 156(1)(b). It should thus be possible to argue that matters listed in Part A of the relevant schedules which have been lawfully assigned to a municipality or municipalities also permit such local authorities to exercise executive authority over such matters.

under such assignment, then such municipality should have the right to exercise *any*<sup>19</sup> power concerning such matters. One can thus conclude that municipalities have not only administrative powers on matters assigned to them but also executive authority, notwithstanding the fact that the matter assigned is a matter falling under either Part A of Schedule 4 or Part A of Schedule 5 of the Constitution. An aspect that is very clear from the Constitution, however, is the fact that if a matter falls outside the matters listed in Part B of Schedule 4 or 5 of the Constitution and has not been lawfully assigned to a municipality, then a municipality has no executive or administrative authority over such matter or matters.<sup>20</sup>

Apart from the executive authority mentioned above, subsection 156(2) specifically provides for constitutional confirmation of the legislative authority accorded to local governments. Municipalities are allowed to make and administer by-laws for the effective administration of the matters which they have the right to administer. In the first instance it should be evident that municipal legislative authority is not without restrictions and that the extent of such authority is in need of careful consideration. The making of a by-law is undoubtedly referring to legislative authority.<sup>21</sup> The Constitution seems to suggest that a municipality may make and administer by-laws in respect of only those matters which it has the right to administer.<sup>22</sup> Municipal legislative authority is further restricted in the sense that the Constitution allows such legislative authority only for the effective administration of the matters which are administered by such a municipality.<sup>23</sup>

The Constitution is also very clear on the fact that municipal by-laws are subordi

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<sup>19</sup> Own emphasis added.

<sup>20</sup> This is, of course, excluding matters that are reasonably necessary for, or incidental to, the effective performance of the functions already entrusted to local governments. The Constitution s 156(5).

<sup>21</sup> The term "by-law" was also used in the previous dispensation. Some writers argue that the term by-law is inappropriate and should rather be called a "local law" or "municipal law", similar to "national laws" or "provincial laws". The term by-law is often still perceived as being subordinate to national or provincial laws, as was the case under the previous dispensation. See Meyer (1997) 116.

<sup>22</sup> To determine which matters a municipality has the right to administer, one must again look at the Constitution s 156(1)(a)-(b). The conclusion is thus that only the matters listed in Sch 4 Part B and Sch 5 Part B or any other matter specifically assigned to a municipality by either national or provincial legislation would qualify as matters over which a municipality has legislative authority. This would also include matters reasonably necessary for, or incidental to, the effective performance of a municipality of its functions. The Constitution s 156(5).

<sup>23</sup> If a by-law is thus enacted for other reasons than to provide for the effective administration of the matter(s) falling under a municipality's jurisdiction, it would seem to fall foul of the constitutional mandate and thus be unconstitutional and invalid.

nate to national or provincial legislation. In this respect it is confirmed that if a by-law conflicts with national or provincial legislation it is invalid.<sup>24</sup> It should be noted that the Constitution defines national or provincial legislation to include subordinate legislation made in terms of an Act of parliament, or a provincial Act, and it also includes legislation that was in force when the Constitution took effect and is administered by either national government or provincial governments respectively.<sup>25</sup> The invalidation of a by-law that conflicts with national or provincial legislation is subjected to the constitutional obligation that neither national nor a provincial governments may compromise or impede a municipality's ability or right to exercise its powers or perform its functions, however.<sup>26</sup> *Prima facie* this situation seems to refer to a *contradictio in terminis*. On one hand, a by-law which represents the constitutionally permitted legislative power of a municipality that conflicts with legislation of the two higher spheres is invalid, but on the other, the Constitution restricts the two higher legislatures from compromising or impeding municipal abilities or the exercise of its functions, through either legislative or executive actions. Both national and provincial legislatures must thus guard against enacting legislation that would compromise or impede municipal powers that would result in a conflict between municipal by-laws and such national or provincial laws. It follows that although municipalities have original legislative authority, such authority cannot be exercised in contradiction with national or provincial legislation. Municipal by-laws are subsequently subordinate in comparison with national or provincial laws. The only protection given to municipalities regarding a total domination by national or provincial laws is that such laws may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. In light of this protection, it would seem that if national or provincial legislation is mainly directed at or has the effect of compromising or impeding a municipality's ability or right to exercise its powers or perform its functions, a municipal by-law should have preference over such national or provincial legislation.<sup>27</sup> Subsection

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<sup>24</sup> See the Constitution s 156(3).

<sup>25</sup> Refer to the Constitution s 239 definitions.

<sup>26</sup> See the Constitution s 156(3) read together with s 151(4).

<sup>27</sup> In this regard it would be of importance to look and evaluate the purpose of the national or provincial legislation. One must remember that the Constitution allows both national and the provincial legislatures to exercise legislative authority over the matters listed in the Constitution Schs 4 and 5 Parts A and B respectively. There is thus no prohibition on such legislatures to legislate on the matters that are also listed and over which municipalities can make by-laws. The purpose of the national or provincial law is a decisive factor, however.

156(3) further requires an investigation of section 149 of the Constitution. Section 149 states that a decision by a court that legislation (either national or provincial) prevails over other legislation, such a decision does not invalidate that other legislation, but such other legislation becomes inoperative for as long as the conflict remains. Because provincial legislatures have both exclusive legislative competencies and concurrent legislative competencies, conflict between a national law and a provincial law is a strong possibility. National legislation does not have automatic dominance over provincial legislation.<sup>28</sup> If such a conflict has occurred and a court has given a decision in favour of either the national law or the provincial law then the other law which is part of the conflict becomes inoperative for as long as the conflict remains. If a municipal by-law in turn conflicts with legislation that is inoperative, the by-law is not invalid and must be regarded as valid for as long as that legislation is inoperative.<sup>29</sup>

#### **14.2.2 Constitutional provisions that indirectly impact on municipal powers and functions**

The Constitution itself provides for various obligations and requirements that have an impact, albeit often indirectly, on the powers and functions of municipal governments. These aspects are briefly identified and discussed as follows:

- The Constitution confirms that both the executive authority and legislative authority of a municipality is vested in its municipal council. There can be no doubt therefore as to the ability of a municipality to exercise or perform executive or legislative authority. Such authority vests only in the municipal council, however.<sup>30</sup>
- Municipalities are also accorded a right to govern the local government affairs of their communities on their own initiative. Once it has been determined that a specific matter(s) is to be classified as part of local government affairs, a municipality has a constitutional right to govern that matter on its own initiative. However, this

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<sup>28</sup> See the Constitution s 146, which indicates how such a dispute is to be resolved.

<sup>29</sup> Take the following practical example: Imagine both a national law and a provincial law on the environment. The two laws are in conflict with one another and a court has decided that the provincial law is to prevail over the national law. The national law becomes inoperative insofar as the conflict remains. If such a national law is also in conflict with a municipal by-law, the by-law will not be invalid and must be regarded as valid for as long as the national legislation is inoperative. See s 156(3). Such circumstances, especially within the constitutional framework of cooperative government, should be very rare, however.

<sup>30</sup> See the Constitution s 151(2).

right is circumscribed by the Constitution to the extent that it is subject to national and provincial legislation, as provided for in the Constitution.<sup>31</sup>

- Municipal powers and functions are also protected through the provision that national or provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.<sup>32</sup> Any consideration of a dispute in this regard would call for an objective evaluation of all relevant facts and circumstances.<sup>33</sup>
- Apart from being subject to national and provincial legislation as mandated by the Constitution, municipal powers and functions are also largely influenced by mostly national legislation.<sup>34</sup> In this regard and subject to section 229, which deals with financial matters, national legislation is required to make provision for an appropriate division of powers and functions between municipalities in areas which have both category B and C municipalities. Such division of powers between category B and C municipalities need not be uniform across a province.<sup>35</sup>
- Mention has already been made of the fact that the Constitution mandates both national and provincial governments to have legislative and executive authority to

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<sup>31</sup> See the Constitution s 151(3). This subsection must be read together with s 156(3), which invalidates a municipal by-law that conflicts with national or provincial legislation. The wording "as provided for in the Constitution" used in s 151(3) is somewhat controversial, however, and in need of clarification. Two possible interpretations seem possible: one is that the Constitution refers only to those national or provincial laws which are specifically mentioned in the Constitution ch 7 and which deal with local government aspects. The other possibility, which suggests a broader interpretation, refers to any national or provincial legislation that is constitutionally legitimate or lawful, evaluated in the broad constitutional framework. The latter interpretation seems to be the one that should be favoured.

<sup>32</sup> Refer to the Constitution s 151(4).

<sup>33</sup> The principles and requirements of cooperative government set out in the Constitution ch 3 are also important in such cases. Such principles require all spheres of government to *inter alia* respect the constitutional status, institutions, powers and functions of governments in the other spheres; not to assume any power or function except those conferred in terms of the Constitution and to exercise their powers and perform their functions in a manner that do not encroach on the geographical, functional or institutional integrity of another sphere of government. See the Constitution s 41(e)-(g).

<sup>34</sup> Throughout the chapter on local government in the Constitution, many obligations are set whereby national legislation must establish criteria, define the types of municipality and determine various other aspects applicable to local governments. See, eg, the Constitution ss 155(3)(2) and (3)(a) and 160(5).

<sup>35</sup> According to s 155(3)(c) the Constitution determines that a division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B and C municipality. All that is constitutionally required is an appropriate division method whereby such powers and functions are divided. It should be noted that the national legislation referred to in this instance is obligated to take into account the need to provide municipal services in an equitable and sustainable manner. See the Constitution s 155(4). The division of powers and functions between category B and C municipalities must thus be carefully considered.

see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5. This national or provincial authority to oversee municipal performance is exercised through a process of regulating the exercise by municipalities of their executive authority referred to in section 156(1).<sup>36</sup>

- In respect of the internal procedures of a municipal council, the Constitution also determines that a municipal council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality. Municipal councils are also permitted to employ personnel that are necessary for the effective performance of municipal functions.<sup>37</sup> The fact that the municipal legislative authority is a function that may not be delegated by a municipal council and must be exercised by the council self is also constitutionally protected.<sup>38</sup> Furthermore, municipal councils are constitutionally authorised to make by-laws, thus exercising legislative authority, through rules and orders for its internal arrangements, its business and proceedings and the establishment, composition, procedures, powers and functions of its committees.<sup>39</sup> *Prima facie* these provisions refer to additional legislative authority of municipal councils apart from the ones mentioned earlier, closer evaluation suggests that such authority is a further elaboration of the so-called “implied powers” of municipalities permitted under section 156(5) of the Constitution.

In the discussion of the constitutional requirements regarding the powers and functions of municipalities, mention was made of the important role that mostly national legislation is obligated to play in the new local government system. Such national legislation is also important in relation to the powers and functions of municipal governments. Both the Local Government: Municipal Structures Act and the Municipal Systems Act contain important legislative requirements in this respect. These are discussed briefly below.

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<sup>36</sup> See the Constitution s 155(7). Through the regulation of municipal executive authority, municipal legislative authority is also regulated. Municipal legislative authority is thus dependent on the existence of municipal executive authority. See the Constitution s 156(2).

<sup>37</sup> See the Constitution s 160(1)(a) and (d) respectively.

<sup>38</sup> Refer to the Constitution s 160(2)(a).

<sup>39</sup> See the Constitution s 160(6)(a)-(c).



### **14.3 National legislation to enhance the constitutional foundation on the powers and functions of municipal councils**

The importance of both national and provincial legislation on the powers and functions of municipalities have been clearly indicated above. Apart from the most obvious influence, namely that national or provincial governments may, or sometimes must, assign other matters to municipalities through legislation,<sup>40</sup> the Constitution also requires national legislation to provide for an appropriate division of powers and functions between category B and C municipalities.<sup>41</sup> Such division is per definition relevant only between a category B municipality (local municipality) and a category C (district municipality). Category A or metropolitan municipalities have exclusive municipal executive and legislative authority within their areas of jurisdiction.<sup>42</sup> In compliance with the abovementioned constitutional requirements, the following national legislative provisions have been enacted.

#### **14.3.1 Functions and powers of municipalities under the Local Government: Municipal Structures Act<sup>43</sup>**

In general, the Municipal Structures Act provides that a municipality has the functions and powers assigned to it in terms of sections 156 and 229 of the Constitution. Such powers must be divided between a district municipality and local municipalities within the area of a district municipality.<sup>44</sup> The Act further obligates a district municipality to achieve the integrated, sustainable and equitable social and economic development of its area as a whole. Such development is to be achieved through exercising or providing the following powers or functions:<sup>45</sup>

- (a) Ensuring integrated development planning for the district as a whole;
- (b) By promoting bulk infrastructural development and services for the district as a whole;
- (c) By building the capacity of local municipalities in its area to perform their functions and to exercise their powers where such capacity is lacking; and

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<sup>40</sup> See the Constitution s 156(1)(b) and 156(4).

<sup>41</sup> This is confirmed in the Constitution s 155(3)(c).

<sup>42</sup> See the Constitution s 155(1)(a)-(c) for an explanation of the three categories of municipalities.

<sup>43</sup> 117 of 1998.

<sup>44</sup> See the Structures Act s 83(1) and (2).

<sup>45</sup> See s 83(3)(a)-(d). It is clear that the Act accords significantly more responsibility and authority to district councils over local councils in its area. This seems to be in line with the Constitution's definition and creation of the two different categories of municipality. The Constitution s 155(1).



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

Apart from the general emphasis on the responsibilities of district municipalities, the Act also specifically provides for the division of functions and powers between district and local municipalities. Accordingly, all district municipalities are accorded the following functions and powers:<sup>46</sup>

- (a) Integrated development planning for the district municipality as a whole, including a framework for integrated development plans of all municipalities in the area of the district municipality.
- (b) Potable water supply systems.
- (c) Bulk supply of electricity, which includes for the purposes of such supply, the transmission, distribution and, where applicable, the generation of electricity.
- (d) Domestic wastewater and sewage disposal systems.
- (e) Solid waste disposal sites, in so far as it relates to –
  - (i) the determination of a waste disposal strategy;
  - (ii) the regulation of waste disposal;
  - (iii) the establishment, operation and control of waste disposal sites, bulk waste transfer facilities and waste disposal facilities for more than one local municipality in the district.
- (f) Municipal roads which form an integral part of a road transport system for the area of the district municipality as a whole.
- (g) Regulation of passenger transport services.
- (h) Municipal airports serving the area of the district municipality as a whole.
- (i) Municipal health services.
- (j) Fire fighting services serving the area of the district municipality as a whole, which includes –
  - (i) planning, coordination and regulation of fire services;
  - (ii) specialised fire fighting services such as mountain, veld and chemical fire services;
  - (iii) coordination of the standardisation of infrastructure, vehicles, equipment

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<sup>46</sup> See the Structures Act s 84(1)(a)-(p).

and procedures;

(iv) training of fire officers.

- (k) The establishment, conduct and control of fresh produce markets and abattoirs serving the area of a mayor proportion of the municipalities in the district.
- (l) The establishment, conduct and control of cemeteries and crematoria serving the area of a mayor proportion of municipalities in the district.
- (m) Promotion of local tourism for the area of the district municipality.
- (n) Municipal public works relating to any of the above functions or any other functions assigned to the district municipality.
- (o) The receipt, allocation and, if applicable, the distribution of grants made to the district municipality.
- (p) The imposition and collection of taxes, levies and duties as related to the above functions or as may be assigned to the district municipality in terms of national legislation.

All the remaining powers and functions afforded under section 83(1) which have not been vested in terms of section 84(1) in the district municipality of a relevant area will fall under the authority of the relevant local municipalities.<sup>47</sup>

Although section 84(1) of the Structures Act clearly distinguishes between the powers and functions of district and local municipalities, the Act does allow for a local municipality to perform certain powers and functions that have been allocated to district municipalities. In this regard, the Act requires that the minister (responsible for local government) may authorise a local municipality to perform a function or exercise a power mentioned in subsection 84(1)(b), (c), (d) or (i), or any aspect of such function or power, in the area of that local municipality

- by notice in the *Government Gazette*
- after consultation with the cabinet member responsible for the functional area in question
- after consulting the MEC for local government in the provinces and, if applicable,

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<sup>47</sup> The Structures Act s 84(2). A comparison between the Constitution ss 156 and 229 and the functions and powers allocated to district municipalities under s 84(1) shows that only a few powers and functions will remain under local municipalities. In this regard it should be obvious that the authority of local municipalities is severely restricted in favour of district municipalities, which are legally empowered with more powers and functions.

subject to national legislation.<sup>48</sup>

According to subsection 84(3)(a), only the powers and functions regarding potable water supply systems, bulk supply of electricity, domestic waste water and sewage disposal systems and municipal health services can be allocated to local municipalities.<sup>49</sup> It is also required of the Minister of Local Government that if he/she issues a notice in terms of section 84(3)(a), such notice must regulate the legal, practical and other consequences of his/her authorisation. Such consequences may include the transfer of staff, the transfer of assets, liabilities, rights and obligations and administrative and other records, and also the continued application of any by-laws and resolutions in the area of the municipalities concerned. The minister may amend a notice and then regulate the legal, practical and other consequences of such amendment.<sup>50</sup>

The Structures Act also provides for the adjustment of the division of functions and powers between district and local municipalities. The Act states that, subject to section 85 and within a prescribed policy framework, the MEC for local government may adjust the division of functions or powers between a district and local municipality as set out in section 84(1) and (2) by

- allocating any of those functions or powers vested in the local municipality to the district municipality
- allocating any of those functions or powers vested in the district municipality to the local municipality.<sup>51</sup>

An MEC may allocate a function or power mentioned above only if the municipality in which the function or power is vested lacks the capacity to perform that power or

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<sup>48</sup> The Structures Act s 84(3)(a). Strictly speaking, the Minister of Local Government does not have to follow the decision reached after consultation as long as the consultation was held, but from a political and cooperative point of view unilateral decisions should not be accepted.

<sup>49</sup> This would thus require the involvement of the Ministers of Water, Energy and Health respectively.

<sup>50</sup> See the Structures Act s 84(3)(b)-(e) as amended.

<sup>51</sup> Note that a function or power referred to in s 84(1)(a), (b), (c), (d), (i), (o) or (p) is excluded from such allocation from the district municipality to the local municipality. See the Structures Act s 85(1)(b). Note that the MEC may adjust the division of functions and powers between a district and a local municipality by allocating a function or power within a particular policy framework. According to the policy framework for the adjustment of division of functions and powers regulations published under GN 2592 in GG 21370 of 12 July 2000, the allocation of a function or a power must be aimed at specific objectives. Refer to s 2(b)(i)-(xi) of the regulations.

function and the MEC has consulted the Demarcation Board and has considered its assessment of the capacity of the municipality concerned.<sup>52</sup>

Apart from the general role of the Demarcation Board explained in chapter 10 of this work, the Demarcation Board must consider the capacity of a district or local municipality to perform the functions and exercise the powers vested in the municipality as set out in section 84(1) or (2). This consideration must be done in two distinct instances:

- where the Board is determining or re-determining the boundaries of such municipalities
- when requested to do so in terms of subsection 85(2)(b) of the Structures Act by the MEC for Local Government in the relevant province.

The Board must also convey its assessment in writing to the relevant MEC.<sup>53</sup> If an MEC disagrees with the assessment of the Board and still decides to adjust or refuses to adjust the division of powers and functions between the municipalities concerned, the MEC must furnish reasons to the relevant municipalities and the Minister before finalising such an adjustment.<sup>54</sup> An important aspect to note is that any adjustment of the division of powers or functions must be reflected in the section 12 notices whereby the concerned municipalities have been established.<sup>55</sup> The MEC's decision can be vetoed by the Minister because after consulting the MEC and municipalities concerned the Minister is given the power to vary or withdraw any allocation or to adjust the division of powers and functions between a district municipality and local municipality in instances where the MEC has refused to make an adjustment in accordance with the assessment of the Demarcation Board. It is the MEC's responsibility to amend the section 12 notices in order to give effect to any variation or withdrawal of any allocation or reallocation and also regularly to review the capacity of the relevant municipality(s) and to reallocate a function or power to a municipality when it acquires the capacity to perform or exercise that power or function.<sup>56</sup>

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<sup>52</sup> Note that the second requirement does not apply if the Demarcation Board omits to comply with a request from the MEC within a reasonable period. Disputes in this regard will depend on the circumstances of each case. See the Structures Act s 85(2) and (3).

<sup>53</sup> See the Structures Act s 85(4).

<sup>54</sup> The Structures Act s 85(5).

<sup>55</sup> See ch 9 of this work dealing with the establishment of municipalities. See also the Act s 85(6).

<sup>56</sup> See the Act s 85(7)-(9). Any reallocation must be made with the concurrence of the receiving municipality or, if such concurrence cannot be obtained, after consultation with the Demarcation

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According to the Structures Act, if a dispute arises between a district and local municipality concerning the performance of a function or exercise of a power, the MEC may resolve the dispute by defining their respective roles by notice in the *Provincial Gazette*. Such resolve by the MEC may be done after consultation with the municipalities concerned.<sup>57</sup> It is furthermore also provided that if the provision of basic services by a district or local municipality collapses or is likely to collapse because of a lack of capacity or *any other reason*,<sup>58</sup> the MEC, after written notice to the relevant municipality and with immediate effect, may allocate any power or function necessary to restore or maintain those basic services to a local or district municipality, depending on the circumstances of the case.<sup>59</sup> Either the district or local municipality concerned may lodge a written objection against such "emergency" allocation to the minister. In return, the minister has the power to confirm, vary or withdraw the allocation after he/she has consulted the Demarcation Board. A written objection such as that mentioned above must be lodged within 14 days of the date of the official notice of the MEC in the *Provincial Gazette*, and any failure to lodge an objection timeously will be regarded as consent to the allocation by the municipalities concerned. When a municipality has lost a power or function but is again in a position to resume the provision of those basic services, then the MEC must reallocate such power or function to the original municipality.<sup>60</sup>

Mention has been made of the importance of the principles of cooperative government, especially in respect of the powers and functions relating to municipalities. Not only cooperation between municipalities and the two higher spheres of government is important, but also co-operation between municipalities *inter se*. In order to enhance such cooperation, both a district municipality and local municipalities within the area of that district municipality must cooperate with one another by assisting and supporting each other. Cooperation also includes provision of financial, technical and administrative support services, if capacity allows. Support will be requested by

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Board regarding the capacity of that municipality. In this regard, municipalities are protected against being allocated powers or functions which they cannot or do not have the capacity to exercise or perform.

<sup>57</sup> See the Structures Act s 86 as substituted by Act 33 of 2000 s 8.

<sup>58</sup> Own emphasis.

<sup>59</sup> The Structures Act s 87.

<sup>60</sup> See the Structures Act s 87(2)-(4). During difficult times municipalities are thus protected against being deprived of the powers and functions on a permanent basis; they are deprived of

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mostly one municipality from another, and include support between a district municipality or local municipality or *vice versa* or between local municipalities *inter se*.<sup>61</sup>

Lastly, it should be noted that no division of powers and functions is applicable in a category A or metropolitan municipality. All municipal powers and functions assigned in terms of sections 156 and 229 of the Constitution are vested in the metropolitan council itself. The position is similar in district management areas, where all the municipal powers and functions are vested in the relevant district municipality within whose area the district management area falls.<sup>62</sup>

#### **14.3.2 Aspects regarding municipal functions and powers under the Local Government: Municipal Systems Act<sup>63</sup>**

In order to further regulate aspects regarding the powers and functions of municipalities and also to compliment and support the Constitution and Structures Act, the Municipal Systems Act provides that a municipality has all the functions and powers conferred by or assigned to it in terms of the Constitution and must exercise such powers and functions subject to chapter 5 of the Municipal Structures Act.<sup>64</sup> A municipality also has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers.<sup>65</sup>

The Systems Act originally dealt with two types of assignment of powers or functions. The first type was assignments initiated by the national or provincial executives to all municipalities generally. In this regard the Act provided that a cabinet member or depute minister that initiated the assignment of a function or a power by way of national legislation to municipalities in general had, before the draft legislation is introduced in parliament to:

- consult the Minister of Local Government, the National Minister of Finance and

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them only temporarily – until they resume a position of service delivery. Simultaneously the community is also assured of continuous service delivery.

<sup>61</sup> See the Structures Act s 88(1)-(3). When a district municipality is to provide support services to a local municipality, the MEC is obligated to assist that district municipality to provide the relevant support services.

<sup>62</sup> See the Structures Act s 89.

<sup>63</sup> 32 of 2000.

<sup>64</sup> The Municipal Structures Act ch 5 encompasses s 83 to 89 of the Act, which is discussed above.

<sup>65</sup> Refer to the Systems Act s 8(2). This subsection is in confirmation of the Constitution s 156(5).

### Organised Local Government<sup>66</sup>

- consider any assessment by the Financial and Fiscal Commission (FFC) and
- publish the draft legislation in terms of section 154(2) of the Constitution.<sup>67</sup>

The position was very similar when an MEC (thus a provincial executive) initiated the assignment of a function or power in terms of provincial legislation to municipalities in that province. The legislative position was changed, however, during 2003<sup>68</sup>. The Systems Act now allows for the assignment of functions or powers to municipalities generally by Acts of parliament or provincial Acts. According to the amended provisions, a cabinet member or deputy minister who seeks to initiate the assignment of a function or power by way of an Act of Parliament to municipalities in general, or to any category of municipality, must, within a reasonable time before the draft bill is introduced as the following:

- (a) He/she must request the Financial and Fiscal Commission (FFC) to assess the financial and fiscal implications of the proposed legislation. For purposes of the assessment, the FFC must be informed about the possible impact of the assignment on the future division of revenue between the spheres of government in terms of section 214 of the Constitution; the fiscal power, capacity and efficiency of municipalities or any category of municipalities and the transfer, if any, of employees, assets and liabilities.
- (b) He/she must consult with the minister of local government, the ministers of finance and organised local government who represent local government nationally. The consultation should have regard to the assessment by the FFC; the policy goals to be achieved by the assignment and the reasons for utilising assignment as the preferred option; the financial implications of the assignment projected over at least three years; any possible financial liabilities or risks after the three year period; the manner in which additional expenditure as a result of the assignment will be funded; the implications of the assignment for the capacity of municipalities; the assistance and support that will be provided to municipali-

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<sup>66</sup> OLG is represented by SALGA at national level.

<sup>67</sup> According to the Constitution s 154(2), draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in parliament or a provincial legislature. The publication must be done in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to such draft legislation.

<sup>68</sup> See Act 44 of 2003 sec 2.



ties and, finally, any other matter that may be prescribed by regulation under the Act.<sup>69</sup>

When draft legislation, as is mentioned above, is introduced in parliament or a provincial legislature, then the legislation must be accompanied by a memorandum which should give a projection of the financial and fiscal implications, disclose any possible financial liabilities or risks, indicate how any additional expenditure will be funded and indicate the implications of the assignment for the capacity of the municipalities involved. The official assessment of the FFC must also be annexed.<sup>70</sup>

The Systems Act also provides for the assignment of functions or powers to specific municipalities by acts of the executive or by agreement. In this regard it is provided that if a function or power is assigned to any specific municipality in terms of a power contained in an Act of parliament or a provincial Act, or by agreement in terms of section 99 or 126 of the Constitution, then the organ of state assigning the function or power must submit a memorandum to the Minister of Local Government and the National Treasury. The memorandum must give at least a three-year projection of the financial implications of the function or power for the municipality, disclose any possible financial liabilities or risks and indicate how additional expenditure will be funded.<sup>71</sup> It is further provided that the Cabinet member, MEC or other organ of state initiating an assignment of a power or function to a municipality in terms of sections 9 or 10 of the Systems Act must take appropriate steps to ensure sufficient funding and capacity building initiatives for the performance of the assigned power or function, if:

- the assignment imposes a duty on the municipality
- the power or function falls outside the functional areas listed in parts B of Schedules 4 and 5 to the Constitution or is not incidental to any of those functional areas
- the performance of the power or function (duty) has financial implications for the municipality.<sup>72</sup>

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<sup>69</sup> Refer to s 9(1)(a)-(b) of the Systems Act. The position is very similar when an MEC seeks to initiate the assignment of a function or power by way of a provincial Act to municipalities in the province or only certain category of municipalities in the province. Read s 9(2)(a)-(b) of the Act. What is regarded as a reasonable time for purposes of ss 9(1)(a) and 9(2)(a) is, however, unclear.

<sup>70</sup> See s 9(3)(a)-(b) of the Systems Act.

<sup>71</sup> See the Systems Act s 10 as substituted by Act 44 of 2003 s 3.

<sup>72</sup> Read s 10A of the Systems Act as inserted by Act 44 of 2003 s 4.

#### 14.4 Executive and legislative functioning

In support of and in compliance with the Constitution, the Systems Act confirms that both the legislative and executive authority of a municipality are exercised by the council of a municipality and that the council takes all decisions of the municipality subject only to section 59 of the Systems Act, which deals with the delegation of powers and functions to other functionaries within the municipality.<sup>73</sup>

Similar to other instances where executive or legislative authority is exercised or performed, there are various requirements and determinations that must be adhered to. In this regard, it is a common principle that a legislature or executive organ can lawfully exercise only such authority that has been given to it and can do so only within a specific area. In this respect, a municipality is authorised in general to exercise executive and legislative authority within its boundaries only.<sup>74</sup> However, it is possible for a municipality to exercise executive authority in the area of that other municipality by agreement with another municipality and subject to chapter 5 of the Municipal Structures Act and other applicable national legislation.<sup>75</sup>

In order for a municipality to exercise its executive and legislative authority, it must obviously comply with constitutional and other legislative requirements. Many of these requirements have been identified and discussed above. In respect of the exercise of executive authority, it is very important to look at the legislation dealing with the internal procedures and functioning of local governments. Again, the Constitution and other national legislation are prescriptive in this regard and will be discussed in a following chapter. Apart from those requirements, the Systems Act in general determines that a municipality exercises its legislative or executive authority in various ways, and more particularly by doing the following:<sup>76</sup>

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<sup>73</sup> Although the Constitution confirms that executive and legislative authority of a municipality is vested in the municipal council, the Systems Act also confirms that it is the responsibility of a council to take all the executive and legislative decisions and accordingly also the responsibility for such authority. See the Constitution s 151(2) and the Systems Act s 11. Delegated powers or functions are exercised or performed by the delegated functionary, but the municipal council still retains final responsibility. See the Systems Act s 59(2)(e).

<sup>74</sup> Again the boundary determinations and the role of the Demarcation Board should be emphasised in this regard.

<sup>75</sup> See the Systems Act s 11(2). Note that this exception refers only to the exercise of executive authority and is somewhat unclear about the exercise of legislative authority. According to the Constitution, the authority to exercise legislative authority follows from the authority to exercise executive authority. It could thus be argued that even legislative authority can be exercised by one municipality in the jurisdiction of the other.

<sup>76</sup> The Systems Act s 11(3)(a)-(n).

- (a) Developing and adopting policies, plans, strategies and programmes, including setting targets for delivery;
- (b) Promoting and undertaking development;
- (c) Establishing and maintaining an administration;
- (d) Administering and regulating its internal affairs and the local government affairs of the local community;
- (e) Implementing applicable national and provincial legislation and its by-laws;
- (f) Providing municipal services to the local community, or appointing appropriate service providers in accordance with the criteria and process set out in section 78;
- (g) Monitoring and, where appropriate, regulating municipal services where those services are provided by service providers other than the municipality;
- (h) Preparing, approving and implementing its budgets;
- (i) Imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees including setting and implementing tariff, rates and tax and debt collection policies;
- (j) Monitoring the impact and effectiveness of any services, policies, programmes or plans;
- (k) Establishing and implementing performance management systems;
- (l) Promoting a safe and healthy environment;
- (m) Passing by-laws and taking decisions on any of the above mentioned matters; and
- (n) Doing anything else within its legislative and executive competence.

Lastly, it is important to note that a decision taken by a municipal council or any other political structure of the municipality must be recorded in writing.<sup>77</sup>

#### **14.5 Legislative procedures and requirements**

In the preceding paragraphs of this chapter it was mentioned that municipalities have both executive and legislative powers and functions. Municipal legislative powers or functions are restricted to such matters that are necessary for municipalities to ensure an effective administration.<sup>78</sup>

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<sup>77</sup> This requirement is directed more at executive decisions than legislative decisions, as legislative decisions are always in writing.

<sup>78</sup> Refer to the Constitution s 156(1) and (2). It is argued that such legislative authority, ie to make and administer by-laws, depends on the extent of municipality's executive authority and also

*continued on next page*

Apart from determining the basis of a municipality's legislative authority, the Constitution also stipulates other procedural considerations that must be complied with when municipalities exercise their legislative powers or functions. The newly enacted national legislative framework gives further content to such requirements. The following constitutional requirements are of importance in this respect:

- Subject to section 151(4), a municipality should not enact by-laws that are in conflict with national or provincial legislation.<sup>79</sup>
- It is the responsibility of the municipal council to make decisions concerning the exercise of all the powers and the performance of all the functions including legislative powers and functions. This responsibility is so important that the Constitution specifically forbids such functioning to be delegated to any other organ or functionary in that council.<sup>80</sup> In *Fedsure Life Assurance v Greater JHB TMC*<sup>81</sup> the Constitutional Court held *inter alia* that [a] [municipal] council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate. Such decisions must, of course, be lawful, but the requirement of legality exists independently. The procedures according to which legislative decisions are to be taken are prescribed by the Constitution, the empowering legislation and the rules of the council. Whilst this legislative framework is subject to review for consistency with the Constitution, the making of by-laws and the imposition of taxes by a council in accordance with the prescribed legal framework cannot appropriately be made subject to challenge by "every person" affected by them. The court also stated that each member of a council is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on po-

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whether it is required for the effective administration of its executive powers or functions. It would seem that the basis of municipal legislative authority is indirect and not original. The Constitution confirms this submission by stating that a municipality has executive authority and the right to administer the local government matters listed in the Constitution Schs 4 and 5 Part B or assigned to it in terms of national or provincial legislation.

<sup>79</sup> The Constitution s 156(3).

<sup>80</sup> See the Constitution ss 160(1)(a) and (2)(a). The passing of by-laws is a function that may not be delegated by a municipal council. This requirement is seen to protect representative and accountable democratic government. Only the properly elected municipal council should have the authority to perform or exercise legislative competencies.

<sup>81</sup> 1999 (1) SA 374 (CC).

litical grounds. It is for the members and not the courts to judge what is relevant in such circumstances.<sup>82</sup>

- A majority of the members of a municipal council must be present before a vote may be taken on any matter. However, all questions concerning the passing of by-laws are determined by a decision taken by that council with the support of a majority of its members.<sup>83</sup>
- The Constitution requires that no by-law may be passed by a municipal council unless all the members of the council have been given reasonable notice of the by-law and the proposed by-law has been published for public comment. Both these requirements must be met before a by-law can lawfully be enacted by a municipal council. What is regarded as reasonable notice is not altogether certain and depends on the circumstances of each case. It is submitted that national legislation should provide for such uncertainties and should, for instance, prescribe a minimum notice period.<sup>84</sup>
- In order to enhance the notification of municipal by-laws, the Constitution requires that a municipal by-law may be enforced only after it has been published in the official gazette of the relevant province. Upon request by a municipality, an official *Provincial Gazette* must publish a municipal by-law. The Constitution also requires that municipal by-laws must be accessible to the public.<sup>85</sup>

In an effort to further enhance the basic constitutional framework regarding the legislative powers and functions of municipalities, a specific chapter on municipal functions and powers was included in the Local Government: Municipal Systems Act.<sup>86</sup> The Act specifically addresses aspects such as legislative procedures, the publication of by-laws, standard draft by-laws and the municipal code.<sup>87</sup> Each of these aspects is discussed briefly below:

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<sup>82</sup> See paras 41-42 at 394-395.

<sup>83</sup> In this regard one should distinguish between a relative majority and an absolute majority. A relative majority/simple majority is the majority of 50% + 1 of the members present who formed a quorum. A quorum is often less than 50% of the total number of members of a particular council. An absolute majority, on the other hand, is a majority of 50% + 1 of the total number of members of a council. If a council thus has 200 members, at least the support of 101 of the members is required to obtain an absolute majority. See the Constitution s 160(3)(a) and (b). See also Rautenach and Malherbe (1999) 159.

<sup>84</sup> Neither national nor provincial legislation seem to address such an important aspect. See the Constitution s 160(4)(a) and (b).

<sup>85</sup> See the Constitution s 162.

<sup>86</sup> See the Systems Act ch 3.

<sup>87</sup> Refer to the Systems Act ss 12-15.

- *Legislative procedures* In respect of legislative procedures, it is legally required that only a member or a committee of a municipal council may introduce a draft by-law in the council.<sup>88</sup>

Furthermore, a by-law must be enacted by a decision taken by a municipal council

(a) in accordance with the rules and orders of the council and

(b) with a supporting vote of a majority of its members.<sup>89</sup>

No by-law may be passed by a municipal council unless

(a) all members have been given reasonable notice and

(b) the proposed by-law has been published for public comment in a manner that allows the public an opportunity to make representations with regard to the proposed by-law.<sup>90</sup>

The legislative procedures mentioned above also apply when a municipal council incorporates by reference, as by-laws, provisions of either legislation passed by another legislative organ of state or standard draft by-laws made in terms of section 14 of the Systems Act.<sup>91</sup>

- *Publication by by-laws* According to the Systems Act, a by-law passed by a municipal council
  - (a) must be published promptly in the relevant *Provincial Gazette* and, when feasible, also in a local newspaper or in any other practical way in order to bring the contents of the by-law to the attention of the local community and
  - (b) takes effect when published or on a future date determined in the by-law.<sup>92</sup>

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<sup>88</sup> This position is similar to provincial legislatures, where only members of the executive council of a province or a committee of the legislature or a member of the provincial legislature may introduce a bill in the legislature. Only the MEC for finance may introduce a money bill. See the Constitution s 119. Because a municipal council is vested with both executive and legislative authority, the functionary that may introduce a by-law in the council is not comparable with the position in provincial legislatures. See also the Systems Act s 12(1).

<sup>89</sup> Thus referring to an absolute majority.

<sup>90</sup> These requirements are directed to ensure compliance with the Constitution ss 160(3) and (4) and 162 (1)-(3). It is also submitted that municipal rules and orders should address issues such as "reasonable notice" and "a manner to allow for public opportunity to make representations". The Constitution allows specifically for the making of by-laws which prescribe rules and orders for the internal arrangements, business and proceedings and aspects concerning committees of a municipal council. See the Constitution s 160(6)(a)-(c) and the Systems Act s 12(2) and (3).

<sup>91</sup> See the Systems Act s 12(4)(a)-(b).

<sup>92</sup> "Promptly" is generally regarded to mean "as soon as possible". Unfounded delays should not be acceptable. One should also take note that other practical ways to inform local residents or community members includes reports by local radio stations, advertisements in local newspapers, community newspapers and leaflets that are sent out by post with each resident's rates and taxes account.

Similar to national or provincial legislation, municipal by-laws take effect either when published or on a date as is determined by the by-law self.

- *Standard draft by-laws* According to section 14 of the Systems Act, at the request of OLG representing LG nationally or after consulting the MECs for local government and OLG and by notice in the national gazette:

(a) The minister of local government may make standard draft by-laws concerning any matter for which a municipal council may make by-laws. This includes aspects mentioned in section 160(6) of the Constitution.

(b) The minister of local government may amend any such standard draft by-laws. Before the minister is to make or amend a standard draft by-law he/she must publish the proposed by-law or amendment in the national gazette for public comment and consult the cabinet member concerned if the by-law or amendment is to affect a particular area of responsibility.<sup>93</sup> As with the national minister, an MEC for local government may make standard draft by-laws or amend such by-laws concerning any matter for which municipal councils in that province may make by-laws, on request by OLG in the province or after consulting the minister of local government and by notice in the *Provincial Gazette*.<sup>94</sup> Again proper publication of the by-laws or amendments and consultation with other MECs in the province is required.<sup>95</sup> In order to protect the constitutionally granted legislative authority, the Systems Act states that a standard draft by-law or an amendment is applicable in a municipality only if, to the extent that, and subject to any modifications and qualifications have been adopted by the council of that municipality.<sup>96</sup>

A somewhat uncertain aspect of the Act is whether a standard draft by-law which is repealed by the national government after it has been adopted by a municipality still applies in the relevant municipal jurisdiction. The intention of the drafters of the Act is uncertain in this regard, and it seems that they intended that it would not be possible to repeal a draft standard by-law once it had been adopted by a mu

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<sup>93</sup> See the Systems Act s 14(1)(b).

<sup>94</sup> This will normally refer to such matters that have been assigned to municipal councils in terms of a provincial legislation and over which that municipality can subsequently exercise legislative authority.

<sup>95</sup> See the Systems Act s 14(2)(a) and (b).

<sup>96</sup> The Act s 14(3)(a). The standard draft by-law can thus not be enforced on a municipal council and only serves as a concept on which a municipality can finalise its own more detailed by-laws, if it so wishes.



municipal council. This would mean that such a standard draft by-law cannot be amended by the council itself and may be amended by only the Minister or MEC as set out in section 14(1) and (2) of the Act. The constitutionality of this section of the Act is somewhat in doubt, as it seems that the Act limits the legislative authority of municipalities, which would also mean the amendment of municipal legislative actions. Nowhere does the Constitution allow for such a restriction; on the contrary, the Constitution specifically requires that neither the national or a provincial government may compromise or impede a municipality's ability or right to exercise its powers or perform its functions.<sup>97</sup> In the last instance, if a municipal council intends to adopt a standard draft by-law with or without modifications or qualifications, the council must follow the same procedure set out in section 12(3) of the Systems Act and also publish the by-law in accordance with section 13 of the Act.<sup>98</sup>

*Municipal code* According to the Systems Act, a municipality must compile and maintain in bound or loose-leaf form or, when feasible also in electronic format, a compilation of all its by-laws and the provisions incorporated by reference as by-laws. This compilation is known as the "municipal code" and must constantly be updated and annotated. Furthermore, the code must be kept at the municipality's head office as its official record of all applicable by-laws. At the request of a member of the public, the municipality must provide that person with a copy or extract from its municipal code against payment of a reasonable fee as determined by the council.<sup>99</sup>

#### **14.6 Municipal financial powers**

Apart from the powers and functions mentioned above, municipal governments also have some limited financial powers. Again, it is important in this regard to refer to the Constitution, which provides the following foundation regarding municipal fiscal powers and functions:<sup>100</sup>

- (1) Subject to subsections (2), (3) and (4), a municipality may impose

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<sup>97</sup> The restrictions set out in the Systems Act s 14(3)(b) thus seem to be contrary to the provisions of the Constitution, and more specifically the Constitution s 151(4).

<sup>98</sup> These requirements are confirmed in the Systems Act ss 14(4) and 12(4).

<sup>99</sup> Refer to s 15(1)-(3) of the Systems Act.

<sup>100</sup> See the Constitution s 229.

- (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
  - (b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.
- (2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties
- (a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and
  - (b) may be regulated by national legislation.
- (3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria:
- (a) The need to comply with sound principles of taxation.
  - (b) The powers and functions performed by each municipality.
  - (c) The fiscal capacity of each municipality.
  - (d) The effectiveness and efficiency of raising taxes, levies and duties.
  - (e) Equity.
- (4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.
- (5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.

From the text of the Constitution it is apparent that local governments have been vested with significant fiscal powers and functions and that national legislation may regulate such powers more extensively. Apart from quite a wide range of fiscal pow-

ers, the Constitution specifically excludes municipalities from imposing income tax, value-added tax, general sales tax or customs duty.<sup>101</sup> Only a constitutional amendment would allow for such powers to be extended to municipalities as well. Municipal financial powers such as the power to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality or other taxes, levies or duties as provided for in national legislation are constitutionally curtailed in two ways:

- Such powers may not be exercised in a way that materially and unreasonably prejudice national economic policies, economic activities across the municipal boundaries or the national mobility of goods, services, capital or labour<sup>102</sup>
- The powers or functions may be regulated by national legislation.<sup>103</sup>

The Constitution further allows for the division of fiscal powers and functions between two municipalities. Again regulation through national legislation is significant after the criteria set out in section 229(3)(a)-(e) of the Constitution has been taken into account. In order to facilitate cooperation and involvement, the national legislation that the Constitution envisages may be enacted only after OLG and the FFC have been consulted and any of the recommendations of the Commission have been considered. For more detail regarding matters concerning municipal finance, such as the raising of loans and the sharing of revenue, see the chapter on finance in this work.

#### **14.7 Municipal powers and functions regarding municipal law enforcement**

In the new local government dispensation municipalities have also been allocated stronger powers and functions regarding municipal law enforcement. Such powers already existed under the LGTA and have been included in the final municipal legal framework.<sup>104</sup> According to the final structure of local government, no direct reference is made to the power or functions regarding municipal law enforcement. Neither Part B of Schedule 4 nor Part B of Schedule 5 of the Constitution refers to the func-

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<sup>101</sup> See the Constitution s 229(1)(b).

<sup>102</sup> This provision is again directed at ensuring uniformity throughout the country and emphasises the importance of cooperation between all spheres of government. The criteria mentioned above are also similar to the provisions employed by the Constitution to determine if national legislation should prevail over provincial legislation in cases of disputes between such legislative enactments. See the Constitution s 146(2) and see also s 44(2).

<sup>103</sup> See the Constitution s 229(2)(a)-(b).

<sup>104</sup> In terms of the LGTA Schs 2 and 2A, certain powers were given to transitional metro councils and transitional local councils in order to establish and control municipal law enforcement agencies. However, such powers were subject to the South African Police Service Act 69 of 1995, as amended.

tional area of municipal law enforcement. The only reference to law enforcement is dealt with under Schedule 4 Part A dealing with police, to the extent that the provisions of chapter 11 of the Constitution confer any competence upon the provincial legislatures. One can conclude, therefore, that municipal law enforcement is not a direct executive, and thus legislative, competence of municipalities and can be exercised by municipalities only if assigned to them in terms of national or provincial legislation.<sup>105</sup>

In order to allow for municipal law enforcement, the South African Police Services Act was amended in 1998<sup>106</sup> and provided for the establishment of a municipal police service.<sup>107</sup> According to section 64A of the Act and in the prescribed manner, any municipality may apply to the MEC for safety and security of a province for the establishment of a municipal police service for its area of jurisdiction. Subject to certain conditions, the MEC may approve an application for the establishment of such a municipal police service if:

- the application complies with the prescribed requirements
- the municipality has the resources at its disposal to provide for a municipal police services which complies with national standards on a 24-hour basis
- traffic policing services by the municipality will not prejudicially be affected by the establishment of a municipal police service
- proper provision has been made by the municipality to ensure civilian supervision of the municipal police service and
- the establishment of the municipal police service will improve effective policing in that part of the province.

The MEC may approve an application only after consultation with the national police commissioner; after consultation with the metro council if the municipality falls in the area of a metropolitan council and with approval of the member or members of the executive council responsible for local government, finance, transport and traffic

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<sup>105</sup> Refer again to the Constitution s 156(1)(a)-(b). One can possibly also argue that limited municipal law enforcement is necessary for all municipalities to ensure the effective performance of their functions. Without a measure of law enforcement powers, municipalities will be toothless to enforce their own or other applicable legal rules and regulations and would thus be severely undermined in respect of their own functions and responsibilities. See also the Constitution s 156(5).

<sup>106</sup> See Act 83 of 1998.

<sup>107</sup> Reference to only a metropolitan police services was deleted by Act 83 of 1998 s 1(a). A "municipal police service" now refers to a municipal police service established under Act 83 of 1998 s 64A. See the Act s 1 definitions.

matters or the premier or member to whom such responsibilities have been assigned. Once an application has been approved, the MEC can establish the municipal police services by notice in the *Gazette*. All expenditure incurred by or in connection with the establishment, maintenance and functioning of a municipal police service shall be for the account of the municipality.<sup>108</sup>

The chief executive officer of a municipality is responsible to the municipal council for the functioning of the municipal police service (MPS). It is the council that incurs final responsibility, however. Once an MPS has been established, a municipal council appoints a member of the MPS as the executive head thereof. This person is required to be a fit and proper person.<sup>109</sup> Subject to the Act, the national standards and the directives of the CEO of the municipality, the executive head of the MPS exercises control over the municipal police service. More specifically, such control includes the following:

- being responsible for maintaining an impartial, accountable, transparent and efficient municipal police service
- being responsible for the recruitment, appointment, promotion and transfer of members of the municipal police service, subject to the applicable laws
- ensuring that traffic policing services by the municipality are not prejudicially affected by the establishment of the municipal police service
- being responsible for the discipline of the municipal police service
- representing the municipal police service on every local policing coordination committee established in terms of section 64k within the area of jurisdiction of the municipality, either personally or through a member or members of the municipal police service designated by him or her for that purpose
- representing the municipal police service on every community police forum or sub-forum established in terms of section 19 within the area of jurisdiction of the municipality, either personally or through a member or members of the municipal police service designated by him or her for that purpose
- developing before the end of each financial year a plan which sets out the priorities and objectives of the municipal police service for the following financial year,

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<sup>108</sup> See the Police Service Act s 64A(3)-(6), as amended.

<sup>109</sup> The Act s 64C and D. It is submitted that such a person should at least have expertise in law enforcement tasks and responsibilities.

provided that such plan, insofar as it relates to the prevention of crime, shall be developed in cooperation with the service

- performing such duties as may from time to time be imposed upon him or her by the chief executive officer of the municipality.

According to the Act, the functions of an MPS are threefold:

- traffic policing, subject to any legislation relating to road traffic
- policing of municipal by-laws and regulations which are the responsibility of the municipality
- prevention of crime.<sup>110</sup>

Furthermore, it is stated that, subject to the Constitution, a member of a municipal police service may exercise such powers and perform such duties as are by law conferred upon or assigned to that member. In this regard the minister of safety and security is empowered to prescribe that any power conferred upon a member of the Police Service may be exercised by a member of the MPS.<sup>111</sup> The Act also confirms that every member of an MPS is an officer of the peace and may exercise the powers conferred upon a peace officer in terms of the law within the area of jurisdiction of the municipality in question. In special circumstances a member may exercise such powers outside the area of jurisdiction if it is done:

- in pursuit of a person whom the member reasonably suspects of having committed an offence, and if the pursuit commenced within the area of jurisdiction of the municipality, and
- in terms of an agreement between municipalities.<sup>112</sup>

When a person is arrested, either with or without a warrant, by a member of an MPS, such person shall be brought as soon as possible to a South African Police station or to the place mentioned in the warrant of arrest, if applicable. Furthermore, any legal proceedings against an MPS or member of such service shall be instituted against the municipal council in question.<sup>113</sup>

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<sup>110</sup> See the Act s 64E.

<sup>111</sup> The Act s 64F(1)-(2).

<sup>112</sup> See the Act s 64F(3)(a)-(b). It appears that both requirements must be met before an extra territorial pursuit will be lawful.

<sup>113</sup> This again confirms the final responsibility of the municipal council. The Limitation of Legal Proceedings Act 94 of 1970 are applicable to disputes involving MPS actions, however. See the Act s 64I(2).

In order to ensure proper control over an MPS, it is required that a municipal council shall appoint a committee consisting of members of the council and such other civilian persons as determined by the council to oversee the MPS. The committee has various functions and shall do the following:

- advise the council on matters relating to the municipal police service, at the request of the municipal council in question
- advise the chief executive officer with regard to the performance of his or her functions in respect of the municipal police service
- perform such functions as the member of the executive council, the municipal council or the chief executive officer may consider necessary or expedient to ensure civilian oversight of the municipal police service
- promote accountability and transparency in the municipal police service
- monitor the implementation of policy and directives issued by the chief executive officer and report to the municipal council or chief executive officer thereon
- perform such functions as may from time to time be assigned to the committee by the municipal council or the chief executive officer and
- evaluate the functioning of the municipal police service and report to the municipal council or chief executive officer thereon.

Both the National Police Commissioner and the Minister of Safety and Security have various powers in respect of the MPS. For example, the National Commissioner may determine national standards of policing for the MPS and in addition to the training prescribed for traffic officers in terms of the Road Traffic Act<sup>114</sup>, may determine national standards with regard to the training of members of a MPS. Failure by an MPS to maintain national standards shall be reported by the commissioner to the minister.<sup>115</sup> Upon receipt of a failure report, the minister may request the MEC concerned to intervene in terms of section 139 of the Constitution and, upon failure of the MEC to intervene as requested, the minister may intervene in terms of section 100 of the Constitution. In such circumstances the national executive authority shall have the same powers as its provincial counterparts in this regard.<sup>116</sup> The MEC for safety and

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<sup>114</sup> 29 of 1989.

<sup>115</sup> Refer to the Act s 64L.

<sup>116</sup> The Act s 64M(1)-(2).



security also has important powers in respect of an MPS and should ensure compliance with national standards.<sup>117</sup>

The Act also provides that the minister may prescribe which other provisions of the Act shall apply to an MPS, and to what extent. The minister is also authorised to make regulations regarding the effective functioning of an MPS.

When the South African Police Service Amendment Act took effect,<sup>118</sup> only one previously established municipal police service had been established, namely the Durban City Police, established under section 83 of the Durban Extended Powers Consolidated Ordinance, 1976.<sup>119</sup> The amendment Act now provides that such a former MPS is deemed to have been established in terms of the Act and shall continue to exist subject to certain requirements.<sup>120</sup> The Act also provides that every person who, on the date of the establishment of an MPS, is registered as a traffic officer and who is employed by that municipality may be appointed as a member of that MPS even though the person may not comply with the training requirements for appointment.<sup>121</sup> However, the Act determines that a member appointed to an MPS shall cease to be a member of that MPS unless before 1 October 2003 he/she has successfully completed a training course which complies with the requirements determined by the National Commissioner.<sup>122</sup> Since the Act took effect, no municipal service has been permitted to include the word "police" in its name unless the service was established as an MPS under the Act.<sup>123</sup>

#### 14.8 Conclusion

From the legal principles and requirements mentioned above, it is evident that the new constitutional framework has a significant impact on the powers and functions of all local governments throughout South Africa. All municipalities have both executive and legislative authority, which authority may be lawfully exercised or performed only within the broader constitutional setting.<sup>124</sup> According to the new system, municipal

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<sup>117</sup> For more details on such powers see the Act s 64N(1)-(7).

<sup>118</sup> 83 of 1998.

<sup>119</sup> Natal Ordinance 18 of 1976.

<sup>120</sup> See the Act s 64Q(1)(a)-(e).

<sup>121</sup> This provision has been included to incorporate traffic officers of relevant municipalities into its MPS.

<sup>122</sup> See the Act s 64Q(2)(a)-(b).

<sup>123</sup> The Act s 64Q(3).

<sup>124</sup> See the case of *Aussenkehr Farms (Pty) Ltd v Walvis Bay Municipality* 1996 (1) SA 180 (C). In the case the applicant had erected a tent on a site in Walvis Bay in order to sell fresh fish and vegetables to the public. It did so with the apparent approval of an official of the respondent muni-

*continued on next page*

by-laws are no longer regarded as subordinate legislation, but as original and direct constitutionally entrenched legislative powers and functions. These newly entrenched legislative powers have important impact in cases where by-laws are part of a legal dispute.<sup>125</sup>

One of the most important and difficult dilemmas faced by local governments in the new dispensation is how to restructure so-called “old order” legislation and substitute such legislation with newly redrafted and constitutionally accepted municipal legislative enactments.<sup>126</sup> During the restructuring of the old local government system and even after the new system was established, many former by-laws and executive decisions were, and still are, applicable in certain areas and are in need of urgent clarification and transformation. It would have been impractical and severely disruptive if all old order legislation were revoked without new legislation’s being put in place simultaneously. In this regard the Constitution provides that all law that was in force when the Constitution took effect continues to be in force subject, however, to any amendments or repeals and consistency with the Constitution. Any old order legislation that continues to be in force does not have a wider application, territorially or otherwise, unless subsequently amended to have a wider application and continues to be administered by the authorities that administered it when the Constitution took effect, subject only to the Constitution.<sup>127</sup> Within this legal framework many old order laws are still applicable within local governments jurisdictions today.<sup>128</sup> Because of the restructuring of provincial boundaries under the interim Constitution of 1993, many difficulties regarding the application and authority of certain legislation

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pality. The applicant was then told to vacate the site. The court held that the applicant was entitled to an interdict against being deprived unlawfully of its *de facto* possession, even if his possession was itself unlawful. See paras B-D at 190.

<sup>125</sup> Eg, under the previous local government dispensation, magistrate courts had the authority to pronounce on the validity of a by-law. By-laws are now constitutionally authorised, however, and their validity must be determined with reference to the Constitution in general. In this regard it is important to note that not all courts have the jurisdiction to rule on constitutional issues. The Constitution itself proclaims that magistrates courts and all other courts may decide any matter determined by an Act of parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of *any legislation*, (including municipal legislation) or any conduct of the president. See the Constitution s 170. Disputes regarding by-laws, which are not of a constitutional nature or that are not based on a constitutional issue should be determined by a court which has been empowered to do so in terms of an Act of parliament. The relevant Acts of parliament are the Magistrates Court Act 32 of 1944 and the Supreme Court Act 59 of 1959.

<sup>126</sup> “Old order legislation” is defined by the Constitution as legislation that was enacted before the interim Constitution Act 200 of 1993 took effect, which was 27 April 1994.

<sup>127</sup> See the Constitution Sch 6(2)(1) and (2).

<sup>128</sup> See, eg, the Transvaal Ordinance on Municipal Administration Ordinance 17 of 1939.

have been experienced. It is proposed that especially provincial and local authorities should work proactively towards a complete overhaul of all legislative enactments applicable in each province and each municipal jurisdiction. Any law or conduct inconsistent with the Constitution, including of the Bill of Rights, will be invalid.<sup>129</sup>

Finally it is submitted that the new framework regarding the executive powers and functions of all municipalities and the overall constitutional protection of such powers and functions should be sufficient to ensure that municipalities can perform their functions effectively and comply with their constitutional obligations and duties. There are, however, significant challenges that must be overcome. For example, local government functions are expected to take responsibility for a set of functions that is growing in complexity and scope. An increasing number of new responsibilities are being added through the processes of assignments and delegations and also through new responsibilities identified in new legislation. Some examples and key issues relating to the way in which municipal functions are undertaken are:

- the establishment of sound relationships between councillors and senior officials
- the implementation of new land reform legislation;
- the integration of health services which are statutorily divided between the national and provincial spheres of government;
- the provision of housing, water and electricity services
- the provisions of functions such as roads and transport, environmental management, community and security services and municipal economic development.

Only a committed municipal corps and administration functioning within an environment of cooperative government would ensure proper fulfilment of the new powers and functions of South African municipalities.

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<sup>129</sup> The Constitution s 2.

## Political structures and internal procedures of municipal councils

### 15.1 Introduction

In modern day societies both urban and rural communities are becoming increasingly complex and often difficult to govern effectively. A wide range of different interests are involved in such communities, and each particular local area is becoming more part of an overall network of social, economical and political transactions, rather than staying a closed society unto itself. Many decisions of a local authority thus transcend its local boundaries and impact on a wide range of other civil and corporate role players. Within this context, the new system of developmental local government is in need of strong political leadership that is able to make difficult policy judgements and decisions and to guide the actions of the municipal administration in order successfully to promote the social and economic well-being of its local communities. Accordingly, the White Paper on Local Government has identified various principles whereby political leadership should be able to fulfil its diverse obligations. These principles can be summarised as follows:<sup>1</sup>

- *To provide community-wide leadership and vision* Many local communities are diverse, with multiple interests combined. New partnerships and coalitions of common interests can be built through a specified local vision which in turn should encourage and promote local government.
- *To constantly build capacity and implement policy initiatives:* Governing is about making choices. Such choices include the prioritisation of interests to the allocation of limited resources. Capacity and progress cannot be achieved if political representatives do not understand the dynamics of a local area and if they do not anticipate changes and learn from past mistakes.

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<sup>1</sup> See White Paper on Local Government (1998) at 101-102.

- *To be accountable and transparent* Apart from being basic constitutional principles, accountability and transparency require political leadership that should account to their community regularly, apart from during normal elections and should do so openly and without personal or political hidden agendas. Both accountability and transparency involve the community, increase legitimacy and deepen democracy.
- *To build partnerships and coalitions* Strong partnerships and coalitions, with local, national and even international actors must be developed in order to achieve positive development.
- *To represent the diversity of interests* First and foremost, municipal representatives should strive for the best interests of the municipality as a whole. Narrow political ideologies do not serve all interests and can be very detrimental to many. Marginalised sections of communities must also be identified and their interests protected.
- *To ensure and demonstrate value for money* Local taxes should be utilised to the maximum benefit of each local community. All local administrations must be efficient and effective and should constantly seek ways to enhance performance and quality services.

In order to achieve and facilitate the abovementioned principles, the Constitution allows and provides for special measures that are directed at supporting the internal procedures and functions of all municipalities. Various options are available to cater for different scenarios. For example, all municipalities must

- decide if powers should be delegated to other functionaries in the council and, if so, which ones
- decide whether to establish an individual or collective executive system
- determine which committees should be established to enhance decision making and ensure effective governance.<sup>2</sup>

Many of these issues have now been given direct constitutional protection or are constitutionally authorised to be prescribed in mostly national legislation. Both the

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<sup>2</sup> With regard to the delegation of executive powers, which is a common phenomenon in most governmental systems, each municipal council should make a careful assessment of its abilities and circumstances. In general, the delegation of powers, enhances both accountability and efficiency. Smaller executive bodies have more ability to act quickly and effectively than larger legislatures, but are not removed from accounting to the full council on executive or administrative obligations.

constitutional and other legislative provisions are subsequently investigated and discussed.

## **15.2 The basic constitutional framework regarding the internal procedures of municipal councils**

In respect of the internal procedures of municipal councils, the Constitution states the following:<sup>3</sup>

- (1) A Municipal Council
  - (a) makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;
  - (b) must elect its chairperson;
  - (c) may elect an executive committee and other committees, subject to national legislation; and
  - (d) may employ personnel that are necessary for the effective performance of its functions.
- (2) The following functions may not be delegated by a Municipal Council:
  - (a) The passing of by-laws;
  - (b) the approval of budgets;
  - (c) the imposition of rates and other taxes, levies and duties; and
  - (d) the raising of loans.
- (3) (a) A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.
  - (b) All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.
  - (c) All other questions before a Municipal Council are decided by a majority of the votes cast.
- (4) No by-law may be passed by a Municipal Council unless
  - (a) all the members of the Council have been given reasonable notice; and
  - (b) the proposed by-law has been published for public comment.
- (5) National legislation may provide criteria for determining
  - (a) the size of a Municipal Council;

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<sup>3</sup> See the Constitution s 160.

- (b) whether Municipal Councils may elect an executive committee or any other committee; or
  - (c) the size of the executive committee or any other committee of a Municipal Council.
- (6) A Municipal Council may make by-laws which prescribe rules and orders for
- (a) its internal arrangements;
  - (b) its business and proceedings; and
  - (c) the establishment, composition, procedures, powers and functions of its committees.
- (7) A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.
- (8) Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that
- (a) allows parties and interests reflected within the Council to be fairly represented;
  - (b) is consistent with democracy; and
  - (c) may be regulated by national legislation.

Although the provisions of the Constitution seem simple and precise, it will become evident that there are many uncertainties and issues that are in need of a more complete and clearer interpretation. Some of these have already been the focus of legal disputes and judicial interpretation.<sup>4</sup> In order to understand the various constitutional provisions regarding the internal procedures of a municipal council, each of the provisions will be investigated and discussed individually. In each instance, the fuller legal framework as provided by national legislation will be highlighted.

### **15.2.1 *Internal procedure with regard to municipal councils***

#### **15.2.1.1 Decisions by municipal councils**

The Constitution makes it very clear that the municipal council is the body that makes the decisions in a municipal jurisdiction in respect of the exercise of all powers and the performance of all the functions of that relevant municipality.<sup>5</sup> As a general rule, it is thus the municipal council that takes responsibility for its powers and

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<sup>4</sup> Refer, eg, to s 160(6) below and the case law on such subsection.

<sup>5</sup> See the Constitution s 160(1)(a).



functions.<sup>6</sup> It is possible, however, for a municipal council to delegate many such powers or functions to other functionaries, such as an executive committee or an executive mayor. Despite such delegations, the relevant municipal council still retains the final responsibility and accountability.

#### **15.2.1.2 Electing a chairperson/speaker**

A municipal council is obligated to elect its own chairperson.<sup>7</sup> This mandatory requirement seems to point to the fact that each municipal council in the new local government systems must elect an internal chairperson and that such a person must be elected by the municipal council itself. This requirement is further expanded upon by the Municipal Structures Act. According to the Structures Act, each municipal council must have a chairperson who is subsequently called the “speaker”, and who is elected from amongst the councillors of the municipal council at the council’s first sitting after its election or when it is necessary for the council to fill a vacancy. The task to elect a speaker is a specific obligation of a municipal council.<sup>8</sup> When a speaker is to be elected, the municipal manager of the municipality or, if he/she is not available, a person designated by the MEC for local government in the province, is to preside over the election process. Schedule 3 of the Structures Act specifically sets out the procedure that is to be followed when a speaker or a mayor is elected.<sup>9</sup> A councillor may not hold office as speaker and mayor or executive mayor at the same time.<sup>10</sup>

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<sup>6</sup> Powers and functions in this respect would seem to include both legislative and executive powers and functions.

<sup>7</sup> See the Constitution s 160(1)(b).

<sup>8</sup> See the Structures Act s 36(1)-(2).

<sup>9</sup> See the Structures Act s 36(3)-(4) and Sch 3. According to Sch 3, the presiding person must first call for the nomination of candidates. A nomination must be carried out in a prescribed manner, signed by two members of the Municipal Council and must be accepted in writing by nominee. Names are then announced, but no debate over names is allowed. If only one candidate is nominated, he/she must be declared elected. If there is more than one candidate, an election procedure is prescribed together with an elimination procedure if no candidate receives a majority of votes. If no election can be achieved, a further meeting must be held within seven days, and the election procedure is applied again.

<sup>10</sup> This is not relevant in all instances. In municipalities with either a plenary executive system or a plenary executive system combined with a ward participatory system, the speaker must be called the mayor. In such municipalities, the mayor and speaker is the same person, although the position is called mayor and not speaker. See the Structures Act s 36(5).

The speaker of a municipal council has specific functions to perform. These functions include the following:<sup>11</sup>

- to preside at meetings of the municipal council
- to perform the duties and exercise the powers delegated to the speaker in terms of section 59 of the Local Government: Municipal Structures Act
- to ensure the council meets *at least* quarterly
- to maintain order during meetings
- to ensure compliance in the council and council committees with the code of conduct of councillors as set out in Schedule 1 of the Local Government: Municipal Systems Act
- to ensure council meetings are conducted in accordance with the rules and orders of the council.

In normal circumstances, the speaker of a municipal council is elected for a term ending when the next council is declared elected. The term thus normally corresponds with the term of the municipal council. However, a speaker will have to vacate office during a term if that person

- resigns as speaker
- is removed from office
- ceases to be a councillor of the relevant municipality.<sup>12</sup>

A speaker may be removed only by a municipal council itself, and only by resolution adopted by the council. Prior notice of an intention/motion to move for the removal of the speaker must be given. Although the Structures Act does not specify the notice period, a reasonable time would seem sufficient. What is to be regarded as a “reasonable time” is not entirely certain, but it is submitted that such time that would allow the different political parties represented in the council to discuss and consider the proposed removal would suffice. It should also be noted that the Structures Act does not require a special majority for the removal of the speaker. It therefore seems acceptable to assume that a normal quorum and a normal majority of votes in favour or against a removal will be lawful.<sup>13</sup> If a speaker is absent or not available to per-

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<sup>11</sup> Refer to the Structures Act s 37. According to this section, it is important for any newly elected speaker to obtain a copy of the rules and orders of the council and to ensure he/she is up to speed with any powers that might be delegated to the office of speaker.

<sup>12</sup> See the Structures Act ss 38 and 39.

<sup>13</sup> See the Structures Act s 40 read together with the Constitution s 160(3).

form the functions of speaker or if there is a vacancy in the office, the municipal council must elect another councillor to act as speaker.<sup>14</sup>

### 15.2.1.3 Executive and other committees or functionaries

Apart from the election of a chairperson, a municipal council may also elect an executive committee and other committees, subject to national legislation. On the point of the establishment of committees subject to national legislation, the Constitutional Court has already determined the following: In the case of *Executive Council, KZN v President of the RSA*,<sup>15</sup> two provincial governments instituted proceedings in the court which challenged the constitutional validity of certain provisions of the Local Government: Municipal Structures Act<sup>16</sup>. It was contended *inter alia*, that the Act encroached on the constitutional powers of municipalities, especially a municipal council's power to elect executive committees or other committees in violation of section 160(1)(c) of the Constitution. The court held that section 160(1)(c) conferred this power "subject to national legislation", which meant that the right of municipalities to elect committees would not prevail where there was national legislation to the contrary. The national legislation referred to in section 160(1)(c) had to include any other legislation passed by Parliament in terms of chapter 7 of the Constitution. If the legislation was within the scope of national legislation sanctioned by chapter 7, the municipal power to elect committees had to be exercised, subject to that legislation. The municipal power to elect executive or other committees was therefore subordinate to these provisions and to the provincial power to select types of municipality. If this had the effect of precluding particular municipalities from electing executive or other committees, that resulted from the provisions of the Constitution itself and could not be challenged as being a breach of section 160(5)(b).<sup>17</sup> It is important to note that a municipal council is not obliged to elect an executive committee, as was the position under the interim Constitution. Subject to the new legislative framework

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<sup>14</sup> The Act is unfortunately somewhat uncertain in this regard, as two different situations can occur. Eg, if a speaker is absent or unavailable, the newly elected speaker will act as only acting speaker, and will be replaced by the usual, elected speaker upon his/her return or availability. When there is a vacancy in the position of the speaker, the next-elected speaker should be the elected speaker of the municipal council until the end of the remaining term of the municipal council. Strictly speaking, the person is thus not acting temporarily as speaker for another person. See the Structures Act s 41.

<sup>15</sup> 2000 (1) SA 661 (CC).

<sup>16</sup> 117 of 1998.

<sup>17</sup> See paras 87-88 at 699-700.

and based on the specific type of municipality that has been established, a municipal council may decide to elect an executive committee.<sup>18</sup> The new legislative framework makes provision for various committees or internal functionaries. Apart from general criteria applicable for the establishment of committees, the Structures Act also contains specific requirements applicable to the various committees or functionaries. Each of the sets of requirements will be discussed below.

#### **15.2.1.4 Criteria for the establishment of committees**

According to the Structures Act, three general criteria are laid down for the establishment of a committee(s). A municipality may establish a committee as provided for in the Act if:

- the municipality is of a type that is empowered in terms of the Act to establish a committee of the desired kind<sup>19</sup>
- the establishment of the committee is necessary.<sup>20</sup> When the necessity of the establishment of a certain committee is evaluated, the following factors should also be taken into account:
  - (a) the extent of the functions and powers of the municipality
  - (b) the need for the delegation of those powers and functions in order to ensure efficiency and effectiveness in their performance
  - (c) the financial and administrative resources of the municipality available to support the proposed committee.<sup>21</sup>
- in the case of the establishment of an executive committee, the municipality has more than nine councillors.<sup>22</sup>

#### **15.2.1.5 Requirements regarding the composition, functions and procedures of executive committees**

Only certain municipalities may establish executive committees. These are municipalities that are defined or classified as municipalities with

- a collective executive system

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<sup>18</sup> See the Structures Act ss 7-11.

<sup>19</sup> In respect of the various types of municipalities, see the Structures Act ss 7-11. According to the Structures Act ss 42, 54, 61 and 72 only municipalities of specific type may establish certain committees or functionaries.

<sup>20</sup> The necessity of a committee will depend on the relevant circumstances of each municipality. Almost all larger municipalities will need certain committees in order to fulfil and execute their functions and duties.

<sup>21</sup> See the Structures Act s 33(b)(i)-(iii).

<sup>22</sup> The Structures Act s 33(c).

- a collective executive system combined with a sub-council participatory system
- a collective executive system combined with a ward participatory system
- a collective executive system that is combined with both a sub-council and a ward participatory system.<sup>23</sup>

If a municipal council establishes an executive committee, it must elect as members of the committee a number of councillors who will ensure effective and efficient municipal government. However, the Structures Act determines that no more members than 20% of the councillors of the council or 10 councillors, whichever is the least, may be elected. It is further also required that an executive committee may not have fewer than three members.<sup>24</sup> The Act further determines that an executive committee be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in substantially the same proportion that they are represented in the council. This section must be read together with section 160(8) of the Constitution, which requires that the members of a municipal council be entitled to participate in the proceedings of the council and of its committees, allows parties and interests reflected in the council to be fairly represented, is consistent with democracy and may be regulated by national legislation.<sup>25</sup> The Structures Act also provides that a municipal council may determine any alterna-

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<sup>23</sup> See the Structures Act s 42(1) read together with ss 8(a), (b), (c) and (d), 9(a) and (b) and 10(a). It is clear from the Act that any municipality that has a collective executive system or combination with such an executive system may establish an executive committee.

<sup>24</sup> See the Structures Act s 43. It thus seems clear that an executive committee can never have more than 10 members. Eg, if a municipal council consists of 30 councillors and decides to establish an executive committee, the committee will consist of 6 councillors.  $30 \times 20\% = 6$ . Six is fewer than 10, thus only 6 members. If a municipal council consists of 100 members, the executive committee will have 10 members.  $100 \times 20\% = 20$ , whichever is fewer than 10 = 10.

<sup>25</sup> This requirement has caused several legal disputes both under the interim Constitution and the Constitution. See also the Structures Act s 43. See, eg, the case of *Democratic Party and Others v Brakpan TLC and Others* 1999 (4) SA 339 (W), where it was mentioned that it is not the function of the court to prescribe to a council the number of members which must comprise its executive committee or what system of proportional representation it should adopt in electing such members; such a function has been entrusted to the legislature. The court is however obligated to intervene if the exercise of such powers negates the right[s] conferred on members in terms of the Constitution s 160(8)(a). It was further stated that the objective and purpose of s 160(8)(a) is to ensure, as far as is practically possible, that members that are representing political parties in the council participate fairly in the committees of the council. Such fairness is then determined according to the representation of the parties on the council and not according to political support amongst the electorate. It is the parties and interests within the council that must be fairly represented. The court finally held that the decision to appoint an executive committee of only ANC and NP members, notwithstanding the fact that the DP had equal representation to the NP within the council, was unconstitutional. See at 344-345.

tive mechanism for the election of an executive committee, provided that it complies with section 160(8) of the Constitution.<sup>26</sup>

Executive committees have specific powers and functions, and thus play an important role in the overall performance and exercise of municipal obligations and duties. In this regard the Structures Act determines the following:

- An executive committee is regarded as the *principal committee* of a municipal council. It is also the committee of a municipal council which receives reports from all other committees, which must then be forwarded by the executive committee, together with its recommendations to the municipal council itself. This requirement is applicable only when it (the executive committee) cannot dispose of such matters in terms of its delegated powers.<sup>27</sup>
- The executive committee is obligated to
  - (a) identify the needs of the municipality
  - (b) review and evaluated those needs in order of priority
  - (c) recommend to the municipal council strategies, programmes and services to address priority needs through the integrated development plan and estimates of revenue and expenditure. The executive committee should in such instances take any applicable national and provincial developmental plans into account.
  - (d) recommend or determine the best methods possible to deliver its strategies, programmes and services to the maximum benefit of the community.<sup>28</sup>
- An executive committee, when performing its duties, must comply with various legislative requirements. In this regard, the Structures Act determines that an executive committee must:<sup>29</sup>
  - (a) identify and develop criteria in terms of which progress in the implementation of the council's strategies, programmes and services can be evaluated. Such criteria can include Key Performance Indicators (KPI) relevant to the municipal council or that are common to local government in general

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<sup>26</sup> See the Structures Act s 43(3). It thus seems that while the composition of an executive committee is strictly determined, alternative procedures for the election of the members of such executive committee can be provided for.

<sup>27</sup> See the Structures Act s 44(1)(a)-(b).

<sup>28</sup> Such recommendations or determinations may include partnerships and other approaches. See the Structures Act s 44(2)(a)-(d).

<sup>29</sup> See the Structures Act s 44(3)(a)-(h).

- (b) evaluate progress against the KPI
- (c) review the performance of the municipality in order to improve the economy, efficiency, effectiveness, efficiency of credit control, revenue and debt collection services and also the implementation of the municipality's relevant by-laws
- (d) monitor the management of the municipality's administration in terms of the policy directions of the municipal council
- (e) oversee the provision of services to communities in a sustainable manner
- (f) perform such duties and exercise such powers as the municipal council may delegate to it
- (g) report annually on the involvement of communities and community organisations in the affairs of the municipality
- (h) ensure that regard is given to public views and report on the effect of consultation on the decisions of the council.

Apart from the reporting duties mentioned above, an executive committee is generally obligated to report to the municipal council on all decisions taken by the committee.<sup>30</sup>

Members of an executive committee must be elected from among the members of a municipal council and by the municipal council itself within 14 days of the council's election or, if it is a district council, within 14 days after the last of the local councils has appointed its representatives to that district council.<sup>31</sup> If the type of municipality has been changed to a type that may establish an executive committee, within 14 days the municipal council of the new type of municipality must also elect the members of the executive committee.<sup>32</sup> Subject to any vacancies, members of an executive committee are elected for a term ending when the next municipal council is declared elected.<sup>33</sup> Members of an executive committee are not always elected for

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<sup>30</sup> This relates to all aspects where an executive committee has the power or authority to take certain decisions itself and thus to bind the municipal council. One must remember that the municipal council is always ultimately responsible for all decisions taken within that municipality's structures. It speaks for itself therefore that a municipal council must be updated regularly and informed of all decisions that the municipal council itself has not taken directly. See the Structures Act s 44(4).

<sup>31</sup> See the Structures Act s 45(a)-(b).

<sup>32</sup> See the Structures Act s 45(c) as substituted by Act 1 of 2003 s 1.

<sup>33</sup> In essence, the term of members of an executive committee is similar to the term of a municipal council in normal circumstances. Refer to the Structures Act s 46. The term of office as an ex-

*continued on next page*



the full term of office, as vacancies can occur. A member of an executive committee must vacate his/her office during a term if that member

- resigns as a member of the executive committee
- is removed from office as member of the executive committee in terms of section 53 of the Act
- ceases to be a councillor.

When a vacancy has occurred and needs to be filled, such filling is subject to section 43 of the Act.<sup>34</sup>

Although the new legislative framework for local government makes provision for the election of an executive mayor in certain circumstances, the election of a mayor is not restricted to such executive systems of municipality only. Accordingly, a municipal council must elect a member of its executive committee as the mayor, and if so approved by the MEC in the province, also a deputy mayor.<sup>35</sup> The election of a mayor or deputy mayor takes place according to the procedure set out in Schedule 3 of the Act. When a mayor or deputy mayor is elected, he/she is elected for the duration of that person's term of office as member of the executive committee.<sup>36</sup> Similar to membership of the executive committee, a mayor or deputy mayor must vacate his/her office during a term if that person

- resigns as mayor or deputy mayor
- is removed from office as a member of the executive committee;
- ceases to be a member of the executive committee.<sup>37</sup>

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ecutive committee member can also be shortened if the type of municipality has been changed to a type which does not allow for the establishment of an executive committee. See Act 1 of 2003 s 2.

<sup>34</sup> This again emphasises the fact that if vacancies do occur, the proportional representation systems must still apply. If, eg, a member of political party A resigns, a fellow member of that party should take up such membership. The reflection of parties and interests in the executive committee as a committee of the municipal council should be maintained, as was determined according to the election results. The filling of vacancies cannot be used by the majority party in the municipal council to strengthen its own representation in the executive committee. See the Structures Act s 47(2).

<sup>35</sup> It is important to note that a mayor or deputy mayor is not elected by the executive committee itself, but by the municipal council. The mayor or deputy mayor must be a member of the executive committee before he/she is elected, however. The facts thus speak for themselves that the election of a mayor or deputy can take place only once the executive committee has been elected or when it is necessary to fill a vacancy. See the Structures Act s 48(1)-(2).

<sup>36</sup> Although the new legislative framework does not directly make mention of the time when a mayor or deputy is to be elected, it is submitted that such election should take place simultaneously with the election of the members of the executive committee, or very shortly thereafter. Because of the important role that a mayor plays within the executive structures of a municipality, a quick and speedy election of such a person is essential. The election of mayor or deputy mayor is conducted in terms of the procedures set out in the Structures Act Sch 3. See also the Act s 48(2).

<sup>37</sup> See the Structures Act s 48(4)(a)-(c).

No person may hold office as mayor or deputy mayor in the same council for more than two consecutive terms.<sup>38</sup> If a person is elected to fill a vacancy in the office of mayor or deputy mayor, the period between that election and the next election of a mayor or deputy mayor *was originally regarded* as a term of office.<sup>39</sup> During 2003 the Structures Act was amended to determine that when a vacancy in the office of mayor or deputy mayor is to be filled, the period between such election and the next election of mayor or deputy mayor is not regarded as a term. Any time served by a person in order to fill a vacancy or when the type of municipality has been changed to one which requires a mayor or deputy mayor, such a term is also not regarded as a term of office as mayor or deputy mayor. A mayor whose two consecutive terms have expired may not immediately after the expiry be elected as deputy mayor.<sup>40</sup>

The person elected as mayor in an executive committee system has specific powers and functions. The mayor normally presides at meetings of the executive committee and performs the necessary duties, including any ceremonial functions, and he/she exercises the powers delegated to the office of mayor by the municipal council or executive committee. If a mayor is absent or not available, the deputy mayor will exercise the powers and perform the duties of the mayor. It should be noted that the mayor may also delegate duties to the deputy mayor.<sup>41</sup>

Generally speaking, it is the mayor that decides where and when the executive committee should meet. However, if a majority of the members of an executive committee requests the mayor in writing to convene an executive committee, the mayor is obligated to convene such a meeting at a time and place set out in the

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<sup>38</sup> The position is the same regarding a deputy mayor or deputy executive mayor. A person may hold office for only two consecutive terms.

<sup>39</sup> This position is now similar to the position or office of president or premier. When a person is elected to fill a vacancy in the office of the president on national level or the office of premier on a provincial level, the period between that election and the next election of either the president or the premier *is not regarded* as a term of office. See the Constitution ss 88(2) and 130(2). See the Structures Act s 48 as amended by Act 1 of 2003 s 3.

<sup>40</sup> See the Structures Act s 48(6). The time period that is required is not certain, however. It is submitted that a term should pass before a former mayor who has served two consecutive terms as such can be elected as a deputy mayor. Arguably, the position should not be the same with regard to a deputy mayor who has served consecutive terms as deputy and now stands to be elected as mayor. If the legislator intended such requirements, it would have been included in the legislation. The elevation from deputy mayor to mayor should not be restricted/delayed by a certain time period.

<sup>41</sup> If a mayor is absent or not available and there is no deputy mayor, or he/she is also absent or not available, then the members of the executive committee designated as such by the mayor in writing will act as mayor, or if the mayor has not designated anyone, the members of the Executive

*continued on next page*

written request.<sup>42</sup> If both the mayor and deputy mayor are absent from a meeting and if there is a quorum of members present, the members present must elect another member to preside at the meeting.<sup>43</sup>

It is standard practice for an executive committee to determine its own internal procedures and functioning. Accordingly, an executive committee, by resolution taken with a supporting vote of a majority of its members, may determine its own procedures subject, however, to any directions and the rules and orders of the relevant municipal council.<sup>44</sup> The Structures Act determines not only the rules and orders of a municipal council, but also the fact that a majority of the members of an executive committee constitutes a quorum for a meeting. Decisions or questions before the executive committee are further decided if there is agreement/consensus among at least the majority of the members present that form a quorum. If there is an equality of votes on any question (an equal number of votes against and in favour of a matter), the person presiding must exercise a casting vote. Such a casting vote is in addition to that member's normal vote as a member of the executive committee.<sup>45</sup>

Lastly, it is important to note that members of an executive committee may be removed from office as members of the executive committee. A municipal council is authorised to remove one or more or all members of its executive committee by resolution. The municipal council must ensure that it acts within the ambit of the law, however. Before a member or members of an executive committee are removed, prior notice of the intention to move for a motion for removal must be given.<sup>46</sup> If all the members of an executive committee are removed, a new election of members and of the mayor or deputy mayor, if applicable, must be held in terms of sections 45

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Committee can elect someone from amongst its members to act as mayor. The Structures Act s 49(1)-(3).

<sup>42</sup> It is submitted that the majority in such instances refers to an absolute majority, which requires a 50% + 1 of all the members of the executive committee. See the Structures Act s 50(1).

<sup>43</sup> The Structures Act s 50(2).

<sup>44</sup> In this respect the Constitution s 160(6) determines that a municipal council may make by-laws which prescribe rules and orders for the council's internal arrangements, business and proceedings and the establishment, composition, procedures, powers and functions of its committees. See also the Structures Act s 51.

<sup>45</sup> To illustrate by way of an example: If an executive committee consists of 8 members, at least (4 + 1) 5 members will constitute a quorum, and at least 3 members should be in agreement in terms of a decision. See the Structures Act s 52(1)-(3).

<sup>46</sup> See the Structures Act s 53(1). Note also that according to the Constitution s 160(3) a majority of members of the municipal council must be present and that such a decision will be decided by majority votes of the members present. Refer also the Structures Act s 30.

and 48 respectively. Any new election will subsequently also be subject to the requirements of section 43 of the Structures Act.<sup>47</sup>

#### **15.2.1.6 Requirements regarding the composition, functioning and procedures of executive mayors**

In the new local government system, only municipalities with a mayoral executive system or such a system combined with a sub-council participatory system or ward participatory system are allowed to have or establish an executive mayor.<sup>48</sup> If a municipal council has decided to choose an executive mayor, it must elect an executive mayor from among its members. If the MEC for local government so approves, an executive deputy mayor may also be elected from among the members of the municipal council. Furthermore, an executive mayor must be elected within 14 days after the date from which the type of municipality has been changed to a type that allows for an executive mayor.<sup>49</sup> The election of an executive mayor must be held at a meeting of the municipal council within 14 days of the council's election or, in the case of a district council, within 14 days after the last one of the local councils has appointed its representatives to the district council. The election of an executive mayor or deputy mayor is prescribed in Schedule 3 of the Structures Act. Any vacancy in the office of executive mayor or deputy executive mayor must be filled when necessary.<sup>50</sup>

Similar to the position of an executive committee, an executive mayor has specific powers and functions. In this respect an executive mayor is entitled to receive reports from committees of the municipal council and forward such reports together with a recommendation to the municipal council in instances when the matter cannot be disposed of by the executive mayor himself/herself in terms of the powers delegated to his/her office. An executive mayor has the same obligations as an executive committee.<sup>51</sup> In municipalities that have established an executive mayor, such an executive mayor is obligated to perform ceremonial functions if the municipal council so determines, and he/she must report to the municipal council on all decisions

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<sup>47</sup> See the Structures Act s 53.

<sup>48</sup> See the Structures Act ss 54(1) and 8(e), (f), (g), (h), 9(c) and 10(b).

<sup>49</sup> See the Structures Act s 55(1)(c) as substituted by Act 1 of 2003 s 4.

<sup>50</sup> See the Structures Act s 55. According to Sch 3, certain formal requirements and procedures must be complied with.

<sup>51</sup> See s 56(2)(a)-(c) and (3)(a)-(h). The mayor must identify the needs of the municipality, prioritise needs and make recommendations to the municipal council.

taken by his/her office. If the executive mayor is absent, not available or if the office is vacant, the deputy mayor, if applicable, exercises all powers and performs the duties and functions of the executive mayor.<sup>52</sup>

An executive mayor and deputy executive mayor must be elected for a term ending when the next council is declared elected or when the type of municipality is changed to one not allowing for an executive mayoral system. No executive mayor or deputy mayor may serve as such for more than two consecutive terms. When filling a vacancy, such a vacancy period is not regarded as a term. This position is the same regarding the term of office as mayor or deputy mayor in both the executive committee system or the mayor executive system. The period served as mayor or deputy mayor in instances where the type of municipality has been changed is also not regarded as a term of office. As in the executive committee system, an executive mayor whose two consecutive terms have expired may not be elected as deputy executive mayor immediately after such expiry.<sup>53</sup> The term of an executive mayor is not always fixed until the next council is declared elected. By resolution, a municipal council may remove its executive mayor or deputy mayor from office. Prior notice of an intention to propose a motion for removal must be given.<sup>54</sup> Apart from removal, an executive mayor or deputy will also have to vacate his/her office during a term if he/she resigns, is removed or ceases to be a councillor of the municipal council.<sup>55</sup>

An important addition to an executive mayor system is the appointment of a mayoral committee. According to the Structures Act, if a municipal council has more than

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<sup>52</sup> See the Structures Act s 56(4)-(6). In a system with an executive mayor, the office of executive mayor is vested with both the executive authority and ceremonial duties. Note that if the executive mayor is absent or not available to perform his/her functions and there is no deputy mayor or such a deputy mayor is also absent or unavailable, then the council must designate a councillor to act as executive mayor. See the Act s 56(7) as amended by Act 51 of 2002 s 16(b).

<sup>53</sup> The reasoning for such provisions seems to be to allow other members of a municipal council an opportunity to obtain experience as mayor and deputy mayor, to allow for new leadership and to ensure that powers are not fixed in one or two individuals. An aspect that is unclear is if an executive mayor, after serving two consecutive terms, and after he/she has sat out a term, can be elected again as mayor or deputy mayor. In this regard it is submitted that should a person be allowed to serve as mayor or deputy again, this would be contrary to the intention of the legislator. In both national and provincial spheres, once a president or premier has served his/her consecutive terms, such a person cannot again be elected to that office or position. See the Constitution ss 88 and 130. This should also be the position on local government level. However, the position is different if a mayor is elected as deputy mayor or *vice versa*. Only the requirement of s 57(2) is relevant to such situations.

<sup>54</sup> Refer to the Structures Act s 58.

<sup>55</sup> See the Structures Act s 59.

nine members and has established an executive mayoral system, then its executive mayor.<sup>56</sup>

- must appoint a mayoral committee from among the councillors to assist the executive mayor
- may delegate specific responsibilities to each member of the mayoral committee
- may delegate any of the executive mayor's powers to the members of the committee and
- may dismiss a member of the mayoral committee.

The mayoral committee is comparable with the cabinet of the president on a national level or an executive council on a provincial level.<sup>57</sup> A mayoral committee must consist of the deputy executive mayor, if applicable, and as many councillors as may be necessary for effective and efficient government. However, no mayoral committee may have more members than 20% of the councillors of a municipal council or 10 councillors, whichever is the least.<sup>58</sup>

The powers and functions of an executive mayor as may be designated by the municipal council must be exercised and performed by the executive mayor *together* with the other members of the mayoral committee.<sup>59</sup> Generally speaking, the members of a mayoral committee will remain in office for the term of the executive mayor who has appointed them. However, if the executive mayor vacates office, the mayoral committee will also dissolve.<sup>60</sup>

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<sup>56</sup> See the Structures Act s 60(1)(a)-(d).

<sup>57</sup> In both the national and provincial spheres of government the members of cabinet or members of executive councils are appointed by the president or premier and are given tasks by them and can be dismissed by them respectively. See the Constitution ss 91 and 132. There seems to be uncertainty, however, if a mayoral committee must be appointed in a manner that allows parties and interests reflected in the municipal council to be fairly represented. In light of the Constitution s 160(8), it seems that such appointment should indeed be proportional.

<sup>58</sup> Eg, if a municipal council has 40 members, a mayoral committee can consist out of 8 members.  $40 \times 20\% = 8$ . A municipal council with 150 members can have a mayoral committee of only 10 members.  $150 \times 20\% = 30$ . The least between 30 and 10 is 10. See the Structures Act s 60(2). The mayor is also a member of the mayoral committee and must be calculated within the membership total.

<sup>59</sup> See the Structures Act s 60(3). The wording "together with the other members" indicates that the mayoral committee should act on consensus. The executive mayor should consult the other members and should act on their advice. He/she is not merely obligated to consult such members and then act on his/her own accord. The decision-making process of a mayoral committee seems to be left for such committee self to decide. Normally majority decision making or sufficient consensus would be employed.

<sup>60</sup> Read the Structures Act s 60(5) together with s 59.



### **15.2.1.7 The establishment, powers and internal arrangement of metropolitan sub-councils**

Apart from an executive committee and an executive mayor, the Structures Act also provides for the establishment of metropolitan sub-councils and ward committees. Only metropolitan municipalities with a collective executive system or mayoral executive system that is combined with a sub-council system may establish metropolitan sub-councils.<sup>61</sup>

If a metropolitan municipality decides to establish metropolitan sub-councils, it must do so by passing a by-law which should:

- determine the number of sub-councils to be established
- determine an area within the municipal area that will consist out of a cluster of adjoining wards for each sub-council
- establish a sub-council under a distinct name in each area
- determine a mechanism that complies with Part 2 of Schedule 4 for the appointment of councillors in terms of section 63 of the Structures Act
- provide for an equitable financial framework in terms of which the sub-councils must function and
- regulate any other relevant matters.<sup>62</sup>

When wards are clustered together to determine the area of a metropolitan sub-council, the municipal council must apply the criteria set out in sections 24 and 25 of the Demarcation Act, insofar as they can be applied, and must also consult the Demarcation Board regarding such exercise.

After metropolitan sub-councils have been established, each of such sub-councils shall consist of

- the councillors representing the wards in the sub-council area
- an additional number of councillors that are allocated in terms of Part 1 of Schedule 4 of the Structures Act.<sup>63</sup>

Schedule 4 determines that the component of seats in section 63(1)(b) of the Structures Act, which refers to the allocating of seats to parties, is allocated to each party

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<sup>61</sup> See the Structures Act s 61(1) read with s 8(b), (d), (f) and (h).

<sup>62</sup> Note that before the by-law is passed, a process of public consultation must have been undertaken. See the Structures Act s 62 as amended by Act 20 of 2002.

<sup>63</sup> See the Structures Act s 63(1)-(2).



in accordance with the following formula:<sup>64</sup>

$$\frac{A}{B} \times C$$

If the equation results in fractions, such fractions are to be disregarded. The seats allocated in terms of section 63(1)(b) must be allocated to parties represented in the metro council in a manner that will allow parties and interests reflected in the council to be fairly represented in the metro sub-council and that is consistent with the principle of democracy. In order to facilitate party representatives on the metro sub-council, each party represented in the metro council must designate their representatives to each metro sub-council from amongst their councillors not representing wards. No councillor may serve on more than one sub-council, and vacancies must be filled as they occur. Schedule 4 does not apply in cases where

- metropolitan sub-councils are established;
- the *areas* of existing metro sub-councils are changed; or
- the *number* of existing metro sub-councils are changed, after the composition of a metro council has changed as a result of the provisions of Schedule 6B of the Constitution.

In such cases, the additional number of councillors is determined by the metro council, so as far as possible the seats held by proportional representative councillors are equally distributed amongst all the metro sub-councils.<sup>65</sup>

The councillors referred to in section 63(1)(b) must consist of councillors elected to the metro council from party lists in terms of Part 3 of Schedule 1 and must be appointed in terms of Part 1 of Schedule 4 or section 62(1)(cA) of the Act. It must be emphasised that item 3 of the code of conduct for councillors as set out in Schedule 1 to the Systems Act, which deals with the attendance at meetings, does not apply to the speaker, executive mayor, a member of the mayor committee or a member of the

<sup>64</sup> A = total number of valid votes cast for each party on the party vote in the area of the metropolitan *sub-council*; B = the total number of valid votes cast for each party on the party vote in the total area of the metro council; and C = the total number of seats allocated to each party in the metro council in accordance with Sch 1 Part 3.

<sup>65</sup> See the Structures Act s 63(1)(b) as amended by Act 2 of 2003 s 9.

executive committee in respect of meetings of a metro sub-council of which such an office bearer is a member.<sup>66</sup>

In respect of powers and functions, a metro sub-council has such duties and powers as the metro council may delegate to it, and it may make recommendations to the metro council on any matter affecting its area. In respect of delegated powers, a metro sub-council may advise the metro council on what duties and powers should be delegated to it.<sup>67</sup>

A metro sub-council must further elect one of its members to be the chairperson of that sub-council. In normal circumstances the term of members of a metro sub-council will be until the next metro council is declared elected. However, where a section 63(1)(b) member of a metro sub-council is replaced as a result of the provisions of item 6(b) of Schedule 6B to the Constitution, the newly appointed member is appointed for the remainder of the replaced member's term, subject to section 67. Vacancies in sub-council membership can occur if a councillor resigns as a member of the sub-council or ceases to be a councillor in general, however.<sup>68</sup>

Subject to any directions of the metro council, the chairperson of a metro sub-council decides when and where the sub-council will meet. However, if a majority of members makes a request to the chairperson in writing, the chairperson must convene a meeting as requested. At meetings of the sub-council, the chairperson will preside. If the chairperson is absent but a quorum is present, then the members present must elect a member to preside at that meeting. With a supporting vote of a majority of its members, all metro sub-councils are allowed to determine their own internal procedures. Such procedures are subject to any directions of the metro council, however. Quorums in sub-councils are achieved when a majority of the members are present. Questions or decisions before the sub-council are then decided if there is agreement among at least the majority of the members present that form a quorum.<sup>69</sup> If there is an equality of votes on any question, the member presid-

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<sup>66</sup> See the Structures Act s 63(3).

<sup>67</sup> It is important that a proper evaluation of the capacity and capabilities of the metro sub-councils be undertaken before unrealistic and unachievable powers or duties are delegated. One must remember that the metro council will ultimately have the responsibility regarding the duties and provision of services. Refer to the Structures Act s 64.

<sup>68</sup> Refer to the Structures Act ss 65-67, as amended by Act 20 of 2002 and Act 2 of 2003.

<sup>69</sup> Again, this refers to a normal majority of 50% + 1. If a sub-council consists of 12 members, at least (6 + 1 =) 7 members must be present to form a quorum and at least 50% + 1 of the members present must agree or vote in favour of a question. See the Structures Act ss 68-70.

ing must exercise a casting vote in addition to that member's normal vote as a member. Lastly, all metro sub-councils are permitted to appoint internal committees, including a management committee. Members of the committees are appointed from among the members of the sub-council itself, and the main purpose of such committees is to assist the sub-council in the performance of its duties and the exercise of its powers.<sup>70</sup>

#### **15.2.1.8 The establishment, powers and functions of ward committees**

Similar to the position mentioned above, only metropolitan and local municipalities with a collective executive system or a mayoral executive system may establish ward committees. The main objective of a ward committee is to enhance participatory democracy in local government.<sup>71</sup>

If a metro or local council decides to have ward committees, it must establish a ward committee for each ward in the municipality. A ward committee consists of

- the ward councillor, who must also be the chairperson of the ward committee
- not more than 10 other members.

A metro or local council must further make rules regulating the election procedure of the ward committee members other than the chairperson. Such rules must take into account the need for women to be equitably represented in the ward committee and also the need to represent the diversity of interests in the ward. The rules must furthermore regulate the circumstances under which a ward committee member must vacate his/her office and the frequency of meetings of ward committees.<sup>72</sup>

In an effort to enhance participatory democracy, ward committees have been given specific powers and functions. A ward committee may make recommendations on any matter affecting its ward to either the ward councillor or through the ward councillor, to the relevant municipal council or its executive committee or executive mayor, or even the metro sub-council if applicable. All ward committees have such duties and powers as the municipal council may delegate to it.<sup>73</sup>

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<sup>70</sup> See the Structures Act s 71.

<sup>71</sup> See the Structures Act s 72(1)-(3) read together with ss 8(c), (d), (g) and (h) and 9(b), (d) and (f).

<sup>72</sup> See the Structures Act s 73(1)-(4). The Act also allows a metro or local council to make administrative arrangements to enable ward committees to perform their function and exercise their powers effectively. Such arrangements should include technical and administrative support through the provision of advice or infrastructure.

<sup>73</sup> Refer to the Structures Act s 74.

Generally speaking, the members of a ward committee are elected for a term as is determined in terms of the rules of the metro or local council.<sup>74</sup> Vacancies in membership of ward councillors, apart from a vacancy in the office of the elected ward councillor himself/herself, must be filled in terms of a procedure determined by the relevant municipal council. It is important to note that no remuneration is payable to members of a ward committee apart from the relevant ward councillor. Again, emphasis should be placed on the fact that ward committees are directed at achieving and enhancing participation by local residents in ward-related matters. Such committee members are not official office bearers of the relevant municipal council and are thus not remunerated for their services. It is lastly also possible for a metro or local council to dissolve a ward committee if that committee fails to fulfil its objectives.<sup>75</sup>

#### **15.2.1.9 Other committees of municipal councils**

Apart from the committees mentioned above, a municipal council may also establish one or more committees necessary for the effective and efficient performance of any of its powers or functions.<sup>76</sup> The members of such committees are appointed from among the members of the municipal council by the municipal council, and the municipal council is also permitted to dissolve a committee at any time.<sup>77</sup> When so-called section 79 committees are established, the municipal council must adhere to the various legislative requirements:

- It must determine the functions of the committee.
- It may delegate duties and powers to the committee.
- It must appoint the chairperson of the committee.
- It may authorise a committee to co-opt advisory members to the committee, who are not members of the council, within the limits determined by the municipal council.
- It may remove a member of a committee at any time.
- It may determine a committee's procedure.<sup>78</sup>

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<sup>74</sup> See the Structures Act ss 73(3)(b) and 75 read together.

<sup>75</sup> Refer to the Structures Act ss 77-78 respectively.

<sup>76</sup> Such committees are often referred to as "s 79 committees" or "portfolio committees".

<sup>77</sup> The establishment of such committees should comply with s 160(6)(c) regarding the establishment of *inter alia* committees and the Constitution s 160(8), which requires proportionality in such committees. See also the Structures Act s 79.

<sup>78</sup> See the Structures Act s 79(2)(a)-(f).

If a municipal council has an executive committee or an executive mayor, it may appoint, in terms of section 79, certain committees of councillors to assist the executive committee or the executive mayor respectively. The number comprising such committees may not exceed the number of members of the executive committee or the mayoral committee, as was discussed above.<sup>79</sup> Depending on the circumstances, either the executive committee or the executive mayor:

- appoints a chairperson for each committee
- may delegate any power and duties to such committees
- is not divested of responsibility of such powers or duties, however
- may vary or revoke any decision taken by a committee, subject to any vested rights.<sup>80</sup>

All section 80 committees must report to either the executive committee or the executive mayor in accordance with the directions given by the executive committee or executive mayor, whichever is applicable.<sup>81</sup>

#### **15.2.1.10 The employment of municipal personnel**

The Constitution specifically entrenches the authority of a municipal council to employ personnel that are necessary for the effective performance of its functions. Each municipal council must therefore decide which personnel should be appointed and if such personnel can be afforded by the municipality concerned. Although generally speaking it is open for a municipal council to employ personnel, every municipal council is obligated to appoint a municipal manager who is to head the administration and also the accounting officer for the municipality. When necessary, a municipal council must also appoint an acting municipal manager. A person that is appointed as a municipal manager must have the relevant skills and expertise to perform the duties and functions associated with such a post.<sup>82</sup>

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<sup>79</sup> Where a municipal council has established an executive mayor, the mayor must appoint a mayor committee if the council have more than 9 members. Such mayor committee may never have more than 10 members. See s 60 of the Structures Act. Therefore, a s 80 committee, appointed in terms of s 79, can never have more than 10 members as a maximum. See the Structures Act s 80(2).

<sup>80</sup> Refer to the Structures Act s 80(3)(a)-(d).

<sup>81</sup> In the former local government dispensation a distinction was made between committees with authority to bind the municipal council through its decisions and committees that performed only administrative functions without binding authority. See, eg, the Transvaal Ordinance on Municipal Administration, O17 of 1939 ss 59 and 60.

<sup>82</sup> Apart from sophisticated managerial skills, a municipal manager should also have wide knowledge of local government matters as well as experience in public administration. See the Structures Act s 82.

### **15.2.2 Aspects regarding the delegation of powers and functions in local government structures**

It is an accepted practice in many governmental systems and public departments to allow and provide for the delegation of powers by one functionary to another. Generally speaking, the power or authority to delegate a power or function entails the lawful transfer of such a power or function from a structure which has legally been vested with a power or performance of such a power or function to another structure. Such delegation of authority is directed mainly at ensuring more effective and sufficient decision making within governmental structures. Because of its importance, the Constitution specifically entrenches the principles of agency and delegation.<sup>83</sup> In this regard, section 238 of the Constitution states as follows:

An executive organ of state in any sphere of government may-

- (a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or
- (b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

In its position as an executive organ of state in the third sphere of government, a municipal council is therefore constitutionally authorised to delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state. Such delegation must be consistent with the legislation in terms of which the power is exercised or the function is performed. Consequently, any delegation of authority must be evaluated against either the Constitution or other legislation applicable to such delegation.

Apart from section 238, a further constitutional provision regarding the delegation of powers on local government sphere is found in section 160(2) of the Constitution. According to the subsection and notwithstanding the provisions of section 238, certain functions may not be delegated by a municipal council. Such functions include

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<sup>83</sup> In the case of *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC) the Constitutional Court *inter alia* held that there was nothing in the interim Constitution prohibiting parliament from delegating subordinate regulatory authority to other bodies. The court stated that the power to delegate authority was necessary for effective law making. See para 51 at 899D-E.

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

All such functions must be taken by the municipal council itself and may not be delegated to another functionary such as an executive committee or an executive mayor.<sup>84</sup> See the case of *Executive Council, Western Cape v Minister of Provincial Affairs*,<sup>85</sup> where the Constitutional Court per Ngcobo J held that section 160(2) of the Constitution simply prohibited municipalities from delegating certain matters. Section 160(2) did not give municipalities an unqualified right to delegate any other matter, however. Section 160(2) indeed provided how the power to delegate might be exercised and to which structures it might be delegated. The section did not in any way take away from municipalities the power to delegate matters except those excluded by the subsection. The court further confirmed that section 154(1) of the Constitution conferred wide legislative authority on the national government in respect of municipalities, and it authorised both national and provincial governments to enact legislation to empower municipalities to manage their affairs. According to the court, such legislative authority was wide enough to confer authority on the national government/parliament to enact section 32 of the Structures Act. The enactment of section 32, which required a municipal council to develop a system of delegation that would maximise administrative and operational efficiency was therefore not inconsistent with section 160(2) of the Constitution.<sup>86</sup>

#### **15.2.2.1 The new system for delegation in local government**

Apart from the constitutional requirements regarding the delegation of powers, the new legislative framework for local government established under the Constitution also contains several aspects regarding the delegation system that must be developed. In this regard the Local Government: Municipal Systems Act determines that a municipal council must develop a system of delegation that will maximise the admin-

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<sup>84</sup> Cf the case of *Kritzinger v Newcastle Local Transitional Council and Others* 2000 (1) SA 345 (N), where the court held that the Constitution s 160 did not mention the right to delegate to the executive committee the power to determine whether civil proceedings should be instituted or defended as one of those aspects which municipal councils were precluded from delegating. See at 350B-H.

<sup>85</sup> 2000 (1) SA 661 (CC).

<sup>86</sup> Refer to paras 126-129 at 711-712.



istrative and operational efficiency of the municipality. The system of delegation must also provide for adequate checks and balances.<sup>87</sup> The Systems Act furthermore determines that, according to the system of delegation, appropriate powers may be delegated to any of the municipality's other political structures, political office bearers, councillors or staff members. Certain powers may not be delegated to such functionaries, however. These powers are:

- a power mentioned in terms of section 160(2) of the Constitution
- the power to set tariffs
- the power to decide to enter into a service delivery agreement in terms of section 76(b) of the Systems Act
- the power to approve or amend the municipality integrated development plan (IDP).<sup>88</sup>

The system of delegation may also instruct any political structure, political office bearer, councillor or staff member to perform any of the municipality's duties.<sup>89</sup> Notwithstanding the fact that certain powers or duties have been delegated to other functionaries by a municipal council, such delegation authority is not absolute, and accordingly the system of delegation may also provide for the withdrawal of any delegation or instruction.

When a delegation or instruction is given, there are specific requirements that legally must be met. These requirements can be summarised as follows:<sup>90</sup>

- A delegation or instruction must not conflict with the Constitution, the Systems Act or Structures Act.
- It must be in writing.
- It is subject to any limitations, conditions and directions that the municipal council may impose.
- It may include the power to sub-delegate a already delegated power.

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<sup>87</sup> See the Systems Act s 59(1).

<sup>88</sup> See the Systems Act s 59(1)(a).

<sup>89</sup> Delegation therefore refers not only to the exercise of certain powers, but also to the performance of certain duties. See the Systems Act s 59(1)(b)-(c).

<sup>90</sup> See the Systems Act s 59(2)(a)-(f). Refer also to the case of *Nelson Mandela Metropolitan Municipality v Greyvenouw* CC 2004 (2) SA 81 SECLD, where the court held that the delegation of non-discretionary decisions, such as giving effect to a discretionary decision taken by a Municipal Manager to institute legal proceedings, did not offend against the purpose of the system of delegation of authority. If the Municipal Manager was authorised to exercise the decision, he/she could then legally authorise someone else to fulfil such authority. See para 49-51 and 98-99.

- It does not divest the municipal council of the responsibility concerning the exercise of the power or duty.
- It must be reviewed when a new council is elected or, in the case of a district council, when such council has been elected and appointed.

In order to strengthen and enhance accountability and to ensure a proper check on delegated powers or duties, a municipal council may, in accordance with its internal procedures, review any decision taken by a political structure, political office bearers, councillor or staff member in consequence of a delegation or instruction. Upon such review, the municipal council may either confirm, vary or revoke the decision taken by such functionary, subject to any rights that may have accrued to a person. Apart from a municipal council's authority to review *mero moto* the exercise of a delegated power or duty, a municipal council must review a decision taken in consequence of a delegation or instruction if at least one quarter of the councillors of the council request the municipal council to do so, in writing.<sup>91</sup> A municipal council may also require its executive committee or executive mayor to review any decision taken by a functionary in consequence of a delegation or instruction.<sup>92</sup>

However, according to the new legislative framework, certain delegations are restricted to executive committees or executive mayors only. In this regard, the powers to:

- take decisions to expropriate immovable property or rights in or to immovable property and
  - determine or alter the remuneration, benefits or other conditions of service of the municipal manager or managers directly responsible to the municipal manager
- may only be delegated to the executive committee or executive mayor, which ever is applicable within a policy framework determined by the municipal council.<sup>93</sup> It is also determined that a municipal council may delegate only to an executive committee or executive mayor or chief financial officer the authority to make investments on behalf

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<sup>91</sup> See the Systems Act s 59(3)(a).

<sup>92</sup> The Systems Act s 59(3)(b). It is important to note that any delegation or sub-delegation to a staff member of a power conferred on a municipal manager must be approved by the municipal council in accordance with the system of delegation that has been established in terms of the Act s 59(1). See s 59(4) as added by Act 51 of 2002 s 36.

<sup>93</sup> See the Systems Act s 60(1)(a)-(b).

of the municipality, within the policy framework determined by the national minister of finance.<sup>94</sup>

In order to ensure control over delegated matters, it is determined that a political structure, a political office bearer, a councillor or a staff member of a municipality to whom a delegating authority has been delegated or sub-delegated may or sometimes must refer the matter to the relevant delegating authority for a decision.<sup>95</sup> Furthermore, any person whose rights are affected by a decision taken by a functionary in terms of a power or duty delegated or sub-delegated may appeal against that decision by giving written notice of the appeal and reasons therefore to the municipal manager within 21 days of the date of the notification of the decision. Upon receipt of a notice of appeal, the municipal manager must promptly submit the appeal to the appropriate appeal authority, which must consider the appeal and confirm, vary or revoke the decision.<sup>96</sup> According to the Systems Act, various persons or a combination of persons will be regarded as an appropriate appeal authority, depending on the particular circumstances. For example, if the appeal is against a decision by a staff member other than the municipal manager, then the municipal manager is the appeal authority. If the appeal is against a decision by the municipal manager, then the executive committee or executive mayor is the relevant appeal authority. If a municipality does not have an executive committee or executive mayor, then the municipal council of the municipality is the appeal authority. Lastly, if an appeal is against a decision by a political structure such as an executive committee or executive mayor, or a political office bearer or a councillor, then the municipal council is the appeal authority. This will be the case only where the council comprises less than 15 councillors. Where the council comprises more than 15 councillors, a committee of councillors must be appointed and will be the appropriate appeal authority.<sup>97</sup> It is further required that an appeal authority commence with an appeal within six weeks from the date of referral of the appeal to it and decide the appeal within a reasonable

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<sup>94</sup> The Systems Act s 60(2).

<sup>95</sup> See the Systems Act s 61.

<sup>96</sup> In this respect it is of importance to note that no variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision. See the Systems Act s 62(3).

<sup>97</sup> A special appeal committee must be appointed by the municipal council for such a purpose and must involve councillors who were not involved in the original decision. See the Systems Act s 62(4)(a)-(c).

period. It should be noted that an internal appeal does not detract from any appropriate appeal procedure that is provided for in any other applicable law.<sup>98</sup>

In an effort to further ensure accountability and oversight in respect of delegated powers, it is determined that a political structure, office bearer, councillor or staff member to whom an authority has been delegated or sub-delegated must report to the delegating authority in such intervals as the delegating authority may require. A delegation or sub-delegation may also be withdrawn or amended, or can even lapse. It is, however, important to note that the withdrawal, amendment or lapsing of a delegation or sub-delegation does not invalidate anything done as a consequence of a decision taken in terms of that delegation or sub-delegation.<sup>99</sup>

Delegations or sub-delegations should also be reviewed at regular intervals.<sup>100</sup> In this regard, and whenever it becomes necessary to review a municipality's delegations, the municipal manager must submit to the municipal council the following:

- a report on the existing delegations issued in terms of section 59 of the Systems Act and all other delegating authorities and
- recommendations on any changes to the existing delegations which the municipal manager may consider necessary.

If the municipality has an executive committee or an executive mayor, then the municipal manager must submit his/her report and recommendations to the municipal council through such executive committee or executive mayor.<sup>101</sup>

### **15.2.3 Quorums and majorities necessary to take lawful municipal decisions**

Similarly to the two higher spheres of government, all municipal councils must comply with certain basic procedural requirements in order to take lawful decisions. In this regard the Constitution requires that a majority of the members of a municipal council be present before a vote may be taken on *any matter*.<sup>102</sup> A majority in this respect seems to refer to a normal or simple majority. Such a majority would equate to 50% + 1 of the members of a particular municipal council.<sup>103</sup> The Constitution thus

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<sup>98</sup> See the Systems Act s 62(6).

<sup>99</sup> See the Systems Act ss 63 and 64.

<sup>100</sup> According to s 59(2)(f), a delegation or instruction must be reviewed when a new council is elected.

<sup>101</sup> See the Systems Act s 65(1)-(2).

<sup>102</sup> Own emphasis added.

<sup>103</sup> Eg, if a municipal council consists of 100 members, then 50 + 1 members must be present to form a quorum and before a vote may be taken.

seems clear that a quorum of at least 50% + 1 of the members of a municipal council must be present before a decision is taken. This requirement is relevant for all matters before the council.<sup>104</sup>

If a majority of the members of a municipal council is present, then such council may take lawful decisions. There are exceptions to the general rule, however. If an aspect is considered that falls within the ambit of section 160(2) of the Constitution, then it is required that the matter can be determined only by a decision taken by the municipal council with a supporting vote of a majority of its members.<sup>105</sup> This subsection seems to indicate a so-called “absolute majority”, which in turn refers to a majority vote/supporting vote of the total number of members of a municipal council. All questions before the municipal council are decided by a majority of the votes cast.<sup>106</sup>

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<sup>104</sup> See the Constitution s 160(3)(a). During the restructuring of local government, similar provisions were applicable under the LGTA. See the case of *MEC, Development Planning and Local Government v DP* 1998 (4) SA 1157 (CC). In this case a dispute arose between members of the Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council (“the Council”) as to whether or not a simple majority or a two-thirds majority was required for the approval of its budget for the forthcoming financial year. The Council and the appellant brought an urgent application in a High Court for an order declaring a simple voting majority to be sufficient. The application was dismissed with costs. The appellant then applied for leave to appeal directly to the Constitutional Court or, in the event of such leave being refused, to the Supreme Court of Appeal or to a Full Bench of the High Court. The substance of the appeal was the constitutionality of the LGTA 209 of 1993 s 15(5), which provided that the budget of a municipal council had to be approved by a two-thirds majority of that council and that, if the budget for any financial year was not approved by 30 June of that year, the member of the executive council of a province responsible for local government could exercise the power to approve the budget. The basis of the challenge was that s 16(5) was inconsistent with the 1996 Constitution, in that it violated the Constitution s 160(3)(b) read with s 160(2)(b), which required the budget of a municipal council to be approved by a majority of the members of that council. The dispute turned on the meaning of the second sentence of Constitution Sch 6 Item 26(2), which provided that the LGTA s 16(5) and (6) may not be repealed before 30 April 1999. The court finally held that the LGTA s 16(5) could not be repealed and remained in force until 30 April 1999 despite the provisions of the Constitution s 160(3)(b), which would not apply during this limited period. S 16(5) was accordingly consistent with the Constitution s 160(3)(b). See para 53 at 1178 B-D.

<sup>105</sup> Refer to the Constitution s 160(3)(b).

<sup>106</sup> See the Constitution s 160(3)(c). The following example can be used to illustrate the practical effect of the abovementioned requirements. Imagine a municipal council that consists of 100 members. According to the Constitution s 160(3)(a), at least 50% + 1 (51 or more) members must be present before a vote may be taken. If a vote is to be taken on any matter which falls outside the functions mentioned in the Constitution s 160(2)(a)-(d), then such matters are to be decided by a majority of the votes cast of the members that are present. If we accept that 60 members out of the 100 members are present, then it would seem that the Constitution requires a majority of 50% + 1, thus equating to 30 + 1 = 31 or more votes to decide the matter. It is unclear, however, what the position would be if certain members, although present, abstained from voting. Let's say that four members of the 60 present do not vote. In this regard it is submitted that the decision is to be taken on the votes cast. If only 56 votes were cast, then the majority of such votes would determine the final outcome. If the matter before the council referred to a s 160(2) matter, then a supporting vote of [the] majority members of the municipal council would be mandated. This would mean that within a council with a total of 100 members, at least 51 (50% + 1) of the members would have to vote in

*continued on next page*

An important principle to mention here is that municipal decisions such as those taken under the LGTA are not classified as administrative actions, and municipal councils are subsequently not required to provide reasons for their decisions. It seems that municipal decisions cannot legally be attacked on grounds of content; only on grounds of required procedures. This writer does not agree with such an hypothesis, however. Under the new constitutional dispensation, municipalities are required not only to comply with procedural requirements, but also to ensure that the result of certain actions or decisions comply with constitutional obligations.<sup>107</sup> This writer agrees that municipal decisions do not fall under the definition of administrative action, however.<sup>108</sup>

Apart from the mentioned constitutional requirements regarding internal quorums and majorities necessary to take lawful decisions, there is other national legislation which sets out certain requirements. According to the Local Government: Municipal Structures Act,<sup>109</sup> the speaker of a municipal council decides when and where the council should meet, subject to section 18(2) of the Act.<sup>110</sup> However, the speaker must convene a meeting if a majority of the councillors request in writing that the speaker convene a council meeting. The meeting must then be convened at a time

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support of the proposal. It should be clear from the abovementioned explanation that an absolute majority requires more votes than a normal majority.

<sup>107</sup> Refer again to the positive obligations set out in the Bill of Rights and also the Constitution ss 152 and 153. See also the constitutional case of the *Minister of Health v TAC (No 2)* 2002 (5) SA 721 (CC).

<sup>108</sup> See *Steele v South Peninsula Municipal Council* 2001 (3) SA 640 (C). In the case the respondent municipality decided by a majority vote to remove about half of the speed bumps which had been constructed in two "collector roads" in a suburb within its area of jurisdiction. The applicants, who were dissatisfied with the decision, applied in a Provincial Division for an order reviewing and setting aside the resolution so taken. The applicants contended that the resolution was an administrative act of the kind contemplated by the Constitution s 33 and was therefore subject to review. The court held that, although the council's resolution, apart from that portion of it which related to the allocation of expenditure, could not properly be regarded as legislation, it did not fit comfortably into the notion of administrative action either. The decision by the council rather constituted the exercise of its constitutional authority and "right to govern ... the local government affairs of its community" as intended in of the LGTA 209 of 1993 s 10C(3) read with the Act Sch 2A Items 6 and 7. The court further held that the resolution of the council could not be categorised as administrative action: the council passed a resolution pursuant to its statutory obligation to see to traffic control and road safety within its area of jurisdiction and it did not implement any particular law. The council resolution was carried by a majority. It was not a decision taken by a functionary who could be expected to furnish reasons but was a decision taken by a politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted. See at 643-644.

<sup>109</sup> The Act s 29.

<sup>110</sup> According to the Structures Act s 18(2), a municipal council must meet at least quarterly.



set out in the written request.<sup>111</sup> This position was affirmed by the Pretoria High Court in 2001 in the case of *Oelofse and others v Sutherland and others*.<sup>112</sup> The background to the case was the following: The second respondent, a municipal council established in terms of the Municipal Structures Act 117 of 1998, had 12 councillors, elected in the local government elections in November 2000. Six of the councillors (the applicants) formed a group or block in the second respondent council, while the other six formed another group or block. The first respondent, who had been elected the speaker of the second respondent council, was a member of the latter group or block. One of the members of the latter group resigned as a councillor in March 2001, leaving only 11 incumbent councillors. The first respondent then wrote to the other councillors informing them that as "all political parties and interest groups will need ... to prepare themselves for the by-election" he "will not be calling any council meeting before the by-election takes place". The six applicants thereupon signed a written notice calling upon the first respondent to convene a council meeting for 24 April 2001. The first respondent, claiming that the applicants lacked the requisite number of councillors to give a valid notice, declined to convene a council meeting. Relying on section 29(1) of the Act (which provided that "if the majority of the councillors requests the speaker in writing to convene a council meeting, the speaker must convene a meeting at a time set out in the request"), the six applicants applied in a Provincial Division for an urgent order compelling the first respondent to convene the council meeting. The first respondent, in opposing the application, contended that the phrase "a majority of councillors" in section 29(1) did not mean the majority of incumbents without counting any vacancies in the council and that the applicants therefore did not constitute a majority of councillors. The court, as per Bertelsmann J, held that although there was no definition of the word "quorum" in the Act, the legislature had provided in section 35 that a quorum of members was required before a valid meeting of a council could be held. None of the sections of the Act provided a number or formula for the calculation of the relevant quorum. Consequently, the quorum consisted of half the total number of members plus one. From this it followed that a municipal council had to have at least one half

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<sup>111</sup> See the Municipal Structures Act s 29(1). It is submitted that a majority of the councillors would seem to refer to an absolute majority, which would require a majority (50% + 1) of the total number of councillors of the particular municipal council.

<sup>112</sup> 2001 (4) SA 748 (T).



plus one of the number of potential council seats allocated to it by the MEC for local government to be filled by incumbents before the council could function.<sup>113</sup> The court further held in regard to section 160 of the Constitution that "members" referred to incumbents and that it was clear that a majority of incumbents could request a meeting of the municipal council. The Act clearly provided that, once a council was quorate, the majority of incumbents held sway. The court held accordingly that the application had to succeed. The applicants represented the majority of incumbents ('the majority of the councillors' referred to in section 29(1)) and were entitled to demand that a meeting be convened.<sup>114</sup>

Furthermore, the municipal manager of a municipality or, in the absence of the municipal manager, a person designated by the MEC for local government in the province, must call the first meeting of the council within 14 days after the council has been declared elected or after all the members of a district council have been appointed.<sup>115</sup> Where the composition of a municipal council has been changed as a result of the provisions of item 2, 3 or 7 of Schedule 6B of the Constitution, then, subject to item 6(b) of Schedule 6B of the Constitution, the speaker, must convene council meetings to deal with council matters. The first meeting must be held within 7 days.<sup>116</sup>

According to section 30 of the Structures Act, the basic constitutional requirements regarding municipal council quorums and decisions, as is set out in section 160(3) of the Constitution, are reiterated. However, the Act also provides that if there is an equality of votes on any question, the councillor presiding must exercise a casting vote in addition to his/her normal vote as a councillor.<sup>117</sup> It is further also legislated that before a municipal council is to take a decision on

- any matter mentioned in section 160(2) of the Constitution
- the approval of an integrated development plan for the municipality or any amendment to that plan
- the appointment and conditions of service of the municipal manager and a head of a department of the municipality

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<sup>113</sup> See pages 751-752.

<sup>114</sup> At 752-753.

<sup>115</sup> See the Structures Act s 29(2).

<sup>116</sup> See the Constitution Sch 6B read in conjunction with the Structures Act s 29(3)(a) and (b).

<sup>117</sup> See the Structures Act s 30(4).

the council must first require from its executive committee or executive mayor, whichever is applicable, to submit to it [the council] a report and a recommendation on the relevant matter.<sup>118</sup>

#### **15.2.4 Internal procedures regarding municipal by-laws**

With regard to the internal procedures of municipal councils, the Constitution further requires that no by-law may be passed by a municipal council unless

- all the members of the council have been given reasonable notice of such by-law
- the proposed by-law has been published for public comment.<sup>119</sup>

The enactment of by-laws forms part of a municipality's legislative powers and is discussed more fully in chapter 14 in this work.

#### **15.2.5 Procedures relating to the size of a municipal council and its committees**

The size of a municipal council or of its committees is a very important factor in determining the effectiveness and success of any municipal government. Very large municipal councils tend to be more ineffective than smaller, more compact, councils. The most effective municipal government would need a council that is ideally balanced and that is not too large but also not too small to be unrepresentative of community interests.

In relation to the size of a municipal council, the Constitution determines that national legislation may provide for criteria for determining the size of a municipal council, whether the council may elect an executive committee or other committees and also the size of the executive committee or other committees, if so permitted.<sup>120</sup> Again the Constitution seems to confirm a need for uniformity regarding the sizes of municipal councils and the committees operating within such councils. This uniformity is then achieved through national legislation, and it is not left to the provinces to determine differently in each province.<sup>121</sup>

#### **15.2.6 The making of by-laws to regulate internal procedures**

The Constitution specifically authorises a municipal council to enact or make a by-law which prescribes rules and orders for the internal arrangements of the council. The by-law also regulates the council's business and proceedings and should further

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<sup>118</sup> See the Structures Act s 30(5).

<sup>119</sup> See the Constitution s 160(4)(a)-(b).

<sup>120</sup> The Constitution s 160 (5)(a)-(c).

<sup>121</sup> See the Structures Act ch 3, as was discussed above.

deal with the establishment, composition, procedures, powers and functions of the committees within the relevant council.<sup>122</sup> In this regard it is important to note that the Constitution seems to enhance some sort of autonomy for municipalities regarding its internal procedures, as well as the functioning and operation of its committees. This position was confirmed in the case of *Executive Council's WC and KZN v Minister of Provincial Affairs*,<sup>123</sup> where the court held that the constitutional power of legislatures to regulate the internal proceedings of committees was a narrow power, not a broad one, and was related not to the executive committees of these legislatures, but rather to other committees entrusted with specific tasks or portfolios. Section 160(6) of the Constitution had to be interpreted in a similar fashion: although the section conferred an important power upon municipalities, its scope was relatively narrow and did not relate to the power to regulate the establishment or functioning of the executive of municipal councils, whatever form that executive might take, or any other committee of the municipality which was a key part of its democratic structure. It related only to task and working committees which might be established and disestablished from time to time. The court held further that the committees which fell within those contemplated in section 160(6)(c) were those regulated by sections 71, 79 and 80 of the Structures Act. The power of municipalities to appoint committees was subject to section 160(1)(c). Municipalities had the power to elect "an executive committee or other committees subject to national legislation". The effect of section 160(1)(c) was that the power of the municipalities to appoint committees contemplated in section 160(1)(c) was subject to national legislation. Therefore, there could be no objections to sections 71, 79 and 80. Apart from this, these provisions largely repeated the provisions of the Constitution, which afforded municipal councils the power to determine whether to establish committees or not.<sup>124</sup>

When one is dealing with a municipal council, one should have due regard to such by-laws as regulate the internal functioning. However, it is equally important to remember that municipal by-laws may not be in conflict with national or provincial legislation.<sup>125</sup> It is therefore safe to say that no by-laws that prescribe rules and orders

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<sup>122</sup> See the Constitution s 160(6)(a)-(c).

<sup>123</sup> 2000 (1) SA 661 (CC).

<sup>124</sup> See paras 100-104 at 703-705.

<sup>125</sup> See again the Constitution s 156(3). A by-law that conflicts with either national or provincial legislation is invalid.

for internal arrangements, business or proceedings or relating to municipal committees, may be different from the provisions regarding such aspects that have been determined in the legislation of the two higher spheres of government.

#### **15.2.7 Procedures regarding the manner of conducting the internal business of municipal councils**

All municipal councils are obligated by the Constitution to conduct their business in an open manner.<sup>126</sup> In essence this means that all activities of municipalities are open for public scrutiny and oversight. This obligation is applicable to not only the municipal council but to all of its committees. Only when it is reasonable to do so may a municipal council or a committee of a council close its sittings. Such closure would mean no publicity regarding the content or outcome of a particular issue or issues.<sup>127</sup> An interesting aspect is that neither the Structures Act nor the Systems Act deals further with the issue of closure of sittings. In the absence of any other such legislative provisions, it is up to each individual municipality to enact by-laws which prescribe rules and orders relating *inter alia* to its internal arrangements and its business and proceedings.<sup>128</sup>

#### **15.2.8 Internal procedures regarding the participation of members of municipal councils in council proceedings**

The final constitutional provision dealing with internal council proceedings relates to the participation of members in council or committee proceedings. In this respect the Constitution states that members of a municipal council are entitled to participate in the proceedings of the council or in the proceedings of the committees within the council.<sup>129</sup> The Constitution however circumscribes the entitlement to participate in three ways: firstly, members are entitled to participate in a manner that allows parties and interests reflected within the council to be fairly represented. What is or should constitute fair representation is somewhat uncertain and needs better clarification.

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<sup>126</sup> See the Constitution s 160(7).

<sup>127</sup> In order to determine the reasonability of closing a council or committee sitting, the council or committee must determine the circumstances objectively and after due regard to all relevant aspects has been given. The Constitution specifically requires due regard to be given to the nature of the business that is being transacted. See s 160(7). Eg, when a council is considering implementing a strategic law enforcement operation, it is obvious that the nature of such business requires secrecy and non-disclosure.

<sup>128</sup> See s 160(6)(a)-(b) above.

<sup>129</sup> It should be noted that the Constitution does not exclude certain members or certain committees. The Constitution therefore seems to suggest that all the members of a council should participate in all proceedings of the council, if they so wish.

As a starting point, one can argue that fair representation would equate to proportional representation. The *prima facie* wording of the Constitution seems to suggest that the requirement of proportional representation is applicable to all committees of a municipal council. The wording of section 160(8) of the Constitution does not distinguish directly between different municipal councils or any of its committees. When the issue regarding the requirement of fair representation in a council or a committee came before the courts, the highest court in our state held a different view. See the matter of the *DA v Masondo No and another*<sup>130</sup>. The main issue in the case was whether or not minority parties in the Johannesburg municipal council were entitled to representation on a mayoral committee established under the provisions of the Local Government: Municipal Structures Act. Section 60 of the Act provided that “if a municipal council has more than nine members, its executive mayor (a) must appoint a mayoral committee from among the councillors to assist the executive mayor”. Section 160(8) of the Constitution provided that “members of a municipal council are entitled to participate in its proceedings and those of its committees in a manner that (a) allows parties and interest reflected within the council to be fairly represented”. The appellants argued that on a proper construction of section 60(1)(a) of the Structures Act, read with section 160(8)(a) of the Constitution, the representation of minority parties is a requirement even if the subsection does not expressly say so. The respondents contended that neither the Constitution nor the Structures Act required a mayoral committee to have minority party representation. Chapter 7 of the Constitution, which contained the framework for local government, provided for three types of executive system in municipal government: a plenary executive system, an executive committee system and the executive mayoral system. The Johannesburg municipal council has the latter system.

The majority members of the Constitutional Court held that the primary function of the mayoral committee was the rendering of assistance to the mayor in the exercise of his authority. This view was supported by the provisions of section 160(6)(c) and (8) of the Constitution which, in context, referred only to committees elected by the municipal council.<sup>131</sup> It also held that, although the democratic principle and the requirement of minority party representation in the deliberative processes of local gov-

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<sup>130</sup> 2003 (2) SA 413 (CC).

<sup>131</sup> See paras 19-20 at 420-421.

ernment were important, so was the need for effective delivery of services. A mayoral committee, which was personally chosen by the mayor to assist in the discharge of his duties as mayor, was simply not the type of committee contemplated by section 160(8). The mayor was entitled to choose that committee because he or she was personally responsible for what it did. To force the mayor to choose a multiparty committee to discharge these responsibilities would be to blur the distinction between an executive mayoral system and an executive committee system.<sup>132</sup> The Structures Act did not describe the mayoral committee as a committee of the municipal council; nor did it expressly require that the mayoral committee should have minority party representation. There were a number of factors pointing to a deliberate distinction in the Act between committees of the municipal council and a mayoral committee. First, the powers granted in section 60(1) of the Act to appoint, dismiss and delegate were given to the mayor, not the municipal council; secondly, the Act expressly required that the composition of the executive committee be representative of parties and interests in the council (section 43(2) of the Act) when dealing with the executive committee system, but not so when dealing with mayoral committees; and, thirdly, there is a deliberate distinction between the mayoral committee and the municipal committees appointed under section 80 of the Act.<sup>133</sup>

The court continued that the power of the municipal council under section 60(3) of the Act to insist that the mayor exercise certain powers or perform certain functions in conjunction with the mayoral committee did not mean that the mayoral committee was a committee of the council. The mayoral committee was accountable to and controlled by the executive mayor only.<sup>134</sup> The mayoral committee was not a committee of the municipal council as contemplated in section 160(8) of the Constitution, and the provisions of the section were thus not applicable to the composition of the mayoral committee.<sup>135</sup> Finally the contention of the appellants that section 60(1)(a) fell foul of section 160(8) of the Constitution because it did not require minority representation on a mayoral committee had to be rejected: since it was clear that the provisions of section 160(8) had no relevance to the appointment of a mayoral committee, it followed that neither the Structures Act nor the Constitution required minor-

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<sup>132</sup> Paras 22-23 at 421D/E-422A.

<sup>133</sup> Paras 24-27 at 422A/B-I, paraphrased.

<sup>134</sup> Paras 28-30 at 422I/J-423H, paraphrased.

<sup>135</sup> Para 33 at 424D.

ity representation on a mayoral committee. Accordingly, section 60(1)(a) was not in conflict with the Constitution.<sup>136</sup>

This writer disagrees with the reasoning of the court, however. Although the conclusion of the court that a mayoral committee is different from other committees and should not allow for proportional representation should be accepted, the basis for the court's decision is wrong. It is clear that the wording of the Constitution, read together with the Structures Act, is vague and uncertain and that the position should have been corrected through legislative amendments and clarification.<sup>137</sup> It is submitted that it is very dangerous for our courts to decide and read things into the legislation where the legislature has failed to express its legislative intentions clearly. Such an assumption of legislative authority could in itself be contrary to the Constitution and could be unconstitutional when tested against the principle of separation of powers. Rather, the courts should demand clarification of an issue from the legislature. Secondly, participation should be allowed in a manner that is consistent with democracy and, thirdly, such participation may be regulated by national legislation.<sup>138</sup>

### **15.3 The privileges and immunities of municipal councils and their members**

The protection of members of legislative organs of the state is not new to South Africa's constitutional system. During the development of the parliamentary system in England, many privileges developed to protect members against interference or pressures from outside the legislature. Although the protection of privileges was originally directed at members of parliament, over the years such protection was also extended to members of other legislatures. Within the new constitutional dispensation in South Africa such privileges have been entrenched on all three spheres of government.<sup>139</sup> In respect of local government, the Constitution confirms that provincial legislation within the framework of national legislation may provide for privileges and immunities of municipal councils and their members.<sup>140</sup>

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<sup>136</sup> Para 34 at 424E-G.

<sup>137</sup> See the minority decision of the *Masondo* case *supra* fn 130 at 429 *et seq.*

<sup>138</sup> Refer to the Constitution s 160(8)(a)-(c). See also the Structures Act chs 3 and 4.

<sup>139</sup> According to the Constitution ss 58, 71 and 117, both members of parliament and of provincial legislatures have certain privileges such as freedom of speech in the legislature or its committees and are also exempted from civil or criminal proceedings in relation to anything they have said or produced before the legislature or any of its committees.

<sup>140</sup> See the Constitution s 161. It is conspicuous that the Constitution does not directly entrench the privileges of members of municipal councils in a similar fashion as the protection afforded to the

*continued on next page*



A closer evaluation of section 161 of the Constitution indicates that the constitutional drafters intended to give more authority to the provincial legislatures in respect of municipal privileges, although not a *carte blanche* power. The provincial legislatures could each provide for privileges or immunities of municipal councils and their members in each province, but such legislative provisions have to fall within the framework of national legislation. The autonomy regarding privileges and immunities is thus circumscribed by national framework directions. In compliance with the Constitution, the Municipal Structures Act determines that provincial legislation enacted in terms of section 161 of the Constitution provide for at least the following:<sup>141</sup>

- that councillors have freedom of speech in a municipal council and in its committees, subject to the relevant council's rules and orders as is envisaged in section 160(6) of the Constitution and
- that councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything that they have said in, produced before or submitted to the council or any of its committees or for anything revealed as a result of anything that they have said in, produced before or submitted to the council or any committee of the council.

On the point of freedom of speech in municipal council meetings, two particular aspects are of importance. In the first instance, freedom of speech is a constitutionally recognised fundamental right and may only be limited in accordance with the Constitution.<sup>142</sup> Secondly, freedom of speech is important to allow for fair and free political criticism and is a core component of the principle of a democratic government. Confirmation of this position was given in various court decisions.<sup>143</sup>

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members of the two higher spheres of government. Such diminution in the protection of local government affairs is somewhat unfortunate. It is submitted, as is the case in respect of other issues, that the Constitution could indeed have provided equal protection to certain constitutional issues for all three spheres of government. The protection given by the Constitution in respect of local government matters merely confirms that national or provincial legislation may provide for certain aspects. Such legislative provisions are much easier to amend and thus provide less protection than the Constitution itself.

<sup>141</sup> See the Structures Act s 28(1)(a)-(b).

<sup>142</sup> See the Constitution ss 16 and 36 respectively.

<sup>143</sup> See, eg, *Waters v Khayalami Metropolitan Council* 1997 (3) SA 476 (W), where the court held that the censuring of applicant who criticised and requested information regarding other councillors stifled freedom of expression and restricted debate in the respondent's meetings. The action of the respondent militated against the fundamentals of democracy. The court held that in an open and accountable society those who held power and were responsible for public administration ought to be open to criticism. See at 491C-D. See also the case of *De Lille v The Speaker of the National Assembly* 1998 (3) SA 430 (C).

It should be noted that the enactment of provincial legislation in terms of section 161 of the Constitution is not compulsory. Provinces may enact such legislation if they so wish. It is thus quite possible that some provincial legislatures will not opt to enact such legislation. To address such situations, the Structures Act provides that until such provincial legislation has been enacted, the privileges referred to in section 28(1) of the Act will apply to all municipal councils in the province concerned.<sup>144</sup> Apart from the legislative provisions mentioned above, it is advisable for all municipal councils to make provision for the privileges and immunities of council members in their own internal rules and orders. This is particularly important since the protection given in the Structures Act is made subject to a council's rules and orders.<sup>145</sup>

It seems that the Act wants to protect a certain measure of autonomy for municipalities in respect of the privileges and immunities of their members. However, one must emphasise the constitutional provision that any municipal by-law that is in conflict with a national or provincial law is invalid. The autonomy is therefore relatively restricted. Only a limited measure of autonomy regarding privileges is given to municipalities within a national regulatory framework.

#### **15.4 Internal municipal functionaries and procedures**

In accordance with the new legal framework, all municipalities are obligated to define the specific role and area of responsibility of each political structure and each political office bearer of the municipality. This also includes the role and responsibilities of the municipal manager.<sup>146</sup> The respective roles and areas of responsibility must be

- defined in precise terms by way of separate terms of reference and must be in writing
- acknowledged and given effect to in the rules, procedures, instructions, policy statements and other written instruments of the specific municipality.<sup>147</sup>

The terms of reference mentioned above may also include the delegation of powers and duties to the relevant functionary(ies).

When the respective roles and areas of responsibility of each political structure, political office bearer or the municipal manager are being defined by the relevant

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<sup>144</sup> See the Structures Act s 28(2).

<sup>145</sup> Cf the case of *Herselman No v Botha* 1994 (1) SA 28 (A).

<sup>146</sup> See the Systems Act s 53(1).

<sup>147</sup> Refer to the Systems Act s 53(2)(a)-(b).

municipality, the municipality must determine five aspects:<sup>148</sup>

- the relationship among those political structures, office bearers and the municipal manager and also the manner in which they must interact
- the appropriate lines of accountability and reporting procedures for the functionaries
- the mechanisms, processes and procedures for minimising cross-referrals and prevention of unnecessary overlapping of responsibilities between the functionaries
- the mechanisms, processes and procedures for resolving disputes between the functionaries *inter se*
- the mechanisms, processes and procedures to ensure interaction between the functionaries and other staff members of the municipality and between the councillors and the municipal manager and other staff members of the municipality.

It is further important to note that if a specific municipality has a decentralised regional administration in any part of its area, the municipality must determine mechanisms, processes and procedures for interaction between the regional management structures and

- the ward councillor or other councillors responsible for that part of the municipal area
- any sub-council or ward committee where applicable
- the local community in that area.<sup>149</sup>

### **15.5 Code of conduct for councillors**

Within the new legal system for local government, specific provision has been made for a code of conduct for political office bearers/councillors. The main aim of this code of conduct is to enhance the overall principles of accountability and responsiveness that are entrenched in the Constitution.<sup>150</sup> The inclusion of a specific code of conduct for councillors is not a new aspect, but has always been included in the legal structure of the third sphere of government.<sup>151</sup> A code of conduct for political

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<sup>148</sup> See the Systems Act s 53(5)(a)-(e).

<sup>149</sup> The Systems Act s 53(6)(a)-(c).

<sup>150</sup> The Constitution s 1 provides the basic values on which the new democratic state is founded.

<sup>151</sup> See, eg, the LGTA of 1993 Sch 7.

members of a legislature is not only required on the lowest level of government in a state but is also prescribed for the higher spheres of government.<sup>152</sup>

On local government level, the Systems Act determines that the code of conduct that is contained in Schedule 1 of the Act applies to every member of a municipal council. This code of conduct thus applies only to the political component of a municipality, as a municipal council comprises elected representatives only.<sup>153</sup> According to the preamble of the code of conduct, councillors are elected to represent local communities on municipal councils, to ensure that municipalities have structured mechanisms of accountability to local communities and to meet the priority needs of communities by providing effective, equitable and sustainable services. In the fulfilment of their roles, councillors must be accountable to local communities and must report back at least quarterly to constituencies on council matters, including the performance of the municipality. In an effort to ensure that councillors fulfil their obligations and to support the achievement by a municipality of its objectives as set out in the Constitution and section 19 of the Municipal Structures Act, a detailed code of conduct has been established.<sup>154</sup>

#### **15.5.1 General conduct of municipal councillors**

According to the code of conduct for councillors, every councillor must:

- perform the functions of his/her office in good faith, honestly and in a transparent manner
- act in the best interests of the municipality at all times and in such a way that the credibility and integrity of the municipality are not compromised.

Conduct relating to aspects of good faith, honestly, transparency and best interests are not defined, and it is submitted that an objective determination of all relevant circumstances will be required in order to determine whether or not a councillor has breached these requirements in specific circumstances.<sup>155</sup>

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<sup>152</sup> See, eg, the Constitution ss 96 and 136. Both the members of cabinet and deputy ministers as well as the members of the executive council of a province must act in accordance with a code of ethics that is prescribed by national legislation. According to internal house rules, both national and provincial executive members act in a prescribed manner. See also the Executive Members Ethics Act 82 of 1998.

<sup>153</sup> Officials and the public are excluded from such code of conduct, and the code applies only to municipal councillors.

<sup>154</sup> Refer to the preamble of the code of conduct for councillors set out in the Systems Act Sch 1.

<sup>155</sup> See the Systems Act Sch 1 Item 2.

### **15.5.2 Attendance at meetings**

Every councillor must attend each meeting of the municipal council and of a committee of which that councillor is a member. Exceptions to this obligation will be accepted only when

- leave of absence is granted in terms of an applicable law or as may be determined by the rules and orders of the council or
- if the councillor is required in terms of this code to withdraw from the meeting.<sup>156</sup>

Provision is further made that a municipal council may impose on a councillor a fine as is determined by its standing rules and orders for

- not attending a meeting as is required or
- failing to remain in attendance at such a meeting.

If a councillor is absent from three or more consecutive meetings of the council or a committee meeting which he/she is required to attend, then he/she must be removed from office as a councillor.<sup>157</sup> Any proceeding for the imposition of a fine or the removal of a councillor must be conducted in accordance with a uniform standing procedure, which procedure each municipal council must have in place for the purposes of this item. Such procedure must naturally comply with the rules of natural justice, which in turn form part of the constitutional right to just administrative action.<sup>158</sup>

### **15.5.3 Disclosure of interests and personal gain**

According to item 5 of the code of conduct, a councillor must

- disclose to the municipal council, or to any committee of which the councillor is a member, any direct or indirect personal or private business interest that that councillor, his or her spouse, partner or business associate may have in any matter before the council or the committee
- withdraw from the proceedings of the council or committee when that matter is considered, unless the council or the committee decides that the councillor's direct or indirect interest is trivial or irrelevant.<sup>159</sup>

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<sup>156</sup> Refer to the Systems Act Sch 1 Item 3.

<sup>157</sup> It is evident that the Act is very strict and severe on this point. Councillors should be well advised to note that the Act is mandatory in this regard.

<sup>158</sup> See the Systems Act Sch 1 Item 4 as well as the Constitution s 33.

<sup>159</sup> It is important to note that the Act Item 1 of the code of conduct defines a "partner" as a person who permanently lives with another person in a manner as if married. This inclusion is to be welcomed, as a much wider disclosure of interests is required. In a country where corruption is the order of the day, strict and extensive measures of anti-corruption prevention are indeed needed.

It is furthermore legislated that a councillor who or whose spouse, partner, business associate or close family member acquired or stands to acquire any direct benefit from a contract concluded with the municipality must disclose full particulars of the benefit of which the councillors is aware.<sup>160</sup> Such disclosure is to be done at the first meeting of the municipal council at which it is possible for the councillor to make such disclosure. Such disclosure is not required in instances where an interest or benefit has been acquired in common with other residents of the municipality, however.<sup>161</sup>

A councillor is further prohibited from using his/her position or privileges as a councillor or from using confidential information obtained as a councillor for private gain or to improperly benefit another person. Furthermore, no councillor, except with the prior consent of the municipal council, may

- be a party to or beneficiary under a contract for the provision of goods or services to the municipality or for the performance of any work other than the work as a councillor for the municipality
- obtain a financial interest in any business of the municipality and
- appear on behalf of any other person before the council or a committee for a fee or other consideration.

Prior consent of the municipal council can be vetoed by more than a quarter of the councillors of a particular council.<sup>162</sup>

The code of conduct for councillors also requires that when a councillor is elected or appointed, he/she must declare to the municipal manager in writing and within 60 days of the date of such election or appointment the following financial interests which he/she holds:

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<sup>160</sup> See the case of *Mpakathi v Kghotso Development CC and Others* 2003 (3) SA 429 (W). The essential question in the case was whether or not a councillor of a local authority may purchase property at a sale in execution where the local authority was the judgment creditor. According to the Local Government Ordinance 17 of 1939 (T) s 40, a councillor could not enter into a contract with the council in which he had any direct or indirect pecuniary interest unless prior approval had been obtained from the administrator. The court held that, in selling the property, a contract came into existence between the sheriff and the purchaser. The judgment creditor was not a party to the contract. The argument of the plaintiff that the contract should be declared void had to be dismissed. See paras E-F at 438.

<sup>161</sup> See the Systems Act Sch 1 Item 5(3).

<sup>162</sup> If more than one quarter of the councillors of a municipal council object to consent's being given to a councillor that has requested consent pertaining to an aspect where personal gain is involved, then such consent may be given to the councillor only with the approval of the MEC for local government in the specific province. See the Systems Act Sch 1 Item 6.

- shares and securities in any company
- membership of any close corporation
- interests in any trust
- directorships
- partnerships
- other financial interest in any business undertaking
- his/her employment and remuneration
- interest in property
- pension
- subsidies, grants and sponsorships by any organisation.

Apart from declaring the abovementioned interests, a councillor is also obligated to declare to the municipal manager any change in the nature or detail of his/her financial interests, in writing and on an annual basis.<sup>163</sup> Furthermore, a councillor must also declare all gifts received that are above a prescribed amount.<sup>164</sup>

#### **15.5.4 Undertaking of other paid work and the acceptance of rewards, gifts and favours**

The code of conduct further determines that a full-time councillor may not undertake any other paid work except with the consent of the relevant municipal council. Such consent should not be withheld unreasonably.<sup>165</sup>

No councillor may request, solicit or accept any reward, gift or favour for

- voting or not voting in a particular manner on any matter before the council or a

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<sup>163</sup> See the Systems Act Sch 1 Item 7(1) and (2). On close consideration of the various interests that must be declared, one can justifiably question whether such declaration is too extensive and whether it is indeed unnecessary. Keeping in mind the purpose of such declaration, it seems inevitable that after having been elected or appointed some councillors will be legally obligated to declare to the municipal manager certain personal or private interests that do not relate to his or her position as a councillor. To what extent these provisions may limit a councillor's other rights, such as a right to personal privacy, is not absolutely certain and may well cause legal disputes in future. In an attempt to obviate some of these problems, the Systems Act determines that the municipal council must determine which of the financial interests mentioned above should be made public. Such determination must take into account the need for confidentiality of certain matters, as well as the importance of the public interest for disclosures.

<sup>164</sup> The amount is not fixed by the Act but is prescribed by regulations. According to the Local Government: Municipal Systems Regulations as published under GNR 459 in GG 22328 of 25 May 2001, gifts received by a councillor must be declared where:

- the value of the gift exceeds R1 000, and
- the value of gifts received from a single source in any calendar year exceeds R1 000.

A declaration of gifts received by a councillor must also contain a description of such gift/gifts and must indicate the value and source of such gift/gifts.

<sup>165</sup> See the Systems Act Sch 1 Item 8.



committee of the council

- persuading the council or any committee to exercise any power, function or duty in a certain regard
- making a representation to the council or any committee of the council
- disclosing privileged or confidential information.<sup>166</sup>

**15.5.5 *The unauthorised disclosure of information, intervention in the administration of the municipality and aspects concerning council property***

Without the permission of the municipal council or a committee, a councillor may not disclose any privileged or confidential information of the council or committee to any unauthorised person. For the purposes of this item, privileged or confidential information includes any information:

- determined by the municipal council or committee to be privileged or confidential
- discussed in closed session by the council or committee
- whose disclosure would violate a person's right to privacy
- that is declared to be privileged, confidential or secret in terms of the law.<sup>167</sup>

It is further also provided that, except if provided by law, no councillor may:<sup>168</sup>

- interfere in the management or administration of any department of the council unless mandated by the council to do so
- give or purport to give any instruction to any employee of the council, except when authorised to do so
- obstruct or attempt to obstruct the implementation of any decision of the council or a committee by an employee of the municipality
- encourage or participate in any conduct which would cause or contribute to the mal-administration in the relevant council.

A councillor may also not use, take, acquire or benefit from any property or asset owned, controlled or managed by the municipality to which that councillor has no

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<sup>166</sup> See the Systems Act Sch 1 Item 9(a)-(d).

<sup>167</sup> See the Systems Act Sch 1 Item 10(2)(a)-(d). It should be noted that according to Item 10(3) the prohibition of privileged or confidential information does not derogate from the right of any person to access to information in terms of national legislation. This item is really unnecessary, as it is obvious that such prohibitions must comply with the law of the state in general. Reference in this instance to national legislation is also incorrect and should rather refer to the protection given in terms of the provisions of the Constitution.

<sup>168</sup> See the Systems Act Sch 1 Item 11.

right. Furthermore, no councillor may be in arrears to the municipality for rates and service charges for a period longer than three months.<sup>169</sup>

#### **15.5.6 Breaches of the code of conduct**

According to item 13 of the code of conduct of councillors, if the chairperson of a municipal council, on reasonable suspicion, is of the opinion that a provision of the code has been breached, the chairperson must:

- authorise an investigation of the facts and circumstances of the alleged breach
- give the councillor concerned a reasonable opportunity to reply in writing regarding the alleged breach
- report back to a meeting of the municipal council after the requirements of the investigation and reply from the councillor have been complied with. Such report to the municipal council is open to the public, and the chairperson must report the outcome of the investigation to the MEC for local government in the province concerned.<sup>170</sup>

Because of the serious consequences that can follow when the code has been breached, not only for the councillors of a municipal council but ultimately also for the principle of democracy, the chairperson of each municipal council must ensure that, when each councillor is taking office, he/she is given a copy of the code of conduct and also that a copy of the code is available in every room or place where the council meets.<sup>171</sup>

It is further permitted for a municipal council to investigate and make a finding on any alleged breach of a provision of the code of conduct or to establish a special committee to investigate and make a finding on any alleged breach, and also to make appropriate recommendations to the relevant municipal council.<sup>172</sup> If the council or special committee has found that a councillor has breached the code, the council may do any of the following:

- issue a formal warning to the councillor
- reprimand the councillor

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<sup>169</sup> Refer to the Systems Act Sch 1 Items 12 and 12A. Item 12A was inserted by Act 51 of 2002 s 45. In light of a councillor's sufficient remuneration packages, there should be no acceptable reason why such a councillor is not up to date with his/her own municipal rates and taxes. Councillors have a duty to set an example in terms of punctual payment for services received.

<sup>170</sup> See the Systems Act Item 13(1), (2) and (3).

<sup>171</sup> See the Systems Act Item 13(4).

<sup>172</sup> See the Systems Act Sch 1 Item 14(1)(a)-(b).

- request the MEC for local government in the province to suspend the councillor for a period
- fine the councillor or
- request the MEC to remove the councillor from office.<sup>173</sup>

Any councillor who has been warned, reprimanded or fined may appeal to the MEC in writing within 14 days of having been notified of the decision of the municipal council. The appeal should set out the reasons on which the appeal is based. If an appeal is lodged, a copy thereof must be provided to the council, which may in turn within 14 days of receipt of the appeal make any representation thereto to the MEC in writing.<sup>174</sup>

After having considered the appeal, the MEC may then confirm, vary or set aside the decision of the council and inform both parties of the outcome. The MEC may also appoint a person or a committee to investigate any alleged breach of the code and to make a recommendation on whether the councillor should be suspended or removed from office.<sup>175</sup> Lastly, it is also provided that if the MEC is of the opinion that a councillor has breached a provision of the code and that such contravention warrants a suspension or removal, the MEC may

- suspend the councillor for a period and on conditions determined by the MEC or
- remove the councillor from office.

Any investigation or decision must be in accordance with the rules of natural justice and obviously also any other applicable laws.<sup>176</sup> According to case law, nothing in item 13 or 14 permits an MEC to act *mero motu*, particularly in a case where the

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<sup>173</sup> Two aspects should be noted in this regard. First is that the municipal council must decide on an appropriate action against a councillor who has breached the code of conduct. The Act does not allow for the special committee to decide on an appropriate punishment. Secondly, it is only the MEC that can remove a councillor from office. The municipal council may only request such removal. See the Systems Act Sch 1 Item 14(2).

<sup>174</sup> It should be of interest to note the decision in *Van der Merwe and others v Slabbert NO and Others* 1998 (3) SA 613 (N). In the case, which concerned allegations of breaches of the code of conduct for councillors promulgated under the LGTA, the court held that investigating bodies in code breach investigations do not necessarily need to apply the rules of natural justice during their investigations, depending on the circumstances. However, whenever a statute empowered a public official or body to do something or to give a decision which would affect an individual's liberty, property or other existing rights, then the rules of natural justice come into play and the investigating body does not have an unfettered discretion to determine the procedure that should be followed. See at 624D-H.

<sup>175</sup> The Systems Act Sch 1 Item 14(3) and (4). If the MEC appoints a one man or other committee to investigate a breach of the code of conduct, then the Commissions Act 8 of 1947 as amended, or where appropriate, applicable provincial legislation may be applied.

<sup>176</sup> See the Systems Act Item 14(6)-(7).

municipal council has taken definite steps to investigate an alleged breach of the code of conduct. The MEC is obliged to await the outcome of the council's own investigation and recommendation before he/she acts in terms of item 14(1) and (6).<sup>177</sup>

#### **15.5.7 Application of the code of conduct to traditional leaders**

An important addition to the code of conduct is that most of the items also apply to a traditional leader who participates in or who has participated in the proceedings of a municipal council in terms of section 81 of the Municipal Structures Act. The code of conduct applies to traditional leaders in the same way as it applies to councillors. If a traditional leader has breached the code, the council may either issue a formal warning to him or request the MEC to suspend or cancel his right to participate in the proceedings of the council. It should be noted, however, that the suspension or cancellation of a traditional leader's right to participate in the proceedings of a council does not affect that traditional leader's right to address the council in terms of section 81(3) of the Municipal Structures Act.<sup>178</sup>

#### **15.6 The procedures regarding the election of municipal office-bearers**

A specific procedure has been determined in Schedule 3 of Municipal Structures Act, which should be applied whenever a municipal council meets to elect a speaker, an executive mayor, a deputy executive mayor, a mayor or a deputy mayor.<sup>179</sup> In short, the procedure requires the presiding person at a meeting of the municipal council to call for the nomination of candidates. A nomination must be made on the form determined by the municipal manager and it must be signed by two members of the municipal council. All nominees must also indicate their acceptance of the relevant nomination by signing either the nomination form or any other form of written confirmation.<sup>180</sup>

After the nominations have been called for, the person presiding at the meeting must announce the names of the persons who have been nominated as candidates. No debate on such nominations is permitted. If only one candidate is nominated, then the presiding person must declare that candidate elected. If there is more than one candidate, then a vote by secret ballot must be taken at the meeting. During

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<sup>177</sup> See *Van Wyk v Uys No 2002 (5) SA 92 (C)* at 99-100.

<sup>178</sup> See the Structures Act Sch 1 Item 15(1)-(8).

<sup>179</sup> See the Structures Act Sch 3 Item 1 as amended.

<sup>180</sup> See the Structures Act Sch 3 Item 3. A nominee can thus accept his/her nomination through any form of written confirmation. Oral acceptance is not permitted, however.

such a vote each councillor present at the meeting may cast one vote, and the presiding person must declare the candidate who has received a majority of the votes to be elected.<sup>181</sup>

A specific elimination procedure is provided for if no candidate has received a majority of the votes. In such a case the candidate who has received the lowest number of votes must be eliminated from the procedure and a further vote taken on the remaining candidates in accordance with item 6 of the schedule. Such an elimination procedure must be repeated until a candidate receives a majority of votes for the position nominated.<sup>182</sup>

If only two candidates are nominated or remain after an elimination procedure and those two candidates receive the same number of votes during an election to decide between them, then a further meeting must be held within seven days, at a time determined by the presiding person. The same procedure mentioned above is to be applied during the follow-up meeting as if it were the first meeting for the election of a specific position. If at this further meeting only two candidates are nominated or remain after an elimination procedure and the two candidates receive the same number of votes, then the presiding person must determine by lot who of the two candidates will hold the office for which the election has taken place.<sup>183</sup>

## 15.7 Conclusion

It is submitted that the new legal framework that has been enacted to regulate and control the internal functioning and procedures of all municipal councils has established a firm foundation for municipalities to conduct their affairs and fulfil their obligations and functions properly. Similar to the position in a private company or business, no municipality will be in a position to fulfil its overall constitutional duties effectively and sufficiently without strict internal control and management. Local

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<sup>181</sup> See the Structures Act Sch 3 Items 4-6. Again, the Act seems to refer to a normal majority of votes that is needed to elect a nominee for a certain position. A normal majority does not refer to 50% + 1 of the total number of councillors represented in the relevant municipal council.

<sup>182</sup> If two or more candidates have each received the lowest number of votes during the taking of a vote, then a separate vote must be taken on those candidates alone, and should be repeated as often as may be necessary to determine which candidate is to be eliminated. See the Structures Act Sch 3 Item 7(2).

<sup>183</sup> The purpose of the first postponement is to give the councillors a chance to re-think their votes and to determine the issue afresh. If the same result is obtained, the presiding person must determine the outcome by lot. A determination by lot is generally understood to mean the two names will be put in a hat and the presiding person will at random select one name from the hat, which person will then be elected to hold office in the specific position. Determination by lot can also be conducted by flipping a coin.

governments are not private companies or business institutions *per se*, however, and their functioning is often complicated with policy considerations and political objectives. In this regard it is important for all municipalities that a balanced approach between political idealism and private realism is achieved. Again, strong emphasis should be placed on the main reasons for local government's existence and their constitutional objectives. All internal structures and procedures must be directed at ensuring compliance with the predetermined constitutional duties and obligations. This writer is of the opinion that the new legal framework regarding the internal structures and functioning of municipal councils can indeed succeed in ensuring that municipal duties and obligations are met. Such success is dependant on the proper and unbiased enforcement of all the newly enacted legal rules, however.

## **Municipal services and service delivery and the basic functional activities of municipal governments**

### **16.1 Introduction**

In their capacity as the third and lowest sphere of government and the one that functions closest to local communities, municipal governments have often been described as comprising the sphere of government that is tasked mainly with the development and provision of services to communities. Some writers have even commented that if a municipality cannot or does not perform its service provision obligations, it should forfeit its right to exist.<sup>1</sup> This idealism is strongly entrenched in the new constitutional framework that has been devised for local government.<sup>2</sup>

Although all municipalities have been constitutionally tasked with providing sustainable and effective services, such a realisation is not as easy as it may seem. There are many different aspects that must integrate with one another before a municipality will be able to succeed in this mammoth task. One should therefore look not only at the different services that should be provided by local governments but also to the various obstacles and problems to their fulfilling their mandate. Factors that influence services and service delivery change drastically from one municipal term to the next, and continuous and long term planning is of the order of the day.<sup>3</sup>

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<sup>1</sup> See Craythorne (1997) 391.

<sup>2</sup> According to the Constitution s 152(b), one of the main objectives of local government is to ensure the provision of services to communities in a sustainable manner. The provision of services is thus a cardinal function, if not the most important function, of every municipal government.

<sup>3</sup> New demands on services and service provisions are especially relevant in many formerly underdeveloped areas and also in areas where drastic urbanisation is taking place. Without proper planning, future service delivery objectives will most definitely be jeopardised.



## **16.2 The new vision of local government service delivery**

### **16.2.1 Assessing basic needs**

It has been mentioned above that local government administrations have been undergoing radical changes under the new constitutional dispensation of South Africa. Unfortunately many of such changes have not been driven by clear and precise visions of the role and responsibilities that all municipalities should play. A practice that was introduced during the process of amalgamating and restructuring municipal administrations and which was subsequently proceeded with in the new local government system was to adopt and extent the structures and functioning of the former established municipal administrations without significant changes.<sup>4</sup>

On the contrary, it must be said that many municipalities indeed used the amalgamation process to initiate processes of review of their administrative organisation. This is how many innovative approaches to especially strategic management procedures were introduced, for example. Such approaches focussed mainly on technical problems, however, and little attention was given to rethinking the basic principles on which the administrations were organised. For the transformation and new local government system to be successful, a process of administrative reorganisation is required. This is particularly essential if all municipalities are to achieve the new constitutional obligations.<sup>5</sup> In order to enhance service delivery, almost all municipalities have wide-ranging options. Most prominent, however, is the need to assess and plan strategically for the most appropriate and effective forms of service delivery mechanisms within each particular municipal area. Municipal administrations must choose those delivery options that would ensure maximum benefit and efficiency.

### **16.2.2 Basic principles and approaches on service delivery**

In order to achieve optimal service delivery, each municipal government should choose a delivery system that is best suited to the type of municipality concerned and after taking into account all the special needs of the local communities. When municipalities are deciding on the particular delivery options for their areas, they

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<sup>4</sup> In order to minimise administrative disruption, minimal changes were made to many municipality's organisational structures. This aspect was, and still is, not absolutely favoured by the ruling government, as it perceives the old structures as ineffective and disruptive to the new local government vision. See the White Paper on Local Government (1998) at 111.

<sup>5</sup> Again, emphasis should be placed on the fact that the central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all South African commu-

*continued on next page*

should be guided by certain basic principles.<sup>6</sup> The principles can be summarised as follows:

- *Accessibility* All communities should have access to at least a minimum level of services. This is not a goal, but a constitutional obligation. The many imbalances that still exist regarding equal access to services should be addressed through the development of new infrastructure and the rehabilitation and upgrading of existing infrastructure.
- *Simplicity* Municipal services should not only be accessible, they should also be easy and convenient to use. In this regard it is of special importance that municipalities should aim to ensure that people with disabilities or that are illiterate should be able to access and use municipal services with ease.
- *Affordability* It is a given that many services remain unaffordable for many South African residents. In order to enhance quality of life, municipalities should strive to make services as affordable as possible. This is not an easy task, as many factors have an impact on the pricing of services.<sup>7</sup>
- *Quality* Services should not be rendered below a certain determined quality. In this regard, services should be suitable for their purpose, should be timeously provided, should be safe and should be accessible on a continuous basis. Service users will not pay and support their municipal service providers promptly if services are sub-standard and of a poor quality. Not only the services themselves but also back up maintenance and support should comply with the minimum quality standard.
- *Accountability* The new South African state, which includes local governments, is founded on, *inter alia*, the values of a democratic government, which includes principles of accountability and responsiveness.<sup>8</sup> Whenever a delivery system is adopted by a particular municipal government, therefore, it remains the responsi-

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nities. The provision of basic services enhances the quality of life of all citizens, and it increases many new economic opportunities and productive initiatives.

<sup>6</sup> See the White Paper on Local Government (1998) at 113-114. The principles mentioned in the White Paper should not be regarded as a *numerus clausus*, but should serve as a basic point of departure.

<sup>7</sup> Again one must remember that municipalities have a constitutional obligation to provide at least certain minimum services to people, even though they cannot pay for such services. See, eg, the socio-economic rights set out in the Constitution ch 2, as well as ch 7 ss 152 and 153. In compliance with these requirements, many municipalities have introduced so-called "sliding scale payment schemes", where all residents are provided with a predetermined quantity of water and electricity free of charge.

bility of that municipality to be accountable for all its activities, which includes the assurance of service provision of an acceptable quality.

- *Integration* All municipalities should adopt an integrated approach to planning and ensuring municipal service provision. The integration of municipal services requires specifically that each municipality take into account the economic and social impact of service provision in relation to overall municipal policy objectives such as poverty eradication and job creation.
- *Sustainability* The provision of services to local communities in a sustainable manner is also a constitutional imperative for all municipal governments.<sup>9</sup> In light of this constitutional requirement, service provision is an ongoing process. However, ongoing service provision depends on municipal institutions that are properly managed both financially and administratively.
- *Value for money* Municipal services should account for value for money. Municipalities should strive to provide not only sustainable services but services that provide value for money for all services users. In this respect, value for money and affordability goes hand in hand.
- *Promotion of competitiveness* All municipalities should take cognisance of the fact that job generation and the competitive nature of local commerce and industry could be adversely affected by imposing higher rates and service charges on such industries in order to subsidise domestic users. Such practices could have a negative impact on local economic development, as many potential investors or businesses could be scared or lured away to other jurisdictions. In this regard, sufficient transparency is needed to ensure that all investors are aware of the costs of doing business in a particular local area.
- *Promotion of the new constitutional values* Lastly, it is not only a legal prerequisite for all municipalities to comply and adhere to the new constitutional values and requirements, it is also an essential recipe for all local governments to achieve optimal sufficiency and support. Municipal administrations must therefore fulfil and promote the democratic and other administrative values and principles that are enshrined in the Constitution.

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<sup>8</sup> See the Constitution s 1(d).

<sup>9</sup> Refer to the Constitution s 152(1)(b).

After the abovementioned criteria have been taken into account, a municipality should be in a good position to determine which service delivery options would be best for its particular area of jurisdiction. In appropriate circumstances, a special mixture of different delivery options can be implemented. Apart from the delivery option or options, most municipalities can further enhance service delivery through the implementation of specific delivery mechanisms. Such mechanisms include the following:<sup>10</sup>

- *Building on existing capacity* It is a known fact that municipal governments throughout South Africa have different levels of administrative capacity. Many municipalities have however a sound existing infrastructure and established municipal capacity. Without ignoring new initiatives, it is very important for all municipal governments to build on their already existing capacity and potential. Reinvention of the wheel so to speak will only result in poor service delivery and unnecessary expenditure. Not all existing capacities are however suitable for expansion. In many instances drastic reform measures should be introduced as a matter of urgency. Such measures could include the introduction of performance-based contracts for senior staff members, the development of new codes of conduct, the implementation of reform policies such as affirmative action programmes, training and empowering the skills of frontline workers to interact with the communities, the decentralisation of operational management responsibilities and, lastly, the development of new strategies through consultation and communication.
- *Corporatisation* In essence the term corporatisation refers to the separation of service delivery units from the specific municipal council. This in turn should enable a council to determine specific policy goals and to set service standards to which corporate units can be held responsible. Corporatisation also offers greater autonomy and flexibility to the management of the different service units which could allow for commercial management practices to be introduced.<sup>11</sup>
- *Establishment of public-public partnerships* The establishment of public-public partnerships or so-called public joint ventures can allow for horizontal co-operation between municipalities. Such partnerships are often common in other countries

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<sup>10</sup> See the White Paper on Local Government (1998) at 115-121.

<sup>11</sup> Corporatisation can take a number of forms, from public institutions such as Water Boards or Town Planning Boards to joint ventures between municipalities. Corporatisation is of particular value in large municipal jurisdictions.

especially in areas such as joint purchasing, training initiatives and technical support.<sup>12</sup> Within the new local government scheme of South Africa, municipalities should begin to explore these innovative partnership agreements with other state institutions or parastatals such as the Post Office for the collection of municipal revenue. Obvious benefits can be derived from such partnerships, not only for the municipalities concerned, but also for the benefit of local residents.

- *Establishment of partnerships with community-based organisations and non-governmental organisations* Partnerships with community-based organisations (CBOs) and non-governmental organisations (NGOs) can be very effective in involving local communities and also to stimulate local economic development. Often such organisations have particular skills that could enhance and facilitate new development initiatives and serve as an effective intermediary in local initiatives. In the new area of local government development, municipalities should consider involving CBOs and NGOs in partnerships with other public or private institutions. Even so-called three-way-partnerships between a public, a private and a CBO/NGO can be very effective.<sup>13</sup>
- *Public-private partnerships* Municipalities should also explore the possibilities of entering into partnerships with local businesses. Apart from stimulating the local economy, such partnerships should also ensure effective services and less financial expenditure for the local authority.
- *Out sourcing/out contracting* For many years already, many municipalities have benefited from the practice to contract certain services out to specialist private companies. Such specialist companies can often provide such services more effectively than in-house municipal departments can. It is however important for municipalities that when services are contracted out the municipality should protect and ensure minimum standards, contract specifications and an overall control and monitoring capacity. The modern trend in local government seems to be that services are outsourced by way of tender procedures and not by subjective unilateral decision making, or even auction procedures. During a tender process, the lowest

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<sup>12</sup> Refer to the White Paper on Local Government (1998) at 117.

<sup>13</sup> In such a partnership a municipality can, eg, provide funding for a project, a private contractor can provide skills and equipment, whilst a CBO can facilitate the recruitment and management of local labour and community support. The advantage of such a partnership is that skills are effectively transferred, employment is created and effective services are provided without exhausting municipal capacity.

bidder is not always the best contractor. Various factors such as the financial standing of the contractor, the inclusion of local labour and technical capacity and quality control should be taken into account. Municipalities must ensure that all legal requirements are adhered to in this regard. Contracting out should be most effective when municipalities are clear about the services they are seeking from a private contractor, and when they have the capacity to manage the tender process and monitor the rendering of the services to ensure that municipal objectives are met.

- *Leases and concessions* A further approach to service delivery is the conclusion of either lease or concession agreements. Such agreements are forms of public-private partnerships that are most common for services where large-scale capital investment is required. The agreements are characterised by an often long contractual period extending over many years, a contractor that is required to take charge of the assets and infrastructure associated with the service for the duration of the contract, which requires substantial investment from the contractor's side. Because the contractor is taking on more risk, it normally demands the transfer of the responsibility for revenue collection in order to minimise financial losses. The long contract period is usually long enough to allow the contractor to recover its initial investment through the revenue that is generated from the provision of the services. In almost all instances the contractor will require ownership of the assets for the duration of the contract period. When the contract lapses, ownership and infrastructure is then transferred to the municipality.<sup>14</sup> Lease and concession agreements can be concluded in various formats. There are so-called build-operate-transfer (BOT) agreements, where a contractor builds an asset, operates it for a period of time and then transfers it to a municipality. Then there is the build-own-operate-transfer (BOOT) agreement, which further gives ownership of

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<sup>14</sup> Although this form of service provision is not entirely new to government institutions, it has only recently started to take effect. A good example of such a partnership is the partnership between the department of correctional services and private institutions to build and manage new correctional facilities. The private companies have agreed and contracted with government to build new prisons, which they will then manage for a certain period in lieu of payment for such services. After the contract period has lapsed, the prison and other assets will fall back on the government. There are many areas in local government service provision, where such partnerships can be very effective. One such example is the possible upgrading and management of old power stations in municipal areas. Private companies can reinvest in such stations and then sell the electricity to the local municipality. After a certain period, the power station and new infrastructure will again be owned by the municipality, to utilise to the benefit of its local communities.

the assets or infrastructure to the contractor for the length of the contract period. Lastly, there is also a build-operate-train-transfer (BOTT) variation which specifically provides for training for municipal employees during the contract period, which will then operate and manage the facilities and services, after the contract period has come to an end. Apart from the obvious benefits of such partnerships, there are high financial risks if such partnerships are managed or structured poorly. To avoid such negative possibilities, national government has put forward certain regulatory requirements to ensure public accountability and consumer protection. Some of these requirements will be discussed elsewhere in this chapter.

- *Privatisation/transfer of ownership* The last procedure to enhance service delivery refers to the transfer of ownership from municipalities to private or community-based entities. The transfer of ownership in this respect particularly refers to the sale of municipal assets, together with the transfer of responsibilities for the management of such services. Such a process is more generally referred to as privatisation. Although privatisation should not easily be considered with reference to primary/core municipal services such as water, electricity and solid waste disposal, it certainly could have positive outcomes in respect of secondary services such as municipal maintenance, parks and recreation and even refuse removal services.<sup>15</sup> All in all, the privatisation of non-core assets can boost municipal capacity and revenue in order for municipalities to focus on the delivery of strategic and core municipal services. Although there seems to be no clear consensus on which municipal services should be regarded as core or non-core services, national guidelines provide more clarity in this respect. It is, however, the final responsibility of each municipal council to make its own assessments in relation to what services are core services and what are not. In this regard, municipalities should be guided by the strategic policies put forward in each municipally integrated development plan.

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<sup>15</sup> With special emphasis on the central role that municipalities are constitutionally obligated to play in meeting the material, social and economic needs of communities, it is undesirable that ownership of core infrastructure and assets is removed from the municipal/public sphere.



### **16.2.3 Some basic administrative capacities that will enhance municipal development**

In order to play and ensure a developmental role effectively and to improve performance in respect of service delivery, all municipalities will need to develop at least the following capacities:

- Municipalities will have to become more strategic in their orientation. They should be open and flexible to new or unforeseen demands.
- They will have to maximise integrated capacity, both inside and outside the municipal jurisdiction.<sup>16</sup>
- They will have to become much more community orientated.

Municipal councils need to develop mechanisms to interact with community groups and to identify service needs and priorities. Without the capacity to strategise, integrate and interface with non-municipal groups, many local governments are unlikely to be sustainable in the future. The implementation of new strategies and policies requires a strong municipal leadership, with the necessary support and belief of the municipal council. Continuous communication between all role players and regular oversight and training should be provided.<sup>17</sup>

Suffice it to say that the approaches to improving service delivery efficiency and quality, which build on existing capacity, are more likely to succeed if they are structured as a partnership between council, management, labour and the community. Although labour protects particular interests, such interests should not prevent effective service delivery to communities. In this respect the South African Local Government Bargaining Council (SALGBC) will play a critical role in achieving new service delivery standards and development objectives. The SALGBC will have to look specifically at new measures to ensure more flexibility in the retraining and redeployment of municipal staff, the introduction of a more customer- and performance-orientated service system and the improvement of accountability and commitment to delivery within municipal administrations. Finally, one should remember that it is

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<sup>16</sup> The vertical integration of national and provincial programmes with municipal administrative systems may be a particularly effective way for rural municipalities to build their administrative capacity.

<sup>17</sup> It should be noted that the training of municipal councillors falls under SALGA, which in turn should ensure that an intensive councillor training programme is provided for after every election of new municipal councillors. See the White Paper on Local Government (1998) at 125.

ultimately the responsibility of national and provincial governments to monitor and oversee the effective performance by municipalities of their functions.<sup>18</sup>

### **16.3 The new legislative requirements regarding municipal services and service provision**

#### **16.3.1 *The constitutional legal basis***

According to the new constitutional framework, all municipalities are obligated to provide certain services and to achieve certain objectives. In this regard there is a strong relationship between the functions that municipalities should fulfil and the services and objectives that they should achieve and provide. It is interesting to note that the Constitution itself does not go into much detail regarding all the services that a modern municipal government should provide. The Constitution merely states that all municipalities must strive, within their financial and administrative capacities, to achieve the objectives of:

- a democratic and accountable government
- the provision of services in a sustainable manner
- social and economic development
- safe and healthy environments
- community involvement in local government matters.<sup>19</sup>

The Constitution also mandates all municipalities to structure and manage their administrations, budgets and planning processes to give priority to the basic needs of their communities and to promote social and economic development.<sup>20</sup> What the basic needs of communities are is not altogether certain. Some core/basic needs are universal, however, and should take centre stage in any municipal service provision planning. Such basic services would normally include water and electricity provision, as well as solid waste disposal and general municipal infrastructure. These services must be provided in an equitable and sustainable manner.<sup>21</sup> The Constitution again does not provide more guidance regarding specific services that should be rendered.

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<sup>18</sup> See again the Constitution ss 154(1) and 155(6).

<sup>19</sup> Refer again to the Constitution s 152(1)(a)-(e). It is self evident that without the necessary financial and administrative capacity the mentioned objectives will not be achieved. Various strategic programmes and initiatives should be implemented in order to enhance both financial and administrative capacities.

<sup>20</sup> See the Constitution s 153(a)-(b).

<sup>21</sup> In terms of s 155(4) of the Constitution, national legislation must take into account the need of municipalities to provide municipal services in an equitable and sustainable manner.

Apart from the fact that municipalities are obligated to provide certain core services to their residents, a municipality must be legally authorised to provide such a service or to impose fees or tariffs for such services. Without legal authorisation, a municipal government will not be entitled to render particular services or to impose fees for such services.<sup>22</sup>

In an effort to further enhance the achievement and fulfilment of their obligations towards service provision, the Constitution requires provincial governments to establish municipalities in a manner that will promote the development of local government capacity in each province so as to enable municipalities to perform their functions and manage their own affairs.<sup>23</sup> Only time will tell if the different types of municipality that have been established under provincial authorisation will indeed promote the development capacities as is required. On this point, it is also important to mention that both national and provincial governments, through their legislative and executive powers, should see to the effective performance by a municipality of its functions in relation to the matters listed in Schedules 4 and 5 of the Constitution.<sup>24</sup> Furthermore, a municipality, in the effective performance of its functions, has the right to exercise any power concerning a matter that is reasonably necessary for or incidental to the performance of its normal functions.<sup>25</sup> In this respect one should remember that it is the municipal council itself that makes decisions concerning the exercise of powers

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<sup>22</sup> See, eg, the case of *Kajee v Stanger Borough Town Council* 1994 (3) SA 9 (A). In this case the appellant's property was situated outside the municipal area and not connected to the respondent's electricity system. The respondent's main electricity cable, however, passed within 23 metres of appellant's property; accordingly, the respondent alleged, the appellant was liable in terms of the Local Authorities Ordinance 25 of 1974 (N) s 266(1)(f), which provides that the town council can make by-laws prescribing, *inter alia*, "an availability electricity charge in respect of properties ... which are not connected to the council's electricity scheme if such properties can reasonably be so connected". These charges were purportedly fixed and levied in terms of two municipal notices promulgated by a resolution of the council. However, on appeal the respondent was unable to produce a by-law authorising the council to impose such charges, but referred instead to s 268 of the ordinance (as it existed prior to its amendment in 1985), which, after dealing with the procedure to be followed for the making of valid by-laws, provided in ss (4) that "notwithstanding anything in s 266 contained, the council shall impose fees and frame tariffs of charges only by resolution". The court held that before the council could impose fees or frame tariffs it had to be properly empowered to do so. Because no valid by-law had been passed, the municipality had no power to prescribe or recover the particular tariff. See paras C-D at 14.

<sup>23</sup> See the Constitution s 155(6)(b). This establishment took place during the 2000 local government elections and with the beginning of the final phase of the restructuring process.

<sup>24</sup> See the Constitution s 155(7).

<sup>25</sup> This aspect is confirmed in the Constitution s 156(5).

and the performance of all functions of a municipality and also employing the necessary personnel to perform its functions effectively.<sup>26</sup>

In light of the abovementioned, it seems acceptable to argue that the constitutional drafters did not want to address extensively all the various legal aspects and specific services that municipalities in the new legal scheme have to comply with. Basically they left it open for parliament to address these issues in more detail and with more certainty, and created only a broad framework wherein such services had to be identified and sufficiently provided for. In this respect the Municipal Systems Act contains numerous legal requirements relating to municipal service provision and fulfilment.

### **16.3.2 General provisions regarding municipal services according to national legislation**

#### **16.3.2.1 The general duty on municipalities in respect of municipal services and basic aspects concerning service tariffs**

In compliance with the basic constitutional provisions and requirements in respect of municipal service provision, the Local Government: Municipal Systems Act<sup>27</sup> determines specific duties and requirements for all municipalities, which must be complied with. As a general duty, a (or all) municipality must give effect to the provisions of the Constitution and must:

- give priority to the basic needs of the local community
- promote the development of the local community
- ensure that all members of the local community have access to at least the minimum level of basic municipal services.<sup>28</sup>

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<sup>26</sup> The Constitution S 160(1)(a) and (d).

<sup>27</sup> 32 of 2000 as amended.

<sup>28</sup> See the Systems Act s 73. According to s 1 of the Act, the term "basic municipal services" is defined to mean a municipal service that is necessary to ensure an acceptable and reasonable quality of life and that, if not provided, would endanger public health or safety or the environment. Although the definition provides some guidance, an exact determination of what should be regarded as a basic municipal service is very open ended and will have to be determined on a case-to-case basis and after consideration of all relevant circumstances. See the case of *Manqele v Durban TMC* 2002 (6) SA 423 (D). The Water Services Act 108 of 1997 s 2(a) sets out that one of the main objectives of the Act is to provide for "the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being". In terms of the Act s 3 everyone has "a right of access to basic water supply and basic sanitation", and every water service institution must take reasonable measures to realise these rights. In terms of the definitions in the Act s 1, "basic water supply" means the "prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene", whilst "prescribe" itself means "prescribe by regulation". In the absence of regulations defining the extent of the right of access to a basic water supply, the court has no guidance from the legislature

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The Systems Act furthermore identifies five specific requirements that municipal services must adhere to. These requirements are:<sup>29</sup>

Municipal services must be:

- equitable and accessible
- provided in a manner that is conducive to prudent, economic, efficient and effective use of available resources and the improvement of standards of quality over time
- financially sustainable
- environmentally sustainable
- regularly reviewed with a view to upgrading, extension and improvement.<sup>30</sup>

The Act is unfortunately silent on ways or mechanisms whereby municipalities are to achieve and adhere to the mentioned requirements. It seems that the main initiatives in this regard should come from individual municipalities themselves. All municipal councils should therefore take full cognisance of the listed requirements and put policies and programmes in place in order that they do not fall foul of the broad and more specific legal obligations. It is also submitted, however, that national and provincial governments should do more to assist and support municipalities in comply-

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or the executive to enable it to interpret the content of the right to basic water supply embodied in the Act s 3. The applicant approached a Local Division after the discontinuation by the respondent of the water supply to the premises she occupied together with four of her own children and three other children, as a result of non-payment of the applicant's water account. The relief sought was predicated on the existence of the applicant's "right" to a basic water supply as referred to in the Act s 3. The court held that, in the absence of prescription of the minimum standard of water supply services necessary to constitute a basic water supply, the interpretation that the applicant wanted the court to place on the Act s 3 required it to pronounce upon and enforce upon the respondent, a local authority, the quantity of water that the applicant was entitled to have access to, the quality of such water and acceptable parameters for "access" to such basic water supply. Those were policy matters which fell outside the purview of the court's role and function and were inextricably linked to the availability of resources. See also *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T), where the court held *inter alia* that the attitude adopted by the respondents in their answering affidavits reflected a certain contempt for the plight of the people whose water supply had been cut off; a degree of unwillingness to co-operate that was unacceptable on the part of an organ of state.

<sup>29</sup> See the Systems Act s 73(2)(a)-(e).

<sup>30</sup> It is interesting to note that according to recent case law it was stated that there is no language anywhere in the Act which expressly requires one to confine the ordinary meaning of the wide expression "municipal services", where it appears in the Act, to municipal services which are charged for or which are notionally capable of being charged for and which have identifiable users. It cannot be accepted that throughout the whole of the Act any reference to municipal services must be taken to be confined to services which are chargeable to individual users. See *SAMWU v City of Cape Town* 2004 (1) SA 548 (SCA) para 8 at 550.

ing with their general service delivery duties. This can be achieved through the enactment of more detailed legislative or even executive guidelines.<sup>31</sup>

Apart from the basic duties and requirements on local governments in respect of municipal services, the Systems Act further determines that all municipal councils must adopt and implement a tariff policy on the levying of fees for municipal services that are provided by the municipality itself or by way of service delivery agreements. Such a tariff policy must then comply with the provisions of the Systems Act, the MFMA, as well as with any other applicable legislation.<sup>32</sup> The Act then determines that the mentioned tariff policy must reflect at least a certain minimum principles. These minimum requirements are the following:<sup>33</sup>

- (a) users of municipal services should be treated equitably in the application of tariffs;
- (b) the amount individual users pay for services should generally be in proportion to their use of that service;
- (c) poor households must have access to at least basic services. This can be achieved through tariffs that cover only operating and maintenance costs, by introducing special tariffs or life line tariffs for low levels of use or consumption or for basic levels of service, or by any other direct or indirect method of subsidisation of tariffs;
- (d) the tariff policy must reflect the costs reasonably associate with rendering the service, including capital, operating, maintenance, administration and replacement costs, and also interest charges;
- (e) tariffs must be set at levels that facilitate the financial sustainability of the service, taking into account the subsidisation from sources other than the particular service concerned;
- (f) provision may be made in appropriate circumstances for a surcharge on the tariff for a particular service;

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<sup>31</sup> In this regard, emphasis should again be placed on the constitutional obligations placed on national or provincial governments as set out in the Constitution ss 151(3) and (4), 154(1), 155(4), (6)(b) and (7). Even if such provisions are viewed to be inadequate, then s 164 should be helpful, which determines that any matter concerning local government that has not been dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.

<sup>32</sup> See the Systems Act s 74(1) as substituted by Act 44 of 2003 s 10.

<sup>33</sup> See the Systems Act s 74(2)(a)-(i).



- (g) provision may be made for the promotion of local economic development through special tariffs for certain categories of commercial and industrial users;
- (h) the policy must also encourage the economical, efficient and effective use of resources, the recycling of waste and other appropriate environmental objectives to be achieved;
- (i) the policy should also fully disclose the extent of subsidisation of tariffs for poor households and other categories of users.<sup>34</sup>

Apart from the basic tariff policy principles mentioned above, special cognisance should be taken of the fact that a tariff policy may lawfully differentiate between various categories of service user, debtor, service provider, service, service standard, geographical area and other matter, as long as such differentiation does not amount to unfair discrimination.<sup>35</sup>

When the tariff policy has been finalised, a municipal council must adopt by-laws to give effect to the implementation and enforcement of such a tariff policy. Again, such by-laws may differentiate between different categories of user, debtor, service provider, service, service standard and geographical area as long as such differentiation does not amount to unfair discrimination.<sup>36</sup>

Apart from the tariff policy, municipalities are afforded a general power to levy and recover fees, charges and tariffs. Accordingly, the Systems Act determines that a municipality may

- levy and recover fees, charges or tariffs in respect of any function or service of the municipality

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<sup>34</sup> It is submitted that this provision should have the positive support of the tariff policy in general. Many South African citizens do accept that there are enormous gaps between average households and very poor households, which in turn requires special measures in order to provide basic life-supporting services to such households. However, when municipalities are not clear and transparent about their policies and reasons for special measures to support such poor households, many other service users can feel that they are not being treated equally and fairly, and thus they object and do not support such initiatives.

<sup>35</sup> See the Systems Act s 74(3). This reasoning seems in line with the general principle of the rule of law which requires a legitimate governmental purpose to exist if people are treated differently as well as direct provisions set out in the Constitution. The Bill of Rights s 9 allows for the unequal treatment of people in certain circumstances. Such treatment would be constitutionally sanctioned and would not be unjustifiable and unreasonable in terms of the Constitution s 36. However, care must be taken not to exceed the constitutional provisions and thus allow for unconstitutional policies or conduct. When the provisions of the Constitution are breached, such conduct or actions would be invalid. Refer to the Constitution s 2.

<sup>36</sup> See the Systems Act s 75.



- recover collection charges and interest on any outstanding amount.

The mentioned fees, charges and tariffs are levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members.<sup>37</sup> After such a resolution has been passed, the municipal manager must do the following without delay:

- Conspicuously display a copy of the resolution for a period of at least 30 days at the main administrative office of the municipality and at such other places within the municipality to which the public has access. Such other places may be determined by the municipal manager.
- Publish in a newspaper of general circulation in the municipal jurisdiction a notice stating that a resolution in respect of fees, charges or tariffs has been passed by the municipal council and that a copy thereof is available for public inspection during office hours at the main administrative office of the municipality and at other places specified in the notice. The notice must also indicate the date on which the determination will come into operation.
- Seek to convey the information of the notice to the local community by means of radio broadcasts covering the area of municipal jurisdiction.<sup>38</sup> As soon as the notice of any fees, charges or tariffs has been published in a newspaper, the municipal manager must forthwith send a copy of the notice to the MEC for local government in the province concerned.<sup>39</sup>

#### **16.3.2.2 National legislative requirements regarding the provisions of municipal services**

According to the new national legislative framework for local government, a municipality may provide a municipal service in its area or a part of its area. Such a service or services may be provided through an internal mechanism or external mechanism.

*Internal mechanisms* include

- a department or other administrative unit within the municipal administration
- any business unit devised by the municipality, provided that such a unit operates within the municipality's administration and under the control of the municipal council in accordance with its operational and performance criteria

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<sup>37</sup> See the Systems Act s 75A(1) and (2). It is submitted that the section refers to an absolute majority of 50% + 1 of the total number of members of the relevant municipal council.

<sup>38</sup> Refer to the Systems Act s 75A(3)(c).

<sup>39</sup> The Systems Act s 75A(4).

- any other component of the municipal administration.<sup>40</sup>

On the other hand, an *external mechanism* refers to a service delivery agreement that has been entered into between a municipality and any of the following institutions:

- a municipal entity
- another municipality
- an organ of state, including a water services committee established in terms of the Water Services Act of 1997, a traditional authority or any other registered service provider registered or recognised in terms of national legislation
- a CBO or NGO that are legally competent to enter into such an agreement
- any other institution, entity or person legally competent to operate a business activity.

It is striking and rather unfortunate that the Act does not require the partners in an external service delivery agreement to be competent and able to provide the municipal service relevant to the contract. It is therefore left to a municipality itself to determine if a party to a service delivery agreement is indeed competent to provide a specific municipal service in the municipal area or a part thereof. Municipalities are therefore obligated to review or decide on an appropriate mechanism to provide a municipal service. In cases of a service provision which is provided through an internal mechanism, municipalities must review or decide on an appropriate service provision mechanism when:

- an existing municipal service is to be significantly upgraded, extended or improved
- a performance evaluation requires a review of the existing mechanism
- the municipality is restructured or re-organised in terms of the Municipal Structures Act.<sup>41</sup>

When a municipal service is provided through an external mechanism, a municipality must review or decide on an appropriate mechanism to provide a particular service when:

- a performance evaluation requires a review of the particular service delivery agreement<sup>42</sup>

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<sup>40</sup> See the Systems Act s 76(a)(i)-(iii).

<sup>41</sup> See the Systems Act s 77(a)(i)-(iii).

<sup>42</sup> In order to determine if such a performance evaluation is required, refer to the Systems Act ch 6.

- the service delivery agreement is anticipated to expire or be terminated within the next 12 months or
- an existing municipal service or part thereof is to be significantly upgraded, extended or improved and such an event is not addressed in the relevant service delivery agreement.<sup>43</sup>

A municipality must also review and decide on an appropriate mechanism in order to provide a municipal service when a review of such a service is required by an intervention in terms of section 139 of the Constitution. The same obligation is required when a new municipal service is to be provided or when the local community has requested such review or when a review of the municipalities IDP also requires a review of the delivery mechanisms regarding a service or services.<sup>44</sup>

Apart from the obligation placed on municipalities to review and decide on mechanisms to provide municipal services, certain criteria and processes for deciding on such mechanisms have been statutorily provided for. Accordingly, when a municipality has decided on a particular mechanism to provide a municipal service or to review any existing mechanism, it must first assess five particular criteria. These criteria are the following:<sup>45</sup>

- The direct and indirect costs and benefits associated with the project if the service is provided by the municipality through an internal mechanism. Part of this assessment must also include the expected effect the mechanism could have on the environment, on human health and well-being, as well as safety.
- The municipality's capacity and potential future capacity to furnish the skills, expertise and resources that are necessary or will become necessary for the provision of the service through an internal mechanism.
- The extent to which the re-organisation of the municipality's administration and the development of the human resource capacity within that administration could be utilised to provide a service through an internal mechanism.
- The likely impact the decision could have on aspects such as development, job creation and employment patterns in the municipality.
- The views of organised labour.

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<sup>43</sup> See the Systems Act s 77(b)(i)-(iii).

<sup>44</sup> See the Systems Act s 77(c)-(f). The procedure for review on request by the local community is determined in terms of the Act ch 14.

<sup>45</sup> See the Systems Act s 78(1)(a)(i)-(v).

It is important to note that all of the abovementioned aspects must be assessed. After thorough assessment has taken place a municipality may also take into account any developing trends that are generally applicable to the sustainable provision of municipal services.<sup>46</sup> After the abovementioned criteria have been applied, a municipality may decide on an appropriate internal mechanism to provide the service or, before it takes a decision on an appropriate mechanism, explore the possibility of providing such a service through an external mechanism. If it decides to explore an external mechanism, the municipality must give notice to the local community of its intention to explore the provision of the service through an external mechanism and must also assess the various delivery options as are mentioned in section 76(b) of the Systems Act. When assessing such options, the municipality must take into account similar criteria, as would be the case under section 78(1)(a) of the Systems Act.<sup>47</sup> The municipality must also conduct or commission a feasibility study which must be taken into account before a final decision is taken. The feasibility study must include the following:<sup>48</sup>

- a clear identification of the municipal service for which the municipality intends to consider an external mechanism
- an indication of the number of years for which the provision of the service through an external mechanism might be considered
- the projected outputs which the provision of the service might be expected to produce
- an assessment as to the extent to which the provision of the service will provide value for money, address the needs of the poor, be affordable for the municipality and residents and impact of the transfer of appropriate technical, operational and financial risk
- the projected impact on the municipality's staff, assets and liabilities
- the projected impact on the municipality's integrated development plan

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<sup>46</sup> Refer to the Systems Act s 78(1)(b).

<sup>47</sup> See the Systems Act s 78(2) and (3). The mentioned criteria are: (i) the direct and indirect costs and benefits associated with the project, including the expected effect of any service delivery mechanism on the environment and on human health, well-being and safety; (ii) the capacity and potential future capacity of prospective service providers to furnish the skills, expertise and resources necessary for the provision of the service; (iii) the views of the local community; (iv) the likely impact on development and employment patterns in the municipality; and (v) the view of organised labour.

<sup>48</sup> See s 78(3)(c)(i)-(viii) of the Systems Act.

- the projected impact on the municipality's budget including impacts on revenue, expenditure, borrowing, debt and tariffs
- any other matter that may be prescribed.

After having applied and assessed the mentioned criteria, a municipality must decide on an appropriate internal or external mechanism that would ultimately result in or achieve the best outcome.<sup>49</sup>

On the question of whether a municipality is obligated to assess or take into account the views of organised labour before making a decision to establish a (municipal police) service, the Supreme Court of Appeal stated that while provisions 16-21 of the Systems Act, which foster participation by the community in municipal decision-making processes, are expressed in relatively wide and general terms, the provisions of section 78 of the Act are not. Section 78 provisions are applicable only when a municipality has decided on a mechanism to provide or review a municipal service in terms of section 77. Section 78 provisions are not applicable to the anterior decision to provide or extend a municipal service. Sections 77 and 78 of the Act are concerned with the question of how things (services) are to be done and not whether they should be done. The purpose of sections 77 and 78 of the Act is to compel a municipality to consider how a particular service can be done and through which appropriate internal mechanism it can be done. Only after that has been done may the provision of a service through an external mechanism be considered. It is in considering these questions that section 78(1)(a)(v) and (3)(b)(v) oblige the municipality to assess and take into account the views of *inter alia* organised labour. Section 78 also postulates that a decision has already been made to provide or review a municipal service.<sup>50</sup>

Apart from the determining criteria discussed above, a further important obligation on municipalities is that, if a municipality has decided to provide a municipal service through an internal mechanism, it must allocate sufficient human, financial and other resources to the particular unit that might be necessary for the proper provision of

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<sup>49</sup> It is important to note that when a municipality is following the abovementioned requirements, it must comply with any applicable legislation that is relating to the appointment of a service provider other than the municipality itself and also any other additional requirements that may be prescribed by regulations. See the Systems Act ss 78(4)-(5).

<sup>50</sup> Refer to *SAMWU v City of Cape Town* 2004 (1) SA 548 (SCA). The court held that the provisions of ss 77 and 78 do not have to be complied with before a decision to provide a new service or to upgrade or review an existing service is reached. Paras 11-14 at 551-552 and also at 555.

such service and must also transform the actual provision of that service in accordance with, and thus in compliance with, the provisions of the Systems Act.<sup>51</sup> If a municipality decides to provide a service through a service delivery agreement in terms of section 76(b) of the Systems Act with:

- a municipal entity or another municipality, it may, subject to subsection (3) of the Act, negotiate and enter into such an agreement with the relevant municipal entity or municipality without applying part 3 of chapter 8 of the Systems Act which refers to service delivery agreements involving competitive bidding
- a national or provincial organ of state, it may enter into such an agreement with the relevant organ of state without applying the principles of competitive bidding
- any institution or entity, or any person, either juristic or natural, which was not mentioned above in either paragraphs (a) or (b), then it must apply part 3 referring to competitive bidding before entering into an agreement with such institution, entity or person.<sup>52</sup>

It is further provided that before a municipality enters into a service delivery agreement with an external service provider it must establish a programme for community consultation and information dissemination regarding the appointment of the external service provider and the contents of the service delivery agreement. The contents of a service delivery agreement must be communicated to the local community through the media. In instances where a municipality decides to enter into a service delivery agreement with another municipality, that other municipality must conduct or commission a feasibility study and take it into account before the agreement is entered into.<sup>53</sup>

The new legislative framework also establishes specific responsibilities of municipalities when they provide services through service delivery agreements with other

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<sup>51</sup> See the Systems Act s 79(a)-(b). In determining what would be sufficient resources, all relevant circumstances should be taken into account. Various factors can have an impact on such a determination. It is suggested that if a municipality makes an objective and informed determination, such a determination would hardly fall foul of the requirements of the Act.

<sup>52</sup> See s 80(1)(a)-(b) of the Systems Act as substituted by Act 44 of 2003 s 12. Note that a 'municipal entity' means a private company, a service utility or a multi-jurisdictional service utility. A 'multi-jurisdictional service utility' again means a body established in terms of s 87 of the Systems Act. Refer to the definitions of the Act, s 1 as amended by Act 44 of 2003.

<sup>53</sup> Read ss 80(3)(a)-(b) of the Systems Act. Note that the feasibility study must include an assessment on the impact on the budget and other assets, liabilities and staff expenditure, an assessment whether staff should be increased, an assessment on the ability of the other municipality to absorb any commitments, liabilities or employees involved, when the appointment ends and finally any other relevant information as may be prescribed.

external mechanisms. In such instances it is required that if a municipal service is provided through a service delivery agreement with an external mechanism the municipality remains responsible for ensuring that such service is provided to the local community in accordance with new legal standards.<sup>54</sup> In order to oversee and ensure its obligations of final service provision, all municipalities must do the following:<sup>55</sup>

- regulate the provision of the service in accordance with section 41 of the Systems Act, which sets certain core components for performance management
- monitor and assess the implementation of the service agreement and performance management of the particular service provider<sup>56</sup>
- perform its functions and exercise its powers according to the Systems Act if the municipal service falls within a development priority or objective of the municipality's IDP
- control the setting and adjustment of tariffs by the service provider for the service, within the council's tariff policy
- general exercise its service authority to ensure uninterrupted delivery of service in the best interests of the local community.

Through its conclusion of a service delivery agreement, a municipality is legally authorised to do the following<sup>57</sup> in order to ensure effective, sustainable and uninterrupted municipal services:

- It may assign to a service provider the responsibility for
  - (a) developing and implementing detailed service delivery plans (SDP) within the framework of the municipality's IDP
  - (b) the operational planning, management and provision of the municipal service
  - (c) the undertaking of social and economic development that is directly related to the provision of the service
  - (d) customer management
  - (e) managing its own accounting, financial management, budgeting, investment and borrowing activities within the framework of transparency, accountability,

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<sup>54</sup> Such provisions confirm the new constitutional obligations in terms of accountability and sustainable service provisions. Municipalities cannot contract their responsibilities away regarding service provision.

<sup>55</sup> See the Systems Act s 81(1)(a)-(e).

<sup>56</sup> Such evaluation of performance by a service provider must be done in terms of s 41 provisions.

<sup>57</sup> See the Systems Act s 81(2)(a)-(e).



reporting and financial control determined by the municipality, all of which are subject to the MFMA.<sup>58</sup>

- (f) the collection of service fees for its own account from users of services, in accordance with the municipality's tariff policy and credit control measures.<sup>59</sup>
- It may pass on funds for the subsidisation of services to the poor to the service provider through a transparent system, which must be subject to performance monitoring and audit.
  - It must ensure that the agreement provides for a dispute-resolution mechanism to settle disputes between the municipality and the service provider.
  - It may transfer or second any staff members to the service provider, with the concurrence of the staff member concerned and in accordance with applicable labour legislation.
  - It must ensure continuity of the service if the service provider is placed under judicial management, becomes insolvent, is liquidated or for any other reason is unable to continue performing its functions and obligations in terms of the particular service delivery agreement.
  - It must, where applicable, take over the service, including all assets, when the service delivery agreement expires or is terminated.

The municipal council is also permitted to set, review or adjust the tariffs within its tariff policy. The service delivery agreement may further provide for the adjustment of tariffs by the service provider, within certain limits set by the municipal council<sup>60</sup> It is further possible for a service delivery agreement to be amended by agreement between the parties, except where an agreement has been concluded, following a competitive bidding process. Where a service agreement has been concluded following a competitive bidding process, an amendment can be made only after the local community has been given:

- reasonable notice of the intention to amend the agreement, including the reasons for the proposed amendment
- sufficient opportunity to make representations to the municipality.<sup>61</sup>

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<sup>58</sup> See the Local Government: Municipal Finance Management Act 56 of 2003.

<sup>59</sup> See also the Act ch 9 which deals with aspects concerning credit control and debt collection.

<sup>60</sup> See the Systems Act s 81(3).

<sup>61</sup> See the Systems Act s 81(4)(a)-(b).

It is important to note that no councillor or staff member may share in any profits or improperly receive any benefits from a service provider providing or proposing to provide any municipal service in terms of a service delivery agreement.<sup>62</sup>

### **16.3.2.3 Service delivery agreements that involve competitive bidding**

The Systems Act further provides that if a municipality decides to provide a municipal service through a service delivery agreement with a person referred to in section 80(1)(b) of the Act, it is obliged to select such a service provider through a selection process which

- complies with chapter 11 of the MFMA
- allows all prospective service providers to have equal and simultaneous access to information relevant to the bidding process
- minimises the possibility of fraud and corruption
- makes the municipality accountable to the local community with regard to the progress of selecting a service provider and the reasons for any decision in this regard
- takes into account the need to promote the empowerment of small and emerging enterprises.<sup>63</sup>

It is also provided for, but subject to the provisions of the Preferential Procurement Policy Framework Act,<sup>64</sup> that a municipality may determine a preference for categories of service providers in order to advance the interests of persons disadvantaged by unfair discrimination, as long as such preference is exercised in a manner that does not compromise or limit the quality, coverage cost and developmental impact of the services.<sup>65</sup> The selection of preferential service provider contenders must be fair, equitable, transparent, cost-effective and competitive.<sup>66</sup> Such requirements may be

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<sup>62</sup> Such prohibition on receiving any profits or benefits is in line with new procedures to eradicate corruption and bribery. Apart from possible criminal prosecution, councillors and staff members that receive such profits or benefits will also contravene their respective codes of conduct and can also be held punishable under such codes.

<sup>63</sup> See the Systems Act s 83(1)(a)-(e).

<sup>64</sup> Act 5 of 2000, which aims at giving effect to the Constitution s 217(3) by providing a framework for the implementation of a procurement policy.

<sup>65</sup> In other words, preferential service providers such as affirmative action appointments or black empowerment groups may be preferred, as long as certain minimum standards and obligations are not compromised.

<sup>66</sup> See *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) where it was submitted that the Preferential Procurement Policy Framework Act requires organs of state to establish a procurement policy, and also makes it obligatory for organs of state to follow a tender procedure for the procurement of goods and services. If such requirements are not met, then the tender process, if any, was unlawful.

provided for in other applicable national legislation. Even in cases of the consideration of a municipality to select a service provider, the selection process must also apply with the criteria listed in section 78 of the Systems Act in addition to the preferences for certain categories referred to in this subsection.<sup>67</sup>

It is also required that on the basis of the bidding documents, any addenda, amendments or variations that were provided to all bidders after a prospective service provider has been selected, the municipality must negotiate the final terms and conditions of the service delivery agreement with the preferred service provider. If the negotiations are successful, the municipality must then enter into the agreement on such terms and conditions that were specified in the bidding documents, together with additions thereto. It should be noted that modifications to the bidding process must not materially affect the bid in any manner that would compromise the integrity of the bidding process. If the terms and conditions of an agreement cannot be agreed upon within a reasonable time, the municipality may negotiate a possible agreement with the next-ranked prospective service provider.<sup>68</sup> When a municipality has entered into a service delivery agreement it must

- make copies of the agreement available at its offices for public inspection
- give notice in the media of the particulars of the service that will be provided in terms of the agreement, the name of the selected service provider and the place and period where copies of the agreement will be available for public inspection.<sup>69</sup>

#### **16.3.2.4 The legal requirements relating to internal municipal service districts**

It is generally understood that the provision of municipal services, according to the new constitutional and other legal requirements, is not an easy task. Even more difficult is the provision of services in large metropolitan or district municipal jurisdictions. In an effort to lighten the burden on service delivery and in order to ensure effective and sustainable service provision, the new legislative framework on local

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<sup>67</sup> See the Systems Act s 83(2) and (3).

<sup>68</sup> The bidding process is therefore not to be repeated because the first preferred service provider did not accept the conditions of the agreement. The reference to a reasonable time for the negotiations will depend on the circumstances of each case. The more urgent the service that should be provided, the less time would be regarded as reasonable. It is, however, advisable for municipalities to communicate in writing the circumstances and urgency of each case and to put the preferred bidder on terms to either accept or withdraw from the bidding process.

<sup>69</sup> Refer to the Systems Act s 84(1)-(3).

government allows for the establishment of so-called “internal municipal service districts”. In this regard and in accordance with its policy framework, a municipality is allowed to establish part of the municipality as an Internal Municipal Service District (IMSD) to facilitate the provision of a municipal service in that part of the municipality. Before an IMSD is established, the municipality must:

- consult the local community on the following matters:
  - (a) the proposed boundaries of the service district
  - (b) the proposed nature of the municipal service
  - (c) the proposed method of financing the service
  - (d) the proposed mechanism for provision of the service and
- obtain the consent of the majority of the members of the local community in the proposed IMSD that will be required to contribute to the provision of the municipal service.<sup>70</sup>

Following on subsection 85(2), when a municipality establishes an IMSD, the municipality must determine the boundaries of the district, the mechanism to provide the service and establish a separate accounting system and other record-keeping systems in respect of the service. The municipality may also set a tariff or levy for the service, impose a special surcharge in the district for the service or increase the tariff in the district for the service. The municipality may further establish a committee comprising persons representing the community of the IMSD to act as a consultative or advisory forum regarding the management and other matters of the service.<sup>71</sup> In areas where IMSDs are considered, a municipality must develop and adopt a policy framework for the establishment, regulation and management of such an IMSD. Such a policy framework must reflect at least the following aspects:

- the development needs and priorities of designated parts of the municipality which must be balanced against the needs and priorities of the municipality as a whole and
- the extent to which the establishment of one or more IMSDs will promote the local economic development of the municipality as a whole, will contribute to enhancing the social, economic and spatial integration of the municipality and which may not

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<sup>70</sup> See the Systems Act s 85(1) and (2).

<sup>71</sup> See the Systems Act s 85(3)(a)-(e). Note that the committee proposed in s 3(e) should be established on the basis of gender representivity.

entrench or contribute to further disparities in service provision in the municipal jurisdiction.<sup>72</sup>

According to wide-ranging amendments to the Systems Act during 2003, various new issues have been incorporated under section 86 of the Act. Section 86A provides now for the following:

The Minister may for purposes of municipal services, make regulations or issue guidelines in accordance with section 120 of the Act, in order to provide for or regulate the following matters:

- The preparation, adoption and implementation of a municipal tariff policy
- the subsidisation of tariffs for poor households through cross-subsidisation within and between services, equitable share allocations to municipalities and national and provincial grants to municipalities
- limits on tariff increases
- criteria to be taken into account by municipalities when imposing surcharges on tariffs for services and determining the duration thereof
- incentives and penalties to encourage the economical, efficient and effective use of resources when providing services; the recycling of waste and other environmental objectives
- criteria to be taken into account by municipalities when assessing options for the provision of a municipal service
- measures against malpractice in selecting and appointing service providers, including measures against the stripping of municipal assets
- mechanisms and procedures for the co-ordination and integration of sectoral requirements in terms of legislation and the manner in which municipalities must comply with these
- standard draft service delivery agreements
- the minimum content and management of service delivery agreements
- additional matters that must be included in a feasibility study in terms of section 78(3)(c) of the Act, which may include the strategic and operational costs and benefits of an external mechanism in terms of the municipality's strategic objectives, an assessment of the municipality's capacity to effectively monitor the provi-

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<sup>72</sup> Refer to the Systems Act s 86(1) and (2).

sion of the municipal service through an external mechanism and to enforce the service delivery agreement

- performance guarantees by service providers and
- any other matter that would facilitate the effective and efficient provision of municipal services or the application of the provisions of the Act.<sup>73</sup>

The Minister may make regulations and issue guidelines relating to fiscal matter only after consulting with the Minister of Finance and any other Cabinet member whose portfolio is affected by such regulations and guidelines. When making regulations or issuing guidelines, the Minister must take into account the capacity of municipalities to comply with such regulations and guidelines and differentiate between different kinds of municipality according to their respective capacities.<sup>74</sup>

The Act specifically determines that there are the following kinds of municipal entity:

- a private company established by one or more municipalities in terms of Part 2 of the Act or in which one or more municipalities have acquired or hold an interest according to Part 2 of the Act
- a service utility established by a municipality in terms of Part 3 of the Act and
- a multi-jurisdictional service utility established by two or more municipalities in terms of Part 4.<sup>75</sup>

It is specifically provided that no municipality may establish, or participate in the establishment of, or acquire or hold an interest in, a corporate body, including a trust, except where such corporate body is a private company, service utility or multi-jurisdictional service utility referred to above or a fund for the benefit of its employees in terms of a law regulating pensions or medical aid schemes. However, such requirements do not apply to the acquisition by a municipality for investment purposes of securities in a company listed on the Johannesburg Securities Exchange in accordance with the investment framework envisaged in section 13 of the Municipal Finance Management Act.<sup>76</sup>

It is further provided that a municipality may, subject to subsection 86C (2), establish or participate in the establishment of a private company in accordance with the

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<sup>73</sup> See s 86A(1)(a)-(m) of the Systems Act.

<sup>74</sup> Refer to ss 86A(2)-(3) of the Systems Act.

<sup>75</sup> Read s 86B(a)-(c) of the Systems Act.

<sup>76</sup> See ss 86B(2)-(3) of the Systems Act.

Companies Act,<sup>77</sup> or acquire or hold an interest in a private company in accordance with the Companies Act. In this regard it is further permitted that:

- A municipality may in terms of subsection 86C(1)(a) or (b) either acquire or hold full ownership of a private company or acquire or hold a lesser interest in a private company.
- A municipality may acquire or hold such a lesser interest in a private company only if all the other interests are held by (i) another municipality or municipalities, (ii) a national or provincial organ of state or organs of state or (iii) any combination of institutions referred to in (i) and (ii).
- A municipality may, despite paragraph (b), acquire or hold an interest in a private company in which an investor other than another municipality or a national or provincial organ of state has an interest, but only if effective control in the private company vests in that municipality, another municipality, or that municipality and another municipality collectively.<sup>78</sup>

It is also important to note that a private company referred to in section 86C(1) is a municipal entity if a municipality, or two or more municipalities collectively, have effective control of that private company or is a public entity to which the Public Finance Management Act applies, if ownership control in the company is held by a national or provincial organ of state.<sup>79</sup> A private company which is a municipal entity must further restrict its activities to the purpose for which it is used by its parent municipality in terms of section 86E(1)(a) of the Systems Act and it has no competence to perform any activity which falls outside the functions and powers of its parent municipality contemplated by section 8 of the Act.<sup>80</sup>

Municipalities may further establish a private company or acquire an interest in such a company only for the purpose of utilising the company as a mechanism to assist it in the performance of any of its functions or powers or if the municipality can demonstrate that there is a need to perform that function or power in accordance with business practices in order to achieve the strategic objectives of the municipality

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<sup>77</sup> 61 of 1973.

<sup>78</sup> Refer to ss 86C(1)-(3) of the Systems Act. Note that if a municipality establishes a private company or acquires or holds an interest in such a company, it must comply with the Companies Act and any other law regulating companies. If any conflict however arises between the Companies Act or other law and a provision of the Systems Act, then the Systems Act prevails.

<sup>79</sup> See Act 1 of 1999 read together with s 86D(1) of the Systems Act.

<sup>80</sup> Read ss 86D(1)-(2) of the Systems Act.



more effectively and that the company would benefit the local community. It is also imperative that all other conditions that may be prescribed have been complied with. It should be noted however that if a municipality establishes a private company or acquires an interest in such a company for the purpose of using that company as a mechanism to provide a municipal service, then the provisions of Chapter 8 of the Systems Act are applicable.<sup>81</sup>

According to the new amendments, if two or more municipalities intend to establish a private company or to acquire interests in the same private company, each of those municipalities must:

- comply with section 86E of the Systems Act
- consider and reach agreement on proposals for shared control of the company and
- consider cash flow projections of the company's proposed operations for at least three financial years.<sup>82</sup>

A municipality may further transfer ownership or otherwise dispose of a wholly owned private company, subject to the Municipal Finance Management Act, or an interest in a private company subject to section 14 of the Municipal Finance Management Act and only if that transfer or disposal would not result in an infringement of section 86C (2) of the Systems Act by another municipality which holds an interest in the company.<sup>83</sup>

In respect of the establishment of a service utility, it is now statutorily permitted for a municipality to pass a by-law establishing such a service utility. A by-law establishing a service utility must: state the purpose for which the service utility is established, confer the powers and impose the duties on the service utility which are necessary for the attainment of such purpose and provide for the following aspects:

- a board of directors to manage the service utility
- the number of directors to be appointed
- the appointment of directors, the filling of vacancies and the replacement and recall of directors by the parent municipality
- the terms and conditions of appointment of directors

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<sup>81</sup> Ss 86E(1)-(2) of the Systems Act.

<sup>82</sup> See s 86F of the Systems Act.

<sup>83</sup> Read s 86G of the Systems Act.

- the appointment of a chairperson
- the operating procedures of the board of directors
- the delegation of powers and duties to the board of directors
- any other matter necessary for the proper functioning of the board of directors
- the acquisition of infrastructure, goods, services, supplies or equipment by the service utility, or the transfer of infrastructure, goods, services, supplies or equipment to the service utility
- the appointment of staff by the service utility or the transfer or secondment of staff to the service utility in accordance with applicable labour legislation
- the terms and conditions on which any acquisition, transfer, appointment or secondment is made
- the governance of the service utility and
- any other matter necessary for the proper functioning of the service utility.

The by-law may also determine budgetary and funding arrangements for its implementation. No by-law may confer on a service utility any functions or powers falling outside the competence of the parent municipality contemplated by section 8 of the Systems Act.<sup>84</sup> It should also be noted that a service utility is a juristic person and a municipal entity under the sole control of the municipality which established it. All service utilities must restrict their activities to the purpose for which they were established and have no competence to perform any activity which falls outside their functions or powers as are determined in terms of the by-law of the municipality.<sup>85</sup>

Apart from establishing IMSDs, municipalities may also establish so-called Multi-jurisdictional Municipal Service Utilities (MMSUs).<sup>86</sup> In this regard it is provided that two or more municipalities, by written agreement, may establish a multi-jurisdictional service utility to perform any function or power envisaged by section 8 of the Systems Act, in their municipal areas or in any designated parts of their municipal areas. The Minister may, in the national interest and in consultation with the Cabinet member responsible for the functional area in question, request two or more municipalities to establish a multi-jurisdictional service utility to conform to the requirements of national legislation applicable to the provision of a specific municipal service. The

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<sup>84</sup> Read ss 86H(1)-(4) of the Systems Act.

<sup>85</sup> See s 86I(1)-(2) of the Systems Act.

<sup>86</sup> See s 87 of the Systems Act as substituted by s 19 of Act 4 of 2003.

municipalities that receive such a request must within two months decide whether to accede to the request, and convey their decision to the Minister.<sup>87</sup> An agreement establishing a multi-jurisdictional service utility must describe the rights, obligations and responsibilities of the parent municipalities, and must :

- determine the boundaries of the area for which the multi-jurisdictional service utility is established
- identify the municipal service or other function to be provided in terms of the agreement
- determine budgetary and funding arrangements for implementation of the agreement
- provide for a board of directors for the multi-jurisdictional service utility, the appointment of directors by the respective parent municipalities, the filling of vacancies and the replacement and recall of directors, the number of directors appointed by each parent municipality, the terms and conditions of appointment of directors, the appointment of a chairperson, the operating procedures of the board of directors, the delegation of powers and duties to the board of directors and any other matter relating to the proper functioning of the board of directors
- provide for the acquisition of infrastructure, goods, services, supplies or equipment by the multi-jurisdictional service utility or the transfer of infrastructure, goods, services, supplies or equipment to the multi-jurisdictional service utility; the appointment of staff by the multi-jurisdictional service utility or the transfer or secondment of staff to the multi-jurisdictional service utility in accordance with applicable labour legislation and the terms and conditions on which any acquisition, transfer, appointment or secondment is made
- determine the conditions for, and consequences of, the withdrawal from the agreement of a parent municipality
- determine the conditions for, and consequences of, the termination of the agreement, including the method and schedule for winding-up the operations of the multi-jurisdictional service utility; the distribution of the proceeds and the allocation among the parent municipalities of any assets and liabilities
- provide for the governing of the multi-jurisdictional service utility, compulsory written reports regarding the activities and performance of the multi-jurisdictional ser-

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<sup>87</sup> See s 88 as amended by s 20 of Act 44 of 2003.

vice utility to a parent municipality, information that may be requested from the multi-jurisdictional service utility by a parent municipality, the amendment of the agreement and any other matter necessary for the proper functioning of the multi-jurisdictional service utility.<sup>88</sup>

A multi-jurisdictional service utility is further accountable to the parent municipality(ies) and must comply with the Municipal Finance Management Act. Parent municipalities are again entitled to receive such regular written reports from the multi-jurisdictional service utility with respect to its activities and performance, as may be set out in the agreement establishing the multi-jurisdictional service utility. They may also request the multi-jurisdictional service utility to furnish them with such information regarding its activities as the parent municipality(ies) may reasonably require. Parent municipalities may also appoint a nominee to inspect, at any time during normal business hours, the books, records, operations and facilities of the multi-jurisdictional service utility and those of its contractors relating to the performance of the function or power for which the multi-jurisdictional service utility is established.<sup>89</sup>

Multi-jurisdictional service utilities terminate automatically, when there is only one remaining parent municipality or by written agreement among all of the parent municipalities or upon the termination date or the fulfilment of any condition for termination contained in the agreement establishing the multi-jurisdictional service utility.<sup>90</sup>

The parent municipality(ies) of a municipal entity have specific duties towards such a municipal entity and must:

- exercise any shareholder, statutory, contractual or other rights and powers it may have in respect of the municipal entity to ensure that both the municipality and the municipal entity comply with this Act, the Municipal Finance Management Act and any other applicable legislation and that the municipal entity is managed responsibly and transparently and meets its statutory, contractual and other obligations
- allow the board of directors and chief executive officer of the municipal entity to fulfil their responsibilities and

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<sup>88</sup> See s 90 of the Systems Act as substituted by s 22 of Act 44 of 2003. A (MMSU) is a juristic person and falls under the control/shared control of the parent municipalities. All (MMSU) must restrict their actions to the object of their establishment and they have no other competencies outside the functions set out in their establishment agreement.

<sup>89</sup> Read s 92 as substituted by s 24 of Act 44 of 2003.

<sup>90</sup> S 92 as substituted.

- establish and maintain clear channels of communication between the municipality and the municipal entity.<sup>91</sup>

In instances where a parent municipality, which has sole control of a municipal entity, or effective control in the case of a municipal entity which is a private company, the parent municipality must ensure that annual performance objectives and indicators for the municipal entity are established by agreement with the municipal entity and included in the municipal entity's multi-year business plan in accordance with section 87 (5) (d) of the Municipal Finance Management Act. The parent municipality is further obligated to monitor and annually review, as part of the municipal entity's annual budget process, the performance of the municipal entity against the agreed performance objectives and indicators and may liquidate and disestablish the municipal entity if the performance of the municipal entity is unsatisfactory, if the municipality does not impose a financial recovery plan in terms of the Municipal Finance Management Act and the municipal entity continues to experience serious or persistent financial problems or if the municipality has terminated the service delivery agreement or other agreement it had with the municipal entity.<sup>92</sup> Parent municipalities that have shared control of a municipal entity must enter into a mutual agreement determining and regulating the following:

- their mutual relationships in relation to the municipal entity
- the exercise of any shareholder, contractual or other rights and powers they may have in respect of the municipal entity
- the exercise of their powers and functions in terms of the Systems Act and the Municipal Finance Management Act with respect to the municipal entity
- measures to ensure that annual performance objectives and indicators for the municipal entity are established by agreement with the municipal entity and included in the municipal entity's multi-year business plan in accordance with section 87 (5) (d) of the Municipal Finance Management Act
- the monitoring and annual review, as part of the municipal entity's annual budget process as set out in section 87 of the Municipal Finance Management Act, of the performance of the municipal entity against the established performance objectives and indicators

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<sup>91</sup> Refer to s 93A as inserted by s 26 of Act 44 of 2003.

<sup>92</sup> See s 93B of the Systems Act.

- the payment of any monies by the municipalities to the municipal entity or by the municipal entity to the municipalities
- procedures for the resolution of disputes between those municipalities
- procedures governing conditions for and consequences of withdrawal from the municipal entity by a municipality
- procedures for terminating the appointment and utilisation of the municipal entity as a mechanism for the performance of a municipal function
- the disestablishment of the municipal entity, the division, transfer or liquidation of its assets and the determination of the responsibility for its liabilities and
- any other matter that may be prescribed.

Parent municipalities may further liquidate and disestablish the municipal entity if the performance of the municipal entity is unsatisfactory, if the municipality does not impose a financial recovery plan in terms of the Municipal Finance Management Act and the municipal entity continues to experience serious or persistent financial problems, or if the municipality has terminated the service delivery agreement or other agreement it had with the municipal entity.<sup>93</sup>

In respect of municipal representatives, it is now determined that the council of a parent municipality must designate a councillor or an official of the parent municipality, or both, as the representative or representatives of the parent municipality. The functions of such representative(s) are to represent the parent municipality as a non-participating observer at meetings of the board of directors of the municipal entity concerned and to attend shareholder meetings and exercise the parent municipality's rights and responsibilities as a shareholder, together with such other councillors or officials that the council may designate as representatives. It is further important to note that the official lines of communication between a municipal entity and the parent municipality exist between the chairperson of the board of directors of the municipal entity and the mayor or executive mayor, as the case may be, of the parent municipality. The mayor or executive mayor, as the case may be, of a parent municipality may at any time call or convene any meeting of shareholders or other general meeting comprising the board of directors of the municipal entity concerned and the representatives of the parent municipality, in order for the board of directors to give

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<sup>93</sup> Read s 93C as inserted by s 26 of Act 44 of 2003.

account for actions taken by it. The council of a parent municipality may also determine the reporting responsibilities of a municipal representative. A municipal representative is strictly obligated to represent the parent municipality faithfully at shareholder meetings, without consideration of personal interest or gain, and must keep the council informed of how voting rights were exercised and of all relevant actions taken on behalf of the municipality by the representative. A municipal representative must further act in accordance with the instructions of the council and may be reimbursed for expenses in connection with his or her duties as a municipal representative. The municipal representative may not receive any additional compensation or salary for such duties, however.<sup>94</sup>

It is also provided that the board of directors of a municipal entity must have the requisite range of expertise to effectively manage and guide the activities of the municipal entity. The board must consist also of at least a third non-executive directors and must have a non-executive chairperson. Before nominating or appointing a director, it is the responsibility of the parent municipality of a municipal entity to establish a process through which applications for nomination or appointment are widely solicited, to compile a list of all applicants and any prescribed particulars concerning applicants and to ensure that the municipal council makes the appointment or nomination from such list.<sup>95</sup> A person is not eligible to be a director of a municipal entity if he or she:

- holds office as a councillor of any municipality
- is a member of the National Assembly or a provincial legislature
- is a permanent delegate to the National Council of Provinces
- is an official of the parent municipality of that municipal entity
- was convicted of any offence and sentenced to imprisonment without the option of a fine, and a period of five years since completion of the sentence has not lapsed
- has been declared by a court to be of unsound mind or
- is an unrehabilitated insolvent.

If a director of a municipal entity during that person's term of office becomes disqualified on a ground mentioned above, then such a person ceases to be a director from

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<sup>94</sup> See s 93D of the Systems Act as amended.

<sup>95</sup> See s 93E of the Systems Act.



the date of becoming disqualified.<sup>96</sup> The parent municipality of a municipal entity is further authorised to remove or recall a director appointed or nominated by that municipality. Such removal or recall is permitted only when the performance of the director is unsatisfactory; when the director, either through illness or for any other reason is unable to perform the functions of office effectively or if the director, whilst holding office, is convicted of fraud or theft or any offence involving fraudulent conduct or has failed to comply with or breached any legislation regulating the conduct of directors, including any applicable code of conduct.<sup>97</sup>

The board of directors of a municipal entity has also been afforded specific duties and responsibilities. As such, the board must provide effective, transparent, accountable and coherent corporate governance and conduct effective oversight of the affairs of the municipal entity. It must also ensure that it and the municipal entity comply with all applicable legislation and agreements and communicate openly and promptly with the parent municipality of the municipal entity. In general, the board must deal in good faith with the parent municipality of the municipal entity. A director of a municipal entity is further obligated to disclose to the board of directors and to the representative of the parent municipality any direct or indirect personal or business interest that the director or his or her spouse or partner may have in any matter before the board, and must withdraw from the proceedings of the board when that matter is considered, unless the board decides that the director's direct or indirect interest in the matter is trivial or irrelevant. Directors must at all times act in accordance with the Code of Conduct for directors referred to in section 93L of the Systems Act, which is referred below.<sup>98</sup> In respect of meetings of the board of directors it is provided that such meetings must be open to the municipal representatives referred to in section 93D of the Systems Act. Municipal representatives have non-participating observer status in a meeting of the board of directors of a municipal entity.<sup>99</sup> It is also determined that the board of directors of a municipal entity must appoint a chief executive officer of the municipal entity. Such a chief executive officer

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<sup>96</sup> Refer to s 93F of the Systems Act.

<sup>97</sup> Read s 93G of the Systems Act as inserted by s 26 of Act 44 of 2003.

<sup>98</sup> See s 93H of the Systems Act.

<sup>99</sup> Refer to s 93I of the Systems Act.

is accountable to the board of directors for the management of the municipal entity.<sup>100</sup>

Municipal entities may not establish or participate in the establishment of a company or any other corporate body, including a trust, or acquire or hold an interest in a company or any other corporate body, including a trust. This prohibition does not apply, however, to the acquisition by a municipal entity of securities in a company listed on the Johannesburg Securities Exchange for investment purposes, subject to any applicable provisions of the Municipal Finance Management Act or a fund for the benefit of employees of a municipal entity in terms of a law regulating pensions or medical aid schemes.<sup>101</sup>

Mention was made earlier in this chapter that the Systems Act now provides for a specific Code of Conduct for directors and members of staff of a municipal entity. In this regard, it is provided that the Code of Conduct for councillors contained in Schedule 1 of the Act also applies, with the necessary changes, to directors of a municipal entity. In the application of item 14 of Schedule 1 of the Act to directors of a municipal entity, that item must be regarded as providing that:

- the board of directors of a municipal entity may investigate and make a finding on any alleged breach of a provision of this Code by a director or establish a special committee to investigate and make a finding on any alleged breach of a provision of this Code by a director or make appropriate recommendations to the board of directors
- if the board of directors or special committee finds that a director has breached a provision of this Code, the board of directors may issue a formal warning to the director, reprimand the director, fine the director or recommend to the parent municipality that the director be removed or recalled
- the board of directors of a municipal entity must inform a parent municipality of that entity of any action taken against a director in terms of the Code of Conduct.

The Code of Conduct for municipal staff members contained in Schedule 2 of the Systems Act applies, with the necessary changes, to the members of staff of a municipal entity. For purposes of this provision, any reference in Schedule 1 or 2 of the Act to a 'councillor', 'MEC for local government in the province', 'municipal council',

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<sup>100</sup> S 93J of the Systems Act.

<sup>101</sup> Read s 93K of the Systems Act.

'municipality' and 'rules and orders' must, unless inconsistent with the context or otherwise clearly inappropriate, be construed as a reference to a director of a municipal entity, parent municipality, board of directors, municipal entity and procedural rules, respectively.<sup>102</sup>

## **16.4 An overview of services that are generally provided by local governments**

### **16.4.1 General factors that impact on municipal services**

It has been explained in the introductory chapters of this work that the provision of municipal services is arguably the most important reason for the existence and creation of local government structures. So important and fundamental is the provision of municipal services to local communities that it has been incorporated and entrenched within the new constitutional framework of South Africa. Before one investigates the basic services that municipalities should provide, it is important to look briefly at specific factors that have an impact on service provision and service levels, however. To a large extent these factors are determining factors in achieving a system of effective and sustainable service provision. The factors can be summarised as follows:

- *Financial resources* Finance is often regarded as the oil that keeps the engine of government running smoothly.<sup>103</sup> Without financial resources there can be no effective and sustainable provision of municipal services. All municipalities should maximise their potential financial income and should utilise such resources sparsely and diligently. Municipal finances are generated mainly via two sources:
  - (a) the sharing in revenue that is raised nationally
  - (b) revenue that is generated locally through the collection of rates, taxes and surcharges on services.
- *Training and municipal planning* The restructuring of municipal governments since 1993 has had a somewhat negative impact on skilled municipal employees. Many municipalities have lost the services of highly skilled and experienced municipal personnel. Coupled with the reality of a new legal and administrative framework, all municipalities are in need of extensive training and education programmes to ensure services are provided in compliance with the new legal foundation. Local governments should not be short sighted in respect of the

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<sup>102</sup> Refer to s 93L of the Systems Act as inserted by s 26 of Act 44 of 2003.

<sup>103</sup> See Craythorne (1997) 391.

importance of new training initiatives. The new local government systems must be supported by a comprehensive and continuous programme of training and skills development. Without proper attention to such aspects, sustainable service provision might be an unattainable ideal. Equally important to training is the principle of municipal planning. Planning in general is an inseparable part of the processes of public administration and accordingly requires specific consideration.<sup>104</sup> In basic terms, municipal planning means looking ahead by anticipating and making arrangements for dealing with future problems by projecting trends. One such trend is, for example, the migration of people. Migration of people from mostly rural areas to more developed areas such as towns or cities is a universal phenomenon. People migrate from one place to another in the hope of obtaining work and achieving a better quality of life. The most important consideration in municipal planning in terms of accommodating migration trends is to anticipate future demand for basic municipal services such as water, sanitation, refuse removal and primary health care facilities and means. Often migration patterns are difficult to anticipate, because many informal settlements are established almost anywhere. In light of such sudden municipal demands, municipal planning is a *sine qua non* for a successful local government system. Planning thus has its roots in the past, but with a view to deciding the future in the present.<sup>105</sup>

- *Accountability, effective decision making and local democratic governance* The new constitutional dispensation of South Africa, which includes local governments, is founded *inter alia* on the values of a democratic, accountable, responsive and open government.<sup>106</sup> All municipal governments must therefore structure and manage their affairs in compliance with such values. Municipalities must take decisive steps to eradicate all forms of maladministration and corruption and must align themselves with the new supreme values in the state. Without a concerted effort to establish a new, clean and accountable local governance, there is little

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<sup>104</sup> See Craythorne (1997) 400-402. The writer refers to certain definitions of the term "planning", which in essence means that objectives need to be clarified, whereafter specific actions should be implemented to achieve the desired goals. Planning involves not only the financial inputs necessary but also who the various role players should be.

<sup>105</sup> See Craythorne (1997) 402.

<sup>106</sup> See the Constitution s 1(d).

chance that the newly established local government structures will secure and fulfil their obligations towards effective and sustainable service delivery.<sup>107</sup>

- *Public participation and social and economic development* Public participation within all spheres of government is a constitutional prerequisite. This is of particular importance since the former local government dispensation excluded many people from its processes and decision-making procedures. Without proper participation of all the role players in local communities, the new local government dispensation is stillborn from the outset. In general, participation leads to information, which in turn ensures support. It is further a well-known fact that people generally support and participate in processes in which they have a direct or even an indirect stake. Communities need to realise that local governments are there mainly to provide services and to manage and control the local area to the benefit of all that are living or working there. As a counterweight, municipalities must assure and provide their services so as to ensure social and economic development which in turn will ensure a better future for all residents. The importance of this objective has been given constitutional protection.<sup>108</sup>

#### **16.4.2 Municipal services to be provided under the Constitution**

##### **16.4.2.1 Distinguish between functions and services**

Before one looks at the different services a municipality is required to provide, it is of value to distinguish between the terms functions and services. As defined by Craythorne,<sup>109</sup> a municipal function is something that is linked to the nature of governance. A government must govern, and in order to govern it must perform certain functions, such as making laws, levying taxes, employing personnel and allocating resources. On the other hand, a service is something that is provided by one person or institution to another person or groups of persons. In this regard, a service is something that is to be rendered to others.<sup>110</sup>

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<sup>107</sup> The more money is lost or wasted because of maladministration and corruption, the fewer resources are available to provide much-needed services and infrastructure to service hungry local communities.

<sup>108</sup> See the Constitution s 152.

<sup>109</sup> See Craythorne (1997) 409.

<sup>110</sup> The main objective of municipalities, not only historically, but also according to the Constitution, is to provide effective and sustainable services to their respective communities. In order to provide such services, a municipality must also perform certain functions. The provision of services is therefore dependent on the ability to perform certain functions.

### 16.4.2.2 Specific municipal services

It is interesting to note that within the new constitutional dispensation no direct or specific mention is made with regard to the specific services that municipalities should ordinarily render to their communities. On the contrary, the new legal framework refers to the powers, functions, objects and duties of municipalities. A closer evaluation of such powers, functions, objects and duties the terms seem to indicate reveals, albeit indirectly, certain services that should be rendered. However, it is submitted that it is not altogether certain whether certain powers, functions or duties also require municipalities specifically to render services regarding such matters.<sup>111</sup> In summary, municipalities have executive and legislative powers with regard to the matters listed in Part B of Schedule 4 and 5 of the Constitution, as well as with regard to those matters that have been assigned to them in terms of national or provincial legislation.<sup>112</sup> Apart from the functional areas mentioned above, all municipalities have to strive, within their financial and administrative capacities, to achieve the objects set out in section 152(1)(a)-(e) of the Constitution.<sup>113</sup> Seen in context, the areas or matters mentioned in Part B of Schedules 4 and 5 indicate the type of service that local government should provide for. These seem to be areas that neither the national nor the provincial government would be able to provide without unnecessary bureaucratic growth. Before the different services are discussed briefly, it must be remembered that, according to item 2 of Schedule 6 of the Constitution, much old order legislation, for example old provincial ordinances, are still in force, and many of them require extra services or functions to be rendered.<sup>114</sup>

Upon a close evaluation of the different municipal services that should be rendered, two broad categories of such service are recognisable. Some services are

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<sup>111</sup> The Constitution Sch 4 Part B and Sch 5 Part B identify the functional areas of municipal executive authority and also indirectly municipal legislative authority. Only a few of these functional areas refer to a service or services that are to be rendered. Sch 4 Part B refers only to fire fighting services, municipal health services and water and sanitation services. Sch 5 Part B does not refer to any services that should be provided. In this regard it is somewhat uncertain if the other functional areas also refer to a service that should be rendered regarding such areas or if they are only to be regulated through executive and legislative actions.

<sup>112</sup> See the Constitution s 156(1)(a)-(b). Again reference should be made to the obligation on the two higher spheres of government to assign to municipalities those matters listed in Schs 4 and 5 Part A, which necessarily relates to local government. See the Constitution s 156(4)(a)-(b).

<sup>113</sup> See the Constitution s 152(2).

<sup>114</sup> Only if such old-order laws are contrary to the Constitution or have been repealed would they be of no further force. See, eg, also the matters listed in the LGTA Schs 2 and 2A. The LGTA has been revoked, however, and is no longer applicable.

regarded as *support services*, while others are classified as *operational services*. Support services refer broadly to those services that are vital for the efficient and effective operation of the overall municipal machine and differ from one municipality to another, according to size and capacity. Operational services again refer to those services that are generally considered to be services that a municipality should render to its local community. The different services in each category can be summarised briefly as follows:

**(a) General municipal support services**

- *Legal services* All municipalities need legal advice and support in order to ensure that they operate within the Constitution and the law in general. Basically all the different branches of the law are applicable and relevant to municipal operations and activities. There are hardly any legal aspects, apart from aspects such as international relations, that are not applicable within some municipal situation. In order to deal with the many legal aspects, municipalities appoint either their own legal staff or make use of various private legal advisors.
- *Financial services* Internal financial advice services are indispensable for all municipalities. Without such advice, municipalities will not be able to plan and realise their other responsibilities according to the new constitutional requirements.<sup>115</sup> The importance of financial services therefore speaks for itself.
- *Personnel services* As a legal person, no municipality can act without natural persons that act on behalf of the municipality. This municipal corps or administration is thus vital to any local government. All in all personnel services refers to the recruitment, selection, appointment, placement, promotion and disciplinary procedures relating to the members of staff of a particular municipal government.
- *Secretarial services* These services refer mainly to the overall administration of a municipality. All internal procedural aspects are handled mostly through such services which include internal correspondence and also the finalisation of council agendas and the keeping of council minutes.
- *Repair and maintenance services* Municipalities need a very large infrastructure to operate effectively. This infrastructure requires various movable assets, which assets should be maintained and repaired from time to time. Basically all municipi

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<sup>115</sup> See again the Constitution ss 152(2) and 153.



palties therefore provide for internal repair and maintenance services.

- *Information and technology services* In the 21st century, no government can operate effectively and sufficiently without the modern world's new technological development. It is especially the computerised information services that have revolutionised all institutions. No local government can afford to be without such services.
- *Supply services* All municipalities must provide for a certain number of supplies that should be available for effective and smooth operations. Such services are a vital support service to municipal operations. Supplies include aspects such as stationery, furniture, and other supplies, to name but a few.

**(b) Municipal operational services:**<sup>116</sup>

- *Air pollution* Municipalities similar to the two higher spheres of government are also responsible for environmental protection. Air pollution from car exhaust fumes or industrial smoke is an important environmental concern and should be addressed and controlled on a local level.<sup>117</sup>
- *Building regulations* The control and oversight of building activities is generally regarded as one of the so-called "inspection services". All municipalities should control and inspect compliance to building regulations and standards. This is a very important service to the public in general, as substandard building or dwellings can have life-threatening consequences. Although building regulations and standards are set nationally, it is their enforcement and control on a municipal level that ensures a safe and acceptable system.<sup>118</sup>
- *Childcare facilities* The provision and control of childcare facilities is also a municipal matter. Neither national government nor the provincial governments are in an ideal position to address and control such a functional area. It is for municipalities themselves to determine local needs and expectations and to provide for them as may be required. Although childcare facilities and services have also been allocated to local governments, the specific role of such governments is not

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<sup>116</sup> See the Constitution Schs 4 and 5 Parts B.

<sup>117</sup> Municipalities are constitutionally obliged to promote a safe and healthy environment. The Constitution s 152(d).

<sup>118</sup> See the National Building Regulations and Building Standards Act 103 of 1977. Many municipalities also provide for their own town-planning schemes, which also require certain standards regarding building activities. Some municipal by-laws are also important in this regard.

clearly explained. Some commentators have already suggested that new legislative guidance is needed to rectify such a position.<sup>119</sup>

- *Electricity and gas reticulation* Arguably one of the most common and important services that are provided for by municipalities is electricity and/or gas reticulation. This is an example of a traditional service that has become indispensable within a modern society. The service does not necessarily relate to the generation of electricity or exploitation of gas, but rather to providing such commodities to local premises for utilisation.

In a similar way to water provision, electricity is normally rendered to local residents after such residents have concluded a service-provision agreement with their local municipality. When such services are received, residents are normally responsible for paying for such services.<sup>120</sup> Most municipalities are mere suppliers of electricity to local residents. In order to become a supplier, a municipality must become a licensee, as is intended in national legislation.<sup>121</sup> Once a municipality has started to supply electricity to consumers, it is prohibited from disconnecting such supply if such a consumer has paid the full amount due in respect of the supply of electricity. This is the position regardless of whether the consumer owes any other amount to the municipality for other services or other causes of action.<sup>122</sup> Generally a municipality is required to supply electricity to consumers. To supply means to make available rather than to actually deliver. Electricity is nor-

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<sup>119</sup> See Zaal and Matthais "Local Government and the Provision of Childcare Services: An Essential area for legislative reform" *SALJ* 119 (1) 138 *et seq.* The writers mention that the potential importance of the role of local authorities was recognised by the drafters of the 1996 Constitution: therefore its inclusion in Sch 4B. They finally reiterate that local government authorities have a constitutional obligation to provide services for children but that such an obligation has largely gone unrecognised, and needs urgent attention. They conclude by suggesting that the best way to redress this serious inadequacy is for the national legislature to promulgate additional legislation. At 153-154.

<sup>120</sup> See *Wellington Court Shareblock v Johannesburg City Council* 1995 (3) SA 827 (A). In the case the appellants, each of whom owned immovable property within the respondent's municipal jurisdiction, concluded agreements with the respondent in terms of which the respondent was to supply the properties in question with electricity and water. In its particulars of claim in an action in a local division the respondent alleged that the appellants were liable to it for the payment of certain amounts in respect of such services. The appellants excepted to these particulars on the ground that the agreements were *ultra vires* the relevant by-laws and could accordingly not support a claim for payment. The local division assumed, for the sake of argument, that the agreements were indeed *ultra vires*, but held, on the authority of a long line of cases, that the appellant, having received benefits under the contract, was estopped from raising the *ultra vires* defence.

<sup>121</sup> See the Electricity Act 41 of 1987.

<sup>122</sup> See *Senekal Inwonersvereniging v Plaaslike Oorgangraad* 1998 (3) SA 719 (O). The court held that the disconnection of the electricity supply of residents who had not paid all accounts in respect of services or rates in full could not be valid. At 727 paras H-I.

mally also supplied to consumers and not a property. There can thus be more than one consumer on a particular erf.<sup>123</sup> Generation or exploitation is normally done nationally, although it is not entirely uncommon for certain municipalities to generate electricity for themselves.<sup>124</sup> Generally municipalities are responsible for the establishment and maintenance of the electricity provision network and for providing support services thereto. Local authorities must note that they are not generally allowed to discontinue one service because of arrear rates for another. In the case of *Hartzenberg v Nelson Mandela Metropolitan Municipality (Despatch admin unit)*,<sup>125</sup> the court held that although the applicants were in unlawful occupation of houses and were in arrears with payments for water supplies, the respondent municipality could not disconnect the electricity supply to the properties. The court held that neither the relevant Electricity Supply by-law nor the Local Government: Municipal Systems Act gave the respondent such authority. The respondent was thus not entitled to discontinue the electricity supply because of the arrears on the water accounts.<sup>126</sup>

- *Fire fighting services* The provision of fire fighting services is the first service that is specifically referred to in Part B of Schedule 4 of the Constitution. It is self-explanatory that this service is of cardinal importance to all residents of municipal areas. Every day local residents are at risk in respect of fires. In this respect, such services are often lifesaving. Municipalities should ensure that fire stations are ideally located within each particular municipal jurisdiction, in order to provide a rapid and effective service. The nature of the service at hand requires the quickest response possible. The personnel that provide the service must be properly trained and should be effectively equipped to handle any foreseeable situation. Emphasis should be placed not only on corrective fire-fighting services, but also on preventative initiatives. Such initiatives and responsibilities are especially important in high-risk areas such as informal settlements. Fire-fighting services are controlled mainly through national legislation.<sup>127</sup> It should be noted that fire-

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<sup>123</sup> See *Omtter (Edms) Bpk v Welkom Stadsraad* 1999 (3) SA 787 (SCA).

<sup>124</sup> See the Electricity Act 41 of 1987 and the Gas Act 48 of 2001 for more details.  
<sup>125</sup> 2003 (3) SA 633 (SE).

<sup>126</sup> See at 638E-F.

<sup>127</sup> See the Fire Brigade Services Act 99 of 1987.

fighting services are not free of charge and that fees could be recovered by the service provider.<sup>128</sup>

- *Local tourism* In an effort to attract national or even international investment, all municipalities should explore local investment opportunities. Tourism is one such opportunity that could be a significant enhancement in municipal financial income and one which should be explored thoroughly. Local tourism is something that cannot be done locally on an isolated basis, however; it needs to tie in with an overall national programme for the country as a whole.
- *Municipal airports* In some municipal areas there might be a need to provide and or maintain a municipal airport. To this extent, such a service should be provided to fulfil local needs, depending on financial resources and overall strategic programmes. When such a service is indeed provided for, municipal governments should take note of the various responsibilities and possible liabilities that accompany the provision of such a service.
- *Municipal planning* It has been stated several times in this work that all municipalities are obligated to provide and ensure proper municipal planning services. Such services refer mainly to various aspects of the management and control of land use or land use rights. There are many laws applicable in relation to municipal planning services, ranging from national laws such as the Physical Planning Act<sup>129</sup> and the Development Facilitation Act<sup>130</sup>, provincial laws and ordinances and also relevant local by-laws and town planning schemes.<sup>131</sup>
- *Municipal health services* All municipalities are involved in ensuring and providing certain minimum health services to their local communities. Such service provision is essential to everyday life, and municipalities are best suited to provide and en-

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<sup>128</sup> See, eg, *Tuinroete Klein Karoo Distriksmunisipaliteit v Lategan* 2003 (2) SA 683 (C). The Fire Brigade Services Act 99 of 1987 (the Act) s 10 creates a statutory obligation to pay for fire brigade services, coupled with an effective debt-recovery mechanism. The Act s 10(1) authorises a controlling authority (which is a local authority in terms of the Act s 1) to determine the fees payable by a person on whose behalf fire-fighting services were rendered. The subsection creates a *sui generis* cause of action. It does not exclude the recovery of compensation for the rendering of services on common-law grounds. The chief fire officer who wishes to recover compensation from a person on whose behalf fire-fighting services were rendered has a choice to institute action for compensation on a common-law cause of action or to recover the moneys as determined by the controlling authority.

<sup>129</sup> 88 of 1967 and also the Physical Planning Act 125 of 1991.

<sup>130</sup> 67 of 1995.

<sup>131</sup> See, eg, the old Transvaal ordinance on town planning and towns, ordinance 15 of 1986 and the former Pretoria town-planning scheme 1974, which was enacted in accordance and on the authority of s 19 of the ordinance.

sure such services. Again, one should remember that such services interact with national and provincial programmes on health services.

- *Municipal public transport* Public transport is an indispensable service to the public at large. Depending on the size and density of a local area, municipalities should plan and make provision for public transport facilities. These services are very expensive and need to be justified according to local needs.
- *Municipal public works* Municipalities should also provide for certain municipal public works. Such works refer only to facilities or services that are required in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under the Constitution or any other law. Most other public works services are to be provided by the higher spheres of government.
- *Municipal services relating to pontoons, ferries, jetties, piers and harbours* Depending on location and geographical features, some municipalities are required to provide, maintain and control certain services where water is applicable. Often such services are also regulated in terms of higher legislative provisions. In some instances municipal involvement is entirely excluded. The regulation of, for example, international and national shipping and matters related thereto are exempt from local government control.
- *Storm water management systems in built-up areas* As municipal jurisdictions are becoming more and more developed, the management, provision and maintenance of storm-water systems are becoming ever so troublesome. Urbanisation with complaisant modern infra-structure such as tarred roads and roofed buildings increasingly causes severe flooding in residential areas. Municipalities therefore need to plan and provide for sufficient infrastructure to handle and control such higher volumes of storm water.
- *Trading regulations* The modern 21st century city has undergone significant changes from its humble beginnings a few hundred years ago. Many changes in society, especially in some third world countries and economies, have led to new approaches regarding trading patterns in especially highly populated areas. In many towns and cities, residents have become accustomed to informal trading practices that are permitted throughout the municipal area. However, such trading habits can sometimes have a negative impact on long-established and more tradi-

tional business establishments, which in turn could negatively affect new job creation and sustainable enterprises.<sup>132</sup>

- *Water and sanitation services* The provision of water, and more specifically drinking water, to local residents is generally accepted as one of the most basic of services that municipalities must render.<sup>133</sup> Without water and basic sanitation infrastructure and services, it is difficult to imagine how such settlements can sustain and survive. Accordingly, water and sanitation services are seen to tie in strongly with the developmental duties and objectives of municipalities that have been entrenched in the Constitution.<sup>134</sup>
- *Beaches and amusement facilities* Coastal municipalities have an additional service to their communities, in that they must control and manage local beaches in their areas. Apart from beachfront management, all municipalities are to a greater or lesser degree responsible for the control and management of amusement facilities.
- *Billboards and the display of advertisements in public places* The advertising industry has become a very competitive and fast-growing business. Every municipal administration is therefore regularly confronted with new developments regarding advertisement initiatives. Because of factors such as traffic safety, environmental considerations and an overall aesthetic presentation of a particular area, proper management and control over billboards and the display of advertisements in public is necessary. Under the Constitution, special attention should be given to the regulation of billboards and the display of advertisements in public places. In light of the fact that the Bill of Rights protects the right to freedom of expression, which right also includes commercial free speech, municipalities must ensure that their policies and by-laws do not limit such a right unreasonably. For more on such aspects see *African Billboard Advertising v NSS Central Local*

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<sup>132</sup> Most informal or so-called "street trader" do not pay levies for being able to trade in certain areas and it is the responsibility of formal business owners to cross-subsidise for loss in municipal revenue. These practices not only create unequal trading standards but they often also pose environmental and safety hazards. The trading of goods and services within municipal areas should therefore be regulated and controlled, to the benefit of all parties concerned.

<sup>133</sup> See the Water Services Act 108 of 1997. See also *Manqele v Durban TMC* 2002 (6) SA 423 (D).

<sup>134</sup> Refer to the Constitution ss 152(d) and 153. Water is an essential life-sustaining commodity and is also indispensable to ensure a healthy environment. Municipal water and sanitation services are, however, limited to portable water supply systems and domestic wastewater and sewage dis-

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*Councils.*<sup>135</sup> In this case the applicant erected certain advertising signs on property in the Durban area which was owned by Spoornet. Acting in terms of its local building by-laws, the respondent objected to the presence of the signs on the basis that they had been erected either in contravention of its by-laws or without the requisite permission to do so, and it placed the applicant on terms to remove them. When the applicant failed to oblige, the respondent engaged the services of a contractor to remove them. The applicant demanded its property back. The court held that the removal of the billboards was unlawful and that the by-law in question had not intended that such signs be removed without a court order. The respondent was subsequently ordered to re-erect the signs.<sup>136</sup>

- *Cemeteries, funeral parlours and crematoria* Providing for cemeteries, crematoria and funeral parlours has always been a function of local governments. Such services are important in the day-to-day living experiences of all communities and should thus be provided on a continuous basis.
- *Cleansing services* According to the Constitution, the provision of cleansing services is also regarded as a local government matter that falls within the functional areas of exclusive provincial legislative competence. What is included under such services is not clear. It is submitted that cleansing services are closely related to municipal health services, however, and that a strong link between the two types of services is self-evident.
- *Control of public nuisances* Municipalities are also responsible for controlling public places within their relevant municipal jurisdiction, and they must therefore also provide for control measures to ensure that public nuisances are addressed. Typical examples of public nuisances that should be controlled are matters that relate to noise control, zoning-scheme contraventions and aspects that have their origin in bad neighbour relations. Municipalities should ensure that community members live as far as possible in harmony with one another and that clear and effective mechanisms exist in order to address any negative or nuisance-like actions or activities that do arise.

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positional systems. As is the case with many other services, water and sanitation services should link up with national and provincial programmes and initiatives.

<sup>135</sup> 2004 (3) SA 223 (N).

<sup>136</sup> See pages 228-229.



- *Control of undertakings that sell liquor to the public* The selling of liquor to the public has always been a contentious and often difficult issue, as there are many negative consequences attached to such activities. Because of the enormous extent of the liquor industry and liquor consumption in our country, control over the liquor trade is something that must be exercised in all three spheres of government. Various national and provincial laws are directed at the liquor trade, and municipalities must also do their bit in order to complete and enhance the overall regulatory framework.<sup>137</sup>
- *Facilities for the accommodation, care and burial of animals* The keeping of animals for farming or as pets is part of human life all over the world. To accommodate aspects relating to animals, especially within modern urbanised areas, certain services should be provided to address issues such as the accommodation, care and disposal of animals. Often the neglect of such services could lead to health risks or could even cause the outbreak of infectious diseases, which in turn could have enormous consequences, not only within a particular municipal area but even for the country as a whole.<sup>138</sup>
- *Fencing and fences* Depending on local circumstances, issues relating to fencing and fences within a municipal area could also have important implications. Not only are fences and issues relating to fencing important for private and public safety reasons, they often also assist in preventing damage to property or even disputes relating to ownership of goods or animals. The control and services relating to fences are therefore often more important in rural or farming communities than in some urban developments.
- *Licensing of dogs* Mention was made of the fact that many people keep so-called “domestic animals” as pets on their properties. The control over such animals is much less of a problem in rural communities, as they are within modernised towns or cities. Arguably the most common domesticated pet and security measure is a dog. In light of the nature of such animals, certain minimum controls should be exercised, and thus municipalities are empowered to insist that dogs within their areas of jurisdiction be licensed.

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<sup>137</sup> Eg, see the Liquor Act 27 of 1989 as amended.

<sup>138</sup> One should recall the attention that was given to the outbreak of mad cow disease and foot and mouth disease in Britain, eg, to see what devastation such diseases can create within a country.

- *Licensing and control of undertakings that sell food to the public* In an effort to ensure and enhance public health standards, municipalities should provide for measures that regulate the licensing and the control over undertakings that sell food to the public. There are various standards and requirements that must be enforced to ensure and promote a safe and healthy environment.<sup>139</sup> Municipalities are often best suited to ensuring and enforcing such standards and requirements.
- *Local amenities* Municipalities should make a determination with regard to local needs in respect of possible amenities and should then provide, manage and control such amenities. The availability of resources and budget priorities would impact considerably on the variety and extent of local amenities provided. General amenities are municipal pools, picnic areas, caravan parks and even resorts.
- *Local sport facilities* South Africa is generally recognised as a sporting nation. Our climate and weather patterns allow for favourable outdoor sporting activities. Sport forms an important part of many people's private lives and social interactions. Most people do not have the financial capacity to build and maintain their own private sporting facilities. Local governments are therefore tasked and best suited to provide, manage and maintain such facilities.
- *Markets* In large metropolitan areas, some municipalities also provide and manage market facilities. A market is a place where people trade in various items, but mostly in foodstuff. The existence of fresh produce markets or wholesale flower markets is well known in this respect.
- *Municipal abattoirs* In some instances, and depending on local circumstances, some municipalities are also required to provide and control municipal abattoirs. An abattoir is a place where animals are slaughtered and meat is prepared for public consumption. Strict hygiene and health requirements must be adhered to at all times.
- *Municipal parks and recreation* All municipalities should provide so-called "open spaces" or municipal parks where members of local communities can relax and

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<sup>139</sup> Note the case of *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City council* 1994 (3) SA 170 (A). The appellant, a bottler and distributor of soft drinks, was convicted in a magistrate's court of contravening by-law 18(c) of the City of Durban Food By-Laws, which had been promulgated in terms of the Local Government Ordinance 21 of 1942 (N) s 197(1)(f). The conviction was based on an admission at the appellant's trial that it had sold a bottle of carbonated mineral water which contained a bee to a supermarket in Durban. The magistrate found that by-law 18(c)

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where children can meet and play. In modern urbanised areas, many residents in high-rise compartment blocks do not have gardens or play areas of their own. It is thus a responsibility of municipal governments to create and maintain such public recreational areas.

- *Municipal roads* Municipal infrastructure plays an important role in achieving social and economic development and ensuring that other essential services can also be rendered. In this regard, the proper control and maintenance of municipal roads are of paramount importance. The control and maintenance of municipal roads cannot be done on an isolated basis and must interact with national and provincial initiatives and schemes. Maintenance of municipal roads also includes the provision and maintenance of storm-water systems citywide.
- *Noise pollution* Within the new constitutional scheme, environmental issues are the responsibility of all three spheres of government. Various national and provincial laws are applicable in order to enhance the protection of environmental demands and requirements. Noise pollution, especially in urban areas, is an aspect that ties in with other environmental interests, and municipalities are best suited within their local jurisdictions to address and control such a matter.
- *Pounds* It is advisable for municipalities to provide for so-called “municipal pounds” where stray animals, illegally parked vehicles or other unauthorised goods can be stored and secured. Pounds vary accordingly to what is to be secured. Proper measures should be introduced to ensure that municipal councils do not incur civil liability for goods or property that have been impounded.
- *Public places* The provision and maintenance of public places is also an important local service that should be provided to local communities. The availability of finances will determine to what extent such places can be afforded.
- *Refuse removal, refuse dumps and solid waste disposal* It is an essential service for municipalities to provide for both domestic and industrial refuse or solid waste removal and dumping facilities. Such services are needed in every community and must be rendered and controlled effectively in order to prevent possible health risks. Because of environmental importance, services relevant to refuse removal,

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imposed a strict liability. The court held that the contamination was foreseeable and that the appellant had been negligent in preventing foreign objects from passing into the consumable products.

dumps and solid waste disposal mechanisms must comply with legislative requirements from the higher spheres of government.

- *Street trading* Many municipal functions and services are interrelated with other services. The control and management of street trading is a good example. Street trading also ties in with general trading regulations and is directed at controlling and managing trading activities that are conducted next to municipal streets. Other functions such as traffic, parking and municipal roads are also relevant to trading services.
- *Street lighting* Apart from addressing the services relating to municipal roads and public transport, municipalities should also provide street lighting in certain areas. The provision of street lighting is particularly important for road safety and personal security. Not all municipal roads can be provided with lighting facilities, and municipalities should conduct investigations to determine which streets require lighting.
- *Traffic and parking* Traffic control and parking facilities are among the most common municipal services that have been rendered over the years. Such services must interrelate with other similar services such as municipal transport and municipal roads. Various national and provincial laws also exist regarding such matters and must be complied with in the fulfilment or rendering of such services. Traffic control is regarded as an area-bound service and should be managed through strict command and control procedures.

The abovementioned areas of municipal service provision have been entrenched within the new constitutional dispensation of South Africa and cannot be taken away unless the Constitution so permits.<sup>140</sup> Apart from the areas mentioned in the Constitution, some older laws that are still in place and in effect also identify and confirm certain services or functions to be fulfilled by local governments. Some such services or functions are the following:

- *Civil protection services* All municipalities should plan and provide for emergency protection or even disaster management services. In this regard, all possible scenarios should be investigated and potential crisis areas or hazards should be identified. Common aspects that should be provided for are, for example, floods or

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<sup>140</sup> See the Constitution Sch 4 and 5 Part B.

other natural disasters, outbreaks of infectious diseases and possible human-made emergency situations such as terrorist attacks or arson incidents. The prevention and management of such incidents is very important and should not be neglected.<sup>141</sup>

- *Housing* All spheres of government are involved in providing housing services in South Africa. Therefore, housing is one of the most needed commodities in our new state. Many people are living in extreme poverty and with no roof over their heads. Because of the special need of new houses, the national government has introduced various housing schemes.<sup>142</sup> Broadly speaking, the provision of housing services includes aspects such as low-cost housing, modern township developments, retirement homes and facilities, as well as rental properties. Municipalities must interact with the programs of the two higher spheres of government and must also assess and evaluate local housing needs. It is submitted that without the provision of proper housing services there can be no real social and economic development. Housing is thus a high priority service in the new governmental systems in South Africa.
- *Licensing services* In many instances municipalities are tasked with certain licensing services that are to be performed within their areas of jurisdiction. Such services are often required by either national and provincial laws, which in turn mandate local authorities to act as a so-called “controlling” or “inspection” authorities. Examples of these services include business- and vehicle-licensing services, inspection of the premises of liquor-selling businesses and also building regulation fulfilments.
- *Civic centres, city halls and public libraries* Over the years, it has been customary for local authorities to provide and maintain civic centres and city halls. Such centres play an important role in building a local symbolic identity. City halls or civic centres provide a place for public gatherings, official and ceremonial functions and also cultural activities. It is obvious that such centres fulfil an important role in local community activities. Such services are very expensive, however, and careful pri-

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<sup>141</sup> In South Africa special attention must be given to frequent fires that occur within rural areas and also within informal settlements. As prevention is better than cure, local governments should not be unaware of the devastating effect such incidents could have on local communities.

<sup>142</sup> See, eg, the Redistribution and Development Program, which specifically provides for the provision of housing developments.

orisation should be done locally. Building town halls or city halls is very costly, but most towns or cities in South Africa already possess one, and these should be maintained and controlled.<sup>143</sup> Providing a library service is not a specific function of municipalities, but many municipalities often provided such a service. A library service is directed at serving the local population through the provision of educational and recreational information. In light of modern electronic development, such centres should also provide internet and even e-mail facilities.

- *Law enforcement and municipal police services* It was explained above that municipalities have various law-enforcement obligations and services that must be rendered. Such services differ from building inspections, town planning scheme control, various health and safety measures and also road traffic law enforcement. Apart from providing such services, municipalities are also permitted to establish and maintain a municipal police service.<sup>144</sup> It should be pointed out that local governments do not have an automatic right to establish a municipal police service.<sup>145</sup> Specific requirements must be met before permission can be granted for the establishment of a municipal police service.

## 16.5 Conclusion

As is the case with many other aspects of the new local government dispensation, it is imperative that municipal services and service provision should comply and conform to the new constitutional vision and requirements. Municipal services must be equitable and accessible for all local residents and must enable all municipalities to achieve and fulfil their objectives and duties.

The basic municipal services are set out in Part B of Schedules 4 and 5 of the Constitution. Apart from such services, national or provincial governments may as-

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<sup>143</sup> City halls are often rich with local heritage and traditions.

<sup>144</sup> According to the Constitution s 205(1), the national police services must be structured to function in the national, provincial and, where appropriate, local spheres of government. S 206(7) further states that national legislation must provide a framework for the establishment, powers, functions and control of municipal police services. For more detail, see the South African Police Service Act 68 of 1995.

<sup>145</sup> *In re Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) the Constitutional Court held that whereas the interim Constitution required provision to be made for the establishment by a local government of a municipal or metropolitan police service whose functions would be restricted to crime prevention and the enforcement of municipal and metropolitan by-laws, there was no comparable provision in the new text. Local policing was a matter to be dealt with by an Act of parliament. See paras 395-401 at 888-890.

sign other matters to municipalities via legislation.<sup>146</sup> One can thus conclude that municipal services are not absolutely defined or identified and can differ from one municipality to another as circumstances may require. Within the new local government legislative framework there seems to be rediscovery of the basic essential services that a municipality is supposed to render. This development has caused almost all local governments to focus mainly on the core services and to deregulate or even privatise many other secondary services.

The Constitution compels all municipalities to strive within their financial and administrative capacities to achieve the objectives and therefore the services that were identified above. Services should be provided and rendered to uplift and enhance the quality of life of all local people without a sacrifice in quality or sustainability. In many cases services should be decentralised or even privatised in order to allow local governments all over South Africa to focus and achieve their main constitutional service objectives.

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<sup>146</sup> See the Constitution s 156(1)(b). Subs (4) further enhances such assignment as national and provincial governments must assign to a municipality the administration of a matter listed in the Constitution Sch 4 or 5 Part A, which matter necessarily relates to local government.



## Municipal personnel, labour relations and staffing matters

### 17.1 Introduction

It is an obvious observation that no municipality would be able to fulfil its obligations and duties without basic personnel administration and management. Not only are employees necessary, they have to be motivated, dedicated and properly trained. In light of their vast and diverse functions, municipalities need a mix of personnel that vary from general administrative officials, such as administrative clerks and office personnel, to highly qualified experts such as engineers, town planners, lawyers, accountants and personnel managers. Without the abovementioned personnel corps in place, no municipal government will be able to perform and fulfil its constitutional duties and obligations, and the Constitution specifically states that a municipal council may employ personnel that are necessary for the effective performance of its functions.<sup>1</sup> All municipalities therefore have to evaluate and determine their specific personnel needs in order to perform their functions. It goes without saying that it is not only the appointment of personnel that is important in this regard; so is the management, control and performance measurement of such personnel.

According to the Constitution, municipalities have significant powers regarding personnel matters.<sup>2</sup> One must be aware of the fact that other national or provincial legislation also impacts on personnel matters or even labour relations, however, and that municipalities may not act contrary to such laws.<sup>3</sup> When municipal personnel, also often referred to as the municipal administration, is discussed, it is again important to remember the three components that together complete a local government. All

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<sup>1</sup> See the Constitution s 160(1)(c).

<sup>2</sup> The Constitution s 156(5) states that a municipality has the right to exercise *any power* concerning a matter that is reasonable necessary for, or incidental to, the *effective performance of its functions* (own emphasis added). Since the appointment of personnel is essential for the effective performance of municipal functions, municipalities should be able to exercise strong powers in this respect.

<sup>3</sup> See the Constitution s 156(3).

municipal governments consist of a combination of political functionaries, administrative personnel and a specific local community.<sup>4</sup> Together the three components comprise a municipal government. The importance of a municipal personnel corps is thus self-evident. However, one should guard against possible confusion between municipal administrative personnel and office bearers representing political structures. Municipal personnel are not elected political representatives; they are employees in the normal sense of a municipal council.<sup>5</sup>

## **17.2 The broad organisational structure and overall personnel administration of local governments**

### **17.2.1 Basic organisational systems**

In the past the organisational structure of a municipal government could be compared with a human body:

- A particular structure (the skeleton) exists to ensure effectiveness.
- Staff (the muscles) are needed to perform functions and ensure movement
- A decision-making body (the brain) is required, through which communication is achieved between the decision-making body and the staffing component, which must then perform the instruction given.<sup>6</sup>

Broadly speaking, two types of organisational structure have been identified. There is the *mechanistic/closed type* of structure, in which duties are precisely defined and where a high value is placed on precision, specified job descriptions and strong loyalty to the organisation. Functional tasks are differentiated, and there is a hierarchical structure of command. The manager or head of the organisation is often deemed to be omniscient, as he or she possesses all important knowledge. Factors such as authority, coordination and efficiency are strongly emphasised. Job responsibilities are mainly routine, with most decisions and knowledge coming from the top. Contrary to the closed organisational structure, one finds the *organic or open type* of organisational structure. Such a structure was developed and adopted to handle

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<sup>4</sup> See ch 7 of the work and also the Systems Act s 2(b)(i) and (ii).

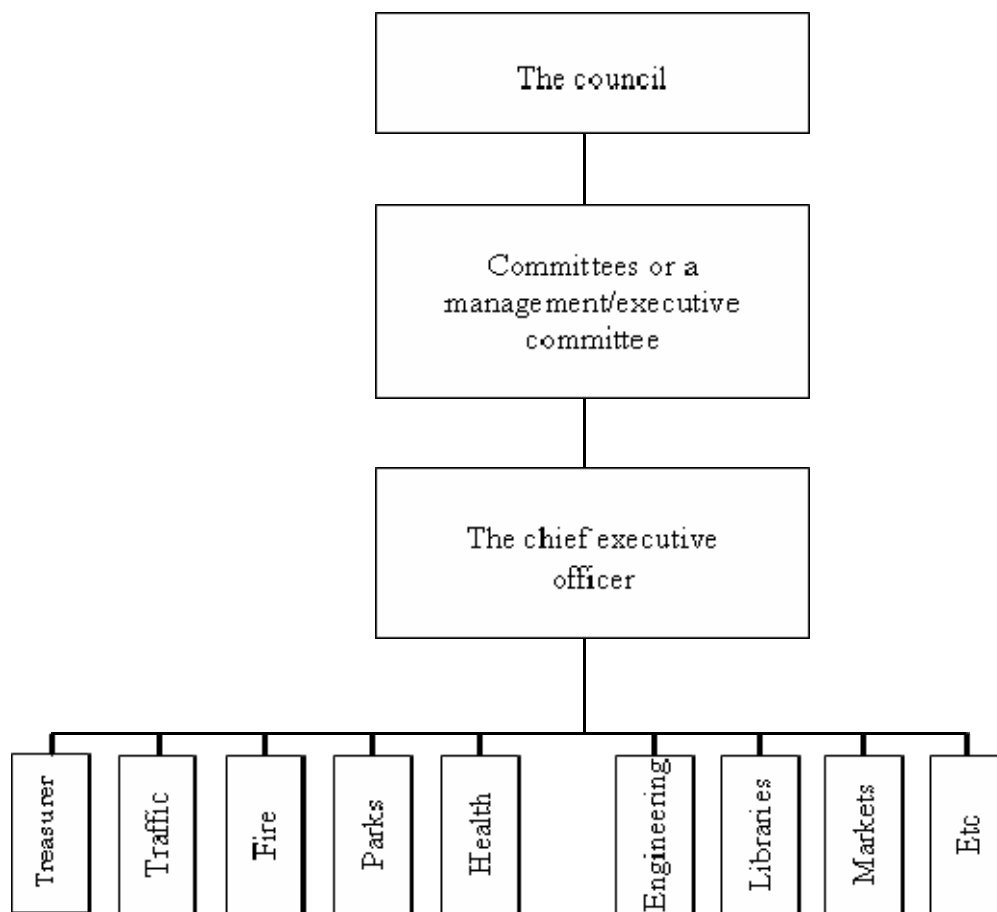
<sup>5</sup> Again notice should be taken of the fact that it is a municipal council, as a legal entity that acts as an employer and that appoints or concludes services/employment contracts with potential employees. The position regarding political office bearers, as was discussed elsewhere, is quite different. Anyone who is appointed by or in the service of a municipality is normally not eligible to be a member of the political component of that municipal council. Refer to the Constitution s 58(1)(a) and (b).

<sup>6</sup> See Craythorne (1997) 279.

unstable and continuously changing conditions. Many internal jobs have little formal definition, and functions are not precisely demarcated. Responsibilities and tasks are constantly redefined. In an organic structure the emphasis is on getting the job done, and thus individual responsibilities are not precisely defined.<sup>7</sup> It is also possible to find institutions that incorporate a combination of the two types of organisational structure.

From a municipal government point of view, municipalities exist to provide services to their inhabitants. They must therefore have a structure within which staff can be deployed and organised to ensure that the required services are indeed provided. Craythorne mentions that in the South African local government of the past it was usual to encounter two forms of organisational structure. One was identified as a long, flat organisation with many departments. The other form was more of a pyramidal type, with fewer departments.<sup>8</sup>

(A)

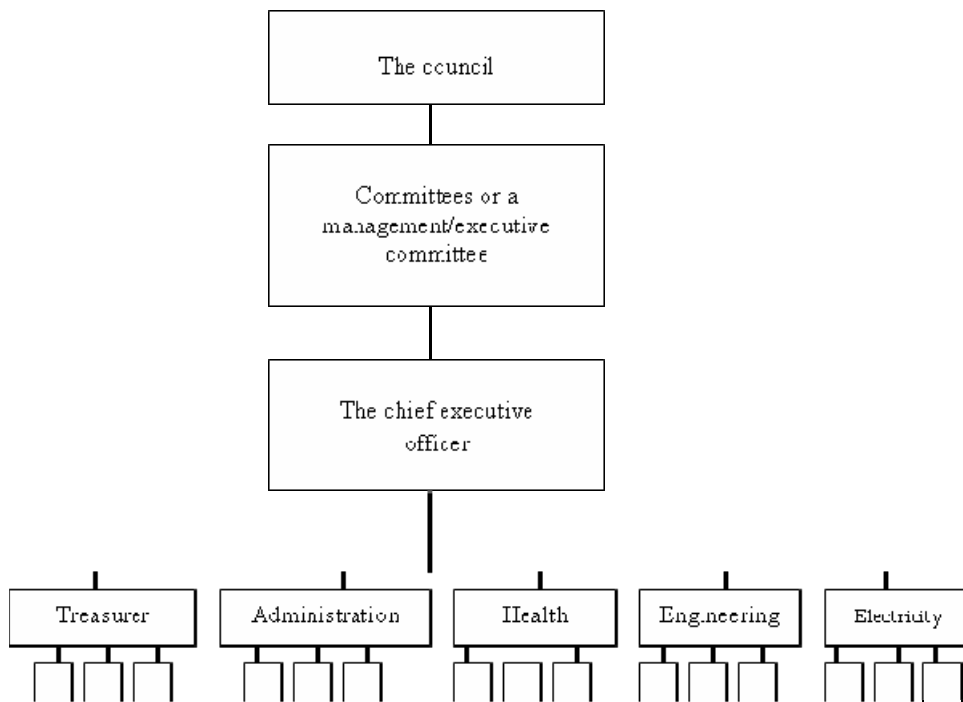


<sup>7</sup> See Craythorne (1997) 282-283.

<sup>8</sup> See Craythorne (1997) 283-285.

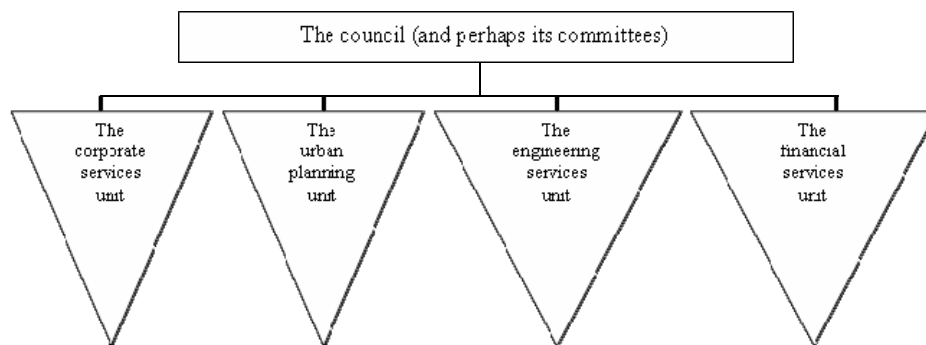
In more recent years, a new local government organisational structure, generally termed the business unit model, was developed. In such a model, the municipal organisation is divided into semi-autonomous business units. Especially from a concentration of skills and expertise point of view, the business unit model has definite advantages.

(B)



Specialised branches within departments

(C)



It is important to remember, however, that in a public-sector body, where control over policy and decision making is necessarily political, it is not possible to have a truly decentralised structure. Although many decisions should be delegated to strategic officials, ultimately the overall policy and political decisions must be made at municipal council level.

In the new local government dispensation, municipalities have been established and are constitutionally required to render effective, efficient and sustainable services. Depending on the services, this obligation often requires professional experts and technicians and a careful preplanning and evaluation of the organisational structure is thus essential. It is also generally accepted that the personnel of specialised services such as engineering, town planning, accounting and also legal services should not be lumped together, but should rather be placed within separate specialised units, which are then tasked with only that specialised service.<sup>9</sup>

### **17.2.2 Internal mechanisms to enhance organisational efficiency**

No organisation can be efficient and effective without certain control measures' being put in place. It is a fact of any organisational structure that not all members or staff can be expected to meet standards voluntarily. Measures of control in local governments arise from various sources, such as from the political leadership, internal leadership structures and even through public complaints and requests. The main objective of control within the public sector is to ensure accountability for everything the public authority does.<sup>10</sup> Another form of external control over the public sector is via the law and judicial structures. Many legal rules have been developed to ensure that the public service is regulated within certain minimum standards. The judicial structures are also properly empowered to oversee public sector compliance with the law.<sup>11</sup>

Local governments should further also guard against the familiar concept of empire building in public structures. Empire building arises mostly from personal motivations such as ambition, a desire for status, a lust for power and also professional jealousy. Status-driven and power-orientated personnel see the organisation in which they work merely as a tool for achieving personal goals. Ineffective and unnecessary empires are commonly developed through a process of lengthening work outputs

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<sup>9</sup> See Craythorne (1997) 290. In many instances, professional personnel are controlled and supervised by their professional body (eg the South African Law Society for attorneys, and a minimum standard of professionalism is required which may not be reduced or limited by political intervention. A municipality can therefore not prescribe to a professional employee such as a civil engineer to design structures that would not comply with minimum safety requirements but would save the municipality lots of money. Minimum professional standards may never be compromised.

<sup>10</sup> For more on this point see Cloete (1997) 184, and also Craythorne (1997) 297.

<sup>11</sup> Within the new constitutional dispensation of South Africa, the importance of control and minimum standard setting within the public sector is strongly echoed in the Constitution ch 10, which sets basic values and principles to which the public administration must adhere. See the Constitution s 195 in particular.

and by creating the impression that a certain post has more responsibilities than it really has. This is then followed by requests for additional posts and the upgrading of the original post to a unit supervisor or leader.

One should not mistake genuine personnel enlargements with the concept of empire building, however. Many municipalities in South Africa are facing severe shortages of qualified and properly trained personnel. There are many internal departments that are functioning with only 50% or even less of the minimum staff that are required to perform the particular workload. This situation has become critical since the commencement of the final phase of the new local government restructuring. Many newly established municipalities have lost vast numbers of highly trained and experienced municipal personnel and do not have appropriate replacements on hand. This situation has resulted in many inexperienced personnel being appointed to often strategic positions or municipal councils being indecisive in appointing and filling urgently needed vacant posts.

Since the beginning of the restructuring of local governments, it has always been envisaged that the overall internal organisational structures of all municipalities should be reviewed and reorganised. This is a difficult and ongoing process, however, and many local governments are in need of professional assistance to achieve a genuinely effective and streamlined municipal corps. Most jobs will have to be re-analysed to ensure that they are suitably defined.

Another important aspect of a municipal organisation is municipal leadership. Every municipal structure must have a leader that is not only knowledgeable in terms of local government affairs but who is also followed and respected by the general personnel corps. Municipalities differ from many other organisations in that they have a number of leaders, such as the councillors, the municipal manager, heads of department and sub-units. Each official in charge of a unit is a leader, but at a different level.<sup>12</sup>

No organisation can establish and maintain a successful organisational structure without a proper personnel administration in place. Personnel administration is a key activity in local government administrations and, if handled effectively, it will contribute significantly to the existence and maintenance of a healthy municipal organisa

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<sup>12</sup> See Craythorne (1997) 302-303.

tion. Even the smallest local authority must devote some of the time allocated to administrative duties to employment-related matters such as conditions of service and remuneration and recruitment/appointment procedures. Municipal councils should provide for at least the following regarding personnel management:

- a written service contract which explains the general conditions of service
- an employee file setting out the date of appointment, the position and basic remuneration package
- basic job description lists
- grievance and disciplinary procedures.

Every council should have a data base containing a record of all the posts and jobs in that council's service. In planning and improving on the structure of a municipal organisation, posts should be ranked and grouped together in appropriate departments or sectors. It is also a good policy to review the staff establishment periodically in order to ensure that the administrative structure is still streamlined and effective.<sup>13</sup> In recent years, many questions have been asked about the overall remuneration packages that are paid to municipal personnel. According to media reports, some municipal managers have even bigger remuneration packages than the president of the country. It follows, therefore, that an urgent investigation of how such remuneration rates are determined should be undertaken. Craythorne identifies methods that can be used to determine an acceptable remuneration rate for a particular post.<sup>14</sup> The methods are:

- to compare a post with a similar post in the private sector
- to compare posts between different municipal councils
- to use a cost of living index
- to look at customary or trade rates in a particular area.

Apart from establishing an effective administrative personnel corps, municipalities should also ensure that proper manpower planning initiatives are put in place. According to Craythorne, personnel planning is concerned with identifying the personnel needs of a particular organisation. Proper planning is required to replace those staff mem-

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<sup>13</sup> It is of interest to note that the staff component of a municipality constitutes a large proportion of the costs of that council's operating budget and that there has to be proper control over the number of posts permitted. Employee remuneration comprises a large part of a municipal budget, and it includes not only the basic salary packages but also issues such as housing subsidies, pension or provident scheme contributions, medical aid, life insurance, bonuses and long-service awards.

<sup>14</sup> See Craythorne (1997) 310-312.



bers who leave the organisation by resigning, retiring, or for other reasons. Personnel planning is essential if municipalities are to fulfil their objectives and duties.<sup>15</sup> Apart from personnel planning, municipal councils as employers should also spend considerable time on the motivation and development of their human resources. Often municipal employees work in unpleasant and highly stressful circumstances, and it is important for the managerial structures to ensure that employees are motivated. Without a motivated personnel corps the desired, and indeed required, results are not likely to be achieved. Various practical steps have been developed to motivate employees.<sup>16</sup>

One of the most important challenges facing the new local government dispensation is ensuring and building properly trained local government administrations. South Africa requires trained municipal employers in order to meet the needs of local populations. Without adequately trained personnel, many service standards will decline, and some municipal governments will not be able to fulfil and adhere to their new constitutional obligations. In an effort to enhance the training of municipal personnel, various initiatives have been introduced which, through proper application, could significantly boost training targets.<sup>17</sup>

### **17.3 New legislative provisions regarding municipal staff matters**

#### **17.3.1 *The appointment and employment conditions of municipal managers***

Under the new local government legislative framework, the head of the municipal administration is called the “municipal manager”.<sup>18</sup> In his/her capacity as the head of the administration of a municipality, the municipal manager is tasked with a wide range of responsibilities and is also the final accountable official for many municipal affairs. Both the responsibilities and accountable duties are subject to the policy directions of the particular municipal council, however.<sup>19</sup> It is generally accepted that

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<sup>15</sup> See Craythorne (1997) 317. In essence, personnel planning ensures that an organisation will have and continue to have a certain required number and quality of personnel that are able to perform the tasks of the organisation in order for it to be successful.

<sup>16</sup> Some of these steps are: to ensure that the organisation has a shared objective or mission statement; to enhance aspects of team spirit or esprit de corps; by sharing responsibility and authority; by rewarding excellence; by allowing inputs from employees in relation to work procedures; through proper training initiatives; by clearly identifying expectations and tasks; by introducing regular performance appraisals and by treating employees as human beings. See Craythorne (1997) 322-323.

<sup>17</sup> See Craythorne (1997) 323 *et seq.*

<sup>18</sup> This office was formerly known as the Chief Executive Officer (CEO) during the transitional phases, and the Town or City Clerk under the old dispensation.

<sup>19</sup> See the Systems Act s 55(1).

the municipal manager is the chief of a municipal administration and that he/she is also the chief agent of that municipality. This position has already been confirmed in a number of judicial decisions. In *Gcali NO v MEC for Housing & Local Government, EC*<sup>20</sup> the court held that in authorising the institution of legal proceedings, a town clerk acted as an agent for the municipality. Furthermore, when the interests of the municipality so demanded, the town clerk had to act as a *negotiorum gestor* on behalf of the municipality and had no authority to institute legal action on behalf of the municipality without instructions to do so.<sup>21</sup> In the case of *King William's Town TLC v Border Alliance Taxi Association (Bata)*<sup>22</sup> it was mentioned that the town clerk as chief executive officer was not merely the recipient of instructions, he/she was

- privy to the council's deliberations, debates and decisions
- in as good a position as any other to give evidence of the collective mind of the council over years
- the proper person/functionary to testify to the reasons for council decisions.

Such evidence is admissible and relevant to show that the council applied its corporate mind to a particular issue.<sup>23</sup> According to the new legal order, a municipal manager is responsible and accountable for the following:<sup>24</sup>

- the formation and development of an economical, effective, efficient and accountable administration that is equipped to carry out the task of implementing the municipality's IDP, to operate in accordance with the municipality's performance management system and to be responsive to the needs of the local community in order to participate in the affairs of the municipality<sup>25</sup>
- the management of the municipal administration in general
- the implementation of the municipality's IDP as well as the monitoring of progress with the implementation of the plan
- the management of the provision of services to the local community in a sustainable and equitable manner

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<sup>20</sup> 1996 (4) SA 456 (TkS).

<sup>21</sup> See paras E-H at 463.

<sup>22</sup> 2002 (4) SA 152 (E).

<sup>23</sup> See paras B-E at 156.

<sup>24</sup> See the Systems Act s 55(1)(a)-(q).

<sup>25</sup> It is therefore the municipal manager's responsibility to ensure that a proper municipal administration is established and maintained in order for that municipality to fulfil its obligations and duties.

- the appointment of staff other than the staff that are appointed by the municipal council itself<sup>26</sup>
- the management, effective utilisation and training of staff
- the maintenance of discipline of staff
- the promotion of sound labour relations and compliance by the municipality with applicable labour legislation
- advising the political structures and political office bearers of the municipality
- managing the communications between the administration and political structures
- carrying out the decisions of the political structures
- overseeing the administration and implementation of the municipal by-laws and other legislation
- the exercise of any power or performance of any duties delegated by the municipal council or other body under a sub-delegation to the (office of the) municipal manager
- facilitating the participation by the local community in the affairs of the municipality
- developing and maintaining a system whereby community satisfaction with municipal services is assessed
- ensuring or overseeing the implementation of national and provincial legislation applicable to the municipality
- performing any other function that may be assigned by the municipal council to the municipal manager.

A further important responsibility of the municipal manager is to ensure and oversee the municipality's financial and fiscal matters. The municipal manager is *ex officio* and *ex lege* the accounting officer of a municipality and as accounting officer he/she is responsible and accountable for

- all income and expenditure of the municipality
- all assets and the discharge of all liabilities of the municipality
- the proper and diligent compliance with the Municipal Finance Management Act.<sup>27</sup>

In light of the aforementioned, it is clear that from an administrative point of view the municipal manager is the final responsible and accountable person in relation to the

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<sup>26</sup> See the Systems Act s 55(1)(e) read with s 56(a). Note that the appointment of staff is subject to various legislative requirements, including the Employment Equity Act 55 of 1998.

<sup>27</sup> See the Systems Act s 55(2)(a)-(c) as amended by Act 44 of 2003. Refer also to ch 17 of this work.

general obligations and duties of a municipality. It goes without saying that the tasks and responsibilities of the municipal manager are enormous and that, unless he/she is assisted by a dedicated and effective municipal administration, it is difficult to imagine how all the responsibilities falling under such a post can properly be fulfilled.

In an effort to assist a municipal manager in the fulfilment of his/her responsibilities, the new legislative system developed for local government specifically envisages the appointment of managers that are directly accountable to the municipal manager. In this regard it is required that after consultation with the municipal manager a municipal council should appoint a manager (or managers) that are directly accountable to the municipal manager. The appointment of managers should enable a municipal manager to fulfil the diverse responsibilities vested in the position.<sup>28</sup> A person that is appointed as a manager must have the relevant skills and expertise to perform the duties that are associated with the post in question. For example, if a manager is appointed to manage municipal finance, that person must have the necessary skills and expertise to perform such duties. These are usually acquired through academic studies and practical experience.<sup>29</sup>

The appointment of municipal managers and other managers accountable to the municipal managers is further regulated through various legislative provisions. In this respect, it is required that a municipal manager or other managers be appointed to such posts only in terms of written employment contracts with the municipality and subject to separate performance agreements that are concluded annually between the council and the incumbents.<sup>30</sup> The performance agreement must be concluded within a reasonable time after a person is appointed and thereafter within one month after the beginning of the municipality's next financial year. When a performance agreement is concluded with a municipal manager, the agreement must be entered into with the municipality as represented by the mayor or executive mayor, and when

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<sup>28</sup> Note that it is the responsibility of the municipal council to appoint the managers under the municipal manager. Although prior consultation between the council and the municipal manager should take place, it is still the council's decision whom to appoint as managers. Only consultation is required; not consensus or agreement. It would be unwise to appoint managers with whom the municipal manager is not satisfied or comfortable, however. A strong and united managerial team should be pursued. Although the Systems Act refers only to the appointment of a manager, it is submitted that the intention of the legislator was the appointment of one or more such managers. See the Systems Act s 56(a).

<sup>29</sup> When managers or other personnel are appointed, the requirements of any applicable affirmative action policy should be considered. See the Systems Act s 56(b).

<sup>30</sup> See the Systems Act s 57(1)(a)-(b).

entered into with other managers, as represented by the municipal manager.<sup>31</sup> With regard to the performance agreement, it is required that such an agreement include:

- the performance objectives and targets that must be met, as well as the time frames within which targets must be met
- the standards and procedures for evaluating performance and intervals for evaluation
- the consequences of substandard performance.<sup>32</sup>

Finally, it is required that the employment contract for a municipal manager be concluded for a fixed term of employment, which term may not exceed a period ending two years after the election of the next council of the municipality. The term may thus be no longer than seven years.<sup>33</sup> The contract must also provide for a cancellation clause should there be non-compliance with the employment conditions.<sup>34</sup> Although the term of the contract must be fixed, it is possible for the renewal of the employment relationship. The only statutory requirements in this regard are that although the renewal of the employment contract is permitted it can be done only by agreement between the relevant parties. In the last instance, the municipal manager's employment contract must reflect the values and principles referred to in section 50 of the Systems Act, the code of conduct for municipal staff members as well as the management standards and practices that are contained in section 51 of the Systems Act. On this point it should be noted that the requirements relating to the em-

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<sup>31</sup> See the Systems Act s 57(2) and (3). The employment contract mentioned above must include details of duties, remuneration, benefits and other terms and conditions of the employment. All related employment particulars are subject to applicable labour legislation. It should be noted that under old-order laws, many of which are still applicable, issues such as medical aid schemes, pension schemes etc. were also addressed. Such aspects should be closely considered. See, eg, the case of *Munimed v Premier, Gauteng and Others* 1999 (4) SA 351 (T), where the court held that by establishing a medical aid scheme contrary to the provisions of s 79bis(1) of the Local Government Ordinance 17 of 1939 (T), the administrator had acted beyond the scope of his powers.

<sup>32</sup> The performance objectives and targets must be practical, measurable and based on the key performance indicators set out in the municipality's IDP. The provisions of the MFMA conferring responsibilities on the accounting officer of a municipality must be regarded as forming part of the performance agreement of a municipal manager. It should also be noted that bonuses based on performance may be awarded to a municipal manager or a manager directly accountable to the municipal manager after the end of the financial year and only after an evaluation of performance and approval of such evaluation by the municipal council. See ss 4A and 4B as inserted by Act 44 of 2003 s 8. Refer also to s 57(5) of the Systems Act.

<sup>33</sup> The normal term of a municipal council is 5 years plus the maximum 2 years mentioned above.

<sup>34</sup> Such conditions may also include the fulfilment or compliance with the relevant performance agreement conditions as were agreed upon. See the Systems Act s 57(6)(b).

ployment contract of a municipal manager may also be extended to the contract of any other manager that is directly accountable to the municipal manager.<sup>35</sup>

An aspect that has become very controversial in recent times is the remuneration packages that are paid to municipal managers and other managers. It is reported that in some instances, particularly where metropolitan councils are involved, the municipal managers earn very high remuneration packages; in some cases these are even more than members of the national government. This situation seems somewhat distorted and is currently under investigation. One must remember, however, that a municipal manager is not a political functionary in a municipal government, but is part of the administrative component. A comparison between the salary of such a person and a political functionary is therefore not necessary. Salaries of municipal staff members, including a municipal manager, form part of the public administration and should be regulated under such principles. In principle, it is advisable for government to structure the remuneration of the public service in a uniform manner within all spheres of government and after all relevant considerations have been taken into account. With regard to the remuneration of municipal managers or other managers, the Systems Act required that on or before 31 October of each year a municipality had to publish in the media the salary scales and benefits of the municipal manager and other managers directly accountable to the municipal manager.<sup>36</sup>

### **17.3.2 Basic principles relating to local public administration and internal municipal organisation**

It was mentioned above that issues concerning the local public administration and internal municipal organisational structures are also regulated within the framework of national legislation and that compliance to such requirements must also form part of the conditions of employment of a municipal manager. With reference to the values and principles of local public administration, the new legislative framework states that the local public administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution. Furthermore, in the administra-

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<sup>35</sup> See the Systems Act s 57(7). Note that the Act ss 50 and 51 deals with the basic values and principles relevant to local public administration and organisational requirements of municipal administrations respectively. Such requirements are discussed below.

<sup>36</sup> There seems to be no legislative regulation in relation to what such salaries or benefits should be. It is thus up to especially national government to regulate such issues via uniform legislative provisions. Note that s 58 was repealed by Act 44 of 2003 s 9.

tion of its affairs a municipality must strive to achieve the objectives of local government and the general duties of municipalities.<sup>37</sup>

Apart from the general principles that regulate public administration, all municipalities must establish and organise their administration, within their administrative and financial capacity, in a manner that would enable a municipality to achieve and comply with certain objectives/requirements. These objectives are the following:<sup>38</sup>

- to be responsive to the needs of the local community
- to facilitate a culture of public service and accountability amongst municipal staff
- to be performance orientated and focused on the objectives and duties of local government in general
- to ensure that political structures, political office bearers and managers and other staff members align their roles and responsibilities with the priorities and objectives set out in the municipality's IDP
- to establish clear relationships and to facilitate co-operation, co-ordination and communication between political structures, office bearers and the administration and the local community
- to organise the political structures, office bearers and the administration in a flexible way in order to respond to changing priorities and circumstances
- to perform municipal functions through operationally effective and appropriate administrative units and mechanisms, including through departments and other functional or business units; such functions, when necessary, may also be performed on a decentralised basis
- to assign clear responsibilities for the management and co-ordination of the administrative units and mechanisms
- to hold the municipal manager accountable for the overall performance of the administration
- to maximise efficiency of communication and decision making within the administration
- to delegate responsibility to the most effective level within the administration
- to involve staff in management decisions as far as is practicable

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<sup>37</sup> See the Systems Act s 50(1) and (2). The values set out in s 195 will be discussed in a separate chapter dealing with the basic principles concerning the public administration.

<sup>38</sup> See the Systems Act s 51(a)-(m).



- to provide an equitable, fair, open and non-discriminatory working environment.

Suffice it to say that the structuring and management of a municipal administration is quite a complex and extensive exercise. The internal arrangements are therefore likely to differ from one municipality to another as circumstances may require or depending on the category of municipality in question. There seem to be no uniform models of how a municipal administration should be established. What is certain, however, is that municipalities must establish and organise their administrations to ensure compliance with the set criteria, and the way in which the administration is structured and organised may vary from one municipality to another, as long as the minimum objectives are attained. Because of a possible conflict between municipal staff affairs and labour legislation in general, it is determined that in the event of any inconsistency between a provision in the Systems Act relating to municipal organisational matters, including the code of conduct for municipal staff members and any applicable labour legislation, such labour legislation should prevail.<sup>39</sup> In this regard it should be obvious that all municipalities under the new local government dispensation must familiarise themselves with applicable labour laws and developments and must ensure compliance with such laws.<sup>40</sup>

### **17.3.3 Municipal staff matters**

According to the Systems Act, it is the responsibility of the municipal manager to

- approve a staff structure for the municipality
- provide a job description for each post
- attach to the posts the remuneration and service conditions as may be determined
- establish a process or mechanism to evaluate the staff establishment regularly and, if necessary, to review such establishment and the remuneration or conditions of service.<sup>41</sup>

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<sup>39</sup> See the Systems Act s 52. In situations of conflict, provisions of the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997 or other labour legislation will prevail over the aspects directed at the structuring and management of internal municipal administrations set out in the Systems Act or regulations made under the Act.

<sup>40</sup> For examples of such labour disputes see the cases of *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) and also *Ntshotsho v Umtata Municipality* 1998 (3) SA 102 (Tk). Even part-time employees of municipalities are protected under labour laws, and they cannot be dismissed contrary to their employment contracts and without proper cause.

<sup>41</sup> These obligations do not apply to the employment contracts of managers directly accountable to the municipal manager. See the Systems Act s 66(1)-(2). The obligations on the municipal manager are subject to any applicable legislation and the policy framework that has been determined by the relevant municipal council. The protection given under any applicable legislation is to ensure

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All municipalities are obligated to develop and adopt appropriate systems and procedures that are directed at achieving fair, efficient, effective and transparent personnel administrations. Such systems and procedures must comply with applicable laws and are also subject to any applicable collective agreements that are in effect. The systems and procedures should provide for the following aspects:<sup>42</sup>

- the recruitment, selection and appointment of persons as staff members
- service conditions of staff
- supervision and management of staff
- monitoring, measuring and evaluating the performance of staff
- the promotion and demotion of staff
- the transfer of staff
- grievance and disciplinary procedures
- investigations of allegations of misconduct or complaints against staff
- the dismissal and retrenchment of staff
- any other matter prescribed by regulation.

It is the responsibility of the municipal manager to ensure that every staff member or relevant trade union has easy access to a copy of the staff systems and procedures. On the written request of a staff member, a copy or part of the relevant staff systems and procedures must be made available to that staff member. It is also the responsibility of the municipal manager to ensure that all staff members have been informed about the systems and procedures.<sup>43</sup>

Municipalities should also develop various capacity-building initiatives. All municipalities are obligated to develop their human resources capacities in order to perform their functions and to exercise their powers as is required by the Constitution and other applicable legislation. In this respect, the provisions of the Skills Development Act,<sup>44</sup> as well as the Skills Development Levies Act,<sup>45</sup> are of particular importance and must be complied with. Apart from any training levies required by law, a municipality may in addition provide in its budget for the development and training pro-

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that a municipal manager cannot unilaterally change or amend conditions of employment of members of staff. Strict requirements are set in this regard by mainly the Labour Relations Act.

<sup>42</sup> See the Systems Act s 67(1)(a)-(k).

<sup>43</sup> Refer to the Systems Act s 67(4)(a)-(c). Special attention must be given to informing staff members who cannot read.

<sup>44</sup> 97 of 1998.

<sup>45</sup> 9 of 1999.

grammes of municipal personnel. If a municipality does not have the financial means to provide additional funds for training, it may apply to the Sector Education and Training Authority (SETA) for local government for such funds. The SETA was established in terms of the Skills Development Act to assist municipalities in training programmes.<sup>46</sup>

#### **17.3.4 The code of conduct for municipal staff members**

Similar to the position regarding political office bearers of municipalities, all municipal staff members must adhere to a particular code of conduct that is very similar to the code of conduct applicable to municipal councillors. The code of conduct is set out in Schedule 2 of the Systems Act, and it states the following:

- *General conduct* All staff members of municipalities must at all times:
  - (a) execute loyally the lawful policies of the municipal council
  - (b) perform the functions of office in good faith, diligently, honestly and in a transparent manner
  - (c) act in such a way that the spirit, purport and objects of a municipal administration are promoted<sup>47</sup>
  - (d) act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised
  - (e) act impartially and treat all people, including other staff members, equally without favour or prejudice.<sup>48</sup>
- *Commitment to serving the public interest* In light of the fact that every municipal staff member is recognised as a public servant in a developmental local system, all staff members must:
  - (a) implement the provisions of organisational systems as is set out in section 50(2), (b)
  - (b) foster a culture of commitment to serving the public, together with a sense of responsibility for performance in terms of standards and targets
  - (c) promote and implement the basic values and principles of the public administration

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<sup>46</sup> For more details see both the Skills Development Act and Skills Development Levies Act mentioned above. Refer also to the Systems Act s 68(1)-(3).

<sup>47</sup> See the Systems Act s 50 for such objects.

<sup>48</sup> Refer to the Systems Act Sch 2 Item 2.

- (d) seek to implement the objectives of the municipal IDP and to achieve the performance targets set for each performance indicator
- (e) participate in the overall performance management system as well as the individual performance appraisal and reward system.<sup>49</sup>
- *Personal gain* A staff member of a municipality may not use his/her position or privileges or confidential information for private gain or to improperly benefit another person. Personnel may also not take a decision on behalf of the municipality concerning a matter in which that staff member, his/her spouse, partner or business associate has a direct or indirect personal or private business interest.<sup>50</sup> Furthermore, and unless a staff member has obtained prior consent from the council, no staff member may be a party to a contract for the provision of goods or services to the municipality or may not perform any other work for the municipality apart from the duties associated with his/her employment contract. Staff may also not obtain a financial interest in any business of the municipality or be engaged in any business, trade or profession, other than his/her work for the municipality.<sup>51</sup>
  - *Disclosure of benefits* Any direct benefit from a contract concluded between the municipality and a staff member or spouse, partner or business associate of such a staff member must be disclosed in writing and with full particulars. This disclosure does not apply to a benefit which a member of staff has acquired in common with all other residents of the municipality, however.<sup>52</sup>
  - *Unauthorised disclosure of information* Without permission, members of a municipal staff may not disclose to an unauthorised person any privileged or confidential information obtained. On this point, privileged or confidential information includes any information that
    - (a) is determined as such by the municipal council or any of its structures or functionaries
    - (b) is discussed in closed session by the council or a committee
    - (c) would violate a person's right to privacy

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<sup>49</sup> See the Systems Act Sch 2 Item 3.

<sup>50</sup> According to the Act, a "partner" refers to a person who permanently lives with another person in a manner as if they are married.

<sup>51</sup> See the Systems Act Sch 2 Item 4.

<sup>52</sup> See the Systems Act Sch 2 Item 5.

(d) is declared to be privileged, confidential or secret in terms of the law.<sup>53</sup>

- *Unduly influence* A staff member of a municipality may not unduly influence or attempt to influence the council, a structure, functionary, or councillor with a view to obtaining any appointment, promotion, privilege, advantage or benefit, or for such a benefit or advantage for a friend, associate or family member. Furthermore, members of staff may not mislead or attempt to mislead the council, municipal structures or functionaries in their consideration of any matter. No member of staff may be involved in a business venture with a councillor unless prior written consent of the council has been obtained.<sup>54</sup>
- *Receiving gifts, favours or rewards* Municipal staff may not request, solicit or accept any reward, gift or favour in return for
  - (a) persuading the council or any structure or functionary to exercise any power or perform any duty
  - (b) making a representation to the council or any structure
  - (c) disclosing any privileged or confidential information
  - (d) doing or not doing anything within that staff member's powers or duties.<sup>55</sup>

It seems from the wording of the item that an innocent gift received by a staff member for having done his/her work well or because he/she has "gone the extra mile" would not be in contravention of the code of conduct. Personnel should be very careful, however, and should not accept gifts from the public or immediately report such a gift or favour to their superiors or the speaker of the council. It is common practice for municipal staff to receive flowers, a box of chocolates, a bottle of wine or free tickets for a meal or sports happening as a gesture of appreciation from a member of the local community. The acceptance of such gifts should not be seen as a contravention of the code, but staff should be careful not to create a wrong impression. It is advisable for municipalities to establish a clear policy on such matters.

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<sup>53</sup> See the Systems Act Sch 2 Item 6. It should be noted that the prohibition to disclose information does not derogate from a person's right to access to information, which is provided for in terms of national legislation. For more, see the Promotion of Access to Information Act 2 of 2000.

<sup>54</sup> See the Systems Act Sch 2 Item 7.

<sup>55</sup> All staff must report to either a superior official or to the speaker of the council without delay any offer which, if accepted, would constitute a breach of this subitem. Municipal staff are thus obligated to report any attempts from other persons or institutions to solicit a bribe or to try and buy favours. Refer to the Systems Act Sch 2 Item 8.

- *Council property, payment in arrears and staff participation in elections* No member of a municipal staff may use, take, acquire or benefit from any property or asset owned, controlled or managed by that municipality. Again it is submitted that the circumstances of each case will be indicative of whether or not there is a real contravention of this prohibition. Innocent usage, without real benefit to the staff member, should not be regarded as a breach of this item.<sup>56</sup>

Similar to municipal councillors, no member of staff may be in arrears to the municipality for rates and services charges, for a period longer than three months. After this period, municipalities are permitted to deduct any outstanding amounts from staff members' salaries. This stipulation is somewhat controversial, however. Although it is acceptable that staff members and councillors should set an example regarding payment for municipal rates and service charges, it is not clear why outstanding amounts may be deducted from staff members' salaries but not from the salaries of councillors.<sup>57</sup> Furthermore, it seems unlawful to recover outstanding debts without an investigation regarding the merits of each case.<sup>58</sup> It is submitted that such automatic recovery of outstanding amounts should not be permitted, as it raises several legal and even constitutional issues. Municipalities should be obligated to follow the normal procedure applicable for the recovery of outstanding rates and services charges under the law in general.

A further and somewhat unclear provision in the code of conduct is that municipal staff are prohibited from participating in an election of the council of the municipality, other than in an official capacity or pursuant to any constitutional right. Staff members also have constitutional rights regarding the participation in municipal elections, and the purpose of this item is not clear.<sup>59</sup>

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<sup>56</sup> Eg, if a staff member uses the internet and prints a report for a personal use, or if member uses stationery that belongs to the council, such events should not constitute a breach of the code. The well-known maxim of South African law, namely *de minimus non curat lex*, should be applicable in such instances. See the Act Sch 2 Item 9.

<sup>57</sup> Cf Sch 2 Item 10 and Sch 1 Item 12A as inserted by Act 51 of 2002.

<sup>58</sup> It is quite possible for a municipal staff member to be in a dispute with his/her local municipality and subsequent employer regarding the correctness of a municipal account. To allow a council to deduct any amounts it deems outstanding from the salary of the staff member would not only negatively prejudice such a staff member, but would probably also not pass the test under the Bill of Rights s 36. A staff member should be able to argue that he/she is being treated unequally and that normal recourse under the law has been restricted.

<sup>59</sup> See the Systems Act Sch 2 Item 11. See also the Constitution s 19, which refers to the political rights of every adult citizen.

- *Sexual harassment* Following on other legislative prohibitions, no staff member of a municipality may embark on any action amounting to sexual harassment. The purpose of this item is self-evident, and breaches will depend on the circumstances of each case.<sup>60</sup>

Finally, the code of conduct obligates all staff members to report such possible breach without delay to a superior officer or to the speaker of the council whenever staff members have reasonable grounds to believe that there has been a breach of this code. Any breach or breaches of the code must be dealt with in terms of the relevant disciplinary procedures that are in force within the relevant municipality.<sup>61</sup> It is the responsibility of the municipal manager to ensure that a copy of the code of conduct or any amendments thereof have been provided to every member of the staff, if applicable. The municipal manager must also ensure that the purpose, content and consequences of the code have been explained to staff members who cannot read and furthermore to communicate to the local community the sections of the code that affect the public.<sup>62</sup>

#### **17.3.5 Miscellaneous aspects relevant to municipal staff members and the organisational structure of a municipal administration**

In order to address any shortcomings in the new legislative framework enacted to regulate the internal organisational structures of municipalities as well as related staff matters, the Systems Act allows the minister responsible for local government to make regulations or to issue guidelines covering a vast array of matters. In relation to the making of regulations, the Systems Act confirms that the following matters may be extended by regulations:<sup>63</sup>

- the procedure to be followed in appealing against decisions taken in terms of delegated powers and the disposal of such appeals
- the suspension of decision on appeal

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<sup>60</sup> See the Systems Act Sch 2 Item 12.

<sup>61</sup> It is thus safe to conclude that a *prima facie* breach of the code does not (allow or) permit a municipality to act against such a staff member other than according to the normal disciplinary processes. A breach of the code thus creates a ground or grounds for further disciplinary action and does not allow immediate termination of the employment relationship between the parties. See the Systems Act Sch 2 Items 13 and 14 as amended. Note that a breach of the code is not only a ground for dismissal or other disciplinary steps, but that such steps may include a suspension without pay for no longer than three months; a demotion; a transfer to another post; a reduction in salary, allowances or benefits or an appropriate fine. See item 14A as added by Act 44 of 2003 s 29.

<sup>62</sup> See the Systems Act s 70(1) and (2).

<sup>63</sup> See the Act s 72(1)(a)(i)-(vi).



- the setting of uniform standards for municipal staff establishments, municipal staff systems and any other matters concerning municipal personnel administration
- capacity building within municipal administrations
- training of staff, including in-house-training subject to national legislation<sup>64</sup>
- any other matter that may facilitate the application of the chapter and requirements regarding local public administration and human resources.

On the other hand, it is also provided that the minister may issue guidelines to provide for the following matters:<sup>65</sup>

- the establishment of job evaluation systems
- the regulation of remuneration and other conditions of service of staff members of municipalities
- the measuring and evaluation of staff performance
- the development of remuneration grading and incentive frameworks for staff members
- corrective steps in cases of substandard performance by staff members
- any other matter that may facilitate the implementation by a municipality of an efficient and effective system of personnel administration.

When making regulations or issuing guidelines, the minister must take into account the capacity of municipalities to comply with such matters and differentiate between the different kinds of municipality, according to their capacities. Issues regarding local public administration and human resources which place a financial or administrative burden on municipalities may be phased in by the minister. Such phasing in is done by notice in the *Government Gazette*.<sup>66</sup> Finally, it is also important to note that apart from relevant labour legislation that must be adhered to, municipalities are also obliged to comply with any collective agreements that have been concluded by organised local government within its mandate on behalf of local government in the specific bargaining council that has been established for municipalities.<sup>67</sup>

#### **17.4 Conclusion**

It can be concluded that municipalities, in similar fashion to all other private or public entities, need an effective and efficient personnel corps in order to fulfil their vast array

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<sup>64</sup> See again the Skills Development Act and Skills Development Levies Act.

<sup>65</sup> See the Systems Act s 72(1)(b)(i)-(vi).

<sup>66</sup> See the Systems Act s 72(2)-(4).

<sup>67</sup> See the Systems Act s 71.

of municipal services and obligations. There is no doubt therefore that municipalities must make every possible effort to maintain, control, educate, train and motivate their respective administrative functionaries. In the past, local governments too often neglected their personnel obligations and political ambitions overshadowed people-related interests.

Under the new local government dispensation a rejuvenated effort has been launched to protect and enhance municipal labour- and staff-related matters. Local government does not operate in an exclusive environment, however, and therefore must adhere to standard labour laws and practices. In light of the specific tasks and obligations of all local governments, it is very important for all municipal administrations to organise and structure their respective administrations in such a manner that optimal efficiency is obtained. Bureaucratic institutions should be avoided and regular evaluation of the organisational structure must be undertaken.

Various new initiatives have been incorporated into the new legal framework to ensure more professional and skilled local government administrations. Such initiatives include *inter alia* the introduction of key performance indicators to measure overall performance, fixed term service contracts for senior personnel and a comprehensive code of conduct for all administrative staff. A municipal manager as head and chief of the municipal administration has been legally entrenched and is finally tasked with overall personnel accountability. All municipal managers should have strong leadership and human relations qualities, and municipal councils must ensure that properly trained and suitably experienced candidates are appointed to such positions. The influence of the municipal manager is of fundamental importance to the overall success of a particular local government.

With due regard to the various constitutional requirements, such as the principles of the public administration and financial management, read together with the new criteria on municipal administrative management, it is submitted that local governments should be able to perform and fulfil their legal functions and obligations. There seems to be a stronger realisation that without effective and efficient municipal administrations most, if not all, local governments will not be able to succeed in their roles as the third branch of the overall governmental structure of a new and truly democratic state.

## Issues relating to municipal finance and municipal fiscal management

### 18.1 Introduction

The overall reform and transformation of the new local government dispensation has not only affected the composition and internal functioning of all local governments in South Africa, it has also significantly impacted on municipal financial affairs. It is clear that municipalities need adequate financial resources to achieve their new constitutional objectives. From the outset it is important to note not only that municipal income sources should be protected, but also sound expenditure policies and financial control mechanisms must be implemented.<sup>1</sup> In light of the new constitutional dispensation, all governmental expenditure and financial management practices must adhere to the basic values of accountability and transparency.<sup>2</sup> Strict control over municipal financial matters is thus a *sine quo non* for a successful and effective local government sphere.

Against this background, a new legal framework has been developed to manage and control the financial affairs of all municipalities. At the centre of the new framework is the Constitution, which specifically requires that all local governments must be developmentally orientated and that they aim at meeting the basic needs of their respective communities in their budgeting and administrations.<sup>3</sup> Furthermore, municipalities must also strive to achieve various constitutional objectives, which spe-

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<sup>1</sup> No local government will be able to fulfil its overall constitutional objectives and duties without effective and strict monetary control. See also Cloete (1997) 108.

<sup>2</sup> These values are the basic foundations upon which the new governmental structure, including the new local government dispensation, is based. Refer also to the Constitution s 1.

<sup>3</sup> See the Constitution ss 152 and 153 respectively.

cifically include the provision of basic services to local residents in a sustainable manner.<sup>4</sup>

In order for the new framework of municipal finance to be effective, the White Paper on local government has identified three aspects which the new financial framework had to incorporate:

- The new system had to be developmentally orientated and had to address the root causes of current financial problems.
- A balance had to be achieved between programmes for poverty eradication combined with strategies of growth and job creation.
- All local governments had to be empowered to fulfil their overall constitutional mandates.<sup>5</sup>

It is further imperative that the new framework recognises and accommodates the difference between the three categories of municipality. In this respect it is important to take cognisance of the fact that urban and rural municipalities have very different financial circumstances and capacities.<sup>6</sup> In light of the abovementioned factors, the Department of Constitutional Development and Local Government has embarked on a programme to establish and enact various legislative provisions in order to establish a broad financial framework for local governments. Although it is hoped that the new legal framework will be effective in order to secure the responsibilities that local governments must meet, the department has encountered many delays in finalising the proposed legal framework.<sup>7</sup>

## **18.2 The new legislative framework for municipal financial management**

Within the new constitutional dispensation of South Africa, all local governments are specifically entrenched as being part of the government of the Republic, and their existence and functioning are thus constitutionally controlled and regulated. This is also the position regarding the principles of municipal finance. The Constitution pro-

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<sup>4</sup> In this regard it is submitted that sustainable services refer to services that can be continued on a day-to-day basis. Apart from sustainability, services should also be affordable to all members of local communities which in turn often require some form of local cross-subsidisation within a matrix of affordability, efficiency and constitutional effectiveness. See Craythorne (1997) 342.

<sup>5</sup> See the White Paper on Local Government (1998) at 129.

<sup>6</sup> See the three categories of municipality set out in the Constitution s 155. Against the backdrop of a combination of various factors, such as the system of segregation, poor administration and inadequate control measures, many local governments, especially in rural areas, do not have adequate tax bases to fund and sustain basic service delivery.

<sup>7</sup> It took nearly five years to finalise the new Local Government: Municipal Property Rates Act, and the Local Government: Municipal Finance Management Act.

vides the basic foundation and directives which have to be observed and complied with by all spheres of government, including municipalities. In relation to municipal finance, the Constitution incorporates various directives, and accordingly the new restructured system of municipal finance needs to be founded on the supreme constitutional foundation. Apart from such constitutional provisions, both national and provincial legislatures are authorised to enact further legal rules in order to complete the new envisaged system. Each of the new legislative sources is discussed below.

### **18.2.1 The broad constitutional foundation relevant to municipal finance**

According to the Constitution, all municipalities are obligated to structure and manage their administrations, budgeting and planning processes in such a way as to give priority to the basic needs of their respective communities and also to promote the social and economic development of such communities. In order to achieve these constitutional duties, all municipalities are obligated to participating in national and provincial development programmes.<sup>8</sup> A further important constitutional requirement that impacts on municipal financial affairs is the fact that neither national government nor provincial governments may compromise or impede a municipality's ability or right to exercise its powers or perform its functions. Both higher spheres of government must support and strengthen the capacity of municipalities to manage their own affairs and to exercise and perform their powers and functions.<sup>9</sup> It is clear from the constitutional text that the two higher spheres of government have a significant responsibility to ensure that municipalities are capacitated and able to perform their powers and functions. Apart from the provisions mentioned above, the chapter on local government in the Constitution contains no requirements regarding the system of municipal finance. However, the broad requirements relating to municipal finance are set out in chapter 13 of the Constitution, which deals with the financial affairs of all three spheres of government. In this regard, the Constitution deals with the following:

- *National revenue fund* The Constitution determines that a national revenue fund be established and that all money which is received by the national government

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<sup>8</sup> Refer to the Constitution s 153. This section must be read together with s 152, which confirms the various objects that municipalities must strive to achieve, depending on their financial and administrative capacities.

<sup>9</sup> See the Constitution s 151(4) read with s 154(1).

be paid into such national revenue fund. Only money that is reasonably excluded by an Act of parliament may be deposited in another fund(s).<sup>10</sup>

- *Equitable shares and allocations of revenue* According to the Constitution, an Act of parliament must provide for *inter alia*, the equitable division of revenue that has been raised nationally among the national, provincial and local spheres of government and also for any other allocations of revenue to provinces. The Act must also provide for any other allocations to the provinces or *local government or municipalities* from the national government's share of that revenue and any conditions on which those allocations may be made.<sup>11</sup> The Act of parliament that regulates the equitable share and allocation of revenue raised nationally may be enacted only be after the provincial governments, Organised Local Government (OLG) and the Financial and Fiscal Commission (FFC) have been consulted, and after any recommendations of the commission have been considered. Furthermore, the Act must take various factors into account, such as *inter alia*:
  - (a) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them
  - (b) the fiscal capacity and efficiency of the provinces and municipalities
  - (c) the developmental and other needs of provinces and municipalities
  - (d) the various obligations of the provinces and municipalities that have been allocated to them in terms of national legislation.<sup>12</sup>

In essence, the Constitution addresses intergovernmental fiscal relations in two broad respects. On one hand the Constitution entitles the local sphere of government to an equitable share of revenue raised nationally. Such sharing of national revenue is generally referred to as "intergovernmental transfers" (IGTs). Apart from the entitlement to share in revenue, the Constitution specifically entrenches oversight and regulation of the financial affairs of municipalities in the national government.<sup>13</sup>

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<sup>10</sup> See the Constitution s 213(1)-(3).

<sup>11</sup> Refer to the Constitution s 214(1)(a)-(b). In compliance with s 214(1)(a) national parliament has enacted the Division of Revenue Act 7 of 2003. The Act specifically provides for the equitable division of revenue between the three spheres of government.

<sup>12</sup> For more details see the Constitution s 214(2)(a)-(j). The use of the terms "local governments" and "municipalities" in s 214 is somewhat unclear and unnecessary, as both terms are synonymous with one another.

<sup>13</sup> This oversight and control is protected in various sections of the Constitution. For more details, refer to the Constitution ss 100, 139, 155(7), 229 and 230A. Many other sections regarding

- *National, provincial and municipal budgets* The new constitutional dispensation envisages an overall financial system for all spheres of government that is transparent, effective and accountable and regards it as obligatory. All national, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.<sup>14</sup> Again, the Constitution itself requires national legislation to further complete and regulate such financial processes. The national legislation must prescribe the form of the budgets in all three spheres of government, and all budgets must show the sources of revenue and the way in which proposed expenditure will comply with national legislative requirements.<sup>15</sup> The Constitution further determines that each budget in each sphere of government, including all municipal budgets, must contain specific information. For example, each budget must contain estimates of revenue and expenditure, proposals for financing any anticipated deficit and an indication of intentions regarding borrowing and also other forms of public liability that will increase public debt.<sup>16</sup>
- *Treasury control and procurement* The Constitution also requires national legislation to establish a national treasury and to prescribe measures to ensure both transparency and expenditure control in each sphere of government. Such measures are to be achieved by introducing generally recognised accounting practices, by uniform expenditure classifications and through uniform treasury norms and standards. It is the responsibility of the national treasury to enforce compliance with the measures that have been mentioned above. If an organ of state commits a serious or persistent material breach of the mentioned measures, then the national treasury may stop the transfer of funds to that organ or organs.<sup>17</sup> It is evident that the Constitution, as with other issues, vests the final oversight and control with the national sphere of government, within which sphere the national treasury operates. This is also the case concerning municipal treasury control.

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finance such as ss 215 and 216 grant further powers to the national treasury to regulate municipal financial affairs. The Act will therefore set financial controls for all spheres of government and will impose responsibilities and penalties on not only accounting officers, but also on the municipal manager and political heads. Refer also to the White Paper on Local Government (1998) at 130-131.

<sup>14</sup> See the Constitution s 215(1).

<sup>15</sup> Refer to the Constitution s 215(2)(a)-(c).

<sup>16</sup> See the Constitution s 215(3)(a)-(c).

<sup>17</sup> See the Constitution s 216(1) and (2).



*Requirements regarding aspects of procurement* These are also constitutionally entrenched. When an organ of state in any sphere or any other institution so identified in national legislation contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and also cost effective. Procurement procedures or policies may further provide for categories of preference in the allocation of contracts and also for the protection or advancement of persons or categories of persons that have been disadvantaged by unfair discrimination.<sup>18</sup> National legislation must again prescribe a framework within which the procurement policy is to be implemented.<sup>19</sup>

In accordance with the abovementioned constitutional imperative set out in section 217 of the Constitution, national parliament has enacted the Preferential Procurement Policy Framework Act (PPPFA).<sup>20</sup> The main aim of the Act is to give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2). The PPPFA determines that organs of state, including municipalities, must determine their preferential procurement policies and also implement them within the following framework:<sup>21</sup>

- (a) A preference points system must be followed.
- (b) For contracts with a rand value above a prescribed amount, a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d), provided that the lowest acceptable tender scores 90 points for price. For contracts with a rand value equal to or below a prescribed amount, a maximum of 20 points may be allocated for specific goals, provided that the lowest acceptable tender scores 80 points for price.<sup>22</sup>

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<sup>18</sup> This preferential treatment is a good example of so-called "affirmative action" initiatives. It is submitted that although such initiatives are constitutionally permitted, the relevant institutions do not have a carte blanche freedom over the contract requirements with outside institutions. Such appointments or awarding of contracts must also comply with other constitutional requirements. See, eg, the provisions of s 9 (equality) and s 33 (fair administration action) set out in the Bill of Rights.

<sup>19</sup> See the Constitution s 217(1)-(3).

<sup>20</sup> 5 of 2000.

<sup>21</sup> See the PPPFA s 2(1)(a)-(g).

<sup>22</sup> "Prescribed" in this sense means prescribed by regulation by the Minister of Finance. See the PPPFA ss 1 and 5 respectively. Read also with the Act s 2(1)(d). Note also that an "acceptable tender" means any tender which in all respects complies with the specifications and conditions of tender set out in the tender document.

- (c) Any other acceptable tenders which are higher in price must score fewer points, on a *pro rata* basis. Points are calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula.
- (d) The specific goals may include the contracting with persons or categories of persons that have been historically disadvantaged by unfair discrimination on the basis of race, gender or disability and the implementing of the programmes of the Reconstruction and Development Programme.<sup>23</sup>
- (e) Any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender.<sup>24</sup>
- (f) The contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer.
- (g) Any contract awarded on account of false information by a tenderer to secure preference may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have in terms of the law.

On request, however, the Minister of Finance may exempt an organ of state from any or all of the provisions of the Act. Such exemption is permitted only if it is in the interests of national security, if the likely tenderers are international suppliers or if it is in the public interest to grant exemption.<sup>25</sup> Any procurement processes implemented under a preferential procurement policy, where the invitation to tender was advertised before the commencement of the PPPFA, must be finalised as if the Act had not come into operation. Furthermore, the minister may make regulations regarding any matter that may be necessary or expedient in order to achieve the objectives of the Act.<sup>26</sup> With reference to the tender processes of municipalities, the supreme court of appeal in *Metro Projects CC and Another v Klerksdorp Local Municipality and Others*<sup>27</sup> held that any tender process must be fair, equitable and cost effective. As an organ of state in the local government sphere, a municipality, in awarding a tender, is obliged to comply with section

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<sup>23</sup> See *Government Gazette* 16085 of 23/11/1994.

<sup>24</sup> Such goals must be measurable, quantifiable and monitored for compliance. See the Act s (2).

<sup>25</sup> Read the PPPFA s 3(a)-(e).

<sup>26</sup> Refer to the PPPFA ss 4 and 5.

<sup>27</sup> 2004 (1) SA 16 (SCA).

10G(5)(a) of the Local Government Transition Act,<sup>28</sup> read with section 217(1) of the Constitution. These provisions mandate it to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The PPPFA requires organs of State to establish a procurement policy, and also makes it obligatory for the first respondent, as an organ of state in the local sphere, to follow a tender procedure for the procurement of goods and services.

There is also another reason why the tender procedure of a local authority must be fair. Invitations by organs of state to tender and the awarding of tenders where it is done in the exercise of public power is an administrative process. Section 3(2)(a) of the Promotion of Administrative Justice Act<sup>29</sup> requires the process to be lawful, procedurally fair and justifiable. Fairness must be decided on the circumstances of each case. In given circumstances it may be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake and, particularly in a complex tender, it may be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.<sup>30</sup>

- *Government guarantees* Governments, including municipalities, may guarantee a loan or loans only if the guarantee complies with the conditions set out in national legislation.<sup>31</sup> In order to ensure accountability and transparency, the Constitution demands that every government publish a report each year on the guarantees it has granted. This is an important requirement, since a government guarantee is a legally binding instrument whereby such government has financially bound itself to the extent of that guarantee.
- *The remuneration of persons that are holding public office* In the former system for local government in South Africa, the remuneration of municipal office bearers had a significant impact on municipal finance. According to the Act on the remuneration of town clerks,<sup>32</sup> the town clerk was the highest paid official of a municipality, and his or her salary scale was the sealing of all salaries for a particular

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<sup>28</sup> 209 of 1993.

<sup>29</sup> 3 of 2000.

<sup>30</sup> See pages 20-21.

<sup>31</sup> See the Constitution s 218. The national legislation referred to in this section may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

<sup>32</sup> 115 of 1984.

municipality. Municipalities were further divided into categories, rated from 1 to 14, 1 being the smallest municipality and 14 the biggest. The top salary, that of the town clerk, was determined according to the specific category. Town clerks of category 14 municipalities earned much more than their counterparts in smaller local government structures. Under the new dispensation, the Constitution requires that an Act of parliament establish a framework for determining the upper limits of salaries, allowances or benefits of *inter alia* municipal councils of the different categories of municipality.<sup>33</sup> In order to make recommendations concerning the salaries, allowances and benefits mentioned above, the Constitution obligates national parliament to enact national legislation, which must then establish an independent commission to undertake such tasks. The provisions of such a national law may be implemented only by government institutions, including municipalities, after the consideration of any recommendations of the independent commission.<sup>34</sup>

- *The establishment of the Financial and Fiscal Commission* Under the new financial framework, the Constitution confirms that there is a Financial and Fiscal Commission (FFC) for the Republic of South Africa which makes recommendations on government fiscal matters to parliament, provincial legislatures or other authorities. The commission is independent and subject only to the Constitution and the law. It must also be impartial and must perform its functions in terms of an Act of parliament.<sup>35</sup> The commission consists out of a chairperson and a deputy chairperson, one person nominated by the executive councils of each of the nine provinces, two persons nominated by organised local government and nine other

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<sup>33</sup> See the Constitution s 219(1)(b). It is interesting to note that only the *upper limit of salaries, allowances or benefits* of members of provincial legislatures, MECs and members of municipal councils must be established in terms of national legislation. See the Constitution s 219(1)(a). The Constitution does not require the national Act to prescribe only the upper limits of salaries or benefits of members of the NA or NCoP, cabinet, deputy ministers, traditional leaders or members of councils of traditional leaders. The Act must establish the specific salaries or benefits that are applicable. This position seems to indicate that a similar system as was used under the Act for the remuneration of town clerks is proposed for local government.

<sup>34</sup> Refer to the Constitution s 219(2) and (4). In compliance with this requirement, parliament has enacted the Independent Commission for the Remuneration of Public Office-bearers Act 92 of 1997.

<sup>35</sup> See the Constitution s 220. Furthermore, the Financial and Fiscal Commission Act 99 of 1997 has been enacted to give effect to the constitutional requirements that relates to the FFC.

persons.<sup>36</sup> Finally the FFC is obligated to report regularly, both to parliament and to the provincial legislatures.<sup>37</sup>

- *Provincial revenue funds and national sources of provincial and local government funding* Apart from the national revenue fund, the Constitution also determines that there should be a provincial revenue fund for each of the provinces into which all money received by a provincial government must be paid.<sup>38</sup> Money may be withdrawn from a provincial revenue fund only in terms of an appropriation allowed by a provincial Act. More importantly is the provision that revenue allocated through a province to local governments in terms of section 214(1) of the Constitution is a direct charge against that province's revenue fund.<sup>39</sup> It is furthermore determined that local government and each province is entitled to:
  - (a) an equitable share of revenue raised nationally to enable it to provide basic services and to perform the functions allocated to it
  - (b) receive other allocations from national government revenue, either conditionally or unconditionally.<sup>40</sup>

An important provision in this regard is that the Constitution protects additional revenue raised by provinces or municipalities. Such additional revenue may not be deducted from their share of revenue raised nationally or from any other allocations made to them. If a municipality is thus entitled to a specific share of revenue, but it has also earned additional revenue, by whatever means, such revenue may not be deducted from its original share amount. The intention of the constitutional

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<sup>36</sup> There should thus be in total 22 members of the commission. Members must also have appropriate expertise, which would include financial and public affairs expertise. See the Constitution s 221.

<sup>37</sup> Refer to the Constitution s 222.

<sup>38</sup> Exceptions may be provided for through an Act of parliament.

<sup>39</sup> Refer to the Constitution s 226. The Constitution further states that national legislation may determine a framework within which revenue allocated through a province to local government in that province, must be paid to municipalities in the province. In this regard the Intergovernmental Fiscal Relations Act 97 of 1997 has been enacted. The purposes of the act are to promote co-operation between the spheres of government relating to fiscal and budgetary matters, and to ensure equitable sharing and the allocation of revenue.

<sup>40</sup> See the Constitution s 227(1)(a)-(b). It is of interest to note that in the case of *In re: Certification of the Constitution of the RSA 1996*, 1996 (4) SA 744 (CC) the Constitutional Court held that the absence in the new text of the Constitution of a provision equivalent to the interim Constitution s 158(b), which provided that [the] financial allocations by the national government to local government shall ordinarily be made through the provincial government of the province in which the local government is situated was not a material diminution in the powers of provincial governments. S 158(b) established [only] the possibility, not the certainty, that provincial government could be utilised as a conduit through which funds raised nationally could be allocated to local government.

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drafters seems to be to promote and encourage provinces and municipalities to implement initiatives, so as to earn additional income. If such income were to be deducted from a municipality's share in income then there would be no motivation or purpose for it to secure additional revenue. By protecting additional revenue, municipalities are encouraged to devise new initiatives in order to raise more money for themselves and to thus be more able to fulfil and perform their functions and duties. As a counter protection, the Constitution also determines that there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.<sup>41</sup> It is submitted that although national government is under no obligation to compensate the two lower spheres of government for their own ineffectiveness to raise revenue which they should have raised, national government, being the highest sphere of government, is still constitutionally obligated to intervene and oversee the fulfilment of the duties and functions of the lower spheres.<sup>42</sup>

- *Municipal fiscal powers and functions* The chapter on finance in the Constitution specifically determines certain fiscal powers and functions for municipalities. In this regard municipalities may impose:
  - (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality
  - (b) other taxes, levies and duties appropriate to local government or the specific category concerned if so authorised by national legislation.<sup>43</sup>

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Such a section did not purport to create provincial powers in respect of such revenue. See para 430 at 897.

<sup>41</sup> See the Constitution s 227(2).

<sup>42</sup> See the Constitution ss 100, 139 and 154 respectively. Refer also to the case of *Member of the Executive Council for Local Government, Mpumalanga v IMATU and Others* 2002 (1) SA 76 (SCA). The court stated that the Constitution ss 139 and 154 do not impose on a provincial government the constitutional duty towards a local authority to provide it with funds to enable it to pay its debts. See paras 8-10 at 79.

<sup>43</sup> Refer to the Constitution s 229(a)-(b). National legislation must therefore determine such other taxes or levies before local governments may impose them. See also *Gerber and others v Member of the Executive Council for Development, Planning and Local Government, Gauteng and Another* 2003 (2) SA 344 (SCA). The case concerned an appeal regarding the legality of land rates imposed on owners of agricultural land. The local authority argued that it was entitled to impose a flat rate under the provisions of the Ordinance for the Transvaal Board for the Development of Peri-Urban Areas 20 of 1943 (T). The court held that the original powers granted to municipalities in terms of the Constitution s 229(1)(a) were to impose a property rate. "Rate" referred to rate on property in relation to size or value of property. S 229 did not depart from such a meaning. The LGTA s 10G(6) stated in pre-emptory terms that if not feasible to value or measure a property, rates could be determined as prescribed. Data of the properties was provided. The court held that there was no correlation between the size of the property and the rate imposed, thus the rate imposed

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It is, however, specifically determined that no municipality may impose income tax, value-added tax, general sales tax or customs duty. Such taxes may be imposed only by the national government; not even by provincial governments.<sup>44</sup> Municipalities clearly have the authority to impose rates on property and surcharges on fees for services and other taxes, levies or duties. However, such power or authority may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries or the national mobility of goods, services, capital or labour. National legislation is again envisaged to regulate such powers of municipalities.<sup>45</sup> When two municipalities have the same fiscal powers and functions in an area, an appropriate division of such powers and functions must be made in terms of national legislation. The division may be made only after at least the following criteria have been taken into account:<sup>46</sup>

- (a) the need to comply with sound principles of taxation
- (b) the powers and functions performed by each municipality
- (c) the fiscal capacity of each municipality
- (d) the effectiveness and efficiency of raising taxes, levies and duties
- (e) equity.

There is no prohibition on the sharing of revenue raised between municipalities that have fiscal powers in the same area. It is important that division of powers and the sharing of revenue between municipalities in the same area should be carefully considered and monitored. National legislation as well as the involve-

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treated landowners unequally. Owners of smaller pieces of land paid as much as owners of larger tracts of land within same area. Since the council relied on the Constitution s 229(1)(a) and not s 229(1)(b), which allowed a levy on property, its basis for calculation of the levy/rate was irrational, unfair and discriminatory. The rates were thus set aside. See para 25-28 at 354 and para 36 at 357. Refer also to *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (CPD). The case concerned the validity of a municipality levying service charges comprising part property rates and part service fees. The court held that there was nothing in the Constitution or other legislation that precluded a municipality from levying service charges that comprise both property rates and user fees. The court concluded that such authority is permitted under the LGTA, s 229 of the Constitution and ss 74-75 of the LG: Municipal Systems Act. See pages 560-561.

<sup>44</sup> See the Constitution s 228(1), which determines that provincial legislatures may impose taxes, levies and duties *other than* income tax, value-added tax, general sales tax, rates on property or customs duties. See the Constitution s 228(1)(a) read with s 229(1)(a).

<sup>45</sup> See the Constitution s 229(2).

<sup>46</sup> Refer to the Constitution s 229(3)(a)-(e).



ment of the FFC should play a vital role in creating an effective and equitable system of sharing revenue.<sup>47</sup>

- *Municipal loans* The Constitution determines that a municipal council may, in accordance with national legislation:
  - (a) raise loans for capital or current expenditure for the municipality
  - (b) bind itself and a future council in the exercise of its legislative and executive authority in order to secure loans or investments for the municipality.

It must be noted, however, that loans for current expenditure may be raised only when it is necessary for bridging purposes during a fiscal year.<sup>48</sup> The national legislation that authorises municipal loans may be enacted only after recommendations of the FFC have been considered.

It is clear from sections 229 and 230A of the Constitution that the Constitution grants municipalities considerable taxation and borrowing powers, but subject such powers to national legislative control and regulation. Municipal taxation powers are further also limited, in that they may not unreasonably prejudice national economic policies and activities. Finally, the prohibition that borrowings may not fund budget deficits effectively outlaws deficit budgeting on local government level. It is quite evident that the new constitutional framework specifically demands that local authorities adhere to specific constitutional directives when dealing with financial matters. These basic directives may be expanded upon by parliament through the enactment of new national legislation.

### **18.2.2 The new basic policy objectives**

In order to meet the new supreme objectives as set out in the Constitution, a new system of municipal finance had to be created. Such reconstruction had to conform

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<sup>47</sup> The sharing of revenue between municipalities in the same area is applicable only between category B and C municipalities, and national legislation must regulate the position. Such national legislation may be enacted only after organised local government and the FFC have been consulted and any of their recommendations have been considered, however. See the Constitution s 229(5). See also *Robertson & Another v City of Cape Town and Another* 2004 (5) SA 412 (CPD), where the court held that bilateral consultation had to take place between the FFC and the Minister or Parliament regarding the provisions of the Structures Act as amended, before such provisions could be enacted. Refer to para 109-110 at 446-448.

<sup>48</sup> The importance of municipal loans should not be underestimated, and such loans could have a significant impact on the fulfilment of the powers and functions of future councils. Because of this important impact, only the municipal council may conclude loans and may not delegate such authority. See the Constitution s 160(2)(d) read together with s 230A.

to a number of basic policy principles. According to the White Paper on local government, the principles for the new system can *inter alia* be summarised as follows:<sup>49</sup>

- *Revenue adequacy and certainty* All municipalities need to have access to adequate revenue sources to fulfil their powers and functions. Such sources should then be fully exploited in order for municipalities to meet their developmental objectives. In order to ensure compliance with their objectives, municipalities will need certainty regarding their revenue so as to allow them to plan realistically for the future.
- *Sustainability* Financial sustainability requires municipalities to ensure that their budgets are balanced. Income should cover expenditure adequately. In order to achieve sustainability, services should be provided at affordable levels, and municipalities must recover the costs of service delivery. Bail-outs for overspending on budgets or improper financial management will not be provided by higher spheres. In this regard, it is the responsibility of the political leadership to ensure that realistic budgets are set.
- *Effective and efficient use of resources*: Generally speaking, municipal resources are scarce and should be used in the best possible way to ensure maximum benefit for local communities. All communities should ensure through participation that their elected municipal council adheres to this important principle.
- *Accountability, transparency and good governance* Municipalities should be held responsible and accountable to local taxpayers for the use of public funds. Expenditure decisions must be explained in detail. The overall fiscal system should be designed to encourage accountability and should be open to public scrutiny. Community participation in the budgeting processes should be encouraged, and people should understand why decisions or priorities were taken. In general, the accounting procedures should allow for minimal opportunities for corruption and malpractice.
- *Equity and redistribution* Citizens must be treated equitably and within the ambit of the law. This treatment is also relevant to the provision of services. Municipalities themselves should also be treated equitably by the higher spheres of government regarding intergovernmental transfers. In order to ensure equity, municipalities are allowed to cross-subsidise between high and low-income con-

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<sup>49</sup> See the White Paper on Local Government (1998) at 131-132.

sumers. The extent of cross-subsidisation is a local choice and needs to be exercised very carefully within the overall framework of a municipality's integrated development plan.

- *Adhering to national policies* Municipalities form an important part of the public sector in South Africa. Many actions or decisions of local governments can substantially affect national policy. Municipalities thus need to operate and fulfil the obligations within the national macro-economic framework of the state.

### **18.2.3 Financial matters under the Local Government Transition Act**

Under the provisions of the LGTA, every municipality had to adhere to certain principles in respect of the management of its financial affairs. In this regard municipalities had to:<sup>50</sup>

- conduct their affairs in an effective, economical and efficient manner with a view to optimising the use of their resources in addressing the needs of the community
- conduct their financial affairs in an accountable and transparent manner
- prepare a financial plan in accordance with the IDP
- structure and manage their administration, budgeting and planning processes to give priority to the basic needs of their communities, to promote social and economic development and to support the implementation of national and provincial development programmes
- manage their financial resources so as to meet and sustain their objectives
- regularly monitor and assess their performance against their IDP
- annually report to and receive comments from their community regarding the objectives set out in their IDPs.

According to the LGTA, the chief executive officer (CEO) was responsible for keeping accounting records that reflected the transactions and financial state of affairs of a municipality. All money received had to be deposited in a banking account in the name of the municipality. Every municipality was also obligated to establish and maintain a system of internal financial control. Furthermore, all municipal financial years were to end on 30 June of each year, and all accounts had to be audited by the Auditor-General.<sup>51</sup> The report of the Auditor-General had to be submitted to the council, and notice of such referral to the council had to be given in a newspaper

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<sup>50</sup> See LGTA s 10G(1)(a)-(g).

<sup>51</sup> See the LGTA s 10G(2)(c)-(d).

circulating in the area. The council meeting on the report had to be open to the public, and the CEO had to be present to answer possible questions in his/her capacity as accounting officer.<sup>52</sup>

On the point of accountability, the LGTA stated that if a person who is or was in the employ of a municipality caused a loss or damage for the municipality because he/she:

- failed to collect money owing to the municipality for which collection he/she was responsible
- was responsible for an irregular payment of money or payment not supported by a proper voucher
- was responsible for fruitless expenditure due to an omission
- was responsible for the destruction or damage to council property or
- was responsible, due to an omission, for a claim against the municipality, the CEO or the council, who had to determine the amount of such loss or damage, had to take disciplinary action where possible and had to recover the loss or damage in appropriate cases.

Any fraudulent and corrupt actions by employees had to be reported to the SANPS.<sup>53</sup> According to the Act, an expenditure was unauthorised if payment was made:

- by the CEO without provision having been made therefore by any budget or if payment resulted in the total amount of the approved annual operating or capital expenditure budget was exceeded
- if the CEO was unable to produce to the Auditor General (AG) or MEC or council authority for the payment as was required by law or where the CEO made a payment inconsistent with a provision by any law.

Any unauthorised expenditure had to be disallowed until approved by the responsible authority. Any unauthorised expenditure had to be recovered from the CEO if he/she was unwilling to recover such from either the beneficiary or person responsible for the expenditure. An interesting provision on this point was that in instances where unauthorised expenditure has been effected on a written instruction of a councillor or as a result of a council resolution in favour of which a councillor voted,

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<sup>52</sup> Refer to the LGTA s 10G(e)(i)-(iii).

<sup>53</sup> See the LGTA s 10G(2)(f)-(i).

unless it was recorded that the councillor voted against such resolution, the expenditure had to be recovered from the councillor(s) concerned.<sup>54</sup>

The LGTA also provided for strong oversight procedures regarding the financial management of municipalities. If the MEC was of the opinion that the finances of a municipality were or became unsound, he/she could instruct the council to take certain steps specified in writing.<sup>55</sup>

In respect of municipal budgets, the LGTA stated that a municipality had to compile and approve annually a budget with a two-thirds majority of all members of its council. The budget had to provide for operating income and expenditure and for capital expenditure which had to reflect the sources of finance, future capital charges, operating and maintenance costs as well as the consequential influence thereof on levies, rates and services charges. All municipalities had to ensure that they did not budget for a year-end deficit on their operating accounts and that their budgets were in accordance with their IDPs. Expenditure could be incurred only in accordance with the approved budget. Any decision to incur expenditure had to be taken by a majority of votes cast in council. It was also possible for the Minister of Finance to determine maximum expenditure limits for municipal budgets.<sup>56</sup> If a budget did not comply with the maximum expenditure limits, it had to be referred back to the council for reconsideration and amendment. In some cases, certain exceptions were allowed.

A further important provision in the LGTA was that municipalities had to award contracts for goods and services in accordance with a system which had to be fair, equitable, transparent, competitive and cost-effective. Preference could be given to persons previously disadvantaged by unfair discrimination. In cases of emergency, municipalities could dispense with the calling of tenders or if such option was allowed by law. Properties had to be valued and a single valuation roll for all properties had to be compiled, which had to be open to the public. Councils could levy and recover property rates, and metropolitan councils had to determine a common rating system.

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<sup>54</sup> Refer to the LGTA s 10G(2)(k)-(l).

<sup>55</sup> See the LGTA s 10G(2)(m)(i)-(iii). The term "unsound" also included any failure to claim or collect income, to control expenditure or to compile and approve an operating budget. If a municipality did not comply to the instructions of the MEC, the MEC could take such steps as he/she deemed necessary to restore the finances to a sound footing.

<sup>56</sup> See the LGTA s 10G(3)-(4). A municipal budget had to be submitted to the minister of Finance within 14 days of its adoption. The minister could delegate this monitoring power to the MEC.

Municipalities could also levy and recover levies, fees, taxes and tariffs, also known as charges. A municipality could also

- differentiate between different categories of user or property on such grounds as it deemed reasonable
- in respect of charges, amend or withdraw previous determinations
- recover any charges, including interest on any outstanding amount.<sup>57</sup>

Municipalities could also obtain money and raise loans for capital expenditure. The Minister of Finance could determine reasonable conditions and criteria regarding loans, however. Loans for bridging finance, which included bank overdrafts, could be raised by a municipality during a financial year only in order to finance current expenditure in anticipation of the receipt of revenue in that year. Municipalities could not raise loans denominated in a foreign currency and were not permitted to incur any other liability or risk payable in a foreign currency without approval by the minister of Finance. Any money borrowed by a municipality was a financial obligation of the municipality and was chargeable and payable from the revenues and assets of that municipality.<sup>58</sup>

In respect of investment policies, a municipality could make investment in various instruments with the concurrence of the minister of Finance. Such instruments included *inter alia*

- deposits with registered banks
- securities issued by the national government
- municipal stock
- long-term securities offered by insurance companies.<sup>59</sup>

With the concurrence of the Minister of Finance, the minister of Local Government could determine other investment instruments. Full details of any investments had to be published. Finally, municipalities had to ensure that the acquisition, disposal, utilisation, control and maintenance of its assets were carried out in an economic, efficient and effective manner.<sup>60</sup>

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<sup>57</sup> See the LGTA s 10G(7)(a)-(b). Decisions regarding charges had to be passed on to the MEC and to the public, who could lodge objections.

<sup>58</sup> See the LGTAs 10G(8).

<sup>59</sup> See the LGTA s 10G(9)(a)(i)-(ix).

<sup>60</sup> Refer to the LGTA s 10G(10)-(12). No claim of any creditor of any municipality could attach or be paid out of the national revenue fund or be paid by the national or any provincial government, unless this was specifically authorised by such government.

### **18.3 Legislative control mechanisms over municipal finance matters**

#### **18.3.1 Parliamentary control**

In compliance with the new constitutional demands and in order to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government and furthermore to establish treasury norms and standards for the local sphere of government, the national parliament has enacted the Local Government: Municipal Finance Management Act (MFMA).<sup>61</sup> The object of the MFMA is to be achieved by establishing norms and standards and other requirements for the following issues:<sup>62</sup>

- (a) ensuring transparency, accountability and appropriate lines of responsibility in the financial and fiscal affairs of municipalities and municipal entities;
- (b) the management of revenues, expenditures, assets, liabilities and the handling of municipal financial dealings;
- (c) budgetary and financial processes and the co-ordination of those processes with the processes of organs of state in other spheres of government;
- (d) borrowing;
- (e) the handling of financial problems in municipalities;
- (f) supply chain management; and
- (g) other financial matters.

##### **18.3.1.1 The broad requirements of the Local Government: Municipal Finance Management Act**

###### **(a) Application and aspects of supervision over local government financial management**

The MFMA applies to

- all municipalities
- all municipal entities<sup>63</sup>
- national and provincial organs of state to the extent of their financial dealings with municipalities.<sup>64</sup>

In the event of any inconsistency between a provision of the MFMA and any other legislation in force when the MFMA took effect and which regulates any aspect of the

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<sup>61</sup> 56 of 2003, hereafter referred to as the MFMA. See also the long title of the MFMA.

<sup>62</sup> See the MFMA s 2(a)-(g).

<sup>63</sup> A municipal entity is defined in terms of the Municipal Systems Act s 1.

<sup>64</sup> The MFMA s 3(1)(a)-(c).



fiscal and financial affairs of municipalities or municipal entities, the provision of the MFMA prevails.<sup>65</sup> Draft national legislation directly or indirectly amending the MFMA or providing for the enactment of subordinate legislation that may conflict with the Act may be introduced in Parliament only after the Minister of Finance and the Financial and Fiscal Commission have been consulted in writing on the contents of the draft legislation, and after they have responded in writing.<sup>66</sup>

The MFMA further determines general functions of the National Treasury and provincial treasuries. The National Treasury must:

- fulfil its responsibilities in terms of Chapter 13 of the Constitution and the Act
- promote the object of the Act as stated in section 2
  - (a) within the framework of co-operative government set out in chapter 3 of the Constitution and
  - (b) when coordinating intergovernmental financial and fiscal relations in terms of the Intergovernmental Fiscal Relations Act, the annual Division of Revenue Act and the Public Finance Management Act<sup>67</sup> and
- enforce compliance with the measures established in terms of section 216(1) of the Constitution, including those established in terms of the MFMA.<sup>68</sup>

To the extent necessary to comply with the general functions mentioned above, the National Treasury may:

- (a) monitor the budgets of municipalities to establish whether they:
  - (i) are consistent with the national government's fiscal and macro-economic policy; and
  - (ii) comply with chapter 4;
- (b) promote good budget and fiscal management by municipalities, and for this purpose monitor the implementation of municipal budgets, including their expenditure, revenue collection and borrowing;
- (c) monitor and assess compliance by municipalities and municipal entities with—
  - (i) the act; and
  - (ii) any applicable standards of generally recognised accounting practice and uniform expenditure and revenue classification systems;

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<sup>65</sup> The MFMA s 3(2).

<sup>66</sup> See the MFMA s 4.

<sup>67</sup> The Act provided for under the Constitution s 214(1) and also Act 97 of 1997 respectively.

<sup>68</sup> See the MFMA s 5(1)(a)-(c).

- (d) investigate any system of financial management and internal control in any municipality or municipal entity and recommend improvements;
- (e) take appropriate steps if a municipality or municipal entity commits a breach of the act, including the stopping of funds to a municipality in terms of section 216(2) of the Constitution if the municipality, or a municipal entity under the sole or shared control of that municipality, commits a serious or persistent material breach of any measures referred to in that section; and
- (f) take any other appropriate steps necessary to perform its functions effectively.<sup>69</sup>

In turn, a provincial treasury must in accordance with a prescribed framework

- fulfil its responsibilities in terms of the Act
- promote the object of the Act as stated in section 2 within the framework of co-operative government set out in chapter 3 of the Constitution and
- assist the National Treasury in enforcing compliance with the measures established in terms of section 216(1) of the Constitution, including those established in terms of the Act.<sup>70</sup>

To the extent necessary to comply with the abovementioned requirements, a provincial treasury:

- (a) must monitor –
  - (i) compliance with the act by municipalities and municipal entities in the province;
  - (ii) the preparation by municipalities in the province of their budgets;
  - (iii) the monthly outcome of those budgets; and
  - (iv) the submission of reports by municipalities in the province as required in terms of the act;
- (b) may assist municipalities in the province in the preparation of their budgets;
- (c) may exercise any powers and must perform any duties delegated to it by the National Treasury in terms of the act; and
- (d) may take appropriate steps if a municipality or municipal entity in the province commits a breach of the act.<sup>71</sup>

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<sup>69</sup> See the MFMA s 5(2)(a)-(f).

<sup>70</sup> See the MFMA s 5(3)(a)-(c).

<sup>71</sup> The MFMA s 5(4)(a)-(d).

It should be noted that the functions assigned to the National Treasury or a Provincial Treasury in terms of the MFMA are additional to those assigned to the National Treasury or a Provincial Treasury in terms of the Public Finance Management Act.<sup>72</sup> The Minister of Finance, as the head of the National Treasury, takes all decisions of the National Treasury in terms of the Act, except those decisions taken as a result of a delegation in terms of section 6(1). Similarly, the MEC for finance in a province, as the head of the provincial treasury, takes all decisions of the provincial treasury in terms of the Act, except those decisions taken as a result of a delegation in terms of section 6(4). A provincial treasury must submit all information submitted to it in terms of the MFMA to the National Treasury on a quarterly basis, or when so requested.<sup>73</sup>

According to the MFMA, both the National Treasury and provincial treasuries are authorised to delegate their powers. On a national level the minister may delegate any of the powers or duties assigned to the National Treasury in terms of the MFMA to

- the Director-General of the National Treasury or
- the MEC responsible for a provincial department, as the minister and the MEC may agree.<sup>74</sup>

It should be noted, however, that the minister may not delegate the National Treasury's power to stop funds to a municipality in terms of section 5(2)(e).<sup>75</sup> A delegation authorised under section 6(1) is restricted as follows:

- (a) must be in writing;
- (b) is subject to any limitations or conditions which the minister may impose;
- (c) may, subject to any such limitations or conditions, authorise –
  - (i) the Director-General of the National Treasury to sub-delegate a delegated power or duty to a staff member of the National Treasury; and
  - (ii) the MEC responsible for the relevant provincial department to sub-delegate a delegated power or duty to a staff member of that department; and
- (d) does not divest the National Treasury of the responsibility concerning the

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<sup>72</sup> 1 of 1999.

<sup>73</sup> See the MFMA s 5(5)-(8).

<sup>74</sup> Refer to the MFMA s 6(1)(a)-(b).

<sup>75</sup> The MFMA s 6(2).

exercise of the delegated power or the performance of the delegated duty.<sup>76</sup>

The MEC for finance in a province may also delegate any of the powers or duties assigned to a provincial treasury in terms of the Act to the head of the relevant provincial department of which the provincial treasury forms part. Such delegation is subjected to the same conditions as are required on national level.<sup>77</sup> Both the minister or MEC for finance in a province may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.<sup>78</sup>

### **(b) Aspects relating to municipal revenue**

Under the new legislative framework, every municipality must open and maintain at least one bank account in the name of the municipality. All money received by a municipality must be paid into its bank account or accounts, and this must be done promptly and in accordance with the MFMA and any requirements that may be prescribed. A municipality may not open a bank account:

- abroad
- with an institution not registered as a bank in terms of the Banks Act<sup>79</sup> or
- otherwise than in the name of the municipality.<sup>80</sup>

Money may be withdrawn from a municipal bank account only in terms of the procedure set out in section 11(1) of the MFMA.

It is further required for each municipality to have a primary bank account. If a municipality has only one bank account, that account is its primary bank account. If it has more than one bank account, it must designate one of those bank accounts as its primary bank account.<sup>81</sup> Specific moneys must be paid into a municipality's primary bank account. Such moneys include:

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<sup>76</sup> See the MFMA s 6(3)(a)-(d).

<sup>77</sup> Read the MFMA ss 6(3) and 6(5) together.

<sup>78</sup> The MFMA s 6(6).

<sup>79</sup> 94 of 1990.

<sup>80</sup> See the MFMA s 7(1)-(2).

<sup>81</sup> The MFMA s 8(1)(a)-(b).

- all allocations to the municipality, including those made to the municipality for transmission to a municipal entity or other external mechanism assisting the municipality in the performance of its functions<sup>82</sup>
- all income received by the municipality on its investments
- all income received by the municipality in connection with its interest in any municipal entity, including dividends
- all money collected by a municipal entity or other external mechanism on behalf of the municipality and
- any other moneys as may be prescribed.<sup>83</sup>

The accounting officer of a municipality must submit to the National Treasury, the relevant provincial treasury and the Auditor-General, in writing, the name of the bank where the primary bank account of the municipality is held and the type and number of the account. If a municipality wants to change its primary bank account, it may do so only after the accounting officer has informed the National Treasury and the Auditor-General, in writing, at least 30 days before effecting the change.<sup>84</sup>

Each accounting officer of a municipality must submit to the relevant provincial treasury and the Auditor-General, in writing, the following information:

- within 90 days after the municipality has opened a new bank account, the name of the bank where the account has been opened, and the type and number of the account and
- annually before the start of a financial year, the name of each bank where the municipality holds a bank account, and the type and number of each account.<sup>85</sup>

It is the responsibility of the accounting officer of a municipality to

- administer all the municipality's bank accounts

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<sup>82</sup> "Allocation" in relation to a municipality means: (a) a municipality's share of the local government's equitable share referred to in the Constitution s 214(a); (b) an allocation of money to a municipality in terms of the Constitution s 214(1)(c); (c) an allocation of money to a municipality in terms of a provincial budget; or (d) any other allocation of money to a municipality by an organ of state, including by another municipality, otherwise than in compliance with a commercial or other business transaction. See the MFMA s 1 definitions.

<sup>83</sup> Refer to the MFMA s 8(2)(a)-(e). A municipality must take all reasonable steps to ensure that all moneys referred to above are paid into its primary bank account. Furthermore, no organ of state in the national, provincial or local sphere of government may transfer an allocation of money referred to above to a municipality, except through the municipality's primary bank account. All allocations due by an organ of state to a municipal entity must be made through the parent municipality, or if there is more than one parent municipality, any of those parent municipalities as may be agreed between the parent municipalities.

<sup>84</sup> Refer to the MFMA s 8(5).

<sup>85</sup> See the MFMA s 9(a)-(b).

- account to the municipal council for the municipality's bank accounts
- enforce compliance with the requirements of the MFMA.

The accounting officer may delegate the duties referred to above to the municipality's chief financial officer only.<sup>86</sup>

Only the accounting officer or the chief financial officer of a municipality or any other senior financial official acting on the written authority of the accounting officer may withdraw money or authorise the withdrawal of money from any of the municipality's bank accounts, and may do so only:

- (a) to defray expenditure appropriated in terms of an approved budget;<sup>87</sup>
- (b) to defray expenditure authorised in terms of section 26(4) of the MFMA;
- (c) to defray unforeseeable and unavoidable expenditure authorised in terms of section 29(1) of the MFMA;
- (d) in the case of a bank account opened in terms of section 12 of the MFMA, to make payments from the account in accordance with subsection (4) of that section;
- (e) to pay over to a person or organ of state money received by the municipality on behalf of that person or organ of state, including –
  - (i) money collected by the municipality on behalf of that person or organ of state by agreement; or
  - (ii) any insurance or other payments received by the municipality for that person or organ of state;
- (f) to refund money incorrectly paid into a bank account;
- (g) to refund guarantees, sureties and security deposits;
- (h) for cash management and investment purposes in accordance with section 13 of the MFMA;
- (i) to defray increased expenditure in terms of section 31 of the act; or
- (j) for such other purposes as may be prescribed.<sup>88</sup>

Any authorisation to a senior financial official to withdraw money or to authorise the withdrawal of money from a bank account must be in accordance with a framework

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<sup>86</sup> See the MFMA s 10(1)-(2).

<sup>87</sup> An "approved budget" means an annual budget (a) approved by a municipal council or (b) approved by a provincial or the national executive following an intervention in terms of the Constitution s 139 and includes such an annual budget as revised by an adjustments budget in terms of the MFMA s 28. See s 1 definitions.

<sup>88</sup> See the MFMA s 11(a)-(j).

as may be prescribed. The accounting officer may not authorise any official other than the chief financial officer to withdraw money or to authorise the withdrawal of money from the municipality's primary bank account if the municipality has a primary bank account which is separate from its other bank accounts.<sup>89</sup>

Within 30 days after the end of each quarter, it is the responsibility of the accounting officer to table in the municipal council a consolidated report of all withdrawals made in terms of subsection 11(1)(b) to (j) of the Act during that quarter and to submit a copy of the report to the relevant provincial treasury and the Auditor-General.<sup>90</sup>

No political structure or office-bearer of a municipality may set up a relief fund, charitable fund, trust or other fund of whatever description, except in the name of the municipality. Only the municipal manager may be the accounting officer of any such fund. A municipality may open a separate bank account in the name of the municipality for the purpose of a relief fund, charitable fund, trust or other fund, however. All money received by the municipality for the purpose of such a fund must be paid into a bank account of the municipality or into a separate bank account if one has been opened. Money in a separate account may be withdrawn from the account without appropriation in terms of an approved budget, but only by or on the written authority of the accounting officer acting in accordance with decisions of the municipal council and also only for the purposes for which the fund was established or the money in the fund was donated.<sup>91</sup>

The MFMA further provides that the minister, acting in concurrence with the Cabinet member responsible for local government, may prescribe a framework within which municipalities must conduct their cash management and investments and invest money not immediately required. Each municipality must establish *an appropriate and effective cash management and investment policy* in accordance with any framework that may be prescribed.<sup>92</sup> A bank where a municipality holds a bank account at the end of a financial year, or held a bank account at any time during a financial year, must:

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<sup>89</sup> Note that money may be withdrawn from a bank account in terms of s 11(1)(b) to (j) without appropriation in terms of an approved budget. See the MFMA s 11(3).

<sup>90</sup> Refer to the MFMA ss 11(4)(a)-(b). A "quarter" is defined under the MFMA as any of the following periods in a financial year: (a) 1 July to 30 September, (b) 1 October to 31 December, (c) 1 January to 31 March, or (d) 1 April to 30 June. See s 1 definitions.

<sup>91</sup> See the MFMA s 12(1)-(4).

<sup>92</sup> See the MFMA s 13(1)-(2).



- within 30 days after the end of that financial year notify the Auditor-General, in writing, of such bank account, including
  - (a) the type and number of the account and
  - (b) the opening and closing balances of that bank account in that financial year and
- promptly disclose information regarding the account when so requested by the National Treasury or the Auditor-General.

A bank, insurance company or other financial institution which at the end of a financial year holds, or at any time during a financial year held, an investment for a municipality, must also

- within 30 days after the end of that financial year, notify the Auditor-General, in writing, of that investment, including the opening and closing balances of that investment in that financial year and
- promptly disclose information regarding the investment when so requested by the National Treasury or the Auditor-General.<sup>93</sup>

Under the new legislative dispensation a municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.<sup>94</sup> A municipality may transfer ownership or otherwise dispose of a capital asset other than one mentioned above, but only after the municipal council in a meeting open to the public:

- has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services and
- has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.<sup>95</sup>

After a decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services, such decision may not be reversed by the municipality after that asset has been sold, transferred or otherwise disposed of. A municipal council may delegate to the accounting officer of the mu-

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<sup>93</sup> Refer to the MFMA s 13(3)-(4).

<sup>94</sup> A "basic municipal service" means a municipal service that is necessary to ensure an acceptable and reasonable quality of life and which, if not provided, would endanger public health or safety or the environment. See the MFMA s 1 definitions.

<sup>95</sup> See the MFMA s 14(1)-(2).

municipality its power to make the determinations referred to in subsection (2) (a) and (b) of the MFMA in respect of movable capital assets below a value determined by the council. Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent, competitive and consistent with the *supply chain management policy* which the municipality must have and maintain in terms of section 111 of the MFMA.<sup>96</sup>

**(c) Aspects relating to municipal budgets**

A municipality may, except where otherwise provided in the MFMA, incur expenditure or appropriate funds only:

- in terms of an approved budget and
- within the limits of the amounts appropriated for the different votes in an approved budget.<sup>97</sup>

For each financial year, the council of a municipality must approve an annual budget for the municipality before the start of that financial year.<sup>98</sup> In order for a municipality to approve an annual budget, the mayor of the municipality must table the annual budget at a council meeting at least 90 days before the start of the budget year.<sup>99</sup>

According to the MFMA, an annual budget of a municipality must be a schedule in the prescribed format and must incorporate the following:

- (a) setting out realistically anticipated revenue for the budget year from each revenue source;
- (b) appropriating expenditure for the budget year under the different votes of the municipality;
- (c) setting out indicative revenue per revenue source and projected expenditure by vote for the two financial years following the budget year;
- (d) setting out –
  - (i) estimated revenue and expenditure by vote for the current year; and

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<sup>96</sup> These requirements do not apply to the transfer of a capital asset to another municipality or to a municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework. See the MFMA s 14(4)-(6).

<sup>97</sup> See the MFMA s 15(a)-(b).

<sup>98</sup> "Financial year" means a year ending on 30 June of a particular year. See the MFMA s 1 definitions.

<sup>99</sup> Refer to the MFMA s 16(1)-(2). It should be noted that the approval of an annual budget does not preclude the appropriation of money for capital expenditure for a period exceeding three financial years, provided that a separate appropriation is made for each of those financial years. The

*continued on next page*

- (ii) actual revenue and expenditure by vote for the financial year preceding the current year; and
- (e) a statement containing any other information required by section 215(3) of the Constitution or as may be prescribed.<sup>100</sup>

An annual budget must generally be divided into a *capital and an operating budget* in accordance with international best practice, as may be prescribed. When an annual budget is tabled, it must be accompanied by the following documents:

- (a) Draft resolutions –
  - (i) approving the budget of the municipality;
  - (ii) imposing any municipal tax and setting any municipal tariffs as may be required for the budget year; and
  - (iii) approving any other matter that may be prescribed;
- (b) measurable performance objectives for revenue from each source and for each vote in the budget, taking into account the municipality's integrated development plan;
- (c) a projection of cash flow for the budget year by revenue source, broken down per month;
- (d) any proposed amendments to the municipality's integrated development plan following the annual review of the integrated development plan in terms of section 34 of the Municipal Systems Act;
- (e) any proposed amendments to the budget-related policies of the municipality;
- (f) particulars of the municipality's investments;
- (g) any prescribed budget information on municipal entities under the sole or shared control of the municipality;
- (h) particulars of all proposed new municipal entities which the municipality intends to establish or in which the municipality intends to participate;
- (i) particulars of any proposed service delivery agreements, including material amendments to existing service delivery agreements;
- (j) particulars of any proposed allocations or grants by the municipality to –
  - (i) other municipalities;

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MFMA s 16(3). A budget year seems to be the year from 1 July of a year until 30 June of the next year.

<sup>100</sup> See the MFMA s 17(1)(a)-(e).

- (ii) any municipal entities and other external mechanisms assisting the municipality in the exercise of its functions or powers;
- (iii) any other organs of state;
- (iv) any organisations or bodies referred to in section 67 (1);
- (k) the proposed cost to the municipality for the budget year of the salary, allowances and benefits of –
  - (i) each political office-bearer of the municipality;<sup>101</sup>
  - (ii) councillors of the municipality; and
  - (iii) the municipal manager, the chief financial officer, each senior manager of the municipality and any other official of the municipality having a remuneration package greater than or equal to that of a senior manager;
- (l) the proposed cost for the budget year to a municipal entity under the sole or shared control of the municipality of the salary, allowances and benefits of –
  - (i) each member of the entity's board of directors; and
  - (ii) the chief executive officer and each senior manager of the entity; and
- (m) any other supporting documentation as may be prescribed.<sup>102</sup>

It is further required that an annual budget may be funded only from

- realistically anticipated revenues to be collected
- cash-backed accumulated funds from previous years' surpluses not committed for other purposes
- borrowed funds, but only for the capital budget referred to in section 17(2).

All revenue projections in the budget must be realistic, taking into account the projected revenue for the current year based on collection levels to date and also the actual revenue collected in previous financial years.<sup>103</sup> Under the new financial dispensation a municipality may spend money on a capital project only if:

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<sup>101</sup> Note that a political office-bearer in relation to a municipality means (a) the speaker, executive mayor, deputy executive mayor, mayor, deputy mayor or a member of the executive or mayoral committee of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act or (b) a councillor referred to in the MFMA s 57(1). See s 1.

<sup>102</sup> See the MFMA s 17(3)(a)-(m). Note that according to the definitions set out in the MFMA, "shared control" means the rights and powers a municipality has over a municipally entity which is (a) a private company in which effective control as defined in the Municipal Systems Act s 1 is vested in that municipality and one or more other municipalities collectively or (b) a multi-jurisdictional service utility in which that municipality participates, and "sole control" means the rights and powers a municipality has over a municipal entity which is (a) a private company in which effective control as defined in the Municipal Systems Act s 1 is vested in that municipality alone or (b) a service utility established by the municipality.

<sup>103</sup> Refer to the MFMA s 18(1)-(2).

- (a) the money for the project, excluding the cost of feasibility studies conducted by or on behalf of the municipality, has been appropriated in the capital budget referred to in section 17(2);
- (b) the project, including the total cost, has been approved by the council;
- (c) section 33 has been complied with, to the extent that that section may be applicable to the project; and
- (d) the sources of funding have been considered, are available and have not been committed for other purposes.<sup>104</sup>

Before approving a capital project the council of a municipality must consider various issues. Such issues include:

- (a) the projected cost covering all financial years until the project is operational; and
- (b) the future operational costs and revenue on the project, including municipal tax and tariff implications.<sup>105</sup>

The MFMA specifically provides that the minister, acting with the concurrence of the Cabinet member responsible for local government, must prescribe the form of the annual budget of municipalities and may prescribe matters such as:

- the form of resolutions and supporting documentation relating to the annual budget
- the number of years preceding and following the budget year for which revenue and expenditure history or projections must be shown in the supporting documentation
- inflation projections to be used with regard to the budget
- uniform norms and standards concerning the setting of municipal tariffs, financial risks and other matters where a municipality uses a municipal entity or other external mechanism for the performance of a municipal service or other function
- uniform norms and standards concerning the budgets of municipal entities or
- any other uniform norms and standards aimed at promoting transparency and expenditure control.<sup>106</sup>

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<sup>104</sup> Read the MFMA s 19(1)(a)-(d).

<sup>105</sup> See the MFMA s 19(2)(a)-(b). A municipal council may approve capital projects below a prescribed value, however. Such approval may be done either individually or as part of a consolidated capital programme. S 19(3).

<sup>106</sup> See the MFMA s 20(1)(b)(i)-(vi). See also the Municipal Investment Regulations and the Municipal Public-Private Partnership Regulations published under the MFMA.

The minister may further take appropriate steps to ensure that a municipality in the exercise of its fiscal powers as is set out in section 229 of the Constitution does not materially and unreasonably prejudice:

- national economic policies, particularly those on inflation, administered pricing and equity
- economic activities across municipal boundaries and
- the national mobility of goods, services, capital or labour.<sup>107</sup>

With regard to the budget preparation processes, the MFMA determines that the mayor of a municipality must:

- (a) co-ordinate the processes for preparing the annual budget and for reviewing the municipality's integrated development plan and budget-related policies to ensure that the tabled budget and any revisions of the integrated development plan and budget-related policies are mutually consistent and credible;<sup>108</sup>
- (b) at least 10 months before the start of the budget year, table in the municipal council a time schedule outlining key deadlines for –
  - (i) the preparation, tabling and approval of the annual budget;
  - (ii) the annual review of –
    - (aa) the integrated development plan in terms of section 34 of the Municipal Systems Act; and
    - (bb) the budget-related policies;
  - (iii) the tabling and adoption of any amendments to the integrated development plan and the budget-related policies; and
  - (iv) any consultative processes forming part of the processes referred to in subparagraphs (i), (ii) and (iii).<sup>109</sup>

When preparing the annual budget, the mayor of a municipality must also:

- (a) take into account the municipality's integrated development plan;

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<sup>107</sup> The MFMA s 20(2)(a)-(c).

<sup>108</sup> A budget-related policy means a municipal policy affecting or affected by the annual budget of the municipality, including (a) the tariffs policy which the municipality must adopt in terms of section 74 of the Municipal Systems Act, (b) the rates policy which the municipality must adopt in terms of legislation regulating municipal property rates or (c) the credit control and debt collection policy which the municipality must adopt in terms of s 96 of the Municipal Systems Act. Refer to the MFMA s 1.

<sup>109</sup> Read the MFMA s 21(1)(a)-(b).

- (b) take all reasonable steps to ensure that the municipality revises the integrated development plan in terms of section 34 of the Municipal Systems Act, taking into account realistic revenue and expenditure projections for future years;
- (c) take into account the national budget, the relevant provincial budget, the national government's fiscal and macro-economic policy, the annual Division of Revenue Act and any agreements reached in the Budget Forum;
- (d) consult –
  - (i) the relevant district municipality and all other local municipalities within the area of the district municipality, if the municipality is a local municipality;
  - (ii) all local municipalities within its area, if the municipality is a district municipality;
  - (iii) the relevant provincial treasury, and when requested, the National Treasury; and
  - (iv) any national or provincial organs of state, as may be prescribed; and
- (e) provide, on request, any information relating to the budget –
  - (i) to the National Treasury;<sup>110</sup> and
  - (ii) subject to any limitations that may be prescribed, to –
    - (aa) the national departments responsible for water, sanitation, electricity and any other service as may be prescribed;
    - (bb) any other national and provincial organ of states, as may be prescribed; and
    - (cc) another municipality affected by the budget.<sup>111</sup>

Immediately after an annual budget is tabled in a municipal council, the accounting officer of the municipality must:

- (a) in accordance with chapter 4 of the Municipal Systems Act –
  - (i) make public the annual budget and the documents referred to in section 17(3); and
  - (ii) invite the local community to submit representations in connection with the budget; and
- (b) submit the annual budget –

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<sup>110</sup> Note that reference to the National Treasury means the National Treasury established by the Public Finance Management Act s 5. See the MFMA s 1.

<sup>111</sup> See the MFMA s 21(2)(a)-(e).



- (i) in both printed and electronic formats to the National Treasury and the relevant provincial treasury; and
- (ii) in either format to any prescribed national or provincial organs of state and to other municipalities affected by the budget.<sup>112</sup>

In an effort to further accountability and public participation, the MFMA requires that when the annual budget has been tabled, the municipal council must consider any views of:

- the local community and
- the National Treasury, the relevant provincial treasury and any provincial or national organs of state or municipalities which made submissions on the budget.

After considering all budget submissions, the council must give the mayor an opportunity:

- to respond to the submissions and
- if necessary, to revise the budget and table amendments for consideration by the council.<sup>113</sup>

The National Treasury may issue guidelines on the manner in which municipal councils should process their annual budgets, including guidelines on the formation of a committee of the council to consider the budget and to hold public hearings. No guidelines issued in terms the MFMA are binding on a municipal council unless adopted by the council.<sup>114</sup>

At least 30 days before the start of their budget years, all municipal councils must consider approval of the annual budget. An annual budget:

- (a) must be approved before the start of the budget year;
- (b) is approved by the adoption by the council of a resolution; and
- (c) must be approved together with the adoption of resolutions as may be necessary –
  - (i) imposing any municipal tax for the budget year;
  - (ii) setting any municipal tariffs for the budget year;
  - (iii) approving measurable performance objectives for revenue from each source and for each vote in the budget;

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<sup>112</sup> The MFMA s 22(a)-(b).

<sup>113</sup> The MFMA s 23(2)(a)-(b).

<sup>114</sup> Read the MFMA s 23(3)-(4).

(iv) approving any changes to the municipality's integrated development plan;  
and

(v) approving any changes to the municipality's budget-related policies.<sup>115</sup>

The accounting officer of a municipality must submit the approved annual budget to the National Treasury and the relevant provincial treasury. If a municipal council fails to approve an annual budget, including revenue-raising measures necessary to give effect to the budget, the council must reconsider the budget and again vote on the budget or on an amended version thereof. This must be done within seven days of the council meeting that failed to approve the budget. The process provided for must be repeated until a budget is approved, including revenue-raising measures necessary to give effect to the budget. If a municipality has not approved an annual budget, including revenue-raising measures necessary to give effect to the budget, by the first day of the budget year, the mayor must immediately comply with section 55 of the MFMA.<sup>116</sup>

If by the start of the budget year a municipal council has not approved an annual budget or any revenue-raising measures necessary to give effect to the budget, the provincial executive of the relevant province must intervene in the municipality in terms of section 139(4) of the Constitution by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the council and

- appointing an administrator until a newly elected council has been declared elected
- continued functioning of the municipality.<sup>117</sup>

When approving a temporary budget for a municipality, the provincial executive is not bound by any provision relating to the budget process applicable to a municipality in terms of the MFMA or other legislation. Such a budget must, after the intervention has ended, be replaced by a budget approved by the newly elected council, provided that the provisions of the Chapter relating to annual budgets in the MFMA are substantially complied with and are in line with any revised time frames approved by the MEC for finance in the province. Until a new budget for the municipality is

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<sup>115</sup> Read the MFMA s 24(1)-(3).

<sup>116</sup> Read the MFMA s 25(1)-(3). According to s 55, the mayor must send a report to the MEC.

<sup>117</sup> See the Municipal Structures Act s 26(1)(a)-(b), read together with ss 34(3) and (4) and 35. The Structures Act applies when a provincial executive dissolves a municipal council.

approved, with the approval of the MEC for finance in the province, funds for the requirements of the municipality may be withdrawn from the municipality's bank accounts in accordance with certain provisions. Such funds may:

- be used only to defray current and capital expenditure in connection with votes for which funds were appropriated in the approved budget for the previous financial year
- may not:
  - (a) during any month, exceed eight per cent of the total amount appropriated in that approved budget for current expenditure, which percentage must be scaled down proportionately if revenue flows are not at least at the same level as the previous financial year
  - (b) exceed the amount actually available.<sup>118</sup>

Upon becoming aware of any impending non-compliance by the municipality of any provisions of the MFMA or any other legislation pertaining to the tabling or approval of an annual budget or compulsory consultation processes, the mayor of a municipality must inform the MEC for finance in the province, in writing, of such impending non-compliance in an effort to ensure effective control and accountability. If the impending non-compliance pertains to a time provision, except section 16(1), the MEC for finance may, on application by the mayor and on good cause shown, extend any time limit or deadline contained in that provision, provided that no such extension may compromise compliance with section 16(1). An MEC for finance must

- exercise the power contained in the MFMA in accordance with a prescribed framework
- promptly notify the National Treasury, in writing, of any extensions given, together with the name of the municipality concerned and the reasons for the extensions.<sup>119</sup>

Upon becoming aware of any actual non-compliance by the municipality of any required provisions, the mayor of a municipality must also inform the council, the MEC for finance and the National Treasury, in writing, of

- such non-compliance

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<sup>118</sup> The funds provided for above are not additional to funds appropriated for the budget year, and any funds so withdrawn must be regarded as forming part of the funds appropriated in a subsequently approved annual budget for the budget year. See the MFMA s 26(3)-(6).

<sup>119</sup> See the MFMA s 27(1)-(2).

- any remedial or corrective measures the municipality intends to implement to avoid a recurrence.<sup>120</sup>

It should again be noted that the provincial executive may intervene in terms of section 139 of the Constitution if a municipality cannot or does not comply with the provisions of this chapter, including a provision relating to process.

A municipality may revise an approved annual budget through an adjustments budget. In this regard an adjustments budget:

- (a) must adjust the revenue and expenditure estimates downwards if there is material under-collection of revenue during the current year;<sup>121</sup>
- (b) may appropriate additional revenues that have become available over and above those anticipated in the annual budget, but only to revise or accelerate spending programmes already budgeted for;
- (c) may, within a prescribed framework, authorise unforeseeable and unavoidable expenditure recommended by the mayor of the municipality;
- (d) may authorise the utilisation of projected savings in one vote towards spending under another vote;
- (e) may authorise the spending of funds that were unspent at the end of the past financial year where the under-spending could not reasonably have been foreseen at the time to include projected roll-overs when the annual budget for the current year was approved by the council;
- (f) may correct any errors in the annual budget; and
- (g) may provide for any other expenditure within a prescribed framework.<sup>122</sup>

Only the mayor may table an adjustments budget in the municipal council. When an adjustments budget is tabled, it must be accompanied by:

- (a) an explanation how the adjustments budget affects the annual budget;
- (b) a motivation of any material changes to the annual budget;
- (c) an explanation of the impact of any increased spending on the annual budget and the annual budgets for the next two financial years; and

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<sup>120</sup> The MFMA s 27(3)-(4). It should be noted that the non-compliance by a municipality with a provision of the chapter relating to the budget process or a provision in any legislation relating to the approval of a budget-related policy does not affect the validity of an annual or adjustments budget.

<sup>121</sup> A current year refers to the financial year which has already commenced, but not yet ended. See the MFMA s 1.

<sup>122</sup> The MFMA s 28(1)-(3). An adjustments budget must be in a prescribed form.

(d) any other supporting documentation that may be prescribed.<sup>123</sup>

It is important to note that municipal tax and tariffs may not be increased during a financial year, except when required in terms of a financial recovery plan.<sup>124</sup> The mayor of a municipality may in emergency or other exceptional circumstances authorise unforeseeable and unavoidable expenditure for which no provision was made in an approved budget. Any such expenditure:

- (a) must be in accordance with any framework that may be prescribed;
- (b) may not exceed a prescribed percentage of the approved annual budget;
- (c) must be reported by the mayor to the municipal council at its next meeting;
- and
- (d) must be appropriated in an adjustments budget.<sup>125</sup>

The appropriation of funds in an annual or adjustments budget lapses to the extent that those funds are unspent at the end of the financial year to which the budget relates, except in the case of an appropriation for expenditure made for a period longer than that financial year in terms of section 16(3).<sup>126</sup> It is further also determined that when funds for a capital programme are appropriated in terms of section 16(3) for more than one financial year, expenditure for that programme during a financial year may exceed the amount of that year's appropriation for that programme, provided that:

- (a) the increase does not exceed 20 per cent of that year's appropriation for the programme;
- (b) the increase is funded within the following year's appropriation for that programme;
- (c) the municipal manager certifies that –
  - (i) actual revenue for the financial year is expected to exceed budgeted revenue; and
  - (ii) sufficient funds are available for the increase without incurring further

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<sup>123</sup> Read the MFMA s 28(5)(a)-(d).

<sup>124</sup> See the MFMA s 28(6)-(7). Ss 22(b), 23(3) and 24(3) apply in respect of an adjustments budget. "Municipal tax" means property rates or other taxes, levies or duties that a municipality may impose. "Municipal tariff" refers to a tariff for services which a municipality may set for the provision of a service to the local community and includes a surcharge on such tariff. See the MFMA s 1.

<sup>125</sup> Read the MFMA s 29(1)-(3). If such adjustments budget is not passed within 60 days after the expenditure was incurred, the expenditure is unauthorised and s 32 applies.

<sup>126</sup> See the MFMA s 30.

- borrowing beyond the annual budget limit;
- (d) prior written approval is obtained from the mayor for the increase; and
- (e) the documents referred to in paragraphs (c) and (d) are submitted to the relevant provincial treasury and the Auditor-General.<sup>127</sup>

Without limiting liability in terms of the common law or other legislation, the MFMA specifically provides for personal accountability and liability over both political office bearers and officials of a municipality that work with financial matters. The MFMA states that:

- a political office-bearer of a municipality is liable for unauthorised expenditure if that office-bearer knowingly or after having been advised by the accounting officer of the municipality that the expenditure is likely to result in unauthorised expenditure, instructed an official of the municipality to incur the expenditure<sup>128</sup>
- the accounting officer is liable for unauthorised expenditure deliberately or negligently incurred by the accounting officer, subject to subsection (3) of the MFMA
- any political office-bearer or official of a municipality who deliberately or negligently committed, made or authorised an irregular expenditure<sup>129</sup> is liable for that expenditure or

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<sup>127</sup> The MFMA s 31(a)-(e).

<sup>128</sup> Note that “unauthorised expenditure” means any expenditure incurred by a municipality otherwise than in accordance with s 15 or 11(3) and includes (a) overspending of the total amount appropriated in the municipality’s approved budget, (b) overspending of the total amount appropriated for a vote in the approved budget, (c) expenditure from a vote unrelated to the department or functional area covered by the vote, (d) expenditure of money appropriated for a specific purpose, otherwise than for the specific purpose, (e) spending of an allocation referred to in para (b), (c) or (d) of the definition of “allocation” otherwise than in accordance with any conditions of the allocation, or (f) a grant by the municipality otherwise than in accordance with this Act. “Overspending” is further defined thus: (a) in relation to the budget of a municipality, it means causing the operational or capital expenditure incurred by the municipality during a financial year to exceed the total amount appropriated in that year’s budget for its operational or capital expenditure, as the case may be, (b) in relation to a vote, it means causing expenditure under the vote to exceed the amount appropriated for that vote or (c) in relation to expenditure under s 26, it means causing expenditure under the section to exceed the limits allowed in ss (5) of that section. See the MFMA s 1.

<sup>129</sup> “Irregular expenditure” means (a) expenditure incurred by a municipality or municipal entity in contravention of, or not in accordance with, a requirement of this Act, and which has not been condoned in terms of s 170, (b) expenditure incurred by a municipality or municipal entity in contravention of, or not in accordance with, a requirement of the Municipal Systems Act and which has not been condoned in terms of that Act, (c) expenditure incurred by a municipality in contravention of, or not in accordance with, a requirement of the Public Office-Bearers Act 20 of 1998 or (d) expenditure incurred by a municipality or municipal entity in contravention of, or not in accordance with, a requirement of the supply chain management policy of the municipality or entity or any of the municipality’s by-laws giving effect to such policy and not condoned in terms of such policy or by-law. Irregular expenditure excludes expenditure by a municipality which falls within the definition of “unauthorised expenditure”. See the MFMA s 1.

- any political office-bearer or official of a municipality who deliberately or negligently made or authorised a fruitless and wasteful expenditure is liable for that expenditure.<sup>130</sup>

A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure unless the expenditure

(a) in the case of unauthorised expenditure, is –

- (i) authorised in an adjustments budget; or
- (ii) certified by the municipal council, after investigation by a council committee, as irrecoverable and written off by the council; and

(b) in the case of irregular or fruitless and wasteful expenditure, is, after investigation by a council committee, certified by the council as irrecoverable and written off by the council.

If the accounting officer becomes aware that the council, the mayor or the executive committee of the municipality, as the case may be, has taken a decision which, if implemented, is likely to result in unauthorised, irregular or fruitless and wasteful expenditure, the accounting officer is not liable for any ensuing unauthorised, irregular or fruitless and wasteful expenditure provided that the accounting officer has informed the council, the mayor or the executive committee, in writing, that the expenditure is likely to be unauthorised, irregular or fruitless and a wasteful expenditure.<sup>131</sup> The accounting officer must further promptly inform the mayor, the MEC for local government in the province and the Auditor-General, in writing, of:

- (a) any unauthorised, irregular or fruitless and wasteful expenditure incurred by the municipality;
- (b) whether any person is responsible or under investigation for such unauthorised, irregular or fruitless and wasteful expenditure; and
- (c) the steps that have been taken –
  - (i) to recover or rectify such expenditure; and
  - (ii) to prevent a recurrence of such expenditure.<sup>132</sup>

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<sup>130</sup> The MFMA s 32(1)(a)-(d). “Fruitless and wasteful expenditure” means expenditure that was made in vain and would have been avoided had reasonable care been exercised. See the MFMA s 1.

<sup>131</sup> See the MFMA s 32(2)-(3).

<sup>132</sup> The MFMA s 32(4)(a)-(c).



It should be noted that the writing off of any unauthorised, irregular or fruitless and wasteful expenditure as irrecoverable is no excuse in criminal or disciplinary proceedings against a person charged with the commission of an offence or a breach of the MFMA relating to such unauthorised, irregular or fruitless and wasteful expenditure. The accounting officer is further obligated to report to the South African Police Service all cases of alleged

- irregular expenditure that constitutes a criminal offence
- theft and fraud that occurred in the municipality.

The council of a municipality must take all *reasonable steps* to ensure that all cases of irregular expenditure, theft or fraud are reported to the South African Police Service if

- the charge is against the accounting officer or
- the accounting officer fails to report such matters.<sup>133</sup>

Under the new financial requirements, a municipality may enter into a contract which will impose financial obligations on the municipality beyond a financial year, but if the contract will impose financial obligations on the municipality beyond the three years covered in the annual budget for that financial year, it may do so only if:

- (a) the municipal manager, at least 60 days before the meeting of the municipal council at which the contract is to be approved –
  - (i) has, in accordance with section 21A of the Municipal Systems Act:
    - (aa) made public the draft contract and an information statement summarising the municipality's obligations in terms of the proposed contract; and
    - (bb) invited the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed contract; and
  - (ii) has solicited the views and recommendations of:
    - (aa) the National Treasury and the relevant provincial treasury;
    - (bb) the national department responsible for local government; and
    - (cc) if the contract involves the provision of water, sanitation, electricity, or any other service as may be prescribed, the responsible national de

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<sup>133</sup> The MFMA s 32(5)-(8). The minister, acting with the concurrence of the cabinet member responsible for local government, may regulate the application of these provisions by regulation. Read also the MFMA s 168.

partment;

(b) the municipal council has taken into account:

- (i) the municipality's projected financial obligations in terms of the proposed contract for each financial year covered by the contract;
- (ii) the impact of those financial obligations on the municipality's future municipal tariffs and revenue;
- (iii) any comments or representations on the proposed contract received from the local community and other interested persons; and
- (iv) any written views and recommendations on the proposed contract by the National Treasury, the relevant provincial treasury, the national department responsible for local government and any national department referred to in paragraph (a) (ii) (cc); and

(c) the municipal council has adopted a resolution in which:

- (i) it determines that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the contract;
- (ii) it approves the entire contract exactly as it is to be executed; and
- (iii) it authorises the municipal manager to sign the contract on behalf of the municipality.<sup>134</sup>

The process set out in subsection 33(1) of the MFMA does not apply to:

- (a) contracts for long-term debt regulated in terms of section 46(3) of the MFMA;
- (b) employment contracts; or
- (c) contracts:
  - (i) for categories of goods as may be prescribed; or
  - (ii) in terms of which the financial obligation on the municipality is below:
    - (aa) a prescribed value; or
    - (bb) a prescribed percentage of the municipality's approved budget for the year in which the contract is concluded.<sup>135</sup>

All contracts referred to above and all other contracts that impose a financial obligation on a municipality:

- must be made available in their entirety to the municipal council and

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<sup>134</sup> Refer to the MFMA s 33(1)(a)-(c).

<sup>135</sup> See the MFMA s 33(2).

- may not be withheld from public scrutiny, except as provided for in terms of the Promotion of Access to Information Act.<sup>136</sup>

**(d) Aspects concerning municipal financial co-operative government**

It is a constitutional prerequisite that the national and provincial governments must by agreement assist municipalities in building their capacities for efficient, effective and transparent financial management. The national and provincial governments must support the efforts of municipalities to identify and resolve their financial problems. When performing its monitoring function in terms of section 155(6) of the Constitution, a provincial government:

- (a) must share with a municipality the results of its monitoring to the extent that those results may assist the municipality in improving its financial management;
- (b) must, upon detecting any emerging or impending financial problems in a municipality, alert the municipality to those problems; and
- (c) may assist the municipality to avert or resolve financial problems.<sup>137</sup>

In an effort to promote co-operative government on a local government level, both national and provincial departments and public entities must:

- (a) in their fiscal and financial relations with the local sphere of government, promote co-operative government in accordance with chapter 3 of the Constitution;
- (b) promptly meet their financial commitments towards municipalities;
- (c) provide timely information and assistance to municipalities to enable municipalities:
  - (i) to plan properly, including in developing and revising their integrated development plans; and
  - (ii) to prepare their budgets in accordance with the processes set out in chapter 4 of this Act; and
- (d) comply with the Public Finance Management Act, the annual Division of Revenue Act and the Intergovernmental Fiscal Relations Act,<sup>138</sup> to the extent

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<sup>136</sup> See Act 2 of 2000 read together with the MFMA s 33(3)-(4).

<sup>137</sup> See the MFMA s 34(1)-(4). Non-compliance with this section or any other provision of this Act by the national or a provincial government does not affect the responsibility of a municipality, its political structures, political office-bearers and officials to comply with this Act.

<sup>138</sup> 97 of 1997.

that those acts regulate intergovernmental relations with the local sphere of government.<sup>139</sup>

In order to provide predictability and certainty about the sources and levels of intergovernmental funding for municipalities, the accounting officer of a national or provincial department and the accounting authority of a national or provincial public entity responsible for the transfer of any proposed allocations to a municipality must, by no later than 20 January of each year notify the National Treasury or the relevant provincial treasury, as may be appropriate, of all proposed allocations, and the projected amounts of those allocations, to be transferred to each municipality during each of the next three financial years. The minister or the MEC responsible for finance in a province must, to the extent possible when tabling the national annual budget in the National Assembly or the provincial annual budget in the provincial legislature, make public particulars of any allocations due to each municipality in terms of that budget, including the amount to be transferred to the municipality during each of the next three financial years.<sup>140</sup>

Municipalities are themselves also required to promote co-operative government. In doing so, municipalities are obligated to:

- promote co-operative government in accordance with chapter 3 of the Constitution and the Intergovernmental Fiscal Relations Act in their fiscal and financial relations with the national and provincial spheres of government and other municipalities
- provide budgetary and other financial information to relevant municipalities and national and provincial organs of state
- promptly meet all financial commitments towards other municipalities or national and provincial organs of state.

In order to enable municipalities to include allocations from other municipalities in their budgets and to plan effectively for the spending of such allocations, the accounting officer of a municipality responsible for the transfer of any allocation to another municipality must notify the receiving municipality of the projected amount of any allocation proposed to be transferred to that municipality during each of the next

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<sup>139</sup> Read the MFMA s 35(a)-(d).

<sup>140</sup> Refer to the MFMA s 36(1)-(2).

three financial years, by no later than 120 days before the start of its budget year.<sup>141</sup> In certain instances the transfer of funds to municipalities may be stopped. In this regard the MFMA determines that the National Treasury may stop:

- the transfer of funds due to a municipality as its share of the local government's equitable share referred to in section 214(1)(a) of the Constitution, but only if the municipality commits a serious or persistent breach of the measures established in terms of section 216(1) of the Constitution or
- the transfer of funds due to a municipality as an allocation referred to in section 214(1)(c) of the Constitution, but only if the municipality or the municipal entity for which the funds are destined
  - (a) commits a serious or persistent breach of the measures established in terms of section 216(1) of the Constitution or
  - (b) breaches or fails to comply with any conditions subject to which the allocation is made.

Before the National Treasury stops the transfer of funds to a municipality, it must:

- (a) give the municipality an opportunity to submit written representations with regard to the proposed stopping of the funds;
- (b) inform the MEC for local government in the province; and
- (c) consult the Cabinet member responsible for the national department making the transfer.<sup>142</sup>

If the stopping of funds affects the provision of basic municipal services in the municipality, the provincial executive must monitor the continuation of those services. Section 139 of the Constitution applies if the municipality cannot or does not fulfil its obligations with regard to the provision of those services. When considering whether to stop the transfer of funds to a municipality, the National Treasury must take into account all relevant facts, including:

- (a) the municipality's compliance with the requirements of this act, in particular those relating to:
  - (i) annual financial statements, including the submission to the Auditor-General of its annual financial statements; and

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<sup>141</sup> See the MFMA s 37(1)-(2).

<sup>142</sup> See the MFMA s 38(1)-(2).

(ii) budgets, including the submission of information on the budget and implementation of the budget to the National Treasury and the relevant provincial treasury; and

(b) the municipality's co-operation with other municipalities on fiscal and financial matters, in the case of district and local municipalities.<sup>143</sup>

A decision by the National Treasury to stop the transfer to a municipality of funds

- lapses after the expiry of 120 days
- may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 75 of the Constitution.

Such a procedure should be prescribed by the joint rules and orders of Parliament. This process must be completed within 30 days of the decision by the National Treasury to stop the transfer of the funds.<sup>144</sup>

Parliament may further renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection 39(1)(b) of the MFMA. Before Parliament approves or renews a decision to stop the transfer of funds to a municipality, the Auditor-General must report to Parliament, if requested to do so by Parliament, and the municipality must be given an opportunity to answer the allegations against it and to state its case before a committee.<sup>145</sup> If the transfer of funds to a municipality has been stopped in terms of section 38(1)(b) for the rest of the relevant financial year, then the accounting officer of the national or provincial department responsible for the transfer must reflect such stopping of funds, together with reasons, in the annual financial statements of the department.<sup>146</sup>

The National Treasury is further obligated to monitor:

- the pricing structure of organs of state for the supply of electricity, water or any other bulk resources that may be prescribed, to municipalities and municipal entities for the provision of municipal services and
- payments made by municipalities and municipal entities for such bulk resources.<sup>147</sup>

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<sup>143</sup> Read the MFMA s 38(3)-(4).

<sup>144</sup> The MFMA s 39(1)(a)-(b).

<sup>145</sup> Read the MFMA s 39(2)-(3).

<sup>146</sup> The MFMA s 40.

<sup>147</sup> Refer to the MFMA s 41(1).

Each organ of state providing such bulk resources to a municipality must within 15 days after the end of each month furnish the National Treasury with a written statement setting out, for each municipality or for each municipal entity providing municipal services on behalf of such municipalities, the following information:

- the amount to be paid by the municipality or municipal entity for such bulk resources for that month, and for the financial year up to the end of that month
- the arrears owing and the age profile of such arrears and
- any actions taken by that organ of state to recover arrears.<sup>148</sup>

In relation to price increases of bulk resources for the provision of municipal services, it is stated that if a national or provincial organ of state which supplies water, electricity or any other bulk resource as may be prescribed to a municipality or municipal entity for the provision of a municipal service intends to increase the price of such resource for the municipality or municipal entity, it must first submit the proposed amendment to its pricing structure to its executive authority within the meaning of the Public Finance Management Act and secondly to any regulatory agency for approval, if national legislation requires such approval.<sup>149</sup> At least 40 days before making a submission, the organ of state referred to above must request the National Treasury and organised local government to provide written comments on the proposed amendment. Any submission must also be accompanied by:

- a motivation of the reasons for the proposed amendment
- an explanation of how the amendment takes account of
  - (a) the national government's inflation targets and other macroeconomic policy objectives
  - (b) steps taken by the organ of state to improve its competitiveness or efficiency in order to reduce costs
  - (c) any objectives or targets as outlined in any corporate or other governance plan applicable to that organ of state
- any written comments received from the National Treasury, organised local government or any municipalities and
- an explanation of how such comments have been taken into account.<sup>150</sup>

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<sup>148</sup> See the MFMA s 41(1)-(2).

<sup>149</sup> See the MFMA s 42(1)(a)-(b).

<sup>150</sup> Read the MFMA s 42(3)(a)-(d).



The executive authority of the organ of state must table the amendment and the documents referred to above either in Parliament or the relevant provincial legislature, as may be appropriate. Unless approved otherwise by the Minister, an amendment to a pricing structure which is tabled in Parliament or the relevant provincial legislature on or before 15 March in any year does not take effect for the affected municipalities or municipal entities before 1 July in that year or after 15 March in any year, does not take effect for the affected municipalities or municipal entities before 1 July the next year.<sup>151</sup>

If a national or provincial organ of state in terms of a power contained in any national or provincial legislation determines the upper limits of a municipal tax or tariff, such determination takes effect for municipalities on a date specified in the determination. Unless the minister approves otherwise on good grounds, the date specified in a determination referred to above may:

- (a) if the determination was promulgated on or before 15 March in a year, not be a date before 1 July in that year; or
- (b) if the determination was promulgated after 15 March in a year, not be a date before 1 July in the next year.<sup>152</sup>

If a municipality has in accordance with section 33 or 46(3) of the MFMA entered into a contract which provides for an annual or other periodic escalation of payments to be made by the municipality under the contract, no determination in terms of a power referred to in subsection 43(1) of the MFMA regarding the upper limits of a municipal tax or tariff applies to that municipality insofar as such upper limits would impair the municipality's ability to meet the escalation of its payments under the contract.

Whenever a dispute of a financial nature arises between organs of state, the parties concerned must as promptly as possible take all reasonable steps that may be necessary to resolve the matter out of court. If the National Treasury is not a party to the dispute, the parties must report the matter to the National Treasury and may request the National Treasury to mediate between the parties or to designate a per-

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<sup>151</sup> See the MFMA s 42(5)(a)-(b).

<sup>152</sup> See the MFMA s 43(1)-(2).

son to mediate between them. If the National Treasury accedes to a request, it may determine the mediation process.<sup>153</sup>

**(e) Aspects concerning municipal debt**

A municipality may incur short-term debt only in accordance with and subject to the provisions of the MFMA and only when necessary to bridge shortfalls within a financial year during which the debt is incurred. Such debt may be incurred only in expectation of specific and realistic anticipated income to be received within that financial year or capital needs within a financial year, to be repaid from specific funds to be received from enforceable allocations or long-term debt commitments.<sup>154</sup> Furthermore, a municipality may incur short-term debt only if a resolution of the municipal council, signed by the mayor, has approved the debt agreement and the accounting officer has signed the agreement or other document which creates or acknowledges the debt. For the purpose of obtaining a resolution to incur short term debt, a municipal council may:

- (a) approve a short-term debt transaction individually; or
- (b) approve an agreement with a lender for a short-term credit facility to be accessed as and when required, including a line of credit or bank overdraft facility, provided that—
  - (i) the credit limit must be specified in the resolution of the council;
  - (ii) the terms of the agreement, including the credit limit, may be changed only by a resolution of the council; and
  - (iii) if the council approves a credit facility that is limited to emergency use, the accounting officer must notify the council in writing as soon as practical of the amount, duration and cost of any debt incurred in terms of such a credit facility, as well as options for repaying such debt.<sup>155</sup>

A municipality must pay off short-term debt within the financial year and may not renew or refinance short-term debt, whether its own debt or that of any other entity, where such renewal or refinancing will have the effect of extending the short-term debt into a new financial year. No lender may wilfully extend credit to a municipality

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<sup>153</sup> See the MFMA s 44(1)-(4). These provisions apply only if at least one of the organs of state is a municipality or municipal entity. Refer again to the principles of co-operative government set out in the Constitution s 41.

<sup>154</sup> Read the MFMA s 45(1)(a)-(b). "Short-term debt" means debt payable over a period not exceeding one year. See the MFMA s 1.

<sup>155</sup> See the MFMA s 45(2)-(3).

for the purpose of renewing or refinancing short-term debt that must be paid off. If a lender wilfully extends credit to a municipality in contravention of the abovementioned provision, then the municipality is not bound to repay the loan or interest on the loan.<sup>156</sup>

With reference to long-term debt,<sup>157</sup> a municipality may incur such debt only in accordance with and subject to any applicable provisions of the MFMA, including section 19. Such debt may be incurred only for the purpose of:

- (a) capital expenditure on property, plant or equipment to be used for the purpose of achieving the objects of local government as set out in section 152 of the Constitution, including costs referred to in subsection 46(4); or
- (b) re-financing existing long-term debt subject to subsection 46(5). A municipality may incur long-term debt only if a resolution of the municipal council, signed by the mayor, has approved the debt agreement and the accounting officer has signed the agreement or other document which creates or acknowledges the debt.<sup>158</sup>

Furthermore, a municipality may incur long-term debt only if the accounting officer of the municipality:

- (a) has, in accordance with section 21A of the Municipal Systems Act:
  - (i) at least 21 days prior to the meeting of the council at which approval for the debt is to be considered, made public an information statement setting out particulars of the proposed debt, including the amount of the proposed debt, the purposes for which the debt is to be incurred and particulars of any security to be provided; and
  - (ii) invited the public, the National Treasury and the relevant provincial treasury to submit written comments or representations to the council in respect of the proposed debt; and

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<sup>156</sup> See the MFMA s 45(4)-(6). It should be noted that the non-repayment of a loan to a lender does not apply if the lender (a) relied in good faith on written representations of the municipality regarding purpose of the borrowing, and (b) did not know and had no reason to believe that the borrowing was for the purpose of renewing or refinancing short-term debt. A "lender" in relation to a municipality, means a person who provides debt finance to a municipality. Refer to s 1 definitions.

<sup>157</sup> "Long-term debt" means debt repayable over a period exceeding one year. See the MFMA s 1.

<sup>158</sup> See the MFMA s 46(1)-(2). Note that debt means (a) a monetary liability or obligation created by a financing agreement, note, debenture, bond or overdraft, or by the issuance of municipal debt instruments or (b) a contingent liability such as that created by guaranteeing a monetary liability or obligation of another. See the MFMA s 1.

- (b) has submitted a copy of the information statement to the municipal council at least 21 days prior to the meeting of the council, together with particulars of-
- (i) the essential repayment terms, including the anticipated debt repayment schedule; and
  - (ii) the anticipated total cost in connection with such debt over the repayment period.<sup>159</sup>

Capital expenditure contemplated in subsection 46(1)(a) may include:

- financing costs, including
  - (a) capitalised interest for a reasonable initial period
  - (b) costs associated with security arrangements in accordance with section 48 of the MFMA
  - (c) discounts and fees in connection with the financing
  - (d) fees for legal, financial, advisory, trustee, credit rating and other services directly connected to the financing and
  - (e) costs connected to the sale or placement of debt, and costs for printing and publication directly connected to the financing
- costs of professional services directly related to the capital expenditure and
- such other costs as may be prescribed.<sup>160</sup>

Municipalities are further allowed to borrow money for the purpose of re-financing existing long-term debt, provided that:

- the existing long-term debt was lawfully incurred
- the re-financing does not extend the term of the debt beyond the useful life of the property, plant or equipment for which the money was originally borrowed
- the net present value of projected future payments (including principal and interest payments) after re-financing is less than the net present value of projected future payments before re-financing and
- the discount rate used in projecting net present value referred to above, and any assumptions in connection with the calculations, must be reasonable and in accordance with criteria set out in a framework that may be prescribed.<sup>161</sup>

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<sup>159</sup> Read the MFMA s 46(2).

<sup>160</sup> Read the MFMA s 46(3)-(4).

<sup>161</sup> Note that a municipality's long-term debt must be consistent with its capital budget referred to in s 17(2). Read the MFMA s 46(5)-(6).

Both short-term and long-term debt may be incurred only if the debt is denominated in Rand and is not indexed to, or affected by, fluctuations in the value of the Rand against any foreign currency and section 48(3) of the MFMA has been complied with, if security is to be provided by the municipality. With reference to security of debt, the MFMA provides that a municipality may, by resolution of its council, provide security for:

- (a) any of its debt obligations;
- (b) any debt obligations of a municipal entity under its sole control; or
- (c) contractual obligations of the municipality undertaken in connection with capital expenditure by other persons on property, plant or equipment to be used by the municipality or such other person for the purpose of achieving the objects of local government in terms of section 152 of the Constitution.<sup>162</sup>

A municipality may provide any appropriate security, including by:

- (a) giving a lien on, or pledging, mortgaging, ceding or otherwise hypothecating, an asset or right, or giving any other form of collateral;
- (b) undertaking to effect payment directly from money or sources that may become available and to authorise the lender or investor direct access to such sources to ensure payment of the secured debt or the performance of the secured obligations, but this form of security may not affect compliance with section 8(2) of the MFMA;
- (c) undertaking to deposit funds with the lender, investor or third party as security;
- (d) agreeing to specific payment mechanisms or procedures to ensure exclusive or dedicated payment to lenders or investors, including revenue intercepts, payments into dedicated accounts or other payment mechanisms or procedures;
- (e) ceding as security any category of revenue or rights to future revenue;
- (f) undertaking to have disputes resolved through mediation, arbitration or other dispute resolution mechanisms;
- (g) undertaking to retain revenues or specific municipal tariffs or other charges, fees or funds at a particular level or at a level sufficient to meet its financial obligations;

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<sup>162</sup> Refer to the MFMA ss 47 and 48(1)(a)-(c).

- (h) undertaking to make provision in its budgets for the payment of its financial obligations, including capital and interest;
- (i) agreeing to restrictions on debt that the municipality may incur in future until the secured debt is settled or the secured obligations are met; and
- (j) agreeing to such other arrangements as the municipality may consider necessary and prudent.<sup>163</sup>

A council resolution authorising the provision of security must determine whether the asset or right with respect to which the security is provided is necessary for providing the minimum level of basic municipal services and, if so, must indicate the manner in which the availability of the asset or right for the provision of that minimum level of basic municipal services will be protected. If the resolution has determined that the asset or right is necessary for providing the minimum level of basic municipal services, neither the party to whom the municipal security is provided nor any successor or assignee of such party may deal with the asset or right in a manner that would preclude or impede the continuation of that minimum level of basic municipal services in the event of a default by the municipality.<sup>164</sup>

When interacting with a prospective lender or when preparing documentation for consideration by a prospective investor, any person involved in the borrowing of money by a municipality must disclose all information in that person's possession or within that person's knowledge that may be material to the decision of that prospective lender or investor and take reasonable care to ensure the accuracy of any information disclosed. Any lender or investor may rely on written representations of the municipality signed by the accounting officer, if the lender or investor did not know and had no reason to believe that those representations were false or misleading.<sup>165</sup>

With reference to municipal guarantees, a municipality may not issue any guarantee for any commitment or debt of any organ of state or person, except on the following conditions:

- (a) The guarantee must be within limits specified in the municipality's approved budget;
- (b) a municipality may guarantee the debt of a municipal entity under its sole

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<sup>163</sup> See the MFMA s 48(2)(a)-(j).

<sup>164</sup> See the MFMA s 48(3)-(4) and also s 48(5) of the Act.

<sup>165</sup> The MFMA s 49(1)-(2).

control only if the guarantee is authorised by the council in the same manner and subject to the same conditions applicable to a municipality in terms of this chapter if it incurs debt;

- (c) a municipality may guarantee the debt of a municipal entity under its shared control or of any other person, but only with the approval of the National Treasury, and then only if (i) the municipality creates, and maintains for the duration of the guarantee, a cash-backed reserve equal to its total potential financial exposure as a result of such guarantee; or (ii) the municipality purchases and maintains in effect for the duration of the guarantee, a policy of insurance issued by a registered insurer, which covers the full amount of the municipality's potential financial exposure as a result of such guarantee.<sup>166</sup>

**(f) Responsibilities of mayors under the MFMA**

Under the new financial legislative framework, the mayor of a municipality must provide general political guidance over the fiscal and financial affairs of the municipality. In providing such general political guidance, the mayor may monitor and, to the extent provided in the MFMA, oversee the exercise of responsibilities assigned in terms of the Act to the accounting officer and the chief financial officer, but may not interfere in the exercise of those responsibilities. The mayor must take all reasonable steps to ensure that the municipality performs its constitutional and statutory functions within the limits of the municipality's approved budget and must, within 30 days of the end of each quarter, submit a report to the council on the implementation of the budget and the financial state of affairs of the municipality. Finally, all mayors must exercise the other powers and perform the other duties assigned to them in terms of the MFMA or delegated by the council to them.<sup>167</sup>

With regard to the budget processes and other related matters the mayor must do the following:

- (a) provide general political guidance over the budget process and the priorities that must guide the preparation of a budget;
- (b) co-ordinate the annual revision of the integrated development plan in terms of section 34 of the Municipal Systems Act and the preparation of the annual

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<sup>166</sup> Read the MFMA s 50(a)-(c). Note that neither the national nor a provincial government may guarantee the debt of a municipality or municipal entity except to the extent that the Public Finance Management Act ch 8 provides for such guarantees. See the MFMA s 51.

<sup>167</sup> See the MFMA s 52(a)-(e).



budget, and determine how the integrated development plan is to be taken into account or revised for the purposes of the budget; and

(c) take all reasonable steps to ensure:

- (i) that the municipality approves its annual budget before the start of the budget year;
- (ii) that the municipality's service delivery and budget implementation plan is approved by the mayor within 28 days after the approval of the budget; and
- (iii) that the annual performance agreements as required in terms of section 57(1)(b) of the Municipal Systems Act for the municipal manager and all senior managers:
  - (aa) comply with this act in order to promote sound financial management;
  - (bb) are linked to the measurable performance objectives approved with the budget and to the service delivery and budget implementation plan; and
  - (cc) are concluded in accordance with section 57(2) of the Municipal Systems Act.<sup>168</sup>

The mayor must further promptly report to the municipal council and the MEC for finance in the province any delay in the tabling of an annual budget, the approval of the service delivery and budget implementation plan or the signing of the annual performance agreements. He/she must also ensure that the revenue and expenditure projections for each month and the service delivery targets and performance indicators for each quarter, as set out in the service delivery and budget implementation plan, are made public no later than 14 days after the approval of the service delivery and budget implementation plan and that the performance agreements of the municipal manager, senior managers and any other categories of officials as may be prescribed are made public no later than 14 days after the approval of the municipality's service delivery and budget implementation plan. Copies of such performance agreements must be submitted to the council and the MEC for local government in the province.<sup>169</sup>

On receipt of a statement or report submitted by the accounting officer of the municipality in terms of sections 71 or 72 of the MFMA, the mayor must:

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<sup>168</sup> See the MFMA s 53(1)(a)-(c).

<sup>169</sup> The MFMA s 53(2)-(3).

- (a) consider the statement or report;
- (b) check whether the municipality's approved budget is implemented in accordance with the service delivery and budget implementation plan;
- (c) consider and, if necessary, make any revisions to the service delivery and budget implementation plan, provided that revisions to the service delivery targets and performance indicators in the plan may only be made with the approval of the council following approval of an adjustments budget;
- (d) issue any appropriate instructions to the accounting officer to ensure:
  - (i) that the budget is implemented in accordance with the service delivery and budget implementation plan; and
  - (ii) that spending of funds and revenue collection proceed in accordance with the budget;
- (e) identify any financial problems facing the municipality, including any emerging or impending financial problems; and
- (f) in the case of a section 72 report, submit the report to the council by 31 January of each year.<sup>170</sup>

If the municipality faces any serious financial problems, the mayor must

- promptly respond to and initiate any remedial or corrective steps proposed by the accounting officer to deal with such problems, which may include
  - (a) steps to reduce spending when revenue is anticipated to be less than projected in the municipality's approved budget;
  - (b) the tabling of an adjustments budget
  - (c) steps in terms of chapter 13 of the MFMA
- alert the council and the MEC for local government in the province to those problems.

The mayor must ensure that any revisions of the service delivery and budget implementation plan are made public promptly.<sup>171</sup>

If a municipality has not approved an annual budget by the first day of the budget year or if the municipality encounters a serious financial problem referred to in section 136 of the MFMA, then the mayor of the municipality

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<sup>170</sup> See the MFMA s 54(1)(a)-(f).

<sup>171</sup> See the MFMA s 54(2)-(3).

- must immediately report the matter to the MEC for local government in the province
- may recommend to the MEC an appropriate provincial intervention in terms of section 139 of the Constitution.<sup>172</sup>

It is further provided that the mayor of a municipality which has sole or shared control over a municipal entity must guide the municipality in exercising its rights and powers over the municipal entity in a way:

- that would reasonably ensure that the municipal entity complies with this act and at all times remains accountable to the municipality and
- that would not impede the entity from performing its operational responsibilities.

In guiding the municipality in the exercise of its rights and powers over a municipal entity, the mayor may monitor the operational functions of the entity, but may not interfere in the performance of those functions.<sup>173</sup> The council of a municipality which does not have a mayor must designate a councillor to exercise the powers and duties assigned by the MFMA to a mayor. In the case of a municipality which does not have a mayor, a reference in the MFMA to the mayor of a municipality must be construed as a reference to a councillor designated by the council of the municipality to bear the specific responsibilities.<sup>174</sup> In the case of a municipality which has an executive committee, the powers and functions assigned by the MFMA to a mayor must be exercised by the mayor in consultation with the executive committee.<sup>175</sup>

The powers and duties assigned in terms of the MFMA to the mayor of a municipality may be delegated by:

- the executive mayor in terms of section 60(1) of that Act to another member of the municipality's mayoral committee in the case of a municipality which has an executive mayor referred to in section 55 of the Municipal Structures Act
- the council of the municipality to another member of the executive committee in the case of a municipality which has an executive committee referred to in section 43 of the Structures Act or

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<sup>172</sup> Read the MFMA s 55.

<sup>173</sup> Refer to the MFMA s 56(1)-(2).

<sup>174</sup> The MFMA s 57(1)-(2).

<sup>175</sup> The MFMA s 58. It is submitted that "in consultation with" means that the executive committee must be consulted on the matter and that the parties have followed a specified decision-making process. See also Rautenbach and Malherbe (1999) 214-216.

- the council to any other councillor in the case of a municipality which has designated a councilor in terms of section 57(1) of the MFMA.<sup>176</sup>

Any delegation mentioned above:

- must be in writing;
- is subject to any limitations or conditions that the executive mayor or council, as the case may be, may impose; and
- does not divest the mayor of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.

Finally, the mayor may confirm, vary or revoke any decision taken in consequence of a delegation in terms of this section, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.<sup>177</sup>

### **(g) General responsibilities of municipal officials**

According to the MFMA, the municipal manager of a municipality is the accounting officer of the municipality for the purposes of the Act and, as accounting officer, must exercise the functions and powers assigned to an accounting officer in terms of the Act and provide guidance and advice on compliance with the Act to

- the political structures, political office-bearers and officials of the municipality<sup>178</sup>
- any municipal entity under the sole or shared control of the municipality.<sup>179</sup>

The accounting officer of a municipality is obligated to comply with certain fiduciary responsibilities. In this regard the officer must:

- act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs
- disclose to the municipal council and the mayor all material facts which are available to the accounting officer or reasonably discoverable and which in any way might influence the decisions or actions of the council or the mayor and
- seek, within the sphere of influence of the accounting officer, to prevent any

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<sup>176</sup> See the MFMA s 59(1)(a)-(c).

<sup>177</sup> Read the MFMA s 59(2)-(3).

<sup>178</sup> An official in relation to a municipality or municipal entity means (a) an employee of a municipality or municipal entity, (b) a person seconded to a municipality or municipal entity to work as a member of the staff of the municipality or municipal entity or (c) a person contracted by a municipality or municipal entity to work as a member of the staff of the municipality or municipal entity otherwise than as an employee. See the MFMA s 1. Political structures again refer to (a) the council of a municipality or (b) any committee or other collective structure of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act.

<sup>179</sup> The MFMA s 60.

prejudice to the financial interests of the municipality.<sup>180</sup>

An accounting officer may not act in a way that is inconsistent with the duties assigned to accounting officers of municipalities in terms of the MFMA or use the position or privileges of, or confidential information obtained as, accounting officer for personal gain or to improperly benefit another person.<sup>181</sup> The accounting officer of a municipality is further also responsible for managing the financial administration of the municipality and must, for this purpose, take all reasonable steps to ensure that:

- the resources of the municipality are used effectively, efficiently and economically
- full and proper records of the financial affairs of the municipality are kept in accordance with any prescribed norms and standards
- the municipality has and maintains effective, efficient and transparent systems:
  - (a) of financial and risk management and internal control and
  - (b) of internal audit operating in accordance with any prescribed norms and standards
- unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented
- disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of chapter 15 of the MFMA and
- the municipality has and implements:
  - (a) a tariff policy referred to in section 74 of the Municipal Systems Act
  - (b) a rates policy as may be required in terms of any applicable national legislation
  - (c) a credit control and debt collection policy referred to in section 96(b) of the Municipal Systems Act and
  - (d) a supply chain management policy in accordance with chapter 11 of the MFMA.

The accounting officer is responsible for and must account for all bank accounts of the municipality, including any bank account opened for:

- any relief fund, charitable fund, trust or other fund set up by the municipality in terms of section 12 of the MFMA or

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<sup>180</sup> Refer to the MFMA s 61(1).

<sup>181</sup> See the MFMA s 61(2)(a)-(b).

- a purpose referred to in section 48(2)(d) of the Act.<sup>182</sup>

In respect of asset and liability management the accounting officer of a municipality is responsible for the management of the assets of the municipality, including the safeguarding and the maintenance of those assets and the liabilities of the municipality. The accounting officer must for the purposes of these responsibilities take all reasonable steps to ensure that the municipality has and maintains a management, accounting and information system that accounts for the assets and liabilities of the municipality; that the municipality's assets and liabilities are valued in accordance with standards of generally recognised accounting practice and that the municipality has and maintains a system of internal control of assets and liabilities, including an asset and liabilities register, as may be prescribed.<sup>183</sup>

The accounting officer of a municipality is responsible also for the management of the revenue of the municipality. For the purposes of revenue management, the accounting officer must take all reasonable steps to ensure the following:

- (a) that the municipality has effective revenue collection systems consistent with section 95 of the Municipal Systems Act and the municipality's credit control and debt collection policy;
- (b) that revenue due to the municipality is calculated on a monthly basis;
- (c) that accounts for municipal tax and charges for municipal services are prepared on a monthly basis, or less often as may be prescribed where monthly accounts are uneconomical;
- (d) that all money received is promptly deposited in accordance with this act into the municipality's primary and other bank accounts;
- (e) that the municipality has and maintains a management, accounting and information system which:
  - (i) recognises revenue when it is earned;
  - (ii) accounts for debtors; and
  - (iii) accounts for receipts of revenue;
- (f) that the municipality has and maintains a system of internal control in respect of debtors and revenue, as may be prescribed;

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<sup>182</sup> See the MFMA s 62(1)-(2).

<sup>183</sup> Read the MFMA s 63(1)-(2).

- (g) that the municipality charges interest on arrears, except where the council has granted exemptions in accordance with its budget-related policies and within a prescribed framework; and
- (h) that all revenue received by the municipality, including revenue received by any collecting agent on its behalf, is reconciled at least on a weekly basis.<sup>184</sup>

The accounting officer must immediately inform the National Treasury of any payments due by an organ of state to the municipality in respect of municipal tax or for municipal services, if such payments are regularly in arrears for periods of more than 30 days. The accounting officer must also take all reasonable steps to ensure that any funds collected by the municipality on behalf of another organ of state is transferred to that organ of state on at least a weekly basis and that such funds are not used for purposes of the municipality.<sup>185</sup>

The accounting officer of a municipality is also responsible for the management of the expenditure of the municipality. The accounting officer must for such purposes take all reasonable steps to ensure:

- (a) that the municipality has and maintains an effective system of expenditure control, including procedures for the approval, authorisation, withdrawal and payment of funds;
- (b) that the municipality has and maintains a management, accounting and information system which:
  - (i) recognises expenditure when it is incurred;
  - (ii) accounts for creditors of the municipality;<sup>186</sup> and
  - (iii) accounts for payments made by the municipality;
- (c) that the municipality has and maintains a system of internal control in respect of creditors and payments;
- (d) that payments by the municipality are made:
  - (i) directly to the person to whom it is due unless agreed otherwise for reasons as may be prescribed; and

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<sup>184</sup> See the MFMA s 64(1)(a)-(h).

<sup>185</sup> The MFMA s 64(3)-(4).

<sup>186</sup> In relation to a municipality, "creditor" means a person to whom money is owing by the municipality. See the MFMA s 1.



- (ii) either electronically or by way of non-transferable cheques, provided that cash payments and payments by way of cash cheques may be made for exceptional reasons only, and only up to a prescribed limit;
- (e) that all money owing by the municipality be paid within 30 days of receiving the relevant invoice or statement, unless prescribed otherwise for certain categories of expenditure;
- (f) that the municipality complies with its tax, levy, duty, pension, medical aid, audit fees and other statutory commitments;
- (g) that any dispute concerning payments due by the municipality to another organ of state is disposed of in terms of legislation regulating disputes between organs of state;
- (h) that the municipality's available working capital is managed effectively and economically in terms of the prescribed cash management and investment framework;
- (i) that the municipality's supply chain management policy referred to in section 111 of the MFMA is implemented in a way that is fair, equitable, transparent, competitive and cost-effective; and
- (j) that all financial accounts of the municipality are closed at the end of each month and reconciled with its records.<sup>187</sup>

In a format and for periods as may be prescribed, the accounting officer of a municipality must report to the council on all expenditure incurred by the municipality on staff salaries, wages, allowances and benefits, and in a manner that discloses such expenditure per type of expenditure, namely:

- salaries and wages
- contributions for pensions and medical aid
- travel, motor car, accommodation, subsistence and other allowances
- housing benefits and allowances
- overtime payments
- loans and advances and
- any other type of benefit or allowance related to staff.<sup>188</sup>

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<sup>187</sup> See the MFMA s 65(1)-(2).

<sup>188</sup> The MFMA s 66(a)-(g).

Before transferring funds of the municipality to an organisation or body outside any sphere of government otherwise than in compliance with a commercial or other business transaction, the accounting officer must be satisfied that the organisation or body:

- (a) has the capacity and has agreed:
  - (i) to comply with any agreement with the municipality;
  - (ii) for the period of the agreement to comply with all reporting, financial management and auditing requirements as may be stipulated in the agreement;
  - (iii) to report at least monthly to the accounting officer on actual expenditure against such transfer; and
  - (iv) to submit its audited financial statements for its financial year to the accounting officer promptly;
- (b) implements effective, efficient and transparent financial management and internal control systems to guard against fraud, theft and financial mismanagement; and
- (c) has in respect of previous similar transfers complied with all the requirements of this section.<sup>189</sup>

The accounting officer of a municipality must assist the mayor in performing the budgetary functions assigned to the mayor and provide the mayor with the administrative support, resources and information necessary for the performance of those functions.<sup>190</sup> The accounting officer is further responsible for implementing the municipality's approved budget, including taking all reasonable steps to ensure that the spending of funds is in accordance with the budget and is reduced as necessary when revenue is anticipated to be less than projected in the budget or in the service

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<sup>189</sup> See the MFMA s 67(1)(a)-(c). If there has been a failure by an organisation or body to comply with the requirements of ss 67(1) in respect of a previous transfer, the municipality may, despite s 67(1)(c) make a further transfer to that organisation or body, provided that s 67(1)(a) and (b) is complied with and the relevant provincial treasury has approved the transfer. Through contractual and other appropriate mechanisms, the accounting officer must enforce compliance with s 67(1). Furthermore, s 67(1)(a) does not apply to an organisation or body serving the poor or used by government as an agency to serve the poor, provided that the transfer does not exceed a prescribed limit and that the accounting officer: (i) takes all reasonable steps to ensure that the targeted beneficiaries receive the benefit of the transferred funds and (ii) certifies to the Auditor-General that compliance by that organisation or body with ss 67(1)(a) is uneconomical or unreasonable. Read also the MFMA s 67(2)-(4).

<sup>190</sup> The MFMA s 68.

delivery and budget implementation plan and that revenue and expenditure are properly monitored. When necessary, the accounting officer must prepare an adjustments budget and submit it to the mayor for consideration and tabling in the municipal council. No later than 14 days after the approval of an annual budget, the accounting officer must submit to the mayor a draft service delivery and budget implementation plan for the budget year and drafts of the annual performance agreements as required in terms of section 57(1)(b) of the Municipal Systems Act for the municipal manager and all senior managers.<sup>191</sup>

In respect of impending shortfalls, overspending and overdrafts, the accounting officer of a municipality must report in writing to the municipal council any

- impending shortfalls in budgeted revenue
- overspending of the municipality's budget
- steps taken to prevent or rectify such shortfalls or overspending.

If the balance in a municipality's bank account or the consolidated balance in the municipality's bank accounts if the municipality has more than one bank account, shows a net overdrawn position for a period exceeding a prescribed period, then the accounting officer of the municipality must promptly notify the National Treasury in the prescribed format of

- the amount by which the account or accounts are overdrawn
- the reasons for the overdrawn account or accounts
- the steps taken or to be taken to correct the matter.<sup>192</sup>

The accounting officer of a municipality is further obligated to submit, by no later than 10 working days after the end of each month, to the mayor of the municipality and the relevant provincial treasury a statement in the prescribed format on the state of the municipality's budget, which statement should reflect the following particulars for that month and for the financial year up to the end of that month:

- (a) Actual revenue, per revenue source;
- (b) actual borrowings;
- (c) actual expenditure, per vote;
- (d) actual capital expenditure, per vote;

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<sup>191</sup> See the MFMA s 69(1)-(3).

<sup>192</sup> See the MFMA s 70(1)-(3). When determining the net overdrawn position, the accounting officer must exclude any amounts reserved or pledged for any specific purpose or encumbered in any other way.

- (e) the amount of any allocations received;
- (f) actual expenditure on those allocations, excluding expenditure on (i) its share of the local government equitable share; and (ii) allocations exempted by the annual Division of Revenue Act from compliance with this paragraph; and
- (g) when necessary, an explanation of:
  - (i) any material variances from the municipality's projected revenue by source, and from the municipality's expenditure projections per vote;
  - (ii) any material variances from the service delivery and budget implementation plan; and
  - (iii) any remedial or corrective steps taken or to be taken to ensure that projected revenue and expenditure remain within the municipality's approved budget.<sup>193</sup>

The statement mentioned above must include a projection of the relevant municipality's revenue and expenditure for the rest of the financial year and any revisions from initial projections and the prescribed information relating to the state of the budget of each municipal entity as provided to the municipality in terms of section 87(10) of the MFMA. The amounts reflected in the statement must in each case be compared with the corresponding amounts budgeted for in the municipality's approved budget.<sup>194</sup>

The accounting officer of a municipality which has received an allocation referred to in subsection 71(1)(e) of the MFMA during any particular month must submit, by no later than 10 working days after the end of that month, that part of the statement reflecting the particulars referred to in subsection 71(1)(e) and (f) to the national or provincial organ of state or municipality which transferred the allocation. By no later than 22 working days after the end of each month, the provincial treasury must submit to the National Treasury a consolidated statement in the prescribed format on the state of the municipalities' budgets, per municipality and per municipal entity. Within 30 days after the end of each quarter, the provincial treasury must also make public as may be prescribed, a consolidated statement in the prescribed format on the state of municipalities' budgets per municipality and per municipal entity. The MEC for

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<sup>193</sup> The MFMA S 71(1)(a)-(g).

<sup>194</sup> See the MFMA s 71(2)(a)-(b). Note that the statement to the provincial treasury must be in the format of a signed document and in electronic format.

finance must submit such consolidated statement to the provincial legislature no later than 45 days after the end of each quarter.<sup>195</sup>

By 25 January of each year all accounting officers of municipalities must

- assess the performance of the municipality during the first half of the financial year, taking into account
  - (a) the monthly statements referred to in section 71 of the MFMA for the first half of the financial year
  - (b) the municipality's service delivery performance during the first half of the financial year, and the service delivery targets and performance indicators set in the service delivery and budget implementation plan
  - (c) the past year's annual report, and progress on resolving problems identified in the annual report
  - (d) the performance of every municipal entity under the sole or shared control of the municipality, taking into account reports in terms of section 88 of the MFMA from any such entities
- submit a report on such assessment to
  - (a) the mayor of the municipality
  - (b) the National Treasury
  - (c) the relevant provincial treasury.<sup>196</sup>

As part of the review process, the accounting officer must make recommendations as to whether an adjustments budget is necessary and recommend revised projections for revenue and expenditure to the extent that this may be necessary.<sup>197</sup>

The accounting officer of a municipality is obligated to inform the provincial treasury in writing of any failure by the council of the municipality to adopt or implement a budget-related policy or a supply chain management policy referred to in section 111 of the MFMA or any non-compliance by a political structure or office-bearer of the municipality with any such policy.<sup>198</sup> Apart from such obligations, the accounting officer of a municipality must also submit to the National Treasury, the provincial treasury, the department for local government in the province or the Auditor-General

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<sup>195</sup> Read the MFMA s 71(5)-(7).

<sup>196</sup> Refer to the MFMA s 72(1)(a)-(b). The statement referred to in s 71(1) for the sixth month of a financial year may be incorporated into the report referred to in subs (1)(b) of this section.

<sup>197</sup> The MFMA s 72(2)-(3).

<sup>198</sup> See the MFMA s 73(a)-(b).

such information, returns, documents, explanations and motivations as may be prescribed or as may be required. If the accounting officer of a municipality is unable to comply with any of the responsibilities in terms of this Act, he or she must report the inability promptly, together with reasons, to the mayor and the provincial treasury.<sup>199</sup>

In order to facilitate accountability, openness and public participation, the MFMA requires that various aspects of information should be placed on each municipal website. In this regard, the accounting officer of a municipality must place on the website referred to in section 21A of the Municipal Systems Act the following documents of the municipality:

- (a) the annual and adjustments budgets and all budget-related documents;
- (b) all budget-related policies;
- (c) the annual report;
- (d) all performance agreements required in terms of section 57(1)(b) of the Municipal Systems Act;
- (e) all service delivery agreements;
- (f) all long-term borrowing contracts;
- (g) all supply chain management contracts above a prescribed value;
- (h) an information statement containing a list of assets over a prescribed value that have been disposed of in terms of section 14(2) or (4) during the previous quarter;
- (i) contracts to which subsection (1) of section 33 apply, subject to subsection (3) of that section;
- (j) public-private partnership agreements referred to in section 120;
- (k) all quarterly reports tabled in the council in terms of section 52(d); and
- (l) any other documents that must be placed on the website in terms of this act or any other applicable legislation, or as may be prescribed.<sup>200</sup>

All accounting officers are afforded special protection under the MFMA. In this regard the Act determines that any action taken by a political structure or office-bearer of a municipality against the accounting officer of the municipality solely because of that

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<sup>199</sup> Read the MFMA s 74(1)-(2).

<sup>200</sup> See the MFMA s 75(1)(a)-(e). A document referred to in ss 75(1) must be placed on the website not later than five days after its tabling in the council or on the date on which it must be made public, whichever occurs first.

accounting officer's compliance with a provision of this Act is an unfair labour practice for the purposes of the Labour Relations Act.<sup>201</sup>

The MFMA further determines that the top management of a municipality's administration consists of:

- the accounting officer
- the chief financial officer
- all senior managers who are responsible for managing the respective votes of the municipality and to whom powers and duties for this purpose have been delegated and
- any other senior officials designated by the accounting officer.<sup>202</sup>

Each senior manager of a municipality and each official of a municipality exercising financial management responsibilities must take all reasonable steps within their respective areas of responsibility to ensure:

- (a) that the system of financial management and internal control established for the municipality is carried out diligently;
- (b) that the financial and other resources of the municipality are utilised effectively, efficiently, economically and transparently;
- (c) that any unauthorised, irregular or fruitless and wasteful expenditure and any other losses are prevented;
- (d) that all revenue due to the municipality is collected;
- (e) that the assets and liabilities of the municipality are managed effectively and that assets are safeguarded and maintained to the extent necessary;
- (f) that all information required by the accounting officer for compliance with the provisions of this act is timeously submitted to the accounting officer; and
- (g) that the provisions of this act, to the extent applicable to that senior manager or official, including any delegations, are complied with.<sup>203</sup>

The accounting officer of a municipality must, for the proper application of the MFMA in the municipality's administration, develop an appropriate system of delegation that

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<sup>201</sup> See the MFMA s 76 read together with Act 66 of 1995.

<sup>202</sup> The MFMA s 77(1)(a)-(d). The top management must assist the accounting officer in managing and co-ordinating the financial administration of the municipality. It should be remembered that the municipal manager is also the accounting officer of a municipality and thus part of top management.

<sup>203</sup> Note that a senior manager or such official must perform the functions referred to in s 78(1) subject to the directions of the accounting officer of the municipality. See also the MFMA s 78(1)-(2).



will both maximise administrative and operational efficiency and provide adequate checks and balances in the municipality's financial administration. In accordance with that system, such officer may further delegate to a member of the municipality's top management or any other official of the municipality

- any of the powers or duties assigned to an accounting officer in terms of the MFMA
- any powers or duties reasonably necessary to assist the accounting officer in complying with a duty which requires the accounting officer to take reasonable or appropriate steps to ensure the achievement of the aims of a specific provision of the MFMA.

An accounting officer must regularly review delegations issued and, if necessary, amend or withdraw any of those delegations.<sup>204</sup> A delegation in terms of subsection 79(1) of the MFMA:

- must be in writing
- is subject to such limitations and conditions as the accounting officer may impose in a specific case
- may either be to a specific individual or to the holder of a specific post in the municipality
- may, in the case of a delegation to a member of the municipality's top management, authorise that member to sub-delegate the delegated power or duty to an official or the holder of a specific post in that member's area of responsibility and
- does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.<sup>205</sup>

#### **(h) Aspects relating to municipal budget and treasury offices**

Under the MFMA every municipality must have a budget and treasury office. A budget and treasury office consists of a chief financial officer designated by the accounting officer of the municipality, officials of the municipality allocated by the ac-

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<sup>204</sup> Note that the accounting officer may not delegate to any political structure or political office-bearer of the municipality any of the powers or duties assigned to accounting officers in terms of the MFMA. Read also the MFMA s 79(1)-(2).

<sup>205</sup> See the MFMA s 79(3)(a)-(e). The accounting officer may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation in terms of this section, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

counting officer to the chief financial officer and any other persons contracted by the municipality for the work of the office.<sup>206</sup>

Within a treasury office, the chief financial officer of a municipality:

- is administratively in charge of the budget and treasury office
- must advise the accounting officer on the exercise of powers and duties assigned to the accounting officer in terms of the MFMA
- must assist the accounting officer in the administration of the municipality's bank accounts and in the preparation and implementation of the municipality's budget
- must advise senior managers and other senior officials in the exercise of powers and duties assigned to them in terms of section 78 or delegated to them in terms of section 79 of the MFMA and
- must perform such budgeting, accounting, analysis, financial reporting, cash management, debt management, supply chain management, financial management, review and other duties as may be delegated by the accounting officer to the chief financial officer.<sup>207</sup>

The chief financial officer of a municipality may sub-delegate any of the duties referred to in section 81(1)(b), (d) and (e) of the MFMA:

- to an official in the budget and treasury office
- to the holder of a specific post in that office or
- with the concurrence of the accounting officer to
  - (a) any other official of the municipality or
  - (b) any person contracted by the municipality for the work of the office.<sup>208</sup>

If the chief financial officer sub-delegates any duties to a person who is not an employee of the municipality, the chief financial officer must be satisfied that effective systems and procedures are in place to ensure control and accountability. A sub-delegation in terms of subsection (1):

- must be in writing
- is subject to such limitations or conditions as the chief financial officer may impose and

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<sup>206</sup> The MFMA s 80(1)-(2).

<sup>207</sup> See the MFMA s 81(1)(a)-(e). Note that the chief financial officer of a municipality is accountable to the accounting officer for the performance of the duties referred to in the Act s 81(1).

<sup>208</sup> The MFMA s 82(1)(a)-(c).

- does not divest the chief financial officer of the responsibility concerning the delegated duty.<sup>209</sup>

In order to fulfil the vast array of duties and responsibilities, the MFMA sets specific competency levels for financial officials. In this regard the accounting officer, senior managers, the chief financial officer and other financial officials of a municipality must meet the prescribed financial management competency levels. A municipality must provide resources or opportunities for the training of officials referred to above to meet the prescribed competency levels. Both the National Treasury or a provincial treasury may assist municipalities in the training of officials referred to in subsection 83(1) of the MFMA.<sup>210</sup>

#### **(i) Aspects concerning municipal entities**

When considering the establishment of, or participation in, a municipal entity, a municipality must first

- determine precisely the function or service that such entity would perform on behalf of the municipality and
- make an assessment of the impact of the shifting of that function or service to the entity on the municipality's staff, assets and liabilities, including an assessment of:
  - (i) the number of staff of the municipality to be transferred to the entity;
  - (ii) the number of staff of the municipality that would become redundant because of the shifting of that function or service;
  - (iii) the cost to the municipality of any staff retrenchments or the retention of redundant staff;
  - (iv) any assets of the municipality to be transferred to the entity;
  - (v) any assets of the municipality that would become obsolete because of the shifting of that function or service;
  - (vi) any liabilities of the municipality to be ceded to the entity; and
  - (vii) any debt of the municipality attributed to that function or service which the municipality would retain.<sup>211</sup>

A municipality may establish or participate in a municipal entity only if:

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<sup>209</sup> Read the MFMA s 82(2)-(3). Note also that the chief financial officer may confirm, vary or revoke any decision taken in consequence of a sub-delegation, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

<sup>210</sup> See the MFMA s 83(1)-(3).

<sup>211</sup> The MFMA s 84(1)(a)-(b).

- (a) the municipal manager, at least 90 days before the meeting of the municipal council at which the proposed establishment of the entity, or the municipality's proposed participation in the entity, is to be approved –
- (i) has, in accordance with section 21A of the Municipal Systems Act:
    - (aa) made public an information statement setting out the municipality's plans for the municipal entity together with the assessment which the municipality must conduct in terms of subsection (1); and
    - (bb) invited the local community, organised labour and other interested persons to submit to the municipality comments or representations in respect of the matter; and
  - (ii) has solicited the views and recommendations of –
    - (aa) the National Treasury and the relevant provincial treasury;
    - (bb) the national and provincial departments responsible for local government; and
    - (cc) the MEC for local government in the province; and
- (b) the municipal council has taken into account –
- (i) the assessment referred to in subsection (1);
  - (ii) any comments or representations on the matter received from the local community, organised labour and other interested persons;
  - (iii) any written views and recommendations on the matter received from the National Treasury, the relevant provincial treasury, the national department responsible for local government or the MEC for local government in the province.<sup>212</sup>

A municipal entity must open and maintain at least one bank account in the name of the entity. All money received by a municipal entity must be paid into its bank account or accounts, and this must be done promptly and in accordance with any requirements that may be prescribed. A municipal entity may not open a bank account:

- abroad
- with an institution not registered as a bank in terms of the Banks Act<sup>213</sup>
- otherwise than in the name of the entity and

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<sup>212</sup> The MFMA s 84(2)(a)-(b). For the purposes of this section, “establish” includes the acquisition of an interest in a private company that would render that private company a municipal entity.

<sup>213</sup> 94 of 1990.

- without the approval of its board of directors.

Money may be withdrawn from a municipal entity's bank account only in accordance with requirements that may be prescribed. The accounting officer of a municipal entity:

- must administer all the entity's bank accounts
- is accountable to the board of directors of the entity for the entity's bank accounts and
- must enforce any requirements that may be prescribed.<sup>214</sup>

The accounting officer of a municipal entity must submit to the entity's parent municipality, in writing and within 90 days after the entity has opened a new bank account, the name of the bank where the account has been opened and the type and number of the account, and annually before the start of a financial year, the name of each bank where the entity holds a bank account and the type and number of each account. The accounting officer of the municipal entity's parent municipality, or if there is more than one parent municipality, any one of the accounting officers of those municipalities as may be agreed between them must, upon receipt of the information referred to above, submit that information to the Auditor-General, the National Treasury and the relevant provincial treasury, in writing.<sup>215</sup>

In respect of budgets, it is required that for each financial year the board of directors of a municipal entity must submit a proposed budget for the entity to its parent municipality not later than 150 days before the start of the entity's financial year or earlier if requested by the parent municipality. The parent municipality must consider the proposed budget of the entity and assess the entity's priorities and objectives. If the parent municipality makes any recommendations on the proposed budget, the board of directors of the entity must consider those recommendations and, if necessary, submit a revised budget to the parent municipality not later than 100 days before the start of the financial year. The mayor of the parent municipality must table the proposed budget of the municipal entity in the council when the annual budget of the municipality for the relevant year is tabled. The board of directors of a municipal entity must approve the budget of the municipal entity not later than 30 days before

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<sup>214</sup> See the MFMA s 85(1)-(5).

<sup>215</sup> Read the MFMA s 86(1)-(2).

the start of the financial year, taking into account any hearings or recommendations of the council of the parent municipality.<sup>216</sup>

The budget of a municipal entity must conform to the following requirements. It must:

- (a) be balanced;
- (b) be consistent with any service delivery agreement or other agreement between the entity and the entity's parent municipality;
- (c) be within any limits determined by the entity's parent municipality, including any limits on tariffs, revenue, expenditure and borrowing;
- (d) include a multi-year business plan for the entity that –
  - (i) sets key financial and non-financial performance objectives and measurement criteria as agreed with the parent municipality;
  - (ii) is consistent with the budget and integrated development plan of the entity's parent municipality;
  - (iii) is consistent with any service delivery agreement or other agreement between the entity and the entity's parent municipality; and
  - (iv) reflects actual and potential liabilities and commitments, including particulars of any proposed borrowing of money during the period to which the plan relates; and
- (e) otherwise comply with the requirements of section 17(1) and (2) of the MFMA to the extent that such requirements can reasonably be applied to the entity.<sup>217</sup>

With the approval of the mayor, the board of directors of a municipal entity may revise the budget of the municipal entity, but only for the following reasons:

- to adjust the revenue and expenditure estimates downwards if there is material under-collection of revenue during the current year
- to authorise expenditure of any additional allocations to the municipal entity from its parent municipality
- to authorise, within a prescribed framework, any unforeseeable and unavoidable expenditure approved by the mayor of the parent municipality
- to authorise any other expenditure within a prescribed framework.<sup>218</sup>

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<sup>216</sup> Refer to the MFMA s 87(1)-(4).

<sup>217</sup> See the MFMA s 87(5)(a)-(e).

Any projected allocation to a municipal entity from its parent municipality must be provided for in the annual budget of the parent municipality and, to the extent not so provided, the entity's budget must be adjusted. A municipal entity may incur expenditure only in accordance with its approved budget or an adjustments budget. The mayor must table the budget or adjusted budget and any adjustments budget of a municipal entity as approved by its board of directors, at the next council meeting of the municipality. A municipal entity's approved budget or adjusted budget must be made public in substantially the same way as the budget of a municipality must be made public. The accounting officer of a municipal entity must by no later than seven working days after the end of each month submit to the accounting officer of the parent municipality a statement in the prescribed format on the state of the entity's budget reflecting the following particulars for that month and for the financial year up to the end of that month:

- (a) actual revenue, per revenue source;
- (b) actual borrowings;
- (c) actual expenditure;
- (d) actual capital expenditure;
- (e) the amount of any allocations received;
- (f) actual expenditure on those allocations, excluding expenditure on allocations exempted by the annual Division of Revenue Act from compliance with this paragraph; and
- (g) when necessary, an explanation of –
  - (i) any material variances from the entity's projected revenue by source, and from the entity's expenditure projections;
  - (ii) any material variances from the service delivery agreement and the business plan; and
  - (iii) any remedial or corrective steps taken or to be taken to ensure that projected revenue and expenditure remain within the entity's approved budget.<sup>219</sup>

The statement mentioned above must include a projection of revenue and expenditure for the rest of the financial year and any revisions from initial projections.

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<sup>218</sup> The MFMA s 87(6)(a)-(d).

<sup>219</sup> See the MFMA s 87(7)-(11).



Amounts reflected in the statement must in each case be compared with the corresponding amounts budgeted for in the entity's approved budget. Finally, the statement to the accounting officer of the municipality must be in the format of a signed document and in electronic format.<sup>220</sup>

The accounting officer of a municipal entity must by 20 January of each year

- assess the performance of the entity during the first half of the financial year, taking into account the monthly statements referred to in section 87 of the MFMA for the first half of the financial year and the targets set in the service delivery, business plan or other agreement with the entity's parent municipality and the entity's annual report for the past year, and progress on resolving problems identified in the annual report
- submit a report on such assessment to
  - (a) the board of directors of the entity
  - (b) the parent municipality of the entity.<sup>221</sup>

The parent municipality of a municipal entity must determine the upper limits of the salary, allowances and other benefits of the chief executive officer and senior managers of the entity and monitor and ensure that the municipal entity reports to the council on all expenditure incurred by that municipal entity on directors and staff remuneration matters and in a manner that discloses such expenditure per type of expenditure. This should include:

- salaries and wages
- contributions for pensions and medical aid
- travel, motor car, accommodation, subsistence and other allowances
- housing benefits and allowances
- overtime payments
- loans and advances
- any other type of benefit or allowance related to directors and staff.<sup>222</sup>

A municipal entity may not transfer ownership as a result of a sale or other transaction or otherwise dispose of a capital asset needed to provide the minimum level of basic municipal services. Municipal entities may transfer ownership or otherwise

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<sup>220</sup> Read the MFMA s 87(12)-(14).

<sup>221</sup> See the MFMA s 88(1)-(2). A report referred to above must be made public.

<sup>222</sup> Read the MFMA s 89(a)-(b).

dispose of a capital asset other than an asset contemplated in subsection 90(1) of the MFMA, but only after the council of its parent municipality, in a meeting open to the public has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services and has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset. A decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services may not be reversed by the municipality or municipal entity after that asset has been sold, transferred or otherwise disposed of. Furthermore, a municipal council may delegate to the accounting officer of a municipal entity its power to make the determinations referred to in subsection 90(2)(a) and (b) in respect of movable capital assets of the entity below a value determined by the council. Any transfer of ownership of a capital asset in terms of subsection 90(2) or (4) of the MFMA must be fair, equitable, transparent and competitive and consistent with the supply chain management policy which the municipal entity must have and maintain in terms of section 111 of the MFMA.<sup>223</sup>

The financial year of a municipal entity must be the same as that of municipalities and the Auditor-General must audit and report on the accounts, financial statements and financial management of each municipal entity.<sup>224</sup> The chief executive officer of a municipal entity is the accounting officer of the entity. The accounting officer of a municipal entity has various fiduciary duties. He or she must:

- (a) exercise utmost care to ensure reasonable protection of the assets and records of the entity;
- (b) act with fidelity, honesty, integrity and in the best interest of the entity in managing the financial affairs of the entity;
- (c) disclose to the entity's parent municipality and the entity's board of directors all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the parent municipality or the board of directors; and

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<sup>223</sup> Note that s 90 does not apply to the transfer of a capital asset to a municipality or another municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework. See the MFMA s 90(1)-(6).

<sup>224</sup> Refer to the MFMA ss 91 and 92.

(d) seek, within the sphere of influence of that accounting officer, to prevent any prejudice to the financial interests of the parent municipality or the municipal entity.<sup>225</sup> The accounting officer may not act in a way that is inconsistent with the responsibilities assigned to accounting officers of municipal entities in terms of this act or use the position or privileges of, or confidential information obtained as accounting officer, for personal gain or to improperly benefit another person.<sup>226</sup>

The accounting officer of a municipal entity is responsible for managing the financial administration of the entity and must for this purpose take all reasonable steps to ensure:

- (a) that the resources of the entity are used effectively, efficiently, economically and transparently;
- (b) that full and proper records of the financial affairs of the entity are kept;
- (c) that the entity has and maintains effective, efficient and transparent systems-
  - (i) of financial and risk management and internal control; and
  - (ii) of internal audit complying with and operating in accordance with any prescribed norms and standards;
- (d) that irregular and fruitless and wasteful expenditure and other losses are prevented;
- (e) that expenditure is in accordance with the operational policies of the entity; and
- (f) that disciplinary or, when appropriate, criminal proceedings, are instituted against any official of the entity who has allegedly committed an act of financial misconduct or an offence in terms of chapter 15 of the MFMA.<sup>227</sup>

The accounting officer of a municipal entity is responsible for the management of the assets of the entity, including the safeguarding and maintenance of those assets and the liabilities of the entity. For the purposes of subsection 96(1) of the MFMA, the accounting officer must take all reasonable steps to ensure that the entity has and maintains a management, accounting and information system that accounts for proper assets and liabilities of the management systems of the municipal entity and

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<sup>225</sup> See the MFMA s 94(1)(a)-(d).

<sup>226</sup> The MFMA s 94(2)(a)-(b).

<sup>227</sup> Read the MFMA s 95(a)-(f).

a system of internal control of assets and liabilities, including an asset and liabilities register, as may be prescribed.<sup>228</sup> Furthermore, the accounting officer of a municipal entity must take all reasonable steps to ensure:

- (a) that the entity has and implements effective revenue collection systems to give effect to its budget;
- (b) that all revenue due to the entity is collected;
- (c) that any funds collected by the entity on behalf of a municipality-
  - (i) are transferred to that municipality strictly in accordance with the agreement between the entity the municipality; and
  - (ii) are not used for the purposes of the entity;
- (d) that the municipal entity has effective revenue collection systems consistent with those of the parent municipality;
- (e) that revenue due to the entity is calculated on a monthly basis;
- (f) that accounts for service charges are prepared on a monthly basis, or less often as may be prescribed where monthly accounts are uneconomical;
- (g) that all money received is promptly deposited in accordance with this act into the municipal entity's bank accounts;
- (h) that the municipal entity has and maintains a management, accounting and information system which:
  - (i) recognises revenue when it is earned;
  - (ii) accounts for debtors; and
  - (iii) accounts for receipts of revenue;
- (i) that the municipal entity has and maintains a system of internal control in respect of debtors and revenue, as may be prescribed; and
- (j) that all revenue received by the municipal entity, including revenue received by any collecting agent on its behalf, is reconciled at least on a weekly basis.<sup>229</sup>

Monthly reconciliation of revenue and accounts is also required. The accounting officer of a municipal entity must take all reasonable steps to ensure that all revenue received by the entity, including revenue received by any collecting agency on its

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<sup>228</sup> See the MFMA s 96(1)-(2).

<sup>229</sup> See the MFMA s 97(2)(a)-(j). The accounting officer must immediately inform the parent municipality of any payments due by an organ of state to the entity in respect of service charges, if such payments are regularly in arrears for periods of more than 30 days.

behalf, is reconciled on a monthly or more regular basis, and all accounts of the entity are reconciled each month.<sup>230</sup>

Each accounting officer of a municipal entity is responsible for the management of the expenditure of the entity. Such an officer must for the purpose of subsection 99(1) of the MFMA take all reasonable steps to ensure:

- (a) that the entity has and maintains an effective system of expenditure control including procedures for the approval, authorisation, withdrawal and payment of funds;
- (b) that all money owing by the entity is paid within 30 days of receiving the relevant invoice or statement unless prescribed otherwise for certain categories of expenditure;
- (c) that the entity has and maintains a management, accounting and information system which:
  - (i) recognises expenditure when it is incurred;
  - (ii) accounts for creditors of the entity; and
  - (iii) accounts for payments made by the entity;
- (d) that the entity has and maintains a system of internal control in respect of creditors and payments;
- (e) that payments by the entity are made –
  - (i) directly to the person to whom it is due unless agreed otherwise only for reasons as may be prescribed; and
  - (ii) either electronically or by way of non-transferable cheques, provided that cash payments and payments by way of cash cheques may be made for exceptional reasons only, and only up to a prescribed limit;
- (f) that the entity complies with its tax, duty, pension, medical aid, audit fees and other statutory commitments;
- (g) that the entity's available working capital is managed effectively and economically in terms of any prescribed cash management and investment framework; and
- (h) that the entity has and implements a supply chain management policy in accordance with section 111 of the MFMA in a way that is fair, equitable, trans

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<sup>230</sup> The MFMA s 98(a)-(b).

parent and cost-effective.<sup>231</sup>

The accounting officer of a municipal entity is also responsible for implementing the entity's budget, including taking effective and appropriate steps to ensure that

- the spending of funds is in accordance with the budget
- revenue and expenditure are properly monitored
- spending is reduced as necessary when revenue is anticipated to be less than projected in the budget.<sup>232</sup>

It is furthermore required that the accounting officer of a municipal entity must report, in writing, to the board of directors of the entity, at its next meeting, and to the accounting officer of the entity's parent municipality any financial problems of the entity, including:

(a) any impending or actual-

- (i) under collection of revenue due;
  - (ii) shortfalls in budgeted revenue;
  - (iii) overspending of the entity's budget;
  - (iv) delay in the entity's payments to any creditors; or
  - (v) overdraft in any bank account of the entity for a period exceeding 21 days;
- and

(b) any steps taken to rectify such financial problems.<sup>233</sup>

On discovery of any irregular expenditure or any fruitless and wasteful expenditure, the board of directors of a municipal entity must promptly report, in writing, to the mayor and municipal manager of the entity's parent municipality and the Auditor-General

- particulars of the expenditure
- any steps that have been taken
  - (a) to recover the expenditure
  - (b) to prevent a recurrence of the expenditure.

The board of directors of a municipal entity must promptly report to the South African Police Service any irregular expenditure that may constitute a criminal offence and

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<sup>231</sup> Read the MFMA s 99(2)(a)-(h).

<sup>232</sup> The MFMA s 100(a)-(c).

<sup>233</sup> The accounting officer of the municipality must table a report referred to in s 101(1) in the municipal council at its next meeting. See the MFMA s 101(1)-(2).

other losses suffered by the municipal entity which resulted from suspected criminal conduct.<sup>234</sup>

The accounting officer of a municipal entity must promptly report to the speaker of the council of the entity's parent municipality any interference by a councillor outside that councillor's assigned duties in the financial affairs of the municipal entity or the responsibilities of the board of directors of the municipal entity.<sup>235</sup> Except where otherwise provided in the MFMA, the accounting officer of a municipal entity is responsible for the submission by the entity of all reports, returns, notices and other information to the entity's parent municipality as may be required by the Act and must submit to the accounting officer of the entity's parent municipality, the National Treasury, the relevant provincial treasury, the department of local government in the province or the Auditor-General such information, returns, documents, explanations and motivations as may be prescribed or as may be required.<sup>236</sup>

Each official of a municipal entity exercising financial management responsibilities must take all reasonable steps within that official's area of responsibility to ensure that:

- (a) the system of financial management and internal control established for the entity is carried out diligently;
- (b) the financial and other resources of the entity are utilised effectively, efficiently, economically and transparently;
- (c) any irregular expenditure, fruitless and wasteful expenditure and other losses are prevented;
- (d) all revenue due to the entity is collected;
- (e) the provisions of this Act to the extent applicable to that official, including any delegations in terms of section 106 of the MFMA, are complied with; and
- (f) the assets and liabilities of the entity are managed effectively, and that assets are safeguarded and maintained to the extent necessary.<sup>237</sup>

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<sup>234</sup> The MFMA s 102(1)-(2).

<sup>235</sup> The MFMA s 103.

<sup>236</sup> If the accounting officer of a municipal entity is unable to comply with any of the responsibilities in terms of the MFMA, he or she must report the inability to the council of the entity's parent municipality promptly, together with reasons. See the MFMA s 104(1)-(2).

<sup>237</sup> An official of a municipal entity must perform the functions referred to above, subject to the directions of the accounting officer of the entity. Refer to the MFMA s 105(1)-(2).



In respect of the delegation of authority, it is provided that the accounting officer of a municipal entity may delegate to an official of that entity:

- any of the powers or duties assigned or delegated to the accounting officer in terms of the MFMA or
- any powers or duties reasonably necessary to assist the accounting officer in complying with a duty which requires the accounting officer to take reasonable or appropriate steps to ensure the achievement of the aims of a specific provision of the MFMA.

The accounting officer must also regularly review delegations issued and, if necessary, amend or withdraw any of those delegations. A delegation must be in writing, is subject to any limitations and conditions the accounting officer may impose, may be either to a specific individual or to the holder of a specific post in the municipal entity and does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.<sup>238</sup> The accounting officer, senior managers, any chief financial officer and all other financial officials of a municipal entity must meet the prescribed financial management competency levels.<sup>239</sup>

A municipal entity may borrow money, but only in accordance with the entity's multi-year business plan and the provisions of chapter 6 of the MFMA to the extent that those provisions can be applied to a municipal entity. In applying chapter 6 to a municipal entity, a reference in that chapter to a municipality, a municipal council or an accounting officer must be read as referring to a municipal entity, the board of directors of a municipal entity or the accounting officer of a municipal entity, respectively.<sup>240</sup> If a municipal entity experiences serious or persistent financial problems and the board of directors of the entity fails to act effectively, the parent municipality must either

- take appropriate steps in terms of its rights and powers over that entity, including its rights and powers in terms of any relevant service delivery or other agreement

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<sup>238</sup> See the MFMA s 106(1)-(2). Note that an accounting officer may confirm, vary or revoke any decision taken by an official in consequence of a delegation, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

<sup>239</sup> The MFMA s 107.

<sup>240</sup> See the MFMA s 108(1)-(2).

- impose a financial recovery plan, which must meet the same criteria set out in section 142 of the MFMA for a municipal financial recovery plan or
- liquidate and disestablish the entity.<sup>241</sup>

**(j) Issues relating to goods and services**

Each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this part. The supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least the following:

- (a) The range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;
- (b) when a municipality or municipal entity may or must use a particular type of process;
- (c) procedures and mechanisms for each type of process;
- (d) procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;
- (e) open and transparent pre-qualification processes for tenders or other bids;
- (f) competitive bidding processes in which only pre-qualified persons may participate;
- (g) bid documentation, advertising of and invitations for contracts;
- (h) procedures and mechanisms for:
  - (i) the opening, registering and recording of bids in the presence of interested persons;
  - (ii) the evaluation of bids to ensure best value for money;
  - (iii) negotiating the final terms of contracts; and
  - (iv) the approval of bids;
- (i) screening processes and security clearances for prospective contractors on tenders or other bids above a prescribed value;

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<sup>241</sup> Read the MFMA s 109(a)-(c).

- (j) compulsory disclosure of any conflicts of interests prospective contractors may have in specific tenders and the exclusion of such prospective contractors from those tenders or bids;
- (k) participation in the supply chain management system of persons who are not officials of the municipality or municipal entity, subject to section 117 of the MFMA;
- (l) the barring of persons from participating in tendering or other bidding processes, including persons:
  - (i) who were convicted for fraud or corruption during the past five years;
  - (ii) who wilfully neglected, reneged on or failed to comply with a government contract during the past five years; or
  - (iii) whose tax matters are not cleared by South African Revenue Service;
- (m) measures for:
  - (i) combating fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management; and
  - (ii) promoting ethics of officials and other role players involved in municipal supply chain management;
- (n) the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced, including recommendations or decisions that were made, taken or in any way influenced by –
  - (i) councillors in contravention of item 5 or 6 of the Code of Conduct for Councillors set out in Schedule 1 to the Municipal Systems Act; or
  - (ii) municipal officials in contravention of item 4 or 5 of the Code of Conduct for Municipal Staff Members set out in Schedule 2 to that act;
- (o) the procurement of goods and services by municipalities or municipal entities through contracts procured by other organs of state;
- (p) contract management and dispute settling procedures; and
- (q) the delegation of municipal supply chain management powers and duties, including to officials.<sup>242</sup>

With respect to unsolicited bids, a municipality or municipal entity is not obliged to consider an unsolicited bid received outside its normal bidding process. If a municipi-

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<sup>242</sup> See the MFMA ss 111-112. Note that the regulatory framework for municipal supply chain management must be fair, equitable, transparent, competitive and cost effective.

pality or municipal entity decides to consider an unsolicited bid received outside a normal bidding process, it may do so only in accordance with a prescribed framework. Such a framework must strictly regulate and limit the power of municipalities and municipal entities to approve unsolicited bids received outside their normal tendering or other bidding processes.<sup>243</sup>

In respect of the approval tenders, it is stated that if a tender other than the one recommended in the normal course of implementing the supply chain management policy of a municipality or municipal entity is approved, the accounting officer of the municipality or municipal entity must, in writing, notify the Auditor-General, the relevant provincial treasury and the National Treasury and, in the case of a municipal entity, also the parent municipality of the reasons for deviating from such recommendation.<sup>244</sup>

The accounting officer of a municipality or municipal entity must implement the supply chain management policy of the municipality or municipal entity and must take all reasonable steps to ensure that proper mechanisms and separation of duties in the supply chain management system are in place to minimise the likelihood of fraud, corruption, favouritism and unfair and irregular practices. No person may impede the accounting officer in fulfilling this responsibility.<sup>245</sup>

A contract or agreement procured through the supply chain management system of a municipality or municipal entity must

- be in writing
- stipulate the terms and conditions of the contract or agreement, which must include provisions providing for:
  - (a) the termination of the contract or agreement in the case of non- or under-performance
  - (b) dispute resolution mechanisms to settle disputes between the parties
  - (c) a periodic review of the contract or agreement once every three years in the case of a contract or agreement for longer than three years and
  - (d) any other matters that may be prescribed.

The accounting officer of a municipality or municipal entity must also:

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<sup>243</sup> Read the MFMA s 113(1)-(3).

<sup>244</sup> S 114(1) does not apply if a different tender was approved in order to rectify an irregularity. See the MFMA s 114(1)-(2).

<sup>245</sup> The MFMA s 115(1)-(2).

- take all reasonable steps to ensure that a contract or agreement procured through the supply chain management policy of the municipality or municipal entity is properly enforced
- monitor the performance of the contractor under the contract or agreement on a monthly basis
- establish capacity in the administration of the municipality or municipal entity:
  - (a) to assist the accounting officer in carrying out the above duties and
  - (b) to oversee the day-to-day management of the contract or agreement and
- report regularly to the council of the municipality or the board of directors of the entity, as may be appropriate, on the management of the contract or agreement and the performance of the contractor.<sup>246</sup>

A contract or agreement procured through the supply chain management policy of the municipality or municipal entity may be amended by the parties, but only after

- (a) the reasons for the proposed amendment have been tabled in the council of the municipality or, in the case of a municipal entity, in the council of its parent municipality; and
- (b) the local community:
  - (i) has been given reasonable notice of the intention to amend the contract or agreement; and
  - (ii) has been invited to submit representations to the municipality or municipal entity.<sup>247</sup>

According to the MFMA, no councillor of any municipality may be a member of a municipal bid committee or any other committee evaluating or approving tenders, quotations, contracts or other bids, nor attend any such meeting as an observer. No person may further interfere with the supply chain management system of a municipality or municipal entity or amend or tamper with any tenders, quotations, contracts or bids after their submission.<sup>248</sup>

The accounting officer and all other officials of a municipality or municipal entity involved in the implementation of the supply chain management policy of the municipality or municipal entity must meet the prescribed competency levels. A municipality

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<sup>246</sup> The MFMA s 116(2).

<sup>247</sup> See the MFMA s 116(1)-(3).

<sup>248</sup> Read the MFMA ss 117 and 118.

and a municipal entity must for the purposes of subsection 119(1) of the MFMA provide resources or opportunities for the training of officials referred to in that subsection to meet the prescribed competency levels. The National Treasury or a provincial treasury may assist municipalities and municipal entities in the training of officials.<sup>249</sup>

A municipality may enter into a public-private partnership agreement, but only if the municipality can demonstrate that the agreement will:

- provide value for money to the municipality
- be affordable for the municipality and
- transfer appropriate technical, operational and financial risk to the private party.

A public-private partnership agreement must comply with any prescribed regulatory framework for public-private partnerships. If the public-private partnership involves the provision of a municipal service, chapter 8 of the Municipal Systems Act must also be complied with. Before a public-private partnership is concluded, the municipality must conduct a feasibility study that:

- (a) explains the strategic and operational benefits of the public-private partnership for the municipality in terms of its objectives;
- (b) describes in specific terms:
  - (i) the nature of the private party's role in the public-private partnership;
  - (ii) the extent to which this role, both legally and by nature, can be performed by a private party; and
  - (iii) how the proposed agreement will:
    - (aa) provide value for money to the municipality;
    - (bb) be affordable for the municipality;
    - (cc) transfer appropriate technical, operational and financial risks to the private party; and
    - (dd) impact on the municipality's revenue flows and its current and future budgets;
- (c) takes into account all relevant information; and
- (d) explains the capacity of the municipality to effectively monitor, manage and enforce the agreement.<sup>250</sup>

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<sup>249</sup> Refer to the MFMA s 119(1)-(3).

<sup>250</sup> The MFMA s 120(1)-(4).

National government may assist municipalities in carrying out and assessing the feasibility studies referred to above. When a feasibility study has been completed, the accounting officer of the municipality must:

- (a) submit the report on the feasibility study together with all other relevant documents to the council for a decision, in principle, on whether the municipality should continue with the proposed public-private partnership;
- (b) at least 60 days prior to the meeting of the council at which the matter is to be considered, in accordance with section 21A of the Municipal Systems Act-
  - (i) make public particulars of the proposed public-private partnership, including the report on the feasibility study; and
  - (ii) invite the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed public-private partnership; and
- (c) solicit the views and recommendations of-
  - (i) the National Treasury;
  - (ii) the national department responsible for local government;
  - (iii) if the public-private partnership involves the provision of water, sanitation, electricity or any other service as may be prescribed, the responsible national department; and
  - (iv) any other national or provincial organ of state as may be prescribed.<sup>251</sup>

**(k) Requirements regarding financial reporting and auditing**

For each financial year, every municipality and every municipal entity must prepare an annual report in accordance with the MFMA. Within nine months after the end of a financial year the council of a municipality must deal with the annual report of the municipality and of any municipal entity under the municipality's sole or shared control in accordance with section 129 of the Act. The purpose of an annual report is:

- to provide a record of the activities of the municipality or municipal entity during the financial year to which the report relates
- to provide a report on performance against the budget of the municipality or municipal entity for that financial year and

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<sup>251</sup> Note that the MFMA ss 110-119 apply to the procurement of public-private partnership agreements. S 33 also applies if the agreement will have multi-year budgetary implications for the municipality within the meaning of that section. Read also s 110 with reference to the application of the MFMA ss 110-119.



- to promote accountability to the local community for the decisions made throughout the year by the municipality or municipal entity.<sup>252</sup>

The annual report of a municipality must include the following information:

- (a) the annual financial statements of the municipality,<sup>253</sup> and in addition, if section 122(2) of the MFMA applies, consolidated annual financial statements, as submitted to the Auditor-General for audit in terms of section 126(1) of the act;
- (b) the Auditor-General's audit report in terms of section 126(3) on those financial statements;
- (c) the annual performance report of the municipality prepared by the municipality in terms of section 46 of the Municipal Systems Act;
- (d) the Auditor-General's audit report in terms of section 45(b) of the Municipal Systems Act;
- (e) an assessment by the municipality's accounting officer of any arrears on municipal taxes and service charges;
- (f) an assessment by the municipality's accounting officer of the municipality's performance against the measurable performance objectives referred to in section 17(3)(b) of the MFMA for revenue collection from each revenue source and for each vote in the municipality's approved budget for the relevant financial year;
- (g) particulars of any corrective action taken or to be taken in response to issues raised in the audit reports referred to in paragraphs (b) and (d);
- (h) any explanations that may be necessary to clarify issues in connection with the financial statements;
- (i) any information as determined by the municipality;
- (j) any recommendations of the municipality's audit committee; and
- (k) any other information as may be prescribed.<sup>254</sup>

The annual report of a municipal entity must include:

- (a) the annual financial statements of the entity, as submitted to the Auditor-General for audit in terms of section 126(2);

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<sup>252</sup> Read the MFMA s 121(1)-(2).

<sup>253</sup> Such financial statements include statements consisting of at least (a) a statement of financial position, (b) a statement of financial performance, (c) a cash-flow statement, (d) any other statements that may be prescribed and (d) any notes to these statements. See the MFMA s 1.

<sup>254</sup> The MFMA s 121(3)(a)-(k).

- (b) the Auditor-General's audit report in terms of section 126(3) on those financial statements;
- (c) an assessment by the entity's accounting officer of any arrears on municipal taxes and service charges;
- (d) an assessment by the entity's accounting officer of the entity's performance against any measurable performance objectives set in terms the service delivery agreement or other agreement between the entity and its parent municipality;
- (e) particulars of any corrective action taken or to be taken in response to issues raised in the audit report referred to in paragraph (b);
- (f) any information as determined by the entity or its parent municipality;
- (g) any recommendations of the audit committee of the entity or of its parent municipality; and
- (h) any other information as may be prescribed.<sup>255</sup>

For each financial year, every municipality and every municipal entity must prepare annual financial statements which fairly present the state of affairs of the municipality or entity, its performance against its budget, its management of revenue, expenditure, assets and liabilities, its business activities, its financial results and its financial position as at the end of the financial year and disclose the information required in terms of sections 123, 124 and 125 of the MFMA. A municipality which has sole control of a municipal entity or which has effective control of a municipal entity which is a private company within the meaning of the Municipal Systems Act must, in addition to complying with subsection 122(1) of the MFMA, prepare consolidated annual financial statements incorporating the annual financial statements of the municipality and of such entity. Such consolidated annual financial statements must comply with any requirements as may be prescribed. Both annual financial statements and consolidated annual financial statements must be prepared in accordance with generally recognised accounting practice prescribed in terms of section 91(1)(b) of the Public Finance Management Act.<sup>256</sup>

The annual financial statements of a municipality must disclose information on

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<sup>255</sup> The MFMA s 121(4)(a)-(h).

<sup>256</sup> See the MFMA s 122(1)-(3). "Standards of generally recognised accounting practice" refers to an accounting practice complying with standards applicable to municipalities or municipal entities and issued in terms of the Public Finance Management Act ch 11.

- any allocations received by the municipality from
  - (a) an organ of state in the national or provincial sphere of government or
  - (b) a municipal entity or another municipality
- any allocations made by the municipality to
  - (a) a municipal entity or another municipality or
  - (b) any other organ of state
- how any allocations were spent, per vote, excluding allocations received by the municipality as its portion of the equitable share or where prescribed otherwise because of the nature of the allocation
- whether the municipality has complied with the conditions of
  - (a) any allocations made to the municipality in terms of section 214(1)(c) of the Constitution and
  - (b) any allocations made to the municipality other than by national organs of state
- the reasons for any non-compliance with the two conditions referred to directly above and
- whether funds destined for the municipality in terms of the annual Division of Revenue Act were delayed or withheld, and the reasons advanced to the municipality for such delay or withholding.

The annual financial statements of a municipal entity must also disclose information on:

- any allocations received by the entity from any municipality or other organ of state
- any allocations made by the entity to a municipality or other organ of state and
- any other information as may be prescribed.<sup>257</sup>

The notes to the annual financial statements of a municipality must include particulars of

- the salaries, allowances and benefits of political office-bearers and councillors of the municipality, whether financial or in kind, including a statement by the accounting officer whether or not those salaries, allowances and benefits are within the upper limits of the framework envisaged in section 219 of the Constitution
- any arrears owed by individual councillors to the municipality, or a municipal entity under its sole or shared control, for rates or services and which at any time during

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<sup>257</sup> Read the MFMA s 123(1)-(2).

the relevant financial year were outstanding for more than 90 days, including the names of those councillors and

- the salaries, allowances and benefits of the municipal manager, the chief financial officer, every senior manager and such categories of other officials as may be prescribed.

The notes to the annual financial statements of a municipal entity must include particulars of the salaries, allowances and benefits of

- the members of the board of directors of the entity and
- the chief executive officer of the entity, every senior manager and such categories of other officials as may be prescribed.<sup>258</sup>

The notes to the financial statements of a municipality must include:

- a list of all municipal entities under the sole or shared control of the municipality during the financial year and as at the last day of the financial year.
- the total amount of contributions to organised local government for the financial year, and the amount of any contributions outstanding as at the end of the financial year; and
- the total amounts paid in audit fees, taxes, levies, duties and pension and medical aid contributions, and whether any amounts were outstanding as at the end of the financial year.<sup>259</sup>

The notes to the annual financial statements of a municipality or municipal entity must disclose the following information:

- (a) In respect of each bank account held by the municipality or entity during the relevant financial year:
  - (i) the name of the bank where the account is or was held, and the type of account; and
  - (ii) year opening and year end balances in each of these bank accounts;
- (b) a summary of all investments of the municipality or entity as at the end of the financial year;<sup>260</sup>

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<sup>258</sup> See the MFMA s 124(1)-(2).

<sup>259</sup> The MFMA s 125(1).

<sup>260</sup> Investment in relation to funds of a municipality means (a) the placing on deposit of funds of a municipality with a financial institution or (b) the acquisition of assets with funds of a municipality not immediately required, with the primary aim of preserving those funds. See the MFMA s 1.

- (c) particulars of any contingent liabilities of the municipality or entity as at the end of the financial year;
- (d) particulars of:
- (i) any material losses and any material irregular or fruitless and wasteful expenditures, including in the case of a municipality, any material unauthorised expenditure, that occurred during the financial year, and whether these are recoverable;
  - (ii) any criminal or disciplinary steps taken as a result of such losses or such unauthorised, irregular or fruitless and wasteful expenditures; and
  - (iii) any material losses recovered or written off;
- (e) particulars of non-compliance with this act; and
- (f) any other matters that may be prescribed.<sup>261</sup>

It is further determined that the accounting officer of a municipality must prepare the annual financial statements of the municipality and, within two months after the end of the financial year to which those statements relate, submit the statements to the Auditor-General for auditing and in addition, in the case of a municipality referred to in section 122(2) of the MFMA, must prepare consolidated annual financial statements in terms of that section and submit the statements to the Auditor-General for auditing within three months after the end of the financial year to which those statements relate.<sup>262</sup>

It is the responsibility of the accounting officer of a municipal entity to prepare the annual financial statements of the entity and submit the statements to

- the parent municipality of the entity
- the Auditor-General

for auditing within two months after the end of the financial year to which those statements relate. The Auditor-General must audit those financial statements and submit an audit report on those statements to the accounting officer of the municipality or entity within three months of receipt of the statements. If the Auditor-General is unable to complete an audit within three months of receiving the financial statements from an accounting officer, the Auditor-General must promptly submit a report outlining the reasons for the delay to the relevant municipality or municipal entity and to

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<sup>261</sup> See the MFMA s 125(1)-(2).  
<sup>262</sup> The MFMA s 126(1)(a)-(b).

the relevant provincial legislature and Parliament. Once the Auditor-General has submitted an audit report to the accounting officer, no person other than the Auditor-General may alter the audit report or the financial statements to which the audit report relates.<sup>263</sup>

According to the MFMA, within six months after the end of a financial year or on such earlier date as may be agreed between the entity and its parent municipality, the accounting officer of a municipal entity must submit the entity's annual report for that financial year to the municipal manager of the entity's parent municipality. Within seven months after the end of a financial year the mayor of a municipality must table in the municipal council the annual report of the municipality and of any municipal entity under the municipality's sole or shared control. If, for whatever reason, the mayor is unable to table in the council the annual report of the municipality or the annual report of any municipal entity under the municipality's sole or shared control within seven months after the end of the financial year to which the report relates, the mayor must promptly submit to the council a written explanation referred to in section 133(1)(a) of the MFMA, setting out the reasons for the delay, together with any components of the annual report listed in section 121(3) or (4) of the Act that are ready, and also submit to the council the outstanding annual report or the outstanding components of the annual report as soon as possible.<sup>264</sup>

The Auditor-General may submit the financial statements and audit report of a municipality directly to the municipal council, the National Treasury, the relevant provincial treasury, the MEC responsible for local government in the province and any prescribed organ of state, if the mayor fails to comply with subsection 127(2) or (3) of the MFMA or directly to the parent municipality, the National Treasury, the relevant provincial treasury, the MEC responsible for local government in the province and any prescribed organ of state, if the accounting officer of the entity fails to comply with subsection 127(1). In accordance with section 21A of the Municipal Systems Act, the accounting officer of the municipality must make public the annual report and invite the local community to submit representations in connection with the annual report immediately after an annual report is tabled in the council. He or she must also submit the annual report to the Auditor-General, the relevant provincial

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<sup>263</sup> Read the MFMA s 126(2)-(5).

<sup>264</sup> Refer to the MFMA s 127(1)-(3).

treasury and the provincial department responsible for local government in the province.<sup>265</sup>

It is the responsibility of the accounting officer of a parent municipality to monitor whether the accounting officer of any municipal entity under the sole or shared control of the municipality has complied with sections 121(1) and 126(2) of the MFMA, to establish the reasons for any non-compliance and to promptly report any non-compliance, together with the reasons for such non-compliance, to the council of the parent municipality, the relevant provincial treasury and the Auditor-General.<sup>266</sup>

The council of a municipality must consider the annual report of the municipality and any municipal entity under the municipality's sole or shared control, and by no later than two months from the date on which the annual report was tabled in the council in terms of section 127, adopt an oversight report containing the council's comments on the annual report, which must include a statement whether the council:

- has approved the annual report with or without reservations
- has rejected the annual report or
- has referred the annual report back for revision of those components that can be revised.

The accounting officer must also attend council and council committee meetings where the annual report is discussed, for the purpose of responding to questions concerning the report and submit copies of the minutes of those meetings to the Auditor-General, the relevant provincial treasury and the provincial department responsible for local government in the province.<sup>267</sup>

Furthermore and in accordance with section 21A of the Municipal Systems Act, the accounting officer must make public an oversight report referred to above within seven days of its adoption. The National Treasury may issue guidelines on the manner in which municipal councils should consider annual reports and conduct public hearings and the functioning and composition of any public accounts or oversight committees established by the council to assist it to consider an annual report. No

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<sup>265</sup> S 127(5), with the necessary modifications as the context may require, is also applicable if only components of the annual report are tabled in terms of s 127(3). See the MFMA s 127(4)-(6).

<sup>266</sup> Read the MFMA s 128(a)-(c).

<sup>267</sup> The MFMA s 129(1)-(2).



guidelines issued in terms of subsection 129(4) of the MFMA are binding on a municipal council unless adopted by the council.<sup>268</sup>

The meetings of a municipal council at which an annual report is to be discussed or at which decisions concerning an annual report are to be taken must be open to the public and any organs of state, and a reasonable time must be allowed for the discussion of any written submissions received from the local community or organs of state on the annual report and for members of the local community or any organs of state to address the council. Representatives of the Auditor-General are entitled to attend and to speak at any council meeting referred to above.<sup>269</sup>

All municipalities must address any issues raised by the Auditor-General in an audit report. The mayor of a municipality must ensure compliance by the municipality with this requirement. The MEC for local government in the province must also assess all annual financial statements of municipalities in the province, the audit reports on such statements and any responses of municipalities to such audit reports and determine whether municipalities have adequately addressed any issues raised by the Auditor-General in audit reports and within 60 days must report to the provincial legislature any omission by a municipality to address those issues adequately.<sup>270</sup> Various documents must also be submitted to provincial legislatures. Such documents include:

- the annual report of each municipality and each municipal entity in the province or, if only components of an annual report were tabled in terms of section 127(3) of the MFMA, those components and
- all oversight reports on those annual reports adopted in terms of section 129(1) of the MFMA.

The accounting officer of a municipality must submit the documents to the provincial legislature within seven days after the municipal council has adopted the relevant oversight report. The MEC for local government in a province must monitor whether municipalities in the province comply with these requirements. A provincial legisla-

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<sup>268</sup> Read the MFMA s 129(3)-(4). S 129 with the necessary modifications as the context may require, is also applicable if only components of the annual report were tabled in terms of the Act s 127(3).

<sup>269</sup> Again s 130, with the necessary modifications as the context may require, is also applicable if only components of the annual report were tabled in terms of s 127(3). See also the MFMA s 130(1)-(3).

<sup>270</sup> Read the MFMA s 131(1)-(2).

ture may in turn deal with the documents in accordance with its constitutional powers.<sup>271</sup>

If the accounting officer of a municipality or municipal entity fails to submit financial statements to the Auditor-General in accordance with section 126 (1) or (2) of the MFMA, or if the mayor fails to table the annual report of the municipality or a municipal entity in the council in accordance with section 127(2) of the Act, then the mayor must promptly table in the council a written explanation setting out the reasons for the failure. Furthermore, the Auditor-General, in the case of any failure to submit financial statements for auditing, must promptly

- inform the speaker of the council, the National Treasury and the MEC for local government and the MEC for finance in the province of such failure and
- issue a special report on the failure to the relevant provincial legislature.

The municipal council then

- must request the speaker or any other councillor to investigate the reasons for the failure and report to the council
- must take appropriate steps to ensure that the financial statements are submitted to the Auditor-General or that the annual report, including the financial statements and the audit report on those statements, is tabled in the council, as the case may be
- may order that disciplinary steps be taken against the accounting officer or other person responsible for the failure.<sup>272</sup>

The provincial executive may also intervene in the municipality in terms of section 139 of the Constitution. Even the National Treasury and also the provincial treasury may take appropriate steps against the municipality in terms of section 5 of the MFMA.

The Auditor-General must submit to Parliament and the provincial legislatures by no later than 31 October of each year the names of any municipalities or municipal entities which have failed to submit their financial statements to the Auditor-General in terms of section 126 of the MFMA and at quarterly intervals thereafter, the names

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<sup>271</sup> See the MFMA s 132(1)-(5). The National Treasury may issue guidelines on the manner in which provincial legislatures should consider the annual reports of municipalities. No guidelines issued in terms of this subsection are binding on a provincial legislature unless adopted by the legislature.

<sup>272</sup> See the MFMA s 133(1)(a)-(c).

of any municipalities or municipal entities whose financial statements are still outstanding at the end of each interval.<sup>273</sup> As part of the report referred to in section 48 of the Municipal Systems Act, it is also mandatory for the cabinet member responsible for local government to report annually to parliament on actions taken by MECs for local government to address issues raised by the Auditor-General in audit reports on financial statements of municipalities and municipal entities.<sup>274</sup>

### **(l) Resolution of financial problems**

The primary responsibility to avoid, identify and resolve financial problems in a municipality rests with the municipality itself. A municipality must meet its financial commitments. If a municipality encounters a serious financial problem or anticipates problems in meeting its financial commitments, it must immediately seek solutions to the problem, notify the MEC for local government in the province and the MEC for finance in the province and notify organised local government.<sup>275</sup> Apart from the municipality itself, if the MEC for local government in a province becomes aware that there is a serious financial problem in a municipality, the MEC must promptly

- consult the mayor of the municipality to determine the facts
- assess the seriousness of the situation and the municipality's response to the situation
- determine whether the situation justifies or requires an intervention in terms of section 139 of the Constitution.

If the financial problem has been caused by or has resulted in a failure by the municipality to comply with an executive obligation in terms of legislation or the Constitution, and the conditions for an intervention in terms of section 139(1) of the Constitution are met, the provincial executive must promptly decide whether or not to intervene in the municipality. If the provincial executive decides to intervene, section 137 of the MFMA applies. In cases where the municipality has failed to approve a budget or any revenue-raising measures necessary to give effect to the budget, as a result of which the conditions for an intervention in terms of section 139 (4) of the Constitution are met, the provincial executive must intervene in the municipality in accordance with section 26 of the MFMA. Finally, if the municipality, as a result of a

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<sup>273</sup> The MFMA s 133(2)(a)-(b).

<sup>274</sup> Read the MFMA s 134.

<sup>275</sup> See the MFMA s 135(1)-(3).

crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments or admits that it is unable to meet its obligations or financial commitments, as a result of which the conditions for an intervention in terms of section 139(5) of the Constitution are met, the provincial executive must intervene in the municipality in accordance with section 139 of the MFMA.<sup>276</sup>

If the conditions for a provincial intervention in a municipality in terms of section 139(1) of the Constitution are met and the provincial executive decides in terms of section 136(2) of the MFMA to intervene in the municipality, the provincial executive may take any appropriate steps referred to in section 139 (1) of the Constitution, including:

- (a) assessing the seriousness of the financial problem in the municipality;
- (b) seeking solutions to resolve the financial problem in a way that would be sustainable and would build the municipality's capacity to manage its own financial affairs;
- (c) determining whether the financial problem, singly or in combination with other problems, is sufficiently serious or sustained that the municipality would benefit from a financial recovery plan and, if so, requesting any suitably qualified person:
  - (i) to prepare an appropriate financial recovery plan for the municipality;
  - (ii) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and
  - (iii) to submit the recovery plan and any recommendations referred to in subparagraphs (i) and (ii) to the MEC for local government in the province within a period determined by the MEC; and
- (d) consulting the mayor of the municipality to obtain the municipality's cooperation in resolving the financial problem, and if applicable, implementing the financial recovery plan.<sup>277</sup>

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<sup>276</sup> See the MFMA s 136(1)-(4).

<sup>277</sup> Note that the MEC must submit any assessment in terms of ss 137(1)(a), any determination in terms of ss (1)(c) and a copy of any request in terms of ss (1)(c) to the municipality and the Cabinet member responsible for local government. This obligation does not apply to a provincial intervention which is unrelated to a financial problem in a municipality. See the MFMA s 137(1)-(3).

When determining for the purposes of section 137 of the MFMA the seriousness of a financial problem, all relevant facts must be considered, and the following factors, singly or in combination, may indicate a serious financial problem:

- (a) The municipality has failed to make payments as and when due;
- (b) the municipality has defaulted on financial obligations for financial reasons;
- (c) the actual current expenditure of the municipality has exceeded the sum of its actual current revenue plus available surpluses for at least two consecutive financial years;
- (d) the municipality had an operating deficit in excess of five per cent of revenue in the most recent financial year for which financial information is available;
- (e) the municipality is more than 60 days late in submitting its annual financial statements to the Auditor-General in accordance with section 126 of the MFMA;
- (f) the Auditor-General has withheld an opinion or issued a disclaimer due to inadequacies in the financial statements or records of the municipality, or has issued an opinion which identifies a serious financial problem in the municipality;
- (g) any of the above conditions exists in a municipal entity under the municipality's sole control, or in a municipal entity for whose debts the municipality may be responsible, and the municipality has failed to intervene effectively; or
- (h) any other material condition exists which indicates that the municipality, or a municipal entity under the municipality's sole control, is likely to be unable for financial reasons to meet its obligations.<sup>278</sup>

The MFMA also provides for mandatory intervention by provincial governments into the affairs of a municipality. If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the provincial executive must promptly:

- (a) request the Municipal Financial Recovery Service-
  - (i) to determine the reasons for the crisis in its financial affairs;
  - (ii) to assess the municipality's financial state;

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<sup>278</sup> Read the MFMA s 138(a)-(h).

- (iii) to prepare an appropriate recovery plan for the municipality;
- (iv) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and
- (v) to submit to the MEC for finance in the province:
  - (aa) the determination and assessment referred to in subparagraphs (i) and (ii) as a matter of urgency; and
  - (bb) the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) within a period, not to exceed 90 days, determined by the MEC for finance; and
- (b) consult the mayor of the municipality to obtain the municipality's co-operation in implementing the recovery plan, including the approval of a budget and legislative measures giving effect to the recovery plan.<sup>279</sup>

The MEC for finance in the province must submit a copy of any request in terms of subsection 139(1)(a) of the MFMA and of any determination and assessment received in terms of subsection 139(1)(a)(v)(aa) of the Act to the municipality, the Cabinet member responsible for local government and the Minister of Finance. A mandatory intervention supersedes any discretionary provincial intervention, provided that any financial recovery plan prepared for the discretionary intervention must continue until replaced by a recovery plan for the mandatory intervention.<sup>280</sup>

The new financial dispensation also provides certain criteria for determining the seriousness or persistent material breach of financial commitments. When determining whether the conditions for a mandatory intervention referred to in section 139 of the MFMA are met, all relevant facts must be considered. The following factors, singly or in combination, may indicate that a municipality is in serious material breach of its obligations to meet its financial commitments:

- (a) The municipality has failed to make any payment to a lender or investor as and when due;
- (b) the municipality has failed to meet a contractual obligation which provides security in terms of section 48 of the MFMA;
- (c) the municipality has failed to make any other payment as and when due, which individually or in the aggregate is more than an amount as may be pre-

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<sup>279</sup> See the MFMA s 139(1)(a)-(b).

<sup>280</sup> See the MFMA s 139(2)-(3).

scribed or, if none is prescribed, more than two per cent of the municipality's budgeted operating expenditure; or

(d) the municipality's failure to meet its financial commitments has impacted, or is likely to impact, on the availability or price of credit to other municipalities.<sup>281</sup>

Any recurring or continuous failure by a municipality to meet its financial commitments which substantially impairs the municipality's ability to procure goods, services or credit on usual commercial terms, may indicate that the municipality is in persistent material breach of its obligations to meet its financial commitments.<sup>282</sup>

In respect of the preparation of a financial recovery plan, the MFMA determines that any suitably qualified person may, on request by the provincial executive, prepare a financial recovery plan for a discretionary provincial intervention referred to in section 137 of the MFMA. Only the Municipal Financial Recovery Service may prepare a financial recovery plan for a mandatory provincial intervention referred to in section 139 of the MFMA. When preparing a financial recovery plan, the person referred to in subsection 141(1) of the Act or the Municipal Financial Recovery Service must:

(a) consult:

- (i) the relevant municipality;
- (ii) the municipality's principal suppliers and creditors, to the extent they can reasonably be contacted;
- (iii) the MEC for finance and the MEC for local government in the province; and
- (iv) organised labour;

(b) take into account:

- (i) any financial recovery plan that has previously been prepared for the municipality; and
- (ii) any proposed financial recovery plan, or proposals for a financial recovery plan, that may be advanced by the municipality or any creditor of the municipality; and

(c) at least 14 days before finalising the plan:

- (i) submit the plan for comment to:

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<sup>281</sup> The MFMA s 140(1)-(2).

<sup>282</sup> Note that s 140(2) and (3) do not apply to disputed obligations to which there are pending legal actions between the municipality and the creditor, provided that such actions are not instituted to avoid an intervention or obligations explicitly waived by the creditor.



- (aa) the municipality;
  - (bb) the MEC for finance and the MEC for local government in the province;
  - (cc) organised local government in the province;
  - (dd) organised labour; and
  - (ee) any supplier or creditor of the municipality, on request; and
- (ii) publish a notice in a newspaper of general circulation in the municipality:
- (aa) stating the place, including any website address, where copies of the plan will be available to the public free of charge or at a reasonable price; and
  - (bb) inviting the local community to submit written comments in respect of the plan.<sup>283</sup>

The person charged with preparing the financial recovery plan or the Municipal Financial Recovery Service must

- consider any comments received
- finalise the financial recovery plan and
- submit the final plan to the MEC for finance in the province for approval in terms of section 143 of the MFMA.<sup>284</sup>

A financial recovery plan must be aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, and such a plan, whether for a mandatory or discretionary intervention, must:

- identify the financial problems of the municipality
- be designed to place the municipality in a sound and sustainable financial condition as soon as possible
- state the principal strategic objectives of the plan, and ways and means for achieving those objectives
- set out a specific strategy for addressing the municipality's financial problems, including a strategy for reducing unnecessary expenditure and increasing the collection of revenue, as may be necessary
- identify the human and financial resources needed to assist in resolving financial problems, and where those resources are proposed to come from

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<sup>283</sup> The MFMA s 141(1)-(3).

<sup>284</sup> Read the MFMA s 141(4)(a)-(c).

- describe the anticipated time frame for financial recovery, and milestones to be achieved and
- identify what actions are necessary for the implementation of the plan, distinguishing between actions to be taken by the municipality and actions to be taken by other parties.<sup>285</sup>

The plan may also:

- provide for the liquidation of specific assets, excluding those needed for the provision of the minimum level of basic municipal services
- provide for debt restructuring or debt relief in accordance with the MFMA
- provide for special measures to prevent unauthorised, irregular and fruitless and wasteful expenditures and other losses and
- identify any actual and potential revenue sources.<sup>286</sup>

In addition, a financial recovery plan

- for a mandatory intervention must
  - (a) set spending limits and revenue targets
  - (b) provide budget parameters which bind the municipality for a specified period or until stated conditions have been met and
  - (c) identify specific revenue-raising measures that are necessary for financial recovery, including the rate at which any municipal tax and tariffs must be set to achieve financial recovery and
- for a discretionary intervention may suggest, for adoption by the municipality,
  - (a) spending limits and revenue targets
  - (b) budget parameters for a specified period or until stated conditions have been met and (c) specific revenue-raising measures that are necessary for financial recovery.<sup>287</sup>

On receipt of a financial recovery plan pursuant to a discretionary intervention, the MEC for local government in the province may approve the recovery plan with or without amendments, as the MEC considers appropriate. On receipt of a financial recovery plan pursuant to a mandatory intervention, the MEC for finance must verify that the process set out in section 141 of the MFMA has been followed and that the

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<sup>285</sup> See the MFMA s 142(1)(a)(i)-(vii).

<sup>286</sup> The MFMA s 142(1)(b)(i)-(iv).

<sup>287</sup> Read the MFMA s 142(2)(a)-(b).

criteria contained in section 142 of the Act are met and if so approve the recovery plan or if not direct what defects must be rectified. The responsible MEC must submit an approved recovery plan to the municipality, the Minister and the Cabinet member responsible for local government, the Auditor-General and organised local government in the province.<sup>288</sup>

The MEC for local government or the MEC for finance in the province may at any time, but subject to section 141(1) and (2) of the MFMA, request any suitably qualified person or the Municipal Financial Recovery Service to prepare an amended financial recovery plan in accordance with the directions of the MEC. Section 141 of the Act, read with such changes as the context may require, apply to the amendment of a financial recovery plan in terms of this section. No amendment of a recovery plan may impede the implementation of any court order made or agreement reached in terms of the plan before the amendment.<sup>289</sup>

If a financial recovery plan was prepared in a discretionary provincial intervention, the municipality must implement the approved recovery plan and report monthly to the MEC for local government in the province on the implementation of the plan, in such manner as the plan may determine. The financial recovery plan binds the municipality in the exercise of its executive authority, but only to the extent to resolve the financial problems of the municipality. If the municipality cannot or does not implement the approved recovery plan, the provincial executive may in terms of section 139(1) or (4) of the Constitution take further appropriate steps to ensure implementation of the plan.<sup>290</sup> If the recovery plan was prepared in a mandatory provincial intervention referred to in section 139 of the MFMA

- the municipality must implement the approved recovery plan
- all revenue, expenditure and budget decisions must be taken within the framework of, and subject to the limitations of, the recovery plan and
- the municipality must report monthly to the MEC for finance in the province on the implementation of the plan in such manner as the plan may determine.

The financial recovery plan binds the municipality in the exercise of both its legislative and executive authority, including the approval of a budget and legislative meas-

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<sup>288</sup> See the MFMA s 143(1)-(3).

<sup>289</sup> See the MFMA s 144(1)-(3).

<sup>290</sup> Note that the Municipal Structures Act ss 34(3) and (4) and 35 apply if a provincial executive dissolves a municipal council in terms of s (3). See also the MFMA s 145(1)-(4).

ures giving effect to the budget, but only to the extent necessary to achieve the objectives of the recovery plan. The provincial executive must in terms of section 139(5)(b) of the Constitution either

- dissolve the council of the municipality, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures necessary to give effect to the recovery plan within the time frames specified in the plan and
  - (a) appoint an administrator until a newly elected council has been declared elected and
  - (b) approve a temporary budget and revenue-raising measures, and other measures to give effect to the recovery plan and to provide for the continued functioning of the municipality.
- assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not take executive measures to give effect to the recovery plan.<sup>291</sup>

At least every three months the MEC for local government or the MEC for finance in a province must review any discretionary provincial intervention referred to in section 137 or any mandatory provincial intervention referred to in section 139 of the MFMA, including progress with resolving the municipality's financial problems and its financial recovery and the effectiveness of any financial recovery plan. He/she must also submit progress reports and a final report on the intervention to the municipality, the Minister, the Cabinet member responsible for local government, the provincial legislature and organised local government in the province.<sup>292</sup> A discretionary intervention must end if it is terminated in terms of section 139(2)(b) of the Constitution or when the municipality is able and willing to fulfil the executive obligation in terms of legislation or the Constitution that gave rise to the intervention and the financial problem that has been caused by or has caused the failure by the municipality to comply with that obligation is resolved.<sup>293</sup> A mandatory intervention must end when the crisis in the municipality's financial affairs has been resolved and the municipality's ability to

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<sup>291</sup> See the MFMA s 146(1)-(4). The Municipal Structures Act ss 34(3) and (4) and 35 apply when a provincial executive dissolves a municipal council in terms of the Constitution s 139(5)(b)(i).

<sup>292</sup> The MEC for local government or the MEC for finance may request the person who prepared the recovery plan, or the Municipal Financial Recovery Service, to assist the MEC in complying with s 147(1). See the MFMA s 147(1)-(2).

<sup>293</sup> The MFMA s 148(1)(a)-(b).

meet its obligations to provide basic services or its financial commitments is secured.<sup>294</sup>

When a provincial intervention ends, the MEC for local government or the MEC for finance in the province must notify:

- (a) the municipality;
- (b) the Minister, in the case of a mandatory intervention;
- (c) the Cabinet member responsible for local government;
- (d) any creditors having pending litigation against the municipality;
- (e) the provincial legislature; and
- (f) organised local government in the province.<sup>295</sup>

In respect of national interventions, the MFMA determines that if the conditions for a provincial intervention in a municipality in terms of section 139(4) or (5) of the Constitution are met and the provincial executive cannot or does not adequately exercise the powers or perform the functions referred to in that section, then the national executive must consult the relevant provincial executive and act or intervene in terms of that section in the stead of the provincial executive. If the national executive intervenes in a municipality in terms of subsection 150(1) of the MFMA, then:

- (a) the national executive assumes for the purposes of the intervention the functions and powers of a provincial executive in terms of this chapter;
- (b) the Minister assumes for the purposes of the intervention the functions and powers of an MEC for finance in terms of this chapter; and
- (c) a reference in this chapter:
  - (i) to a provincial executive must be read as a reference to the national executive;
  - (ii) to an MEC for finance must be read as a reference to the Minister; and
  - (iii) to a provincial intervention must be read as a reference to a national intervention.<sup>296</sup>

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<sup>294</sup> See the MFMA s 148(2)(a)-(b).

<sup>295</sup> Read the MFMA s 148(3)(a)-(f). Note that if a provincial executive intervenes in a municipality in terms of the Constitution s 139, the provincial executive and its representatives have access to such information, records and documents of the municipality or of any municipal entity under the sole or shared control of the municipality as may be necessary for the intervention, including for identifying or resolving the financial problem of the municipality. Refer also to the MFMA s 149.

<sup>296</sup> See the MFMA s 150(1)-(2).

Apart from the possibility of national interventions, the MFMA also protects the rights of third parties. The MFMA determines that, except as expressly provided for in the Act, nothing in the Act limits or affects:

- the rights of any creditor or other person having a claim against a municipality
- any person's access to ordinary legal process in accordance with the common law and relevant legislation or
- the rights of a municipality or municipal entity, or of the parties to a contract with a municipality or municipal entity, to alternative dispute resolution mechanisms, notice procedures and other remedies, processes or procedures.<sup>297</sup>

Furthermore, if a municipality is unable to meet its financial commitments, it may apply to the High Court for an order to stay, for a period not exceeding 90 days, all legal proceedings, including the execution of legal process, by persons claiming money from the municipality or a municipal entity under the sole control of the municipality. Notice of such an application must be given to:

- the MEC for local government and the MEC for finance in the province
- the Minister
- the Cabinet member responsible for local government
- organised local government and
- to the extent that they can reasonably be contacted, all persons to whom the municipality or the municipal entity owes an amount in excess of a prescribed amount, or if no amount is prescribed, in excess of R100 000.<sup>298</sup>

A municipality may also apply to the High Court for an order:

- to stay, for a period not exceeding 90 days at a time, all legal proceedings, including the execution of legal process, by persons claiming money from the municipality
- to suspend the municipality's financial obligations to creditors, or any portion of those obligations, until the municipality can meet those obligations or
- to terminate the municipality's financial obligations to creditors, and to settle claims in accordance with a distribution scheme referred to in section 155.<sup>299</sup>

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<sup>297</sup> The MFMA ss 151(a)-(c).

<sup>298</sup> Note that an application in terms of s 152(1) may for the purposes of the Constitution s 139(5) be regarded as an admission by the municipality that it is unable to meet its financial commitments. See the MFMA s 152(1)-(3).

<sup>299</sup> The MFMA s 153(1)(a)-(c).

The court may make an order in terms of subsection 153(1) of the MFMA only if

- the provincial executive has intervened in terms of section 139 and a financial recovery plan to restore the municipality to financial health has been approved for the municipality
- the financial recovery plan is likely to fail without the protection of such an order
- section 154 of the MFMA has been complied with, in the case of an application for an order referred to in subsection 153(1)(b) and
- section 155(1) has been complied with, in the case of an application for an order referred to in subsection 153(1)(c).<sup>300</sup>

Notice of an application in terms of subsection 153(1) must be given to

- all creditors to whom the municipality owes an amount in excess of a prescribed amount, or if no amount is prescribed, in excess of R100 000, insofar as those creditors can reasonably be contacted
- the MEC for finance and the MEC for local government in the province
- the Minister
- the Cabinet member responsible for local government and
- organised labour.<sup>301</sup>

Before issuing an order in terms of section 153(1)(b) of the MFMA for the suspension of a municipality's financial obligations to creditors, the court must be satisfied that

- the municipality cannot currently meet its financial obligations to creditors and
- all assets not reasonably necessary to sustain effective administration or to provide the minimum level of basic municipal services have been or are to be liquidated in accordance with the approved financial recovery plan for the benefit of meeting creditors' claims.<sup>302</sup>

Before issuing an order for the termination of a municipality's financial obligations to creditors in terms of section 153(1)(c) of the MFMA, the court must be satisfied that

- the municipality cannot meet its financial obligations to its creditors and is not likely to be able to do so in the foreseeable future
- all assets not reasonably necessary to sustain effective administration or to provide the minimum level of basic municipal services have been liquidated in accor-

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<sup>300</sup> The MFMA s 153(2)(a)-(d).

<sup>301</sup> Read the MFMA s 153(3)(a)-(e).

<sup>302</sup> Refer to the MFMA s 154(a)-(b).



dance with the approved financial recovery plan for the benefit of meeting creditors' claims and

- all employees have been discharged except those affordable in terms of reasonably projected revenues as set out in the approved financial recovery plan.

If the court issues an order referred to subsection 155(1) of the Act, the MEC for finance in the province must appoint a trustee to prepare a distribution scheme for the proportional settlement of all legitimate claims against the municipality as at the date of the order. Those claims must be settled against the amount realised from the liquidation of assets referred to in subsection 155(1)(b) of the Act.<sup>303</sup>

A distribution scheme must

- determine the amount available for distribution
- list all creditors with claims which qualify for the purposes of the distribution scheme, indicating which of those are secured and the manner in which they are secured and
- provide for the distribution of the amount available amongst creditors in the following order of preference:
  - (i) First preference must be given to the rights of secured creditors as to the assets with which they are secured in terms of section 48, provided the security in question was given in good faith and at least six months before the mandatory provincial intervention in terms of section 139 began;
  - (ii) thereafter the preferences provided for in the Insolvency Act,<sup>304</sup> read with the necessary changes as the context may require, must be applied; and
  - (iii) thereafter non-preferent claims must be settled in proportion to the amount of the different claims.<sup>305</sup>

The Minister, acting with the concurrence of the Cabinet member responsible for local government, must by regulation in terms of section 168 of the MFMA provide for an equitable process for the recognition of claims against a municipality for the purposes of sharing in a distribution scheme, provided that rejection of any claim does not prevent a creditor from proving the claim in a court and provide for public

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<sup>303</sup> See the MFMA s 155(1)-(2).

<sup>304</sup> 24 of 1936.

<sup>305</sup> Note that a distribution scheme may not be implemented unless approved by the court. See the MFMA s 155(3)-(4).

access to a distribution scheme.<sup>306</sup> The MFMA also establishes a so-called Municipal Financial Recovery Service (MFRS). According to section 157 of the Act a Municipal Financial Recovery Service is established as an institution within the public service. The Municipal Financial Recovery Service forms part of, and functions within, the National Treasury.<sup>307</sup> The Municipal Financial Recovery Service:

- must perform the duties and may exercise the powers assigned to the Service in terms of this Act
- may, on request by the MEC for finance in a province, prepare a financial recovery plan for a municipality or, with the approval of the Director-General of the National Treasury, instruct any suitably qualified person to prepare the plan in accordance with the directions of the Service
- may, on request by the MEC for finance in the province, monitor the implementation of any financial recovery plans that it has prepared, and may recommend such amendments and revisions as are appropriate
- may, on request by any municipality that is experiencing financial problems, and in co-ordination with any other provincial or national efforts, assist the municipality to identify the causes of, and potential solutions for, these financial problems
- may, with the approval of the Director-General of the National Treasury, obtain the services of any financial expert to perform any specific work for the Service; and
- may collect information on municipal financial problems and on best practices in resolving such problems.<sup>308</sup>

It is the responsibility of the Minister of Finance to appoint a person as the Head of the MFRS, subject to subsection 159(2) of the MFMA and legislation governing the public service. A person appointed as the Head of the Service holds office in the National Treasury on terms and conditions set out in a written employment contract, which must include terms and conditions setting performance standards.<sup>309</sup> The Head of the Service is responsible for the performance by the Service of its functions and the exercise of its powers and takes all decisions of the Service in the performance of its functions and the exercise of its powers, except those decisions of the

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<sup>306</sup> The MFMA s 156(a)-(b).

<sup>307</sup> Read the MFMA s 157(1)-(2).

<sup>308</sup> See the MFMA s 158(a)-(f).

<sup>309</sup> The MFMA s 159(1)-(2).

Service taken in consequence of a delegation in terms of section 162 of the Act.<sup>310</sup> The staff of the Municipal Financial Recovery Service consists of the Head of the Service, persons in the service of or contracted by the National Treasury and designated by the Director-General of the National Treasury for the work of the Service and persons seconded from an organ of state or organisation to the Service by agreement between the Director-General and that organ of state or organisation.<sup>311</sup> Finally, the Head of the Service may delegate any of the powers or duties of the Service to a member of the staff of the Service. Such a delegation must be in writing, is subject to the limitations or conditions which the Head of the Service may impose and does not divest the Head of the Service of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty. The Head of the Service may confirm, vary or revoke any decision taken in consequence of a delegation in terms of subsection 162(1), provided that no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.<sup>312</sup>

**(m) General treasury matters, financial misconduct and miscellaneous provisions**

No municipality or municipal entity may incur a liability or risk payable in a foreign currency. Subsection 163(1) does not apply to debt regulated in terms of section 47 of the MFMA or to the procurement of goods or services denominated in a foreign currency but the Rand value of which is determined at the time of procurement or, where this is not possible and risk is low, at the time of payment.<sup>313</sup> Furthermore, no municipality or municipal entity may:

- conduct any commercial activities
  - (a) otherwise than in the exercise of the powers and functions assigned to it in terms of the Constitution or national or provincial legislation
  - (b) outside the borders of the Republic
- provide a municipal service in an area outside its jurisdiction except with the approval of the council of the municipality having jurisdiction in that area or

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<sup>310</sup> Note that the Head of the Service performs the functions of office subject to the directions of the Director-General of the National Treasury. Read the MFMA s 160(1)-(2).

<sup>311</sup> Refer to the MFMA s 161(a)-(c).

<sup>312</sup> Read the MFMA s 162(1)-(3).

<sup>313</sup> The MFMA s 163(1)-(2).

- make loans to
  - (a) councillors or officials of the municipality;
  - (b) directors or officials of the entity or
  - (c) members of the public.<sup>314</sup>

Each municipality and each municipal entity must have an internal audit unit, subject to subsection 165(3) of the MFMA. The internal audit unit of a municipality or municipal entity must:

- prepare a risk-based audit plan and an internal audit program for each financial year
- advise the accounting officer and report to the audit committee on the implementation of the internal audit plan and matters relating to internal audit, internal controls, accounting procedures and practices, risk and risk management, performance management, loss control and compliance with the MFMA, the annual Division of Revenue Act and any other applicable legislation and
- perform such other duties as may be assigned to it by the accounting officer.<sup>315</sup>

Apart from an internal audit unit, each municipality and each municipal entity must have an audit committee, subject to subsection 166(6) of the MFMA. An audit committee is an independent advisory body which must:

- advise the municipal council, the political office-bearers, the accounting officer and the management staff of the municipality or the board of directors, the accounting officer and the management staff of the municipal entity on matters relating to:
  - (a) internal financial control and internal audits
  - (b) risk management
  - (c) accounting policies
  - (d) the adequacy, reliability and accuracy of financial reporting and information
  - (e) performance management
  - (f) effective governance

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<sup>314</sup> Note that if on the date on which this section takes effect a municipality or municipal entity is engaged in any activity prohibited by s 164(1)(a) or (b) and which is otherwise lawful, the municipality or entity must take all reasonable steps to rectify its position and to comply with that subsection as soon as may be reasonable in the circumstances. See the MFMA s 164(1)-(2).

<sup>315</sup> The internal audit function may be outsourced if the municipality or municipal entity requires assistance to develop its internal capacity and the council of the municipality or the board of directors of the entity has determined that this is feasible or cost-effective. Read the MFMA s 165(1)-(3).

- (g) compliance with this Act, the annual Division of Revenue Act and any other applicable legislation
- (h) performance evaluation and
- (i) any other issues referred to it by the municipality or municipal entity
- review the annual financial statements to provide the council of the municipality or, in the case of a municipal entity, the council of the parent municipality and the board of directors of the entity, with an authoritative and credible view of the financial position of the municipality or municipal entity, its efficiency and effectiveness and its overall level of compliance with this Act, the annual Division of Revenue Act and any other applicable legislation
- respond to the council on any issues raised by the Auditor-General in the audit report
- carry out such investigations into the financial affairs of the municipality or municipal entity as the council of the municipality, or in the case of a municipal entity, the council of the parent municipality or the board of directors of the entity may request and
- perform such other functions as may be prescribed.<sup>316</sup>

In performing its functions, an audit committee has access to the financial records and other relevant information of the municipality or municipal entity and must liaise with the internal audit unit of the municipality and the person designated by the Auditor-General to audit the financial statements of the municipality or municipal entity. An audit committee must also consist of at least three persons with appropriate experience, of whom the majority may not be in the employ of the municipality or municipal entity and meet as often as is required to perform its functions, but at least four times a year.<sup>317</sup>

A municipality may remunerate its political office-bearers and members of its political structures, but only within the framework of the Public Office-Bearers Act,<sup>318</sup>

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<sup>316</sup> The MFMA s 166(1)-(2).

<sup>317</sup> Note that the members of an audit committee must be appointed by the council of the municipality or, in the case of a municipal entity, by the council of the parent municipality. One of the members who is not in the employ of the municipality or municipal entity must be appointed as the chairperson of the committee. No councillor may be a member of an audit committee. Furthermore, a single audit committee may be established for a district municipality and the local municipalities within that district municipality and a municipality and municipal entities under its sole control. See the MFMA s 166(3)-(6).

<sup>318</sup> 20 of 1998.

setting the upper limits of the salaries, allowances and benefits for those political office-bearers and members and in accordance with section 219(4) of the Constitution. Any remuneration paid or given in cash or in kind to a person as a political office-bearer or as a member of a political structure of a municipality otherwise than in accordance with subsection 167(1) of the MFMA, including any bonus, bursary, loan, advance or other benefit, is an irregular expenditure, and the municipality must, and has the right to, recover that remuneration from the political office-bearer or member and may not write off any expenditure incurred by the municipality in paying or giving that remuneration.<sup>319</sup>

Relating to treasury regulations and guidelines, the MFMA determines that the Minister of Finance, acting with the concurrence of the Cabinet member responsible for local government, may make regulations or guidelines applicable to municipalities and municipal entities, regarding:

- (a) any matter that may be prescribed in terms of this act;
- (b) financial management and internal control;
- (c) a framework for regulating the exercise of municipal fiscal and tariff-fixing powers;
- (d) a framework regulating the financial commitments of municipalities and municipal entities in terms of public-private partnership agreements;
- (e) the establishment by municipalities of, and control over-
  - (i) municipal entities; and
  - (ii) business units contemplated in section 76(a)(ii) of the Municipal Systems Act;
- (f) the safe-guarding of the financial affairs of municipalities and of municipal entities when assets, liabilities or staff are transferred from or to a municipality or a municipal entity;
- (g) the alienation, letting or disposal of assets by municipalities or municipal entities;
- (h) internal audit units and their functioning;

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<sup>319</sup> See the MFMA s 167(1)-(3). The MEC for local government in a province must report to the provincial legislature any transgressions of ss 167(1) and any non-compliance with the MFMA ss 17(3)(k)(i) and (ii) and 124(1)(a).

- (i) the information to be disclosed when municipalities or municipal entities issue or incur debt and the manner in which such information must be disclosed, including by way of a prospectus or other document;
- (j) the circumstances under which further or specific disclosures are required after money has been borrowed by a municipality or municipal entity;
- (k) the circumstances under which documentation or information pertaining to municipal debt must be lodged or registered;
- (l) the establishment of a registry for the registration of documentation and information pertaining to municipal borrowing;
- (m) the settlement of claims against a municipality following an order of court in terms of section 153;
- (n) the information that must be placed on the websites of municipalities;
- (o) a framework regulating investments by municipal entities; and
- (p) any other matter that may facilitate the enforcement and administration of this act.<sup>320</sup>

A regulation or guideline may:

- differentiate between different
  - (a) kinds of municipality, which may, for the purposes of this section, be defined either in relation to categories, types or budgetary size of municipalities or in any other manner
  - (b) categories of municipal entity
  - (c) categories of accounting officer or
  - (d) categories of official or
- may be limited in its application to a particular:
  - (a) kind of municipality, which may, for the purposes of this section, be defined either in relation to a category, type or budgetary size of municipality or in any other manner
  - (b) category of municipal entity
  - (c) category of accounting officer or
  - (d) category of official.<sup>321</sup>

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<sup>320</sup> the MFMA s 168(1)(a)-(p).

<sup>321</sup> The MFMA s 168(2)(a)-(b). No guidelines issued in terms of ss (1) are binding on a municipality unless adopted by its council or a municipal entity unless adopted by the council of the entity's parent municipality. The MFMA s 168(3)(a)-(b).



Before regulations in terms of section 168 of the MFMA are promulgated, the Minister must consult organised local government on the substance of those regulations and publish the draft regulations in the *Government Gazette* for public comment. Regulations made must be submitted to Parliament for parliamentary scrutiny at least 30 days before their promulgation.<sup>322</sup> The National Treasury may on good grounds approve a departure from a treasury regulation or from any condition imposed in terms of the Act. Non-compliance with a regulation or with a condition imposed by the National Treasury in terms of the Act may, on good grounds shown, be condoned by the Treasury.<sup>323</sup>

The MFMA also provides for aspects regarding the financial misconduct by municipal officials and entities. The Act thus provides that the accounting officer of a municipality commits an Act of financial misconduct if that accounting officer deliberately or negligently:

- (a) contravenes a provision of the act;
- (b) fails to comply with a duty imposed by a provision of the act on the accounting officer of a municipality;
- (c) makes or permits, or instructs another official of the municipality to make, an unauthorised, irregular or fruitless and wasteful expenditure; or
- (d) provides incorrect or misleading information in any document which in terms of a requirement of the act must be (i) submitted to the mayor or the council of the municipality, or to the Auditor-General, the National Treasury or other organ of state; or (ii) made public.<sup>324</sup>

Furthermore, the chief financial officer of a municipality commits an act of financial misconduct if that officer deliberately or negligently:

- (a) fails to carry out a duty delegated to that officer in terms of section 79 or 81(1)(e) of the MFMA;
- (b) contravenes or fails to comply with a condition of any delegation of a power or duty in terms of section 79 or 81(1)(e) of the MFMA;
- (c) makes or permits, or instructs another official of the municipality to make, an unauthorised, irregular or fruitless and wasteful expenditure; or

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<sup>322</sup> Read the MFMA s 169(1)-(2).

<sup>323</sup> The MFMA s 170(1)-(2).

<sup>324</sup> See the MFMA s 171(1)(a)-(d).

(d) provides incorrect or misleading information to the accounting officer for the purposes of a document referred to in subsection 171(1)(d) of the MFMA.<sup>325</sup>

A senior manager or other official of a municipality exercising financial management responsibilities and to whom a power or duty was delegated in terms of section 79 of the MFMA commits an act of financial misconduct if that senior manager or official deliberately or negligently:

- fails to carry out the delegated duty
- contravenes or fails to comply with a condition of the delegated power or duty
- makes an unauthorised, irregular or fruitless and wasteful expenditure or
- provides incorrect or misleading information to the accounting officer for the purposes of a document referred to in subsection 171(1)(d) of the Act.

A municipality must investigate allegations of financial misconduct against the accounting officer, the chief financial officer, a senior manager or other official of the municipality unless those allegations are frivolous, vexatious, speculative or obviously unfounded. If the investigation warrants such a step, a municipality must institute disciplinary proceedings against the accounting officer, chief financial officer or that senior manager or other official in accordance with systems and procedures referred to in section 67 of the Municipal Systems Act, read with Schedule 2 of that Act.<sup>326</sup>

In respect of offences, it is determined that the accounting officer of a municipality is guilty of an offence if that accounting officer:

- deliberately or in a grossly negligent way:
  - (a) contravenes or fails to comply with a provision of section 61(2)(b), 62(1), 63(2)(a) or (c), 64(2)(a) or (d) or 65(2)(a), (b), (c), (d), (f) or (i) of the MFMA
  - (b) fails to take reasonable steps to implement the municipality's supply chain management policy referred to in section 111
  - (c) fails to take all reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure or
  - (d) fails to take all reasonable steps to prevent corruptive practices:
    - (i) in the management of the municipality's assets or receipt of money or

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<sup>325</sup> Read the MFMA s 171(2)(a)-(d).

<sup>326</sup> See the MFMA s 171(3)-(4). Similar requirements have been laid down regarding financial misconduct by officials of municipal entities. See the MFMA s 172(1)-(4).

(ii) in the implementation of the municipality's supply chain management policy

- deliberately misleads or withholds information from the Auditor-General on any bank accounts of the municipality or on money received or spent by the municipality or
- deliberately provides false or misleading information in any document which in terms of a requirement of this Act must be:
  - (a) submitted to the Auditor-General, the National Treasury or any other organ of state or
  - (b) made public.<sup>327</sup>

A senior manager or other official of a municipality or municipal entity exercising financial management responsibilities and to whom a power or duty was delegated in terms of section 79 or 106 of the MFMA is guilty of an offence if that senior manager or official deliberately or in a grossly negligent way contravenes or fails to comply with a condition of the delegation. A councillor of a municipality is guilty of an offence if that councillor:

- (a) deliberately influences or attempts to influence the accounting officer, the chief financial officer, a senior manager or any other official of the municipality to contravene a provision of the act or to refrain from complying with a requirement of the act;
- (b) interferes in the financial management responsibilities or functions assigned in terms of the act to the accounting officer of the municipality or delegated to the chief financial officer of the municipality in terms of the act;
- (c) interferes in the financial management responsibilities or functions assigned in terms of the act to the accounting officer of a municipal entity under the sole or shared control of the municipality; or
- (d) interferes in the management or operational activities of a municipal entity under the sole or shared control of the municipality.<sup>328</sup>

A councillor, an official of a municipality or municipal entity, a member of the board of directors of a municipal entity or any other person is guilty of an offence if that per

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<sup>327</sup> See the MFMA s 173(1)(a)-(c). Similar offences are created for the accounting officer of a municipal entity. See the MFMA s 173(2)(a)-(c).

<sup>328</sup> See the MFMA s 173(2).

son deliberately or in a grossly negligent way:

- impedes an accounting officer from complying with a provision of the Act
- gives incorrect, untrue or misleading information material to an investment decision relating to borrowing by a municipality or municipal entity
- makes a withdrawal in contravention of section 11 of the MFMA
- fails to comply with section 49 of the Act
- contravenes a provision of section 115(2), 118 or 126(5) of the Act or
- provides false or misleading information for the purposes of any document which must in terms of a requirement of the Act be:
  - (a) submitted to the council, mayor or accounting officer of a municipality or to the Auditor-General or the National Treasury or
  - (b) made public.<sup>329</sup>

A person is liable on conviction of an offence in terms of section 173 of the MFMA to imprisonment for a period not exceeding five years or to an appropriate fine determined in terms of applicable legislation.<sup>330</sup>

The Minister, acting with the concurrence of the Cabinet member responsible for local government, may make regulations prescribing:

- (a) the manner, form and circumstances in which allegations and disciplinary and criminal charges of financial misconduct must be reported to the National Treasury, the MEC for local government in the province and the Auditor-General, including (i) particulars of the alleged financial misconduct; and (ii) steps taken in connection with such financial misconduct;
- (b) matters relating to internal investigations by municipalities and municipal entities of allegations of financial misconduct;
- (c) the circumstances in which the National Treasury or the MEC for local government in the province may direct that disciplinary steps be taken or criminal charges be laid against a person for financial misconduct;
- (d) criteria for the composition and functioning of a disciplinary board which hears a charge of financial misconduct;

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<sup>329</sup> Refer to the MFMA s 173(3)-(5).

<sup>330</sup> The MFMA s 174.

- (e) the circumstances in which the findings of a disciplinary board and any sanctions imposed by the board must be reported to the National Treasury, the MEC for local government in the province and the Auditor-General; and
- (f) any other matters to the extent necessary to enforce the provisions of the act.

A regulation in terms of subsection (1) may:

- differentiate between different:
  - (a) kinds of municipality, which may, for the purposes of this section, be defined either in relation to categories, types or budgetary size of municipalities or in any other manner
  - (b) categories of municipal entity
  - (c) categories of accounting officer or
  - (d) categories of other official or
- be limited in its application to a particular:
  - (a) kind of municipality, which may, for the purposes of this section, be defined either in relation to a category, type or budgetary size of municipality or in any other manner
  - (b) category of municipal entity
  - (c) category of accounting officer or
  - (d) category of other official.<sup>331</sup>

No municipality or any of its political structures, political office-bearers or officials, no municipal entity or its board of directors or any of its directors or officials and no other organ of state or person exercising a power or performing a function in terms of the MFMA is liable in respect of any loss or damage resulting from the exercise of that power or the performance of that function in good faith. Without limiting liability in terms of the common law or other legislation, a municipality may recover from a political office-bearer or official of the municipality, and a municipal entity may recover from a director or official of the entity, any loss or damage suffered by it because of the deliberate or negligent unlawful actions of that political office-bearer or official when performing a function of office.<sup>332</sup> Various cases concerning the recovery of damages caused by municipal office bearers or political representatives have

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<sup>331</sup> Read the MFMA s 175(a)-(b).

<sup>332</sup> Refer to the MFMA s 176(1)-(2).

already been decided. On this point, the new legal system has significantly increased and enhanced the accountability of municipal politicians and officials.<sup>333</sup>

The Minister may by notice in the *Gazette*:

- delay the implementation of a provision of the Act for a transitional period not exceeding five years from the date when this section takes effect or
- where practicalities impede the strict application of a specific provision of the Act, exempt any municipality or municipal entity from, or in respect of, such provision for a period and on conditions determined in the notice. A delay or exemption in terms of subsection (1) may:
  - (a) apply to:
    - (i) municipalities generally; or
    - (ii) municipal entities generally; or
  - (b) be limited in its application to a particular-
    - (i) municipality;
    - (ii) kind of municipality, which may, for the purposes of this section, be defined either in relation to a category, type or budgetary size of municipality or in any other manner;
    - (iii) municipal entity; or
    - (iv) category of municipal entities.<sup>334</sup>

To facilitate the restructuring of the electricity industry as authorised by the Cabinet member responsible for such restructuring, the Minister, acting with the concurrence of the Cabinet member responsible for local government and after consultation with organised local government, may, by notice in the *Gazette*, exempt any municipality or municipal entity from any specific provision of the MFMA for a period of not more than four years and on conditions determined in the notice, provided that such ex-

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<sup>333</sup> See, eg, the case of *Moodley v Umzinto North Town Board* 1998 (2) SA 188 (SCA). In this case the town treasurer made certain investments on behalf of the Town Board. A claim for damages was instituted against him for the recovery of R300 000, which was lost as a result of an investment in a company which was subsequently liquidated. In his defence, the treasurer argued that his liability was exempted by virtue of the Local Authorities Ordinance 25 of 1974 (N) s 99, which stated that an official of a council, acting under the direction of the council and in the scope of his authority, could not be held liable for losses incurred. The court found that the treasurer exceeded his authority, however, and thus rendered himself vulnerable. He could not rescue himself by simply stating that he had acted within the course of his employment. See paras G-I at 194.

<sup>334</sup> The MFMA s 177(1)-(2).

emption may not be understood as obligating any municipality to transfer any staff, assets or liabilities.<sup>335</sup>

#### **(n) Transitional provisions and the amendment of other legislation**

The MFMA specifically determines that anything done in terms of a provision repealed by section 179(1) of the Act, which can be done in terms of a provision of the Act, must be regarded as having been done in terms of the Act. Within three months of the date on which this section takes effect, all municipalities must submit to the National Treasury a list of:

- all corporate entities in which the municipality or a municipal entity under its sole or shared control has an interest, specifying:
  - (a) the name and address of the corporate entity
  - (b) the purpose, extent and other particulars of the interest
  - (c) if such corporate entity is a municipal entity, whether the entity is under the sole or shared control of the municipality and
  - (d) such other information as may be required by the National Treasury
- all public-private partnerships to which the municipality is a party, with a value of more than one million Rands in total or per annum, specifying:
  - (a) the name and physical address of the private party participating in the public-private partnership
  - (b) the purpose and other particulars of the public-private partnership and
  - (c) such other information as may be required by the National Treasury and
- all other types of contract of the municipality for a period beyond 1 January 2007 and with a value of more than one million Rands in total or per annum.<sup>336</sup>

According to the new financial system for local government in South Africa and subject to the provisions of the supreme Constitution, parliament is confirmed as the highest legislature as far as public finance in general is concerned. In this regard, parliament will and has already enacted various pieces of legislation which affect the financial affairs of all three spheres of government. Some of these legislative enact-

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<sup>335</sup> See the MFMA s 177(3).

<sup>336</sup> See the MFMA s 178(1)-(2). Note that the legislation referred to in the second column of the schedule to the MFMA is hereby amended or repealed to the extent indicated in the third column of the schedule. Despite the repeal of s 10G of the LGTA 209 of 1993 by s 179(1) of this section, the provisions contained in ss (6), (6A) and (7) of s 10G remain in force until the legislation envisaged in the Constitution s 229(2)(b) is enacted. The repeal of the Municipal Accountants Act 21 of 1988 takes effect on a date determined by the Minister by notice in the *Gazette*.



ments were put in place before the new constitutional dispensation commenced, and others have recently been finalised by parliament.<sup>337</sup> Many Acts passed by parliament before the new Constitution took effect still affect the financial affairs of local governments today. In many instances, such Acts still compel municipalities to undertake specific functions, with or without financial assistance.<sup>338</sup>

### **18.3.2 Provincial control over municipal financial matters**

Before the former provincial councils were abolished in July 1986, all of them passed various ordinances which, *inter alia*, contained important provisions regarding the financial management and financial affairs of local authorities within their territories.<sup>339</sup> Many of these ordinances have not yet been repealed or replaced and, in accordance with the Constitution, they still remain in force and effect. It is submitted that all legislatures, especially parliament, should take cognisance of the laws that are still in place and should ensure that no duplication or lacunas in the law occur when new laws are promulgated.

### **18.3.3 Financial control by local authorities**

Apart from the control over municipal finance by the two higher spheres of government, each local government has also been afforded significant powers and duties concerning the management and control of its own financial affairs. Arguably the most important local control mechanism is the passing and implementation of municipal by-laws on financial matters. The existence and scope of such by-laws must be passed in each specific case and must be in compliance with the general legal requirements relevant and applicable to the lawful enactment of municipal legislative authority.

## **18.4 General comments on the principles relating to municipal fiscal management**

In view of all the activities and functions of municipalities, it is submitted that municipal fiscal management is a vast and complicated exercise. There are many aspects

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<sup>337</sup> Reference should again be made to the Constitution Sch 6 Item 2, which provides that all legislation which was in force when the new Constitution became effective will continue to be in force until amended or if such legislation is inconsistent with the Constitution.

<sup>338</sup> See, eg, the Health Act 63 of 1977, which compels local authorities to perform specific health services. Refer also to the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>339</sup> See Cloete (1997) 116. The most important ordinances are the Local Authorities Ordinance, 1974 (O 25 of 1974) applicable in the former province of Natal; Local Government Ordinance, 1939 (O 17 of 1939) applicable in the former Transvaal province; Local Government Ordinance, 1962 (O

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in relation to financial management that must be fulfilled, and the overall financial system consists of a number of distinct and important activities. Some of such activities are summarised briefly below.

#### **18.4.1 *Municipal budgeting***

One of the most important financial activities of each municipal government is the annual preparation of a municipal budget. Before the commencement of the new local government dispensation, the preparation and handling of all municipal budgets were controlled by various provincial ordinances. Although such ordinances are still applicable in the new dispensation, they are subject to the new constitutional requirements and demands of new order national and provincial legislation. In the past a municipal budget had to be prepared for 12 months for all municipalities, but the budget procedures differed from one province to another because of the different legislative provisions. Every municipality should realise that its municipal budget is regarded as the foremost financial statement of the municipality, as it reflects the financial capacity and state of affairs within the municipality. It was general practice in the past for the municipal executive to prepare and submit a municipal budget. In practice the former town clerk in co-operation with the city treasurer prepared draft sections of the budget and then submitted them to a council-in-committee. Only once such a council-in-committee has considered the draft budget is it formally discussed and approved by the council. Such council meeting was usually open to the public.<sup>340</sup> The MFMA now determines and regulates the main aspects of a municipal budget.

#### **18.4.2 *Financial records, auditing and financial management***

It is imperative for all municipalities to keep proper records of all its financial affairs. This was also the position under the former provincial ordinances and is continued under the new local government system. Apart from the financial records, municipalities must also submit their accounts for proper auditing procedures. Previously, auditing had to be undertaken by the Auditor-General or by auditors that were registered in terms of the Public Accountants and Auditors Act.<sup>341</sup> More specific

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8 of 1962) applicable in the Free State and Municipal Ordinance, 1974 (O 29 of 1974), which applied in the Cape Province.

<sup>340</sup> See Cloete (1997) 118. The writer mentions that some of the former ordinances specifically prescribed that the budgets had to be open for inspection by the public. According to the Constitution s 215(1) all budgetary processes must promote transparency.

<sup>341</sup> 80 of 1991.

details regarding the auditing procedures, as well as the duties and responsibilities of auditors of municipal accounts, were contained in the relevant provincial ordinances. Under the new local government system, both parliament and the provincial legislatures are required to enact legislation to deal with municipal financial affairs.<sup>342</sup>

#### **18.4.3 Municipal expenditure**

It is self evident that all municipalities have enormous expenses in order to fulfil their duties and perform their functions. All municipalities therefore use funds from their revenue accounts to purchase materials and equipment and to employ personnel.<sup>343</sup>

All former provincial ordinances had specific requirements regarding the expenditure of municipalities in each province, which laws must now be read together with both national and provincial laws dealing with such issues.

#### **18.4.4 Loan funds, stocks and capital goods**

In order to perform their functions, many municipalities are forced to take up certain loans. Often municipalities do not have sufficient income to pay for extensive developments or infrastructure upgrading. In the past the powers of municipalities to negotiate and raise loans were strictly controlled in terms of the provisions of the relevant provincial ordinances.<sup>344</sup> Strict control over loans by municipalities is essential to safeguard the public and future residents of a particular municipal jurisdiction from negative loan-repayment obligations and unpopular service fees increases. Loans can also be negotiated as bank overdrafts or by issuing stocks or debentures. In order to prevent maladministration and ineffective financial control, municipalities are nowadays required to keep and prepare separate budgets for loan funds. This was also the position in the former local government dispensation.<sup>345</sup> It is also a common occurrence that many municipalities have extensive pieces of land at their disposal which land can be sold. One must, however, remember that such land is regarded as public property that belongs to the general public or residents of that municipal area and may thus be disposed of only by the municipality under strict control. In general

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<sup>342</sup> Again one should remember that the Constitution Sch 6 provides for the continuation of 'old order legislation' subject to amendment and consistency with the Constitution.

<sup>343</sup> In general about 30% of revenue is spent on materials and equipment, 35% on salaries and allowances and 25% on interest on loans.

<sup>344</sup> See, eg, the Provincial Ordinances read together with other national legislative enactments such as the Health Act 63 of 1984 and the Housing Act 4 of 1966.

<sup>345</sup> See, eg, the Transvaal Municipal Consolidated Loans Fund Ordinance, O 9 of 1952.

municipalities have the authority to buy, sell or even expropriate land should such expropriation be essential in rendering a municipal/public service.

#### **18.4.5 Municipal credit control and debt collection**

It is of obvious importance, especially for the long-term financial viability of all municipalities, to collect revenues due to them effectively. Such effective collection programmes presupposes that appropriate credit control mechanisms must be established. As a first step, all municipalities must be able to measure the number of services that they must render and bill their consumers accordingly. It is essential that consumers receive regular and accurate bills for the services rendered to them in a format which is easy and clear to understand. Municipalities must also establish mechanisms to enable poor households to apply and qualify for rebates on service charges. Effective measures should be in place, however, to deal with those households or consumers who can afford to pay for services but neglect to do so timeously. It is of fundamental importance that municipalities retain the authority to discontinue certain services to consumers who do not fulfil their responsibilities to their relevant municipalities. Strict credit control measures are thus essential for municipalities to maintain effective and equitable financial management practices. It is this writer's submission that the new legal order adequately addresses such requirements.

Under the new local government legal system, various legislative provisions have been enacted in order to ensure effective credit control and debt collection measures. According to the Local Government: Municipal Systems Act,<sup>346</sup> various requirements have been laid down to enhance effective credit control and municipal debt collection. The measures are briefly discussed below.

##### **18.4.5.1 Customer care and management**

Municipalities are obligated within their financial and administrative capacities and in relation to the levying of rates and other taxes and the charging of fees for municipal services to establish, provide and ensure specific aspects. These aspects are:<sup>347</sup>

- (a) establish a sound customer management system that aims to create a positive and reciprocal relationship between persons liable for these payments and the municipality, and where applicable, a service provider;

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<sup>346</sup> 32 of 2000.

<sup>347</sup> See the Systems Act s 95(a)-(i).

- (b) establish mechanisms for users of services and ratepayers to give feedback to the municipality or other service provider regarding the quality of the services and the performance of the service provider;
- (c) take reasonable steps to ensure that users of services are informed of the costs involved in service provision, the reasons for the payment of service fees, and the manner in which monies raised from the service are utilised;
- (d) where the consumption of services has to be measured, take reasonable steps to ensure that the consumption by individual users of services is measured through accurate and verifiable metering systems;
- (e) ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due;
- (f) provide accessible mechanisms for those persons to query or verify accounts and metered consumption, and appeal procedures which allow such persons to receive prompt redress for inaccurate accounts;
- (g) provide accessible mechanisms for dealing with complaints from such persons, together with prompt replies and corrective action by the municipality;
- (h) provide mechanisms to monitor the response time and efficiency in complying with paragraph (g); and
- (i) provide accessible pay points and other mechanisms for settling accounts or for making pre-payments for services.

It is clear from these requirements that the legislator intended that all municipalities create a financial system that is directed at effective and sufficient service provision but which also provides for customer care and public involvement in respect of municipal rates, taxes and service charges.

#### **18.4.5.2 Debt collection and credit control policy**

Without a system in place which can ensure effective debt collection, all municipalities will encounter financial restraints in varying degrees. In light of the fact that municipal income is dependent largely on regular and up-to-date payment for services rendered, every municipality must provide and enforce proper debt collection procedures. According to the new legislative framework, all municipalities must collect all money that is due and payable to them. This obligation is subject to the provisions of applicable legislation. Furthermore, all municipalities, for the purpose of debt collection, must adopt, maintain and implement a credit-control and debt-collection policy which is consistent with their rates and tariffs policies and which complies with the

provisions of the Municipal Systems Act.<sup>348</sup> There is thus a clear and direct responsibility on municipalities to collect debt and to do so in a clear and informative manner. It is further also provided that the contents of a credit control and debt collection policy must provide for various issues.<sup>349</sup> The policy must include at least the following:

- (a) credit control procedures and mechanisms;
- (b) debt collection procedures and mechanisms;
- (c) provision for indigent debtors that is consistent with its rates and tariff policies and any national policy on indigents;
- (d) realistic targets consistent with-
  - (i) general recognised accounting practices and collection ratios; and
  - (ii) the estimates of income set in the budget less an acceptable provision for bad debts;
- (e) interest on arrears, where appropriate;
- (f) extensions of time for payment of accounts;
- (g) termination of services or the restriction of the provision of services when payments are in arrears;
- (h) matters relating to unauthorised consumption of services, theft and damages; and
- (i) any other matters that may be prescribed by regulation in terms of section 104 of the Systems Act.

Apart from the minimum requirements mentioned above, it is important to note that the policy may differentiate between different categories of ratepayer, user of services, debtor, tax, service, service standard and other matter, as long as the differentiation does not amount to unfair discrimination. It seems that the intention is to give municipalities a broad discretion to differentiate between different municipal debtors. In this respect, emphasis should again be placed on the provisions of the Constitution, which in section 9 of the Bill of Rights outlaws unfair discrimination. Where municipalities thus differentiate between municipal debtors, such differentiation must

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<sup>348</sup> See the Systems Act s 96(a)-(b).

<sup>349</sup> Refer to the Systems Act s 97.

be lawful under the Constitution and may not amount to unfair discrimination.<sup>350</sup> To ensure the effective application and enforcement of a municipal credit control and debt collection policy, municipalities are obligated to adopt by-laws to give effect to such policies.<sup>351</sup> Again provision is made that such by-laws may differentiate between categories of municipal debtor, as long as such differentiation does not amount to unfair discrimination. It is submitted that an evaluation of a policy, whether it amounts to unfair discrimination or not, requires an objective assessment of the relevant circumstances of each case.<sup>352</sup>

#### 18.4.5.3 Supervisory and implementing authority

According to the new legislative framework, specific provision is made for the supervisory and implementing authority of a municipality's credit control and debt collection policy and by-laws. The Systems Act specifically determines that a municipality's executive committee or executive mayor, or if there is no executive committee or executive mayor, then the municipal council itself or a committee appointed by the council, is designated as the supervisory authority and must oversee and monitor the implementation and enforcement of the municipality's credit control and debt collec-

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<sup>350</sup> See the Systems Act s 97(2), read together with the Constitution s 9. Many precedents have also been established in dealing with aspects concerning whether or not particular differentiation practices amounted to unconstitutional conduct.

<sup>351</sup> See the Systems Act s 98(1) and (2).

<sup>352</sup> Debt collection has always been a contentious issue and has often been the focus of legal disputes. Various cases concerning issues of municipal debt collection were reported in recent years. In *Cape Town Transitional Metropolitan Substructure v ILCO Homes Ltd* 1996 (3) SA 492 (C) the court was faced with legal proceedings in terms of the Municipal Ordinance 20 of 1974 (C) s 93(1) for the recovery of rates. The section required authorisation by the Administrator or Premier of the province to institute legal proceedings after the expiration of a period of 12 months from the date upon which the rates became due and payable. It was held that such authorisation could be given before or after the expiration date. Authorisation could further be given after the institution of legal proceedings and could thus be ratified. In *Midrand/Rabie Ridge/Ivory Park Metro Substructure v Lanmer (Pty) Ltd* 2001 (2) SA 516 (T) the court was faced with the issue concerning the recovery of interest on outstanding rates. With reference to debt due to a local authority, the Local Government Ordinance 17 of 1939 (T) provided that a local authority could recover interest at a rate not more than the rate determined by the Local Authorities Loans Fund Board in terms of the Local Authorities Loans Fund Act 67 of 1984 s 11(2)(b). The board determined such maximum interest to be equal to the prime rate charged by the commercial banking industry at the time. The court concluded that such a determination of the interest rate was not vague and required only an investigation into the prime rate applicable at the time. See also *Eastern Metropolitan Substructure v Peter Klein Investments* 2001 (4) SA 661 (W). The case concerned the Local Government Ordinance 17 of 1939 (T) s 49, which permitted the recovery of moneys due for sanitary services from both the owner and occupier jointly and severally of the applicable premises. Refer also to *De Beer NO v North-Central Local Council ETC* 2002 (1) SA 429 (CC). The case concerned the Durban Extended Powers Consolidated Ordinance 18 of 1976 (N) s 105. According to the ordinance, a municipal council had to send out three notices to a delinquent ratepayer before it could institute court proceedings against him/her. The court confirmed *inter alia* that municipal money had to be raised as

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tion policy and related by-laws. The designated supervisory authority is also obligated to oversee and monitor the performance of the municipal manager in implementing the policy and applicable by-laws.<sup>353</sup> The supervisory authority must also, when necessary, evaluate or review the policy and by-laws or the implementation thereof in order to improve the efficiency of its credit-control and debt-collection mechanisms, processes and procedures. Regular reports to the municipal council in respect of the policy are also required.<sup>354</sup> In contrast with the supervisory authority, it is required that the municipal manager or particular service provider, if applicable, must implement and enforce the municipality's credit-control and debt-collection policy and by-laws; must establish effective administrative mechanisms, processes and procedures to collect money that is due and payable to the municipality and must also report to the supervisory authority at such intervals as may be determined by the municipal council.<sup>355</sup>

#### **18.4.5.4 Additional powers of municipalities in respect of their credit control and debt collection procedures**

The Systems Act states that at all reasonable hours the occupier of a premises in a municipality must give an authorised representative of that municipality or of a service provider access to the premises in order to read, inspect, install or repair any meter or service connection for the reticulation of a service or to disconnect, stop or restrict the provision of any service.<sup>356</sup> Municipalities are furthermore allowed to consolidate any separate accounts of persons liable for payments to the municipality, to credit a payment by a person against any account of that person and to implement any of the debt-collection and credit-control measures in relation to any arrears on any of the accounts of such a person.<sup>357</sup> If a person that is liable to the municipality for the payment of rates, taxes or fees consents to it, a municipality may enter into an agreement with that person's employer to deduct from his or her salary or wages:

- any outstanding amounts due to the municipality or

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speedily as possible because it was used by the council to fulfil its constitutional obligations in relation to the delivery of services.

<sup>353</sup> See the Systems Act s 99(a)(i)-(ii).

<sup>354</sup> Refer to the Systems Act s 99(b)-(c).

<sup>355</sup> See the Systems Act s 100(a)-(c).

<sup>356</sup> See the Systems Act s 101.

<sup>357</sup> See the Systems Act s 102(1)(a)-(c). It should be noted that the provisions of the subsection do not apply to cases where there is a dispute between the municipality and the debtor concerning any specific amount claimed by the municipality from that person. S 102(2).

- such monthly amounts/instalments as may be agreed between the parties.

The effect of such an agreement can be regarded as a so-called “emolument attachment order”.<sup>358</sup> Municipalities may also provide for special incentives for employers to enter into such agreements and for employees to consent to such agreement.<sup>359</sup> It is submitted that such incentives could contribute significantly to the collecting of bad debt, which so many municipalities are facing in South Africa. The aim of such incentives is to collect *some* bad debt rather than nothing at all.

#### **18.4.5.5 Regulations and guidelines in respect of credit control and debt collection provisions**

In respect of credit control and debt collection measures, the minister responsible for local government may make regulations or issue guidelines to provide for or to regulate various matters. The matters are the following:<sup>360</sup>

- (a) the particulars that must be contained in the municipal manager’s report in terms of section 100(c);
- (b) the identification of municipal services provided by the municipality or other service providers to users of services where the use of the service by the user can reasonably be determined, measured or estimated per quantity used or per frequency of such use;
- (c) the determination, measurement or estimate of the use by each user of each service so identified;
- (d) user agreements, and deposits and bank guarantees for the provision of municipal services;
- (e) the rendering of accounts to ratepayers and users and the particulars to be contained in the accounts;
- (f) the action that may be taken by municipalities and service providers to secure payment of accounts that are in arrear, including –
  - (i) the termination of municipal services or the restriction of the provision of services;
  - (ii) the seizure of property;
  - (iii) the attachment of rent payable on a property; and

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<sup>358</sup> See the Systems Act s 103(a)(i)-(iii).

<sup>359</sup> Refer to the Systems Act s 103(b)(i)-(iii).

<sup>360</sup> Read the Systems Act s 104(1)(a)-(n).

- (iv) the extension of liability to a director, a trustee or a member if the debtor is a company, a trust or a close corporation;
- (g) appeals against the accuracy of accounts for municipal taxes or services;
- (h) the manner in and time within which such appeals must be lodged and determined and the consequences of successful and unsuccessful appeals;
- (i) extensions for the payment of arrears and interest payable in respect of such arrears;
- (j) service connections and disconnections, and the resumption of discontinued services;
- (k) the combating of unauthorised consumption, connection and reconnection and theft of municipal services;
- (l) the development and implementation of an indigent policy;
- (m) the tampering with or theft of meters, service supply equipment and reticulation network and any other fraudulent activity in connection with the provision of municipal services; and
- (n) any other matter that may facilitate –
  - (i) effective and efficient systems of credit control and debt collection by municipalities; or
  - (ii) the application of this chapter.

When the minister makes regulations or issues guidelines, he or she must take into account the capacity of municipalities to comply with such regulations or guidelines and must differentiate between different kinds of municipality according to their respective capacities.<sup>361</sup>

### **18.5 Important revenue sources of local governments**

The success of the new local government system is dependent largely on the availability of resources and, more so, financial resources. Without appropriate financial capacity, most municipalities will not be able to provide or sustain essential services to their respective communities. Municipal revenue sources are therefore just as important as proper financial management and control. Within the new local government system, municipalities have been afforded various ways of ensuring and enhancing local revenue sources. On the issue of municipal revenue sources, it is

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<sup>361</sup> See the Systems Act s 104(2)(a)-(b).

important to distinguish between so-called *own revenue sources* and *outside sources*. Own sources refer to sources of income that a municipality can or must create for itself. Outside sources again refer to revenue that is not directly generated by the municipality itself but falls under examples such as grants from provincial or national governments to local governments.

One of a municipality's most important revenue sources is the *power of taxation*. The power to tax is regarded as an essential prerequisite to ensuring a system of sustainable and accountable local government. According to the White Paper on local government, there are four areas of local decision-making that are important to municipal taxation. These areas are:

- the choice of tax to be imposed
- the definition of the tax base
- the choice of the tax rate and
- the administration of the tax system.<sup>362</sup>

It is also important for municipalities to have freedom and be able to vary their tax rates. Such a situation will not only strengthen local accountability but will also enable communities to challenge municipalities about the value-for-money of the services that they provide. Any *local tax policy* should be seen within the framework of the total tax system of a country, however, and not in isolation. There is a strong need for a coherent and transparent tax system in general. A particular taxation policy should always take into account any adverse or negative consequences which such a system could have on the productiveness of the economy of the region and/or country as a whole. It was thus envisaged that the new legal dispensation with regard to local government matters would specifically incorporate such important aspects within national legislation. Such a national legislative framework would then ensure uniform standards and practices between the various different types of municipality across the country.

### **18.5.1 Property taxation**

Arguably the most important source of local taxation is so-called "property tax" (rates). This type of taxation requires owners of property located within a municipal area to pay a tax to the municipality based on a valuation of their property. The term

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<sup>362</sup> See the White Paper on Local Government (1998) at 133.

*property tax* is generally used to refer to all taxes relating to immovable property (land).<sup>363</sup> The main reasons property tax is regarded as a very suitable local tax are:

- it is easy to collect
- it produces a predictable and stable income
- it is fixed in location and
- it is impossible to conceal.<sup>364</sup>

Property tax is directed mainly at financing municipal service provision, and it is therefore an important source of so-called “discretionary own-revenue” for local governments that enables municipalities to function effectively.

Historically, property rating in South Africa has been done differently in the various provinces. Each of the former four provinces had its own legislation in this regard. Such provincial legislative requirements were never properly co-ordinated, although the legal requirements were very similar in each province. For various reasons the old property rates/tax system was inadequate and ineffective. Such is the importance of municipal property taxation that the Constitution specifically addresses it. According to section 229(2) of the Constitution, all municipalities have the power to impose rates on property. Such a system may be regulated by national legislation, however.<sup>365</sup> Since property taxation was conducted under the former provincial ordinances regulating such property rating and taxation, such enactments stay in force until such time as they are replaced by national legislation. From the outset of the restructuring of the entire local government dispensation, it was envisaged that the old system relevant to municipal property taxation also had to be overhauled.

According to the White Paper on Local Government, national government had to address four main issues with regard to property taxes. These issues can be summarised as follows:

- *To bring untaxed areas into the tax net* Many former black areas are outside the property tax net and effective measures to integrate them must be implemented.

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<sup>363</sup> From an international perspective, property tax is regarded as the single most important tax at local government level, especially in developing countries. The more developed a country becomes, the less dependent it becomes on property taxes as a source of local revenue.

<sup>364</sup> See Franzen RCD “Property tax: Alive and well and Levied in SA” (1996) 8 *SA Merc LJ* at 351.

<sup>365</sup> See the Constitution s 229(2)(b).

- *To establish a uniform property valuation and tax system* An optimal valuation system should be established. The White Paper has identified various possible rating systems.<sup>366</sup>
- *To determine valuation periods* Properties should be valued regularly.
- *To determine relief or partial exemption for the poorest people who genuinely cannot afford such taxes* Any rebates or grants-in-aid should be clearly indicated in the budget of a municipality.

It has also been argued that local governments should have some latitude in decisions apart from those mentioned above with regard to aspects of property taxes in their area, in order to reflect their own unique circumstances and local economic objectives.

### **18.5.2 The valuation of property**

It was mentioned above that the new constitutional scheme entrenches the fact that municipalities are allowed to impose rates on property. Property rates can be levied only on the basis of some or other form of property valuation, however. Although the Constitution is silent on the issue of property valuations, such aspects are normally set out in national legislation.<sup>367</sup> It is also obvious that apart from the requirements set out in national legislation, any valuation of property must be done within the parameters of South Africa's supreme constitution. Any valuation or recovery of rates on property contrary to the provisions of the Constitution are invalid.<sup>368</sup> In the past valuation had to be done by qualified and registered valuers.<sup>369</sup>

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<sup>366</sup> See the White Paper on Local Government (1998) at 135. The systems include *site rating*, or the valuation of land only, the *combined rating* of land and buildings, and *differential or composite rating*, where both land and buildings are rated together but at different rate levels, and where the rate levied on land is higher than that on improvements. A rating system where a uniform rate is used for areas which were not previously rated, irrespective of the value of the property. (This is often called 'flat-rating' in South Africa). The rate is usually lower than the actual value of the property.

<sup>367</sup> The LGTA s 10G(6), eg, required local councils, metro councils and rural councils to ensure that properties within their areas of jurisdiction had to be valued at intervals prescribed by law and that a single valuation roll had to be compiled and had to be open for public inspection.

<sup>368</sup> See, eg, the case of *Lotus River Etc Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C). The court held that increases in rates under the LGTA s 10G(6) and Property Valuation Ordinance 29 of 1944 (C) may not be in limitation of constitutional rights such as the right to equality unless such limitation is permitted under the limitation clause s 36. However, the court mentioned that its role is not to second-guess the legislature but to assess the lawfulness of any limitation. The court was also aware that municipalities inherited several valuation rolls with differing base dates as a result of the restructuring of local government. The court concluded that the uniform rates increase was carefully considered and was adopted only as an interim measure, thereby justifying the limitation.

<sup>369</sup> See, eg, the Valuers Act 23 of 1982.

### **18.5.3 The basis of property valuations**

There are many important aspects that influence the actual basis upon which property valuations are determined. From the outset it is important to distinguish between valuations on land and valuations on buildings. In all the former provincial ordinances the intention was that the value of land should be the amount which the land would have realised had a willing buyer and seller agreed on a free and voluntary sale. This seems to refer to market value. The value of buildings, on the other hand, was determined as the cost of erection at the time of valuation less depreciation. Another option was to value the land/property inclusive of all the improvements and then to subtract one value from the other.<sup>370</sup> In the past, when reference was made to valuation in legislation it usually referred to immovable property (land) and improvements on the land. It was thus often important to determine whether an object on land was fixed to the land permanently or not.<sup>371</sup> Generally speaking the determination of land values is usually done by reference to sale prices of similar land in a particular area, while the estimation of building replacement or erection/building costs can be calculated according to a standard rate per square meter.

Prior to the new local government dispensation, it was a general rule that valuations had to be done every four to five years. If the time gap was too large, then the valuations would no longer relate to the market value, and distortions would appear in the tax base. Furthermore, all former provincial ordinances have prescribed a basic format for a valuation roll in each municipal area. There were also specific requirements regarding valuations courts or boards and the procedures for making a valuation roll.<sup>372</sup>

### **18.5.4 The levying of municipal property rates**

Today it is a constitutional fact that municipalities have the right to levy property rates.<sup>373</sup> Prior to the new legal system, all former provincial ordinances provided for

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<sup>370</sup> See Craythorne (1997) 351.

<sup>371</sup> See, eg, the case of *Standard-Vacuum Refinery of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A).

<sup>372</sup> See Craythorne (1997) 352-354. See also the cases of *Crawford and Others v Borough of Eshowe and Another* 1956 (1) SA 147 (N) and *Helderberg Butcheries v Municipal Valuation Court, Somerset West* 1977 (4) SA 99 (C).

<sup>373</sup> See the Constitution s 229. See also *Msunduzi Municipality v MEC for Housing, KZN* 2004 (6) SA 1 (SCA).



the levying of property rates.<sup>374</sup> The levying of property rates was also allowed under the LGTA.<sup>375</sup>

Under the legal system prior to the new constitutional dispensation, various methods of rating existed. Three broad rating methods were generally known. The first method was the so-called “site rating” method. According to this method a rate was levied only on the rateable valuation of the particular land. This method encouraged the development of vacant land or the continuous development of occupied land to its fullest potential. To a great extent speculation in land was minimised, although the method produced less income than others. A second method used was the so-called “flat rating” method. Such a method requires that both land and buildings be rated together. It was a very productive method, as it brought in more revenue. This particular method required more detailed administration, however, and it often discouraged the improvement of property. The third method of rating was known as the “differential” (composite) rating method. This method entailed rating both land and buildings, but at different rates: land was levied at a higher rate than improvements on the land.<sup>376</sup> Within a particular rating system, all the prior provincial ordinances

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<sup>374</sup> Various rates such as general rates, town rates, health rates, water rates, sewerage rates, special rates, sanitary rates and local rates were applicable. See Craythorne (1997) 354-355. See also the cases of *Weenen TLC v Van Dyk* 2000 (3) SA 435 (N), which required that rates and taxes had to be properly promulgated before their introduction. In *Midrand/Rabie Ridge/Ivory Park Metropolitan Substructure v Strydom and Others* 2001 (1) SA 98 (SCA) the case concerned the levying of a rate on property only once a year in terms of the Ordinance on Property Tax 11 of 1977 (T). The court held that under the ordinance a general property tax on property based on the site value was authorised only once a year and the taxpayer was entitled to be informed in advance of such taxes. It should be noted that if the required legal procedure to impose rates or taxes was not followed, then such rates are not eligible. Read *Weenen TLC v Van Dyk* 2002 (4) SA 653 (SCA).

<sup>375</sup> According to the Act s 10G(7)(b) a municipality could even differentiate between different categories of property on such grounds as it deemed reasonable. It is important to note, however, that any differentiation could not amount to unfair discrimination. This would be contrary to the Constitution and thus invalid. For more on this position see *PE Municipality v Prut NO* 1996 (3) SA 533 (SE) and also *Beukes v Krugersdorp Transitional Local Council and Another* 1996 (3) SA 467 (W). The interim Constitution s 178(2) required that municipal rates and taxes had to be levied according to a uniform structure. See also *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374 (CC). Note the case of *Robertson v City of Cape Town/Truman-Baker v City of Cape Town* 2004 (5) SA 412 (CPD). The applicants in the case were dissatisfied with the increase of rates levied on their properties, which were levied on the basis of property valuations contained in a provisional valuation roll. The municipality relied on both the Property Valuation Ordinance 1993 (C) and ss 93(7)-(10) of the Structures Act as amended. The court held *inter alia* that the municipality did not fall within the definition of local authority in s 1 of the Ordinance and could therefore not exercise a power to levy rates on the basis of a provisional valuation roll. The court also held that the amendments to the Structures Act violated ss 154(2) and 229(5) of the Constitution and were unconstitutional and invalid. Refer to para 154 at 459-460.

<sup>376</sup> See Craythorne (1997) 355-356. The writer points out that the site-rating method seems to be the least popular in South Africa and that the flat rating method is used mostly in western countries.

provided for the exemption of certain property from the payment of rates. Exemptions commonly included land that was used for agricultural purposes, education (schools) and religious practices (church buildings).<sup>377</sup>

Under the LGTA,<sup>378</sup> councils were authorised to levy and recover property rates in respect of immovable property within their respective jurisdictions. Specific legal requirements were laid down which had to be followed. The LGTA was only a transitional piece of legislation and would be substituted by a uniform national Act once the restructuring process came to a close. This national Act was finally enacted in 2004, and parts of the Act commenced at such time. The new legal system regulating municipal property taxation is significantly different from the old systems that were applicable under the former four provincial ordinances.

#### **18.5.5 Some important aspects concerning municipal property assessment and taxation**

The adoption and finalisation of new legislative provisions regarding the levying and recovery of property taxes in South Africa was preceded by a strong public outcry about new proposals and suggestions. Many people have called new property taxation proposals a “hidden wealth tax” aimed at over-taxing the already heavily taxed average taxpayer.<sup>379</sup> Other commentators have expressed the view that without a complete overhaul of the property taxation system in South Africa, local governments will not be able to fulfil their constitutional mandates, however.<sup>380</sup> Therefore, the aim of a new system for property taxation is to do away with the previously ambiguous situation of having various property rating systems in the country and to replace them with a uniform system applicable equally throughout the territory of the state.<sup>381</sup>

##### **18.5.5.1 A brief history of property taxation in South Africa**

It is reported that the first land-related tax was introduced into South Africa in 1677. The Cape Ordinance of 1836 introduced the first formal property tax in the Cape

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<sup>377</sup> See, eg, *Mosowitz v Johannesburg City Council* 1957 (4) SA 569 (T); *PE Municipality v Marist Brothers* 1948 (1) SA 637 (E); *De Aar Divisional Council v Convent of the Holy Cross* 1952 (1) SA 495 (C) and *St John's Diocese v Umtata Municipality* 1968 (3) SA 55 (E).

<sup>378</sup> S 10G(7).

<sup>379</sup> Refer to Ratiba MM “The Good, the bad or the ugly? Comments on the property rates bill” (2000) *DR* October at 27-29.

<sup>380</sup> See Franzsen RCD “Property tax: Alive and well and levied in South Africa” (1996) 8 *SA Merc LJ* at 348 *et seq.*

<sup>381</sup> The dual local government system of pre 1994 has created various fiscal disparities between municipalities. White local authorities were financially strong because of fiscal autonomy, which in-

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Province, however, and by the end of the 19<sup>th</sup> century, such a system of taxation, based on capital values, was in place throughout the territories.<sup>382</sup> Property tax was levied on the owner of land, irrespective of whether such land was zoned for residential, commercial or industrial purposes, and the tax could be levied on either the value of the land (site rating), the value of the land and improvements (composite rating) or on a uniform or flat rating system. Land was valued at market value, and all provincial valuation rolls had to include minimum information such as identification of the owner of land, the size and description of land as well as the value of the land together with improvements. It was also possible for land owners to appeal decisions of property valuation to a specific tribunal. Finally, the old system also provided for effective measures to recover outstanding levies. Properties could be sold via public auction, and the Registrar of Deeds was prohibited from transferring property from one owner to another unless a clearance certificate had been obtained from the relevant local authority and submitted to the Registrar.<sup>383</sup> It will become clear that many of the old provisions have been incorporated into the new property rates legislative framework.

#### **18.5.5.2 Reasons for changing the old property rates systems**

There are various reasons for the former legal system of levying and collecting property rates and taxes' having to be overhauled. The following examples are a brief summary of such reasons:

- The entire social and legal framework of local government *per se* has changed. Property taxation now operates within a new supreme constitutional framework. Apart from the structural requirements of the Constitution, the Bill of Rights also determines various substantive compliance.<sup>384</sup> In light of the new constitutional requirements, all local government structures were amalgamated which, in turn, required amendments to the former provincial tax legislation.

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cluded trading account surpluses on water and electricity and property taxes. Black local authorities did not have such income sources and thus had poor financial capabilities.

<sup>382</sup> See Franzsen *supra* fn 380 at 352-353.

<sup>383</sup> The clearance certificate had to verify that all rates and taxes on the property in question was paid in full. This provision provided a significant safeguard for local authorities that property taxes would not be lost when a property was sold.

<sup>384</sup> See, eg, the Bill of Rights s 9. Different tax regimes often militate against individual rights and values. Tax payers must be treated equally. Equality does not imply exactly the same tax liability, however, but rather equal tax for equal value. A proper division of the tax burden among tax or ratepayers is required. Vertically taxpayers must be treated in a similar way to other taxpayers simi-

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- According to the newly established municipal structures, the tax base of many municipalities was extended to areas outside of the boundaries of urban municipalities. Such areas include farmland, state-owned land and also tribal land, on which rates had never before been levied. Provision had to be made to incorporate such areas within the taxation legislation.<sup>385</sup>
- The former system of property taxation was fragmented and ineffective. No uniform system was in place, as property rates and taxes were levied and collected in terms of four different provincial ordinances. Such different rating systems caused financial differences between municipalities which, in turn, created a stumbling block for the implementation of a constitutionally sanctioned fiscal system.
- The two-tier model of local government outside metropolitan areas requires a division of fiscal powers between local municipalities and district municipalities.
- The taxation of so-called “public infrastructure” had to be addressed in new legislation. Previously, public infrastructure such as railways and power stations was exempted from paying property taxes. Such income sources had to be brought into the tax system.<sup>386</sup>
- It was also time to re-evaluate aspects such as the exclusion of certain properties from rates and taxes and the former system of rate-capping for certain property owners, since rates and taxes are an extremely important source of municipal revenue and such exclusion and capping could have significant financial implications for an municipality.<sup>387</sup>
- Different rates for different properties had to be reconsidered. The categories of property and the rates applicable to such properties was in need of re-evaluation. On this point it is reported that there seems to be a trend internationally to levy business property more highly than residential property.<sup>388</sup> Uncontrolled differen-

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larly situated. See Franzsen *supra* fn 380 at 355. Refer also to Franzsen RCD “The present status of property tax in SA” (1999) 4 *Journal of Property Tax Assessment and Administration* at 3-13.

<sup>385</sup> For more on such aspects see Franzsen RCD “Some questions about the introduction of a land tax in rural areas” (1999) 11 *SA Merc LJ* at 259 *et seq.*

<sup>386</sup> It is reported that international practices show that public entities should be rated on at least their operational land. See Franzsen RCD and McCluskey WJ “Some policy issues regarding the Local Government: Property Rates Bill” (2000) 12 *SA Merc LJ* at 213.

<sup>387</sup> Rate-capping refers to a maximum limit that is set on the amount of a particular rate. Rate-capping has been implemented mainly to protect ratepayers against unreasonable rates and taxes.

<sup>388</sup> Refer to McCluskey WJ (ed) “Property tax: An international comparative review” (1999) at 305-307.

tiation between rates for different properties can lead to taxation competition between municipalities, however. Special care should be taken in such instances since the Constitution prohibits the exercise of a rating power that materially and unreasonably prejudices national economic policies and activities.<sup>389</sup> Most businesses are not as concerned about higher rates or taxes, however, since they usually pass such costs on to their consumers or employees.<sup>390</sup>

- Exemptions from property taxes or the possible deduction from income tax of property taxes had to be re-evaluated. Property tax was traditionally allowed as a deduction from income tax when the tax was incurred for the purposes of trade or the production of income. This position has shifted the property tax burden to the national sphere of government. Since property taxes are also extended to rural areas, including commercial farming properties, the South African Revenue Service will have to calculate carefully the taxes that will be lost if property taxes are still income tax deductible.<sup>391</sup>

In light of *inter alia* the abovementioned factors, it became necessary to amend and re-evaluate the system of property taxation in South Africa. It should also be pointed out that the enforcement of property tax also influences and interacts with the land use policies of a state. The sustainability of property taxes depends strongly on stable property values. Such values in turn depend on multiple market factors such as the state of the economy, political policies and programmes and investment initiatives.<sup>392</sup>

Furthermore, property rates are also influenced by the maintenance of up-to-date valuation rolls, regular assessment, billing and rates collection, accountability and transparency and a consumer acceptance of value for money. In South Africa in particular, the issue/culture of payment for services has often been somewhat contentious. Payment was used pre 1994 to force political change, but post 1994 such payment is required to ensure municipal development and the sustainability of ser

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<sup>389</sup> See the Constitution s 229(2).

<sup>390</sup> See Franzsen and McCluskey *supra* fn 386 at 215.

<sup>391</sup> The question of whether property tax should be income-tax deductible or not is a policy consideration for the national government and does not directly need incorporation in the property rates legislation. Deductions will be provided in the Income Tax laws.

<sup>392</sup> It is generally accepted that factors such as land invasions, land reform and settlement programmes, as well as land claims could significantly influence property values and therefore also property rates and taxes. See Franzsen *supra* fn 385 at 358.

vices. There is a general need to build tax morality in local communities which is aimed at ensuring payment for services rendered.<sup>393</sup> Tax morality will be improved only if taxes are fair and acceptable. Before the amalgamation of local authorities under the new legal system, property taxes were regarded as fair and not too burdensome.<sup>394</sup>

It is thus very important that property rates and taxes be carefully researched and evaluated holistically within the broader tax system. The importance of public participation and educational programmes regarding property taxation in general can therefore not be overemphasised.

### **18.5.6 Introduction to the new Municipal Property Rates Act**

The Municipal Property Rates Act (MPRA)<sup>395</sup> was assented to by the president on the 11<sup>th</sup> of May 2004. The main aims of the Act are:

- to regulate the power of a municipality to impose rates on property
- to exclude certain properties from rating in the national interest
- to make provision for municipalities to implement a transparent and fair system of exemptions, reductions and rebates through municipal rating policies
- to make provision for fair and equitable valuation methods of property
- to make provision for objections and appeals processes and
- to amend certain legislation and to provide for matters connected with the Act.<sup>396</sup>

According to the preamble of the Act, it is confirmed that the Constitution entitles municipalities to impose rates on property in their areas, subject to regulation in terms of national legislation. Furthermore, municipalities must be developmentally

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<sup>393</sup> During 1995, national government launched the so-called Operation Masakhane campaign, with the specific aim of enhancing a culture of payment for services. Despite some success, non-payment is still very high. Three main reasons for non-payment have been identified: in the first place many residents are so poor that they do not have the ability to pay for services; secondly, many areas lack proper infrastructure and service delivery is not up to standard and, thirdly, some local residents have unrealistically high and immediate expectations regarding service delivery.

<sup>394</sup> See Franzsen *supra* fn 382 at 352-361. The writer mentions the following reasons for property taxes' being accepted under the former property taxation dispensation: (a) relatively low rates and substantial rebates for residential property owners; (b) relatively low rates and income tax deductibility for commercial property owners; (c) conservative assessed values (generally below fair market value) and well-structured objection and appeal procedures; (d) payment by way of monthly instalments, often in combination with the rest of the municipal bill (electricity and water), which rendered property tax relatively invisible; (e) a general preoccupation with high-profile taxes such as income and value-added tax; and (f) property tax fared well as a perceived benefit tax – services of a high standard were received in return for taxes paid.

<sup>395</sup> 6 of 2004, hereafter referred to as MPRA.

<sup>396</sup> Refer to the long title of the Act.



orientated, and must address service delivery priorities and promote economic and financial municipal viability. Local government needs a sufficient and buoyant source of revenue, and property rates have been identified as a critical source of revenue for municipalities to achieve their constitutional objectives. In light of the fact that the Constitution confers on parliament the power to regulate the exercise by municipalities of their fiscal powers and in order to ensure uniformity and simplicity in property rates collection, the Act has been enacted.<sup>397</sup> The Act has been divided into nine chapters and will be discussed briefly below.

#### **18.5.6.1 Issues concerning the rating of property**

According to the Act, only a metropolitan or local municipality may levy a rate on property in its area. In general, a district municipality may levy a rate on property only if it is in a district management area.<sup>398</sup> The power of a municipality to levy a rate on property is subject to three main prerequisites. Such power must be exercised subject to:

- section 229 of the Constitution and other constitutional provisions
- to the MPRA itself and
- to the rates policy which each municipality must adopt when levying property rates.<sup>399</sup>

#### **18.5.6.2 A municipal rates policy**

The council of a municipality must adopt a rates policy consistent with the MPRA with regard to the levying of rates on rateable property in the municipality.<sup>400</sup> Such a rates policy will take effect on the effective date of the first valuation roll prepared by the municipality in terms of the Act and must accompany the municipality's budget for the financial year concerned, when the budget is tabled in the municipal coun-

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<sup>397</sup> See the preamble of the Act.

<sup>398</sup> See the Act s 2(10) and (2)(a). It should be clear from this wording that all property in SA is subject to a possible property tax unless specifically exempted. One must remember that the whole territory of SA has been demarcated under one form or another of local government. The reference to the area of a municipality also includes a district management area. Refer to the Act s 2(b).

<sup>399</sup> See the Act s (3)(a)-(c). Note that according to the MPRA (a) as a corporate entity, "municipality" means a municipality described in the Municipal Systems Act s 2 and (b) as a geographical area "municipality" means a municipal area demarcated in terms of the Local Government: Municipal Demarcation Act 27 of 1998. See s 1 definitions.

<sup>400</sup> Rateable property means property on which a municipality may in terms of s 2 levy a rate, excluding property fully excluded from the levying of rates in terms of the MPRA s 17. Refer to s 1 definitions.



cil.<sup>401</sup> The MPRA further requires that every rates policy must incorporate the following:<sup>402</sup>

- Treat persons liable for rates equitably.
- Determine the criteria to be applied by the municipality if it levies different rates for different categories of property, if it exempts specific owners from payment of rates, if it grants specific owners of properties a rebate or a reduction in the payable rate or if it increases rates.<sup>403</sup>
- Determine or provide criteria for the determination of categories of property for the purpose of levying different rates and categories of owner of properties or categories of properties for the purpose of granting exemptions, rebates and reductions.
- Determine how the municipality's powers in terms of section 9(1) of the MPRA must be exercised in relation to properties used for multiple purposes.
- Identify and quantify in terms of costs to the municipality and any benefit to the local community any exemptions, rebates and reductions, any exclusions referred to in section 17(1)(a), (e), (g), (h) and (i) of the Act and also rates on properties that must be phased in in terms of section 21.<sup>404</sup>
- Take into account the effect of rates on the poor and include appropriate measures to alleviate the rates burden on them.
- Take into account the effect of rates on organisations conducting specified public benefit activities and registered in terms of the Income Tax Act<sup>405</sup> for tax reductions and which own property in the area.
- Take into account the effect of rates on public service infrastructure.<sup>406</sup>

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<sup>401</sup> See the Act s (2), read with the Municipal Finance Management Act 56 of 2003 s 16(2), which regulates *inter alia* aspects concerning municipal budgets.

<sup>402</sup> Refer to the Act s (3)(a)-(j).

<sup>403</sup> A "rebate" refers to a discount granted in terms of s 15 on the amount of the rate payable on the property. A "reduction" means the lowering in terms of s 15 of the amount for which the property was valued and the rating of the property at that lower amount. See the MPRA s 1 definitions.

<sup>404</sup> "Local community", in relation to a municipality (a) means that body of persons comprising (i) the residents of the municipality, (ii) the ratepayers of the municipality, (iii) any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality and (iv) visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality and (b) includes, more specifically, the poor and other disadvantaged sections of such body of persons. See the MPRA s 1.

<sup>405</sup> 58 of 1962.

<sup>406</sup> Public service infrastructure means publicly controlled infrastructure of the following kinds: (a) national, provincial or other public roads on which goods, services or labour move across a municipal boundary; (b) water or sewer pipes, ducts or other conduits, dams, water supply reservoirs, water treatment plants or water pumps forming part of a water or sewer scheme serving the public; (c)

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- Allow the municipality to promote local, social and economic development.
- Identify all rateable properties in the municipal area that are not rated in terms of section 7(2)(a) of the Act.

The MPRA specifically requires that when a municipality is considering the criteria to be applied in respect of any exemptions, rebates and reductions on property used for agricultural purposes, a municipality must take account of the following:<sup>407</sup>

- (a) the extent of services provided by the municipality for such properties;
- (b) the contribution of agriculture to the local economy;
- (c) the extent to which agriculture assists in meeting the service delivery and development obligations of the municipality; and
- (d) the contribution of agriculture to the social and economic welfare of farm workers.

It is further provided that any exemptions, rebates or reductions provided for in the rates policy must comply with and be implemented in accordance with a national framework that may be prescribed after consultation with Organised Local Government (OLG). No municipality may grant relief in respect of payment of a rate to a category of owners of properties or to the owners of a category of properties, other than by way of an exemption, rebate or reduction provided for in the rates policy and granted in terms of section 15 of the Act. No relief may be granted to owners of properties on an individual basis.<sup>408</sup>

Before it adopts its rates policy, a municipality must also follow a process of community participation.<sup>409</sup> The municipality must also ensure that the municipal manager, who is obligated to do so, has conspicuously displayed the draft rates policy for

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power stations, power substations or power lines forming part of an electricity scheme serving the public; (d) gas or liquid fuel plants or refineries or pipelines for gas or liquid fuels, forming part of a scheme for transporting such fuels; (e) railway lines forming part of a national railway system; (f) communication towers, masts, exchanges or lines forming part of a communications system serving the public; (g) runways or aprons at national or provincial airports; (h) breakwaters, sea walls, channels, basins, quay walls, jetties, roads, railway or infrastructure used for the provision of water, lights, power, sewerage or similar services of ports, or navigational aids comprising lighthouses, radio navigational aids, buoys, beacons or any other device or system used to assist the safe and efficient navigation of vessels; (i) any other publicly controlled infrastructure as may be prescribed; or (j) rights of way, easements or servitudes in connection with infrastructure mentioned in para (a)-(i). See the MPRA s 1 definitions.

<sup>407</sup> S 3(4)(a)-(d). Note that agricultural purpose, in relation to the use of a property, excludes the use of a property for the purpose of eco-tourism or for the trading in or hunting of game. S 1 definitions.

<sup>408</sup> See ss 3(5) and (6)(a)-(b).

<sup>409</sup> Such a process is set out in the Local Government: Municipal Systems Act ch 4.

a period of at least 30 days at the municipality's head an satellite offices and libraries and, if the municipality has an official website, on that website.<sup>410</sup> The municipal manager must also advertise in the media a notice stating that a draft rates policy has been prepared for submission to the council, that the draft rates policy is available for public inspection during office hours and that the local community is invited to submit comments and representation to the municipality within a period specified in the notice.<sup>411</sup> A municipal council must take into account all comments and representations made or received when it considers the draft rates policy. A rates policy must be reviewed annually by a municipal council and must be amended if necessary. Any amendments to such a policy must be annexed to the municipality's annual budget when tabled. The requirements of section 3(3)-(6) of the MPRA also apply to any amendment of a rates policy. It should be noted, however, that community participation in amendments to a rates policy is not facilitated under section 4 of the Act, but must be effected through the municipality's annual budget process in terms of sections 22 and 23 of the Municipal Finance Management Act.<sup>412</sup>

Finally, all applicable municipalities must adopt by-laws to give effect to the implementation of their rates policies. Such a by-law may differentiate between different categories of property and also between different categories of property owner liable for the payment of rates.<sup>413</sup>

### **18.5.6.3 Aspects concerning the levying of rates**

In general, when rates are levied, a municipality must levy rates on all rateable property in its area. However, a municipality is not obliged to levy rates on

- property which the municipality owns
- public service infrastructure owned by the municipality
- properties defined as a right registered against immovable property in the name of a person, excluding a mortgage bond registered against the property and properties in respect of which it is impossible or unreasonably difficult to establish a mar-

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<sup>410</sup> Refer in this instance also to the Systems Act s 21B.

<sup>411</sup> The notice period may not be less than 30 days, however. See the Act s 4(2)-(3).

<sup>412</sup> See Act 56 of 2000 read with the MPRA s 5(1)-(2).

<sup>413</sup> Refer to the Property Rates Act s (6)(1)-(2). It would seem that the intention of the legislator is that a rates policy, even if adopted by a council, cannot be enforced and implemented if it has not been included and adopted as a municipal by-law. If such interpretation is indeed correct, then it is obvious that the implementation of a rates policy is more cumbersome than a normal municipal by-law. A municipality must first complete all the legal requirements mentioned above before the by-law, which also requires specific procedures, is adopted.

ket value because of legally insecure tenure resulting from past racially discriminatory laws or practices.<sup>414</sup>

Although rateable property must be levied, a municipality is not prevented from granting exemptions, rebates or deductions.<sup>415</sup> Under the new legal dispensation a municipality may, in terms of the criteria set out in its rates policy, levy different rates for different categories of rateable property, which may include categories determined according to

- the use of the property
- the permitted use of the property or
- the geographical area in which the property is situated.<sup>416</sup>

The levying of different rates is subject to section 19 of the MPRA, however.<sup>417</sup> According to the Act, the categories of rateable property include the following:<sup>418</sup>

- (a) Residential properties;
- (b) Industrial properties;
- (c) Business and commercial properties;
- (d) Farm properties used for agricultural purposes; other business and commercial purposes; residential purposes or other purposes;
- (e) Farm properties not used for any purpose;
- (f) Smallholdings used for agricultural, residential, industrial, business, commercial or other purposes;

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<sup>414</sup> See the MPRA s 7(1)-(2).

<sup>415</sup> Read the MPRA s 7(2)(b) with s 15. This was also the position under previous laws. Refer to the case of *Association for the Aged v Ethekwini Municipality* 2004 (3) SA 81 (D). In this case, the Association/applicant sought an order declaring certain properties to be exempt from rates according to the Local Authorities Ordinance 25 of 1974 (KZN) s 153. The applicant was registered as a *bona fide* welfare organisation. The court held that the onus was on the applicant to show that it qualified for an exemption under the ordinance. The court also held that an exemption clause should be restrictively interpreted. Since the applicant sold life rights and used the premises exclusively to alleviate distress amongst aged persons and to promote their welfare, security and happiness, the properties were exempt from rates under the ordinance. See paras D-E at 87.

<sup>416</sup> "Permitted use in relation to a property" means the limited purposes for which the property may be used in terms of (a) any restrictions imposed by (i) a condition of title, (ii) a provision of a town planning or land use scheme or (iii) any legislation applicable to any specific property or properties or (b) any alleviation of any such restrictions. Refer to the MPRA s 1.

<sup>417</sup> See the MPRA s 8(1)(a)-(c).

<sup>418</sup> See the Act s 8(2)(a)-(r). Note that property in general means (a) immovable property registered in the name of a person, including, in the case of sectional title scheme, a sectional title unit registered in the name of a person, (b) a right registered against immovable property in the name of a person, excluding a mortgage bond registered against the property, (c) a land tenure right registered in the name of a person or granted to a person in terms of legislation or (d) public service infrastructure. Note also that reference to a person also includes an organ of state. See the MPRA s 1.

- (g) State-owned properties;
- (h) Municipal properties;
- (i) Public Service Infrastructure properties;
- (j) Privately owned towns serviced by the owner
- (k) Formal and informal settlements;
- (l) Communal land defined in the Communal Land Rights Act;<sup>419</sup>
- (m) State trust land;<sup>420</sup>
- (n) Properties acquired through the Provision of Land and Assistance Act<sup>421</sup> or the Restitution of Land Rights Act<sup>422</sup> or which properties are subject to the Communal Property Associations Act;<sup>423</sup>
- (o) Protected areas;<sup>424</sup>
- (p) Properties on which national monuments are proclaimed;
- (q) Properties owned by public benefit organisations and which are used for any specific public benefit activities listed in part 1 of the ninth schedule to the Income Tax Act;
- (r) Properties used for multiple purposes. According to section 9 of the PRA a property used for multiple purposes must, for rates purposes, be assigned to a category determined by the municipality for properties used for:
  - (a) a purpose corresponding with the permitted use of the property if so regulated;
  - (b) a purpose corresponding with the dominant use of the property; or
  - (c) as a multiple purposes category in terms of section 8(2)(r) of the act.<sup>425</sup>

The Act contains a specific provision regarding the levying of a rate on property in sectional title schemes. Sectional title schemes are created to cater for mainly resi-

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<sup>419</sup> 11 of 2004.

<sup>420</sup> "State trust land" refers to land owned by the state (a) in trust for persons communally inhabiting the land in terms of a traditional system of land tenure, (b) over which land tenure rights were registered or granted or (c) which is earmarked for disposal in terms of the Restitution of Land Rights Act 22 of 1994. The MPRA s 1 definitions.

<sup>421</sup> 126 of 1993.

<sup>422</sup> 22 of 1994.

<sup>423</sup> 28 of 1996.

<sup>424</sup> Such areas mean an area that is or has to be listed in the register referred to in the Protected Areas Act s 10, which refers to the National Environmental Management: Protected Areas Act 57 of 2003.

<sup>425</sup> Refer to the MPRA s 9(1)(a)-(c). A rate levied on a property categorised for use for multiple purposes must be determined by apportioning the market value of the property to the different use purposes and by applying the rates applicable to the categories for properties used for these purposes to the different market value apportionments. See the MPRA s 9(2)(a)-(b).

dential and sometimes business or commercial uses. According to the MPRA, a rate on sectional-title properties must be levied on the individual sectional-title units and not on the property as a whole.<sup>426</sup>

It is further provided that rates levied by municipalities must be in a rand amount and must be based on:

- the market value of the property or
- in the case of public service infrastructure, on the market value thereof, less 30% of that value or on such a lower percentage as the minister for Local Government may determine.<sup>427</sup>

Property mentioned in section 17(1)(h) of the MPRA is to be levied on the market value less the amount allowed in the section or by the minister.<sup>428</sup> An important confirmation is that properties with a market value below a prescribed valuation level may be levied at a uniform fixed amount per property. This provision thus allows the imposition of a so-called flat rate on certain properties. Municipalities are not obligated to implement a flat rate or uniform fixed rate, but if they do opt for such a rate on a specific category of properties, then such fixed amount may not exceed a prescribed percentage of the amount due for rates payable on a property in that category with a market value equal to the prescribed valuation level.<sup>429</sup>

When rates are being levied, a municipality must levy them for a financial year. Rates lapse at the end of the financial year for which they were levied. The levying of rates must further form part of a municipality's annual budget process and annually, at the time of its budget process, a municipality must review the amount in the rand of its current rates in line with its annual budget for the next financial year. Rates levied for a financial year may be increased during the year only in terms of section 28(6) of the Municipal Finance Management Act.<sup>430</sup> Rates further become payable as of the start of a financial year or, if the municipality's annual budget is not approved by the start of a financial year, then from such later date when the budget,

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<sup>426</sup> See the MPRA s 10 read with s 92.

<sup>427</sup> See the MPRA s 11(1)(a)-(b) read with s 17.

<sup>428</sup> The MPRA s 11(1)(c). According to the definitions in the Act, "market value" in relation to a property means the value of the property as determined in the Act s 46. Refer to the MPRA s 1 read with s 46.

<sup>429</sup> See the MPRA s 11(2)(3).

<sup>430</sup> It is imperative to read both the MPRA and the MFMA together in respect of a period of levying of rates. See the MPRA s 12(1)-(3).



including a resolution to levy rates, is approved by the provincial executive in terms of the Municipal Finance Management Act.<sup>431</sup>

A rate is levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members. This apparently refers to an absolute majority of the members of a council.<sup>432</sup> A resolution to levy rates must further be promulgated by publishing the resolution in the *Provincial Gazette*. The municipality must also without delay conspicuously display the resolution for 30 days at the head and satellite offices and libraries and on the municipal website if applicable. An advertisement in the media is also required, stating that a resolution to levy rates has been passed and that it is available for inspection.<sup>433</sup>

According to section 15 and in terms of the criteria set out in its rates policy, a municipality may exempt a specific category of owners of properties or the owners of specific categories of properties from payment of a levied rate. Rebates or reductions in rates may also be granted. When granting exemptions, rebates or reductions in respect of owners of categories of property, a municipality may determine such categories in accordance with section 8(2) of the MPRA and in respect of categories of owners of properties may include in such categories:

- indigent owners
- owners dependant on pensions or social grants
- owners temporarily without income
- owners of property situated within an area affected by disaster or any other serious adverse social or economic conditions<sup>434</sup>
- owners of residential properties with a market value lower than an amount determined by the municipality or
- owners of agricultural properties who are *bona fide* farmers.<sup>435</sup>

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<sup>431</sup> The term “annually” means once every financial year and “financial year” again means the period starting from 1 July in a year to 30 June the next year. See the MPRA s 1 definitions as well as s 13(1)-(2). The payment of rates per year can further be regulated. See also the MPRA ss 17, 55 and 78(4) respectively.

<sup>432</sup> An “absolute majority” refers to a majority of 50% + 1 of the total number of members of a municipal council. If, eg, a council thus consists of 100 members, at least 51 members must vote in favour of levying rates. An absolute majority is more difficult to obtain than a normal majority, as the latter requires only 50% + 1 of the members forming a quorum, which is normally 50% of the total number of members of a council.

<sup>433</sup> See the MPRA s 14(2)-(3).

<sup>434</sup> “Disaster” is defined in terms of the Disaster Management Act 57 of 2002.

<sup>435</sup> The MPRA s 15(2)(a)-(f).



Again it is the responsibility of the municipal manager annually to table in the council a list of exemptions, rebates and reductions during the previous financial year and also to submit a statement reflecting the income forgone by way of such exemptions, rebates and reductions, or exclusions in terms of section 17 of the Act or phasing-in discounts in terms of section 21.<sup>436</sup> Finally, all exemptions, rebates and reductions projected for a financial year must be reflected in the municipality's annual budget for that year as income on the revenue side and expenditure on the expenditure side.<sup>437</sup>

#### **18.5.6.4 Limitations on levying of rates and additional rates**

The MPRA reiterates the constitutional requirements set out in section 229(2)(a) of the Constitution. Municipalities may not exercise powers to levy rates on property that would materially and unreasonably prejudice national economic policies, economic activities across municipal boundaries or the national mobility of goods, services, capital or labour. If a rate is contra the constitutional prescriptions, then the Minister of Local Government, after notifying the Minister of Finance, should give notice to a municipality by notice in the national *Gazette* that the rate must be limited to an amount in rand that is specified in the notice. A municipality must then give effect to the notice and, if necessary, accordingly adjust its budget for the next financial year.<sup>438</sup> The determination of whether a rate is contra the Constitution is not a clear-cut case, and it is submitted that an objective test is required to make such a finding. However, the MPRA states that any sector of the economy, after consulting the applicable municipality(s) and OLG, may request the minister to evaluate evidence to the effect that a rate is materially and unreasonably prejudicing any of the matters listed above.<sup>439</sup> If the minister is convinced of any material and unreasonable effect, he/she must act as set out in subsection 16(2) of the Act. Any notice issued under subsection 16(2) of the Act must be accompanied by reasons why a rate is contra subsection 16(1) and thus also contra section 229 of the Constitution. In order to help municipalities, the minister of Local Government, after consultation with the minister of finance, may by notice issue guidelines to assist municipalities in the exercise of their power to levy rates.<sup>440</sup>

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<sup>436</sup> Refer to the MPRA s 15(3)(a)-(b).

<sup>437</sup> The MPRA s 15(4)(a)-(b).

<sup>438</sup> See the MPRA s 16(1)-(2).

<sup>439</sup> Read the Constitution ss 16(1) and (3)(a) with s 229.

<sup>440</sup> See the MPRA s 16(4)-(5).

The new legal framework also determines other impermissible rates that a municipality may not levy. Such impermissible rates include the following:<sup>441</sup>

- (a) a rate on the first 30% of the market value of public service infrastructure;<sup>442</sup>
- (b) a rate on any part of the seashore;<sup>443</sup>
- (c) a rate on any part of the territorial waters of the RSA;<sup>444</sup>
- (d) a rate on any island of which the state is owner;<sup>445</sup>
- (e) a rate on those parts of a special nature reserve, national park or nature reserve or of a national botanical garden, which are not developed or used for commercial, business, agricultural or residential purposes;
- (f) a rate on mineral rights;<sup>446</sup>
- (g) a rate on a property belonging to a land reform beneficiary or his/her heirs, provided that such an exclusion lapses after ten years from the date on which such title was registered in the office of the registrar of deeds;<sup>447</sup>
- (h) a rate on the first R15 000 of the market value of a property assigned in the municipal valuation roll to a category determined by the municipality for (i) residential properties; or (ii) for properties used for multiple purposes of which one purpose is for residential purposes;<sup>448</sup>
- (i) a rate on a property registered in the name of and used primarily as a place of public worship by a religious community, including an official residence regis-

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<sup>441</sup> See the MPRA s 17(1)(a)-(i).

<sup>442</sup> Note the minister for Local Government may lower the percentage, but only after consultation. See the MPRA s 17(4)(a)-(c).

<sup>443</sup> Refer to the definition of the "seashore" as defined in the Seashore Act 21 of 1935.

<sup>444</sup> See the definition of "territorial waters" determined in terms of the Maritime Zones Act 15 of 1994.

<sup>445</sup> This includes the Prince Edward Islands referred to in the Prince Edward Islands Act 43 of 1948.

<sup>446</sup> See the definition of "property" in the MPRA s 1.

<sup>447</sup> "Land reform beneficiary", in relation to a property, means a person who (a) acquired the property through (i) the Provision of Land and Assistance Act 126 of 1993 or (ii) the Restitution of Land Rights Act 22 of 1994, (b) holds the property subject to the Communal Property Associations Act 28 of 1996 or (c) holds or acquires the property in terms of such other land tenure reform legislation as may pursuant to the Constitution s 25(6) and (7) be enacted after this Act has taken effect. See the MPRA s 1.

<sup>448</sup> The aim of the legislator is clearly to benefit poor households by not levying rates on property below R15 000 market value. In order to be equitable, every owner will receive such an exemption. Similar provisions have been made in respect of a minimum free water and electricity supply. One must note that such an exemption is applicable only to property being used for residential purposes. Business and commercial properties do not receive the same exemption and are thus treated indifferently. There seems to be a legitimate reason for exempting residential property in this manner and, more specifically, in light of the constitutional objects and demands on local government, a constitutional attack on equality grounds will not easily suffice. The minister of Local Government may increase the monetary threshold. See the MPRA s 17(3).

tered in the name of that community which is occupied by an office bearer of that community.<sup>449</sup>

The exclusion from rates lapses if the status of a property changes, from national land to something else, for example. If an exemption is withdrawn, rates by a private owner that would have been payable were it not for the exemption become payable.<sup>450</sup> The amount payable when an exemption is withdrawn must be regarded as rates in arrears, and interest is applicable on such an amount. Such a position seems somewhat unreasonable. Why should an owner be liable for rates which have been legally exempted and for the interest on such rates? The MPRA clarifies the situation somewhat by stating that such rates and interest are applicable only if the declaration of the property was withdrawn because of a decision of the private owner to withdraw from the agreement regarding the property or because of a decision by the state to withdraw from the agreement because of a breach of the agreement by the private owner.<sup>451</sup> It is of interest to note that a municipality is permitted to apply, in writing, to the minister of Local Government, to be exempted from paragraph 17(a), (e), (g) or (h) of the MPRA if it can demonstrate that an exclusion to levy such rates is compromising or impeding its ability or right to exercise its powers or to perform its functions within the meaning of the Constitution.<sup>452</sup> What this position really means is that, in certain instances, municipalities may be permitted to levy rates on property which are usually regarded as impermissible/exempted rates. Any exemption granted by the minister must be in writing and is subject to such limitations or conditions as he/she may determine.<sup>453</sup>

In order to protect owners of properties, the MPRA determines that a municipality may not levy:

- different rates on residential property, except as provided for in sections 11, 21 and 89 of the Act

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<sup>449</sup> Although such exemption was also allowed under the previous legal dispensation, religious communities should note the requirements of the MPRA s 16(1)(i) regarding the exemption of official residences of religious communities. Exclusion from these rates also lapses if the property is disposed of by the religious community or if the residence is not used as required. See the MPRA s 17(5).

<sup>450</sup> See the MPRA s 17(2).

<sup>451</sup> The MPRA s 17(d)(i)-(ii).

<sup>452</sup> Read the MPRA s 18(1) with the Constitution s 151(4).

<sup>453</sup> The MPRA s 18(2)(a)-(b).

- a rate on non-residential properties that exceeds a prescribed ratio to the rate on residential properties<sup>454</sup>
- rates which unreasonably discriminate between categories of non-residential properties or
- any additional rates except as provided for in section 22 of the Act.<sup>455</sup>

It is further the responsibility of the minister of Local Government, with the concurrence of the minister of finance, to set an upper limit on the percentage by which rates on properties or a rate on a specific category of properties may be increased. However, different limits may be set for:

- different kinds of municipality or
- different categories of property, subject to section 19.<sup>456</sup>

The MPRA also determines a compulsory phasing-in of certain rates. According to the Act, a rate levied on newly rateable property must be phased in over a period of three financial years, subject to subsection 21(5) of the Act.<sup>457</sup> Furthermore, a rate levied on property belonging to a land reform beneficiary must be phased in over a period of three financial years after the exclusion period set out in section 17(1)(g) has lapsed, subject to section 21(5). A rate levied on newly rateable property owned and used by organisations conducting specified public benefit activities and who are registered in terms of the Income Tax Act for those activities must be phased in over a period of four financial years.<sup>458</sup> In the first year, the phasing-in discount on newly rateable properties or on properties belonging to a land reform beneficiary must be at least 75% of the rate otherwise applicable to the property for that year, in the second year at least 50%, and in the third year at least 25%.<sup>459</sup> During the first year no rate may be levied on newly rateable property owned and used by organisations conducting specified public benefit activities. After the first year, the phasing-in discount on

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<sup>454</sup> See the MPRA s 19(a)(b) read with s 11(1)(a). The ratio may only be prescribed with the concurrence of the minister of finance. S 19(2).

<sup>455</sup> See the MPRA s 19(1)(a)-(d).

<sup>456</sup> The minister may on application by a municipality and on good cause exempt a municipality from a set limit. See the MPRA s 20(1)-(4) read together with the MFMA s 43.

<sup>457</sup> Note that according to the definitions in the MPRA s 1, "newly rateable property" means any rateable property on which property rates were not levied before the end of the financial year preceding the date on which the Act took effect. Properties which were (a) incorrectly omitted from the valuation roll or (b) identified by the minister where the phasing-in of a rate is not justified, are excluded from the definition.

<sup>458</sup> Refer to the MPRA s 21(a)-(c).

<sup>459</sup> The MPRA s 21(2)(a)-(e).

such property must be at least 75% in the second year, at least 50% in the third year and at least 25% in the fourth year.<sup>460</sup> A rate levied may also not be higher than a rate levied on similar property or category of property. On written request by a municipality, the MEC for Local Government may extend the phasing-in periods mentioned above. No phasing-in period may exceed six financial years, however.<sup>461</sup> If the MEC has extended a phasing-in period, he/she must determine the minimum phasing-in discount during each financial year of the extended period.

The new rating legislation also provides for additional rates and special rating areas. According to section 22 of the MPRA and by resolution of its council, a municipality may:

- determine an area as a special rating area
- levy an additional rate on property in that area for the purpose of raising funds for improving or upgrading that area
- differentiate between categories of properties when levying an additional rate.<sup>462</sup>

Since additional rates would place a more significant financial burden on certain property owners, it is required that before a municipality determines a special rating area, it must first consult the local community on the proposed boundaries of the area and also on the proposed improvement or upgrading required. Apart from this mandatory consultation obligation, the municipality must also obtain the consent of the majority of members of the local community in the proposed special rating area, who will be liable for paying the additional rate.<sup>463</sup> When a municipality determines a special rating area, it must:

- determine the boundaries of the area

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<sup>460</sup> See the MPRA s 21(3)(a)-(c). It must be noted that according to the definitions of the Act that specified public benefit activity means an activity listed in the Income Tax Act Ninth Sch Part 1 Item 1 (welfare and humanitarian), Item 2 (health care) and Item 4 (education and development).

<sup>461</sup> See the MPRA s 21(4)-(6).

<sup>462</sup> Refer to the MPRA s 22(1)(a)-(c). Since the resolution of the council concerns the levy of rates, it is submitted that such a resolution requires also an absolute majority of members to vote in favour thereof. The differentiation mentioned in s 22(1)(c) could, eg, result in business properties' bearing the brunt of an additional levy, while residential properties in the particular area are excused from such additional levies. It seems clear that additional levies may be levied only if funds are needed to improve or upgrade a particular area. Cross-subsidising through additional levies are not allowed. An objective assessment of all relevant factors must be conducted in this regard.

<sup>463</sup> "A majority" in this respect seems to refer to 50% + 1 of the total number of members of the relevant local community. It should be noted that not all members of the community need to be consulted, but only those members who will be liable for paying the additional rate. The intention of the legislator thus seems only to obtain a majority decision from persons/institutions responsible for pay property rates. See the MPRA s 2(a)-(b).

- determine how the area is to be improved or upgraded from the additional funds
- establish separate accounting and other record-keeping systems regarding the revenue generated by the additional rate and the improvement or upgrading of the particular area(s).

A municipality may further establish a committee comprising persons representing the community in the area as a consultative/advisory forum for the municipality on the improvement/upgrading. Representivity must be taken into account when the committee is established. The committee must then further be a subcommittee of the ward committee(s) in the area, if ward committees are applicable.<sup>464</sup> A special rating area must not be used to reinforce existing inequities in the development of the municipality and must also be consistent with the objectives of the municipality's integrated development plan.<sup>465</sup>

#### **18.5.6.5 The municipal register of properties**

All municipalities levying rates on property are obligated to establish and maintain a property register in respect of all properties situated within the municipal area. Such a register must consist of two parts: a part A and a part B. Part A should consist of the current valuation roll of the municipality and, if applicable, supplementary valuation rolls. Part B must specify which properties are subject to exemption, rebate, reduction in phasing-in rate or an exclusion.<sup>466</sup> The register must be open for inspection by the public during office hours and displayed on the municipal website if applicable. Finally, a municipality must regularly, but at least once a year, update part B of the register.<sup>467</sup>

#### **18.5.6.6 Liability for property rates**

A rate levied on property must be paid by the owner of the property.<sup>468</sup> Joint owners are normally jointly and severally liable for the amounts due for rates on that property. In respect of agricultural property owned by more than one owner in individual

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<sup>464</sup> The MPRA s 22(3)(a)-(d).

<sup>465</sup> See the MPRA s 22(4). Read also the Systems Act s 85 if additional rates are applied to providing funding for an internal municipal service district.

<sup>466</sup> Read the MPRA s 23(1)-(3) with ss 15, 21 and 17.

<sup>467</sup> The MPRA s 23(4)-(5). Part A must be updated in accordance with the provisions of the MPRA relating to the updating and supplementary of valuation rolls. Refer to the MPRA ch 8 for more details. Note that the term "register" generally means (a) to record in a register in terms of (i) the Deeds Registries Act 47 of 1937 or (ii) the Mining Titles Registration Act 16 of 1967 and (b) includes any other formal Act in terms of any other legislation to record (i) a right to use land for or in connection with mining purposes or (ii) a land tenure right. See the MPRA s 1.

<sup>468</sup> See the MPRA s 24(1) read with the Systems Act ch 9.



shares as legally allowed before the commencement of the Subdivision of Agricultural Land Act,<sup>469</sup> a municipality is allowed to hold any one of the joint owners liable for all rates or hold any joint owner liable for only that portion of the rates that represents his/her undivided share in the property.<sup>470</sup> One must note that the term “owner” has an expansive meaning. According to section 1 of the MPRA, the term *owner* means:

- a person in whose name ownership of property is registered
- a person in whose name a right to property is registered
- a person in whose name a land tenure right is registered or to whom the right was granted
- the organ of state which owns or controls a public service infrastructure. Apart from the abovementioned categories, the following persons/functionaries may for the purposes of the MPRA be regarded by a municipality as the owner of property in the following circumstances:
  - (a) a trustee of property in a trust<sup>471</sup>
  - (b) an executor or administrator of property in a deceased estate
  - (c) a trustee or liquidator of property in an insolvent estate/liquidation
  - (d) a judicial manager of property of a person under judicial management
  - (e) a curator of property of a person under curatorship
  - (f) a person in whose name a usufruct or other personal servitude is registered regarding property subject to such usufruct or personal servitude
  - (g) a lessee of a property that is registered in the name of a municipality and is leased by it<sup>472</sup>
  - (h) a buyer of a property sold by a municipality and of which possession was given to the buyer pending registration of ownership in the name of the buyer.<sup>473</sup>

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<sup>469</sup> 70 of 1970.

<sup>470</sup> See the MPRA s 25(a)-(b).

<sup>471</sup> State trust land is however excluded in this regard.

<sup>472</sup> In this regard, lessees and a lawyer advising such lessees should take into account that the lessee could be held liable for property rates even though the property belongs to a municipality. A clear compromise or deduction from rent should be negotiated and contractually confirmed.

<sup>473</sup> Again this provision requires careful consideration by prospective buyers, property lawyers and estate agents. Buyers must be advised of this liability. In cases where properties which do not belong to a municipality are sold, it would appear that the seller/current registered owner will stay liable for property rates up until the registration of transfer of the property to the new

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Rates levied on a sectional title unit are payable by the owner of the unit. Municipalities may not recover the rates on sectional title units or any parts thereof from the body corporate, except when the body corporate is the owner of any specific sectional-title unit. Body corporates are equally not permitted to apportion and collect rates from owners of units.<sup>474</sup>

In respect of the method and time of payment, it is determined that a municipality may recover a rate on a monthly basis or annually, as may be agreed to with the property owner. Rates are payable on or before a date(s) determined by the municipality. Only in special circumstances may the payment of a rate be deferred.<sup>475</sup> A municipality is obligated to furnish each person/owner liable for the payment of a rate with a written account, which account must specify the following:

- the amount due for rates
- the date for payment
- how the amount was calculated
- the market value of the property
- the phasing-in discount, if applicable
- any additional rates, if applicable.<sup>476</sup>

Delivery of an account is no prerequisite for collecting the applicable rate, however. A person/owner is liable for payment whether or not he/she has received an account. If no account is received, the onus is on the person/owner to make the necessary inquiries from the municipality.<sup>477</sup> If an amount due for rates is unpaid after the determined date, then the municipality may recover the amount in whole or in part from a tenant or occupier of the property, despite any contractual obligation to the contrary on the tenant or occupier.<sup>478</sup> The amount may be recovered only after the municipality has served a written notice on the tenant or occupier. The amount recoverable from a tenant/occupier is limited to the amount of rent or other money

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owner/purchaser. Parties will be well advised to specify and address such issues in clear terms in their agreements of sale.

<sup>474</sup> See the MPRA s 25(1)-(4) read with s 92.

<sup>475</sup> See the MPRA s 26(1)-(3). Recovery of rates may also take place less often than a month as prescribed in terms of the MFMA.

<sup>476</sup> Refer to the MPRA s 27(1)(a)-(f).

<sup>477</sup> Read the MPRA s 27(2)-(3). Note also that the furnishing of accounts is subject to the Systems Act s 102.

<sup>478</sup> "An occupier", in relation to a property, means a person in actual occupation of a property, whether or not that person has a right to occupy the property.

due and payable, but which has not yet been paid to the owner of the property, however. The tenant must set off any such amount paid to the municipality against any money owed by the tenant/occupier to the owner.<sup>479</sup> A further method of recovery of rates is provided through section 29 of the MPRA. According to this section and despite the Estate Agents Affairs Act,<sup>480</sup> a municipality may recover the amount due for rates on a property in whole or in part from the agent of the owner, if such a way is more convenient for the municipality. Again the agent must be served with a written notice to recover the due rates, and the amount recoverable is limited to the amount of any rent or other money received by the agent on behalf of the owner, less any commission due to the agent.<sup>481</sup> On request, the agent must furnish the municipality with a written statement specifying all payments received by the agent on behalf of the owner.<sup>482</sup>

#### **18.5.6.7 General aspects concerning the valuation of rateable property**

In accordance with the MPRA, a municipality that intends to levy a rate on property must cause a general valuation to be made of all properties in its area and prepare a valuation roll of such properties.<sup>483</sup> All the rateable properties in a municipal area must be valued during a general valuation exercise, including all properties fully or partially excluded from rates. Properties referred to in section 7(2) of the Act must be valued only to the extent that rates are to be levied on them. The minister of Local Government may further fully or partially exempt a municipality from the obligation to value properties excluded from rates in section 17(1)(e), (g) and (i) of the Act, if the municipality can demonstrate that the valuation of such properties is too onerous for

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<sup>479</sup> It is clear that the legislator's intention is to allow municipalities a quick mechanism to recover non-levy payments by property owners. Although such mechanism is laudable, it is somewhat uncertain if such statutory form of recovery and obligation for set off by the tenant/occupier will withstand constitutional or other legal challenges. It is very likely that tenants/occupiers in such circumstances will suffer victimisation and other pressures from property owners. To what extent a tenant and property owner can be forced to make public the content and value of a private lease agreement or to what extent the contractual freedom between the parties can be overruled from the outside is unknown and somewhat problematic. There seems also to be an unnecessary burden on tenants/occupiers in cases where property owners default on the rates payments. In this regard, eg, a tenant/occupier must on request by a municipality furnish it with a written statement specifying all payments to be made by the tenant/occupier to the owner of the property for rent or other money payable on the property. See the MPRA s 28(4).

<sup>480</sup> 112 of 1975.

<sup>481</sup> "An agent", in relation to the owner of a property, means a person appointed by the owner of the property (a) to receive rental or other payments in respect of the property on behalf of the owner or (b) to make payments in respect of the property on behalf of the owner. See the MPRA s 1.

<sup>482</sup> See the MPRA s 29(1)-(4).

<sup>483</sup> Read the MPRA s 30(1)(a)-(b) with ss 30(2) and (3).

it, given its financial and administrative capacity. All valued properties must be included in the valuation roll.<sup>484</sup> For purposes of the general valuation, a municipality must determine a date that may not be more than 12 months before the start of the financial year in which the valuation roll is first to be implemented. The general valuation must reflect the market value of the properties in accordance with market conditions at the date of the valuation and other statutory requirements.<sup>485</sup>

A valuation roll mentioned above will take effect from the start of the financial year following the completion of the public inspection period set out in section 49 of the MPRA. The valuation roll further remains valid for that financial year or for one or more subsequent financial years as the municipality may decide. In normal circumstances, no valuation roll may remain valid for longer than four financial years.<sup>486</sup> The MEC for local government may extend the period for which a valuation roll remains valid to five years maximum, however. Such extension is permitted only if the provincial executive has intervened in the municipality or on request by the municipality, in exceptional circumstances which warrant such extension.<sup>487</sup> It must also be noted that a valuation roll remains valid for one year after the date on which the roll has lapsed if the provincial executive intervenes in terms of section 139 of the Constitution, which intervention could have been either before or after such a date. However, this position is subject to the fact that the intervention was caused by a municipality's failure to determine a date of valuation for its general valuation or its failure to designate a person as its municipal valuer.<sup>488</sup> It is therefore clear that unless exceptional circumstances exist, a municipality will have to conduct a general valuation of all property in its area every four years or on such intervals as it may have decided.

In order to compile a valuation roll, a municipality must designate a person as its municipal valuer before the date of valuation. This person may either be one of the financial officials of the municipality or a person in private practice. If a private practitioner is appointed, the municipality must follow an open, competitive and transparent process and must designate the successful bidder as its municipal valuer by way

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<sup>484</sup> See the MPRA s 30(2)-(3).

<sup>485</sup> Read the MPRA s 31(1)-(2).

<sup>486</sup> See the MPRA s 32(1)(a)-(b). This position reflect to some degree the similar position as was applicable under the previous legal dispensation.

<sup>487</sup> Read the MPRA s 32(2)(a)-(b) together with the Constitution s 139.

<sup>488</sup> Refer to the MPRA s 32(3)(a)-(b) read with ss 31 and 33.

of a written contract.<sup>489</sup> The designation/appointment of a municipal valuer may be withdrawn/cancelled only on the grounds of misconduct, incapacity, incompetence, non-compliance with the MPRA, under-performance or breach of contract, if applicable.<sup>490</sup>

A municipal valuer has a vast number of functions to perform. Such a person is obligated, *inter alia*, to

- value all properties
- prepare a valuation roll
- sign and certify the valuation roll
- submit the valuation roll to the municipal manager
- consider and decide objections to the roll
- attend every meeting of an appeal board hearing appeals or reviews of his/her decisions
- prepare supplementary rolls
- assist the municipality in collection/obtaining postal addresses of property owners
- generally provide appropriate administrative support incidental to the valuation roll.<sup>491</sup>

In order to assist a municipal valuer, a municipal manager may designate officials/persons in private practice as assistant municipal valuers. Similar requirements applicable to the municipal valuer are prescribed in relation to assistant municipal valuer.<sup>492</sup> A municipal manager may also designate officials or even non-officials of the municipality as data-collectors in order to assist the municipal valuer with the collection of data and other related work. Data-collectors appointed from outside the municipal staff component are remunerated from municipal funds, but only in terms of the contracts concluded with them.<sup>493</sup>

In an effort to help a municipal valuer to fulfil his/her functions and obligations, the MPRA determines that the valuer may delegate any powers or duties reasonably

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<sup>489</sup> See the MPRA s 33(1)-(2), read with the MFMA ch 11. The written contract should set out the terms and conditions of the designation and the person must be issued with an identity card with personal photograph for identification purposes. Read the MPRA s 33(3).

<sup>490</sup> The MPRA s 33(4)(a)-(d).

<sup>491</sup> See the MPRA s 34(a)-(i).

<sup>492</sup> Refer to the MPRA s 35(1)-(5).

<sup>493</sup> All data-collectors are also issued with ID cards and may be removed from such a designation. Normal contractual laws should be applicable in such instances. See the MPRA s 36(1)-(5). A data-collector is a person designated as such. Refer to s 1 definitions.

necessary to an assistant municipal valuer to assist the valuer. Powers and duties in the collection and processing of data may also be delegated to a data-collector. The valuer must regularly review such delegations and, if necessary, amend or withdraw such delegations. Delegations must be in writing, subject to the limitations and conditions determined in the delegation and not divest the valuer of the responsibility of the delegated powers. The valuer may also confirm, vary or revoke any decision taken in terms of the delegation, but any such action may not detract from any rights that may have accrued as a result of the decision.<sup>494</sup> In order to save costs and obtain expertise, a municipality may enter into an agreement with another municipality(s) to designate a single municipal valuer and to share the costs of preparing the different municipal valuation rolls. This sharing possibility is not permitted if the municipality concerned agrees to appoint an official of one of the partaking municipalities as the municipal valuer.<sup>495</sup>

Specific qualifications of municipal valuers are prescribed. The new legislative system determines that a municipal valuer:

- must be registered as a professional valuer or associated valuer in terms of the Property Valuers Profession Act<sup>496</sup> and
- may not be a councillor of the designating municipality or other involved municipalities.<sup>497</sup>

An assistant valuer must also have the same qualifications of a municipal valuer, except that a candidate valuer registered under the Property Valuers Profession Act may also be designated.<sup>498</sup> Before assuming office, a valuer or assistant valuer must make a prescribed declaration before a Commissioner of Oaths regarding the performance of the office and must lodge a copy of such a declaration with the municipal manager.<sup>499</sup>

It is common cause that all rateable property must be valued in order to determine the applicable rate payable. In order to value property and to establish the municipal valuation roll, access to all rateable property is required. To facilitate such access,

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<sup>494</sup> The MPRA s 37(1)-(3).

<sup>495</sup> Refer to the MPRA s 38(1)-(2). Sharing of a municipal valuer is thus permitted only if the designated person is a private practitioner.

<sup>496</sup> 47 of 2000.

<sup>497</sup> See the MPRA s 39(1)(a)-(b).

<sup>498</sup> The MPRA s 39(2)(a)-(b). No councillor may be an assistant municipal valuer.

<sup>499</sup> The MPRA s 40(a)-(b).

the MPRA states that subject to any legislation that restricts or prohibits entry to any specific property, the municipal valuer, assistant valuer, data-collector or other authorised person may enter any property that must be valued and inspect that property for purposes of the valuation, between 07:30 and 19:00 on any day, except a Sunday or public holiday. When entering a property, the person must, on demand by a person on that property, produce his/her identification card. The valuer or other official may also be accompanied by an interpreter or other functionaries.<sup>500</sup> A municipal valuer/other functionary may further require the owner/tenant/occupier of a property to give the valuer access to any document or information in his/her possession, which document or information is reasonably required for purposes of valuing the property. The valuer may make extracts from such documents or information and may also in writing require the owner/tenant/occupier or agent of owner, to provide the valuer either in writing or orally with particulars regarding the property which the valuer reasonably requires for the valuation.<sup>501</sup> Owners/occupiers/tenants should be careful about refusing to supply the information/documentation, since the MPRA determines that where a document/information was not provided, but the owner later relies on such a document/information in an appeal against the valuation, the appeal board hearing such an appeal may make an order as to costs if the board is of the view that the failure has placed an unnecessary burden on the functions of the valuer or appeal board.<sup>502</sup>

Valuers and assistant valuers are obligated to conduct the functions within a certain code of conduct. Every municipal valuer/assistant valuer must disclose any personal or private business interest to the municipality regarding any property in the municipality. The position/office as valuer may also not be used for private gain or improperly benefit another person. Furthermore each valuer/assistant valuer must comply with the code of conduct for municipal officials, as set out in Schedule 2 of the Systems Act.<sup>503</sup> A valuer/assistant valuer who contravenes/fails to comply with

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<sup>500</sup> See the MPRA s 41(1)-(3). In certain circumstances a valuer or other inspecting person may also be accompanied by security personnel, should such assistance be required by the circumstances. It is also submitted that any access to property must at least comply with any constitutional requirements. Examples of such rights are the right to privacy and property, to name but two.

<sup>501</sup> Read the MPRA s 42(1)(a)-(c).

<sup>502</sup> The MPRA s 42(2).

<sup>503</sup> Read the MPRA s 43(1)(a)-(c) together with the Municipal Systems Act Sch 2. According to s 43(2), a municipal valuer/assistant valuer who is not an official of a municipality must comply with the code of conduct as if that person is such an official.

the requirements is guilty of misconduct and subject to dismissal. A decision to dismiss a valuer/assistant who is an employee of the municipality must be based on a finding of an enquiry conducted in terms of the terms and conditions of employment of the person.<sup>504</sup> If a municipal valuer/assistant has an interest in property or his/her spouse, parent, child, partner or business associate, the municipal manager must designate a special valuer to perform such valuation.<sup>505</sup> Owners of the property should note that a municipal valuer or other functionary may not disclose to any person any information obtained except

- if allowed to in terms of the MPRA
- for the purpose of legal proceedings or
- in terms of court orders.<sup>506</sup>

#### **18.5.6.8 Aspects concerning property valuation criteria**

The new uniform Property Rates Act determines that all property must be valued in accordance with generally recognised valuation practices, methods and standards. Physical inspection, all often very useful, is optional. Comparative, analytical or even other systems or techniques may be used, including aerial photography and computer-assisted mass appraised systems/techniques. In cases where the available market-related data of any category of rateable property is not sufficient, such property may be valued in terms of mass-valuation systems. Such mass-evaluation systems/techniques should be approved by the municipality concerned after having considered any recommendations of its municipal valuer and as may be appropriate in the circumstances. Mass-valuation systems/techniques may include a system based on predetermined bands of property values and the designation of properties to one of those bands on the basis of minimal market-related data.<sup>507</sup> Subject to the provisions of the MPRA, the market value of a property is the amount that the property would have realised had it been sold on the date of valuation in the open market by a willing seller to a willing buyer. In order to determine the market value of a prop-

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<sup>504</sup> The section thus requires an inquiry in accordance with applicable labour relations practices and requirements. The municipality's normal disciplinary procedures would thus come into play. See the MPRA s 43(3)-(4).

<sup>505</sup> See the MPRA s 43(5). A special valuer must be qualified similarly to the normal municipal valuer. Refer to s 39 qualifications.

<sup>506</sup> See the MPRA s 44(1)(a)-(d). The protection of information clause is also applicable to any person accompanying a municipal valuer or other functionary, when performing his/her functions under the MPRA s 41(1).

<sup>507</sup> See the MPRA s 45(1)-(3).



erty, the following aspects must be considered for purposes of valuating a property:<sup>508</sup>

- (a) the value of any license, permission or other privilege legally granted to the property;
- (b) the value of any immovable improvement on the property that was erected or is being used for a purpose which is inconsistent with or in contravention of the permitted use of the property;
- (c) the value of the use of the property for a purpose which is inconsistent with the permitted use.<sup>509</sup>

The following issues must be disregarded for purposes of valuation:<sup>510</sup>

- the value of any building or other immovable structure under the surface of the property which is the subject of any mining authorisation or mining right as defined in the Minerals Act<sup>511</sup>
- the value of any equipment or machinery which is regarded as immovable property, excluding a lift, an escalator, an air-conditioning plant, fire extinguishing apparatus, a water pump installation for a swimming pool/irrigation or domestic purposes and any other equipment/machinery that may be prescribed<sup>512</sup>
- any unregistered lease in respect of the property.

When determining the market value of a property used for agricultural purposes, the value of any annual crops or growing timber that have not yet been harvested at the date of the valuation must be disregarded.<sup>513</sup> Where available, the market value of public service infrastructure may be valued in accordance with any other prescribed method of valuation.<sup>514</sup> In respect of sectional-title schemes, the valuer must determine the market value of each sectional title unit in accordance with the provisions of section 46 of the MPRA.<sup>515</sup>

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<sup>508</sup> See the MPRA s 46(a) and (c).

<sup>509</sup> Any unlawful use/improvement is regarded for valuation purposes as if the use/improvement was lawful.

<sup>510</sup> See the MPRA s 46(3)(a).

<sup>511</sup> 50 of 1991.

<sup>512</sup> Prescribed in this sense refer to prescribe by regulation in terms of the MPRA s 83.

<sup>513</sup> Refer to the MPRA s 46(4).

<sup>514</sup> The MPRA s 46(5).

<sup>515</sup> See the MPRA s 47.

### 18.5.6.9 Aspects regarding municipal valuation rolls

All valuation rolls must list all rateable properties in their respective municipal areas. Specific particulars that must be reflected on the roll, if such information is reasonably determinable, are:

- the registered or other description of the property
- the category in which the property falls
- the physical address
- the extent of the property
- the market value, if valued
- the name of the owner and
- any other prescribed particulars.<sup>516</sup>

The municipal valuer must submit the certified valuation roll to the municipal manager, who must within 21 days of receipt of the roll publish in the *Provincial Gazette*, once a week for two consecutive weeks, a notice stating:

- that the roll is open for public inspection for a specified period and
- which invites every person who wishes to lodge an objection against the roll in the prescribed manner and period.<sup>517</sup>

The municipal manager must further disseminate the substance of the notice to the local community and serve by ordinary mail, if appropriate, on every owner a copy of the notice, together with an extract of the valuation roll pertaining to the relevant property.<sup>518</sup> Both the notice and the valuation roll must also be published on the municipality's website, if applicable. Any person may, after publication of the notice, inspect the roll during office hours, and on payment of a reasonable fee, request extracts from the roll and may also lodge an objection with the municipal manager against any matter reflected/omitted from the roll. An objection must be in relation to a specific individual property and not against the valuation roll as such.<sup>519</sup> Objectors

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<sup>516</sup> Read the MPRA s 48(1)-(2)(a)-(g). The minister may prescribe further particulars.

<sup>517</sup> See the MPRA s 49(1)(a)(i)-(ii). The inspection period may not be less than 30 days from the date of the publication of the last/second notice in the *Provincial Gazette*.

<sup>518</sup> Refer to the MPRA s 49(1)(b)-(c). These requirements must be read with the requirements set out in the Municipal Systems Act ch 4 and s 115.

<sup>519</sup> It seems that since the Act allows *any person* (own emphasis added) to lodge an objection, it is therefore not necessarily the owner of a particular property that has such a right. It would thus seem possible that a person could lodge an objection to the valuation of other property owners. See the MPRA s 50(1).

who are unable to read or write must be assisted by the municipal manager.<sup>520</sup> It is not only private persons that may lodge an objection; a municipal council itself may lodge an objection with the municipal manager against the valuation roll that affects the interests of the municipality. The municipal manager must within 14 days of the end of the objection period submit all objections to the municipal valuer, who is again obligated to decide and dispose of the objections promptly. It is important to note that the lodging of an objection does not defer liability of payment of rates beyond the payment date.<sup>521</sup> When considering and processing objections, the municipal valuer must promptly consider the objections, decide them on facts and adjust or add to the valuation roll, depending the decision taken.<sup>522</sup>

The new legislative framework also provides for the compulsory review of decisions of the municipal valuer. In this regard it is provided that if a municipal valuer adjusts the valuation of a property by more than 10% upwards or downwards, then the valuer must give written reasons for such a decision to the municipal manager, who must, in turn, promptly submit the relevant valuation decision, together with reasons and documentation, to the relevant valuation appeal board, for review.<sup>523</sup> The relevant appeal board is then obligated to review the decision and either to confirm, amend or revoke the decision.<sup>524</sup>

It is further required that a municipal valuer must in writing notify every objector and also the owner of a property if not the same, of the valuer's decision, any adjustments made to the roll and whether a section 52 automatic appeal is applicable.<sup>525</sup> An objector or owner may in writing, and within 30 days after such notification, apply to the municipal manager for reasons for the decision. A prescribed fee must accompany the application. Within 30 days after receipt of such application through the

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<sup>520</sup> It seems obvious that the Act does not require the municipal manager to act in his/her personal capacity, but rather that personnel from his/her office provide such assistance. The municipal manager stays finally responsible for such assistance, however. The MPRA s 50(3).

<sup>521</sup> See the MPRA s 50(4)-(6). Payment of rates by property owners whilst an objection is still undecided, is somewhat controversial. It seems that the Act requires payment first and possible settlement/adjustments later. Such a situation could put legitimate objectors in a negative position vis-à-vis their relevant municipalities. The constitutionality of such a position is somewhat doubtful.

<sup>522</sup> Note that the minister may prescribe the objection procedure and also that the objections should be evaluated with due regard to the submissions of an objector, which can be the owner of the property concerned or any other person. See the MPRA s 51(a)-(c).

<sup>523</sup> Read the MPRA s 52(1)(a)-(b).

<sup>524</sup> If an appeal board amends or revokes a decision, the chairperson of such a board and the valuer must ensure that the valuation roll is adjusted according to the decision of the board. the MPRA S 52(3).

<sup>525</sup> See the MPRA s 53(1)(a)-(c).

municipal manager, the relevant valuer must then provide the applicant the reasons for the decision in writing.<sup>526</sup> After receipt of the written reasons for a decision, an appeal to an appeal board against the decision may be lodged in the prescribed manner with the office of the municipal manager. Such an appeal may be lodged by either an objector, an owner of a property who is affected by the decision and the municipal council concerned, if the municipality's interests are affected. An appeal by an objector must be lodged within 30 days after the date on which the written notice was sent to the objector or after 21 days after the day on which the reasons for a decision were sent to an objector who has requested such reasons. An owner of a property must lodge an appeal within 30 days after the date on which the written notice was sent, or within 21 days after the date on which the decision was taken.<sup>527</sup> A municipal manager must then forward any appeal to the chairperson of the appeal board within 14 days after the end of any applicable appeal period. The chairperson of the appeal board must then, for purposes of considering any appeal, convene a meeting of the board within 60 days after an appeal has been forwarded. A copy of the appeal must also be submitted to the municipal valuer concerned. Again the MPRA determines that an appeal lodged does not defer liability for payment.<sup>528</sup> Finally, it is determined in the Act that any adjustments or additions made to a valuation roll will take effect on the effective date of the valuation roll.<sup>529</sup> If an adjustment in the valuation of a property affects the amount due for rates, then the municipal manager must calculate the amount actually paid and the amount payable in terms of the adjustment calculated since the effective date. The municipal manager must then recover or repay the rates to the liable person: the difference together with interest at a prescribed rate.<sup>530</sup>

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<sup>526</sup> The MPRA s 53(2)-(3).

<sup>527</sup> See the MPRA s 54(1)-(2).

<sup>528</sup> Refer to the MPRA s 54(3)-(4).

<sup>529</sup> According to the definitions set out in the MPRA s 1, the term "effective date" means the date on which a valuation roll has taken effect in terms of the Act s 32(1) or the date on which a supplementary valuation roll has taken effect in terms of the Act s 78(2)(b).

<sup>530</sup> See the MPRA s 55(1)-(3). Where additions to a valuation roll were made, the municipal manager must also recover from the liable person, payment of the rate because of the addition, plus interest as prescribed.

#### 18.5.6.10 Requirements and determinations pertaining to valuation appeal boards

The MEC for local government in a province is authorised to establish as many appeal boards in the province as may be necessary. There must be no fewer than one such an appeal board in each district municipality and each metropolitan municipality, however.<sup>531</sup> If more than one appeal board is established in a district municipality, each board must be established for one or more local municipalities or even district management areas.<sup>532</sup> The main function of an appeal board is twofold:

- It should hear and decide appeals under the Act.
- It should review decisions of a municipal valuer submitted under section 52 of the Act.<sup>533</sup>

With reference to the composition of an appeal board, the PRA determines that each appeal board should consist of a chairperson, who must be a person with legal qualifications and sufficient experience in the administration of justice, and not fewer than two and not more than four other members with sufficient knowledge of or experience in the valuation of property. Of such persons, at least one must be a professional valuer registered in terms of the Property Valuers Profession Act. All members of an appeal board must be appointed by the MEC, taking into account the need for including representivity as well as gender representivity. When making appointments, the MEC must follow a transparent process.<sup>534</sup> The following persons are legally disqualified from being a member of an appeal board, however:

- an unrehabilitated insolvent
- a person under curatorship
- a person declared to be of unsound mind by a court of the Republic of South Africa
- a person who, after 24 April 1994, was convicted of an offence and sentenced to imprisonment without an option of a fine for a period of not less than 12 months
- a person who has been disqualified in terms of applicable legislation from practising as a valuer or a lawyer<sup>535</sup>

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<sup>531</sup> Notice of the appeal boards must be given in the *Provincial Gazette* of the province.

<sup>532</sup> See the MPRA s 56(1)-(2).

<sup>533</sup> Read the MPRA s 57(a)-(b).

<sup>534</sup> See the MPRA s 58(1)-(3).

<sup>535</sup> Refer to the Property Valuers Profession Act 47 of 2000 and the Attorney's Act 53 of 1979.

- a person who is in arrears to a municipality for rates or services charges for a period longer than three months.<sup>536</sup>

A member of an appeal board who is a councilor, employee or valuer of a municipality must withdraw from the proceedings of the board if a matter concerning that municipality's valuation roll is being considered by the board.<sup>537</sup> The normal term of office of members of an appeal board is four years, but members are eligible to be reappointed.<sup>538</sup> After consultation with the MEC, the minister of Local Government must determine the conditions of appointment of members of an appeal board. Conditions of appointment may differ between the chairperson and other members. The municipality or municipalities for which an appeal board was established must remunerate the members of the board according to the conditions of appointment and the directions of the MEC.<sup>539</sup> All members of appeal boards must perform their duties in good faith and without fear, favour or prejudice. Any personal or private business interest of a member in a matter on appeal must be disclosed, and such a member must withdraw from the proceedings, unless the board decides that the interest is trivial or not relevant. Such a decision should be announced in public at the first available sitting of the board. No member may use his/her position or privileges for private gain or to improperly benefit another person. Members may also not act in any way that compromises the credibility, impartiality, independence or integrity of an appeal board. If a member contravenes the code of conduct mentioned above, he/she will be guilty of misconduct.<sup>540</sup>

It is also provided that a member of an appeal board ceases to be a member when that person resigns, is no longer eligible or is removed from office. Only the MEC may remove a member from office and only on the grounds of misconduct, incapacity or incompetence. A decision to remove a member must be based on a finding of misconduct or incompetence by an investigating tribunal appointed by the MEC. Members under investigation may be suspended from office by the MEC.<sup>541</sup> The

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<sup>536</sup> The MPRA s 59(1)(a)-(f). The disqualification because of an offence ends five years after the imprisonment has been completed.

<sup>537</sup> The MPRA s 59(3).

<sup>538</sup> No specific terms are laid down in the MPRA. A member can thus be reappointed several times. Refer to the MPRA s 60.

<sup>539</sup> The MPRA s 61(1)-(3).

<sup>540</sup> Refer to the MPRA s 62(1)-(2).

<sup>541</sup> See the MPRA s 63(1)-(4).

MEC may further appoint alternative members of an appeal board. An alternative member acts as a member when a member is absent, has recused him/herself or when the filling of a vacancy on the board is pending.<sup>542</sup>

The chairperson on an appeal board decides where and when a board meets, but he/she must promptly convene a meeting if a majority of members of the board so request in writing, at a time and place set out in the request. When a board is hearing an appeal, it must sit in a municipality whose valuation roll is the subject of the appeal or being reviewed.<sup>543</sup> If a chairperson is absent or not available, or if there is a vacancy in the office of the chairperson, then the other members of the board must elect a member with experience in the administration of justice or elect the alternative as chairperson to preside at the meeting. Meetings are open to the public, but a board may adjourn in closed session when deliberating an issue.<sup>544</sup> An appeal board may further request a municipality whose valuation roll is under consideration to provide it with the necessary office accommodation and other administrative assistance, inclusive of staff for the board. All reasonable requests in this regard must be complied with by the municipality, which is subsequently also liable for the costs of the appeal board.<sup>545</sup> The internal procedure of a board may be determined by the board, subject to any procedures that may be prescribed.<sup>546</sup> A majority of members of an appeal board serving at any relevant time constitutes a quorum for a meeting, and a matter before the board is decided by a supporting vote of a majority of the members. If on any matter there is an equality of votes, then the member presiding must exercise a casting vote in addition to that person's normal vote as a member.<sup>547</sup> It is the responsibility of the chairperson of an appeal board and of the valuer

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<sup>542</sup> See the MPRA s 64(1)-(3).

<sup>543</sup> It seems that the intention of the legislator is for the board to sit and convene within the municipal offices of the municipality concerned. See the MPRA s 65(2).

<sup>544</sup> Read the MPRA s 55(1)-(4).

<sup>545</sup> Refer to the MPRA s 66(1)-(2).

<sup>546</sup> The MPRA s 67.

<sup>547</sup> The MPRA is somewhat unclear on the aspect of decision making. There seem to be two possibilities. Since a majority (50% + 1) of members of a board forms a quorum, such a quorum must normally be present before a meeting and subsequent decision is taken. The Act s 68 determines that any matter before the board is decided by a supporting vote of a majority of the members of the board, however, and not a majority of the members present that formed a quorum. To illustrate the position, let us imagine an appeal board that consists of five members. Refer again to the Act s 58. A quorum would be three members. If the legislator intended that a majority (absolute majority) of the members of a board must support a matter before the board, then all three members must support a decision. If the intention was to refer to a supporting vote of a majority of members present that form a quorum, then only 2 (50% + 1 of the members present) would allow a

*continued on next page*



of a municipality to ensure that that valuation roll is adjusted or added to in accordance with the decisions taken by the board.<sup>548</sup> When an appeal board gives a decision, it may issue an order with regard to costs, as it sees just and equitable. Persons whose appeals or opposition to an appeal were in bad faith or frivolous may be ordered to compensate the municipality concerned in full or in part for costs incurred by the municipality in the appeal.<sup>549</sup> It is also determined that the MEC may on request by an appeal board authorise the board to establish one or more committees to assist it in the performance of its duties. When appointing members of a committee, the board is not restricted to members of the appeal board. Furthermore, the board

- must determine the duties of a committee
- must appoint a chairperson and other members
- must authorise the committee to co-opt advisory members within the limits determined by the board
- may remove members
- may also determine a committee's procedure.

The board can also dissolve a committee at any time.<sup>550</sup>

Similarly to a municipal valuer, an appeal board may enter any property that is subject of an appeal and inspect the property. When entering a property, a member or assistant of the board must identify himself or herself and may be accompanied by an interpreter or other functionaries.<sup>551</sup> Members of appeal boards may require access to documents or information relevant to the appeal/review and may make extracts thereof. They can also require written or oral particulars regarding the property relevant to the appeal/review.<sup>552</sup> Information obtained may not be disclosed, except as authorised under the MPRA.<sup>553</sup>

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decision. The latter would seem the more likely interpretation, since the contrary would make the provision of s 68(1) rather meaningless.

<sup>548</sup> Refer to the MPRA s 69(1)-(3). Where an adjustment affects the amount due for rates, then s 55 must be applied.

<sup>549</sup> The MPRA s 70(1)-(2).

<sup>550</sup> See the MPRA s 71(1)-(5). Note also that ss 61-66(2)(b), read with the necessary changes, apply to the conditions of appointment of members of a committee who are not members of an appeal board.

<sup>551</sup> For the full details read the MPRA s 71(1)-(3). The MEC must issue all members of an appeal board an identity card with the photographs of that person for identification purposes.

<sup>552</sup> Refer to the MPRA s 73(a)-(c).

<sup>553</sup> Read the MPRA s 74(1)(a)-(d).

In order for an appeal board to function properly, the MPRA determines that an appeal board may by notice summon a person to appear before it in order to give evidence or to produce documents specified in the summons/notice. The board may also call a person present at a meeting, whether summoned or not, to give evidence or to produce a document in that person's custody. For evidential purposes, the board may administer an oath or solemn affirmation to a person and question or have a person questioned. Documents obtained may be retained by the board for a reasonable period.<sup>554</sup> It is further also provided that a person who is appearing before an appeal board, whether summoned or not, may at his/her own expense be assisted by a legal representative. When a person is summoned before a board, he/she is entitled to witness fees paid to state witnesses in criminal proceedings in a criminal court. Such fees are payable by the relevant municipality. It should be noted that the law regarding privilege to a witness in a criminal case applies before an appeal board.<sup>555</sup> In the last instance, it is provided that legal proceedings by or against an appeal board may be instituted in the name of the board, and any costs awarded in any legal proceedings against such a board must be borne by the municipality concerned.<sup>556</sup>

#### **18.5.6.11 Aspects regarding the updating of municipal valuation rolls**

All applicable municipalities must regularly, but at least once a year, update its valuation roll by preparing either a supplementary valuation roll or amending its current valuation roll.<sup>557</sup> In respect of supplementary valuations, a municipality must, whenever necessary, cause a supplementary valuation to be made in respect of all rateable property that

- was incorrectly omitted from the roll
- was included in a municipality after the last general valuation
- was subdivided or consolidated after the last general valuation of which the market value has substantially increased or decreased
- was substantially incorrectly valued during the last general valuation

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<sup>554</sup> See the MPRA s 75(1)(a)-(e).

<sup>555</sup> For more details refer to the MPRA s 75(2)-(4).

<sup>556</sup> It seems therefore that an appeal board is afforded legal personality, which can take legal action itself or against which legal action can be instituted. The MPRA is somewhat vague about this particular aspect. See the MPRA s 76(1)-(2).

<sup>557</sup> The MPRA s 77(a)-(b).

- must be revealed because of other exceptional reasons.<sup>558</sup>

A municipal valuer who prepared the valuation roll may be designated for the preparation and completion of the supplementary roll. A supplementary roll takes effect on the first day of the month following the completion of the public inspection period, and it remains valid for the duration of the municipality's current valuation roll.<sup>559</sup>

Supplementary valuations must reflect the market value of properties as determined in accordance with market conditions that prevailed at the date of the valuation determined for the purposes of the municipality's last general valuation and other provisions of the MPRA. Rates applicable to a supplementary valuation roll become payable with effect from:

- the effective date of the supplementary roll
- the date on which the property was included in the municipality
- the date on which the subdivision or consolidation of the property was registered in the deeds office or
- the date on which the market value has substantially increased or decreased.<sup>560</sup>

All municipalities must regularly amend their valuation roll to reflect any changes to the particular roll. Changes to the roll in circumstances under section 78 of the MPRA may be effected only through a supplementary roll, however.<sup>561</sup>

#### **18.5.6.12 Miscellaneous matters pertaining to the new property rates legislation**

The MPRA determines that, on good cause shown and on such conditions as the MEC may impose, the MEC for Local Government in a province may condone any non-compliance with a provision of the Act which requires any Act to be done within a specified period or pertaining to any Act to be done within a specified period. Any

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<sup>558</sup> See the MPRA s 78(1)(a)-(f). Note that the provisions of ch 4 Part 2 and also chs 5, 6 and 7 are applicable to the updating of valuation rolls.

<sup>559</sup> Read the MPRA s 78(2)(a)-(b) together with s 49.

<sup>560</sup> Refer to the MPRA s 78(3)-(4). It seems clear from the Act that not only increases in the value of property are provided for, but also decreases. When the valuation of a property is negatively impacted, eg, through fire or other natural disaster, then a property owner would be well advised to notify the relevant municipal manager of such an occurrence and request the municipal valuer to investigate the matter and to make an adjustment accordingly. It is submitted in this regard that unless an adjustment to the valuation roll by means of a supplementary roll has been made, a property owner will have to pay the rates due on that property as was valued in terms of the previous valuation. A possible refund could be applicable later when the supplementary valuation roll is in effect.

<sup>561</sup> The MPRA s 79.

non-compliance with sections 21, 31 or 32 of the Act may not be condoned.<sup>562</sup> The MEC must further monitor whether municipalities comply with the provisions of the Act. If municipalities fail to comply with the Act, the MEC may take any appropriate steps to ensure compliance, which steps could include a proposal to intervene in accordance with section 139 of the Constitution.<sup>563</sup> Even the minister may monitor or investigate and even issue a public report on the effectiveness, consistency, uniformity and application of municipal valuations. Such an investigation may include studies of the ratio of valuations to sale prices and also other appropriate statistical measures in order to determine the accuracy of valuations.<sup>564</sup> The minister is furthermore authorised to make regulations which are not inconsistent with the Act, and which concern:<sup>565</sup>

- (a) any matter that may be prescribed in the act;
- (b) matters that refer to the preparation, contents, adoption and enforcement of a municipal rates policy;
- (c) the manner in which rates referred to in section 21 of the MPRA must be phased in together with the criteria that municipalities must take into account;
- (d) the property register;
- (e) the form and content of any document referred to in the act, including a declaration, authorization, valuation roll, objection, appeal and notice;
- (f) the valuation and rating of public service infrastructure;
- (g) procedures to be followed in connection with appeals and reviews of decisions of municipal valuers;
- (h) aspects of condonement of non-compliance;
- (i) the giving of reasons by an appeal board;
- (j) the funding of appeal boards;
- (k) inquiries by investigating tribunals for appeal boards;
- (l) inquiries of alleged misconduct of valuers;
- (m) fees payable for information or issuing of documents;

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<sup>562</sup> The MPRA s 80(1)-(3). The power to condone may also only be exercised within a framework, as may be prescribed by regulation by the minister.

<sup>563</sup> Read the MPRA s 81(1)-(2).

<sup>564</sup> Investigations may be undertaken in respect of one, more or all municipalities. See the MPRA s 82(1)-(3).

<sup>565</sup> See the MPRA s 83(1)(a)-(n).

(n) any other matter in the opinion of the minister that is necessary for the effective carrying out or furtherance of the objects of the act.

Furthermore, the minister may declare by regulation a contravention of or failure to comply with any specific regulation to be an offence.<sup>566</sup> Before regulations are promulgated, the minister must consult with OLG on the substance of those regulations and must also publish the draft regulations in the *Government Gazette* for public comment.<sup>567</sup> It is also provided that the copyright of valuation rolls and other documents produced by municipal functionaries under the Act vests in the relevant municipality concerned.<sup>568</sup>

The MPRA determines that a person is guilty of an offence if that person:<sup>569</sup>

- (a) contravenes section 43(1)(a) or (b), 44, 62(1)(b) or (c) or section 74 of the act;
- (b) willfully obstructs, hinders or threatens a valuer or other authorized person when performing a duty or exercising a power in terms of the act;
- (c) willfully gives information in an objection in terms of section 50(1)(c) of the act or in an appeal which is false in any material aspect;
- (d) after having been summoned, fails to be present at a meeting, fails to remain present until excused or fails to produce a document specified in the summons;
- (e) after having been called under section 75 of the act, refuses to appear, answer any question, except where the answer might incriminate the person or to produce a document in the person's custody;
- (f) fails to comply with a request under section 29, 42 or 73 of the act or willfully supplies false or incorrect information in any material respect.

A valuer is guilty of an offence even if he/she is grossly negligent in the exercise of the functions of the office. For someone convicted of an offence, the penalty under the Act is the liability of imprisonment, which may not exceed two years, or a fine as may be prescribed in relevant national legislation. A person convicted of an offence in terms of section 83(2) of the Act is liable only for a fine or imprisonment not exceeding six months, however.<sup>570</sup> Finally, it is determined that the MPRA prevails in

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<sup>566</sup> See the MPRA s 83(2). It should be noted that regulations may treat different categories of property or different categories of owner of property differently.

<sup>567</sup> Reer to the MPRA s 84(a)-(b).

<sup>568</sup> The MPRA s 85.

<sup>569</sup> See the MPRA s 86(1)(a)-(f).

<sup>570</sup> Read the MPRA s 86(1)-(4).

the event of any inconsistency between it and any other legislation regulating the levying of municipal rates.<sup>571</sup>

#### **18.5.6.13 Aspects concerning transitional arrangements and the amendment and repeal of legislation**

According to the MPRA, municipal valuations and property rating conducted by a municipality in an area in terms of legislation which is repealed by the MPRA before the commencement of the Act may, despite such repeal, continue to be conducted in terms of that legislation until the date on which the valuation roll covering that particular area prepared in terms of the Act takes effect in terms of section 32(1).<sup>572</sup> Until a municipality prepares a valuation roll in terms of the MPRA, a municipality may continue to use a valuation roll and supplementary roll that was in force and may levy rates against property values as shown on that roll. Where valuation rolls were prepared by different predecessor municipalities, the current/new municipality may impose different rates based on the different rolls. The amounts payable on similarly situated properties should be more or less similar. The transitional requirements lapse within four years from the date of commencement of the MPRA, however.<sup>573</sup> Similar to valuation rolls, a rates policy adopted before the commencement of the Act continues to be of force until the date on which the first valuation roll prepared under the Act takes effect.<sup>574</sup> Transitional arrangements regarding section 21 applications, the liability of bodies corporate of sectional title schemes and special rating areas are also determined by the MPRA.<sup>575</sup> Finally, the MPRA amends and repeals various pieces of national and provincial legislation. For details on such legislation, refer to the schedule annexed to the Act.<sup>576</sup> In contrast with the levying of property taxes on privately owned land, the state is sometimes exempted from having to pay taxes to local authorities. According to the Rating of State Property Act,<sup>577</sup>

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<sup>571</sup> The enforcement of so-called "old-order" legislation, which is still in existence in the various provinces, is thus subjected to the MPRA. See the MPRA s 87.

<sup>572</sup> See the MPRA s 88(1)-(2).

<sup>573</sup> Read the MPRA s 89(2)-(3). When the old order laws lapse, then the old valuation rolls/supplementary rolls may not be used anymore.

<sup>574</sup> See the MPRA s 90(1)-(2). Any review of such an old rates policy after the commencement of the Act must take the aims of the MPRA s 3(3) into account.

<sup>575</sup> Refer to the MPRA ss 91, 92 and 93 respectively.

<sup>576</sup> See the Act s 95 together with the Sch. The Act comes into operation only on a date to be determined by the president by proclamation. The MPRA s 96. It should specifically be noted that the MPRA repeals the whole of the Rating of State Property Act 79 of 1984.

<sup>577</sup> 79 of 1984.

state property is also rateable. Exemptions are possible, however.<sup>578</sup> This Act was repealed by the MPRA, however.

### **18.5.7 Fees, service charges and tariffs**

Municipalities have always been very dependent on financial income derived from fees, service or user charges and various tariff obligations. All former provincial ordinances provided for such revenue arrangements. Section 10G(7) of the LGTA empowered municipalities to levy and recover levies, taxes, fees and tariffs and also prescribed the procedures for doing so. Unless repealed or contrary to the Constitution, such requirements are still applicable and enforceable. According to the new constitutional scheme, that is, section 229, municipalities are empowered to impose taxes, levies and duties apart from property rates and surcharges on fees if authorised by national legislation. Income tax, general sales tax, and value added tax are excluded, however.<sup>579</sup>

Generally speaking, a “charge” is regarded as a payment for something to be done, for example an electricity or water connection. The fee or charge is then a once-off payment. A “tariff”, on the other hand, refers to a continuing fee or charge for a service that is being rendered or for a function that is to be performed on a continuing basis. Examples of tariffs included tariffs for the supply of water or electricity, refuse removal or even public transport. In essence the purpose of fees, charges and tariffs is to recover the cost of providing such a service or to perform such a function.<sup>580</sup> Fees, tariffs and service charges are often divided into different categories. A distinction is made between *trading services*, *necessary services* and *social services*. Trading/utility services include water and electricity services. Normally it is expected that municipalities do not make a profit on such services, as it could be oppressive to poor households. In many instances in the past profits were indeed achieved on electricity and sometimes on water services. Necessary charges or fees relate mostly to sewerage, refuse removal and associated services. *Social services* refers to services such as clinics, building control, markets, halls, libraries,

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<sup>578</sup> See the Act s 3(3).

<sup>579</sup> The Constitution does not define what is meant by levies or taxes. Taxes must be levied and recovered according to the law, however.

<sup>580</sup> See Craythorne (1997) 360-361. The writer mentions that sometimes the amount charged will cover the entire cost of the service or function, and sometimes the cost will amount to only a contribution of the costs. The balance will then often be subsidised from other sources such as rate

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parks and other recreational facilities. Such services are regarded as important for the growth and development of a community. They are often very expensive and are subsidised from other sources.

It is evident that user charges form an important source of municipal own revenue and that the cost recovery of such charges is essential. Many municipalities under the new legal system contain several backlogs in respect of payment for these services. In an effort to assist municipalities in meeting the capital costs of bulk connector infrastructure, national government has provided for the Consolidated Municipal Infrastructure Programme (CMIP). There is a general obligation on municipalities to develop clear tariff policies and also to ensure that poor/indigent households have access to basic services. It is also important that tariff enforcement and credit control mechanisms should be improved. In an effort to guide tariff policies, government and other stakeholders have agreed on the following guidelines:<sup>581</sup>

- *Payment in proportion to the amount consumed* As far as is practically possible, consumers should pay in proportion to the number of services consumed.
- *Full payment of service costs* All households, with the exception of the indigent, should pay the full costs of the services consumed.
- *Ability to pay* Municipalities should develop a system of targeted subsidies to ensure that poor households have access to at least a minimum level of basic services.
- *Fairness* Tariff policies should be fair, in that all people should be treated equitably.
- *Transparency* Tariff policy should be transparent to all consumers and any subsidies and concessions which exist must be visible and understood by all consumers.
- *Local determination of tariff levels* Municipalities should have the flexibility to develop their own tariffs in keeping with the above principles.
- *Consistent tariff enforcement* A consistent policy for dealing with non-payment of tariffs needs to be developed. This must be targeted and enforced with sensitivity to local conditions.

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charges. If full cost were to be charged, ie for public swimming pool amenities, such facilities would be beyond the financial reach of many local residents.

<sup>581</sup> See the White Paper on Local Government (1998) at 137.

- *Ensure local economies are competitive* Local tariffs must not unduly burden local business through higher tariffs, as these costs affect the sustainability and competitiveness of such businesses and firms.

#### **18.5.8 Trading enterprises and subsidies**

It has always been customary for local governments to participate in trading enterprises. Trading enterprises are associated with activities such as the provision of water, electricity, transport and fresh produce. Trading enterprises should be balanced within the overall tariffs policy to enhance income, on one hand, but not to overburden consumers/residents on the other. In the past it was expected of local authorities to generate sufficient income to carry out their activities. Little financial or other assistance was received from the other spheres of government. Municipalities were exempted from revenue sources such as income tax, stamp duties and the taxation on gifts, however. Subsidies were also received from the central and provincial authorities. The provisions of section 214 of the Constitution, which requires the equitable division of revenue raised nationally, should significantly enhance the financial support from the two higher spheres of government to the lowest spheres. Both national and provincial governments are legally obligated to support municipalities from *inter alia* a financial point of view.

#### **18.5.9 RSC levies and intergovernmental transfers**

In the recent past, Regional Service Council levies have developed into an important source of revenue for especially metropolitan and district councils. Although often controversial, these taxes are important for municipal revenue and should be retained until a suitable alternative is found. Some of the general criticism levelled against RSC levies is the costs of collection and the fact that the tax is directed on staff or labour. This is often perceived to reinforce a bias against labour-intensive enterprises and could therefore negatively impact on development. It is submitted, however, that as long as such levies are restricted to low levels and are effectively controlled, the potentially negative effects should be minimised.<sup>582</sup>

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<sup>582</sup> See the Regional Services Act 109 of 1985, which provides for the payment to councils of a regional services levy by every employer and a so-called "regional establishment levy" payable by every person carrying on an enterprise in the area of a particular council. Refer also to the case of *Greater Johannesburg TMC v Eskom* 2000 (1) SA 866 (SCA). The dispute concerned the liability for regional establishment levies on the part of Eskom to the particular municipal council. According to the RSC Act s 12, every person carrying on an enterprise within a region/jurisdiction is subject to such a levy. Eskom Act 40 of 1987 s 24 exempted Eskom from payment of levies that would other-

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In light of the constitutional obligation that municipalities are entitled to an equitable share of national revenue as well as the obligation on national and provincial governments to support municipalities financially, the principle of intergovernmental transfers (IGT) has become very important. According to the White Paper on local government, three basic types of transfer were identified:<sup>583</sup>

- There are agency payments paid by provincial governments to municipalities for services rendered by the municipalities on behalf of the provinces.
- There are direct grants from higher spheres to municipalities to subsidise the capital costs of investment in municipal infrastructure.
- There are grants to support the operating budget of municipalities.

Municipalities must ensure that the agency payments they receive are sufficient to cover the full cost of the services which they deliver. The possibility of unfunded mandates should be guarded against. It is important that the new system of IGT should address not only the vertical division of revenue but also the horizontal division of revenue between municipalities *inter se*. The vertical division is decided via the national budgeting process. It is also important to note that the equitable share from national revenue covers only funds transferred to cover operating costs of municipalities. Capital grants are classified under so-called “additional grants”. From the horizontal divisional point of view, all municipalities must be able to provide a basic level of services and have at least an administrative infrastructure sufficient to govern its area effectively.

#### **18.5.10      *Municipal loans and capital funds***

It was mentioned above that the Constitution allows municipalities to raise loans for capital or current expenditure.<sup>584</sup> Such loan capacity refers to external loans such as bank overdrafts. Municipalities must be very cautious not to over-exceed their borrowing possibilities and end up having a negative credit rating, however. In order to ensure that a municipality does not fall into a trap of debts, strict requirements are set out before a loan can lawfully be obtained.<sup>585</sup> Loans for bridging finance may be raised only during a financial year and also only to finance current expenditure in

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wise have been payable to the state. Court held that the reference to “state” in the Act was to the state in all its manifestations, including local authorities such as RSC or TMC. Eskom was accordingly exempted from paying regional establishment levies.

<sup>583</sup> See White Paper on Local Government (1998) at 139.

<sup>584</sup> See the Constitution s 230.

<sup>585</sup> See the LGTA s 10G(8) and the various provisions under the LGMFMA discussed above.

anticipation of the receipt of revenue to be collected. Apart from raising loans, municipalities can also utilise internal capital funds as a resource for funding less expensive capital purchases such as equipment and minor building works.

#### **18.5.11      *Municipal stocks***

Another method used in the past in raising capital by municipalities was through the issuing of municipal stock. Stock refers to a fixed amount of money invested by an individual or institution. It is a form of loan. In return for the investment, a certificate is issued as evidence of ownership of a fixed amount of stock. Normally a stock certificate is transferable at a price determined by the prevailing money market. Craythorne identifies three types of stock.<sup>586</sup> These are *bearer stock*, *inscribed stock* and *registered stock*. Transfer of stock takes place through the transfer or surrender of the stock certificates. In South Africa this method of raising money is preferred because of security offered by the stocks and also easy accounting control. Finally, there are two methods of issuing stock: one is through the so-called “fixed price” system and the other is through the “tender” system. Under the tender system municipal stock is put up for public tender, and an issue is made to the highest bidder.<sup>587</sup>

#### **18.6 Conclusion**

It is obvious to conclude that the restructuring process of local government and the various constitutional demands placed on municipalities have introduced many financial challenges. These challenges include a dramatic increase in services responsibilities, escalation in municipal salaries, higher administrative costs and often a significant reduction in experienced personnel.<sup>588</sup> Most of these challenges have placed severe pressure on the cash flows and financial control mechanisms of all newly amalgamated municipalities.

There seems to be a strong need and indeed constitutional obligation for municipalities to restore and implement strict financial discipline and to take effective steps to recover outstanding debts and to fully utilise all local methods to generate the necessary revenue. Without sufficient revenue at their disposal, municipalities will not be able to fulfil and complete their constitutional obligations. It is further also

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<sup>586</sup> See Craythorne (1997) 364.

<sup>587</sup> Craythorne (1997) 364-365.

<sup>588</sup> Refer to the White Paper on Local Government (1998) at 147.

essential that municipalities are properly assisted and supported by both the national government and the provincial authorities. The success of municipal fiscal management lies in strict control and oversight, however. In this regard the higher spheres of government have important control functions to fulfil.

It is submitted that the new legislative provisions, within the basic framework of the Constitution, indeed create a legal dispensation that should allow all municipalities to enhance and secure sufficient financial revenue and thereby provide and sustain essential municipal services. Such support and financial entitlements are not unrestricted, and various measures of control and accountability over fiscal matters have been provided for. Clear and decisive provisions are also made to ensure higher-sphere involvement in municipal financial affairs and to provide for oversight and even national and provincial intervention in cases where municipal finances are inappropriately managed. The new legal framework also allows for much stronger public participation in financial affairs, which in turn should foster stronger relationships of trust and support between local residents and their respective municipal governments. However, the ultimate success of the new system lies in the way in which the new system is implemented and in the manner in which all roleplayers exercise and fulfil their distinctive legal obligations.

## **The principles of municipal public administration and the requirements of performance management, capacity building, accountability and public participation**

### **19.1 Introduction**

The importance of the relationship between municipalities and residents as well as between municipalities and the two higher spheres of government have been emphasised in many previous chapters of this work. These relationships have been given constitutional importance and significance under the new overall constitutional scheme. Especially since the Constitution is the supreme law of the state, all constitutional requirements dealing with the public administration and the relations between the public and government institutions must be strictly complied with. Under the previous local government system, many of these issues were not legally enforceable or were largely downplayed in mostly provincial ordinances. This position has now changed fundamentally under the new constitutional dispensation.

As a basic point of departure, the meaning of administration (ie municipal administration) refers to the overall management of the public affairs of a certain organisation.<sup>1</sup> On a municipal level, public administration encapsulates a special relationship between politics and administrative organs. The politicians are concerned with the uses of power, whilst the administration is concerned with translating the political decisions into practical implementation. Furthermore, the political dimension is subject to change, whereas the administration is characterised by stability and routine.

In terms of public administration, it must be remembered that the concept includes aspects such as policy, decisions, staffing matters, organising, planning and also resource allocations. The concept also differs widely from one administration to an-

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<sup>1</sup> Craythorne (1997) 65.

other. Municipal administration is undoubtedly part of public administration in general, but it also has a more distinctive importance; for example:<sup>2</sup>

- It operates in a political field.
- It operates within the context of democratic notions of an open, responsive and accountable government institution.
- It is decentralised and, to a certain degree, self-financing.
- It is the part of government which is closest to the citizens of a particular state.

### **19.2 Basic aspects concerning municipal public relations**

All forms of government accept in general that their actions have to be acceptable by their subjects. This realisation provides the basis for the development of a relationship of trust and support between the state and its people. In modern day governments this relationship is very important because a government is generally accountable to the people who have elected it to power. This position is particularly true for local governments. Because local authorities provide essential goods and services which affect people directly, it is acceptable that the public at large should be sensitive about the performance of both political office-bearers and administrative staff components.

In contrast to the public relations activities of private enterprises which are directed at sales and profits, public relations programmes of public institutions are usually approached from the point of view of promoting general welfare. Public institutions are mostly monopolistic enterprises with no real competitors. This position has changed somewhat under the new South African constitutional scheme as competitiveness, accountability and responsiveness in providing services and attracting investment have become familiar catch-phrases. Because of their prominent caretaker roles in society, public institutions such as municipalities are subjected to various legal requirements in respect of the exercise and fulfilment of their functions.<sup>3</sup> It is further also an established requirement that public functionaries maintain high ethical standards. This position is so because of the important public responsibilities which municipalities must perform.

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<sup>2</sup> See Craythorne (1997) 71.

<sup>3</sup> See Cloete (1997) 152. The writer mentions that the public does not always understand the reasons for administrative red tape. There are often very good reasons for such requirements, however. The introduction of Public/Private Partnerships (PPP) has also boosted municipal competitiveness and profit targeting.



Municipal public relations are affected by every action of a political or staff representative. The activities of municipalities will always be evaluated carefully by local residents and other stakeholders. If respect is to be achieved, officials and political representatives should foster an attitude of commitment to the general public. It is thus safe to say that the state of public relations is largely dependent upon the conduct and performance of every functionary involved in public administration. Because of its importance, every municipality should appoint officials that are charged exclusively with the handling of its public relations.<sup>4</sup> One of the many difficult tasks of a public relations officer is to determine public opinion and attitudes and to accommodate such opinions and attitudes. Quick and reliable information is very important here.

### **19.3 The constitutional requirements affecting municipal public administration**

In light of the importance and responsibilities of public administration at large, the new constitutional scheme specifically entrenches certain basic values and principles that govern it. These basic values and principles are important to not only the public administration *per se*, but also the public services throughout all three spheres of government. Unless the Constitution is amended, the basic values and principles have been afforded supreme legal status and must be complied with.

#### **19.3.1 *The basic values and principles governing public administration***

In section 195 of the Constitution, the following values and principles relevant to the overall public administration are mentioned as follows:<sup>5</sup>

- A high standard of professional ethics must be promoted and maintained.
- Efficient, economic and effective use of resources must be promoted.
- Public administration must be development-orientated.
- Services must be provided impartially, fairly, equitably and without bias.
- People's needs must be responded to and the public must be encouraged to participate in policy-making.
- Public administration must be accountable.
- Transparency must be fostered by providing the public with timely, accessible and accurate information.

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<sup>4</sup> Such personnel are usually known as "public relations officers" (PROs) and "publicity officers" (media liaison officers).

<sup>5</sup> See the Constitution s 195(1)(a)-(i).

- Good human-resource management and career-development practices must be cultivated to maximise human potential.
- Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress imbalances of the past to achieve broad representation.

All of the abovementioned values and principles are obligatory and must be complied with. The Constitution is clear on the fact that public administration must be governed by the democratic values and principles enshrined in the Constitution and not only those mentioned in section 195(1).<sup>6</sup> Apart from the values and principles mentioned, the Constitution confirms that the principles apply to the public administration in every sphere of government, organ of state and public enterprise. Without a doubt such principles are therefore relevant to all municipalities.<sup>7</sup> The Constitution further requires the enactment of national legislation which must ensure the promotion of the mentioned values and principles.<sup>8</sup> It is also permitted that the national legislation envisaged above may allow for differentiation between aspects regulating public administration between different sectors, administrations or institutions. In this regard the particular nature and functions of different sectors, institutions or administration should be taken into account when the legislation regulating the public administration is enacted. Furthermore, it seems clear from the Constitution that not all aspects concerning the public administration of all administrations or sectors should be precisely the same.<sup>9</sup> The national legislation envisaged in section 195 has been enacted as the Public Service Act.<sup>10</sup> *Inter alia*, the Act provides for the broad principles on the functioning of the public service in general, thereby also including various aspects important to municipal public administration. The Act must also be read in conjunction with section 197 of the Constitution, which in essence creates a public service for the entire Republic of South Africa. According to the Constitution, there is a public service within the overall public administration. Such public service must function

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<sup>6</sup> See the Constitution s 195(1).

<sup>7</sup> See the Constitution s 195(2)(a)-(c).

<sup>8</sup> See the Constitution s 195(3).

<sup>9</sup> See the Constitution s 195(4)-(6).

<sup>10</sup> 103 of 1994 as amended by Act 86 of 1998. Note that the Act is applicable to only the national and provincial spheres of government. Municipalities currently still determine their own conditions of service and determine their own salary scales.

and be structured in terms of national legislation, and the public service must execute the lawful policies of the government of the day loyally.<sup>11</sup> The terms and conditions in the public service must also be regulated by national legislation, and public service employees are entitled to a fair pension. No employee may be favoured or prejudiced because that person supports a particular political party or cause. Finally it is the responsibility of provincial governments to manage the public service in their administrations. They may do so only within a framework of uniform norms and standards applying to the public service.<sup>12</sup>

It was mentioned above that municipal administrations are clearly part of the public administration at large and that the principles and requirements mentioned in the Constitution and national legislation are equally applicable to them. Apart from the national legislative requirements for all administrations, certain specific aspects have also been included in selective laws dealing specifically with local government matters. Such legislative provisions will be discussed below. Finally, it must be pointed out that the Constitution also establishes a single Public Service Commission for the Republic of South Africa. The commission must be independent and impartial and must exercise and perform its functions in the interests of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The commission is regulated by national legislation and therefore it also plays an important role in overseeing and controlling aspects of public service and administration within the municipal public administrative domain.<sup>13</sup> The commission has various constitutionally entrenched powers and functions and also certain additional powers and functions prescribed by national legislation.<sup>14</sup>

### **19.3.2 Issues concerning municipal administration**

In follow-up of the constitutional requirements mentioned above, the new local government legislative framework also provides for aspects relevant to local public administration. According to the Local Government: Municipal Systems Act,<sup>15</sup> the local public administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution. It is further provided that in the administering of

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<sup>11</sup> See the Constitution s 197(1).

<sup>12</sup> Refer to the Constitution s 197(2)-(4).

<sup>13</sup> See the Constitution s 196(1)-(2).

<sup>14</sup> See the Constitution s 196(4)(a)-(g).

<sup>15</sup> 32 of 2000.

its affairs, municipalities must strive to achieve the objects of local government as set out in section 152 of the Constitution and also comply with the duties of local governments.<sup>16</sup> In furtherance of the developmental duties of municipalities, the Systems Act determines that, within their administrative and financial capacity, all municipalities must establish and organise their administration in a manner that would enable municipalities to comply with various administrative and financial requirements. These requirements are the following:<sup>17</sup>

- to be responsive to the needs of the local community
- to facilitate a culture of public service and accountability amongst its staff
- to be performance orientated and focused on the objects and developmental duties of local government
- to ensure that its political structures, political office bearers and managers and other staff members align their roles and responsibilities with the priorities and objectives of the municipality's integrated developmental plan
- to establish clear relationships and to facilitate co-operation, co-ordination and communication between its political structures and political office bearers and its administration; and between its political structures, political office bearers and administration and the local community
- to organise its political structures, political office bearers and administration in a flexible way in order to respond to the changing priorities and circumstances of the municipality
- to perform its functions through operationally effective and appropriate administrative units and mechanisms, including departments and other functional or business units and also, when necessary, to perform such functions on a decentralised basis
- to assign clear responsibilities for the management and co-ordination of the administrative units and mechanisms
- to hold the municipal manager accountable for the overall performance of the administration
- to maximise efficiency of communication and decision-making within the administration

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<sup>16</sup> See the Systems Act s 50(1)-(2).

<sup>17</sup> See the Systems Act s 51(a)-(m).

- to delegate responsibility to the most effective level within the administration
- to involve staff in management decisions as far as is practicable
- to provide an equitable, fair, open and non-discriminatory working environment.

The requirements mentioned above are subject to any applicable labour legislation, however. Applicable labour legislation will prevail if any inconsistencies arise.<sup>18</sup> It seems that the intention of the legislature was to allow municipalities considerable leeway in order to create an effective municipal administration, but not to do so at the expense of established and recognised labour interests.

#### **19.4 Principles of municipal accountability and public participation**

It is an historical fact that to a large extent community participation and municipal accountability were neglected under the former local government dispensation. One of the core elements of change was allowing people to have a say in the decisions that affected their lives. Participation and accountability of representatives are therefore not new concepts in South African public life. Under the new dispensation these concepts have been afforded significant recognition. The supreme law of the state now recognises that participation and accountability are core and crucial principles for ensuring sustainable, democratic and developmental local government. According to the founding provisions and the objectives of local government, the aim of the new constitutional dispensation is to establish a democratic government founded *inter alia* on the values of accountability, responsiveness and openness. These sentiments are echoed in the objectives of local government, which affirms the aim of providing democratic and accountable local governments for local communities and encouraging their involvement in local government matters.<sup>19</sup> With this new constitutional mandate, the principles of participation and accountability are central to the new local government dispensation and the final transformation of the previous system.

The process of ensuring participation and accountability in local government represents major challenges for all municipalities. The transition to the new system was long and difficult, and many adaptations were required in order to accommodate new structures and processes. Central to the success of establishing a new system has been the participation by citizens and the accountability of those in positions of

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<sup>18</sup> See the Systems Act s 52.

<sup>19</sup> See the Constitution ss 1 and 152.

power. There are many shortcomings in the new system, however, and constant development of participation and accountability is required.

#### **19.4.1 Participation, communication and partnerships**

The essence of the concept of participation is giving people, and more specifically local residents, a real say in decisions that affect their lives. In order to take part in such decision-making processes, people must have access to decision-making structures in order to make their voices heard. Real participation strengthens the legitimacy of municipal decision making. South African local governments face various challenges to ensure participation, however. Many members of society do not have the opportunities that others do to express themselves. The lack of resources and education often excludes people from participatory processes. There are two key ways in which participation can be facilitated. They are

- to improve and maintain existing channels of communication
- to form new and strong partnerships between municipalities and local stakeholders.

#### **19.4.2 Channels of communication**

It is a fact that in systems where there are open channels of communication meaningful participation usually occurs. The following different channels of communication should enhance participation between citizens and municipalities.<sup>20</sup>

- *As voters* One of the commonly known and important ways through which citizens can voice their opinions in terms of governmental decision making is through the process of voting. Every adult South African citizen has the right to vote and to take part in elections for any legislative body established in terms of the Constitution.<sup>21</sup> This constitutionally protected right is important not only to ensure a democratic society but also to allow the voters to have a direct say in the choice of their political leaders and their policies. As with all government structures, municipalities have an obligation to make voters aware of their right to vote and to motivate them to exercise such right.
- *As consumers of services* Most people have direct contact with their municipalities through the use of and payment for municipal services. Through this channel

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<sup>20</sup> See LGIS no 2 "Participation and Accountability" (1999) at 3-8.

<sup>21</sup> Read the Constitution s 19(3)(a).

of regular contact, many aspects of municipal decision making can be communicated.

- *As an organised interest group* People often organise themselves in different interest groups. Such groups include political parties, NGOs and a range of Community Based Organisations (CBOs) such as ratepayers associations, church groups etc. Business people also organise themselves into groups that look after their interests and the interests of the region. A local chamber of commerce is a good example of a business organisation that could have an important influence with the local authority and which could serve as an acknowledged and influential communication instrument.
- *Through specialised structures* Communication can also be significantly enhanced through specialised local structures. A ward committee is such a structure and could play a very important intermediary between local residents and their local municipality. Ward committees are best suited to detecting local problems and to communicating such problems quickly and effectively. Apart from ward committees, which interact with the specific ward representative, residents can also communicate and participate with their local municipality through their traditional leaders or other community organisations. The existence of traditional leadership in many regions in South Africa and its role and involvement with local municipalities should also provide a powerful mechanism for participating and communicating with their municipal structures.<sup>22</sup> It is essential that municipalities should ensure that the channels mentioned above are kept open and effective. To this end the new local government legislative framework provides specifically for a chapter on community participation.<sup>23</sup> A further example of a specialised structure is the existence of organised labour. Organised labour should also be consulted by municipalities when issues are considered that could have an impact on them. In the case of *SAMWU v City of Cape Town and Others*<sup>24</sup> the Supreme Court of Appeal stated that the provisions of sections 16-21 of the Systems Act foster

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<sup>22</sup> Municipalities can also ensure participation through the establishment of internal municipal committees, eg, an advisory committee. Such a committee is specifically formed to address the need for effective communication with the public and can act as a vital link between the municipality and its local community.

<sup>23</sup> See the Systems Act ch 4, which is discussed later in this ch.

<sup>24</sup> 2004 (1) SA 548 (SCA).



community participation in municipal decision-making processes. Such participation could include organised labour.<sup>25</sup>

#### **19.4.3 Participation through partnerships**

When channels of communication are open and effective, conditions are conducive for partnerships to be formed. Examples of these are partnerships between the municipality and the police in combating crime, and between local business enterprises to alleviate social upliftment. The new legal framework provides specifically for such programmes and partnerships.<sup>26</sup>

#### **19.4.4 The new legislative provisions regarding community participation**

Under the new local government legislative framework, specific provision has been made for ensuring and protecting the participation of local communities. Chapter 4 of the Municipal Systems Act features various legal obligations to which municipalities must comply. From the start the Act determines that municipalities develop a culture of municipal governance that complements formal representative government with a system of participatory governance. In an effort to achieve and develop such a culture, municipalities must encourage and create conditions for the local community to participate in the affairs of the municipality. Participation should include participation in:

- the preparation, implementation and review of the municipal integrated development plan
- the establishment, implementation and review of the performance management system
- the monitoring and review of performance in general, including outcomes and impact of performance
- the preparation of the municipal budget
- strategic decisions relating to the provision of municipal services.<sup>27</sup>

Municipalities must further contribute to building the capacity of the local community in order to enable it to participate, and to enable councillors and staff members to foster community participation. Municipal resources and funds that are allocated

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<sup>25</sup> Refer to the *SAMVU* case *supra* fn 24 at 551-555.

<sup>26</sup> See the Systems Act ch 4.

<sup>27</sup> Refer to the Systems Act s 16(1)(a)(i)-(v).

annually from the municipal budget should be provided in order to achieve the mentioned participatory objectives.<sup>28</sup>

Specific mechanisms, processes and procedures for community participation have also been provided for. The Systems Act determines that participation by the local community in the affairs of the municipality must take place through various mechanisms.<sup>29</sup> All municipalities must establish appropriate mechanisms, processes or procedures to enable the local community to participate in the affairs of the municipality. In this respect, municipalities must provide for

- the receipt, processing and consideration of petitions and complaints lodged by members of the local community
- notification and public comment procedures
- public meetings and hearings by the municipal council, other political structures and political office bearers, when appropriate
- consultative sessions with locally recognised community organisations and where appropriate, traditional authorities
- report-back mechanisms to the local community.<sup>30</sup>

When a municipality establishes mechanisms or processes of participation, it must take into account the special needs of people who cannot read or write, people who have disabilities, women and various disadvantaged groups. A municipal council may also establish one or more advisory committees to advise the council on any matter within the council's competence.<sup>31</sup>

A further important provision is that municipalities must communicate to their relevant communities information concerning *inter alia* the available mechanisms to encourage and facilitate community participation, the matters on which participation is encouraged and also the rights and duties of members of the local community.

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<sup>28</sup> See the Systems Act s 16(1)(b)-(c). It should be pointed out that the mechanisms to encourage participation must not be interpreted as permitting interference with a municipal council's rights to govern and to exercise executive and legislative authority. In instances where participatory schemes would interfere with municipal administration or the effective provision of services, such schemes must be overruled in favour of a municipality's right to govern and to exercise its functions and obligations. See the Act s 16(2).

<sup>29</sup> See the Systems Act s 17(1)(a)-(e). It is envisaged that participation must take place through (a) political structures; (b) other mechanisms, processes and procedures provided for in terms of the Systems Act; (c) other appropriate mechanisms, processes and procedures established by the municipality; (d) councillors; and (e) generally applying the provisions for participation as provided for in the Systems Act.

<sup>30</sup> See the Systems Act s 17(2)(a)-(e).

<sup>31</sup> See the Systems Act s 17(3)(a)-(d) and s 17(4).

When such information is being communicated by a municipality to its local community, it is obligatory for the municipality to take into account the language preferences and usage in the municipality and the special needs of people who cannot read or write.<sup>32</sup> Participation is also enhanced through giving notice to the public of municipal council meetings and giving them admission to these. It is now required by law that the municipal manager of a municipality give notice to the public of the time, date and venue of every ordinary meeting of the council and also special or urgent meetings, except when time constraints make such notice impossible.<sup>33</sup> As was stated elsewhere in this work, a municipal council must conduct its business in an open manner and may close its sittings only when it is reasonable to do so.<sup>34</sup> The constitutional requirement is reiterated in the new legislative framework. Meetings of a municipal council and of its committees are open to the public, including the media, and neither the public nor the media may be excluded from council or committee meetings except when:

- it is reasonable to do so because of the nature of the business being transacted *and*
- a by-law or resolution of the council specifying the circumstances in which the council/committee may close a meeting, authorises the council or committee to close the meeting to the public.<sup>35</sup> The public or media, may not be excluded, from a council or committee meeting when any of the following matters are being considered or being voted on:<sup>36</sup>
  - (a) a draft by-law tabled in council
  - (b) a budget tabled in council
  - (c) the municipality's draft IDP or amendments thereto, tabled in council
  - (d) the municipality's draft performance management system or amendments, tabled in council
  - (e) the decision to enter into a service delivery agreement in terms of section 76

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<sup>32</sup> Refer to the Systems Act s 18(1)-(2).

<sup>33</sup> See the Systems Act s 19(a)-(b). The manner in which the notice is to be given must be determined by the municipal council.

<sup>34</sup> See the Constitution s 160(7).

<sup>35</sup> See the Systems Act s 20(1)(a)-(b). Note that decisions by local governments are taken via specific resolutions or via the adoption of a by-law. Resolutions can however be *more easily amended* or changed than by-laws.

<sup>36</sup> See the Systems Act s 20(2)(a)-(f).

- (f) any other matter prescribed by regulation.

However, it is interesting to note that, subject to reasonability and the nature of the business being transacted, an executive committee and a mayoral committee may close any or all of its meetings to the public and media.<sup>37</sup> Finally, a municipal council, within its financial and administrative capacity, must provide space for the public in the chambers where the council or committees meet, and it may also take reasonable steps to regulate public access to and public conduct at such meetings.<sup>38</sup>

The new local government legislative framework also determines specific requirements in respect of communications to the local community. When a municipality needs to notify the community of anything through the media, it must do so in the local newspaper(s) of the area, in newspapers circulating in the area and in newspapers determined by the council to be newspapers of record; alternatively, notices can be sent by radio broadcasts covering the area of the municipality.<sup>39</sup> Any notification must be in the official language(s) determined by the council, with consideration of the language preference and usage within its area. Notices must also be displayed at the municipal offices. When a local community is invited to submit comments to the council, the invitation notice must state that municipal staff members will assist persons who cannot write. Similar provisions are set when members of the public are required to fill in forms. Persons who cannot read or write must be assisted.<sup>40</sup>

Specific provisions regarding the publicity of documents have also been included. According to the Systems Act, all documents that must be made public by a municipality in terms of a requirement of the Act, the Municipal Finance Management Act or any other applicable legislation must be conveyed to the local community by displaying the documents at the municipality's head and satellite offices and libraries, on the municipality's official website if available and by notifying the local community of the place and address where detailed particulars concerning the documents can be obtained.<sup>41</sup> Each municipality is also obligated to establish its own official website if it decides that it is affordable, and place on such website all information required under

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<sup>37</sup> The Systems Act s 20(3).

<sup>38</sup> The Systems Act s 20(4)(a)-(b).

<sup>39</sup> See the Systems Act s 21(1)(a)-(c).

<sup>40</sup> See the Systems Act s 21(2)-(5).

<sup>41</sup> See s 21A of the Systems Act as inserted by Act 44 of 2003 s 5. If appropriate, a notification mentioned above must invite the local community to submit written comments or representations to the municipality in respect of the relevant documents.

the Systems Act and the Municipal Finance Management Act. If no website is established, all relevant information should be displayed on an organised local government website sponsored or facilitated by the National Treasury. It is the overall responsibility of the municipal manager to ensure maintenance and regular updating of the electronic information of a municipality.<sup>42</sup>

Under the new legislative framework, the minister of local government is also authorised to make regulations or issue guidelines on various aspects concerning public participation in local municipal affairs. The minister should take into account whether municipalities have the capacity to fulfil extra regulatory or guiding requirements, however.<sup>43</sup>

#### **19.4.5 Local municipal accountability**

It was explained above that accountability is one of the founding values of the new South African constitutional state and is applicable to all spheres of government including the local government sphere. In essence, accountability refers to the need to explain or to defend certain actions or conduct. Accountability is needed to ensure that people in positions of power can be held accountable and responsible for their actions and conduct. Accountability therefore plays an important role in ensuring stability and acceptance of a particular democratic system. It ensures appropriate checks and balances for local residents with regard to their elective representatives. Accountability means not only taking responsibility, but also ensuring liability in certain instances. See, for example, the case of *Umzinto North Town Board v Moodley*.<sup>44</sup> In this case a duly appointed town treasurer, purporting to act under delegated authority, invested municipal funds contrary to the Local Authorities Ordinance<sup>45</sup>. The town treasurer/defendant argued that he was exempt from liability under the Ordinance. However, the court held *inter alia* that the defendant bore the onus of proving that he was entitled to an exemption, that he acted wilfully and knowingly that his investment decision was not covered by the ordinance and that his conduct

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<sup>42</sup> Read s 21B of the Systems Act as inserted by Act 44 of 2003 s 5.

<sup>43</sup> For more details refer to the Systems Act s 22(1)-(4). Note the difference between the words "responsible" and "accountable". Responsibility refers to the fulfilling of a duty, whilst accountability also includes the obligation to provide answers for specific actions/conduct. See also the LG: Municipal Planning and Performance Management Regulations published under GNR 796 in GG 22605 of 24 August 2001. Item 15 of the regulations deals with community participation in respect of IDP and performance management.

<sup>44</sup> 1996 (1) SA 539 (D).

<sup>45</sup> Ordinance 25 of 1974 (N).

was not excused by the ordinance. He was thus liable for the damage caused by his actions.<sup>46</sup> All three components of a municipality must be accountable in municipal matters.<sup>47</sup> There seems to be a stronger awareness of the importance of accountability and our courts should take bold action if accountability is not assured.<sup>48</sup> A system which encourages participation also deepens local democracy, as citizens feel more confident about participating when they know that their inputs count and that those responsible can be held accountable. Accountability in local government further ensures that the actions of the council also reflect the aspirations of the relevant community.

#### **19.4.6 Establishing paths of accountability**

In view of the importance of local accountability, it is essential for all local governments to establish all possible paths/methods to enhance and assure a truly accountable government. There are therefore various paths of accountability, some within the municipality itself and others between the municipality and the particular local community. The following diagram provides an overview of the various paths.<sup>49</sup>

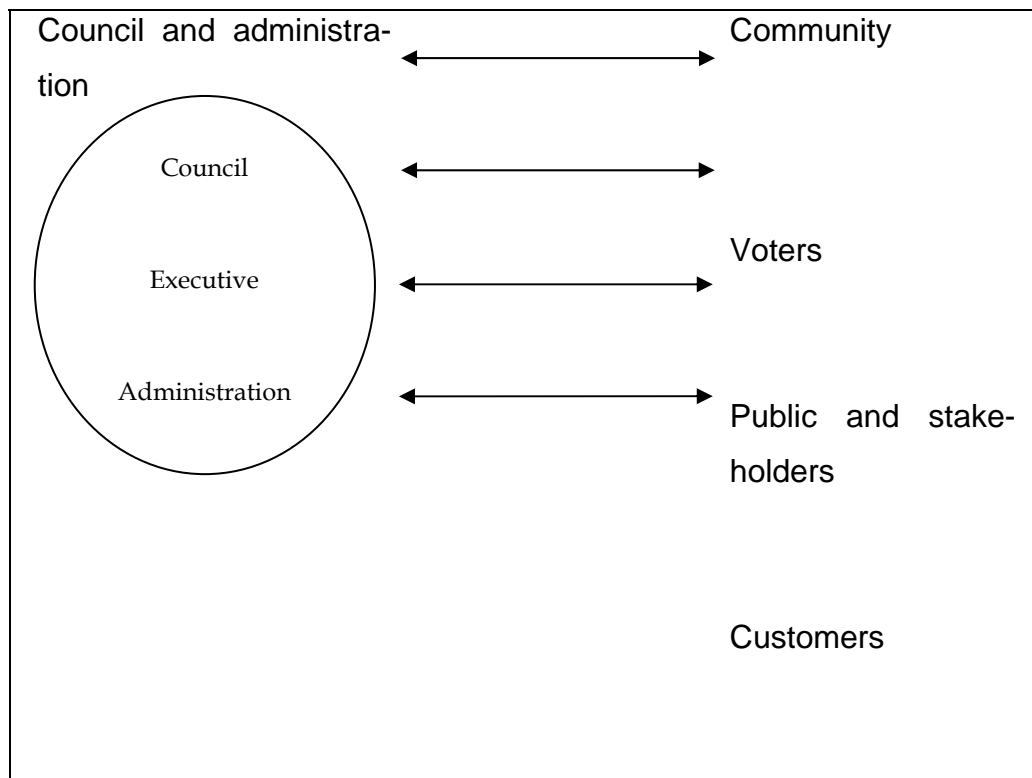
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<sup>46</sup> See the *Umzinto* case *supra* fn 44 at 543-545.

<sup>47</sup> The three components are the political office bearers, the municipal staff members and, to a lesser extent, the local community members.

<sup>48</sup> See in this regard the unreported case of *LR Brink and G Nieuwoudt v Die Speaker van die Munisipale Raad van Nala Plaaslike Munisipaliteit en een ander*, Free State High Court, December 10 2001 under case no 2125/2001. The case concerned mainly the suspension of two councillors from the municipal council. The court found on the facts that the grounds for suspension were frivolous and devoid of the rules of natural justice. The court held that the actions of certain councillors were so unreasonable and tainted by racism and maliciousness that it would be unfair to apply ratepayers' money to funding the action and that the costs of the matters should be paid by the relevant councillors out of their own pockets. The Constitution demands rational decision making, openness and fairness. Such features are essential to legitimacy, public confidence and acceptance of any administration. According to the Constitution, and more particularly s 152, municipal governments must be accountable governments. It is submitted by some legal experts that accountability can now be seen to extend further than the administrative organ itself and, in some extreme cases, can even mean personal accountability of those individuals who collectively make up the particular organ. See also Barrie G "Caveat town councillors" *Without Prejudice* (2001) 8. For a similar example of collective accountability, also refer to the Constitution ss 80(4) and 122(4), which allows the Constitutional Court to order unsuccessful applicants of the National Assembly or a provincial legislature to pay the legal costs of an application under the sections.

<sup>49</sup> Diagram taken from LGIS no 2 "Participation and Accountability" (1999) at 10.



As was mentioned above, a municipality is accountable to both institutions inside the municipality and to the public and other stakeholders outside the municipality. On the external level, municipalities are accountable to the public which they serve. External accountability manifests in different ways. There is, for example, the accountability of a ward councillor to the ward inhabitants. If the population of a ward is not satisfied with such a councillor, they should vote the person out of office in the next election. Non-ward councillors are also held accountable through pressure on the relevant political party that they represent. According to the new local government system, all councils must put an integrated development plan in place, which plan is linked with the five-year term of office of councillors. Councillors can thus be held accountable in respect of their performance relative to such an IDP. It is not only the political office-bearers that are accountable to the public, however; the municipal administration is also accountable. It must be emphasised that the relationship between the administration of a municipality and its local public is very important. Quality and professional service fosters public support and participation.<sup>50</sup> It is ultimately the

<sup>50</sup> Public accountability of municipal administrative staff has always been somewhat problematic, but in many municipalities it seems to have taken a turn for the worse. Both national and provincial governments have recognised the need for improvement in such regard. The *Batho Pele* (people first) programme is but one new initiative, which aims to ensure accountability through im-

*continued on next page*



responsibility of each municipality to ensure that it has implemented effective mechanisms and procedures to ensure that accountability is achieved. It should further be pointed out that organised labour is also accountable to the broader community. Unions have a duty to encourage their members to serve their communities. Ultimately what is needed is a balance between the needs and aspirations of workers and the needs of the community towards affordable and accessible services.<sup>51</sup>

Accountability must also be provided for within a municipal administration. In such instances various forms of accountability can be distinguished. Firstly, there should be strong accountability between the executive authority and the municipal council. Under new policy directives and emerging legislation, the role of executive structures within the council has been enhanced. The introduction of a speaker particularly enhanced executive accountability to the council and public.<sup>52</sup> Apart from being accountable to the executive authority, the council and the administration are accountable to one another. The administration has to answer to the council's political leaders, but the leader must support the administration in doing its work. On this point it should be noted that the new developmental nature of local government, with its greater emphasis on participation and accountability, has resulted in many changes in the way in which municipalities function.<sup>53</sup> Accountability is also required between the municipality as employer and organised labour. Various strategies should be developed to ensure that workers have a say in the way in which a municipality is to function. Finally, municipalities are also accountable to the other spheres of government, which are reciprocally accountable to them. For example, municipalities are required to implement national and provincial development programmes, but both national and provincial governments have a supporting, co-ordinating and monitoring role with regard to municipalities. All in all, the three

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proved customer management and service provision. See LGIS no 2 "Participation and Accountability" (1999) at 11.

<sup>51</sup> According to the White Paper on Local Government, labourer' interests should not stand in the way of transformation or delivery objectives. It is envisaged that the new South African Local Government Bargaining Council must play a critical role in enhancing positive partnerships between labour, management, the council and, finally, the relevant local community.

<sup>52</sup> Refer to all the special functions that the speaker must perform and oversee. The speaker functions as a person who is charged with ensuring that the council and its structures are accountable for the way in which they function.

<sup>53</sup> The enforcement of party political idealism within a particular administration often does not encourage co-operation and can be very destructive. See LGIS no 2 "Participation and Accountability" (1999) at 14.

spheres of government have an overarching constitutional accountability to the new constitutional model and to the nation at large. Such accountability is founded on the Constitution itself, as it requires a system of democratic government founded on *inter alia* the values of accountability, responsiveness and openness.<sup>54</sup>

In an effort to ensure that accountability is achieved, many new initiatives have been implemented. It is submitted that these initiatives should go a long way towards enhancing and achieving accountability. Some of the new initiatives are summarised briefly as follows:<sup>55</sup>

- *Codes of conduct* Codes of conduct have been introduced for councillors, traditional leaders and officials. Such codes should ensure that those individuals act in the interest of the communities that they serve and that they are accountable for their actions.
- *Full-time appointed councillors* Full-time councillors will have more time to fulfil their functions, which should improve effectiveness and accountability.
- *New structures and functionaries* Under the new legislative system, new and enhanced structures and functionaries such as the office of the executive mayor and the new municipal manager have been created. These structures and functionaries have specifically allocated powers, responsibilities and functions and should also play an important role in ensuring municipal compliance to all its duties and objectives.
- *Performance management* Under the new system, municipal performance is measured against key performance indicators (KPI). The KPI should be set up in consultation with the public and other stakeholders and should encourage participation and accountability through regular monitoring.
- *Public rights and responsibilities* Residents in particular municipal jurisdictions have both rights and obligations. Such a system, which requires a balanced approach, should also enhance municipal accountability and effectiveness.

#### **19.4.7 Developing programmes for participation**

It was mentioned above, that all municipalities are now legally obliged to develop systems of public participation. Such development requires different phases. In the first phase, municipalities should build up a relationship with all the relevant stake-

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<sup>54</sup> Refer to the Constitution the Preamble and s 1(d).

<sup>55</sup> Refer to LGIS no 2 "Participation and Accountability" (1999) at 12.

holders in their communities and develop a shared vision for the area as a whole. All interest groups should be involved. This process can be initiated through various strategies such as publicity days and local media coverage. Care should be taken not to marginalise groups within communities. People must also see that the municipal initiative is genuine and that serious consideration is given to their involvement. The second phase should involve the internal restructuring of municipal administrations. Existing staff members and councillors should change their attitudes toward public participation and their own accountability. Once a new relationship has been established the new system of interaction and participation should be maintained.

From the discussion above it is clear that the new local government system is significantly different from the one that existed prior to the new constitutional dispensation. Municipalities are now constitutionally obliged to provide democratic and accountable governance for all local communities. New laws provide the basis for making the new system a reality. The key to the success lies in the capacity and willingness of all stakeholders to take the processes forward, however.

### **19.5 Aspects concerning municipal performance management and capacity building**

The new legislative framework for local government has also established new demands on the performance of municipal staff members to ensure that the objectives of local government are met. After the transformation process had been initiated, municipal administrations were faced with various new challenges and demands: municipal jurisdictions were enlarged, many service backlogs became evident, a new constitutional vision and place for local governments was created, new boundaries were drawn and finally a new legal framework for local governments was initiated. Special directives and assistance to municipal administrations are therefore essential in order to ensure a more efficient, customer-orientated and developmentally creative local government dispensation. In order to create such a system, proper performance management within all municipal administrations is generally regarded as a prerequisite; performance management is seen as a strategic tool that can encourage new attitudes, skills and competencies within the new local government dispensation.

In essence, performance management can be summarised as a process whereby municipalities seek to improve and monitor their functioning and accountability on an ongoing basis. Performance is then regularly assessed to determine whether plans

have been implemented, resources are being used effectively and whether the municipality is fulfilling its duties and responsibilities. If municipal performance management is implemented correctly, it should enable municipalities to deliver quality services in a cost-effective, efficient and accountable manner. In light of the fact that performance management is a new concept for local administrations, there is no uniform or general model available which municipalities can implement with guaranteed success. An effective and efficient performance management system must be developed to meet the unique circumstances that exist in modern local governments in South Africa.<sup>56</sup>

The previous local government dispensation never provided properly for a comprehensive performance management system. Consumers or the public at large never had the opportunity to measure the effectiveness of municipal service delivery and quality of services. Under the new constitutional requirements local governments are obliged to meet the basic needs of citizens, and especially provincial governments are tasked with monitoring the performance, capacity and effectiveness of municipalities within their respective jurisdictions. In follow-up on the constitutional provisions, the new legislative framework for local governments provides specifically for the enhancing of municipal performance management.<sup>57</sup> The need for a general performance management system for all municipal governments was already envisaged in the White Paper on Local Government. The White Paper confirmed that the aim of a new national performance management system is to:<sup>58</sup>

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<sup>56</sup> Under the new constitutional system, various systems have been proposed to establish an effective performance management system. One such proposal was the *Batho Pele* (people first) vision for managing performance in the broader public sector. The *Batho Pele* proposal is aimed at delivering the best service to the public. The proposal consisted of eight service delivery principles (ie consultation, service standards, access, courtesy, information, openness and transparency, redress and value for money). *Batho Pele* also aims at constantly improving the quality of services through the implementation of an eight-step process. Such steps, which could serve as an important guide for municipalities that embark on performance improvement programmes, are: identification of the customer; establishing customer needs and priorities; determining the current service baseline; identifying the improvement gap; setting service standards; gearing up for delivery; announcing service standards and finally monitoring delivery against standards and publishing the results. These principles should form the basis for any new local government performance management system. The overall aim is to make municipalities efficient, customer-orientated, developmentally creative institutions that enable citizens to obtain better service delivery. See LGIS no 2 "Performance Management" (1999) at 4-5.

<sup>57</sup> See the Local Government: Municipal Systems Act ch 6. The aim of the new legal framework is to: define goals and priorities; establish objectives, set indicators for performance, measure performance; review and adjust service delivery mechanism and finally to report on the progress made.

<sup>58</sup> Refer to the White Paper on Local Government (1998) at 51-52.

- assess the overall state of local government
- monitor the effectiveness of development and delivery strategies of municipalities and ensure that scarce resources are utilised efficiently
- provide early warning signals
- allow for performance comparison between municipalities across the country
- identify successful approaches or best practises
- provide a national set of performance indicators.

The envisaged system is not aimed at imposing additional burdens on municipalities but rather at seeking a change in the way in which municipalities perform and fulfil their duties and responsibilities.

#### ***19.5.1 The new legislative requirements regarding municipal performance management***

As was envisaged in the White Paper on Local Government, national legislation under the new local government dispensation specifically determines various aspects regarding municipal performance management. All municipalities are now legally obligated to establish and develop performance management systems (PMS) and to review such systems. The new legal requirements relevant to municipal performance management are briefly as follows:

- *The establishment and development of performance management systems* Each municipality established under the new local government dispensation must establish a performance management system that is commensurate with its resources, that is best suited to its circumstances and is in line with the priorities, objectives, indicators and targets contained in its integrated development plan. Municipalities must further promote a culture of performance management among their political structures, office bearers, councillors and municipal administrations. They must also ensure that their affairs are administered in an economical, effective, efficient and accountable manner.<sup>59</sup> Specific responsibility has been placed on the executive committee or executive mayor, whichever is applicable, or a committee of councillors appointed by the municipal council in the absence of an executive committee or executive mayor,

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<sup>59</sup> See the Systems Act s 38(a)-(c).

- (a) to manage the development of a municipality's performance management system
- (b) to assign certain responsibilities of the system to the municipal manager
- (c) to submit the proposed system to the municipal council for adoption.<sup>60</sup>

All municipalities must further establish mechanisms to monitor and review their performance management system.<sup>61</sup>

- *The core components and community involvement in municipal performance management systems* Every performance management system is required to include various core components. Accordingly, in terms of its performance management system and any other regulations and guidelines that may be prescribed, every municipality must incorporate and provide for the following.<sup>62</sup>

- (a) setting appropriate key performance indicators (KPIs) as a yardstick for measuring municipal performance, including outcomes and impact, with regard to the municipality's development priorities and objectives set out in its IDP
- (b) setting measurable performance targets for each of the development priorities and objectives
- (c) monitoring performance and measuring and reviewing performance at least once a year against the development priorities and KPIs
- (d) taking steps to improve performance where targets have not been met
- (e) establishing a process of regular reporting to the council, political structures, office bearers, staff, the public and appropriate organs of state.<sup>63</sup>

It is further also obligatory for a municipality to involve the local community in the development, implementation and review of the municipality's PMS and also to allow the community to participate in the setting of appropriate key performance indicators and performance targets.<sup>64</sup>

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<sup>60</sup> Refer to the Systems Act s 39(a)-(c).

<sup>61</sup> The new legal framework does not provide guidelines on what mechanisms should be employed. It seems that if it is left to each municipal council to decide on what mechanisms to employ to monitor and review performance. See the Systems Act s 40.

<sup>62</sup> See the Systems Act s 41(1)(a)-(e).

<sup>63</sup> In this regard, appropriate organs of state should include provincial governments which are tasked to oversee and monitor municipal performance. Ss 41(2) requires the PMS applied by a municipality to be so devised that it could serve as an early warning indicator of under-performance.

<sup>64</sup> See the Systems Act s 42. This section entrenches for the first time real and constructive public participation in respect of municipal performance control and oversight. It is submitted that

*continued on next page*

- *The setting of key performance indicators and the audit of performance measurements* Under the new legal framework for local government, after consultation with the MEC for local government and organised local government nationally, the minister for local government may prescribe by regulation general key performance indicators that are appropriate and that can be applied to local government generally. The minister may also review and adjust those KPIs when necessary.<sup>65</sup> All municipalities are further required, in a manner determined by their council, to make known to the general public, both internally and externally, which KPI and performance targets are set by the municipality for purposes of its PMS. The results of such a PMS and performance measurements must be audited as part of the municipality's internal auditing processes and also annually by the auditor-general.<sup>66</sup>
- *Requirements regarding reports on the PMS and the making of regulations and guidelines* Apart from the establishment of a municipal performance management system, each municipality must prepare for each financial year an annual report consisting of *inter alia* a performance report. Such a performance report should reflect:
  - (a) the performance of the municipality and each external service provider during that financial year
  - (b) a comparison of the performances with the targets set for them and also the performances in the previous financial year
  - (c) measures taken to improve performance.<sup>67</sup>

It should be noted that an annual performance report must form part of a municipality's annual report as is determined in chapter 12 of the Municipal Finance Management Act.<sup>68</sup>

Apart from the reporting responsibility on the municipal manager, the newly enacted legislative requirements also place a similar responsibility on the MEC and the minister concerned. In this regard, the MEC for local government in a province is obliged

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this enhancement of public participation would significantly contribute to more active public involvement in municipal affairs.

<sup>65</sup> See the Systems Act s 43(1)(a)-(b). General KPIs must be included in a municipal PMS where applicable. See s 43(2).

<sup>66</sup> Refer to the Systems Act ss 44 and 45 respectively.

<sup>67</sup> Read s 46(1)(a)-(c) of the Systems Act as substituted by Act 44 of 2003 s 6.

<sup>68</sup> See s 46(2) of the Systems Act as amended.



annually to compile and submit to the provincial legislature and the national minister responsible for local government a consolidated report on the performance of municipalities in that province. The consolidated report must identify all municipalities that have underperformed during the year, as well as the proposed remedial action to be taken. The report must then be published in the *Provincial Gazette*.<sup>69</sup> Finally, the minister responsible for local government must annually compile and submit to parliament and the nine MECs for local government in the provinces a consolidated report of local government performance in general, in terms of general key performance indicators. Such a report must be published in the *National Gazette*.<sup>70</sup>

In confirmation of the fact that the new legislative requirements are not a complete legal system and in order to cater for the effectiveness of the system, the national minister is permitted to make regulations or to issue guidelines to provide or regulate certain issues. These are:<sup>71</sup>

- incentives to ensure municipalities establish PMSs within a prescribed period and comply to the Act
- the setting of KPIs by a municipality with regard to its development objectives
- the identification of appropriate general KPIs that can be applied to municipalities generally
- the regular review by a municipality of its KPIs
- the setting of a framework for performance targets by municipalities consistent with their development priorities, objectives and strategies set out in their IDPs
- mechanisms, systems and processes for the monitoring and measurement of performance by a municipality with regard to its development objectives
- the internal auditing of performance measurements
- the assessment of those performance measurements by a municipality;
- the assessment of progress by a municipality with the implementation of its IDP
- the improvement of performance
- any other matter that may facilitate the implementation by municipalities of an effective and efficient PMS or the application of chapter 6 of the Systems Act.

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<sup>69</sup> See the Systems Act s 47(1)-(2). The MEC is also tasked to submit a copy of the report to the NCoP S 47(3) of the Act.

<sup>70</sup> See the Systems Act s 48.

<sup>71</sup> See the Systems Act s 49(1)(a)-(k).

It is clear that the legislator's intention was to give the minister a wide authority to make regulations or to issue guidelines. When the minister makes regulations or issues guidelines he/she must take the capacity of municipalities into account and he/she must differentiate between different kinds of municipality.<sup>72</sup>

### **19.5.2 *Creating and maintaining an effective system of municipal performance management***

With reference to the abovementioned legislative requirements in relation to municipal performance management, two key elements seem to be significant. At first, each municipality will have to identify and prioritise those areas where performance improvement is most required. Such areas will include both external developmental priorities and internal transformation necessities. National government should assist municipalities by identifying common performance areas that are applicable to all municipalities, such as access to basic services such as water, sanitation, electricity and housing. Through national minimum standards, municipalities will be guided when defining their own goals within their unique circumstances and will consolidate existing fragmented approaches to services. The second key element is performance assessment. An objective performance assessment is crucial for the creation and maintenance of an economic, efficient and effective local government performance management system.<sup>73</sup>

Apart from the two key elements of an effective and efficient PMS, all performance management systems should contain six core elements. Each element is important to make the system work, and are discussed briefly as follows:

- *Performance measurement* Performance measurement requires a relatively objective framework for assessing performance. Measurement is achieved by setting

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<sup>72</sup> Refer to the Systems Act s 49(2)-(4). The minister is also permitted to phase in some or all of the applications of the provisions of the chapter on performance management, which provisions place a financial or administrative burden on municipalities.

<sup>73</sup> To illustrate the functioning of such an objective performance assessment system, imagine the following example: Two municipalities, A and B, with similar budgets, responsibilities and staff both decide to undertake similar-sized housing development projects. How would their respective performance with reference to the project be assessed? It is submitted that the first step would be to assess the economic factors of the project. Such measures look at the cost of resources. If one municipality spent more on materials, such a position would be one indication of performance. Cost measures alone can be misleading, as poorer quality material are cheaper. Quality is thus also important. The second phase of assessment should evaluate quantity and quality in relation to resources used. Finally the effectiveness should be evaluated. It is important to assess what effective contribution to the overall developmental objectives of a municipality has been achieved through the project. See also LGIS no 2 "Performance Management" (1999) at 11.

performance indicators and linking them to performance targets. Performance indicators indicate how performance will be measured; that is, the number of households to receive water connections. Performance targets again refer to the result to be achieved within a given timeframe (eg 5000 connections by yearend 2005). Performance indicators can be determined only once a municipality has identified the key objectives for development in its area and with the municipality's overall developmental goals and priorities in mind. Many municipalities have set various performance indicators through their development-planning processes. A distinction should be made between general performance indicators and local performance indicators. General performance indicators refer to such indicators that are applicable to all municipalities, while local indicators reflect particular local developmental priorities and objectives. Any KPI should ensure that the right area of performance is measured and that the quality of performance is also assessed. Part of any process of performance measurement involves the establishment of targets for each performance indicator. Performance is then measured within a given timeframe, according to whether targets for each indicator have been achieved. The setting of performance targets can be a somewhat complicated exercise and should ultimately result in realistic and achievable objectives. In determining proper targets it is suggested that certain guidelines be used and that a checklist be developed when targets are set for particular indicators.<sup>74</sup>

- *Performance monitoring and evaluation* The monitoring and assessment of the performance of municipalities is a crucial aspect of any successful PMS. Monitoring and evaluation are processes aimed at assessing the performance of municipalities and the people that work for them. It is important to note that the assessment of people refers not only to municipal staff members but also to external contractors that do work or provide services on behalf of a municipality. Generally speaking, performance monitoring is an ongoing process to determine whether targets are being met and whether development objectives are being

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<sup>74</sup> According to LGIS no 2 "Performance Management" (1999) at 14 the following guidelines and checklist questions should be useful in determining performance targets: Guidelines are preciseness and measurability, relevance to user, being demanding but realistic, approved by politicians and providing communication to the public. Checklist questions could include the number of each service provided, how many new services were provided in a year, what trends are impacting on the service, what customers expect, the municipality's realistic capacity and what other similar municipalities are achieving.

achieved. Performance management must be conducted very carefully, and information should not be manipulated to produce results that appear better than they really are. Uncompromising integrity of performance management is therefore essential. In contrast with the monitoring process, performance evaluation is a deeper and more detailed process of performance analysis. Such an evaluation process looks not only at whether a municipality is performing adequately but also at the areas of underperformance. All municipalities should make special arrangements to evaluate performance regularly. A further key element of the monitoring and evaluation process is so-called “performance auditing”. This process involves verifying that the measurement mechanisms and results are accurate and that proper procedures have been followed to evaluate and improve performance. The checks built into the new legislative framework should ensure objective verification of performance results and should ultimately enhance municipal service provision and compliance with the new constitutional demands.<sup>75</sup>

- *Performance reporting* Under the new legal framework, all municipalities are obliged to submit annual performance reports to the public and higher spheres of government. It is submitted that the reporting requirement should significantly enhance public participation and municipal accountability and should therefore be strictly enforced.
- *Capacity building* Without the necessary capacity, municipalities will not be able to perform and fulfil their duties and responsibilities. Municipal capacity building must therefore be a core element of a broader performance management strategy. Capacity building is a process of developing the ability for improved performance within municipalities and will be discussed in more detail elsewhere in this chapter.
- *Intervention* It was mentioned earlier that the Constitution allows and demands intervention into the affairs of local government when necessary. Especially the provinces are tasked with oversight and intervention powers into the affairs of municipalities when cases of non-performance are reported. Such interventions should be based on accurate diagnostic results, however, and should be undertaken on an objective basis. When intervention is allowed on subjective grounds

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<sup>75</sup> See LGIS no 2 “Performance Management” (1999) at 16-17. A further check on performance monitoring and evaluation is public participation. Public involvement and pressure for improved performance  
*continued on next page*

or without proper justification, the new constitutionally entrenched status of local government as an independent sphere of government would be unnecessarily jeopardised. In this regard it should be emphasised that the ultimate aim of intervention is not to create a hierarchy of one sphere of government over another but to ensure that citizens receive the essential services that are promised under the new constitutional scheme.

- *Performance incentives* Ultimately the performance of any particular municipality and its staff depends on certain incentives within the PMS. Good performance should be rewarded whilst poor performance should be penalised. Various means of incentive are possible, such as fiscal and political motivators, rewards, competitions and individual motivational schemes.

### **19.5.3 Implementing performance management**

The implementation and maintenance of an effective PMS is in essence founded on the new constitutional foundation. All spheres of government are constitutionally obliged to fulfil their duties and responsibilities according to the constitutional prescriptions and to ensure a general system of democratic government that is accountable, responsive and open. Local governments are further tasked with specific developmental duties and the achievement of specified municipal objectives.<sup>76</sup> In order to determine whether such objects and duties are being met, a proper system of accountability and performance management is necessitated. Under the provisions of the Systems Act, a new legal framework for national performance management has been enacted. In essence, the new system will function as follows:

- *Step 1:* All municipalities must identify the areas that require performance measuring and improvement. This will be an integral part of the IDP process and the setting of development objectives.
- *Step 2:* Once the areas have been identified, a municipality will monitor and measure its performance by developing indicators and targets for each of the development priorities.
- *Step 3:* A municipality will then have to evaluate its performance and take steps to improve performance when targets are not being met.

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formance should be protected as an important part of the overall PMS of a municipal government.  
<sup>76</sup> See the Constitution ss 1, 152 and 153.

- *Step 4:* In addition to those areas identified by a municipality, some areas fundamental to the overall reconstruction and development of South Africa will be identified by national government, through consultation with key stakeholders such as SALGA and provincial governments.
- *Step 5:* Each municipality will be expected to report on these areas through the prescribed national indicators and targets.
- *Step 6:* A municipality will be able to exceed the targets set by national government, but it will not be able to perform below those targets.

To illustrate the practical application of the new PMS, the example is given of a municipality where 50% of the residents do not have access to clean drinking water. Water is arguably the single most essential municipal service, as it is needed for drinking, cooking, washing and cleaning. Without water, communities suffer severe discomfort and disease. As a first step, the particular municipality will identify water provision as an area that requires performance measuring and improvement. Water provision to all residents will be set as a priority with a correlating objective of giving all residents access to at least a certain number of litres of drinkable water per day. The objective will then translate into development strategies which could include major investment programmes in water schemes. Strategies could also include cross-subsidising between consumers if necessary.

As a second step, and once the area of performance have been identified, then a municipality will have to monitor and measure its performance. This is achieved through the development of KPIs and targets for each of the identified priorities. The following KPIs and targets could be relevant to the example mentioned above:

KPIs:

- the percentage of households that do not have access to water (measure growth)
- the bacterial count in water (measure quality of water)
- average time spent by community members (measure impact of scheme on community to bring water to their houses)
- percentage of residents paying for services (measure sustainability and financial impact).

Targets:

- to reduce households without water from 50% - 30% in two years
- to ensure quality of water is up to standard
- to reduce travel time for community to fetch water

- to ensure measures are taken to service payment collections better.

Under the third step, the municipality will have to evaluate its performance and will have to take steps to improve performance when targets are not met. Measurement mechanisms can include:

- keeping data of households with water
- testing water quality regularly
- surveying residents' activities and the implementation of a proper billing and credit control system.

Finally, the municipality must report on its performance management in each area as is required by law.

Although the many benefits of a proper PMS are very clear, the implementation of such a system does present various challenges. Challenges that are most common are limited financial resources, inadequate administrative capacity, poor public participation and a slow ability to adapt to the new legal order. In order for effective and efficient performance management to occur, it is suggested that all municipalities will have to commit themselves to this end and dedicate their energy to overcoming the different challenges and finding new ways to fulfil their duties and obligations. Other spheres of government must assist municipalities in this endeavour, but ultimately the responsibility lies with municipalities all over the country to start focusing on the new outcomes of municipal services and programmes.<sup>77</sup>

## **19.6 Aspects regarding municipal capacity building**

### **19.6.1 Introduction**

It is a general phenomenon all over the world that local governments are pushing for autonomy and decentralised decision making. More autonomy and decentralised powers often leave municipalities with many new performance demands, however. The position in South Africa under the new local government legislative framework is no different. The new local government dispensation has created strict legal demands on municipalities to comply and fulfil certain duties and responsibilities. Without a sufficient capacity, municipalities will not be able to fulfil such duties and

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<sup>77</sup> In order to enhance the new legislative requirements dealing with performance management the LG: Municipal Planning and Performance Management Regulations were promulgated. See GNR 796 in GG 22605 of 24 August 2001. The regulations provide for *inter alia* the nature of a performance management system, the adoption of a PMS, the setting of key performance indicators, general key performance indicators, the setting of performance targets and the monitoring review and internal auditing of performance measurements.



responsibilities, however. It is of paramount importance therefore that municipalities themselves, as well as the two higher spheres of government, ensure that municipal capacity is adequate to ensure compliance with their new constitutional and other legislative obligations. Municipal capacity building is thus regarded as one of the more important tools available to municipalities to ensure service delivery and the overall fulfilment of their duties and responsibilities. Capacity building should therefore form one of the strategic programmes that municipalities must put in place.

During the former local government dispensation, capacity building was often racially determined and did not support democratic municipal development. Under the new system municipalities have been afforded distinctive autonomy and powers and are supported to handle their own affairs in accordance with their own priorities. Capacity building should be a very important objective for all municipalities, as it will ensure various advantages. The following advantages will be secured through a solid municipal capacity:

- services are delivered as is legally required
- more powers can be delegated down to a municipal level
- better investment opportunities can be created.

Capacity building is therefore very important and should be done on the political, financial management and administrative levels. It speaks for itself that capacity building cannot be done without proper training.<sup>78</sup> With the restructuring of local government, the overall local government capacity building scheme had to be revisited and changed. It was especially envisaged that the new system should ensure the following results:<sup>79</sup>

- to respond to municipal needs
- to be acceptable and aimed at all people
- to offer capacity building that qualifies officials and frontline workers for promotion and further development

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<sup>78</sup> Under the former system two training bodies made up local government training. There was the Local Government Training Board (LGTB), established under the Local Government Training Act, and the Apprenticeship Training Board for Local Authorities (ATBLA), established under the Manpower Act. The two structures operated separately and addressed different fields in the training sector. Coordination was poor, and the absence of a common national vision on capacity building led to a lack of objectives, fragmentation of training programmes and poor staff development results. The two bodies later merged into the Local Government Education and Training Board (LGETB).

<sup>79</sup> See LGIS no 2 "Capacity building" (1999) at 5.

- to address the capacity building needs of rural municipalities
- to ensure the involvement of all role players to find solutions for municipal challenges.

### **19.6.2 Establishing a new local government training system**

In the White Paper on Local Government, a vision and framework was provided within which local government capacity building was to be developed. The previous system had to be changed to become a more flexible, decentralised and demand-driven system with continuous improvement of municipal staff members and political office bearers.<sup>80</sup> In response to the new changes and challenges of the new system, a new set of skills and competences had to be created to ensure an overall developmental local government. Various initiatives have thus been piloted in a variety of newly created capacity building programmes and schemes.<sup>81</sup>

In follow-up on the vision in the White Paper on Local Government, various laws have been passed or amended to give more meaning and substance to the new local government capacity-building system. See, for example, the Skills Development Act,<sup>82</sup> which Act requires a Sector Education Training Authority (SETA) to be established in every sector of the South African workforce in order to develop skills.

This LGSETA will be made up of representatives of both organised labour such as SAMWU and IMATU and organised employer's organisations, which are represented under SALGA. Specific functions have been envisaged for the new LGSETA to fulfil. Such functions include:<sup>83</sup>

- Preparing a Local Government Skills Plan.
- Implementing the Local Government Skills Plan by
  - (a) establishing learnerships
  - (b) approving workplace skills plans
  - (c) allocating grants to employers, education and training providers and workers

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<sup>80</sup> See the White Paper on Local Government (1998) at 115.

<sup>81</sup> Examples of some of the new competencies and capacity-building programmes are: councilors' code of conduct, falling under SALGA training; performance management, falling under the department of Constitutional Development; integrated development planning, falling under the department of Constitutional Development; local economic development, falling under the department of Constitutional Development and NGO's financial management; voter education, falling under the IEC and senior management development, falling under university-based training programmes. See LGIS no 2 "Capacity building" (1999) at 7.

<sup>82</sup> 97 of 1998.

<sup>83</sup> See LGIS no 2 "Capacity building" (1999) at 9.

- (d) monitoring local government education and training in the sector.
- Promoting learnerships by
  - (a) identifying work places for practical work experience
  - (b) supporting the development of learning materials
  - (c) improving the facilitation of learning
  - (d) assisting in the conclusion of learnership agreements.
- Registration of learnership agreements.
- Applying to SAQA for accreditation as an Education and Training Quality Authority (ETQA).
- Collecting Skills Development Levies and disbursing these to municipalities.
- Reporting on income and expenditure and the implementation of its sector skills plan to the Director-General of Labour.
- Appointing staff for the performance of its functions.

The Skills Development Act also introduces a new learnership approach to skills development. This approach requires a combination of institutional learning and workplace learning/experience. Skills development, which will require substantial financial resources, is financed largely through the Skills Development Levies Act.<sup>84</sup> The levies are not sufficient to meet the existing training needs, and it is clear that other funding sources such as private donors, business or even other spheres of government should be explored.

It was mentioned above that it is not only municipal staff members that are in need of new training, but also political office bearers. The new constitutional and other legislative requirements have placed important responsibilities on political representatives. In this regard SALGA has developed a so-called "councillor-training programme" for all councillors. In order to ensure quality in the new training programmes, the South African Qualifications Authority Act,<sup>85</sup> has established the South African Qualifications Authority (SAQA), which must oversee the implementation of a national qualifications framework (NQF). The NQF is seen as a new way of "grading" learning achievements by using eight NQF levels.<sup>86</sup> The new NQF ap-

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<sup>84</sup> 9 of 1999.

<sup>85</sup> 58 of 1995.

<sup>86</sup> The lowest NQF level is level 1, which is the equivalent of grades 7-9 of the traditional high school education grading system. Level 4 corresponds to grade 12. In future, most officials will be trained against the eight NQF levels.

proach towards learning is different from the past, as it is based on learning outcomes, which are measured by the ability of a learner after training to convert his/her learning into work performance. SAQA and the NQF also promote a system for the recognition of prior learning and so-called “life-long learning”. These initiatives should allow people gradually to qualify themselves and to help to develop the careers of staff members and ensure that local government becomes an attractive place of work.

### **19.6.3 Mechanisms to enhance municipal capacity building**

In light of the new legal requirements, it is obvious that all local governments will have to establish various training and development programmes. Such programmes and initiatives will necessarily be different for each of the different categories and types of municipality because of their diverse circumstances and responsibilities. In many instances, the new local government dispensation is characterised by various performance gaps, some of which can be filled only through the training of councillors, officials and other frontline workers. What municipalities need is a good training programme. In order to establish such a training programme municipalities need to determine which of the problems they encounter can be solved through building the capacity of staff and which cannot. In instances where internal capacity building cannot solve the problems, alternative approaches exist such as outsourcing or the conclusion of partnerships with other private or public institutions. It is also very important for municipalities to prioritise their capacity-building strategy as part of their integrated development plan. In this regard it is suggested that every IDP should incorporate a skills-development plan as a key component, which should facilitate capacity-building solutions within the municipality.<sup>87</sup> Under the new constitutional dispensation, all provinces are obliged to build the capacity of local governments. Various interactions and cooperation strategies must still be developed between municipalities and their respective provincial governments in order to fulfil the constitutional vision and obligations.

## **19.7 Conclusion**

In conclusion, it is submitted that the principles of public administration, performance management and municipal capacity building are currently in need of major trans

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<sup>87</sup> See LGIS no 2 “Capacity building” (1999) at 16.

formation. According to the new legal framework, an entirely new approach towards capacity building, performance management and public participation has been mandated. All municipalities will have to take and implement new initiatives to ensure compliance with the newly established legislative requirements. All in all one can conclude that the new vision for local government is to create an essentially customer-orientated public service. The codes of conduct for both councillors and staff members set out basic requirements for accountability and control. It is further submitted that the new legal framework indeed lays a sound foundation for a more people-orientated local government system, which should be able to meet the demands of all South African people and should ensure a better and brighter future for all.

## Municipal development planning

### 20.1 Introduction

According to the new legal framework for local governments, a significant measure of responsibility relating to municipal planning has been decentralised to local government structures. Although municipal planning is incorporated as a functional area of concurrent national and provincial legislative competence,<sup>1</sup> all municipalities are constitutionally obligated to structure and manage their administrations and budgeting and planning process in such a way as to give priority to the basic needs of their communities. All municipalities must also promote the social and economic development of their communities.<sup>2</sup> The new constitutional dispensation furthermore determines that one of the objects of local government in general is to promote social and economic development and to promote a safe and healthy environment.<sup>3</sup> Because of this new constitutional mandate, the new local government system is often referred to as a developmentally orientated local government system. It is obvious from the abovementioned requirements that local government planning processes must be structured and organised so as to achieve the objects of the new local government dispensation and also to give priority to the basic needs of their respective communities. If local governments are to achieve such a developmental system, they are to be thoroughly supported by the two higher spheres of government. Both national and provincial laws are therefore needed to ensure municipalities fulfil their developmental duties. Whereas provincial laws will often differ in content and approach, national legislation should provide an overarching set of regulatory provisions so as to enable municipalities to create a basic planning framework. In compliance with its responsibility in this regard, parliament has enacted the Local

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<sup>1</sup> See the Constitution Part B Sch 4.

<sup>2</sup> Refer to the Constitution s 153(a).

<sup>3</sup> See the Constitution s 152(c)-(d).

Government Municipal Systems Act.<sup>4</sup> The provisions of the Act relating to planning and environmental issues will be discussed below.

## **20.2 National principles concerning local government developmental planning**

### **20.2.1 General requirements relating to municipal development planning**

According to the Local Government: Municipal Systems Act, local government planning is to be developmentally orientated. In order to achieve this objective, all municipalities must undertake developmentally orientated planning so as to ensure three purposes:<sup>5</sup>

- that municipalities strive to achieve the objects of local government set out in the Constitution
- that municipalities give effect to their developmental duties set out in the Constitution and
- that municipalities with other organs of state contribute to the progressive realisation of the (socio-economic) fundamental rights contained in the Constitution.<sup>6</sup>

In order to achieve and undertake planning processes that are developmentally oriented, the Systems Act determines that its provisions in this regard must also be read in conjunction with chapter I of the Development Facilitation Act.<sup>7</sup>

A second important feature of the new local government planning framework is that the planning processes undertaken by a municipality must be aligned with and must complement the development plans and strategies of other affected municipalities and other organs of state. The purpose of such alignment and complementation of different development plans and strategies is aimed at giving effect to the principles of co-operative government as is contained in the Constitution.<sup>8</sup>

Apart from the requirements of co-operation in municipal planning processes, municipalities are also obligated to participate in national and provincial developmental programmes. Such participation is directly required by the Constitution and is also a

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<sup>4</sup> 32 of 2000 as amended. The Act aims *inter alia* to establish a simple and enabling framework for the core processes of planning, which process *should* underpin the notion of developmental local government. Refer also to the long title of the Act.

<sup>5</sup> See the Systems Act s 23(1)(a)-(c).

<sup>6</sup> Refer to the Constitution ch 2s 24, 25, 26, 27 and 29.

<sup>7</sup> See the Systems Act s 23(2) as well as the Development Facilitation Act 67 of 1995.

<sup>8</sup> Refer to the Systems Act s 24(1) read together with the Constitution ss 40 and 41. According to s 41, all three spheres of government and all organs of state within each sphere must adhere to the principles of co-operative government as are set out in the Constitution. The main objective of co-operative government is to ensure co-operation and co-ordination between the various role players.



national consequence of the fact that both national and provincial governments have concurrent legislative competence over municipal planning activities.<sup>9</sup> The new legal framework also determines that if municipalities are required to comply with planning requirements in terms of national or provincial legislation, then the responsible organ of state must

- align the implementation of that legislation with the provisions of chapter 5 of the Systems Act and
- consult with the affected municipality in such implementation and take reasonable steps to assist the municipality in meeting the legal requirements relevant to its IDP.<sup>10</sup>

Before either national or provincial legislation affecting municipal planning issues is introduced in parliament or a provincial legislator, the organ initiating the legislation must consult with OLG. Similar consultation is required in respect of subordinate legislation before such legislation is enacted.<sup>11</sup> Again the underlining principle of co-operation and co-ordination as part of a system of co-operative government is emphasised.

The new legal framework directed at municipal planning also requires specific requirements regulating the adoption of IDPs. According to the Systems Act, each municipal council must adopt a single, inclusive and strategic plan for the development of the municipality within a prescribed period after the start of its elected term. Such plan should have the following aims:<sup>12</sup>

- (a) to link, integrate and co-ordinate plans and to take into account proposals for the development of the municipality;
- (b) to align the resources and capacity of the municipality with the implementation of the plan;
- (c) to form the policy framework and general basis on which annual budgets must be based;
- (d) to comply with other provisions of the Systems Act;
- (e) to ensure compatibility with national and provincial development plans and planning requirements binding on the municipality in terms of legislation.

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<sup>9</sup> Refer to the Constitution s 153(b), which specifically requires this participation.

<sup>10</sup> See the Systems Act s 24(3)(a)-(b).

<sup>11</sup> See the Systems Act s 24(4).

<sup>12</sup> See the Systems Act s 25(1)(a)-(e).

An IDP adopted by a municipal council as mentioned above may be amended, but it remains in force until a new IDP is adopted by the next elected council.<sup>13</sup> A newly elected municipal council may adopt the IDP of its predecessor, but must comply with certain requirements.<sup>14</sup> Finally, it is required for all municipalities to give notice to the public of such adoption within 14 days of the adoption of its IDP and also to make copies or extracts from the plan available for public inspection. A summary of the plan must also be published.<sup>15</sup>

### **20.2.2 The contents and core components of Integrated Development Plans**

The new national regulatory legislation furthermore sets specific core components that IDP must incorporate. According to the Systems Act, an IDP must reflect the following:<sup>16</sup>

- (a) the municipal council's vision for the long term development of the municipality with special emphasis on the municipality's most critical development and internal transformation needs;
- (b) an assessment of the existing level of development in the municipality, which must include an identification of communities which do not have access to basic municipal services;
- (c) the council's development priorities and objectives for its elected term, including its local economic development aims and its internal transformation needs;
- (d) the council's development strategies which must be aligned with any national or provincial sectoral plans and planning requirements binding on the municipality in terms of legislation;
- (e) a spatial development framework which must include the provision of basic guidelines for a land use management system for the municipality;
- (f) the council's operational strategies;
- (g) applicable disaster management plans;
- (h) a financial plan, which must include a budget projection for at least the next three years; and
- (i) the key performance indicators and performance targets determined in terms of section 41.

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<sup>13</sup> See the Systems Act ss 34 and 25(2).

<sup>14</sup> Read the Systems Act ss 25(3)(a) and 29(1)(b)(i), (c) and (d) in conjunction with one another.

<sup>15</sup> See the Systems Act s 25(4)(a)-(b).

<sup>16</sup> See the Systems Act s 26(a)-(i).

It is quite clear that the IDP has a central and very important function within the new local government system. The IDP serves basically as a guiding document for the short term developmental needs and initiatives of every municipal government in South Africa. For this reason, special provision regarding the status of an IDP has been made and will be discussed later.<sup>17</sup>

### **20.2.3 Requirements regarding the process for planning, drafting, adopting and reviewing Integrated Development Plans**

The Systems Act also determines specific procedures regarding the framework for integrated development planning, for adoption and review procedures of IDP(s) and for the role players involved during the various processes.

In order to establish a framework for integrated development planning, each district municipality must adopt a framework for integrated development planning in its area as a whole. The adoption of this framework is to be effected within a prescribed period after the start of the elected term of the council and also after a consultative process with the other local municipalities in the area has been followed. After adoption, the IDP framework binds both the district municipality and local municipalities in the relevant area jurisdiction of the particular district.<sup>18</sup> At the very least, the framework must

- identify the plans and planning requirements binding in terms of national or provincial legislation on the district municipality, the local municipalities or even any specific municipality on its own within the area
- identify the matters to be included in the IDPs of the district and local municipalities that require alignment
- specify the principles to be applied and co-ordinate the approach to be adopted in respect of the alignment of IDP matters
- determine procedures for consultation between the district and local municipalities during the process of drafting their respective IDPs and also the procedures to be implemented in order to effect essential amendments to the framework.<sup>19</sup>

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<sup>17</sup> See the Systems Act s 35. Refer also to item 2 of the local government: Municipal planning and performance management regulations as published under GNR 796 in GG 22605 of 24 August 2001. Item 2 deals with the details of an IDP.

<sup>18</sup> See the Systems Act s 27(1)-(2).

<sup>19</sup> Refer to the Systems Act s 27(2)(a)-(d). It should be noted that these provisions are applicable only between a district municipality and its various local municipalities. In a metropolitan area,

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Through their municipal councils and within a prescribed period after the start of their elected term, all municipalities are obliged to adopt a process set out in writing to guide the planning, drafting, adoption and review of their IDPs, however.<sup>20</sup> Through the various mechanisms of public participation, a municipality must consult with its local community before adopting the process mentioned above and must give notice to the local community regarding the particulars of the process it intends to follow.<sup>21</sup>

With reference to the process to be followed by a municipality to draft its IDP, the municipality must ensure the following requirements:<sup>22</sup>

- that the process is in accordance with a predetermined programme which must specify timeframes for different steps
- that mechanisms of public participation allow for
  - (a) the local community to be consulted on its development needs and priorities
  - (b) local community participation in the drafting of the IDP
  - (c) organs of state, traditional authorities and other role players to be identified and consulted on the drafting of the IDP
- that the identification of all plans and planning requirements that are binding on the municipality in terms of national and provincial legislation are provide for
- that the IDP is consistent with any other matters that may be prescribed by regulation.

In areas outside metropolitan areas, all district municipalities must plan integrated development for the area as a whole but in close consultation with the local municipalities and must draft its IDP after having taken into account the integrated development processes of and proposals submitted to it by the local municipalities in its area. Simultaneously, all local municipalities must align their IDPs with the framework adopted by the district municipality and must draft their IDPs, after taking into account the IDP process and proposals from the district municipality.<sup>23</sup>

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no such co-operation and alignment is necessary, as the metro municipality is the only local government operating in the particular area of jurisdiction.

<sup>20</sup> The new requirements make it clear that each and every local government is legally required to draft and adopt an IDP for its area. See the Systems Act s 28(1).

<sup>21</sup> See the Systems Act s 28(2)-(3).

<sup>22</sup> See the Systems Act s 29(1)(a)-(d).

<sup>23</sup> See the Systems Act s 29(2)-(3). It is clear that in the new legal system a district council's responsibility for a district IDP is a statutory requirement. All district councils must formulate district wide IDPs, which must include a framework for the IDPs of local councils in their areas of jurisdiction.

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The management of the IDP drafting processes falls under the responsibility of the executive committee or executive mayor of a municipality or under a committee of councillors appointed by the municipal council if it is a municipality without an executive committee or an executive mayor. The responsible committee or person must manage the drafting of the IDP, must assign responsibilities to the municipal manager in the IDP process and must submit the draft plan to the municipal council for adoption by the council.<sup>24</sup> Further monitoring and support to the process of integrated development planning is provided for in that the MEC for local government in the province may:

- monitor the process followed by a municipality
- assist a municipality with the planning, drafting, adoption and review of its IDP
- facilitate co-ordination and alignment of the IDPs of different municipalities and the strategies and programmes of national and provincial organs of state.

The MEC may take any appropriate steps to resolve disputes or differences in connection with the IDP processes between a municipality and its local community or between municipalities.<sup>25</sup>

After an IDP has been adopted or amended, the municipal manager of a municipality must submit a copy of the IDP to the MEC for local government in the province within ten (10) days after such adoption/amendment. The copy of the IDP must further be accompanied by a summary of the pre-adoption process, a statement that the process has been complied with, together with explanations where necessary, and finally in the case of a district and local municipality, a copy of the framework adopted for integrated development planning between the municipalities.<sup>26</sup> The MEC may within 30 days of receiving a copy of an IDP or amendment thereto, or within such reasonable longer period as may be approved by the minister of local government, request the relevant municipal council to adjust the plan or the amendment, in

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tion. District IDPs should thus determine a strategy for promoting economic development in the entire district and ensure upliftment of all communities. Such IDPs should guide revenue-raising and service-delivery activities and promote interaction between citizens, councillors, officials and higher spheres of government. It is important that District and Local IDPs be drawn up parallel to each other and inform and reinforce one another. District councils are thus responsible for aligning and co-ordinating potentially contradictory municipal IDPs. District IDPs are an important tool for integrating service-delivery activities and municipal goals.

<sup>24</sup> See s 30(a)-(c) of the Systems Act.

<sup>25</sup> See s 31(a)-(d) of the Systems Act. The monitoring and provincial supervision is subject to any other law(s) enacted to regulate such supervision in local government spheres, however.

<sup>26</sup> Refer to the Systems Act s 32(1)(a)-(b)(i)-(iii).

accordance with the MEC's proposals, if the plan/amendment does not comply with a requirement of the Systems Act or is in conflict or not aligned with the development plans and strategies of other affected municipalities or organs of state. The MEC may then request a municipal council to comply with the provisions of the Systems Act.<sup>27</sup> A municipal council must consider the MEC's proposals and, within 30 days of receipt of such proposals, adjust its IDP accordingly, if it agrees with the proposals. If a municipality disagrees with the proposals, it must object thereto and must furnish the MEC with written reasons for disagreeing. On receipt of such an objection, the MEC may refer the objection to an *ad hoc* committee for a decision. If the MEC decides to refer the objection, it must be referred within 21 days of receipt of the objection.<sup>28</sup>

The *ad hoc* committee mentioned above must be appointed by the MEC, whenever necessary. The committee must consist of members representing local government, the provincial government and national government. The MEC appoints the members of an *ad hoc* committee with the concurrence of the municipality concerned, the provincial organ or organs involved and with the concurrence of the national organ or organs of state involved in the dispute or in whose functional area the disputed is located.<sup>29</sup> The procedure of the *ad hoc* committee must be dealt with in accordance with procedures prescribed by regulation.<sup>30</sup> A matter before an *ad hoc* committee is decided if at least two spheres of government agree on the matter. If the committee rejects the objection(s) of the municipality, the municipality must comply with the initial request by the MEC within 30 days of the decision and after having been informed of the decision.<sup>31</sup>

All municipalities are also obligated to review their IDPs annually in accordance with an assessment of their performance measurements under section 41 of the Systems Act and also to the extent that changing circumstances so demand. The amendment procedure should be in accordance with a prescribed process.<sup>32</sup>

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<sup>27</sup> See the Systems Act s 32(2)(a)-(b).

<sup>28</sup> It seems clear from the Act that the MEC has a discretion either to refer such a dispute to an *ad hoc* committee or not to. Should he decide not to refer it, it seems that his decision would be final. See the Systems Act s 32(3)-(4).

<sup>29</sup> See s 33(2)(a)-(c) for more details.

<sup>30</sup> See the Systems Act ss 33(3) and 37.

<sup>31</sup> See the Systems Act s 33(4)-(5).

<sup>32</sup> Refer to the Systems Act s 34(a)-(b).

#### **20.2.4 Miscellaneous aspects concerning municipal integrated development planning**

The new legislative framework also affords specific status to a particular IDP. The Systems Act determines that an IDP adopted by a municipal council has the following importance:

- It serves as the principal strategic planning instrument which guides and informs all planning and development and decisions relating thereto in a municipal area.
- It binds the municipality in the exercise of its executive authority, except to the extent of any inconsistency between a municipality's IDP and national or provincial legislation, in which case such legislation is to prevail.
- It binds all other persons to the extent that those parts of the IDP that impose duties or affect the rights of those persons have been passed as a by-law.<sup>33</sup> It should be noted that a spatial development framework contained in an IDP prevails over a plan as is defined in section 1 of the Physical Planning Act of 1991.<sup>34</sup>

Finally, the Systems Act determines that all municipalities must give effect to their IDPs and conduct their affairs in a manner which is consistent with their IDPs. The national minister is further authorised, for the purposes of municipal integrated development planning, to make regulations or to issue guidelines in terms of section 120 of the Act and to provide or to regulate certain matters. Such matters are the following.<sup>35</sup>

- (a) incentives to ensure that municipalities adopt their integrated development plans within the applicable prescribed period, and comply with the provisions of the Act concerning the planning, drafting, adoption and review of those plans;
- (b) the detail of integrated development plans taking into account the requirements of other applicable national legislation;
- (c) criteria municipalities must take into account when planning, drafting, adopting or reviewing their integrated development plans;

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<sup>33</sup> See the Systems Act s 35(a)-(c). Although an IDP has been given statutory recognition and status, if certain parts of an IDP impose duties or affect the rights of other persons, such as the local community, eg, then such aspects should have been incorporated in a by-law and should have been passed as such to have binding force over such persons. See s 35(1)(c).

<sup>34</sup> 125 of 1991 and the Systems Act s 35(2).

<sup>35</sup> See the Systems Act s 37(1)(a)-(i).



- (d) the detail of the process for the planning, drafting, adoption and review of integrated development plans;
- (e) a process for the amendment of integrated development plans;
- (f) the manner in which an objection must be referred to an *ad hoc* committee envisaged in section 33;
- (g) the manner in which written evidence or documents must be submitted to an *ad hoc* committee;
- (h) the proceedings of an *ad hoc* committee; and
- (i) any other matter that may facilitate –
  - (i) integrated development planning and the drafting of integrated development plans; or
  - (ii) the application of this chapter.

When the minister makes regulations or issues guidelines to regulate matters under subsection 37(1)(b)-(e), he/she must take into account the capacity of municipalities to comply with those matters and must differentiate between different kinds of municipality according to their respective capacities. Furthermore, the minister is authorised to phase in the application of the provisions of the chapter on integrated development planning where such provisions place a financial or administrative burden on such municipalities.<sup>36</sup>

### 20.3 Conclusion

It was demonstrated above that municipal development planning is not only a legal obligation for all municipalities but that without such planning municipalities will not be in a position to fulfil their obligations and responsibilities. The new local government dispensation is developmentally orientated, which in essence requires progress in the real realisation of developmental goals. Municipalities must therefore move forward and should enhance and create a better living environment for all South African citizens. Development planning is not something that can be done in isolation by individual municipalities. It requires constructive involvement of all three spheres of government on a vertical axis and also all relevant municipalities *inter se*, on a horizontal axis. The constitutional obligations and principles of co-operative govern-

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<sup>36</sup> See the Systems Act s 37(3)-(4). Refer again to the LG: Municipal Planning and Performance Management Regulations as published under GNR 796 of GG 22605 of 24 August 2001. Apart from the details of an IDP, the regulations also address the process for amending IDPs, referring of objections to IDPs to an *ad hoc* committee, as well as requirements giving effect to an IDP.

ment are therefore of significant importance in relation to developmental strategies and interaction between the various organs of state. Such co-operation will benefit not only municipalities but also both national and provincial policies and programmes.

Municipal development planning is incorporated mainly in a Municipal Integrated Development Plan (MIDP), which serves as a single, inclusive and strategic plan for the development of the municipal area. All MIDP must incorporate certain minimum core components as they guide the short-term development of local governments in South Africa. Because of its importance, an MIDP is strongly protected, and strict requirements for its adoption and amendment are determined by law. Such plans are flexible, living documents, however, and should be reviewed annually to keep up with the changing demands and circumstances in municipal jurisdictions. All in all, the new requirements and status of MIDP should go a long way towards helping the new local government structures to manage and achieve their important constitutional obligations.

## **Basic legal matters relevant to local government structures**

### **21.1 Introduction**

In light of the various aims and responsibilities of local governments, it is generally accepted that such governments are confronted with almost all aspects of the law. It was explained in chapter 10 that municipalities have been established throughout the whole territory of South Africa, and therefore there is no area that does not fall under the direct authority of a particular municipal council. The importance of legal knowledge regarding not only the composition and functioning of municipalities, but also other fields of law is of significant importance. No legal practitioner can practise law in a particular area in our country without a sound knowledge of the legal rules that are applicable to local governments. Every now and then a practitioner will be confronted with legal disputes that concern the particular local authority either directly or indirectly. In many areas, the local municipality is often the largest employer organisation and also the largest economically active entity. In short, one can say that a legal adviser for a local government or a practitioner advising clients on local government matters should have a sound legal knowledge of almost all the different fields of the South African law.

In order to be able to handle and address legal problems, it is important to know the law and where to find the law. As the law is constantly changing and developing, it is obvious that all role players in local government should be able to access and then apply the relevant legal rules that encompass the new local government dispensation. All role players must have a sound knowledge of the different sources of local government law. These sources are mentioned briefly below.

### **21.2 Sources of local government law**

In principle, there are three main sources of local government law. They are :

- legislation
- a combination of common law and customary law

- legal precedents.

It is only legislation and case law that are of importance to local government practitioners and legal scholars, however. Since local government law is part of the broader constitutional system of South Africa, customary and common law rules have very little or no influence or impact as a source of local government law.<sup>1</sup>

### **21.2.1 Legislation as a source of local government law**

Legislation is without a doubt the most important and influential source of local government law. It was discussed and explained above that the new local government dispensation was not only created in terms of legislation but that it also functions and operates according to various pieces of legislation. Such legislative requirements can be from either the national or a provincial government.<sup>2</sup> It should be pointed out that the term “legislation “ as referred to here, is a wide term and includes both national and provincial laws, as well as proclamations and regulations made by ministers or MECs.<sup>3</sup>

Within the ambit of legislation, it should be obvious and self-explanatory that the Constitution of the Republic of South Africa, which is a very unique and important legislative source of the country’s legal system, forms the basic legal framework on which the new local government system has been founded. The Constitution defines mainly the powers and functions of all three spheres of government and, in particular, the powers and functions of all local governments.<sup>4</sup>

Apart from the constitutional text itself, the Constitution further mandates the enactment of various other national and provincial laws, with the purpose of giving body to the basic legal framework of local governments. Such Acts, as was mentioned and discussed in the previous chapters of this work, then complete the legal framework within which local governments are operating.<sup>5</sup>

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<sup>1</sup> For more on this point see the cases of *In re: Certification of the Constitution of the RSA 1998*, 1996 (4) SA 744 (CC) and also *President of the RSA v Hugo* 1997 (4) SA 1 (CC).

<sup>2</sup> Because of the ever-changing needs of society, local government law is contained and regulated mainly by legislation.

<sup>3</sup> See the Constitution s 239 for a more exact definition of the term “legislation”.

<sup>4</sup> As the supreme law of the state, the provisions and requirements of the Constitution are non-negotiable. Non-compliance with the Constitution would result in invalidation. See the Constitution s 2.

<sup>5</sup> It was mentioned above that local government *per se* is not a concurrent legislative competence or exclusive legislative competence in terms of the Constitution Sch 4 and 5. This position seems to indicate that it is left for mostly the national government to legislate on local government matters, if so allowed by the Constitution. See the Constitution s 163. Only when the Constitution allows provincial laws over certain matters will it be possible for provincial governments to legislate

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### **21.2.2 The importance of customary and common law principles**

Basically there are two main reasons for both the common law and customary law not featuring as important sources of local government law. In the first instance, the new local government system is a totally new legal system which had its origins within the new constitutional legal foundation. The new system was totally overhauled to such an extent that common law rules are no longer of any importance. Secondly, the Constitution also does not contain a provision to the extent that the former common law or customary law principles still continue.<sup>6</sup> Apart from this position, the former local government system was regulated mainly by legislation under the then government of South Africa. The influence of common law or customary law under the former system was largely non-existent. Finally, it was held by the highest judicial authority in South Africa that even from a constitutional viewpoint there are no common law powers left that were derived from the former royal prerogatives. All such powers have now been enumerated within the text of the Constitution or other legislation.<sup>7</sup>

### **21.2.3 Judicial precedent as a source of local government law**

Apart from legislation, judicial precedents, or what are commonly referred to as “case law”, are the second most important source of local government law. The importance of legal jurisprudence is founded on two issues in particular. Firstly, South Africa follows the legal doctrine of *stare decisis*, which means that the lower courts in the hierarchy of judicial bodies are compelled to follow the decisions, in similar cases, handed down by the higher courts. Secondly, the Constitution clearly spells out the importance and role of the judicial authority in our legal system. According to the Constitution, the judicial authority of the Republic of South Africa is vested in the courts and the courts are subject to the Constitution and the law only. Any order or decision by a court binds all persons to whom it applies, including the state.<sup>8</sup> The importance of judicial precedents is therefore self-evident, and local government

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over such matters. See, eg, the Constitution s 139. Provincial laws relevant to local governments are therefore much less important than their national counterparts.

<sup>6</sup> Under the 1983 Constitution s 88 such conventions still continued to be in force. The 1996 Constitution does not provide for such continuation.

<sup>7</sup> See the *First Certification Judgment* 1996 1996 (1) SA 1 (CC); *President of the RSA v Hugo* 1997 (4) SA 1 (CC) and *President of the RSA v SARFU* 2000 (1) SA 1 (CC).

<sup>8</sup> See the Constitution s 165(1)-(5).

practitioners and scholars must ensure that they keep up to date with decisions of our courts regarding local government legal matters.

Apart from the sources mentioned above, there are no other real sources of local government law. Although the works and writings of legal scholars, the discussion and deliberations of politicians and the submissions of the concerned public at large are of importance to legal development, such aspects are not sources of local government law and should be regarded only as primary information sources from which the content of the law can sometimes be determined.

### **21.3 Important fields of law relevant to local government law**

It was mentioned above that local government administrations often face a large variety of legal issues. In order to cope with such issues, most municipal councils that can afford to do so have a specific legal section that advises and handles legal problems for both the political and administrative branches of the local authority. Municipal legal advisors are therefore responsible for both internal and external legal matters. Such a situation often demands broad legal and paralegal expertise. Local government matters are important not only to the political office bearers and administrative personnel, however. Such matters are also regularly of importance to the relevant local community. Of the three spheres of government, citizens of a state are most likely, at some stage, to be involved in a legal dispute with their local authority. Against this background it is obvious that local community members are in need of professional and expert legal advice and assistance regarding local government legal matters.

It falls way beyond the scope of this work to discuss or even try to explain the various legal fields that are of importance in municipal matters. What is of interest, however, is to highlight briefly some of the most common areas of legal dispute that involve local governments. While it is the task of lawyers and legal advisors to keep knowledgeable about the law in general, some of the specialised legal issues are also of value for both the political and administrative components of a municipality in order for them successfully to fulfil and maintain their duties and responsibilities.

#### **21.3.1 Common legal issues relevant to local governments**

- *The law of contract* The law of contract is particularly important to local government legal advisors. All municipalities are involved in various legal contractual re-

relationships on a regular basis. As a sphere of government and a legal entity, municipalities are legally empowered to enter and conclude contracts.<sup>9</sup>

- *Property law* The law concerning property and other related issues is also of regular importance to local governments. Property is regarded as of such importance in our modern democracy that it has been afforded direct protection under the Constitution.<sup>10</sup> Property law also includes issues regarding
  - (a) expropriation
  - (b) property leasing
  - (c) purchase, sale and acquisition
  - (d) transfer of property ownership
  - (e) other related land use rights such as the restitution of land rights, land reform measures, communal property associations, informal land rights issues and eviction requirements and procedures.<sup>11</sup>

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<sup>9</sup> See also *Keyser v Orkney Town Council* 2003 (4) SA 131 (T) with reference to lease agreements. In *Gordon v Pietermaritzburg-Msunduzi: TLC and Another* 2001 (4) SA 972 (N) it was mentioned that with the advent of SA's new constitutional dispensation, momentous changes were brought about to local government. The court held that the contract concluded between the parties was impossible to perform and, although it was true that the state was bound by ordinary commercial contracts concluded by it, in cases of impossible performance, the law of contract allows for the cancellation of the agreement. In the case certain regulations, which formed the basis of the contractual relationship between the parties, were repealed in the context of an entirely new constitutional dispensation, which included local government. See paras B-D at 978.

<sup>10</sup> According to the Constitution s 25, no *person* may be deprived of property except in terms of a law of general application. Arbitrary deprivation of property is specifically outlawed. Although property may be expropriated, there are specified requirements under which such expropriation must be done. Refer also to the case of *Modderfontein Squatters, Greater Benoni City Council v Modderklip boerdery (Pty) Ltd (Agri SA and Legal Resources Centre as amici curiae)*, also referred to as *President of the RSA v Modderklip boerdery* 2004 (6) SA 40 (SCA).

<sup>11</sup> Most of these issues are regulated in terms of specific Acts of parliament. For more on municipal property-related issues, refer to Nonyana MR "Communal Property Associations for convenience v townships for services and maintenance" *Property Law Digest* August 2000 Butterworths at 3. The writer refers to the Communal Property Association Act 28 of 1996 which has improved communal land ownership. See also the following cases: *De Villiers en 'n Ander v Stadsraad van Mamelodi en 'n Ander* 1995 (4) SA 347 (T) dealing with expropriation under the Expropriation Act 63 of 1975. See also *Cape Town Municipality v Table Mountain Aerial Cableway Co Ltd* 1996 (1) SA 909 (C). In *Southern Metropolitan Substructure v Thompson and Others* 1997 (2) SA 799 (W) it was held that a local authority's duty to provide and allocate housing cannot lawfully be fettered by contractual undertakings not to evict illegal occupiers of land. When land/property is sold, it must be described sufficiently in accordance with the Alienation of Land Act 68 of 1981. Faultless description is not required. See *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA). See also *M & J Morgan Investments (Pty) Ltd v Pinetown Municipality* 1997 (4) SA 427 (SCA), and *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) dealing with expropriation issues. Refer also to *Skinberg v South Peninsula Municipality* 2001 (4) SA 1144 (C). It was stated as a *semble* to the case that despite the clear distinction made in the Constitution s 25 between deprivation and expropriation of property, there may be room for the development of a doctrine akin to constructive expropriation in South Africa, particularly where a public body utilises a regulatory power in a manner which, taken in isolation, can be categorised as a deprivation of prop-

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An interesting aspect regarding land is the Subdivision of Agricultural Land Act,<sup>12</sup> which requires that agricultural land may not be subdivided unless the Minister of Agriculture has given his written consent thereto.<sup>13</sup> Section 12 of the Local Government: Municipal Structures Act<sup>14</sup> allowed for the establishment of new municipalities for the entire territory of South Africa, however.<sup>15</sup> Accordingly, it is argued by some that all land now falls within the jurisdiction of a municipality.<sup>16</sup> Since agricultural land also falls within the jurisdiction of a municipal council, it seems that section 3 of the Subdivision of Agricultural Land Act no longer has application.

- *The law of delict* The law of delict is an equally important field of law within the local government domain. All municipalities face delictual accountability on a daily basis. Delictual liability is confined not only to general delictual claims but also more specialised claims under the legal protection of vicarious liability, defamation and other unique forms of delictual accountability. The law of delict is a vast and often complex field of the law and should be studied carefully.<sup>17</sup>

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erty rights and not an expropriation, but which has the effect, albeit indirectly, of transferring those rights to the public body. Other issues dealing with property-related matters were decided in *Bailes v Town and Regional Planning Commission* 2002 (2) SA 589 (N), *Kotzé v Minister of Landbou en Andere* 2003 (1) SA 445 (T), *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn* 2003 (6) SA 140 (C) and *Baartman and Others v Port Elizabeth Municipality* 2003 (3) SA 560 (SCA). Refer also to Griffiths G "Not so fast – that's municipal land: A discourse on the acquisition of municipal property under the Cape Municipal Ordinance 20 of 1974" *Property Law Digest* (1999) Butterworths at 11.

<sup>12</sup> 70 of 1970.

<sup>13</sup> Refer to the Act s 3.

<sup>14</sup> 117 of 1998.

<sup>15</sup> Read also the Constitution s 151(1), which states that the local sphere of government consists of municipalities which must be established for the whole territory of the Republic.

<sup>16</sup> See the letter of MJ Meyer "Is Act 70 of 1970 still necessary?" *DR* December 2001 at 5.

<sup>17</sup> Judicial examples of recent delictual cases concerning local authorities are the following: *Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 (4) SA 745 (O), dealing with the responsibility of a municipal airstrip; *Gardner v Whitaker* 1995 (2) SA 672 (E), dealing with issues of defamation; *Cape Town Municipality v Butters* 1996 (1) SA 473 (C), dealing with public liability; *Cape Town Municipality v Bakkerud* 1997 (4) SA 356 (C), concerning municipal liability for damages resulting from an omission to repair streets and pavements; *Welkom Municipality v Masureik and Herman t/a Lotus Corp* 1997 (3) SA 363 (SCA); *Pretoria City Council v De Jager* 1997 (2) SA 46 (SCA), dealing with the liability when failing to take reasonable precautions to prevent foreseeable harm on municipal sidewalks; *Graham v Cape Metropolitan Council* 1999 (3) SA 356 (C); *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA); *Grootboom v Graaff-Reinet Municipality* 2001 (3) SA 373 (E); *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA); *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA), concerning liability for municipal council's water main bursting and *Minister of Safety and Security v Duivenboden* 2002 (6) SA 431 (SCA) relevant to municipal security/police services. See also the following academic research: Scott J "Grootboom v Graaff-Reinet Municipality" *De Jure* 2002 at 635; Scott J "Re-affirmation of the doctrine of immunity of municipalities against liability for wrongful omissions assessed and rejected – Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA) *THRHR* 2001 (64) at 502; Scott J "The Cape Metropolitan Council v Noel Raymond Graham case no 157/99 (C)" *De Jure* (2001) at 198; Scott J "Cape Town Municipality v Butters 1996 (1) SA 473 (C)" *De Jure* (1996) at 379 and Smith A "Mu-

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- *Constitutional law and administrative law* The importance of constitutional law, which includes not only formal constitutional law but also aspects of fundamental rights law, administrative law, environmental law, legal interpretation and even some aspects of public international law have been highlighted above. Apart from the obvious importance of the Constitution and its Bill of Rights, the legal rules regulating the field of administrative law are also of particular importance to all local government bodies. Many municipal actions form part of the executive authority of the state and therefore fall under the rules of administrative law. The importance of administrative law was specifically highlighted in the case of *Fed-sure Life Assurance v Greater Johannesburg TMC*.<sup>18</sup> In this case it was mentioned that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates or determines appropriations to be made out of public funds, such a power is peculiar to elected legislative bodies. Such powers are exercised by democratically elected representatives after due deliberation of the circumstances and cannot be classed as administrative action.<sup>19</sup> Not only the legal advisors of a municipality, but all municipal administrators, should have a basic understanding and knowledge of administrative law and its various related legal rules.<sup>20</sup>
- *Criminal law* Municipalities are also often involved within the ambit of criminal law. Such issues are confined not only to incidents where municipal personnel are implicated in criminal activity but can also relate to incidents where municipal employees or even councillors are held criminally liable for activities within a particular municipality. So, for example, is it possible for a municipal official, mostly the municipal manager, to be held liable for non-compliance with certain

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municipalities mend your ways" *The Quarterly Law Review* for people in business vol 8 part 2 (2000) at 40.

<sup>18</sup> 1999 (1) SA 374 (CC).

<sup>19</sup> Refer to para 45 at 396-397.

<sup>20</sup> For more on constitutional and administrative law see the cases of *Claude Neon Ltd v Germiston City Council and Another* 1995 (3) SA 710 (W), where the court held that an undertaking by a local authority official to notify a person is an administrative act that gives rise to a legitimate or reasonable expectation. See also *Tony Rahme Marketing Agencies SA (Pty) Ltd and another v Greater JHB TMC* 1997 (4) SA 213 (W); *Gencor SA Ltd v TC for Rustenburg and Environs and another* 1998 (2) SA 1052 (T); *Erf one six seven Orchards CC v Greater JHB Metro Council and Another* 1999 (1) SA 104 (SCA) and *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA). See *City of Cape Town v Rudolph and others* 2004 (5) SA 39 (CPD) regarding a housing dispute under s 26 of the Constitution.

legislative requirements.<sup>21</sup> The importance of criminal law within the new local government dispensation should not be underestimated, therefore.

- *Labour law* The importance of labour law for municipal governments is particularly highlighted by the fact that municipalities are often one of the larger employer organisations within a particular municipal area. Depending on the size of the municipality, municipal councils employ hundreds or even thousands of personnel. Labour law issues are thus part and parcel of a municipal administration, and a sound knowledge of labour law is essential. Apart from normal labour issues such as wage negotiations, promotions and disciplinary action against employees, local government administration also encounter more specialised labour issues such as disputes within essential services areas. Because of the importance of labour law in local government, most municipalities have established personnel and labour relations departments to handle such matters. There is even a specific bargaining council that was established to resolve and deal with municipal labour issues between municipalities as employers, and labour unions as representatives of municipal employees.<sup>22</sup>
- *Building regulations and town and regional planning law* All municipalities are required to be involved in local planning processes and developmental programmes. Each municipal government is therefore regularly involved in town planning activities, and municipalities must also ensure that minimum building standards are complied with.<sup>23</sup>

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<sup>21</sup> See the Occupational Health and Safety Act 85 of 1993 as an example.

<sup>22</sup> For typical examples of labour-related issues in local authorities see *Cape Local Authorities Employers Organisation v IMATU* 1997 (1) SA 656 (C) and *Mhlambi v Matjhabeng Municipality and another* 2003 (5) SA 89 (O). In the latter case the court held *inter alia* that a reasonable request for further particulars in a disciplinary action is an ingredient of the right to a fair hearing and that the principles of natural justice demanded that such information be furnished.

<sup>23</sup> For more on town planning and building requirements see the National Building Regulations and Building Standards Act 103 of 1977. Refer also to cases such as: *Sandton Town Council v Gourmet Property Investments CC* 1994 (4) SA 569 (A) dealing with national building regulations; *Diepsloot Residents and Landowners Association and Another v Administrator Tvl* 1994 (3) SA 336 (A); *Schapenrome Investments (Edms) Bpk v Sandtonse Stadsraad* 1994 (2) SA 34 (A); *Stands 5/1 Wierda Valley (Pty) Ltd and Another v Sandton Town Council* 1994 (1) SA 333 (A); *Knop v JHB City council* 1995 (2) SA 1 (A); *Huisman v Minister of Local Government, Housing and Works* 1996 (1) SA 836 (A); *East Zulu Motors v Empangeni/Ngwelezane TLC* 1998 (2) SA 61 (CC) and also *Paola v Jeeva and others* 2004 (1) SA 396 (SCA), concerning the value of a view of a property. Refer also to Van Wyk J and Van Wyk D "Planning law, administrative justice and the Constitution: *Van Juyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C)" *THRHR* 1996 (59) at 675 *et seq*; *Gildenhuys A "Omgewingsbewaring beperkings op grondgebruiksveranderingen"* *Butterworths Property Law Digest* (2000) at 13 and Van Wyk J "Planning Law – Will Cinderella emerge a princess?" *THRHR* 1996 (59) at 1. See also the case of *Humphrys NO v Barnes* 2004 (2) SA 577

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- *Environmental law* It was mentioned above that all three spheres of government must comply with the new constitutional requirements. One such requirement is the provision of a clean and healthy environment. Environmental laws are therefore of significant importance for all local authorities. It is essential for municipalities to determine their responsibilities under current legislative provisions and to ensure compliance with their obligations in that regard.<sup>24</sup>

#### **21.4 Special legal matters pertaining to local government**

Apart from the general legal fields that have an impact on local governments, the new local government legal framework also provides for specific legal matters that are of particular importance to local authorities.<sup>25</sup> These special provisions regarding municipal legal matters must be read in conjunction with the general provisions of the law.

##### **21.4.1 Legal proceedings**

According to the Systems Act, all municipalities are authorised to compromise or compound any action, claim or proceedings and may submit to arbitration any matter other than a matter involving a decision on its status, powers, duties or the validity of its actions or by-laws.<sup>26</sup> The particular subsection is somewhat dubious and unclear. As a legal person all municipalities have legal standing and may thus institute or defend any legal action in which they have a direct, or sometimes indirect, interest. However, this position is conditional to the extent that the particular legal action is indeed permissible under the law in general.

##### **21.4.2 Legal representation for employees or councillors of a municipality**

Under the new legal framework, it is permissible for a municipality, subject to such terms and conditions as it may determine, to provide an employee or a councillor of

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(CPD) regarding the collapsing of a boundary wall between two private property owners. Refer also to *Botha v White* 2004 (3) SA 184 (TPD) regarding the use of a property contrary to the applicable zoning. See also *Clark v Faraday and Another* 2004 (4) SA 564 (CPD) regarding the approval of building plans and a neighbour's view. The court held *inter alia* that an owner of land who uses his/her property in an ordinary and natural manner is not guilty of committing an *injuria* to other property owners.

<sup>24</sup> For more on environmental aspects see *Verstappen v Port Edward Town Board and Others* 1994 (3) SA 569 (D), the Environmental Conservation Act 73 of 1989 and Witbooi E "Obligations on property owners to control alien invasive vegetation on their land" *Butterworths Property Law Digest* March 2003 at 3.

<sup>25</sup> Refer to the Local Government: Municipal Systems Act 32 of 2000 ch 11 as amended by Act 40 of 2002 s 2(1).

<sup>26</sup> See the Systems Act s 109(2).

the municipality with legal representation where applicable. Such legal representation is limited to only two instances, however.<sup>27</sup>

- where legal proceedings have been instituted against the employee or councillor as a result of any act or omission by that person in the exercise of his or her powers or the performance of his or her duties or
- where the employee or councillor has been summoned to attend any inquest or inquiry arising from the exercise of his or her powers or the performance of his or her duties.

It should be noted that employees or councillors are not automatically entitled to the legal representation mentioned above. The decision to provide for such representation lies with the municipal council. All legal assistance not addressed in the two instances above should be for the employee's or councillor's own account and should not be funded from the municipal/public purse.

#### **21.4.3 Issues concerning evidence**

The Systems Act specifically provides that in legal proceedings against a municipality a certificate which purports to be signed by a staff member of the municipality and which claims that the municipality used the best known or only or most practicable and available methods in exercising any of its powers or performing its functions must, on its mere production by any person, be accepted by a court as evidence of that fact.<sup>28</sup> It is further provided that a copy of the *Provincial Gazette* in which a by-law was published may, on its mere production in a court by any person, be used as evidence that that by-law was passed by a municipality concerned.<sup>29</sup>

#### **21.4.4 Fines, bail and the prosecution of offences**

Under the new legal framework, a staff member of a municipality so authorised may institute criminal proceedings and conduct the prosecution in respect of a contravention of or failure to comply with a provision of

- a by-law or regulation of the municipality
- other legislation administered by the municipality or

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<sup>27</sup> See the Systems Act s 109A(a)-(b).

<sup>28</sup> The Systems Act s 110.

<sup>29</sup> Refer to the Systems Act s 111. It is submitted, however, that such a situation should prevail only in instances where no contrary evidence is presented to a particular court.

- other legislation as determined by the National Director of Public Prosecutions in terms of section 22(8)(b) of the National Prosecuting Act of 1998.<sup>30</sup>

It is also provided that fines and bails that were recovered in respect of offences or alleged offences referred to in item 2 of Schedule 4 to the Public Finance Management Act<sup>31</sup> must be paid into the revenue fund of the municipality concerned.<sup>32</sup>

#### **21.4.5 Time of notices, payments and the service of documents and process**

A payment may be made at a municipality only during the normal or extended office hours of a municipality, except when payment is made by electronic transfer or at an agency pay-point. These times also apply to when any notice or other document may be served on the municipality, including its council, other structures, functionaries or staff members in an official capacity. There are exceptions to this rule in urgent matters, however.<sup>33</sup> Any notice or other document that is served on a person in terms of the Systems Act or by a municipality in terms of any legislation is regarded as having been served when:

- it has been delivered to that person
- it has been left at that person's place of residence or business in the Republic of South Africa with a person apparently over the age of sixteen years
- it has been posted by registered or certified mail to that person's last known residential or business address in the Republic of South Africa and an acknowledgement of the posting thereof is obtained from the relevant postal service
- it has been served on a person's agent or representative in the Republic of South Africa in a manner provided for above if that person's address in the RSA is unknown
- it has been posted in a conspicuous place on the property or premises of the person to which it relates if that person's address or agent in the Republic of South Africa is unknown.<sup>34</sup>

It is also provided that when any notice or other document must be authorised or served on the owner, occupier or holder of any property or right in any property, that it is sufficient if that person is described in the notice or document as the owner,

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<sup>30</sup> A staff member may prosecute or conduct criminal proceedings only if so authorised in terms of the National Prosecuting Authority Act 32 of 1998 s 22(8)(f).

<sup>31</sup> 1 of 1999.

<sup>32</sup> See the Systems Act s 113.

<sup>33</sup> See the Systems Act s 114(a)-(b).

<sup>34</sup> See the Systems Act s 115(a)-(e) as amended by Act 6 of 2004 see 94.



occupier or holder of the property. In such cases it is not necessary to name the person specifically. Finally, any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a person in attendance at the municipal manager's office. Outside parties thus seeking to serve on a municipality documents of whatever nature should serve such documents on the office of the municipal manager.<sup>35</sup>

A further important practical aspect concerning the institution of legal proceedings against a municipal council is the provision of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act<sup>36</sup>. According to this Act a notice must be sent to a municipality informing it of a claim against the municipality. According to section 2 of the Act such a notice/letter of demand must be sent to the council within 90 days of the date of the cause of action. After such notice, no formal summons may be issued against the municipality concerned, unless the claim has been rejected or a further 90 day period has lapsed. It must also be noted that the Act also requires that a claim prescribes against a council unless summons has been issued within 24 months since the occurrence of liability. Several case law precedents have been developed over such matters. See for example *Ntanga v Butterworth Municipality and another*<sup>37</sup> and also *East London Municipality v Abrahamse*.<sup>38</sup> In many instances the requirements of the Act were strictly enforced. Refer to *De Klerk en 'n ander v Groter Kroonstad Plaaslike Oorgangsraad*.<sup>39</sup> In *Provinsie van die Vrystaat v Williams No*<sup>40</sup> the Appellate Division confirmed that the term/word "liability" in the context of the Act has a wide meaning. Finally, the Constitutional Court in 2001 held that the Limitation of Legal Proceedings Act, which requires the specific notice within a short period of time and with limited scope for condonation for non-compliance, constitutes a material limitation of an individual's right of access to a court under section 34 of the Constitution and that such limitation could not be justified under section 36 of the Constitution. Accordingly, the court held that section 2(1)(a) of the Act was unconstitutional and invalid. See *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre*

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<sup>35</sup> Refer to the Systems Act s 115(2)-(3).

<sup>36</sup> 94 of 1970.

<sup>37</sup> 1995 (4) SA 437 (Tks).

<sup>38</sup> 1997 (4) SA 613 (SCA).

<sup>39</sup> 1999 (2) SA 870 (O).

<sup>40</sup> 2000 (3) SA 65 (SCA).



as *Amicus Curiae*).<sup>41</sup> In a follow-up case, the Constitutional Court further held that the invalidation of section 2(1)(a) of the Act operated retrospectively to the moment the Constitution came into effect. Since the Constitution came into effect, the inconsistency of the Act has become evident and, as a matter of law, the provision of the Act has been a nullity since that date.<sup>42</sup>

#### **21.4.6 Public servitudes and the custody of documents**

Similar to the situation under some of the former ordinances that affected local governments, the Systems Act now confirms that all public servitudes in favour of a municipality are under the control of the municipality. A municipality must further protect and enforce the rights of the local community arising from those servitudes.<sup>43</sup> It is also the responsibility of the municipal manager to take custody and control of all of a municipality's records and documents, unless where otherwise provided.<sup>44</sup>

#### **21.4.7 Restraint on transfer of property**

All municipalities are directly involved in the process of transferring property (land) from one person or institution to another. Similarly to the South African Revenue Service, a municipality must provide a clearance certificate stating that all levies, duties or taxes payable to the municipality have been paid up to date before a particular property can be transferred. In order to protect a municipality, and thus also its public community, from losing valuable revenue for service already rendered, the Systems Act determines that a registrar of deeds may not register the transfer of property except on production to that Registrar of Deeds of a prescribed certificate which :

- was issued by the municipality or municipalities in which that property is situated and
- certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.<sup>45</sup>

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<sup>41</sup> 2001 (4) SA 491 (CC).

<sup>42</sup> Refer to *Ex parte Women's Legal Centre v Greater Germiston TLC* 2001 (4) SA 1288 (CC).

<sup>43</sup> See the Systems Act s 116.

<sup>44</sup> The Systems Act s 117.

<sup>45</sup> See the Systems Act s 118(1)(a)-(b). The certificate is valid for a period of 120 days from the date it was issued. The Act s 118(1A). This was also the position under some of the former provincial ordinance. Refer also to *Venter NO v Eastern Metro Substructure, Greater JHB TC* 1998 (3) SA

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In the case of a transfer of property by a trustee of an insolvent estate, the transfer and recovery of monies are subject to section 89 of the Insolvency Act.<sup>46</sup> To help secure municipal funds even more efficiently, it is specifically provided that an amount due for

- municipal service fees
- surcharges on fees
- property rates and other municipal taxes
- levies or duties

is a charge upon the property in connection with which the amount is owing and that such a claim enjoys preference over any mortgage bond registered against the property.<sup>47</sup> The requirement of a clearance certificate does not apply to a transfer from the national government, a provincial government or a municipality of a residential property which was financed with funds or loans made available by any of the three spheres of government, and when the vesting of ownership as a result of a conversion of land tenure rights into ownership in terms of the Upgrading of Land Tenure Rights Act of 1991.<sup>48</sup> However, municipalities are not precluded from collecting any amounts owed to them in respect of such a property at the time of the transfer or conversion.<sup>49</sup> Finally, the preference that is enjoyed over any mortgage bond does not apply to any amount referred to which became due before a transfer of a residential property or a conversion of land tenure rights into ownership.<sup>50</sup>

Although the protection of municipal service fees, surcharges, property rates and other taxes or levies is not something new, its new statutory protection has been the

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1076 (W). For an example of a certificate under s 118 see GN 686 as published in GG 24886 of 23 May 2003.

<sup>46</sup> 24 of 1936. S 89(4) provides that notwithstanding the provisions of any law which prohibited the transfer of any immovable property, unless any tax as defined in ss (5) due thereon had been paid, that law would not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate if he had paid the tax which might have been due on that property in respect of the periods mentioned in ss (1) and that no other preference would be accorded to any claim for such tax in respect of any other period. S 89(5) provided that, for the purposes of subss (1) and (4), 'tax' in relation to immovable property meant any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established under the authority of any law in discharge of a liability to make such periodical payments if that liability was an incident of the ownership of that property.

<sup>47</sup> See the Systems Act s 118(3).

<sup>48</sup> See Act 112 of 1991.

<sup>49</sup> The Systems Act s 118(4)(a)-(b).

<sup>50</sup> The Systems Act s 118(5).

focus of legal debate and even strong judicial challenge. In the matter between *Greater Johannesburg TMC v Galloway No and Others*<sup>51</sup> the first respondent, a liquidator of a company, had sold immovable property belonging to the company to the second respondent. In order to proceed with the transfer of the property, the first respondent applied to the municipality/applicant for clearance figures in order to pay such and to obtain a clearance certificate in accordance with section 50 of the Local Government Ordinance.<sup>52</sup> Upon receipt of the figures, the first respondent disputed certain amounts claimed by the council. The respondent also took the view that he was not required to pay the disputed levies/taxes by reason of section 89 of the Insolvency Act.<sup>53</sup> The court held that section 89(4) overrode the provisions of any other law which prohibited the transfer of any immovable property unless any tax defined under section 89(5) due on the property in question had been paid. The liquidator thus had to pay certain taxes. Any items prescribed by section 50 of the Ordinance which fell outside the definition of a tax set out in section 89(5) were not payable by the liquidator in order to obtain the clearance certificate.<sup>54</sup> The court further held that section 89(4) did not extend to water, electricity and refuse removal charges. Such items were not in respect of the property but were in respect of the agreements which had been entered into for the provision of such services and therefore in respect of the services themselves. Charges in respect of electricity, water and refuse removal were not in respect of the property and could not be recovered as a prerequisite before the clearance certificate was issued. The application by the council was accordingly dismissed.<sup>55</sup> A similar issue was decided in *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council v Venter NO*.<sup>56</sup> The case concerned a liquidator of a close corporation who had paid to the local authority under protest certain amounts for basic water and sewerage charges. The respondent argued that such charges did not constitute taxes under section 89(1) and 89(5) of the Insolvency Act and that he was not obligated to pay such amounts in order to obtain a clearance certificate under section 50 of Ordi-

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<sup>51</sup> 1997 (1) SA 348 (W).

<sup>52</sup> O 17 of 1939 (T) which provided that the transfer of land was not to be effected unless certain amounts due to the council had been paid.

<sup>53</sup> 24 of 1936.

<sup>54</sup> At 355-356.

<sup>55</sup> Refer to paras C-D at 360.

<sup>56</sup> 2001 (1) SA 360 (SCA).

nance 17 of 1939 (T). Rezoning fees under sections 48 and 63 of the Town Planning and Townships Ordinance 15 of 1986 (T) were also in issue. Contrary to the decision in *Greater JHB TMC v Galloway NO* above, the Supreme Court of Appeal held that there was no basis on which it could be contended that amounts not constituting taxes listed in section 50(1) of the Ordinance did not have to be paid by the respondent in order to obtain a clearance certificate. Although the amounts were not taxes, the council was entitled to withhold the clearance certificate until they were paid.<sup>57</sup> The court further held that once it had been accepted that the amounts were due and owing in terms of section 50, there was no legal basis for the amounts to be repaid to the respondent. Since the respondent wished to transfer the properties, he had to pay the amounts due in respect of the rezoning fee, and the basic water and sewerage charges so as to have the embargo created by section 50 lifted.<sup>58</sup> Section 118 of the Systems Act was also subjected to constitutional challenge. In *Geyser and another v Msunduzi Municipality and others*<sup>59</sup> it was argued by the applicant/owner of a property who was held liable by the respondent municipality for municipal service fees due on the property which the applicant leased to a tenant, that the charges were unconstitutional since they resulted in arbitrary destruction and deprivation of the property owner's rights under section 25 of the Constitution. The court held that although section 118 of the Act clearly envisaged deprivation of the property, the purpose of the deprivation was to facilitate debt recovery, which was a legitimate and important purpose essential for the economic viability and sustainability of municipalities in South Africa. There was thus a rational connection between the means employed and the desired result. The limitation on property owners' rights was reasonable and reflected a fair balance between public interest and the property owner's interest. Section 118 is thus not arbitrary and not inconsistent with the Constitution.<sup>60</sup> The court also held that municipal service fees were based on consumption and thus could not refer to rates on property. Such fees included charges for electricity and water consumption supplied to the owner/occupier of the property. The section also applied to all municipalities in the Republic, thus excluding incapacity in application. Notwithstanding the court's decision, some commentators have

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<sup>57</sup> See paras D-F at 369.

<sup>58</sup> At paras B-C at 370.

<sup>59</sup> 2003 (5) SA 18 (N).

<sup>60</sup> Refer to paras A-D at 38-39.

argued that the obligation on owners to pay all outstanding arrears is contrary to the Constitution.<sup>61</sup>

#### **21.4.8 Miscellaneous provisions**

The Systems Act also provides for a few miscellaneous legal aspects.<sup>62</sup> In the first place it is provided that a councillor who attempts to influence the municipal manager or any other staff member or even agent of a municipality not to enforce an obligation in terms of the law or a decision of the council is guilty of an offence and is on conviction liable to a fine or to imprisonment for a period not exceeding two years.<sup>63</sup> A person acceding to such an attempt is also guilty of an offence punishable with the same sanction. If a person is convicted of an offence and is subsequently sentenced to more than 12 months' imprisonment without the option of a fine, he/she is disqualified from remaining a councillor and cannot become a councillor of any municipality during a period of five years from the date of the conviction.<sup>64</sup>

The minister concerned with local government is also authorised to make regulations on certain matters and to issue guidelines that are not inconsistent with the Act.<sup>65</sup>

Finally, the Systems Act provides for certain transitional arrangements and the phasing in of the provisions of the Act itself. Under transitional arrangements, it is provided that any written agreement on the exercise of executive authority in an area of another municipality, which agreement existed immediately before the Act took effect, must be regarded as having been concluded in terms of the relevant provisions of the Systems Act.<sup>66</sup> The minister must also initiate steps for the rationalisation of existing national and provincial planning legislation applicable to municipalities in order to facilitate local development planning as an integrated concept within the system of co-operative government as is envisaged in section 41 of the Constitution. Mechanisms for facilitating co-ordination between sectoral regulation of local government matters must also be established.<sup>67</sup> In order to facilitate a smooth transition,

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<sup>61</sup> Refer to Kidson J "Rights of local government to collect service arrears" March (2002) *DR* at 8-9. The writer submits various arguments to explain why outstanding arrears are not payable.

<sup>62</sup> See the Systems Act ch 12.

<sup>63</sup> The Systems Act s 119.

<sup>64</sup> The Systems Act s 119(4).

<sup>65</sup> See the Act s 120(1)-(7) as amended for more full particulars on the procedures and requirements relevant to the making of regulations and guidelines.

<sup>66</sup> See the Systems Act s 122(1) read with s 11(2).

<sup>67</sup> See the Systems Act s 122(2)(a)-(b).

the minister is authorised to phase in the various applications of the provisions of the Systems Act which place a financial or administrative burden on municipalities.<sup>68</sup>

### **21.5 Conclusion**

It seems obvious that the application of the law is of significant importance to all local government structures. The law in general and, more particularly, the law relating to municipal affairs form not only the basis on which all municipalities must function, but also set the scene within which municipalities are to fulfil and perform their new constitutional role and obligations. It is clear in this respect that a sound knowledge of all the relevant legal principles relating to local government matters is an essential requirement for legal advisors, private practitioners, local administrators and political office bearers alike.

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<sup>68</sup> The Systems Act s 123.

## Concluding remarks

### 22.1 Introduction

It is clear from the above that the third sphere of government has changed drastically from the order that was in place prior to 1994. The new supreme Constitution with its comprehensive Bill of Rights has set a new legal paradigm for municipal government. It is especially the founding values and specific municipal objects of the new constitutional dispensation that had an unprecedented impact.<sup>1</sup> Compliance with the new constitutional provisions is imperative whether that relates to legislative or executive actions or even the conduct of bodies or institutions within the state. The Constitution however only provides a basic constitutional framework. In many instances the basic framework had to be completed through the enactment of various national or provincial laws.<sup>2</sup>

In chapter one of this research it was stated that the aim of the research is two-fold. The first objective was to provide a systematic and comprehensive exposition of the new constitutional and other national legislative provisions relevant to the new system of local government. In this respect it is submitted that the preceding chapters do indeed achieve such an objective. Almost all legislative provisions relevant to local government have been systematically subdivided into the various chapters and have been grouped together according to their topics and relevance. It is submitted that the compilation and systemisation of the many legal requirements should indeed contribute to making the legal dispensation regarding local government law more accessible which in turn could enhance more research and debate in this often neglected albeit important field of law.

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<sup>1</sup> Read s 1 of the Constitution. According to s 2 the Constitution is entrenched as the supreme law of the SA state and any law or conduct inconsistent with the Constitution is invalid. All the obligations imposed by the Constitution must be fulfilled.

<sup>2</sup> See again the provisions set out in ss 151(3), 154(1), 155(2) and (3), 157(2), 160(5) and 164 of the Constitution which specifically require either national or both national or provincial laws on issues directly relevant to local government matters.



The second aim was to evaluate the extent of compliance with the new local government legal system, to the key normative principles set out in the Constitution and which underpins the new legal government system. Such a evaluation can only be conducted after due regard to all the constitutional and subsequent national legislative requirements. In an effort to link the various preceding chapters together and to tie-up the research as a whole, a brief summary of the extent of compliance with the key constitutional requirements and prerequisites is provided in this conclusion. The summary follows the same chronological sequence as was provided for in the introductory chapter of this work.

## **22.2 Evaluating compliance with the key normative principles of the new local government legal dispensation**

### **22.2.1 *Is the new local government legal dispensation non-racial and truly democratic?***

The new dispensation has undoubtedly overturned the segregation and apartheid policies of the past and has provided a platform for a uniform democratic local sphere of governance where municipal services are rendered for the benefit of all people. The confirmation within the supreme law of the South African state of *inter alia* the founding values of equality, democracy, freedom, non-racialism and non-sexism has created a strong foundation to ensure that all spheres of government are constitutionally obligated to ensure a non-racial and democratic government.

### **22.2.2 *Does the new nature, rights and duties of municipalities comply with the new constitutional vision?***

It was indicated above that the new local government system does not only provide local government with a distinctive legal nature, but also sets down clear and precise rights and duties for all local government structures.<sup>3</sup> This is necessary to ensure local governments are empowered to fulfil their duties. The new system not only provides local authorities with the required foundation to act, but also incorporates constitutional values of accountability and public participation. These values are particularly promoted through legislative provisions which confirm that local government consists out of political, administrative and local community components. As such, the new legal framework should enhance and promote the underlying values

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<sup>3</sup> Read ss 4, 5 and 6 of the Municipal Structures Act together with s 156 of the Constitution.

that the Constitution demands.

### **22.2.3 *Municipal government and the principles of co-operative government***

The Constitution obligates all three spheres of government to comply with specific principles aimed at ensuring a system of co-operative federalism. All spheres have been allocated with specific functional activities. Although significant protection of such powers is provided for, many overlaps between the specified functions do occur. Such overlaps in turn again require proper co-operation between the spheres in order to fulfil their functions and responsibilities. In an effort to ensure such co-operation the Constitution determines various principles with which all spheres must comply.<sup>4</sup> The new legal framework, *via* the Municipal Systems Act, specifically expands on the basic constitutional provisions and thus enhances the envisaged constitutional scheme.

### **22.2.4 *The establishment of a new system and structure for local government***

It is a specific constitutional obligation, that all former local governments had to be restructured and that new institutional models for local government structures had to be provided for. Furthermore, the whole territory of the Republic had to be included in the jurisdiction of a specific municipal authority.<sup>5</sup> The new legal dispensation indeed complies with these constitutional requirements. In the first instance, the entire territory of the South African state falls within the jurisdiction of a demarcated municipal government. Even areas that are not viable to have their own direct local government, ie district management areas, fall under the control of a district municipality within that area. Secondly, the Municipal Structures Act provides for various new institutional models of local government. Apart from the constitutionally defined categories of municipalities the act provides for the establishment of various models of municipal types by combining various municipal systems.<sup>6</sup>

In total five systems have been created. Three are so-called executive systems whilst two are participatory systems. Since the powers, functions and circumstances of municipalities differ it is submitted that the various combination possibilities indeed should be able to cater for the different needs and responsibilities of all municipalities. The new legal framework further aims not only to achieve more effective execu

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<sup>4</sup> Refer to ss 40 and 41 of the Constitution.

<sup>5</sup> See s 151 of the Constitution.

<sup>6</sup> See s 7 of the Structures Act.

tive functioning but also to ensure public involvement and participation, which again should enhance the underlying values of the Constitution. Although a clear division of the roles and responsibilities of the various types of municipalities has been determined, there seems to be some uncertainty in practise. Uncertainty especially exists relating to the division of powers and functions between local municipalities and their relevant district municipalities. Notwithstanding such difficulties, the new legislative provisions have ensured that all municipal institutions have been re-established and all former municipal authorities have been replaced by newly transformed local authorities. Municipal boundaries were re-determined and many municipalities were amalgamated into new enlarged and supposedly more effective institutions.

A significant number of municipalities however still face enormous challenges relating to their new structures and boundaries and the amalgamation of municipal administrations and personnel. Further legal directions are needed to address some of these challenges more effectively.

#### **22.2.5 Confirmation of new municipal boundaries**

It is clear from the new constitutional framework, that municipal boundaries had to be re-determined. This requirement was specifically fulfilled *via* the Municipal Demarcation Act which established an independent Municipal Demarcation Board.<sup>7</sup> This board has demarcated all municipal boundaries and has fulfilled the requirement of creating a system of wall to wall municipal government in South Africa. Under the Constitution, national legislation had to determine the criteria and procedures to determine municipal boundaries by an independent authority.<sup>8</sup> Two national acts, the Local Government: Municipal Structures Act and the Local Government: Municipal Demarcation Act were enacted.<sup>9</sup> Together these two acts, address the overall constitutional obligations towards municipal boundaries.

Boundaries are important to ensure local governments can provide municipal services in an equitable and sustainable manner. It would seem that the new laws indeed comply and fulfil the constitutional demands. It should be noted however that the determination and internal delimitation of municipal boundaries are not once off

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<sup>7</sup> Read ss 151(1) and 155(3)(b) of the Constitution together with the provisions of Act 27 of 1998.

<sup>8</sup> S 155(3)(b) of the Constitution.

<sup>9</sup> 117 of 1998 and 27 of 1998.

exercises but are continuous in nature. Regular evaluation of municipal boundaries is thus required. It is also notable that after the demarcation process, the number of official local authorities were reduced from over 800 to 284.<sup>10</sup> The demarcation process thus significantly rationalized local government structures. Such rationalization was needed under the Constitution to create a system of local governance that is effective and efficient and that would ensure the achievement of the objects of local government as set out under the Constitution.

#### **22.2.6 Adhering to the founding values and the Bill of Rights**

The Constitution specifically requires radical changes to the composition and election of municipal councils. In essence the new local government system had to be redesigned to ensure and achieve compliance to the Constitution's founding values and a truly democratic state. In order to complete such a system, many new changes had to be affected. On a closer evaluation, it seems acceptable to conclude that the new legal framework, indeed completes the basic framework of the Constitution regarding the composition and election of municipal councils. Local governments are now truly democratic spheres of government.

The new system is unique in some instances. For example, although the term of local governments is now similar to national or provincial governments, local governments are composed according to a electoral system that provides for a combination of proportional representation and constituency based electoral systems.<sup>11</sup> The unique features have been included to enhance the unique features of local governments and to ensure better representation and accountability. It seems as if the new legal system is well equipped to fulfil the broad constitutional requirements.

#### **22.2.7 Recognising the role of traditional leadership**

One area where the new local government legal dispensation still seems to lack clear direction is with regards to the role and involvement of traditional leaders in local government structures. Although the institution of traditional leaders is constitutionally recognised and protected,<sup>12</sup> the precise role of traditional leaders, specially in local government, has not been properly defined. This problem is confirmed by na-

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<sup>10</sup> The number of 284 is composed out of 6 Metropolitan municipalities, 47 District municipalities and 231 Local municipalities. For more detail refer to [www.info.gov.za/localgovernment](http://www.info.gov.za/localgovernment) visited on 18/07/2005.

<sup>11</sup> Read ss 157(1) and (2)(a)-(b) of the Constitution.

<sup>12</sup> See ss 211 and 212 of the Constitution.

tional government, which has embarked on new policy and legislative initiatives aimed at clarifying the current uncertainties.<sup>13</sup> Traditional leaders form an important part of traditional African cultures and structures and they should not only be included in municipal decision-making processes, but they can play a positive role in ensuring the ultimate success of especially rural municipalities.

The Constitution however only creates three spheres of government and allocates powers or authority only to such spheres and not to traditional leaders. One can thus argue, that unless a constitutional amendment is carried through, traditional leaders will be subjected to the authority of the local governments in which area such leaders fall. Since traditional leaders play an important role in maintaining traditional African customs, their roles should thus be more clearly defined. In view of the fact that the Constitution is the supreme law of the state, the role and functions of traditional leaders must comply with the Constitution. Traditional leaders are thus not autonomous institutions but function within the broad constitutional system. A strong need exists for co-operation and consultation between traditional leaders and local government structures. Clear national guidelines on such issues should ensure positive co-operation between the two institutions. Such legislative requirements are urgently needed.

#### ***22.2.8 The division of the powers and functions between the three spheres of government***

Under the Constitution, local government is not only recognised as distinctive and autonomous sphere of government but the Constitution also determines the specific powers and functions of municipal governments. Such powers and functions are thus constitutionally entrenched and cannot be taken away unless constitutional amendments are executed.<sup>14</sup> Local government powers are however not absolute, and are subject to national and provincial laws. In essence municipal powers and functions must be exercised to fulfil constitutional objectives and developmental duties. Under the constitutional framework, both the Structures Act and the Systems Act expand upon municipal powers and functions. It is of interest to note that within the new constitutional dispensation, local government powers are regarded as original pow-

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<sup>13</sup> See the Traditional Leadership and Governance Framework Act 41 of 2003.

<sup>14</sup> Read s 156 together with parts B of Sch 4 and 5 of the Constitution.

ers.<sup>15</sup> The Constitution does however not directly distinguish between the powers and functions of the different categories of municipalities *inter se*. Although it is constitutionally envisaged that a proper division of municipal powers should be made, such division had to be conducted in terms of national legislation.<sup>16</sup> Since category A or Metropolitan councils have exclusive executive and legislative powers, the division is only relevant between Local Council and their relevant District Councils. This division is specifically provided under the Local Government: Municipal Structures Act.<sup>17</sup> Powers not specifically allocated to a district will vest in the local municipality.

It is thus submitted that the new legal framework indeed complies to the broad constitutional requirements regarding the identification of municipal powers and functions and the division of such powers and functions between category B and C municipalities. Assignment of powers or functions are also permitted, and it is regulated through provisions set out in the Systems Act.<sup>18</sup> The new system also provides for municipal financial powers. The current system however still faces problems relating to old order laws that are still applicable and new proposals that have not yet materialized. Although the national legislative framework has been enacted, both provincial and even municipal laws are needed to complete the overall legal framework.

### **22.2.9 Evaluating the new legal rules dealing with internal mechanisms and municipal leadership**

It is an obvious fact that municipal governments are becoming more and more complex in comparison with their predecessors from yester year. Such complexities and duties require an effective, committed and educated leadership. On evaluation of the new legal framework, it would seem as if the new legal rules indeed support and facilitate the creation of such internal procedures and functions. The new system provides for various leadership options depending on the circumstances relevant in each particular municipal jurisdiction. To enhance and regulate municipal leadership,

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<sup>15</sup> See *Fedsure Life Assurance v Greater JHB TMC* 1999 (1) SA 3741 (CC).

<sup>16</sup> According to s 155(3)(c) the Constitution determines the following: “[S]ubject to section 229, [National Legislation must] make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality”.

<sup>17</sup> See ss 83-84 of the Systems Act.

<sup>18</sup> See ss 8-9 of the Systems Act.

the Constitution directly regulates the internal procedures of municipal councils.<sup>19</sup> These requirements are indispensable for effective municipal decision-making and the achievement of municipal goals and duties.

Both the Systems and the Structures Acts specifically expand on the basic constitutional provisions and thereby support and enhance the constitutional vision. Since the functioning of a local government is largely dependant on the effective exercise of functions, the new legal dispensation provides for specific codes of conduct for both political office bearers and also municipal administrative personnel.<sup>20</sup> It is thus submitted that the new legal provisions indeed have a significant role in regulating and controlling internal municipal functioning. Although the framework is extensive, regular overview should be employed and swift legal changes could be enacted to rectify or expand on existing rules in order to enhance or comply with practical problems.

#### **22.2.10 Ensuring sustainable municipal service delivery**

The new legal dispensation for local government also addresses the important aspect of service delivery and identifies various basic municipal services and functional activities. It must be remembered that the main objective/reason for existence of local governments is to provide sustainable and effective municipal services to local residents. Without such service delivery, local settlements cannot be sustained and the overall governmental structure of the state will be placed in jeopardy. The new system demands a system for service delivery that is accessible, simple, affordable, of high quality with incorporation of the values of accountability, sustainability and value for money.<sup>21</sup>

In compliance with the constitutional prerequisites, the Systems Act determines specific duties and requirements for all local governments in respect of municipal service provision and related aspects.<sup>22</sup> The act is however silent on which mechanism municipal councils should use to achieve and comply with the abovementioned requirements. Municipal councils must put their own policies and programmes in place and should be monitored and controlled by the two higher spheres. Possible expansion on the current legal regulation could enhance better achievement of the

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<sup>19</sup> See s 160 of the Constitution.

<sup>20</sup> Refer to Sch's 1 and 2 of the Municipal Systems Act.

<sup>21</sup> Read again ss 1, 152 and 153 of the Constitution.

<sup>22</sup> See s 73 of the Systems Act.



mentioned goals. Municipal councils must also adopt tariff policies for the levying of fees for municipal services.<sup>23</sup> Services can be provided via internal mechanisms or external ones.<sup>24</sup> Although municipal services per se are not absolutely defined and other services can also be assigned to municipalities, the Constitution together with the new laws, determines what should be regarded as basic municipal services. The achievement and compliance with the constitutional demand on services, will largely depend on how local governments structure their policies and also to what extent effective oversight by national/provincial governments are provided.

#### **22.2.11 Establishing a new local government personnel corps**

In relation to municipal staff the Constitution determines that all municipal councils can employ personnel that are necessary for the effective performance of their functions.<sup>25</sup> Local governments are thus empowered to employ such staff members that are needed to fulfil their obligations and duties. The new requirements have specifically been incorporated to enhance the organisational efficiency of municipalities but vigorous training of personnel is required. Municipal personnel matters should not be seen in isolation but together with other labour related requirements that are set out in other laws.<sup>26</sup> The new dispensation determines that the municipal manager is the head of the municipal administration and as such has been given a wide range of duties and responsibilities. Such a person is also the highest accountable official.<sup>27</sup>

Employment, especially of senior staff is linked to new performance standards and evaluations. Senior staff are mostly employed for fix periods only<sup>28</sup> and a comprehensive code of conduct for staff members has been included.<sup>29</sup> Continuous training and support is however a prerequisite for effective local government administrations. It is submitted that old order bureaucracies should be avoided and regular evaluation of the organizational structures of municipalities must be undertaken. Municipal staff matters should further be linked to the requirements of the public administration and guidelines on financial management. All in all it appears as if the basic constitutional

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<sup>23</sup> S 74 of the Systems Act.

<sup>24</sup> Ss 26-81 of the Systems Act.

<sup>25</sup> S 160(1)(c) read with s 156(5) of the Constitution.

<sup>26</sup> Read for example acts such as the Labour Relations Act 66 of 1995 and also the Basic Conditions of Employment Act 75 of 1997.

<sup>27</sup> See s 55 of the Systems Act.

<sup>28</sup> See s 7 of the Systems Act.

<sup>29</sup> Refer to Sch 2 of the Systems Act.

demands are met and that local government administrations and personnel structures are adequately empowered to achieve and fulfil their important constitutional obligations.

#### **22.2.12 Regulation of municipal fiscal management and fiscal powers**

Mention was made above that municipal administrations and staff members are partly regulated in terms of a new and reformed legislative framework dealing with municipal finance and fiscal management. Without a proper financial system and effective control mechanisms, local governments will not be able to fulfil their obligations. Financial powers and proper fiscal management are essential in the new local government dispensation. From the chapter on municipal finance discussed above it becomes obvious that an entire new legal framework has been established. Not only does the Constitution determine basic fiscal requirements and obligations, but also that new national legislative provisions are authorized to create a uniform system for property tax assessments and recovery as well as a comprehensive system aimed at regulating municipal fiscal management.<sup>30</sup> It is suggested that the new dispensation indeed fulfils the constitutional demands but that the system should be constantly monitored to ensure effectiveness and efficiency. Swift amendments should be considered to better and regulate the new system should new financial challenges arise. Financial discipline is a key component for the success of local governments and careful and continuous oversight by national/provincial governments is essential. It is submitted that the new dispensation, if applied correctly, indeed should enhance and ensure effective municipal financial capacity and fiscal management.

#### **22.2.13 Compliance to new vision for public administration**

It was mentioned above that the Constitution sets various requirements dealing with the public administration and other related matters. The new legal system supports such requirements and seeks to adhere and advance to the supreme constitutional demands.<sup>31</sup> Apart from the provisions dealing with the public administration, various other requirements such as principles and provisions of performance management, capacity building, municipal accountability and public participation have been included in the new system. Such provisions are aimed at fulfilling the new constitu-

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<sup>30</sup> 56 of 2003.

<sup>31</sup> See ss 195, 196, 50 and 51 of the Systems Act.

tional values set out in the founding provisions of our supreme law.<sup>32</sup> The new dispensation aims at ensuring a more customer orientated public service with strict requirements of accountability and control. One can indeed argue that a sound foundation for a general people orientated local government system has been established, which system should not only ensure constitutional compliance but also a more brighter future for all South Africans.

**22.2.14 Adhering to the principles of municipal development, planning, performance management, capacity building and public participation**

The new legal dispensation also incorporates significant provisions relating to municipal development planning and the regulation of basic legal matters. Important aspects relating to municipal planning have been decentralized to municipal governments, and although municipal planning is a functional area of concurrent national and provincial legislative competence, all municipalities are constitutionally obligated to ensure proper and effective municipal development planning. Proper municipal planning is needed to structure and manage municipal administrations in such a way as to give priority to the basic needs of their communities. Municipalities are also obligated to promote the social and economic development of their communities and to ensure a safe and healthy environment. The Constitution specifically requires national laws to provide an overarching set of regulatory provisions to enable all municipalities to create and cater for basic planning needs. This requirement was partly met in the provisions of the Systems Act.<sup>33</sup> Integrated Development Planning is now a core component of the new legal framework and should significantly allow municipalities to fulfil their developmental responsibilities. Municipal Integrated Development Planning should however be continuously monitored and adjusted to keep abreast with local changes and circumstances.

Since municipalities are established throughout the territory of South Africa and since they have a large impact on local communities, many general legal rules are applicable to local government administrations. Apart from a general understanding and knowledge of the different legal fields relevant to the South African legal system, various unique legal provisions are also highlighted. Such unique legal matters pertaining to local government only have been identified in national legislation and is

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<sup>32</sup> See s 1 of the Constitution read together with ch 4 and 6 of the Systems Act.

<sup>33</sup> See ss 24-29 of the Systems Act.

directly regulated in terms of the Systems Act.<sup>34</sup> As a sphere of government, local governments are faced with general legal matters on a daily basis, and as such a complete understanding and compliance with the law of the state in general is a prerequisite for municipalities to be able to perform their functions and achieve their goals.

#### **22.2.15 *Evaluating the new status and autonomy of local government institutions***

One of the more distinct features of the new face of local government in South Africa is the fact that it now has a new enhanced and protected status and autonomy. All local government institutions have been confirmed as a distinct and interdependent sphere of government.<sup>35</sup> Notwithstanding the constitutional confirmation of the new status and subsequent autonomy of local governments, such autonomy is not absolute and is often subjected to the oversight and control of both the national and provincial spheres of government.<sup>36</sup> In light of the constitutional provisions, the autonomy of municipalities is regarded as a limited or restricted autonomy. The crux of the limitation lies in the confirmation within the Constitution itself in that municipalities are in some instances subjected to national and provincial legislation. Any encroachment on the autonomy of a local authority must be justified and permitted under the Constitution or else it would be unconstitutional and invalid. Since the Constitution itself entrenches only a limited autonomy for local government, any dispute relating to such an issue should be resolved with reference and interpretation of the overall constitutional scheme. Many aspects could have an impact in such cases, for example the Bill of Rights, the principles of co-operative government or even the requirements dealing with government finance. It is however submitted that the limited autonomy of local government should not detract from the new role local governments are to play in our new constitutional dispensation.

#### **22.2.16 *Achieving the five core objects of local government***

Arguably the most important function of a local authority, seen from a local community point view, is the provision of sustainable service delivery. This core function of all municipal governments has been at the forefront of municipal development, not

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<sup>34</sup> See ch 11 of the Act for more detail.

<sup>35</sup> Refer to s 40 of the Constitution.

<sup>36</sup> See s 151(3) and (4) of the Constitution.

only in the South African context, but all over the world. It was explained above that the main reason for the existence of local authorities was to ensure and secure sustainable provision of certain municipal services to local communities. The most common problem facing local governments today is the lack or insufficient provision of such services. Since the provision of services is such a fundamental function of a local government, the new constitutional dispensation has specifically incorporated such a function within the new legal framework.<sup>37</sup> The provision of municipal services however is not the only important municipal object and therefore the Constitution has identified and entrenched five core objects of the new local government dispensation.<sup>38</sup> All municipalities are obligated to strive, within their financial and administrative capacities, to achieve the five objects mentioned above. Although the new legal framework should facilitate and enhance the fulfilment of the core objects of local government, it is ultimately left to municipal governments themselves to ensure that they structure their finances and administrations in a manner that will achieve the objects. Many municipalities in South Africa are not complying with this important constitutional requirement and subsequently many are not providing sustainable services and are not achieving the lawful expectations of local communities. It is this writer's submission that the new legal framework indeed fosters and ensures a legal order within which municipalities should be able to achieve their goals and objects. One should however not lose sight of the important role both national and provincial governments must play to ensure through oversight and control measures, that municipalities are indeed making positive progress in the achievement of local government objectives.

#### ***22.2.17 The principle of creating a local government dispensation that is developmentally orientated***

Apart from the core objects of local government the new constitutional scheme also requires all municipalities to be developmentally orientated regarding their duties.<sup>39</sup> In essence, the developmental approach of local government entails the improvement of the quality of life of all municipal communities. In order to achieve the obliga-

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<sup>37</sup> S 152(1)(b) of the Constitution states that one of the objects of local government is to ensure the provision of services to *local* communities in a sustainable manner.

<sup>38</sup> Refer to s 152(1)(a)-(e) of the Constitution. The objects are: democratic and accountable governance, provision of services, promotion of social and economic development, promotion of a safe and healthy environment and lastly the encouragement of public participation in municipal matters.

<sup>39</sup> See s 153 of the Constitution.

tion of being developmental in nature, all municipalities are obligated to do two things: (a) they must structure and manage their administrations and budgeting/planning processes in such a way as to give priority to the basic needs of their respective communities and thereby help to promote the social and economic development of such communities; (b) they must participate in national and provincial development programmes.<sup>40</sup> In view of the new legal system for local government, which includes aspects such as co-operative government and the new internal municipal structures and procedures, it is again writers submission that the new legal dispensation indeed caters and fosters a local government system where developmental duties and objects can be realised. Success however will ultimately depend on the manner in which municipalities themselves structure and manage their institutions in order to achieve such duties at best.

### **22.3 Conclusion**

It is writer's overall conclusion that the new legal dispensation relevant to local government institutions of South Africa, as was created within the general constitutional framework, not only complies with the overall constitutional demands, but if correctly applied and if the envisaged support and oversight is provided, should indeed succeed in steering local government to be a more developmental and more people orientated sphere of local government. A broad and seemingly effective legal system has been created to allow and ensure that municipalities can achieve their specified constitutional duties and objects. The new dispensation not only seems to cover all necessary components of a successful legal dispensation but also provides for various mechanisms to ensure proper control and oversight. Many commentators have in the recent years suggested that both the two higher spheres of government were dragging their feet in completing the legal system for local government, and that especially national government has failed to timeously fulfil its constitutional obligations. In view of the extent and content of the new legal system and upon close evaluation of all the new laws that were enacted, one can however understand that the completion of the new system was not as elementary as many initially believed. It is this writers opinion that the new established legal system indeed signifies a monumental advancement in the creation of an effective and supported municipal government in the new South African constitutional state.

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<sup>40</sup> See s 153(a)-(b) of the Constitution.

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## **The process of transformation and restructuring of local government**

### **5.1 Introduction**

For most of South Africa's history the final control and management of local authorities has fallen under higher government institutions. Apart from this lack of proper autonomy, local governments were also racially divided between white local authorities and "non-white" local authorities. This policy ultimately resulted in a political uprising and drive towards a radical transformation. As was explained in the previous chapter, many attempts were made during the apartheid system to construct separate local governments for different racial groups. These various systems could not be sustained, however, and the total local government system fell apart. After the positive outcome of a referendum held in 1989, in which white voters voted overwhelmingly in favour of political and constitutional reforms, the restructuring and democratisation process of the whole country was fully set in motion. This process also set the scene for the restructuring and transformation of local governments throughout the country.

The initial process of transformation was set in motion by the Local Government Negotiating Forum (LGNF) in 1993. The LGNF identified the important goal of local authorities to provide equal and acceptable services to all local communities. It thus called on all local structures to resume and improve services and to establish the principle of one municipality, one tax base.<sup>1</sup>

Despite the general agreement that all local governments and the system as a whole had to be transformed, such transformation would take considerable time and effort and could not be achieved overnight. Furthermore, it would have been impractical and impossible to dismantle the system and institutions that were in place at the

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<sup>1</sup> See Chaskalson et al (2000) 5A-3.



time.<sup>2</sup> Provision therefore had to be made for a gradual and properly planned process of reform.<sup>3</sup> In order to achieve this progressive restructuring process, the LGNF had reached agreement between all participants on a specific transformation programme. The programme was initiated by agreement in the LGNF on the content of the Local Government Transition Act (LGTA).<sup>4</sup> The main objective of the LGTA was to facilitate local government matters during the transition from the formerly racially based system to a new reformed system of sustainable, uniform and fully democratic local government.<sup>5</sup> From the wording of the Act, three distinct phases of the transition of local governments were identified.<sup>6</sup> While the LGTA had structured the transitional process of local government in the country, it was mostly up to parliament and the Constitutional Assembly, elected under the interim Constitution,<sup>7</sup> to complete and enact the final Constitution of 1996<sup>8</sup> and also to enact all other national legislation that was envisaged in the Constitution. This would then complete the interim phase and enable the final phase to commence.

In light of the above, three important legislative stages could be identified during the restructuring process. The first stage was applicable under the provisions of the LGTA itself. Thereafter, the second stage commenced on 4 February 1997 and was

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<sup>2</sup> It should be remembered that local governments are directed to provide essential services to local residents, and such services could not be suspended while a process of transformation was being implemented.

<sup>3</sup> See Rautenbach and Malherbe (1999) 315-316.

<sup>4</sup> 200 of 1993. See the LGTA as well as the content of the chapter on local government as set out in the interim Constitution of 1993.

<sup>5</sup> The aim of the LGTA can be found in the long title of the Act, which states as follows: "To provide for revised interim measures with a view to promoting the restructuring of local government, and for that purpose to provide for the establishment of Provincial Committees for local government in respect of the various provinces; to provide for the recognition and establishment of forums for negotiating such restructuring of local government; for the exemption of certain local government bodies from certain provisions of the Act; for the establishment of appointed transitional councils in the pre-interim phase; for the establishment of transitional rural local government structures; for the issuing of proclamations by the MECs of the various provinces; for the establishment of Local Government Demarcations Boards in the various provinces; and for the repeal of certain laws; and to provide for matters connected therewith" – the long title was substituted by proclamation no R.65 of 1995 and by s 18(1) of Act 89 of 1995.

<sup>6</sup> These phases were the *pre-interim* phase, which would commence on the date of the commencement of the LGTA itself and end with the commencement of the interim phase; the *interim phase*, which would commence on the day after the elections were held for transitional councils as contemplated in s 9 of the Act and end upon the implementation of final arrangements enacted by a competent legislative authority; and the *final phase*, which would commence on the date of the last local government elections, to be held in terms of the provisions of the Constitution of the Republic of South Africa 1996 and the new national and provincial laws applicable to local government, as mandated by the Constitution. These elections were held during December 2000.

<sup>7</sup> See again the interim Constitution of 1993.

<sup>8</sup> Hereafter referred to as the Constitution.

controlled by the LGTA, the IC and also the FC. The third and final stage was controlled in terms of the provisions of the FC as well as the new national, provincial and even local government laws enacted in accordance with the provisions of the Constitution. Each of these three stages will be referred to in more detail later in this work.

## 5.2 The restructuring of local government under the Local Government

### Transition Act

The LGTA commenced on the 2nd of February 1994, almost two months before the introduction of the IC. As was stated above, the primary role of the Act was to re-integrate and provide the basis for local government structures during the transformation of the previously race-based municipal system.<sup>9</sup> From the outset it is important to remember that the Act was applicable for the entire territory of the Republic of South Africa, which also included the former TBVC states and other Bantustans.<sup>10</sup>

In terms of section 3 of the LGTA, many provincial committees were appointed by the Transitional Executive Committee (TEC) in order to facilitate further discussions and negotiations during the transitional phases. The TEC was again established as a control body over the powers of the former administrators of the provinces.<sup>11</sup> All powers of the provincial administrators could be lawfully exercised only in concurrence with the relevant provincial committee.<sup>12</sup> Any disputes that the parties could

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<sup>9</sup> See also *Gcali No v MEC for Housing of Local Government*, EC 1996 (4) SA 456 (Tks).

<sup>10</sup> See the case of the *ANC v Minister of Local Government and Housing* 1998 (3) SA 1 (CC) where the court held that the restructuring of local government could be effected in terms of the LGTA only and the import thereof was that only the national Parliament would be competent to direct the transformation of local government until the time period identified in s 245(1) had elapsed. The section and the process of transition in local government did not mean that for other purposes the provisions of ch 10 of the Constitution had no effect. The argument that local government established in terms of the LGTA after elections had been held was not local government contemplated by ch 10 was therefore misconceived. See para F-H at 12.

<sup>11</sup> The TEC was established in terms of Act 151 of 1993. Later the reference to administrator was substituted with the MEC responsible for local government in each province. See also the case of *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC).

<sup>12</sup> For more on this refer to the case of *Gardener v East London Transitional Local Council* 1996 (3) SA 99 (E). The background to the case in terms of the Act is that the Greater East London Local Government Negotiating Forum ("the forum") had been established, comprising statutory local government bodies, political parties and other interested organisations. On 4 November 1994 the forum reached agreement ("the agreement") on the establishment of the East London Transitional Local Council (the first respondent). Clause 11(iii) of the agreement provided that the post of town clerk of the Transitional Local Council had to be advertised and filled in accordance with the provisions of the Profession of Town Clerks Act 75 of 1988, and the Municipal Ordinance 20 of 1974 (C). The salary and fringe benefits of the town clerk would be in accordance with directions issued by the Board on Remuneration and Service Benefits of town clerks. Clause 11(iv) stipulated that "until such time as the post of town clerk is filled, the Transitional Local Council shall appoint the town clerk of the former Municipality of East London as acting town clerk and he shall be remunerated on the same basis as he was prior to the establishment of the Transitional Local Council or in accor-

*continued on next page*

not resolve themselves were referred to a special Electoral Court for final adjudication.<sup>13</sup>

According to the LGTA, the National Minister, which the Act defined as the Minister for Provincial Affairs and Constitutional Development,<sup>14</sup> was empowered to issue regulations concerning any matter referred to in terms of the Act.<sup>15</sup> However, regulations could be issued only after consultation between the Minister and administrator of a province.

Part IV of the Act contained provisions directed at the pre-interim phase specifically. The goal was to achieve a 50/50 statutory/non-statutory formula for the nomination of members to the various transitional structures that were envisaged by the Act. In compliance herewith, many previously excluded representatives of local communities and other interest groups were for the first time involved in the processes of local government affairs.<sup>16</sup> In general, the different negotiating forums served as vehicles for the creation of transitional local structures which were to function prior to the holding of the first democratic local elections planned for November 1995. Many different functions and powers were afforded to the negotiating forums and if a decision of a forum was taken in compliance with the requirements of the

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dance with the matter prescribed by the Board on Remuneration and Service Benefits of town clerks". The second respondent (the Administrator) exercised the powers vested in him by s 10 of the Act and gave effect to the agreement by Proc 79 of 1994 (EC). The Court held that in terms of clause 11(i) the employees of the disestablished local government bodies were transferred to the service of the first respondent on conditions of service not less favourable than those previously enjoyed and that, since the agreement contained no specific provision regarding the executive officers and other employees of the East London Municipality, it was implicit that they should retain their corresponding positions in the first respondent, that was with the exception of the town clerk whose post had to be advertised and filled in accordance with paras (iii) and (iv) of clause 11. As to (a), the Court held that in terms of s 10(3) of the Act "a proclamation" could provide for the dissolution of any local government body, including the transfer or admission of persons to or in the service of any transitional council, subject to conditions not less favourable than those under which they served and applicable labour law. S 10(3)(i) stipulated further that "a proclamation" could provide for "the protection of the rights and benefits, including the remuneration, allowances and pension benefits, of employees of a local government body, subject to applicable labour law and due consultation between employer and employee bodies". This protection did not extend to the guarantee of the status of any executive officer in any of the affected local government bodies as it would be incompatible with the objects of the Act. The applicant had lost his status of town clerk but his employment was otherwise firmly protected by applicable labour law and, as to his conditions of service (apart from status). This conclusion accorded with the objectives of the Act, viewed in the light of the relevant socio-economic and political considerations which had given rise to the legislation.

<sup>13</sup> See Chaskalson *et al* (1999) 45 A-4.

<sup>14</sup> See the definitions in the Act in s 1. The definition of the term minister was amended in 1995 to refer to the minister of Constitutional Development and Local Government.

<sup>15</sup> See s 12 of the Act.

<sup>16</sup> See the case of *Munisipale Raad van Bainsvlei v Premier of Province of OVS* 1995 (1) SA 772 (OPA).

LGTA, the administrator was bound to adhere to such a decision. If disputes arose between an administrator and a forum they were referred to independent mediation, which was later substituted by a process of arbitration.<sup>17</sup>

Part V of the LGTA was again directed at the interim phase. Transitional structures were now in place and were named as transitional local councils or transitional metropolitan councils in local or metropolitan areas respectively. In every metropolitan area there was an overarching metropolitan council which had to perform specific functions for the whole area and a number of substructures of that metropolitan area, which, in turn had specific functions in that area.<sup>18</sup> The LGTA also specifically defined a metropolitan area as follows:

“Metropolitan area – means any area –

- (a) comprising the areas of jurisdiction of multiple local governments;
- (b) which is densely populated and has an intense movement of people, goods and services within the area;
- (c) which is extensively developed or urbanized and has more than one central business district, industrial area and concentration of employment; and
- (d) which, economically forms a functional unit comprising various smaller units which are interdependent economically and in respect of services.”<sup>19</sup>

The LGTA also established a specific demarcation board for each of the provinces of the country. These demarcation boards had specific functions, namely to investigate and make recommendations regarding the demarcation of any area of a local government.<sup>20</sup> After the consideration of all written representations from the demarcation board and other role players, the administrator/MEC was empowered to delimit specific areas and to predetermine powers or functions through the issuing of proclamations.<sup>21</sup> The Act further provided a broad framework for the first local government elections for the transitional metropolitans, councils and sub-councils. These elec

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<sup>17</sup> See *Town Council of Lichtenburg v Premier of North West Province* 1995 (8) BCLR 959 (B).

<sup>18</sup> See Cloete (1997) 32. The writer refers to the example of Pretoria where four separate councils were established. Firstly there was the Greater Pretoria Metropolitan Council (the Metro Council) and then there were three other substructures known as the Northern Pretoria Metropolitan Substructure (Akasia-Soshanguve), the Central Pretoria Metropolitan Substructure (Pretoria) and the Southern Pretoria Metropolitan substructure (Centurion).

<sup>19</sup> See the definition in s 1 of the LGTA. See also the case of *Fedsure v Greater Johannesburg Metro Council* 1999 (1) SA 374 (CC).

<sup>20</sup> See s 11 of the LGTA.

<sup>21</sup> Refer to s 8 of the LGTA.

tions were scheduled to take place at the end of 1995 and in fact were held during November 1995 and May and June 1996. The administrators/MECs were empowered to make various regulations with reference to the electoral process and procedures, but such regulations had to be consistent with the LGTA and also the provisions of the interim Constitution.<sup>22</sup>

As can be expected of an Act that is aimed at regulating a transitional process, the LGTA was in certain instances unclear and imprecise. To address these shortcomings the Act was amended in 1994 in order to empower the president of the country to further amend the Act by specific proclamations.<sup>23</sup> Various proclamations were indeed issued in terms of this amendment;<sup>24</sup> however some of them were challenged by the Western Cape provincial government and were found to be unconstitutional.<sup>25</sup>

Apart from the abovementioned proclamations the LGTA was amended a further four times during 1995 until 1996.<sup>26</sup> The Second Amendment Act of 1995 was directed to create the basic framework for rural local government, which was at the time not properly addressed. With the Second Amendment Act of 1996, a new Part VI A was inserted in the LGTA to deal with post-electoral aspects, to repeal the Local Government Demarcation Boards and to substitute the term "Administrator" with the term "Member of the Executive Council (MEC)". Principles of development and co-operative government were also introduced which served to bring the role of local governments within the ambit of the requirements of the FC.<sup>27</sup> Many extensive changes were also included in section 10 of the Act.<sup>28</sup>

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<sup>22</sup> See, eg, *Democratic Party v Miller No 1997 (2) BCLR 223 (D)*; *Tumisi v ANC 1997 (2) SA 741 (O)*; *O'Meara No v Padayachi 1997 (2) BCLR 258 (D)*; *Frans v Munisipaliteit van Groot Brak 1998 (2) SA 770 (C)* en *De Villiers v Munisipaliteit van Beaufort-Wes 1998 (9) BCLR 1060 (C)*.

<sup>23</sup> See s 16A of the LGTA Amendment Act 34 of 1994.

<sup>24</sup> See Proclamations nos R35, R54, R58, R59 and R65 of 1995.

<sup>25</sup> See *Executive Council of the Western Cape supra* fn 11.

<sup>26</sup> See the LGTA Amendment Act 61 of 1995; the LGTA Second Amendment Act 89 of 1995; the LGTA Amendment Act 12 of 1996 and the LGTA Amendment Act 97 of 1996.

<sup>27</sup> Note that the "final" Constitution was only in draft form at the time.

<sup>28</sup> These included three objects of metro councils, namely to promote integrated economic development, equitable redistribution of resources and the equitable delivery of services; to alter municipal jurisdictions and names and the recognition of organisations representing the majority interests in municipalities on both national and provincial levels. These organisations were the forerunners of so-called organised local government, the establishment of national and provincial demarcation boards and finally the introduction of co-operation between local governments and other spheres of government and horizontal co-operation between municipalities *inter se*. See also Chaskalson *et al* (1999) 5A 13.

### 5.3 The role and impact of the interim Constitution on the transition process

The interim Constitution came into effect after the commencement of the LGTA in April 1994. The IC required that the transitional phases of the restructuring of local government had to be done in terms of the LGTA.<sup>29</sup> According to the amended section 245(2) of the IC, provision was made that the post-election restructuring of local governments was to be affected in terms of the principles set out in chapter 10 of the IC specifically, and the whole of the IC and LGTA in general. On a broad reading of sections 245(1) and (2) of the IC, the enforcement of chapter 10 of the IC could be excluded from the transitional restructuring process until the first elections within local government were held. This did not mean exclusion of the Constitution until the end of the overall transitional process, however, as this would have excluded the IC from the restructuring process for its entire existence.<sup>30</sup> After commencement of the IC, some uncertainty existed about the status of the LGTA. Some people held the view that the LGTA was indeed incorporated in the text of the IC. The court clarified the position in two cases, however, and clearly distinguished between the IC and the LGTA.<sup>31</sup>

A close investigation of chapter 10 of the IC reveals that the chapter was written very basically and contains many vague and uncertain provisions. Notwithstanding its uncertainties, the inclusion of chapter 10 in the IC had a profound effect and provided local government with constitutional recognition and a range of original powers.<sup>32</sup> Thus for the first time in South African constitutional history local government was recognised as an autonomous part of the overall governmental structure, with its own powers, functions and constitutional importance. The IC further required that the powers, functions and structure of local government had to be determined by law.<sup>33</sup>

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<sup>29</sup> See interim Constitution s 245 and also the Constitution of Republic of South Africa Second Amendment Act 44 of 1995. Refer also *Premier of KwaZulu v President of the RSA* 1996 (1) SA 769 (CC).

<sup>30</sup> Refer to Chaskalson *et al* (1999) 5A/15 fn 2. See also *Beukes v Krugersdorp* 1996 (3) SA 467 (W); *ANC v Minister of Local Government and Housing* 1998 (3) SA 1 (CC) and *Executive Council of Western Cape* *supra* fn 11.

<sup>31</sup> In *Executive Council of the Western Cape*, the court regarded the operation of the interim Constitution ch 10 as constitutionally delayed, rather than the LGTA being incorporated in the interim Constitution itself. Later in *In re: Certification of the Constitution of RSA* 1996 (4) SA 744 (CC) the Constitutional Court again confirmed that the interim Constitution did not incorporate the LGTA or any portion thereof.

<sup>32</sup> This recognition and entrenchment as part of the highest law of the state was later confirmed in *Fedsure v Greater Johannesburg Metropolitan Council* *supra* fn 19.

<sup>33</sup> See the interim Constitution s 174.



Even financial powers were delegated to local authorities, as long as such powers were exercised in terms of a uniform structure for each municipal area.<sup>34</sup> Lastly, the IC also confirmed the commitment to establish democratic institutions at local government level and also to include traditional authorities in such processes.<sup>35</sup>

#### **5.4 The importance of the 34 constitutional principles included in the interim Constitution and the certification process of the final Constitution**

It was a unique feature of South Africa's new constitutional dispensation that the FC of the Republic had to be certified by the Constitutional Court for compliance with all the constitutional principles set out in the IC. Many of these constitutional principles were very important to the new local government structure that had to be established. Some of the constitutional principles that were applicable to local government can be summarised as follows:

- The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.<sup>36</sup>
- Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in chapter 3 of the IC. The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.<sup>37</sup>
- The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.<sup>38</sup>
- The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that

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<sup>34</sup> The different financial powers of local governments were often the cause of legal disputes. See, eg, *Beukes v Krugersdorp Local Council supra* fn 30; *Frans v Municipality of Groot Brak supra* fn 22; *East London Transitional Local Council v Tax Payers Action Organisation* 1998 (10) BCLR 1221 (E); *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T); *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) and *Fedsure Life Association v Greater Johannesburg Metro Council supra* fn 19.

<sup>35</sup> See *DP v Miller No supra* fn 22; *ANC v Minister of Local Government supra* fn 30.

<sup>36</sup> See the interim Constitution CP I in Sch 4.

<sup>37</sup> See the interim Constitution CP II and III.

<sup>38</sup> CP IV.



have as their object the amelioration of the conditions of the disadvantageded, including those disadvantageded on the grounds race, colour or gender.<sup>39</sup>

- There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.<sup>40</sup>
- There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll and, in general, proportional representation. Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government. Formal legislative procedures shall be adhered to by legislative organs at all levels of government.<sup>41</sup>
- The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.<sup>42</sup>
- Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy. Government shall be structured at national, provincial and local levels. At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.<sup>43</sup>
- Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.<sup>44</sup>
- A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features

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<sup>39</sup> CP V.

<sup>40</sup> CP VI.

<sup>41</sup> See CP VIII, IX and X.

<sup>42</sup> CP XIII.

<sup>43</sup> See CP XIV, XVI and XVIII.

<sup>44</sup> See CP XX.

of local government shall be set out in parliamentary statutes or in provincial legislation or in both.<sup>45</sup>

- The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.<sup>46</sup>
- Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.<sup>47</sup>

In the first certification judgement,<sup>48</sup> the Constitutional Court refused to certify the first submitted text of the FC because the text did not comply with all of the above-mentioned constitutional principles. Some of the reasons for non-compliance were specifically related to local government matters. In this regard the Constitutional Court concluded as follows:

- Chapter 7 of the new text failed to comply with CP XXIV in that it did not provide a framework for the structures of local government, with CP XXV in that it did not provide for appropriate fiscal powers and functions for local government, and with CP X in that it did not provide for formal legislative procedures to be adhered to by legislatures at local government level.
- Section 229 failed to comply with CP XXV in that it did not provide for appropriate fiscal powers and functions for different categories of local government.
- As to the provisions relating to the powers and functions of the provinces, the text failed to comply with CP XVIII.2 in that such powers and functions<sup>49</sup> were substantially less than and inferior to the powers and functions of the provinces under the IC.<sup>50</sup> As to the powers and functions of the provinces, which were substantially diminished in the text, the court stated the following:
  - (a) The new text did not comply with CP XXIV, CP X and CP XXV. At the very least CP XXIV necessitated the setting out in the new text of the different categories of local governments that could be established by the provinces

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<sup>45</sup> CP XXIV.

<sup>46</sup> CP XXV.

<sup>47</sup> CP XXVII.

<sup>48</sup> *In re Certification of the Constitution of the RSA 1996 supra* fn 31.

<sup>49</sup> Specifically with regard to local government matters.

<sup>50</sup> Refer to para 482 at 910-911.

and a framework for their structures. In the new text, the only type of local government and local government structure referred to was the municipality, which was insufficient to comply with the CP. In addition, a structural framework should indicate the formal legislative procedures demanded by CP X that have to be followed by a local government structure. The failure to make provision for appropriate fiscal powers and functions in respect of the different categories of local government was in breach of CP XXV.<sup>51</sup>

- (b) As to the Local Government Transition Act,<sup>52</sup> the effect of the LGTA on the powers and functions of the provinces in respect of local government in the IC had to be ignored for the purpose of the certification exercise. The transitional provisions of the IC were not relevant to this exercise.<sup>53</sup>
- (c) As to the relevant provisions of the IC and the new text, while local government structures were given more autonomy in the new text than they were given in the IC, it had to be borne in mind that the IC contemplated that local government would be autonomous, though it did not delineate the boundaries of such autonomy as clearly as the new text. Whereas in the IC the potential concurrency of powers in parliament and provincial legislatures was in respect of the whole field of local government, in terms of the new text power this would be allocated to specific areas of competence. It was in this process that the local authorities were afforded greater autonomy at the expense of both parliament and provincial legislatures. There was a corresponding diminution of the powers in respect of local government with regard to both national and provincial legislatures. CP XVIII.2 related only to the diminution of provincial powers and functions and not of those of parliament.<sup>54</sup>
- (d) As to the source and ambit of provincial powers and functions, section 155 placed a substantial constraint upon the general provisions which vested legislative authority in the provincial legislatures. Section 155 had the consequence that the ambit of provincial powers and functions in respect of local government was largely confined to the supervision, monitoring and support of municipalities. What the new text sought to realise was a structure for local

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<sup>51</sup> See paras 299-302 at 861A-H.

<sup>52</sup> 209 of 1993.

<sup>53</sup> See paras 357-358 at 876F-877A/B.

<sup>54</sup> Par 364 at 879B-E.

government that revealed a concern for the autonomy and integrity of local government and a desire to prescribe a hands-off relationship between local government and other levels of government on one hand and a need to acknowledge the requirement that higher levels of government monitored local government functioning and could intervene where such functioning was deficient or defective in a manner that compromised this autonomy on the other.<sup>55</sup>

- (e) Under the IC, the provincial government could have assumed powers and functions beyond the areas of supervision, support and monitoring of local government. The extent of such powers afforded to the provinces in the new text was substantially less. Under the new text the provinces could not assume powers outside of these areas or certainly could not assume them to the same extent permissible under the IC. Accordingly, there had been a diminution of provincial powers and functions in some areas.<sup>56</sup>
- (f) As Schedule 6 of the IC granted provinces a broad functional area of legislative competence, the new text detailed specific functional areas in relation to local government in schedules 4 and 5. Notwithstanding that the lists of local government matters in Part B of Schedules 4 and 5 were extensive, it had to be recognised that the enumerated list approach had to be more restrictive than a loosely defined area of competence to some extent. This meant that the new text attenuated the manner in which the legislative powers was exercised and to that extent diminished provincial powers.<sup>57</sup>
- (g) To the extent that provincial legislative powers had been diminished or increased, executive powers of the provinces were also diminished or increased. This followed since both the IC and new text provided that a province had executive authority over all matters in respect of which it had exercised its legislative competence.<sup>58</sup>
- (h) As to the powers of national legislature and executive to regulate and control the exercise of provincial powers regarding local government matters set out in sections 139, 155, 159, 160(3), 161, 163 and 164, it precluded or circum-

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<sup>55</sup> See paras 366, 367, 371, 373 at 879-882.

<sup>56</sup> Par 374 at 882E-G.

<sup>57</sup> See paras 375-377 at 882-883.

<sup>58</sup> Par 379 at 883-884.

scribed provincial legislative competence and as such diminished provincial legislative and executive powers and functions.<sup>59</sup>

In light of the objections the court refused to certify the text of the FC submitted for certification. In accordance with the procedures set out in the IC, the Constitutional Assembly redrafted the FC and later resubmitted the text for certification. The second time round the court found the revised text to comply with the constitutional principles of the IC and thus certified and approved the FC. The FC came into effect on 4 February 1997.<sup>60</sup>

Notwithstanding the enactment of the FC and its specific requirements regarding local government,<sup>61</sup> the provisions of the LGTA as amended had to remain in force until 30 April 1999 or until the Act had been repealed by new legislation, whichever occurred first.<sup>62</sup> The intention was thus to maintain the transitional arrangements of the LGTA and the IC until such time as parliament had passed new legislation to give effect to the provisions/requirements set out in chapter 7 of the FC and until provincial and local governments had completed the new scheme by enacting provincial laws and municipal by-laws to regulate local conditions.

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<sup>59</sup> Para 379 at 883-884.

<sup>60</sup> See *In re: Certification of the amended text of the Constitution of the RSA, 1996, 1997 (2) SA 97 (CC)*. The court held *inter alia* that a number of the grounds for non-certification in the first certification judgment had clearly been eliminated in the amended text (AT). There was accordingly no longer any sustainable ground for objection to the constitutional provisions relating to the legislative procedures of local government. Furthermore that ch 7 of the amended text dealing with local government complied with CP XXIV (requiring a framework for the structures of local government), CP XXV (requiring provision for appropriate fiscal powers and functions in respect of different categories of local government) and CP X (requiring provision for formal legislative procedures to be adhered to by legislatures at local government level), and that in terms of CP XXIV the Constitution had to provide a "framework for local government powers, functions and structures", while the details of the local government system were a matter for legislation. See p 127-130.

<sup>61</sup> See the Constitution ch 7.

<sup>62</sup> The Constitution Item 26 of Sch 6. See also the second certification judgment *supra* fn 60 where the court held that item 26(1)(a) of Sch 6, which preserved certain sections of the LGTA 209 of 1993 from repeal until 30 April 1999, complied with CP IV (constitutional supremacy). The item did not immunise the LGTA from constitutional review. The Act remained subject to constitutional review, but was not subject to the framework provisions of ss 151, 155, 156 and 157 until 30 April 1999. All other provisions of the amended constitutional text applied to it, and any amendment of its provisions had to be consistent with the AT. The item was a transitional provision designed to enable an orderly transition to be made from the existing system of local government to a system which conformed with the requirements of the AT. It was implicit in CP XXIV that this could be done. There was nothing in the language of CP XXIV that required the framework provisions to come into force immediately. On the contrary, the CP contemplated that legislation would be needed to make provision for the comprehensive powers, functions and other features of local government that would be required. The drafting and implementation of such legislation were likely to present difficulties and to require time. A decision as to the period of grace allowed for local government transition was within the authority of the Constitutional Assembly. In view of the complexities of a

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The FC supported the abovementioned position by confirming that all laws that were in place when the new Constitution took effect would continue to be in force subject to any amendment or repeal and subject to consistency with the new Constitution. It was further confirmed that old-order legislation that continued in force:

- (a) did not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have wider application and
- (b) continued to be administered by the authorities that had administered it when the new Constitution took effect, subject to the new Constitution.<sup>63</sup>

### **5.5 The impact of the final Constitution and the commencement of the new local government legal dispensation**

It is evident from the background information provided above that local government has been undergoing profound changes since 1994. These changes were regulated mostly in terms of the LGTA and, to a lesser degree, in terms of the IC. The final phase of the transition process commenced on 5 December 2000 with the general elections that were held on local government level according to the requirements of the FC and new legislative framework mandated by that Constitution.<sup>64</sup> The vision and framework of new local government systems as set out in the FC had originally been established by the White Paper on Local Government, which had served as the founding platform of the restructuring of local government that had to follow. It was important that the new system of local authorities would be able to ensure service delivery, the eradication of poverty and the improvement of social and economic living conditions for all. The FC and new local government laws that were enacted in terms of the Constitution now form the new building blocks of a post-transitional local government system in South Africa. It should be emphasised, however, that at the time of the writing of this work, not all newly proposed local government laws have been enacted, as was authorised by the FC.

Although the transition process has entered into its final phase, the final restructuring process has not been finalised yet, and it is envisaged that this restructuring

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transition to a new order, it could not be said that the period until April 1999 was unreasonable or that the Constitutional Assembly had exceeded its authority in fixing this period.

<sup>63</sup> See the Constitution Item 2(1) and (2) of Sch 6.

<sup>64</sup> It should again be emphasised that the Constitution only provided the vision and basic framework for the new system of developmental local government, and that such vision and structure had to be completed by various national and provincial laws.

process will be a continuous process over many years to come.<sup>65</sup> The final system of a restructured local sphere of government is thus to be founded mainly on the two following fundamentals:

- (a) to provide new local governance that is directed at working with all local residents and communal interests in order to establish sustainable mechanisms to fulfil needs and improve overall quality of life
- (b) to find and maintain solutions for the acceleration and continuous provision of essential services.

The newly transformed local sphere of government in a post constitutional dispensation in South Africa is directed at achieving the following goals and objectives:

- to establish and maintain an effective system and structure
- to enhance service delivery and development
- to ensure representation, participation and accountability
- to maintain high professional administrations
- to ensure and provide effective political leadership and
- to ensure financial support and sustainability.

These goals and objectives mentioned above have been incorporated into the final text of the Constitution<sup>66</sup> and can be achieved only through proper restructuring. In order to adhere to and achieve the constitutionally required objectives and duties, the restructuring/transformation process essentially focused on the following aspects:

- (a) to establish a new institutional framework
- (b) to create newly demarcated municipal jurisdictions and establishments and
- (c) to formulate and execute new operational requirements for all local governments.<sup>67</sup>

The establishment of new municipalities required a legal process during which all municipalities were renamed, redefined and restructured. This was necessary to recreate a stable legal framework for each local authority. Under the Municipal Structures Act<sup>68</sup> all municipalities were formally re-established through a notice of establishment procedure, which was intended to define the structural framework of each

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<sup>65</sup> At the time of writing, many national and provincial laws have not been enacted.

<sup>66</sup> Refer to the Constitution ss 152 and 153.

<sup>67</sup> See the LGIS No 2: Local Government for the 21st century (1999) at 5-8 and 24-28.

<sup>68</sup> 117 of 1998 as amended.



municipality and also to address the transfer of staff and assets.<sup>69</sup> Municipalities also had to be newly demarcated because of the uneven and racially fragmented system of the past. New boundaries were needed to ensure development and sustainability. The main process was finally completed in terms of the Municipal Demarcation Act,<sup>70</sup> and the areas of the 843 former local authorities were re-demarcated and reduced to 284 new local governments. The most important aspects of the demarcation process were laid down in terms of the Local Government: Municipal Structures Act and will be discussed elsewhere.

## 5.6 Conclusion

In retrospect it is safe to say that the restructuring and finalisation of new local government dispensation, which required both national and provincial legislation, was a long and often difficult process. In order for the final process to be successful, all role players such as municipal councillors, officials and local community members had to play their part. Most municipalities all over South Africa were severely constrained by financial difficulties, which was and still is a difficult obstacle in the overall process. All spheres of government must play an active role in ensuring the financial viability and sustainability of municipalities. This can be achieved through the implementation of three distinctive initiatives, namely:

- (a) A drive to improve the financial management of local governments. All municipalities should have a well-balanced budget, strong monetary control measures and must adjust expenditure to revenue income. All revenue sources should be effectively and efficiently utilised and strengthened by a system of political support where the local community is informed and committed to the payment for services rendered.
- (b) Co-ordination and communication within the public financial sphere must be improved. Local governments must be provided with their respective equitable share of national revenue.
- (c) The creditworthiness of municipalities must be developed and strategic investment programmes should be introduced.

In order to achieve success in the restructuring process a so-called Local Government Transformation Programme (LGTP) has been developed by all three spheres

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<sup>69</sup> Thus indicating its boundaries, type, category and powers. See Act 117 of 1998.  
<sup>70</sup> 27 of 1998.

of government. The LGTP has been made up of representatives from local government institutions, provincial governments, national governments, SALGA, the National South African Local Government Bargaining Council (NSALGBC), the National Department of Finance and also some Non-Governmental Organisations (NGOs). Apart from the LGTP, a new local government training system has also been developed with a specific aim at strategic and career-orientated training programmes for councillors and officials alike.<sup>71</sup> Current local government training boards are in the process of being replaced by the Local Government: Sector and Training Authority (LGSETA), which is to be formally established in terms of the Skills Development Act.<sup>72</sup> Again, the LGSETA will have to follow the guidelines for training and qualifications, as is set out in the South African Qualifications Authority Act.<sup>73</sup> The SAQA has introduced standard methods and qualifications for training within the local government sphere.

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<sup>71</sup> See LGIS No 2: Local Government for the 21st century (1999) 27.

<sup>72</sup> 97 of 1998.

<sup>73</sup> 58 of 1995.

## **The current state of local government and the general impact of the Constitution of 1996**

### **6.1 Introduction**

Local government has been given a new face within the new constitutional system of South Africa. Since the local elections that were held during December 2000, local government has entered into the final phase, according to the restructuring process set out in the Local Government Transition Act. During this final phase, all local government matters will be regulated according to the provisions of the Constitution of the Republic of South Africa, 1996<sup>1</sup> and by the newly enacted local government laws, as is envisaged and required by the Constitution. Within the new legal framework, all local governments have been given a special status as a distinctive sphere of the government, together with specific objects and developmental duties that must be achieved.<sup>2</sup> The Constitution has further also identified certain specially entrenched powers and functions of municipalities, which are to be exercised in a system comprising different categories of municipal authority and according to specific procedures.<sup>3</sup>

Apart from the abovementioned changes, many new institutional, membership and procedural requirements have been established, which are all ultimately protected in the highest law of the state.<sup>4</sup> Although the Constitution has created the new legal framework for local government, this framework has been complicated by various external factors such as financial, administrative and legislative difficulties. To under

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<sup>1</sup> Hereafter referred to as the Constitution of the RSA, 1996.

<sup>2</sup> See the Constitution ss 152 and 153.

<sup>3</sup> See the Constitution ss 155 and 156.

<sup>4</sup> According to the Constitution s 2, the Constitution is the supreme law of the Republic, and the obligations imposed by the Constitution must be fulfilled.

stand fully the challenges of the local governments of the future, it is very important to investigate the current state of local government in the country and also to evaluate some of the problems facing such governments.

## **6.2 Current financial constraints in local government**

The restructuring process and, more specifically, the amalgamation of the previously divided local government jurisdictions, has altogether massively increased the population figures for which municipal authorities are responsible. This sudden expansion in numbers of local residents and the accompanying responsibility over a bigger area of jurisdiction have not been counterbalanced by a balancing increase in taxes and financial capabilities. Because of the inherited system with serious service backlogs, a general collapse in infrastructure and a noticeable deterioration in creditworthiness and borrowing capacity, many current local authorities are experiencing distressing and alarming financial crises. These crises are often fuelled by ever-increasing demands and expectations on service delivery by local residents, combined with a decline in national and international economic growth. The position is further hampered by inadequate financial management capabilities and poor staff training programmes.<sup>5</sup> Apart from the financial constraints, many new administrative changes have been introduced, which in practice are often very difficult to implement.

## **6.3 New administrative challenges**

The amalgamation process of local governments has also resulted in drastic administrative changes that have to be implemented. However, many municipalities are still characterised by hierarchical line departments, poor co-ordination between departments, many untrained workers and an unequal representation of women in senior management positions. These factors contribute largely to the inefficiency that often occurs in service delivery. Because of the changed mandate within local governments, new capacities, attitudes and approaches are urgently required. It is of importance that the relations between municipal councils and their administrations, management and workforce as well as between such councils and the local community are to be improved. A new focus on training should be introduced, together with a programme of systematic evaluation and support.

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<sup>5</sup> Refer to the White Paper on Local Government (1998) at 28.

#### **6.4 Legislative complexity of the new system**

Since the start of the restructuring and transformation process in 1993, many new legislative changes within the local government sector have been introduced.<sup>6</sup> The new legal framework was complicated, however, by the fact that many of the so-called old-order laws and regulations, which had supported the previous model of local government, were still in force and effect. This situation often caused legal uncertainty, which impacted negatively on the operation of many new municipal councils. The problem was compounded by the fact that some of the inherited old-order legislation was often applied differently in different jurisdictions and thus resulted in not only confusion and uncertainty but also in the creation of different legal norms and standards. In order for the transformation to be effective and the new systems ultimately to be successful, legislative uniformity was urgently needed. In the time prior to the beginning of the final phase of the restructuring process, many such uniform laws were enacted. These laws were also needed to ensure compliance with the overall constitutional mandate requiring such laws.<sup>7</sup>

#### **6.5 Global and national trends**

In modern times, it has become unimaginable for local governments to ignore the economic changes that are taking place not only in their immediate surroundings but also on a national and international basis. It is generally accepted that the rise and decline of industrial developments have a severe impact on local markets, local income and expenditure, employment possibilities and finally on the quality of life of people. It is thus true to say that globalisation and internationalisation of capital have a major impact on all spheres/levels of governments in all countries, and even more so in developing countries. Usually the lowest government level of a state is affected most by these factors.

The creation of transnational corporations, economic transactions and the integration of systems of production on a worldwide scale, which are supported with a system of rapid development of information technologies and knowledge-sharing, have resulted in the emergence of the so-called global economy. These developments are

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<sup>6</sup> Refer not only to the constitutional requirements but also the LGTA, the Demarcation Act 27 of 1998, Systems Act 32 of 2000 and Structures Act 117 of 1998.

<sup>7</sup> In the Constitution ch 7, many references are made to national and provincial laws that had to be enacted to complete the constitutional framework of the new local government system of the country. Refer to the Constitution ss 154, 155 and 156 respectively.

very important for local authorities, especially if they want to compete and enlarge their revenue possibilities. Many large cities or metropolitan areas have become nodes or points of development and trade, which serve as connections between various economic structures across the globe.<sup>8</sup>

The importance of the global economy is also very important to the central government of South Africa in its strategies and policies for developing the country.<sup>9</sup> In support hereof the government has put in place the so-called Government Growth, Employment and Redistribution strategy (also called GEAR), which places more emphasis on an export-orientated economy. The aim is to achieve international competitive industries and to enhance economic growth. In this context, many municipalities will have to manage and absorb the consequences of globalisation.

Furthermore, local governments have not only the opportunity, but indeed the responsibility to attract foreign investments. This can be achieved through the promotion of systems which allow for competitive industrial development and a strong support for local enterprises. Municipalities throughout the country are challenged to find a balance between competition and co-operation between themselves. Co-operation is necessary to enhance performance and to uplift the economy as a whole.<sup>10</sup>

## **6.6 The influence of settlement patterns and trends**

Settlement patterns and trends play an important role for local governments of the future and must be taken into account to ensure the effective delivery of services. It is generally accepted that settlement dynamics have severe influences on the resources of local authorities. The importance of proper planning in respect of future settlement patterns can thus not be overemphasised. Settlement patterns and trends have also been important during the process of demarcation of the new local government areas; the boundaries had to account for population figures within certain jurisdictions.

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<sup>8</sup> One can take the area of the Eastern Cape as an example. With the motor industry settled in that area, it has become a central node for that industry and provides not only for many job opportunities but has a strong financial and economic importance both locally and also internationally. Many products are exported to other countries in the world.

<sup>9</sup> This is especially important for the RDP programme of the national government.

<sup>10</sup> Refer to the White Paper on Local Government (1998) at 31.

In the White Paper on Local Government, various settlement types have been identified. These types are discussed briefly below, as they are important in understanding the many diversities that are present in the various settlements.<sup>11</sup>

- *Urban core settlements* Such a settlement refers to a formal city or town with a high population density, high levels of economic activity and usually higher land values.
- *Urban fringe settlements* These are settlements outside the urban core of a city or town and often include areas of low income.
- *Dense rural settlements* These types of settlement are divided into two groups. There is the so-called “Betterment settlement”, which has a high density of people. Such settlements are mostly pre-planned and former homeland areas. The second group is called “Informal settlements”. Such settlements are unplanned, un-serviced and mostly relatively poor.
- *Villages* Villages are rural settlements with a active population of more than 500 people but fewer than 5 000. Villages are often unplanned and include traditional African settlements.
- *Argri-villages* Such settlements are planned, densely populated settlements in rural/agricultural areas.
- *Dispersed/Scattered settlements* These are unplanned settlements of fewer than 500 people. Most such settlements are the first step in the creation of an informal settlement.

The importance of the various types of settlement lies within the diverse composition of their communities. Over 20 million people in modern day South Africa live in urbanised areas. It is further estimated that the process of urbanisation is to continue in the foreseeable future, with a dramatic increase in the proportion of urbanised citizens. Metropolitan areas and secondary cities are expected to absorb the most of this urban growth. Recent studies of the Department of Constitutional Development and Local Government have revealed profound changes in the migration trends of people in South Africa, which will have major consequences on local government institutions and their respective programmes for compliance with the new constitutional demands and objectives.

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<sup>11</sup> See the White Paper on Local Government (1998) at 31-32.



## **6.7 General impact of the Constitution**

It goes without saying that the Constitution as the highest or supreme law of the South African state has a profound and decisive impact on local governments.<sup>12</sup> From the wording of section 2 it is clear that not only legislative actions<sup>13</sup> but also the conduct of executive or legislative bodies must comply with the Constitution. In many instances the Constitution also requires positive state action in order for the obligations set out in the Constitution to be fulfilled. If law or conduct does not comply with the Constitution, such law or conduct is unconstitutional and thus invalid.

Many constitutional requirements are applicable to all spheres of government<sup>14</sup>, while others are directed specifically and exclusively at local government.<sup>15</sup> This distinction can be classified under general constitutional principles important to local government and specific constitutional principles for local government. In this chapter the focus will be on the general principles. The specific aspects relevant to local governments will be discussed extensively in later chapters.

### **6.7.1 *Founding constitutional requirements and principles important to local government structures***

#### **6.7.1.1 The preamble and founding provisions**

Both the preamble and founding provisions contain important aspects and insights into the constitutional text as a whole, and such principles/provisions have an important role and significance for the constitutional system. Such provisions are usually the basis/foundation upon which the total constitutional and legal system is founded. Both the preamble and the founding provisions are important to local government institutions and local government law: they contain background information regarding our history and they confirm certain fundamental values on which the new constitutional order is based. The preamble also gives one insight into the text of the Constitution that is to follow and explains the aspirations and goals of the citizens of the state. Both the preamble and founding provisions have important value and significance with regard to future local government developments and the overall

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<sup>12</sup> The Constitution s 2 states that the Constitution is the supreme law of the state and that any law or conduct inconsistent with the Constitution is invalid. The section also requires that the obligations imposed by the Constitution be fulfilled.

<sup>13</sup> Eg, municipal by-laws.

<sup>14</sup> Eg, compliance with the Bill of Rights (ch 2) or the basic values and principles governing the public administration (ch 10).

<sup>15</sup> See the Constitution ch 7 under the heading: Local Government.

achievement of the broad constitutional objectives and goals set out for local governments. In respect of future disputes or local government issues, the preamble and founding provisions can be used as a guide as to how such disputes/issues should be addressed. In this respect the preamble specifically recognises and identifies the following aspects:<sup>16</sup>

- It recognises the injustices of the past and honours those who have suffered for justice and freedom in our land
- It honours those who have worked to build and develop our country and believe that South Africa belongs to all who live in it.
- It is directed at healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights.
- It wants to lay the foundation for a democratic and open society in which the government is based on the will of the people and every citizen is equally protected by the law.
- It wants to improve the quality of life of all citizens and free the potential of each person.
- It wants to build a united and democratic South Africa which should be able to take its rightful place as a sovereign state in the family of nations.

Because local government institutions are part of the overall governmental structure, all of the abovementioned goals and objectives are relevant to them. The goals must thus be read in conjunction with the specific constitutional objectives and duties for local government.<sup>17</sup> All local government institutions must strive to address and heal the injustices/inequalities of the past, especially with regard to unequal provision of services, to ensure democratic values and fundamental rights protection and, even more importantly, to improve the quality of life of local South African residents. Although strictly speaking the preamble is not a specific section of the Constitution, it contains very important directives aimed at ensuring a new democratic and acceptable local government system and should be used to that end.<sup>18</sup>

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<sup>16</sup> Refer to the preamble of the Constitution.

<sup>17</sup> See the Constitution ss 152 and 153.

<sup>18</sup> In *S v Mhlungu* 1995 (3) SA 867 (CC) at para 112 where the Constitutional Court confirmed that the preamble of the Constitution is of interpretative importance as it connects up, reinforces and underlies all of the text of the Constitution that is to follow. It further helps to establish the basic design of the Constitution and it indicates its fundamental purpose.

In contrast with the preamble, the founding provisions of the South African Constitution are entrenched directly within the constitutional text.<sup>19</sup> It is clear from the Constitution itself that the founding provisions are of extreme importance, as they enumerate the fundamental values on which the new constitutional order is founded. These values are stated thus:<sup>20</sup>

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- Human dignity, and the achievement of equality and the advancement of human rights and freedoms.
- Non-racialism and non-sexism.
- The supremacy of the Constitution and the rule of law.
- Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, which is to ensure accountability, responsiveness and openness.”

Many of these values are just as important to local government as they are to the others spheres of government and the state in general, and every effort must be made to achieve and maintain them.

#### **6.7.1.2 The supremacy clause**

The importance of the Constitution is specifically emphasised through the supremacy clause.<sup>21</sup> According to this clause, the Constitution is the supreme law of the Republic, and any law or conduct inconsistent with the Constitution is invalid. Furthermore, all the obligations imposed by the Constitution must be fulfilled. With reference to local government, the supremacy clause is important for *inter alia* the following reasons:

- All the constitutional requirements (direct or indirect) and obligations regarding local government are protected in the Constitution as part of the highest and most

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<sup>19</sup> S 1 of the Constitution, in which the founding provisions are set out, is the most firmly entrenched of all the sections of the Constitution. In s 74(1) the Constitution states that s 1 and also ss 74(1) in its protection of s 1 may be amended only by a Bill passed by the National Assembly with a supporting vote of at least 75 per cent of its members and by the National Council of Provinces with a supporting vote of at least six of the nine provinces.

<sup>20</sup> See the Constitution s 1.

<sup>21</sup> See the Constitution s 2.

important law of the state. Such requirements and obligations can be altered/amended only through special procedures and special majorities.<sup>22</sup>

- Any legislative or executive conduct or law-making actions by a local government, for example the making of a by-law or the acceptance of a new policy, must be consistent with the Constitution; otherwise it will be invalid. Strict compliance with both the procedural and substantive requirements of the Constitution must be ensured.
- Local governments, like all other spheres of government, are also tasked with specified positive obligations that must be fulfilled. The Constitution is mandatory in this regard, and all efforts should be made to achieve and fulfil such obligations.<sup>23</sup>

It is thus clear that the supremacy clause is important to both the direct requirements set out for local government in chapter 7 of the Constitution and also the other indirect or consequential provisions applicable to municipal authorities in general. Any dispute regarding the constitutionality of a law or conduct will depend on the facts and circumstances of each case and will require a process of interpretation in determining possible inconsistency with the Constitution. According to the Constitution it is the function of the judicial authority to resolve such constitutional disputes and to declare laws or conduct to be inconsistent with the Constitution.<sup>24</sup> It is thus clear that the decisions of our courts are thus of profound significance and are an indispensable source of the law.

### **6.7.1.3 Official languages**

South Africa is a multilingual country and the Constitution protects eleven official languages.<sup>25</sup> The state must further take the necessary practical and positive measures to elevate the status and advance the use of the official languages. The protection and use of the official languages are thus also important to local government

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<sup>22</sup> See the Constitution s 74. See also *In re: Certification of the RSA 1996*, 1996 (4) SA 744 (CC).

<sup>23</sup> See s 7 of the Bill of Rights which states that the state must fulfil, promote, respect and ensure the rights set out in the Bill of Rights.

<sup>24</sup> The Constitution s 165(1) determines that the judicial authority of the Republic of South Africa is vested in the courts. S 166 again determines the judicial system. The judicial system is of importance, as only certain courts have the jurisdiction to adjudicate constitutional disputes. South Africa also follows the system of *stare decisis*, which requires the lower courts to follow the decisions of the higher courts.

<sup>25</sup> See the Constitution s 6.

institutions as part of the overall governmental structure of the state. The Constitution sets the following requirements regarding the use of the official languages:<sup>26</sup>

- National and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance and the needs and preferences of the population as a whole or in a relevant province. However, both national and each provincial government must use at least two official languages.
- All municipalities must take into account the language usage and preferences of their respective local residents.

The use of languages is particularly important for the purposes of official communication, the proclamation and wording of laws and the issuing of directives. All official languages enjoy equal protection, although this is not absolute. For the practical reasons mentioned above, certain languages may be preferred for public purposes. This is important, as the public must be able to take cognisance of the rules of law applicable to them and must therefore be informed in a language which they can understand.

It was indicated above that, unlike national and provincial governments, municipalities are not compelled to choose two official languages. They must, however, take the language usage and preferences of their residents into account. Again, it is mandatory in terms of the Constitution that all available demographic statistics be taken into account before a municipality chooses to use a particular language as its official language. It is unclear why the requirement to use at least two official languages is mandatory for only national and provincial governments; it is submitted that it is more important to establish an acceptable and effective system of communication between local authorities and their residents than it is to establish such a system on a national or provincial level. The reasoning of the constitutional drafters for not compelling local governments to use at least two official languages seems unclear and unfortunate. Be that as it may, at present municipalities can decide to use only one official language which, as argued above, could negatively hamper communications and also participation of certain sections of a local community. Before a decision is taken on the use of an official language, an investigation into the language usage and preferences of the local inhabitants is mandatory. It is submitted that a decision of a

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<sup>26</sup> See the Constitution s 6(3)(a)-(b).

municipality to use only one official language will be hard to justify in terms of the constitutional provisions without a proper investigation and in an area where there are also other language users.<sup>27</sup>

It is important to remember that aside from the constitutional requirements set out above, members of the public are still permitted to use any official language of their choice in their communications with government structures. Local governments should position themselves to deal with and answer such communications even though the language used by a private person is not the official language of that municipality. For confirmation of this viewpoint one should look at not only the provisions of section 6 of the Constitution but also the various sections in the Bill of Rights, which protect an individual's right to use a language of choice. The following reasons are submitted as to why a local resident can use any official language to communicate with the local authority of that area:

- All official languages must enjoy parity of esteem and must be treated equitably. No one language is more important than another.<sup>28</sup>
- Only government institutions are restricted or subject to conditions in terms of language usage.
- The Bill of Rights prohibits unfair discrimination on, *inter alia*, the ground of language.<sup>29</sup>
- The Bill of Rights also provides that everyone has the right to use the language of his or her choice, but may not do so in a manner inconsistent with any provision of the Bill of Rights.<sup>30</sup>
- Language is also protected where education is concerned and during criminal proceedings.<sup>31</sup>

With reference to the Bill of Rights, it should be emphasised that any limitation of a right set out in the Bill of Rights can be limited only according to the requirements and provisions of the limitation clause.<sup>32</sup> Languages are further also protected by the Pan South African Language Board which was established in compliance with sec-

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<sup>27</sup> Refer to *Louw v Transitional Local Council of Greater Germiston* 1997 (8) BCLR 1062 (W).

<sup>28</sup> See the Constitution s 6(4).

<sup>29</sup> See the Constitution s 9(3).

<sup>30</sup> See the Constitution s 30.

<sup>31</sup> Refer to the Constitution ss 29(2), 35(3)(k) and 35(4).

<sup>32</sup> See the Constitution s 36.

tion 6(5) of the Constitution. A dispute regarding language issues can also be referred to this board for investigation.

#### **6.7.1.4 The importance of the Bill of Rights**

In the paragraph above, mention was made of the protection of language in the Bill of Rights. However, The Bill of Rights as a whole has a far larger impact on all governmental institutions' Before one investigates such impact, it is important to discuss briefly the general aspects of the Bill of Rights, which are summarised as follows:

- The Bill of Rights is part of the Constitution and as such is a tool in the process of transforming the South African society and legal system within the broad constitutional framework. Most of the constitutional principles are fundamental to understanding the Bill of Rights in its constitutional context.<sup>33</sup>
- A Bill of Rights usually imposes substantive limitations on the exercise of state power. It sets certain standards or rights, which the state may not violate or limit unreasonably. Should the state fail to protect or even limit these pre-determined rights, it will act unconstitutionally and thus unlawfully. Such unconstitutional or unlawful conduct will thus be invalid.<sup>34</sup>
- Many of the rights or duties in a Bill of Rights impose duties not only on the state, but on natural or juristic persons who must comply or protect such rights. Overall, however, the Bill of Rights is concerned mostly with protecting the individual against the excessive powers of the state.

With regard to the purpose of the Bill of Rights, one can clearly identify its value and importance within the new local government structure of South Africa. However, the sections set out in the Bill of Rights can be divided into procedural/operational provisions/rights and also substantive provisions/rights. It is not the focus of this work to explain and investigate fully the functioning of the Bill of Rights and the substantive provisions that are contained therein. There are many legal textbooks available which specifically deal with such issues in great detail.<sup>35</sup> However, it is necessary to refer to some aspects in more detail:

- Rights in general

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<sup>33</sup> Principles such as the idea of constitutionalism, the rule of law and constitutional supremacy.

<sup>34</sup> See the Constitution ss 2, 38 and 172.

<sup>35</sup> See for more information the various chapters in Chaskalson *et al* (1999) and also in De Waal, Currie and Erasmus (2001).



The Bill of Rights proclaims itself as a cornerstone of democracy in South Africa, and it enshrines the rights of all people in our country.<sup>36</sup> Again the importance of democracy within the new South African state is emphasised. The protection of the rights of *all people* (own emphasis added) in our country has important implications for non-citizens who, but for a few exceptions, are also entitled to many of the rights protected in the Bill of Rights.

The Bill of Rights further states that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. This undoubtedly has severe implications for all spheres of government and specifically also for local governments. Normally the state is required only to respect and protect fundamental rights.<sup>37</sup> However, we see here that the Constitution requires the state to act both negatively<sup>38</sup> and positively.<sup>39</sup> The determination of instances when the state must act in a positive manner will strongly depend on the type and nature of the right that is relevant to a particular issue.<sup>40</sup>

Lastly, the Constitution determines that the rights in the Bill of Rights are subject to limitations. Such rights are not absolute and can be limited. However, any limitations must comply with the requirements of the specific limitation clause provided for in the Constitution.<sup>41</sup> If a local authority limits or threatens to limit a right or rights set out in the Bill of Rights through its laws or conduct, special attention must be given to the contents of the limitation clause before such laws or actions are indeed implemented. This obligation requires all government institutions to ensure proactively that their laws, actions or policies do not unreasonably and unjustifiably limit one or more of the rights that are protected in the Bill of Rights.

- Application of the Bill of Rights

A Bill of Rights has normally specific rules regarding its application. In this regard the South African Bill of Rights is no different and the following aspects are of im

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<sup>36</sup> See the Constitution s 4(1).

<sup>37</sup> It is better to refer to the rights set out in the Bill of Rights as fundamental rights rather than human rights, because many of the rights are also applicable to legal persons.

<sup>38</sup> Not limiting or breaching rights.

<sup>39</sup> Acting proactively to achieve or fulfil a right.

<sup>40</sup> Fundamental rights can be divided into three categories, namely civil political rights or so-called first generation rights; socio-economic rights or second generation rights and also third generation rights. Positive state action is often required in cases involving 2nd or 3rd generation rights, such as the right to housing, health care and the environment.

<sup>41</sup> See the Constitution s 36.

portance:

- (a) At first, the Bill of Rights applies to *all law* (own emphasis added) and it binds the legislative, executive and judicial authorities and all organs of state.<sup>42</sup> The reference made to all law should be widely interpreted to include all legislation, be that original or subordinate legislation, the common law and also customary law. All authority in the state – legislative, executive or judicial – together with all organs of state, are bound by the provisions of the Bill of Rights. The Constitution specifically defines organs of state and also the terms “national legislation” and “provincial legislation”.<sup>43</sup> From the above wording of the Constitution it is clear that local governments are undoubtedly bound by the Bill of Rights, both in its capacity as a legislature and as an executive organ of state on the local level of government.<sup>44</sup>
- (b) Taking into account the nature of a right and also the nature of any duty imposed by the right, a provision of the Bill of Rights binds a natural or a juristic person if it is applicable and to the extent that it is applicable.<sup>45</sup> This subsection of the Constitution confirms without uncertainty that the Bill of Rights has both vertical and horizontal application, depending on the nature of the right and the nature of any duty imposed by a right.<sup>46</sup> It should be noted that some rights specifically explain who carries the responsibility to comply with duties imposed by such rights.<sup>47</sup>

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<sup>42</sup> See the Constitution s 8(1).

<sup>43</sup> In this regard see the Constitution s 239. National legislation includes subordinate legislation made in terms of an Act of parliament (eg, regulations issued by a minister) and also legislation that was in force when the Constitution took effect and that is administered by the national government. Provincial legislation includes also subordinate legislation in terms of a provincial Act, and legislation in force when the Constitution took effect and that is administered by a provincial government. “Organ of state” means any department of state or administration in the national/provincial/or local sphere of government; or any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial Constitution; or exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

<sup>44</sup> Again reference must be made to the Constitution s 2, which determines that both law or conduct must be consistent with the Constitution. It is also important to note that on the local sphere of government, municipal councils act in both legislative and executive capacities. S 151(2) states that legislative and executive authority is vested in the relevant municipal council. See also *S v Mercer* 2004 (2) SA 598 (CC).

<sup>45</sup> Refer to the Constitution s 8(2).

<sup>46</sup> Some rights, eg, the right to life or human dignity are applicable only to natural persons, while rights such as access to court or privacy are also applicable to juristic persons.

<sup>47</sup> Many rights place a duty on government as a juristic entity and not on private individuals. It is for government to take reasonably legislative measure to achieve progressive realisation of the rights to housing or health care, food, water and social security. Other rights, eg, the right that no

*continued on next page*

(c) Juristic persons are bound by the Bill of Rights only to the extent that they are required to be bound by the nature of the rights and the nature of that juristic person.<sup>48</sup> Many rights set out in the Bill of Rights are applicable only to natural persons.<sup>49</sup> The nature of such rights disqualifies juristic persons from their protection, because juristic entities do not live or have human features. It is further important to determine whether a juristic person has a private or public nature. When it has a public nature the state cannot simultaneously be bound and entitled to the rights set out in the Bill of Rights.<sup>50</sup> The nature of a local government in its role as a juristic institution excludes it from the protection of the rights contained in the Bill of Rights. It is not entirely certain what the position would be when two organs of state or different spheres of government are involved in a dispute between one another, however, and where one organ/sphere is supposedly discriminating against the other. It is submitted that the Bill of Rights cannot be enforced in such instances, however, but that other provisions in the Constitution can be called upon to protect and address the dispute.<sup>51</sup>

- Limitation, enforcement and the interpretation of the Bill of Rights

It was stated above that the rights contained in the Bill of Rights are not absolute and can be limited. Any limitation must comply with the requirements set out in the limitation clause of the Constitution.<sup>52</sup> Any limitation of a right which does not comply to the limitation clause requirements will not be reasonable and justifiable and will thus be unconstitutional and invalid. All local authorities must thus ensure that they do not fall foul of provisions of the limitation clause through either legislative actions or executive conduct.

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person may unfairly discriminate against anyone, applies also horizontally between private individuals or institutions. See s 9(4) of the Constitution.

<sup>48</sup> Refer to the Constitution s 8(4).

<sup>49</sup> The rights to life and human dignity for example.

<sup>50</sup> Fundamental rights have been developed to protect against excessive state powers.

<sup>51</sup> Eg, when a provincial government is withholding financial grants to a particular local authority on the basis of the political composition/control of that authority while other local authorities are treated much more favourably, the relevant local authority should not base its claim on unfair discrimination in terms of the Constitution, but rather on the protection given elsewhere in the Constitution. They should rather use the protection given in the Constitution Chs 10 and 13.

<sup>52</sup> See the Constitution s 36.

The protection of the rights of the Bill of Rights is further enhanced through the specific enforcement clause.<sup>53</sup> Various categories of people or institutions can approach a competent court in instances where rights of the Bill of Rights have been infringed or are under threat of being infringed.<sup>54</sup> The Constitution also provides directives for the purposes of interpreting the extent and content of the rights of the Bill of Rights.<sup>55</sup> These interpretative directives should be applied together with various other directives that were developed by the courts.<sup>56</sup>

- The substantive rights protected in the Bill of Rights:

The rights explained in (a)–(c) above are regarded as procedural rights. Most rights in the Bill of Rights are so-called “substantive rights”, however, and should be studied extensively. With the exception of a few, almost all of the substantive rights are important and applicable to local government in one way or another.<sup>57</sup> It is thus imperative for all local governments, as part of the government in general, to familiarise themselves with the content and extent of the rights of the Bill of Rights and to adhere to the constitutional obligation that the state must respect, protect, promote and fulfil the rights where applicable.<sup>58</sup>

Since the commencement of the IC and the FC, many legal disputes have been decided that have involved local governments and fundamental rights protected under the constitutions. Examples of such disputes are briefly mentioned as follows:

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<sup>53</sup> See the Constitution s 38 .

<sup>54</sup> See the Constitution s 38(a)–(e). In the case of *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC) the court doubted whether a local government could act on its own behalf in a Bill of Rights issue and do so in the interest of others. See para 15 at 933-934. See also *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T). In the case the applicant, a voluntary association, instituted proceedings against the municipality for having, according to them, unlawfully terminated the water supply to the residents’ township. The court *inter alia* held that s 38 required the words “an association” in s 38(1)(e) to be interpreted so as to be compatible with the overarching spirit, purport and objects of the Bill of Rights. Since an “association” did not require legal personality for it to sue or be sued in its own name, *ex facie* the text there were no restrictions on the *locus standi* of an association. To hold that the common law restrictions applied would be contrary to the constitutional context against which s 38 stood to be interpreted and would make the common law an unjustifiable obstacle to constitutional rights, particularly in view of the Constitution ss 39(2) and 173. See para 25 at 78B-E. The court also held that the conduct of the respondents could indeed constitute reviewable administrative action.

<sup>55</sup> See the Constitution s 39.

<sup>56</sup> See, eg, the interpretation guidelines laid down in the case of *S v Makwanyane* 1995 (3) SA 391 (CC).

<sup>57</sup> Arguably the rights to citizenship, freedom of movement and access to courts are enforceable against only national government and not local governments. See ss 20, 21 and 34 of the Constitution.

<sup>58</sup> See the Constitution s 7(2).

- (a) The cases that follow reflect the courts' decisions under the equality clause.<sup>59</sup> In *Beukes v Krugersdorp Transitional Local Council*<sup>60</sup> the court held that the present instance invoked a claim of indirect unfair discrimination: the first respondent did not levy the 'flat rate' from only black residents, nor did it levy the higher, service-based charges from white persons only, but based its charges on locality. However, its differential charges stemmed precisely from the racial history that divided those localities and confined members of various racial groups to different areas which were still largely, albeit not exclusively, racially divided. The consequence was that differential charges had an undeniable, though indirect, racial impact. The question was whether or not the differences could be historically, socially or economically justified. If they could not, they would constitute unfair discrimination and the applicant would have a valid complaint on the grounds of race.<sup>61</sup>

The first respondent's answer to the applicant's complaint regarding non-collection and waiver of arrears in townships but not in "white" areas was that it had collected moneys due to it from township residents and, to the extent that it might have waived what those residents owed, it had done so for reasons which were 'sound and businesslike'. The court held that this seemed amply warranted within the latitude which had necessarily to be permitted a public authority in exacting compliance in regard to debts owed to it from those subject to its jurisdiction. The court pointed out, however, that if a local authority were to follow a sustained locality-directed policy of non-collection or waiver which had a direct or indirect racially discriminatory impact, that policy would be unfair and open to challenge under section 8(2). However, the applicant could not claim in the present proceedings to have made out such a case.<sup>62</sup>

Finally the court held that the first respondent had stated that the "flat rate" charged in the townships had been adopted only as an interim measure and for practical reasons which included inadequate metering facilities, the long-standing boycott by black township residents of local authorities' levies and

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<sup>59</sup> The Constitution s 9, which states that everyone is equal before the law and has the right to equal protection and benefit of the law, and also that the state may not unfairly discriminate against anyone on certain grounds.

<sup>60</sup> 1996 (3) SA 467 (W).

<sup>61</sup> At 480F-H.

<sup>62</sup> At 481G/H-I, read with 481F.

the fact that municipal facilities and services in the formerly white areas were far superior to those in the townships and that that amounted to an economic and social justification for the differentiation of which the applicant complained. The differences of which the applicant complained were not based on racial discrimination, but were warranted by the localities' differing circumstances.<sup>63</sup> These cases were followed by a Constitutional Court decision in the case of *Pretoria City Council v Walker*<sup>64</sup>. In this case the applicant (appellant) successfully sued the respondent in a magistrate's court for arrear service charges for the period July 1995 to April 1996. The respondent's defence, which was not upheld by the magistrate, was that he was entitled to withhold payment by reason of the fact that the applicant's conduct had constituted a violation of his constitutional right to equality in terms of section 8 of the Constitution. The applicant had charged the residents of the former municipal area of Pretoria on the basis of a tariff for the actual consumption of water and electricity supplied, which was measured by means of meters installed on each property in that area, whereas it had charged residents in the former Mamelodi and Atteridgeville municipal areas (where no meters had been installed) a flat rate based on the amount of water and electricity supplied to such areas divided by the number of residences therein. It was the applicant's intention to install meters on each property in Mamelodi and Atteridgeville, after which residents there would be charged on the basis of water and electricity actually consumed. The court held that the differentiation in the present case was rationally connected to legitimate governmental objectives, however; not only were the measures of a temporary nature but they were designed to provide continuity in the rendering of services by the applicant while phasing in equality in terms of facilities and resources during a difficult period of transition.<sup>65</sup> With regard to the policy of the selective enforcement of the charges for municipal services, the court held further that the burden of rebutting the presumption of unfairness was on the applicant. Action had been taken against

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<sup>63</sup> See also *Port Elizabeth Municipality v Prut* No 1996 (4) SA 318 (E). In this case the respondents argued that the writing off of R63 million in outstanding services charges owed by residents of certain areas, but not their area, unfairly discriminated against them.

<sup>64</sup> 1998 (2) SA 363 (CC).

<sup>65</sup> See para 27 at 378 B-C.



defaulters in old Pretoria but not in Mamelodi and Atteridgeville, thus singling out white defaulters for legal action while at the same time consciously adopting a benevolent approach which exempted black defaulters from being sued.<sup>66</sup> In the circumstances it had to be held that the presumption of unfairness had not been rebutted and that the course of conduct of which the respondent had complained amounted to unfair discrimination within the meaning of section 8(2) of the IC. Finally, the court held that the debt that was owed by the respondent remained and that the only question was whether its payment should be enforced; the finding that the conduct of the applicant's officials amounted to unfair discrimination was an intimation that the applicant had acted incorrectly and that it should put its house in order; it was not a vindication of the respondent's refusal to pay for services rendered.<sup>67</sup>

- (b) Local governments are also confronted with the right to freedom of religion.<sup>68</sup> In the case of *Garden Cities Incorporated Association not for gain v Northpine Islamic Society*<sup>69</sup> the court held that the prohibition in a written sale agreement that the respondent may not install sound amplification equipment on the property bought from the applicant for religious usage did not infringe the respondent's right to freedom of religion. The court held that the sanctity of the agreement which the applicant had concluded with the respondent should prevail.<sup>70</sup>
- (c) With reference to the right of freedom of expression<sup>71</sup> various disputes can occur in which municipalities can have an interest. In the case of *City of Cape*

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<sup>66</sup> See para 80 at 396 A-B.

<sup>67</sup> See para 94 at 400 E-G. The court thus reversed the decision in *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T). See also the case of *Lotus River, Oltery, Grassy Park Residents Association v South Penninsula Municipality* 1999 (2) SA 817 (C), in which the court, dealing with a dispute which focussed on whether the municipality's decision to increase rates across the board by 19% for a financial year had contravened the applicant's rights to equality protected under s 9. The court held: That the respondent had discharged the *onus* of justification; it had been placed in an invidious financial position as a result of the restructuring of local government; its reliance on external subsidies was no longer available; the valuation roll was outdated and could not be updated in time for the 1998/1999 financial year; and it had a limited range of viable options and had chosen to increase rates only after careful consideration. Accordingly, even though the applicants' right to equality in terms of s 9 had been breached by the 19% increase in rates, viewed from the short-term perspective of the 1998/1999 financial year, the respondent had supplied sufficient justification for the limitation.

<sup>68</sup> See the Constitution s 15(1).

<sup>69</sup> 1999 (2) SA 257 (C).

<sup>70</sup> See 272A-H.

<sup>71</sup> The Constitution s 16.



*Town v Ad Outpost (Pty) Ltd*,<sup>72</sup> a case concerning the display of billboards in contravention with a particular by-law of the relevant municipality, the Cape High Court held that that particular advertising was a form of expression and hence stood to be protected under section 16(1) of the Constitution. The by-law further breached the respondent's right to freedom of expression by prohibiting any form of a particular mode of advertising and could not be justified under the Constitution. A similar dispute concerning the right to freedom of expression against advertising requirements was heard in the case of *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd*.<sup>73</sup> The case concerned an outdoor advertising billboard which violated the relevant municipality's by-law. Ratepayers had objected to the billboard on the grounds that it was an eyesore and a traffic hazard in a purely residential area. The first respondent resisted the application on the grounds that the by-law was unconstitutional in that it infringed their right to freedom of expression as entrenched in section 16 of the Constitution. The applicant municipality contended that the by-law was justifiable according to criteria prescribed in section 36(1) of the Constitution. Contrary to the *City of Cape Town v Ad Outpost* case above, the court held that although advertising was a constitutionally protected form of commercial speech, the applicant had adopted the measures in question in the interests of traffic safety and the appearance of the city. The applicant had a substantial interest in the regulation of the location of billboards, and the measures in question were, contrary to the respondents' contentions, rationally connected to a legitimate, substantial and pressing purpose of promoting public service and welfare. They directly advanced that purpose and were the least restrictive means available to the applicant to achieve its purpose. The court also held that the limitation of the respondents' rights was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>74</sup>

- (d) Municipalities are also regularly involved in property-related matters as well as other so called "socio-economic rights", such as the rights to access to ade-

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<sup>72</sup> 2000 (2) SA 733 (C).

<sup>73</sup> 2002 (2) SA 625 (D).

<sup>74</sup> See 636A-C.

quate housing, health care, food and water.<sup>75</sup> Not only are municipalities obliged to participate in housing schemes in order to fulfil the right to housing but they must also ensure that any eviction from land belonging to them is authorised under the Constitution and other applicable laws.<sup>76</sup>

Various land/property related disputes have already emerged under the new constitutional dispensation. In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*,<sup>77</sup> the appellant municipality owned a piece of land which it had earmarked for development in terms of a scheme which would entail the surveying of the land, its division into approximately 680 erven, the installation of water reticulation, rudimentary road networks and storm water facilities. Provision would also be made for refuse removal and a bucket system for sewerage. The intention was to allocate these erven to the very poor who were most in need of accommodation. Beneficiaries would then apply for first homeowners' subsidies, to be utilised for the erection of dwellings. During the latter half of 1998 a small group of people moved onto the land and erected shacks on it. The appellant conceded that this had been a result of a desperate need for housing in the area. It agreed to allow a limited number of families to remain on the land. Thereafter, however, increasing numbers moved onto the land. By June 1999 at least 340 structures had been erected and were occupied. The appellant served formal notice to vacate on these occupants (the further respondents), but to no avail. Their occupation made it impossible for the appellant to proceed with its proposed development. The court held *inter alia* that the deliberate and premeditated manner in which the further respondents had occupied the land had to weigh heavily against them. While it was common knowledge that the shortage of housing was a huge problem throughout the country, it could be addressed only if the relevant organs of state were allowed to plan and implement developments methodically. The premeditated and wanton occupation of land in order to blackmail municipalities into giving occupiers preferential treatment could not be countenanced.

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<sup>75</sup> Refer to the Constitution ss 25, 26 and 27.

<sup>76</sup> In this respect refer to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. Under s 1 of the Act an owner of land includes an organ of state which includes a municipal council.

<sup>77</sup> 2001 (4) SA 759 (E).

There was therefore no doubt that the public interest demanded that the courts intervene effectively to avert such conduct.<sup>78</sup>

A further and very significant case concerning socio-economic rights relating to land was the case of *Government of the RSA v Grootboom*.<sup>79</sup> In this case the respondents had been evicted from their informal homes situated on private land earmarked for formal low-cost housing. They applied to a High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The High Court held that section 28(1)(c) of the Constitution of the Republic of South Africa Act 108 of 1996 obliged the state to provide rudimentary shelter to children and their parents on demand if the parents were unable to shelter their children, that this obligation existed independently of and in addition to the obligation to take reasonable legislative and other measures in terms of section 26 of the Constitution and that the state was bound to provide this rudimentary shelter irrespective of the availability of resources. The appellants were accordingly ordered by the High Court to provide the respondents who were children and their parents with shelter. The appellants appealed against this decision. The respondents based their claim on two constitutional provisions: section 26 of the Constitution, which provides that everyone has the right of access to adequate housing, thereby imposing an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources, and section 28(1)(c) of the Constitution, which provides that children have the right to shelter.

In this landmark decision the Constitutional Court held *inter alia* the following:

- (i) The state was obligated to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing<sup>80</sup>
- (ii) Section 26 as a whole placed, at the very least, a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The manner in

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<sup>78</sup> See para D at 772A-F.

<sup>79</sup> 2001 (1) SA 46 (CC).

<sup>80</sup> Para 24 at 62D-E.

which the eviction in the present circumstances had been carried out had resulted in a breach of this obligation. Section 26(2) made it clear that the obligation imposed upon the state was not an absolute or unqualified one. The extent of the state's obligation was defined by three key elements which had to be considered separately: the obligation (i) to take reasonable legislative and other measures, (ii) to achieve the progressive realisation of the right and (iii) within available resources.<sup>81</sup>

(iii) Reasonable legislative and other measures (such as policies and programs) had to be determined in the light of the fact that the Constitution created different spheres of government and allocated powers and functions amongst these different spheres emphasising their obligation to cooperate with one another in carrying out their constitutional tasks. A reasonable housing program capable of facilitating the realisation of the right therefore had to clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources were available to implement it. Furthermore, the formation of a program was only the first stage in meeting the state's obligations. The program also had to be reasonably implemented, as failure to do so would not constitute compliance with the state's obligations;<sup>82</sup>

(iv) The national government bore the overall responsibility for ensuring that the state complied with the obligations imposed by section 26. However, the court confirmed that section 26 did not entitle the respondents to claim shelter or housing immediately on demand.<sup>83</sup> In light of the background the court reversed, in part, the decision in *Grootboom v Oostenberg Municipality*.<sup>84</sup>

A further reference to the right of property was made in the case of *Ex Parte Optimal Property Solutions CC*.<sup>85</sup> In this case the applicant had applied for the removal of a title deed restriction registered in the title deed of three erven. In

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<sup>81</sup> See pages 66-67 and 84-85.

<sup>82</sup> Refer to paras 39 and 42 at 67-69.

<sup>83</sup> Paras 66-69, 93-95 at 79-80 and 86.

<sup>84</sup> 2000 (3) BCLR 277 (C).

<sup>85</sup> 2003 (2) SA 136 (C).

terms of section 3(6) of the Removal of Restrictions Act,<sup>86</sup> service of such application had to be given to affected property owners in both official languages and had to be published once in the Provincial Gazette. With reference to such title conditions the court held that a restrictive condition imposed in the title deed of every lot in a township subdivision that "not more than one house shall be erected on any one lot" created a reciprocal praedial servitude imposing contractual rights and obligations on all the owners of the affected erven. The registration of those servituted rights and obligations resulted in the creation of real rights in property. It followed that any alteration to or removal of such title deed conditions altered or terminated the rights and obligations of the affected property owners *inter se* and altered or expunged, as the case may be, real rights in property. The courts would not, therefore, assume the power at common law to alter or remove title deed conditions of this nature without the consent of every affected property owner.<sup>87</sup> The court concluded that for purposes of section 25(1) of the Constitution of the Republic of South Africa Act 108 of 1996, "property" included a registered praedial servituted right [restrictive condition] and removal or deletion of such rights was *pro tanto* a deprivation of property.<sup>88</sup>

- (e) Arguably the most applicable right protected in the Bill of Rights for local governments is the right to access to information and just administrative action.<sup>89</sup> As a sphere of government, municipalities are mostly involved in executive processes which are directly relevant to the principles of administrative law. A good and sound knowledge of administrative law is essential to every municipal council or other functionaries of such a municipality. The following cases are indicative of the wide variety of administrative disputes that local authorities face regularly. In *Cape Metropolitan Council v Metro Inspection Services CC*<sup>90</sup> the court held that section 33 of the Constitution was not concerned with every act of administration performed by an organ of state, but was designed to control the conduct of the public administration when it exercised a public

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<sup>86</sup> 84 of 1967.

<sup>87</sup> See paras 4, 5 and 6 at 139C-G.

<sup>88</sup> Para 19 at 143-144.

<sup>89</sup> See the Constitution ss 32 and 33.

<sup>90</sup> 2001 (3) SA 1013 (SCA).

power and that it followed that whether or not conduct amounted to "administrative action" depended on the nature of the power being exercised. Other relevant considerations were the source of the power, the subject-matter, whether it involved the exercise of a public duty and how closely it was related to the implementation of legislation.<sup>91</sup>

The court further concluded that the appellant derived its power to cancel the contract from the terms of the contract and the common law; when it had concluded the contract it did not act from a position of superiority or authority, nor did it, when cancelling, find itself in a stronger position than the position it would have been in had it been a private institution; and when it purported to cancel the contract, it did not perform a public duty or implement legislation. The court further held that different considerations applied where a contract between an organ of state and a private entity was preceded by purely administrative actions and decisions by officials in the sphere of the spending of public money by public bodies in the public interest; these amounted to administrative actions because section 217(1) of the Constitution specifically provided that, when an organ of state in the national, provincial or local sphere of government contracted for goods or services, it had to do so in accordance with a system that was fair, equitable, transparent, competitive and cost effective.<sup>92</sup> The municipality cancelled the contract, however, because of a material breach of the contract whose cancellation did not amount to administrative action under section 33 of the Constitution.<sup>93</sup>

In a further development the Supreme Court of Appeal held in the case of *Fedsure Life Assurance v Greater Johannesburg TM Council*<sup>94</sup> that it was common cause between the parties that in taking the resolutions to impose a general rate in the rand on the ratepayers in order to yield an excess of in-

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<sup>91</sup> See paras 16 and 17 at 1023B-H.

<sup>92</sup> See paras 18 and 19 at 1023-1024.

<sup>93</sup> Para 22 at 1025F-G. The court thus reversed in part the decision in *Metro Inspection Services (WC) CC v Cape Metropolitan Council* 1999 (4) SA 1184 (C). See also *Frans v Groot Brakrivier Munisipaliteit* 1998 (2) SA 770 (C).

<sup>94</sup> 1998 (2) SA 115 (SCA).

come over expenditure, the respondent municipalities had performed administrative acts.<sup>95</sup>

### 6.7.1.5 General Constitutional requirements important to Local Government

It was explained earlier that there are many other provisions set out in the Constitution that are important to local governments. These aspects/requirements are divided in two categories. The first category is all the requirements directed at local governments alone, while the second category refers to those requirements that are relevant to all spheres of government, thus including local governments. Chapter 7 of the Constitution, under the heading Local Government, contains the aspects that are mentioned in category one. Category two aspects can be summarised as follows:

- *Principles of co-operative government* These principles are applicable to all spheres of government and as such are also very important to the local sphere of government.<sup>96</sup>
- *Vesting of legislative authority* The Constitution specifically determines where the legislative authority of the Republic of South Africa is vested: on a national level it is vested in parliament, on a provincial level in provincial legislatures and at a local level in municipal councils.<sup>97</sup> Local governments are also entitled to participation in the proceedings of the National Council of Provinces and are therefore involved in the highest legislative level of the state.<sup>98</sup> It is of interest to note that in respect of executive authority the Constitution does not explain where such responsibility vested in one section specifically, as is the case with legislative authority. Executive authority is dealt with in three separate sections of the Constitution.<sup>99</sup>
- *Assignment and provincial supervision of local government* Any power or function that is to be exercised or performed in terms of an Act of parliament or a provincial

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<sup>95</sup> The court also held that it was further common cause that the interim Constitution had operated at the time the proceedings had been instituted but that the interim Constitution had been superseded by the Constitution of the Republic of South Africa, 1996 by the time judgment was given in the court *a quo*. Accordingly, in terms of the Constitution s 17 of Sch 6, the jurisdiction of the court to adjudicate on any challenge based on the lawfulness or not of administrative actions performed by the respondents had to be determined in terms of the interim Constitution, unless the interest of justice required otherwise.

<sup>96</sup> See the Constitution ch 3.

<sup>97</sup> See the Constitution s 43.

<sup>98</sup> See the Constitution ss 67 and 163.

<sup>99</sup> On the provincial levels, executive authority is vested in the premiers of the provinces, and on a local level such authority is vested in the different municipal councils. S 85(1) states that the executive authority of the Republic of South Africa is vested in the president. This refers to national executive authority.



Act can be assigned to a Municipal council.<sup>100</sup> Provincial authorities cannot assign powers or functions only to municipalities; they are also constitutionally entitled to intervene when a municipality cannot or does not fulfil an executive obligation.<sup>101</sup> Assignment of functions and provincial supervision are very important considerations for local authorities and can have serious implications in general.

- *State institutions in support of constitutional democracy* The Constitution specifically provides for various institutions that have been entrenched in the text of the Constitution and have the overall aim to support and enhance constitutional democracy. Local authorities within the structure of government must also adhere to the broad constitutional objectives in creating a democratic state. Therefore, all the state institutions mentioned in the Constitution will play an important role in supporting democracy on a local government level.<sup>102</sup>
- *Principles regarding the public administration* Public administration can broadly be defined as the administrative branch of the state; the public administration is thus divided between the different levels of government and must be governed by the democratic values and principles that are enshrined in the Constitution.<sup>103</sup> All local government administrations must therefore comply with the requirements governing the public administration in general.<sup>104</sup>
- *The role of the security services* The Constitution specifically sets down certain requirements and obligations in respect of the overall security services of the Republic of South Africa. Although these principles are applicable to mostly national government, there are aspects that are important to local governments and must be taken into account. It is specifically provided that the national police service must be structured to function in the national, provincial and, *where appropriate*, the local spheres of government.<sup>105</sup> These requirements are thus of importance to municipalities in certain instances. It will be explained and discussed later, but in the new local government structure the functioning of security services, especially new metropolitan police services, will play and provide important security roles

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<sup>100</sup> See the Constitution s 126.

<sup>101</sup> See the Constitution s 139(1).

<sup>102</sup> See the Constitution ch 9. Such institutions *inter alia* include the Public Protector, the Auditor General and the Human Rights Commission, to name but a few.

<sup>103</sup> See the Constitution s 195(1).

<sup>104</sup> In this regard see the whole of the Constitution ch 10.

<sup>105</sup> See the Constitution s 205(1).

and services in certain municipal areas in the future. Without the effective implementation of security services it is hard to imagine the overall success and attainment of the objectives set out for municipal governments.

- *Traditional leaders and local government* It is moot law that traditional leaders have played an important part in African development and customs. Taking the history and composition of our country into account, it is self evident that traditional leaders have and will have important roles and functions to fulfil. It is submitted that the new goals and objectives as well as effective functioning of local authorities will not be achieved without the proper and generally accepted inclusion of traditional leaders within local authorities. This aspect is specifically emphasised through the constitutional protection given to traditional leaders.<sup>106</sup>
- *Principles of public/government finance* The Constitution also contains many important financial requirements and principles that are of crucial importance to all spheres of government.<sup>107</sup> Without sound fiscal policies and strict management systems, no form of government will succeed in achieving growth and ensuring compliance to its constitutional objectives. The financial aspects are thus of fundamental importance to all municipalities.

## 6.8 Conclusion

In this chapter many of the challenges and problems that are facing the new local government structure have been identified. The overall role and importance of the Constitution has also been highlighted and a distinction between general constitutional requirements and specific local government matters has been made. Compliance with all of these aspects and requirements are of fundamental importance for the overall success and stability of the state as a whole.

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<sup>106</sup> See the Constitution ch 12.

<sup>107</sup> See the Constitution ch 13.

## The status, objects, challenges and developmental duties of local authorities

### 7.1 Introduction

In the new constitutional dispensation, local government has been confirmed as a sphere of government at which government authority is exercised. Although local authorities are the smallest governmental institutions in a state, they are often regarded as the cornerstone of modern democratic systems.<sup>1</sup> The role of local governments in democratic systems is multiple, and some important aspects can be summarised as follows:

- Local government is the branch of government that functions the closest to the inhabitants/constituents of a specific area and is involved with the rendering of wide variety of services that materially affects the lives of all the people residing in its jurisdiction.
- Local authorities serve as an effective counterweight to the over-concentration of governmental authority in the other levels/branches of government. This positive influence can be achieved only if local governments are afforded a certain measure of autonomy.<sup>2</sup>
- Local authorities are often seen as local community-based management and administrative institutions which involve both political and bureaucratic components. Through these institutions, community actions and needs are promoted and regulated. In this capacity local governments are the best positioned to provide and ensure the sustainable provision of essential services to their relevant communities.

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<sup>1</sup> See Rautenbach and Malherbe (1999) 299.

<sup>2</sup> Rautenbach and Malherbe state that it is generally accepted as a sound principle that the local level of government should be an autonomous level of government. *Abid* 300.

- Through the exercise of their powers and functions, local governments ensure access to and bring the decision-making processes closer to the local residents. This then allows for better participation and involvement by local residents in the local government processes and decisions that affect their lives on a daily basis. By its nature, local government is best suited to allow and encourage local participation in all democratic processes and to provide an important training ground for democracy and political experiences. After gaining experience in local government affairs, local political leaders are often taken into higher levels of government.

It must be emphasised, however, that the advantages of a third or local sphere/branch of government can be severely limited if such a sphere of government is not supported through specialised expertise, financial backing and administrative infrastructure. Without such support in place, most municipalities will not be able to perform their functions and fulfil their obligations.

Apart from the advantages mentioned above, a local or third level of government is also confronted with certain disadvantages. The following disadvantages are generally accepted:<sup>3</sup>

- Most local governments often have to compete with higher levels of government over scarce resources; for example, water resources and tourism-promoting environments.
- Small municipalities are often manipulated by wealthy and powerful private enterprises. This must be guarded against, as it could lead to decisions that are not in the interests of the general public of that area.
- Through the process of decentralisation, many functions of higher spheres of government can be decentralised/delegated to local authorities in an attempt to abandon their responsibilities. Such practices can have severe negative implications on both financial and social standards and must be avoided at all costs.<sup>4</sup>

With reference to the abovementioned information it is important to determine specifically the status and role of local authorities within South Africa's new constitutional

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<sup>3</sup> See Rautenbach and Malherbe (1999) 300.

<sup>4</sup> The Constitution specifically protects local government in this respect. National or provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or functions. See the Constitution s 151(4). National and provincial governments must support and strengthen the capacity of municipalities to manage their own affairs and exercise their powers and functions.

order. The relevant status of local authorities is very important with reference to the extent of autonomy that is afforded to such a level of government.

In general, almost all modern states provide for different levels of government within their governmental structures. The division of government functions between different levels provides for a mechanism whereby government authority is distributed. It is important that government authority be distributed and exercised at the specific level where it is to be the most effective and efficient. In this regard each system differs from another and each state usually determines a specific system that is most suitable for its own circumstances. In most states provision is made for at least two, but mostly three, levels or spheres of government. Most frequently, the decision to have two or three levels is determined after various factors have been taken into account.<sup>5</sup> Many of these factors differ from state to state, and therefore all states have developed their own unique structures.<sup>6</sup>

After the recent constitutional reform South Africa has developed a new government system according to the new constitutional requirements and has entrenched three specific spheres of government. The Constitution identifies and explains these three spheres as follows:<sup>7</sup>

- In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.
- All spheres of government must observe and adhere to the principles of co-operative government and must conduct their activities within the parameters of such requirements.
- The importance of this division specifically lies in the confirmation that all three spheres of government are distinctive, interdependent and interrelated. The word “distinctive” protects and confirms each sphere’s independence or autonomy and it influences the manner in which each sphere is to operate and fulfil its powers and functions. The words “interdependent” and “interrelated” in turn refer to the constitutional commitment to an overall system of co-operative government in the Republic. The Constitution confirms that all spheres of government are to a

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<sup>5</sup> These factors include historical, political, geographical, economical and administrative information as well as specific population figures.

<sup>6</sup> In some states, eg, in the Netherlands, local authorities are mere administrative organs. In Germany however, local authorities are afforded distinctive and autonomous powers and functions.

<sup>7</sup> The Constitution s 40.

greater or lesser degree interdependent and interrelated and that all spheres should work together to achieve the new constitutional obligations and objectives. Section 40 was included in the final Constitution in compliance with Constitutional Principle XVI which, under the final Constitution, required the government to be structured on a national, provincial and local level.<sup>8</sup> Under this division each sphere has its own constitutionally determined powers and functions, which must be exercised and fulfilled according to the newly established constitutional mandate. Before one is to investigate the implications of local government as a part of the overall governmental structure, it is important to consider the unique characteristics of the local sphere of government.

## 7.2 The characteristics of local governments

In essence the characteristics of a local authority are threefold. *At first* a local authority is an identifiable juristic entity which has been formed within a specific area of jurisdiction by the community of that area. The entity is then tasked and bonded together by the common interests of the people of that area. *Secondly*, all local authorities provide a forum for local community participation in the affairs of government, albeit on the local level. This protection to participation is often referred to as “grass-roots democracy”.<sup>9</sup> In the *last instance* local governments are local political institutions which have been empowered with executive and legislative powers and functions. The significance and importance of the fact that local authorities are part of the political structure of the state must never be overlooked or underestimated.<sup>10</sup>

## 7.3 The importance of being a sphere of government

It was shown above that local government as a distinctive, interdependent and inter-related part of the overall government of the Republic of South Africa has become a constitutional fact.<sup>11</sup> Gone are the days when local authorities were mere phenomena of applied administrative law.<sup>12</sup> It is, however, of interest to note that the final

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<sup>8</sup> 200 of 1993 and CP XVI.

<sup>9</sup> One must again remember that the Constitution requires an overall democratic state in which public participation is of fundamental importance. See ss 1 and 152(1)(a) and (e) of the Constitution.

<sup>10</sup> See Meyer (1997) 8.

<sup>11</sup> See the Constitution ss 40 and 43.

<sup>12</sup> Under the constitutional dispensation in South Africa prior to 1994, parliament was supreme, and local authorities were mere administrative units under mostly the control of provincial administrations. Traditionally municipalities were regarded as mere service delivery units of government. With the enactment of the interim Constitution and the final Constitution, an important paradigm

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Constitution refers to a sphere of government and not a level of government.<sup>13</sup> This new reference to sphere is not unimportant and should be carefully considered.

In the first place the term sphere of government refers to a specific area of jurisdiction or territory. Many constitutional and local government scholars believe that the reference to sphere and not level of government in the final Constitution is aimed at emphasising a new relationship between the different branches of government. It is argued that the reference to sphere, as opposed to level or tier of government, indicates a radical shift away from the hierarchical division of government structures and powers of the past. It also signals a new era of co-operative, distinctive, governmental structure that is afforded constitutional recognition and protection.<sup>14</sup> In such a relationship each sphere of government has its own distinctive status, powers and functions, which are entrenched in the Constitution. The higher government institutions are not automatically permitted to encroach or intervene in the powers or functions of lower government institutions. Disputes between the various spheres of government are to be resolved through co-operation and interaction rather than through legal battles and animosity. The reference to sphere of government thus refers to a government of distinctiveness and cooperation in contrast with a government of subordination.<sup>15</sup>

The reference to sphere rather than level is also important with regard to local government autonomy. No government institution can really be autonomous if it doesn't have a say in or isn't permitted participation in the governmental processes that have a direct or indirect influence on its own powers and functions. It is submitted that the reference to sphere of government specifically enhances not only the autonomy of the different spheres but also strengthen and advance inter-governmental participation and support.<sup>16</sup> Suffice it to say that the reference to spheres of government truly affords each sphere distinctive status and protection and also gives government constitutional guidance on how inter-governmental relations and cooperation are to

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shift took place, and local governments are now afforded autonomous status within the overall structure of government.

<sup>13</sup> See the Constitution ss 40(1), 43 and 151(1).

<sup>14</sup> See Chaskalson *et al* (1999) 5A – 26.

<sup>15</sup> Refer to the ch on co-operative government for a more detailed discussion on all the principles regarding cooperation between the different spheres of government.

<sup>16</sup> Good examples of local government participation in higher levels of government can be found in the Constitution ss 67, 154(2) and 163.



be developed. Through the term "sphere of government" all three divisions of government are treated independently. Although the Constitution provides the basic framework for this structure of co-operation, the total system should ultimately be completed by other national legislation.<sup>17</sup>

#### **7.4 The status of municipalities**

The status of municipalities is significantly linked to the reference to sphere of government and not level of government. The new constitutionally entrenched status of municipalities is so important to the new government structure that the Constitution includes a section specifically protecting and explaining such status. In this regard the Constitution states the following:<sup>18</sup>

- The local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic.
- The executive and legislative authority of a municipality is vested in its Municipal Council.
- A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
- The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

A few important aspects of section 151 should be emphasised:

- Through section 151, the Constitution confirms the distinctive nature of the local sphere of government, which consists of municipalities.<sup>19</sup> The Constitution further sets the obligation<sup>20</sup> that the local sphere of government must be established for the whole territory of the Republic of South Africa. It is thus envisaged that no area in the state will be excluded from the jurisdiction of a local government in one form or another.<sup>21</sup>

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<sup>17</sup> See the Constitution s 41(2).

<sup>18</sup> Refer to the Constitution s 151.

<sup>19</sup> It should be noted here that there are three categories of municipality and various types of municipality within each category. These different categories and types will be discussed later in more detail.

<sup>20</sup> See the word "must" in the Constitution s 151(1).

<sup>21</sup> This aspect also confirms the importance of local government to all legal scholars. No matter where people find themselves in South Africa they will always fall under the jurisdiction of a particular local authority.

- The Constitution also confirms that all authority, be that executive or legislative, is vested in the Municipal Council of that local authority.<sup>22</sup>
- A limited measure of autonomy is further confirmed in section 151(3) of the Constitution. Municipalities have the right to govern all local government affairs on their own initiative. This right is, however, restricted and subjected to national and provincial legislation that is provided for in the Constitution itself. One can thus conclude that local governments do not have a comparable autonomy to what national or even provincial spheres have.<sup>23</sup> Although the autonomy and status of municipalities have been improved, these are still subjected to intervention by the two higher spheres. The subjection to higher intervention is curtailed by the constitutional text itself, however.<sup>24</sup> Once again it is of importance to note that national or provincial legislation also includes subordinate legislation and legislation that was in force when the Constitution took effect and that is administered by national or provincial governments respectively.<sup>25</sup>
- National or provincial intervention or control over local government affairs is further restricted by the Constitution in its determination that such governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.<sup>26</sup> *Prima facie* this looks like a contradiction in terms. On one hand a municipality has the right to govern on its own initiative, subject to national and provincial legislation, but on the other neither national or provincial governments may compromise or impede a municipality's ability or right to exercise its powers or perform its functions. Closer investigation of the text of the Constitution indicates that the right to govern is limited by the Constitution itself. The Constitution alone is but the framework for the new structure of government and, espe-

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<sup>22</sup> See the Constitution s 151(2). This important role of a Municipal Council will again be alluded to later.

<sup>23</sup> *In re: Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) the court held that local government structures were given more autonomy in the new text than in the interim Constitution and this autonomy was sourced in the new text and not derived from anything given to local government structure by the provinces. Further, it held that, whereas Sch 6 of the interim Constitution listed a broad functional area of provincial legislative competence which was termed "local government, subject to the provisions of ch 10", the new text specifically listed the particular areas of local government which in terms of Schs 4 and 5 of the new text fell within the legislative competence of provinces. To this extent there was some diminution in provincial legislative power. There was also a corresponding diminution in the executive power of the provinces that flowed from their diminished legislative powers. See paras 462 and 463 at 905-906.

<sup>24</sup> Refer to the Constitution s 151(3). A *carte blanche* intervention is not envisaged.

<sup>25</sup> See the Constitution s 239 for the complete definitions of national and provincial legislation.

<sup>26</sup> See the Constitution s 151(4).

cially with regard to local government, requires the enactment of national and provincial laws to complete the structure. To exclude municipalities from such national or provincial laws will be contrary to the text of the Constitution itself. However, where the Constitution has already determined a municipality's ability or right to exercise its powers or perform its functions, such constitutionally founded protection may not be compromised or impeded by national or provincial governments. It is also important to note that section 151(4) does not refer to national or provincial legislation, but rather to national or provincial governments. It is thus possible to conclude that neither the legislative authority nor the executive authority of the two higher spheres may compromise or impede the rights or abilities of municipalities that are protected in terms of the Constitution.

It seems that the Constitution provides local government with a significant measure of at least administrative autonomy against higher levels of government. On a legislative basis this autonomy is restricted to the extent that a municipal by-law that conflicts with national or provincial legislation is invalid.<sup>27</sup> This invalidation of municipal by-laws is subject to the provisions of section 151(4), however, as was explained above.

In summary of the status of municipalities, it is safe to say that the Constitution clearly entrenches local government as a distinctive and interdependent sphere of government. The concept of a sphere is often referred to in the Constitution.<sup>28</sup> This new constitutionally entrenched status should enable local governments to defend and resist attempts to intrude on their specific terrain and also to defy attempts from other government institutions to interfere or encroach on their powers and functions in an unconstitutional manner. Municipalities are afforded much more autonomy than they had before 1993 and are thereby more assured of real independent decision-making opportunities.<sup>29</sup> All the powers and functions of local authorities are protected

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<sup>27</sup> See the Constitution s 156(2).

<sup>28</sup> See the Constitution ss 40, 41, 43, 151, 205(1), 214(1), 215(2)(c), 238 and 239.

<sup>29</sup> With reference to local government autonomy the Constitutional Court in the case of *In re: Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) held that, while local government structures were given more autonomy in the new text than they were given in the interim Constitution, it had to be borne in mind that the interim Constitution contemplated that local government would be autonomous, though it did not delineate the boundaries of the autonomy as clearly as the new text. Whereas in the interim Constitution the potential concurrency of powers in parliament and the provincial legislatures was in respect of the whole field of local government, in terms of the new text power would be allocated to specific areas of competence. It was in this proc-

*continued on next page*

in the Constitution, and higher spheres may intervene only if constitutionally mandated to do so. This protection of the autonomy of local governments is generally accepted to provide a system of effective and efficient government in the new constitutional state and to protect it. It is important, however, to emphasise that without proper financial support and the provision of infrastructure, local government autonomy can be negatively compromised.<sup>30</sup> It is in the last instance also of value to note that the Constitution does not stipulate that the field of local government *per se* is a functional area of provincial or national legislative authority.<sup>31</sup> This exclusion from national or provincial legislative competence further confirms and strengthens local government autonomy as an interdependent sphere of the government. Although both national and provincial governments may exercise powers in relation to local government matters, they may do so only if permitted to do so by the Constitution. Local governments must be aware of their constitutional protection, but should also not lose sight of the fact that their entrenched status also carries a substantial burden. As a part of the government, local authorities have various constitutional obligations that they are compelled to fulfil and to which they are compelled to adhere.

### **7.5 The objects of local government**

Apart from establishing local government as a specific sphere of government, the Constitution also directly sets specific objects for local governments that should be achieved within the lowest level of government operations. In this regard the Constitution states that:<sup>32</sup>

- The objects of local government are
  - (a) to provide democratic and accountable government for local communities
  - (b) to ensure the provision of services to communities in a sustainable manner
  - (c) to promote social and economic development
  - (d) to promote a safe and healthy environment and

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ess that the local authorities were afforded greater autonomy at the expense of both parliament and the provincial legislatures.

<sup>30</sup> See Devenish (1998) 203.

<sup>31</sup> The Constitution Schs 4 and 5 provides for the functional areas of concurrent and exclusive national and provincial legislative authority. Parts B of both Sch 4 and 5 have incorporated all the traditional local government functions, thus allowing either national, provincial or even local governments to legislate over such matters. The legislative competence to legislate over local government as an institution or sphere of government is not included in either of the Schs.

<sup>32</sup> Refer to the Constitution s 152.

(e) to encourage the involvement of communities and community organisations in the matters of local government.

- A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

The constitutional provision of specific objects of local governments is strongly linked and founded on the traditional purpose of local authorities and is in confirmation of its role and duties. In the Local Government Transition Act<sup>33</sup> it was stated that every municipal authority must conduct its affairs in an effective, economical and efficient manner to optimise the use of resources, to meet the needs of its respective community, to structure and manage its administration and financial management, to promote social and economical development and also to support and implement national and provincial programmes.<sup>34</sup> Section 152 now incorporates some of the provisions of the LGTA and sets the constitutional foundation for the objects of local government in general, thus creating an overarching set of obligations that are to be achieved.

In essence the specified objects are to confirm the new constitutional commitment to an overall democratic state and accountable government, to ensure the sustainable provision of services to the people of the country, to promote social and economic upliftment and development, to create a safe and healthy environment and finally to revitalise public participation and involvement. The different objects are thus clear and in no need of further explanation, but the systems and programmes that must be put in place in order to achieve these objectives present formidable challenges to all involved in local government, be they political leaders, municipal administrators or the relevant local communities themselves.

## **7.6 The new challenges and developmental duties facing municipalities**

Local government has been entrenched as part of the new structure with its commitment of a government founded on new constitutionally protected values.<sup>35</sup> The new local government system had to be built on some of the strengths and structures of the transitional system. This in itself presented local government with interesting challenges. Apart from these challenges, almost all local authorities the world

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<sup>33</sup> 200 of 1993.

<sup>34</sup> See the LGTA s 10G.

<sup>35</sup> See the Constitution s 1.

over are facing new demands, especially in providing viable and environmentally stable urban and rural developments. In the new South Africa many other unique challenges have also been identified. Some of these challenges are summarised as follows:<sup>36</sup>

- Addressing and transforming skewed settlement patterns. Many current patterns are functionally inefficient and costly.
- Redistribution of concentrations of taxable economic resources, which are founded mostly in former white settlements.
- To address the huge backlogs in service infrastructure in almost all historically underdeveloped areas. This challenge requires municipal expenditure far in excess of the revenue that is currently available.
- To create viable municipal institutions in areas with dense rural settlements. These areas have usually large population figures with minimal access to services and little or no economic tax base to support financial limitations.
- To integrate the spatial disparities between towns and townships. The spatial disparities are largely responsible for increased demands on service provision and high transport costs.
- To create municipal institutions which recognise the linkages between urban and rural settlements.
- To change the former modes of decision making and administrative systems in local authorities and to ensure sustainable delivery and provision of services to the broad community.
- To uplift and promote private sector involvement and the poor creditworthiness of many municipal councils. Administrative capacity in most municipalities must also be reformed. Some institutions have little or no pre-existing institutional foundation to build on.
- To rebuild the relationships between newly demarcated local authorities and their local communities. Municipalities should be particularly sensitive towards the needs of people who tend to be marginalised within their communities.<sup>37</sup>

As part of the government, all local authorities have been given a new constitutional mandate to uplift and sustain acceptable and viable human settlements. The chal-

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<sup>36</sup> See the White Paper on Local Government (1998) at 35.

<sup>37</sup> Such people should specifically include women and persons with disabilities.

lenges mentioned above are comprehensive in nature and difficult to achieve in practice. Local governments will have to reposition and re-equip themselves in order realistically to be in a position to fulfil these challenges. All possible efforts should be set in motion to achieve optimal success, but only time will tell if they have succeeded.

## **7.7 Developmental duties of municipalities**

### **7.7.1 Introduction**

Apart from the constitutionally founded objects of local government, all municipalities are also constitutionally obligated to fulfil certain developmental duties. It is the task of all local government institutions to work individually and in co-operation with their local communities to ensure sustainable ways to meet the needs and to improve the quality of life for all people of South Africa. In this regard it is of fundamental importance and in the interest of the nation as a whole that local government is capacitated and transformed to play a developmental role. In essence, a developmental local government is intended to have a major impact on the daily lives of all South Africans. Developmental duties cannot be achieved without the co-operation and constructive support of both national and provincial governments, however. In instances where local authorities are not successful in developing their own strategies to meet community needs, national and provincial governments may have to adopt a more prescriptive approach. In this regard it is important to note that developmental duties should not be seen on an individual basis within each sphere of government, but should be promoted on a collective basis within government as a whole.

### **7.7.2 The constitutional obligations**

The Constitution specifically entrenches the developmental duties of municipalities. In this regard section 153 states that a municipality must

- structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community and to promote the social and economic development of the community and
- participate in national and provincial development programmes.

The Constitution is clear on the fact that all municipalities must do their best to attend to the basic needs of people and to promote social and economic development. The Constitution is silent on how local authorities are to structure and manage their administrations, budgets and planning processes in order to fulfil their developmental duties, however. It is submitted that political policies and programmes combined with



community proposals should form the basis of most developmental plans. As a starting point such plans must give priority to people's basic needs and their social and economic upliftment. Development and upliftment should be regarded as synonymous in this regard. In a determination of whether or not priority is really given to the mentioned needs, an objective evaluation of the actions and steps taken by municipalities will be required. This will differ from case to case and will be influenced by the relevant circumstances of each situation.

It is further submitted that if the facts of a case indicate that a municipality has not given priority to the needs of its community and to promoting social and economic development, its actions or programmes will be contrary to the constitutional obligation in this regard and should be declared unconstitutional and invalid. This would further create a possible situation where the judicial authority of the country is called upon to adjudicate on the legislative or even executive powers of a local sphere of government. The judicial authority does not usually prescribe to the legislative or executive authority how it should structure and manage its administrations and how it should prioritise its programmes and policies. It is submitted, however, that the Constitution specifically allows for such judicial intervention when municipalities are not complying with their developmental duties.<sup>38</sup>

#### **7.7.2.1 The nature and characteristics of developmental local government**

In principle the idea of developmental local government refers to local governments that are committed to working with the people within their respective communities in an effort to find sustainable ways to meet their different social, economic and material needs and improve their overall quality of life. This commitment is indeed the foundation of the new constitutional vision for local government. The Constitution specifically enshrines the rights of all people in our country<sup>39</sup> and, depending on the availability of resources, it commits our government to taking all reasonable measures to ensure that all South Africans have adequate access to housing, health care, education, food, water and social security.<sup>40</sup> The reality in many towns and, more particularly, in many rural areas is far from this ideal. Millions of people live in dire poverty and without basic services and life-sustaining support. It is the task of the

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<sup>38</sup> For more detail on this point, refer to ss 2, 8 and 172 of the Constitution.

<sup>39</sup> See the Constitution s 7.

<sup>40</sup> See the Bill of Rights ss 26, 27, 28 and 29.

new developmental local government structures to ensure human upliftment and the provision of sustainable essential services. All efforts and resources must be directed carefully in order to achieve the overall developmental obligations.

#### **7.7.2.2 Interrelated characteristics of developmental local government**

According to the White Paper on Local Government, the nature of a system of developmental local government comprises four specific interrelated characteristics.<sup>41</sup> These characteristics are: maximising social development and economic growth, integrating and co-ordinating activities, democratising development and a process of leading and learning. These four characteristics form the basis on which the new developmental local structures are to be developed, and they are thus in need of further explanation.

##### **(a) Maximising social development and economic growth**

Social upliftment and economic growth are in the forefront of developmental local government. All powers and functions that are accorded to local governments should be exercised in such a way as to ensure maximum advancement of social development. Social development can be achieved only if the basic needs of people are provided for and if financial resources are available. Without continuous growth within local economies not enough funding will be available to ensure the basic provision of services. In this regard local authorities are dependent not only on the economic policies and success of the national government, but also on their own creative initiatives to secure investment and resources.

Without doubt local governments, through the exercise of their traditional responsibilities,<sup>42</sup> exert a great influence over the social and economic well-being of local communities. Local authorities collect large sums of rates and taxes, and they employ many people and pay many salaries. In some cases they are responsible for the pricing and quality of basic life necessities such as water, electricity and sanitation services, and they also control the direction of land-development projects. Local governments themselves often own substantial amounts of land, and they are frequently involved in the purchasing of goods and in other economic activities. In this regard they substantially contribute to the flow of money within their local economy. Furthermore, local governments are responsible for setting the agendas for local

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<sup>41</sup> See White Paper on Local Government (1998) at 38.

<sup>42</sup> Eg, the provision of basic services and a healthy and safe environment.

political issues and providing insight in future policies and programmes. The way in which local governments operate thus sends out important signals to their own residents and also to prospective investors. Their influence on the local economy is clearly of great significance. All municipalities should therefore have a clear vision for their local area and economy and should seek strong partnerships with business enterprises to ensure job creation and to maximise investment.

It should be noted that it is not the direct responsibility of local government to ensure job creation. Job creation falls within the ambit of mainly the national sphere of government. However, municipalities are responsible for ensuring local economic and social conditions that are conducive to the creation of employment opportunities. In this regard it is generally accepted that the provision of basic household infrastructure forms the central basis for ensuring social and economic development.<sup>43</sup>

Other initiatives such as changes to existing procedures, the speeding up of approval procedures and the proactive release of land for development purposes could provide further positive stimulus for social and economical progress. Social development can also be advanced through functions such as arts and culture and the provision of recreational and community facilities. Through its constitutionally entrenched powers local government has been given the strongest possible foundation to succeed in its developmental obligations.

#### **(b) Integrating and co-ordinating activities**

Within any local area there are many different agencies that contribute to development. These usually include various national and provincial government institutions, parastatals, community organisations and private-sector institutions. It is the responsibility of developmental local government to provide vision, leadership and strong co-ordination between these different role players. Poor co-ordination could severely undermine the new development effort. In this regard, it is important for all municipalities actively to develop mechanisms to ensure resources and investment initiatives from both public and private sectors in order to meet their developmental targets. An important method of ensuring better co-ordination and commitment is through the process of Integrated Development Planning. Integrated Development Planning is facilitated through the provision set out in the Development Facilitation

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<sup>43</sup> See White Paper on Local Government (1998) at 39.

Act<sup>44</sup> which provides powerful assistance to municipalities to facilitate and co-ordinate integrated development.

Although it is true that circumstances differ from one community to another, it is submitted that the establishment of sustainable and successful human settlements depends largely on proper co-ordination and integration between all possible role players and a wide range of services and regulations.<sup>45</sup> Local governments have a pivotal role to play in ensuring that this co-ordination and integration is attained.

### **(c) The importance of democratic local development**

It was stated earlier that Municipal Councils play a central role in promoting and establishing a system of local democracy.<sup>46</sup> One of the main objectives of local democracy is to ensure public involvement and participation.

In the previous local government dispensation, most municipalities made their presence felt through a process of abstract control and regulation of communal actions. Regulation still remains an important municipal function in the new system, but it should be supplemented with elements of leadership, accountability, support and public participation. All divisions within local communities must be encouraged and motivated to take an active part in the day-to-day functioning of their local authority. It is therefore important for municipalities to adopt inclusive approaches to community participation in all respects. This aspect is also promoted in various national programmes.<sup>47</sup> From its so-called “grass roots” position, developmental local government is uniquely placed to combine and ensure empowerment and redistribution of wealth through a number of specialised programmes. Examples of such programmes are:

- Specialised service subsidy schemes, which could provide low-income households with an opportunity to improve their circumstances.
- Simple technical and training courses, which should enable people to better themselves and to be less dependent on others.

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<sup>44</sup> 67 of 1995.

<sup>45</sup> These services and regulations would include land-use planning, provision of household infrastructure, environmental management, transport issues, health and education upliftment, as well as the insurance of safety, security and housing.

<sup>46</sup> Local government is defined as being a cornerstone of a democratic system.

<sup>47</sup> The importance of empowerment to poor people and marginalised communities is emphasised in the Reconstruction and Development Programme and also the Growth, Employment and Redistribution strategy.

- Carefully designed cross-subsidising programmes to ensure financial and infra-structural support to very poor areas; for example, a developmental levy that is imposed in fast-growing areas which is then used to subsidise services in other underdeveloped suburbs.<sup>48</sup> It must be noted, however, that cross-subsidising is a very contentious matter and should be approached very carefully. Ill-considered cross-subsidising schemes can quickly alienate certain groups within a community. These groups are usually the more wealthy inhabitants or institutions, and their sudden opposition/dissatisfaction with the local policies can have a severe impact on local financial support, development and involvement. It is of cardinal importance that open and constructive communication and participation be introduced before any such schemes are implemented. Emphasis must also be drawn to the fact that because of the negative results of the pre-1993 local government system it will not be possible to achieve social development and upliftment without a measure of controlled cross-subsidising. It is also important to take cognisance of the fact that cross-subsidising is not in principle contrary to constitutional requirements and that such a system has indeed been allowed by our courts.<sup>49</sup>

#### **(d) Moving ahead through processes of leading and learning**

The many changes and challenges of modern local communities are forcing local communities and institutions to re-evaluate the manner in which they organise themselves and the way in which they are governed by their local authorities. Most local communities the world over are facing the challenges of sustaining their economies in order to uplift their societies, to protect their environments, to eradicate poverty and to provide personal safety and security. Although support by higher levels or spheres of government is essential, such support alone is not enough. Municipal communities are increasingly forced to find within themselves new ways to secure sustainable development and the continuous provision of services. In this regard municipalities must take a leading role within their jurisdictions and should learn from the failures and successes of other local authorities. Municipalities must become visionary and strategic in the way in which they operate, and they have a crucial role

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<sup>48</sup> During the transitional phases of local government, many Transitional Metropolitan Councils introduced a so-called "development levy" which was introduced to obtain financial resources mostly from private enterprises in order to provide financial assistance to certain communities in need.

<sup>49</sup> See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) and *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC).

to play as policymakers, planners, innovators and providers of basic human necessities. There are many ways in which local authorities can provide for favourable development conditions.<sup>50</sup> Some of these steps are the following:

- Building the kind of political leadership that is able to bring together coalitions and networks of local interests that co-operate to realise a shared vision.
- Responsive problem solving and a commitment to working in open partnerships with business, trade unions and community-based organisations.
- Ensuring that knowledge and information are acquired and managed in a way that promotes continuous learning and that anyone can access easily and quickly.
- Enhancing local democracy through raising awareness of human rights issues and promoting constitutional values and principles.
- Building an awareness of environmental issues and how the behaviour of residents impacts on the local environment and encouraging citizens to utilise scarce natural resources in a prudent, careful manner.
- Investing in youth development as a key resource for the future and building on their creativity and motivation through involvement in civic and development programmes.
- Empowering ward councillors as community leaders who should play a pivotal role in building a shared vision and mobilising community resources for development.

### **7.7.2.3 The developmental outcomes of local government**

Local governments should guard against establishing a system of developmental local governance that looks good on paper but has no real success in terms of practical achievement. Ultimately, the success of all developmental programmes will be measured by their final results. It is safe to say that all citizens and community-based institutions are positively concerned about their local areas, not only in support of their own needs but also to ensure prosperity for future generations. The success and positive outcomes which developmental local government are obligated to achieve are thus extremely important. The White Paper on Local Government has identified certain key outcomes that are relevant to all municipalities in the new structure. These outcomes are as follows:

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<sup>50</sup> See White Paper on Local Government (1998) at 42.

### **(a) The provision of sustainable household infrastructure and services**

In principle, all local governments are responsible for the provision of household infrastructure and basic services. These services and infrastructures form the foundation of successful social and economic development. Basic services usually include the provision of water, sanitation, local roads, electricity, drainage and refuse collection. Apart from being a constitutional right, the provision of basic services is essential to enable people to support their families and to develop their skills and to support job creation.<sup>51</sup> The starting point for positive development must therefore be to prioritise the delivery of at least a basic level and minimum standard of services to all members of local communities. Again, this ideal depends on mostly financial capabilities and resources.<sup>52</sup> Local governments are also supported through the Municipal Infrastructure Investment Framework (MIIF) and the Consolidated Municipal Infrastructure Programme (CMIP). Furthermore, local government is constitutionally entitled to an equitable share of national revenue.<sup>53</sup> Generally, the allocations from national revenue sources should enable most municipalities to help in subsidising the operating costs of basic services.

### **(b) Creating integrated local areas**

Integrating the spatial disparities of urban and rural settlements in South Africa is of critical importance for the overall acceptance, success and prosperity of South African communities. Spatial parity will enhance economic growth to great extent and should facilitate more sustainability in the provision of services and a reduction in commuting costs of many households. All these aspects are beneficial in terms of overall social development. It is further of importance that the challenges facing urban areas and rural areas, although mostly similar, are sometimes different. Most of the challenges facing urban areas are those of integration of towns and townships. In metropolitan areas particular emphasis should be placed on future needs and infrastructure in response to the rapidly growing population figures in those areas.

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<sup>51</sup> The Constitution through the Bill of Rights protects the right of everyone to a safe and healthy environment, access to adequate housing, access to health care services, sufficient food and water, social security and appropriate social assistance. See the Constitution ss 24, 26 and 27.

<sup>52</sup> It was mentioned earlier that financial capacity could be gained through capital grants, local cross-subsidisation schemes or private investment initiatives.

<sup>53</sup> The equitable shares and allocations of revenue raised nationally must be provided for in an Act of parliament. See the Constitution s 214 as well as the Equitable Share of National Revenue Act. These aspects will be discussed in more detail in the ch on municipal finance.



Rural areas are concerned mostly with building liveable environments and service delivery. These areas are often densely populated, with an inadequate or indeed no sustainable economic base. Many rural residents commute for many kilometres from their homes to work and back on a daily basis. Such commuting costs involve high transport costs and expenditure. Innovative strategies and programmes are needed to address these issues successfully. Both urban and rural areas must also plan and implement environmental protection programmes.<sup>54</sup>

### **(c) Enhancing local economic development and providing special services**

Local governments should focus much of their developmental initiative on investing in basic services. Through the provision of good quality, cost-effective services and by making a local area a pleasant place in which to live and work, significant boosting of the local economy can be achieved. Municipalities should also strive to improve and simplify many of their procedures and rules in order to achieve effective and speedy decision making.<sup>55</sup> Many local authorities must also review their policies and by-laws in order to ensure compliance with the new constitutional obligations. Lastly, the establishment of user-friendly one-stop service centres should significantly increase efficiency and local support.

One should also not lose sight of the fact that the Constitution specifically requires local governments to take responsibility for promoting the social and economic development of local communities.<sup>56</sup> Municipalities are therefore mandated to provide special services and take extra-ordinary steps. Innovative marketing and investment initiatives as well as small business support services should be provided for. Continuous research and technology upgrading together with quality training programmes are also important mechanisms to ensure competitiveness and positive developmental progress. Without proper knowledge and administrative support, continuous economic growth and development will be unnecessarily restricted.<sup>57</sup>

#### **7.7.2.4 Mechanisms for local governments to achieve developmental goals**

In order to achieve the various developmental outcomes, significant changes in the way in which local governments function will have to be introduced. In an effort to

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<sup>54</sup> According to the Constitution s 24, everyone has the right to an environment that is not harmful to their health or well-being and also to have the environment protected.

<sup>55</sup> Rezoning applications, eg, those which are frequently delayed because of stringent bureaucratic approval processes, should be simplified.

<sup>56</sup> Refer to the Constitution s 152.

<sup>57</sup> See White Paper on Local Government (1998) at 46.

become more developmental, the government in its White Paper on Local Government has put forward three interrelated approaches. These approaches were directed not only at the transformation process but also at municipal developmental strategies of the future. The approaches can be summarised as follows:

**(a) Integrated development planning, budgeting and performance monitoring**

In order to meet the challenges of social and economic development, all municipalities are facing extensive difficulties to ensure sustainable and acceptable human settlements. Municipalities must investigate and understand their local circumstances, needs and dynamics and accordingly develop a concrete vision to address such needs and to provide for overall quality of life. Within the new structure of developmental local government, a process of Integrated Development Planning (IDP) has been initiated, through which municipalities must establish local development plans for the short, medium and long term. In producing an Integrated Developmental Plan (IDP), various steps are to be taken. These steps include the following:

- an assessment of the current social, economic and environmental reality in the municipal area – the current reality
- a determination of community needs through close consultation
- developing a vision for development in the area
- an audit of available resources, skills and capacities
- a prioritisation of these needs in order of urgency and long-term importance
- the development of integrated frameworks and goals to meet these needs
- the formulation of strategies to achieve the goals within specific time frames
- the implementation of projects and programmes to achieve key goals
- the use of monitoring tools to measure impact and performance.

In essence Integrated Developmental Plans are planning and strategic guidelines/frameworks that have been drafted to help and guide local authorities to fulfil their developmental mandate. The idea of such plans is to build up a comprehensive integrated framework, with specific focus on the advancement of development in a particular local area. There are many advantages if proper Integrated Development Plans have been established. Some of these advantages are:

- They enable municipalities to align their financial and institutional resources behind agreed policy objectives and programmes.

- They are a vital tool to ensure the integration of local government activities with other spheres of development planning at provincial, national and international levels by serving as a basis for communication and interaction.
- They serve as a basis for engagement between local government and the citizenry at the local level, and with various stakeholders and interest groups. Participatory and accountable government has meaning only if it is related to concrete issues, plans and resource allocations.
- They enable municipalities to weigh up their obligations and to prioritise programmes and resource allocations systematically. In a context of great inequalities IDPs serve as a framework for municipalities to prioritise their actions around meeting urgent needs while maintaining the overall economic, municipal and social infrastructure already in place.
- They assist municipalities to focus on the environmental sustainability of their delivery and development strategies. Sustainable development is development that delivers basic social and economic services to all without threatening the viability of the ecological and community systems upon which these services depend.
- They help municipalities to develop a holistic strategy for poverty alleviation. Poverty is about more than the inadequacy of a low household income: it includes other deprivation such as a lack of assets to help households cope with shocks and stresses; a lack of the resources or contacts necessary to secure political advantage; a lack of access to education, health care and emergency services and the lack of safe, secure, and adequately sized housing with basic services.

Integrated Development Plans should not be viewed as fixed inflatable frameworks but should rather be seen as incremental development plans which are regularly reviewed and subject to adaptations. In essence, all integrated development planning is a municipal function and should not be outsourced to consultants. After consideration has been given to all local inputs, municipalities should manage the development and amendment of IDPs themselves.

Within the new local government dispensation, many municipalities are required in

terms of the Development Facilitation Act<sup>58</sup> to produce Land Development Objectives (LDOs). LDOs should provide the basis for further strategic development in a specific area. LDOs fulfil a critical role. They are submitted to the provincial government of a province for approval. Once approved, they have legal status and become powerful instruments in directing and managing development initiatives in a particular area. Development planning will be discussed in more detail in later chapters.

In order to achieve service delivery, municipalities must develop and implement action plans to ensure continuous sustainability. Two types of plan should be considered. The first is institutional plans, which should be aimed at assisting municipalities with functioning and administration. The second plan should be directed at the financial and budgeting aspects of the local authority. These financial plans should involve medium- to long-term projections of capital and expenditure. Through capital planning and control a municipality should be able to manage infrastructure targets and enhance possible investment opportunities.

#### **(b) Municipal performance management**

Performance management is a crucial component of any successful private or public institution. The critical role of performance management in local government is to ensure that local objectives and duties are implemented, monitored and corrected if necessary. In the new system of local government, municipalities will set their own standards of performance. These measures or standards are often referred to as Key Performance Indicators (KPI). KPIs will vary from one municipality to another, depending on the relevant circumstances and requirements within each jurisdiction. KPIs can provide valuable assistance to local authorities in assessing the impact and effectiveness of their plans and ultimately their compliance with the constitutional obligations. Community involvement in setting KPIs is also very important. Priorities in communities differ from community to community. By involving the community, efficiency, accountability and local trust will be enhanced.

KPIs should also be developed in consultation with internal municipal stakeholders. Such stakeholders would include management, administrative personnel and also organised labour interests. The involvement of all such role players can entrench a shared organisational vision and in turn improve performance and delivery goals.<sup>59</sup>

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<sup>58</sup> 67 of 1995.

<sup>59</sup> See White Paper on Local Government (1998) at 51.

Without doubt performance management will play an integral and important part in the ultimate success of the new local government institutions. According to international experiences, a system of poorly designed performance indicators usually has a negative effect on delivery and efficiency.<sup>60</sup> It is of significant importance that KPIs should focus on outcomes specifically and not only on inputs and outputs.<sup>61</sup>

Performance management should also be implemented on a national level. Integrated performance management must be advanced to assess overall effectiveness. This could provide so-called “early warning indicators” in instances where local authorities are experiencing problems and could enable other spheres of government to provide assistance and support before a crisis situation has developed. Proper and controlled performance management is thus of great importance, not only within local government systems but within the overall governmental framework.

### **(c) Municipal co-operation with local citizens and private partners**

It was explained above that one of the strengths of integrated development planning is the fact that it recognises the linkages between development, service delivery, upliftment of quality of life and public participation and democracy. Again emphasis should be placed on the importance of local governments to ensure local democratic principles. This can be achieved only if citizens and private institutions are involved within all affairs of local government. The White Paper on Local Government has identified four levels/areas of public participation in municipal affairs.<sup>62</sup> These areas are the following:

- (a) *As voters*: As voters residents should ensure maximum democratic accountability of their elected political leadership. As is the position in all democratic systems, South African municipalities must ensure that voters are frequently informed about the need to vote and to participate in the local electoral procedures. If voter participation declines, democratic accountability is diluted. Voter participation can

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<sup>60</sup> See White Paper on Local Government (1998) at 52.

<sup>61</sup> To illustrate this principle the following example can be used. Imagine a municipality has a programme for cutting the grass verges in its care with the aim to maintain an orderly and clean appearance and to discourage rubbish dumping of garden refuse by residents. The municipality's original objective would be defeated, if the performance management system would only measure the frequency of cutting the grass (the output) and not its effect in relation to the aim/objective (the outcome). Such a performance management system would provide a misleading report on the effectiveness of the municipality's performance.

<sup>62</sup> See White Paper on Local Government (1998) at 53.

be enhanced through educational programmes, creative electoral campaigning and by ensuring that the electoral process is accountable and legitimate.

- (b) As participants in the policy process: Local residents should convey their views and preferences regarding local policies and development priorities. All municipalities should develop mechanisms to ensure citizen participation. This can be achieved through the creation of various public forums.
- (c) As consumers and end-service-users: The only contact most local citizens have with their local government is through the consumption and utilisation of municipal services. Municipalities should be responsive to the needs of local inhabitants and private businesses. People should demand value-for-money, affordable and effective services. It was stated elsewhere that improved customer management and service provision are critical in ensuring socio and economic development. Various principles have been identified to ensure participation and involvement of local customers. These principles include consultation initiatives, the establishment of basic service standards, easy access to services, the provision of accurate information, openness and transparency, mechanisms to redress mistakes efficiently and courteously and products that represent value for money.
- (d) Local partners in resource mobilisation: All local governments are expected to enhance service delivery within their available resources. In order to achieve more effective and efficient service delivery, local authorities will have to involve private institutions and enter into various types of partnership initiatives. Some of these initiatives could include, for example, community development corporations, public-private or public-public partnerships, community contracting for services, information and learning centres, training and capacity-building initiatives.

## **7.8 Conclusion**

It is safe to say that all South African municipalities are facing extensive challenges in promoting human rights, meeting basic needs, addressing past backlogs and spatial distortions and ensuring a sustainable and democratic local future. This can be achieved only through commitment, training and working hand in hand with all role players. The Constitution provides local government with a sound foundation as a distinctive sphere of government, with its own entrenched autonomy and specified powers and functions. Local government alone will not be able to fulfil and comply with its various objectives and duties without the constructive assistance of other spheres of government, the positive and committed support of administrators, a

purposeful and public-orientated, effective, efficient and accountable political leadership and a supportive, informed and fully committed local community.



## **The legal nature and general rights and duties of local government institutions**

### **8.1 Introduction**

In the previous chapter the specific status as well as the constitutionally entrenched objects of local government were identified and discussed. It must be remembered that apart from these objects and developmental duties, local governments have a specific legal nature with specific rights and duties that are statutorily confirmed. From earlier discussions it should be evident that the Constitution is the basic framework of the new local government structure and that this framework was to be completed in terms of various national or sometimes provincial legislation. Various pieces of legislation were enacted to complete and fulfil this constitutional requirement.<sup>1</sup> Together with the basic provisions in the Constitution, these Acts provide the core legislative basis of the new local government system in South Africa and should be studied in conjunction with one another. With reference to the specific legal nature and general rights and duties relevant to the local government sphere, the Municipal Systems Act is of importance. Before the sections of the Act are investigated, it is important to look at the specific purpose of the Act. The purpose of the Act is multi-fold and can be summarised as follows:

- to provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities and to ensure universal access to essential services that are affordable to all people

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<sup>1</sup> These national Acts are: The Local Government: Municipal Demarcation Act 27 of 1998; the Local Government: Municipal Structures Act 117 of 1998; the Local Government: Municipal Systems Act 32 of 2000; the Local Government: Municipal Electoral Act 27 of 2000 and the Local Government: Municipal Finance Management Act 56 of 2003.

- to define the legal nature of a municipality as including the local community within the municipal area that should be working in partnership with the municipality's political and administrative structures.
- to provide for the manner in which municipal powers and functions are exercised and performed
- to provide for community participation in the different processes of municipalities
- to establish a simple and enabling framework for the core processes of planning, performance management, resource mobilisation and organisational change which underpin the notion of developmental local government
- to provide a framework for local public administration and human resource development
- to empower the poor and to ensure that municipalities put in place service tariffs and credit control policies that take their needs into account by providing a framework for the provision of services, service delivery agreements and service districts
- to provide for credit control and debt collection
- to establish a framework for support, monitoring and standard setting by other spheres of government in order progressively to build local government into an efficient, frontline development agency that is capable of integrating the activities of all spheres of government in order to benefit the overall social and economic upliftment of all communities in harmony with their local natural environment
- to provide for legal matters pertaining to local government as well as for matters incidental thereto.<sup>2</sup>

As was explained elsewhere, the pre-1993 local government system failed to meet and sustain the basic needs of the majority of South African people. In the new local government dispensation, all municipalities are constitutionally obligated to provide services to all the people and to be fundamentally developmental in orientation. To achieve and fulfil these obligations, local government needs to identify some basic core principles that should provide a

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<sup>2</sup> See long title of the Municipal Systems Act.

clear understanding of what local governments are required to achieve. These core values will help municipalities to move progressively towards the social and economic upliftment of all communities in our country and to succeed in providing basic life sustaining services.<sup>3</sup>

From the purpose and preamble to the Municipal Systems Act, read within the context of the Constitution, it becomes clear that, apart from the provision of services, all local governments are actively to promote and engage their community's involvement in the affairs concerning their local area. These affairs particularly refer to aspects of planning, service delivery and performance management. The constitutional foundation requires an efficient, effective and transparent local public administration that conforms to the new principles of openness, transparency and effectiveness. These aspects could ensure a financially and economic viable local government system. In the light of these principles it is of importance to establish a strong system of local government that will be capable of exercising and fulfilling its powers and functions and will create a more harmonious interaction between all spheres of government, between local governments *inter se* and between municipalities and their local administrations, political leaders and local communities. To enable and protect local authorities to comply with the abovementioned objectives, the Municipal Systems Act specifically protects and explains not only the legal nature of municipalities but also the general rights and duties of municipal councils, of the local community and of the municipal administrations.<sup>4</sup> Before one investigates these provisions in detail, it is of value to look briefly at the character of local government according to the new legal framework.

## **8.2 The specific character of local government**

In order to understand the legal nature of a local government fully, it is necessary briefly to investigate the basic characteristics of such a sphere of government. Apart from being a constitutionally recognised and protected

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<sup>3</sup> Reference to the word "progressively" is not unimportant in this context. It indicates that there should be a balance between financial and administrative capacity of a local government and its specific programmes of upliftment. The provision of all basic services is not attainable at once and is strongly linked to available resources, especially financial resources.

<sup>4</sup> See the Municipal Structures Act ss 4, 5 and 6.

sphere of government, a municipality also has the following general characteristics:<sup>5</sup>

- It is a public institution.<sup>6</sup>
- It functions and performs its powers under the direction and control of an elected municipal council<sup>7</sup>
- It is a corporate body with legal personality, which exists separately and independently from the persons who head the municipal council.
- It is created to give the residents/local community of the area a say in the local government affairs that affect them. In this regard it is important to note that the Municipal Systems Act specifically distinguishes between the terms “local community”, “ratepayer” and “resident”.<sup>8</sup>
- It is vested with specific powers and functions.<sup>9</sup>
- It is also an institution/sphere of government that is constitutionally obligated to be a democratic entity.<sup>10</sup>

With reference to the mentioned characteristics the Systems Act then goes further and explains the legal nature of municipalities in specific terms.

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<sup>5</sup> See Cloete (1997) 46.

<sup>6</sup> According to the Municipal Systems Act a municipality is an entity as is described in s 2 of the Act. Refer also s 1 definitions.

<sup>7</sup> The Systems Act defines political structure in relation to a municipality as the council of the municipality or any committee or other structure of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act. See s 1 of Municipal Systems Act.

<sup>8</sup> According to the Act s 1 *a local community or community*, in relation to a municipality means that body of persons comprising (a) residents of the municipality; (b) the ratepayers of the municipality; (c) any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality; and (d) visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality. The Act also states that local community includes, more specifically, the poor and other disadvantaged sections of such body of persons. This inclusion is somewhat unnecessary, as such people will automatically be included in the abovementioned categories. To argue that the poor or disadvantage groups in a specific community should be afforded stronger protection or should be given more emphasis than other people or organisations in that area is unfounded and could be contrary to the equality provision in the Constitution; a *ratepayer* in relation to a municipality means a person who is liable to the municipality for the payment of (a) rates on property in the municipality; (b) any other tax, duty or levy imposed by the municipality; or (c) fees for services provided either by the municipality or in terms of a service delivery agreement; lastly a *resident* means a person who is ordinarily a resident in the municipality.

<sup>9</sup> The provision and entrenchment of specific powers and functions is constitutionally protected and will be discussed elsewhere. See the Constitution s 156.

<sup>10</sup> See the Constitution ss 1, 40, 41 and 152(1)(a).

### 8.3 The legal nature of a municipality

The legal nature of a municipality is explained in terms of the Municipal Systems Act as follows:<sup>11</sup>

- A municipality is an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act.<sup>12</sup> The reference to the word “state” in this regard is often the basis of uncertainty, as the term “state” is not always clearly defined. However, two decisions are of importance in this regard. In the case of *Greater Johannesburg TMC v Eskom*<sup>13</sup> the court held that the expression “the state” as used in section 24 of the Eskom Act<sup>14</sup> was not limited to central and provincial government but covered the state in all of its manifestations, including bodies such as regional service councils and transitional metropolitan councils.<sup>15</sup> In the case of *Mateis v Ngwathe Plaaslike Munisipaliteit*,<sup>16</sup> where a judgment had been obtained against a municipality and execution steps were taken, the court held that in terms of the State Liability Act<sup>17</sup> the concept “state” was an amorphous juristic-political concept and had no fixed, general meaning in legislation. The meaning of the word “state” thus depended on every specific piece of legislation. For purposes of the State Liability Act, the word “state” did not include a municipality, and municipalities were not protected against liabilities to third parties.<sup>18</sup>
- A municipality consists of (i) the political structures and administration of the municipality; and (ii) the local community of the municipality.<sup>19</sup>
- A municipality functions in its area in accordance with the political, statutory and other relationships between its political structures, political office bearers and administration and its community.<sup>20</sup>

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<sup>11</sup> See the Municipal Systems Act s 2.

<sup>12</sup> 27 of 1998. Organs of state are defined in the Constitution s 239. Reference should also be made to the Constitution s 151(2) which confirms that the executive and legislative authority of a municipality is vested in its Municipal Council.

<sup>13</sup> 2000 (1) SA 866 (SCA).

<sup>14</sup> 40 of 1987.

<sup>15</sup> See paras 18, 22 and 23 at 877-879.

<sup>16</sup> 2003 (4) SA 361 (SCA).

<sup>17</sup> 20 of 1957.

<sup>18</sup> Paras 7-9 at 367-368.

<sup>19</sup> The constitutional objective of community involvement/public participation is specifically incorporated.

- A municipality has a separate legal personality which excludes liability on the part of its community for the actions of the municipality. This confirmation of the legal personality of a municipality allows a municipality to sue or be sued by other natural or legal persons. It is also important to note that although liability on the part of the local community for the actions of a municipality is excluded, such exclusion has not been given to either the political structures or administration component of a municipality.<sup>21</sup>

A clear understanding of the legal nature of local authorities is thus of great importance. It not only explains the basic composition of a municipality but also provides for significant responsibilities in terms of the political and administrative structures. Confirmation of these responsibilities is again in compliance with the constitutional foundation of a government based on the values of accountability, responsiveness and openness.<sup>22</sup> The extent of such political and administrative responsibility for the actions of local authorities will be discussed elsewhere.

### **8.3.1 General rights and duties of a local government**

The Municipal Systems Act specifically provides for various rights and duties that are vested in the municipal council, the local community or the municipal administration.<sup>23</sup> It is important, however, to distinguish between rights and duties on one hand and powers and functions on the other. The Constitution specifically refers to the powers and functions of municipalities,<sup>24</sup> but provides no direct reference to the rights and duties of municipalities. However, these rights and duties are incorporated in national legislation. This is explained below.

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<sup>20</sup> The political dimension of local government as being part of the government structure in general must never be ignored. The various political interactions and tensions play a major role in local government affairs and must not be underestimated. As such, the political structures represent the local interests within each municipal council.

<sup>21</sup> This clearly indicates that the drafters of the legislation did not intend to excuse the political or administrative components of local governments from liability and responsibility for actions of the municipality. If a political or administrative structure of a municipality has caused harm/damages to that local authority, they could be held responsible and liable for such actions or decisions.

<sup>22</sup> See the Constitution s 1.

<sup>23</sup> See the Municipal Systems Act ss 4, 5 and 6.

<sup>24</sup> See the Constitution s 156.

### **8.3.2 Rights and duties of municipal councils**

According to the Municipal Systems Act, a municipal council has the following rights and duties:<sup>25</sup>

- To govern on its own initiative the local government affairs of the local community.<sup>26</sup>
- To exercise the municipality's executive and legislative authority and to do so without improper interference.<sup>27</sup> Improper interference by the other sphere of gov-

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<sup>25</sup> See the Act s 4.

<sup>26</sup> This seems to be in confirmation of the Constitution s 151(3), which states that a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

<sup>27</sup> See the Constitution s 151(3). Again the autonomy of local government is protected.



ernment is outlawed.<sup>28</sup>

- To finance the affairs of the municipality by (i) charging fees for services and (ii) by imposing surcharges on fees, rates on property and, to the extent that municipalities are authorised by national legislation, impose other taxes, levies and duties.<sup>29</sup>

Apart from these general rights, the Municipal Systems Act also confers certain duties on the council of a municipality. The Act states that the council of a municipality, within the municipality's financial and administrative capacity and after having regard to practical considerations, has the duty to<sup>30</sup>

- exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community
- provide, without favour or prejudice, democratic and accountable government
- encourage the involvement of the local community
- strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner
- consult the local community about (i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and (ii) the available options for service delivery
- give members of the local community equitable access to the municipal services to which they are entitled
- promote and undertake development in the municipality
- promote gender equity in the exercise of the municipality's executive and legislative authority
- promote a safe and healthy environment in the municipality and
- contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.

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<sup>28</sup> What will be interference is not altogether clear and will be interpreted according to the circumstances of each case as well as in context with the broad constitutional framework.

<sup>29</sup> These financial rights will be discussed in more detail in the chapter on finances that are to follow later.

<sup>30</sup> See the Municipal Systems Act s 4(2).

These duties are in compliance with the broad constitutional obligations and requirements and must be read in conjunction with such sections. Subsection (3) also confirms a municipality's responsibility in the exercise of its executive or legislative authority to respect the rights of citizens and those of other persons that are protected by the Bill of Rights. With reference to the duties of municipalities in relation to their local residents, our courts have already confirmed this. In *Fedsure Life Assurance v Greater Johannesburg TMC*<sup>31</sup> the court held that there was an important element of trust in the relationship between municipalities and their ratepayers. The ratepayers therefore had a sufficient interest in seeking to impugn those decisions of the respondents impacting on the utilisation of ratepayers' funds which they contended to be unlawful. The appellants therefore had *locus standi* to seek an order against the respondents to set aside the resolutions.<sup>32</sup>

A similar view was expressed in *Kempton Park/Tembisa Metropolitan Substructure v Kelder*<sup>33</sup>. It was confirmed that in a broad sense there is a fiduciary relationship between a local authority and its ratepayers. Local government should be representative of the inhabitants of its area of jurisdiction, and its actions should be open and transparent. However, private law duties derived from the law of trusts cannot be attributed to a local authority. A local authority owes its existence to the provisions of the Local Government Transition Act<sup>34</sup> and the proclamations made in terms thereof, and its powers and duties are conferred by the Constitution (IC), by other statutes and the relevant principles of public and administrative law. Therefore, to impose upon it additional duties in accordance with the principles of private law negates its function as an organ of state and a branch of government.<sup>35</sup>

### **8.3.3 Rights and duties of members of local communities**

It was explained above that a municipality consists of the political structures, the administration and the community of the municipality. Community participation and involvement in local government matters are thus of

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<sup>31</sup> 1998 (2) SA 1115 (SCA).

<sup>32</sup> At 1122-1123.

<sup>33</sup> 2000 (2) SA 980 (SCA).

<sup>34</sup> 209 of 1993.

<sup>35</sup> See para 15 at 986A-G.

significant importance. Contrary to what is generally accepted, the local community not only has rights with regard to its local authority and can make certain demands of that authority, it has specific statutory duties with which it must comply. In this regard the Municipal Systems Act provides that members of the local community have the right<sup>36</sup>

- to contribute to the decision-making processes of the municipality and to submit written or oral recommendations, representations and complaints to the municipal council or to another political structure or a political office bearer or to the administration of the municipality through mechanisms and in accordance with processes and procedures provided for in the act or other applicable legislation<sup>37</sup>
- to prompt responses to their written or oral communications, including complaints, to the Municipal Council or to another political structure or political office bearer or the administration of the municipality<sup>38</sup>
- to be informed of the decisions of the Municipal Council or another political structure or any political office bearer of the municipality that has an effect on their rights, property and reasonable expectations<sup>39</sup>
- to regulate disclosure of the state of affairs of the municipality, with inclusion of its financial affairs and status<sup>40</sup>
- to demand that the proceedings of the municipal council and those of its committees *must* be open to the public, subject to section 20; conducted impartially and without prejudice and untainted by personal self-interest<sup>41</sup>

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<sup>36</sup> See the Act s 5.

<sup>37</sup> This not only confirms public participation in both legislative and executive functions of a municipality but it also indirectly requires a municipality to apply its attention to such recommendations or public comments.

<sup>38</sup> Through this protection the local community is ensured of accountable and responsive government and the municipal council is not only committed to comply to public request or complaints but more specifically municipal councillors as political office bearers are required to respond to requests from their local constituencies.

<sup>39</sup> This right is of particular importance to all local residents, as many decisions of municipalities will impact on their rights in one way or another. It is further also a drastic departure of the draconian exclusion of information by the previous local government system and if implemented as intended should foster strong, acceptable, open and accountable local government institutions.

<sup>40</sup> Local community members and ratepayers to a local authority must make use of these rights to ensure a measure of control over the internal political and administrative functions and financial management of their local governments. Even potential investors should satisfy themselves that the local authority in the area in which they consider to invest is in control of its financial and administrative functions.

<sup>41</sup> See the Municipal Systems Act s 5(e).

- to the use and enjoyment of public facilities, including facilities such as parks and recreations facilities which were often in the past reserved for certain groups of people only
- to have access to municipal services which the municipality provides, provided that the duties set out in subsection (2)(b) are complied with.<sup>42</sup>

Members of a local municipal community have rights not only against their municipality, they also have specific duties. These duties are the following:

- to observe the mechanisms, processes and procedures of the municipality  
When exercising their rights
- to pay promptly service fees, surcharges on fees, rates on property and other taxes levies and duties imposed by the municipality, where applicable and subject to section 97(1)(c)
- to respect the municipal rights of other members of the local community
- to allow municipal officials reasonable access to their property for the performance of municipal functions
- to comply with the relevant by-laws of their municipality.

#### **8.3.4 Duties of municipal administrations**

Municipal administrations must be seen as part of the public administration in general. In this regard and in compliance with the constitutional obligations toward the public administration in general, the Municipal Systems Act provides for the following:<sup>43</sup>

- A municipality's administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution.<sup>44</sup>
- The administrations of municipalities are further obligated to ensure and adhere to the following principles:
  - (a) to be responsive to the needs of the local community
  - (b) to facilitate a culture of public service and accountability amongst staff
  - (c) to take measures to prevent corruption

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<sup>42</sup> According to s (2)(b) members of the local community have the duty to pay promptly for service fees, surcharges on fees, rates on property and other taxes, levies and duties that are imposed on them by their municipality.

<sup>43</sup> See the Act s 6(1) and (2).

<sup>44</sup> The Constitution s 195 is part of ch 10, and it provides the basic values and principles that must govern the public administration. S 195 should also be read in conjunction with the Constitution s 1(d), which requires a democratic government founded on *inter alia* the values of accountability, responsiveness and openness.

- (d) to establish clear relationships, and facilitate co-operation and communication, between it and the local community
- (e) to give members of the local community full and accurate information about the level and standard of municipal services they are entitled to receive
- (f) to inform the local community of how the municipality is managed, of the costs involved and the persons in charge.

The rights and duties of municipal councils and the members of their local communities and the duties of the administrations of municipalities are subject to the Constitution as well as to the Municipal Systems Act and other applicable legislation. These rights and duties should therefore not be evaluated in isolation but within the context of the new system of local governance.

#### **8.4 Conclusion**

Within the new system of local government, municipalities have been afforded a specific statutory legal nature together with various rights and duties that must be fulfilled. Strong emphasis should also be placed on the fact that the municipalities are not mere political institutions but comprise political, administrative and local community components. Each component has its own rights and duties within that specific sphere of government, and strong interactions and co-ordination between the various components is a *sine qua non* for political stability, community participation, regular payment for services and a committed and effective local administration.

There can be no doubt that the new legal framework which not only explains the legal nature of all municipal authorities but also give statutory protection thereto has significantly advanced the requirements and objectives of the Constitution. Not only does the new legal framework give expression to the structural framework that had to be created, it also furthers values such as accountability and public participation, to mention but two. The nature and legal character of municipal governments are specifically entrenched as unique democratic public institutions with specific powers and functions in specific areas which involve not only political structures but also the local community and the administration of the particular authority. Each of the three distinct components has its own rights and duties which, when combined should result in a more effective and sufficient local sphere of governance. In this regard it is submitted that the entrenched legal nature and divided rights and duties of local government institutions significantly contributes to the system that is envisaged under the Constitution.

## **Local government within a system of co-operative governance**

### **9.1 Introduction**

The new constitutional order in South Africa states that the government is constituted as national, provincial and local spheres of government.<sup>1</sup> Local government is now a district sphere of government in its own right and is no longer a mere function of either the national or provincial government. In the new constitutional dispensation, local government is an integral component of the new democratic state.<sup>2</sup>

Within the new supreme constitutional framework, all spheres of government are obliged to observe the principles of co-operative government as put forward by the Constitution.<sup>3</sup> In essence co-operative government assumes and touches on the integrity of each sphere of our government. Apart from this, it also recognises the complex nature of a government functioning within a modern society. It is hard to imagine a country today that can effectively meet the challenges of our modern world, unless the various components of government function together as a cohesive unit.<sup>4</sup>

Co-operative government requires a system co-operation and constructive inter-governmental relations within each separate sphere and also across all spheres of government. Consequently, the principles and requirements of co-operative govern-

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<sup>1</sup> See the Constitution s 40(1).

<sup>2</sup> Refer to the Constitution s 1 which confirms that the Republic of South Africa is one sovereign, democratic state.

<sup>3</sup> See the Constitution ch 3.

<sup>4</sup> To function as a cohesive unit involves the following: to collectively harness all public resources behind common goals and with mutual support; to develop multi-sectoral perspectives on the interests of the country and to respect the discipline of national/uniform goals, policies and initiatives; to co-ordinate activities and avoid wasteful competition and costly duplication; to utilise human resources effectively; to settle disputes constructively without resorting to costly and time-consuming litigation and to identify and divide the roles and responsibilities of government between the three spheres so as to minimise confusion and to maximise efficiency and overall effectiveness. Refer to the White Paper on Local Government (1998) at 57.

ance in South Africa have been described as part of an ingenious and innovative process of harmonising the operation of all spheres of government in such a way that even the lowest sphere have a say and influence in matters that effect them.<sup>5</sup>

The new constitutional mandate places a strong emphasis on the important necessity of all spheres of government to ensure good and positive relationships between one another. This relationship is particularly influenced and controlled by the principles of co-operative government. It must be pointed out, however, that a system of co-operation can have important implications on the status of the lowest sphere within the overall relationship in particular. Within the new South African system, and notwithstanding the fact that local authorities can be controlled by the national or provincial governments, local authorities have together been afforded constitutional recognition as a fully fledged sphere of government. This protection means *inter alia* that local governments *per se* may not be abolished or discarded without compliance with the overall constitutional obligations.<sup>6</sup>

## 9.2 Local government and intergovernmental relations

The concept of co-operative government is closely related to the principle of intergovernmental relations. In general, intergovernmental relations can be described as a set of multiple formal and informal processes, structures and institutional arrangements for both bilateral and multilateral interaction within and between different spheres of government. In South Africa's new governmental system, the concept "intergovernmental relations" has emerged to give more meaning to the foundation of co-operative government that is protected in chapter 3 of the Constitution.

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<sup>5</sup> See Devenish (1998) 201.

<sup>6</sup> Any attempt by the national government to change the status, powers, functions or existence of local authorities must comply with the overall constitutional obligations, and only if a constitutional amendment is approved can such rights, powers or existence be limited or even taken away. The Constitution s 74(3) determines that any other provision of the Constitution, apart from the Constitution s 1 or ch 2, may be amended by a bill passed by the National Assembly with a supporting vote of at least two thirds of its members and also by the National Council of Provinces with a supporting vote of at least six provinces if the amendment relates to a matter that affects the Council, alters provincial boundaries, powers, functions or institutions or amends a provision that deals specifically with a provincial matter. Although local government as such is not a provincial matter – refer to the Constitution Sch 4 or 5 – it is submitted that a constitutional change in the powers, functioning or existence of local governments will affect the NCoP and can alter provincial powers or functions. According to the ch on local government, many powers regarding local governments have been given to provincial governments, and any change or amendment to the local government structure could impact on such powers. It is thus submitted that both the NA and the NCoP must approve a constitutional amendment in regard to local government matters.



According to the White Paper on Local Government, a system of intergovernmental relations has the following strategic purposes:<sup>7</sup>

- to promote and facilitate co-operative decision making
- to co-ordinate and align priorities, budgets, policies and activities between spheres of government
- to ensure the smooth, effective and accurate flow of information, not only within government institutions *inter se*, but also between government and the public
- to prevent and resolve intergovernmental conflicts and disputes effectively and efficiently.

During the transitional phase of local government the focus on the development of a framework for intergovernmental relations was on the relationship between national and provincial spheres of government.<sup>8</sup> With the establishment and recognition of local government and organised local government structures an important time has dawned whereby local government must be included and represented in all intergovernmental processes and forums.<sup>9</sup> It should also be noted that the Constitution further requires the development of an Act of parliament to establish and provide for the structures and institutions that should promote and advance intergovernmental relations.<sup>10</sup>

### **9.3 The constitutional foundation of co-operative government**

It was mentioned above that the Constitution specifically recognises and protects the principle of co-operative government.<sup>11</sup> The principles of co-operative government were regarded as having such important value and influence within a modern democratic government that the constitutional drafters had to ensure the inclusion of such principles within the supreme law of the Republic. In compliance with the con-

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<sup>7</sup> See White Paper on Local Government (1998) at 58.

<sup>8</sup> It was submitted that the role of local government should be defined as it develops in practice over time.

<sup>9</sup> The role of SALGA within some of the processes of the NCoP is an important example of such inclusion and representation.

<sup>10</sup> See the Constitution s 41(2)(a) and (b). At the time of going to print the Intergovernmental Relations Bill was still being considered by National Parliament. It should be noted that in late 2005 parliament enacted the Intergovernmental Relations Framework Act 13 of 2005. The aim of the act is to establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations and also to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes. The scope of the Act fell outside the cut of date for this work, and was thus not included.

<sup>11</sup> See the Constitution ch 3.

stitutional principles of the interim Constitution<sup>12</sup> the final Constitution states the following regarding co-operative government:<sup>13</sup>

- In the Republic, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated.
- All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

Apart from the obligation on all spheres of government to observe and adhere to the principles set out in chapter 3 of the Constitution and to conduct their activities within the parameters of this chapter, the Constitution also entrenches the basic principles of co-operative government and intergovernmental relations. It is important to note that such principles are applicable to not only all spheres of government but also all organs of the state within each sphere.<sup>14</sup> The South African courts have had significant opportunities to adjudicate on the principles of co-operative government. In *Van Wyk v Uys No*,<sup>15</sup> for example, it was expressed that section 41 of the Constitution enjoins the central, provincial and local tiers of government to foster the principle of co-operative government, to assist and support each other, to consult on matters of common interest and to co-ordinate their actions. This is the background against which Schedule 1 to the Local Government: Municipal Systems Act 32 of 2000 has to be interpreted.<sup>16</sup> With reference to the definition of organ of state the Constitutional Court mentioned in *National Gambling Board v Premier, KZN*<sup>17</sup> that while parliament, the President and the cabinet are organs of state in the national sphere of government, they do not fall within paragraph (a) of the definition of “organ of state” as set out in section 239 of the Constitution. Such institutions would rather fall under section 239(b) of the Constitution. The three mentioned organs are also not the only components of the national sphere of government.<sup>18</sup> In an earlier decision the same court concluded that although the Independent Electoral Commission is clearly a

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<sup>12</sup> 200 of 1993.

<sup>13</sup> See the Constitution s 40.

<sup>14</sup> Refer again to the definition of organs of state set out in the Constitution s 239.

<sup>15</sup> 2002 (5) SA 92 (C).

<sup>16</sup> See paras F-G at 99.

<sup>17</sup> 2002 (2) SA 715 (CC).

<sup>18</sup> Refer to para 21 at 724-725. There are other national bodies such as parliamentary committees or national commissions of enquiry.

state structure it does not fall under the definition of an organ of state within the national sphere of government.<sup>19</sup>

It is submitted that the inclusion of all organs of state further enhances and should help to facilitate and foster the type of interrelationships that are to ensure an effective and co-operative government. Organs of state are often so closely involved in governmental functions and practices that their exclusion would have impacted negatively on the overall success and effect of the constitutional principles. In respect of such principles, the Constitution states the following:<sup>20</sup>

- All spheres of government and all organs of state within each sphere must:
  - (a) preserve the peace, the national unity and the indivisibility of the Republic
  - (b) secure the well-being of the people of the Republic
  - (c) provide effective, transparent, accountable and coherent government for the Republic as a whole
  - (d) be loyal to the Constitution, the Republic and its people
  - (e) respect the constitutional status, institutions, powers and functions of government in the other spheres
  - (f) not assume any power of function except those conferred on them in terms of the Constitution
  - (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere
  - (h) co-operate with one another in mutual trust and good faith by
    - (i) fostering friendly relations
    - (ii) assisting and supporting one another
    - (iii) informing one another of, and consulting one another on, matters of common interest
    - (iv) co-ordinating their actions and legislation with one another

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<sup>19</sup> See *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC). See also *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC), where the court held that in interpreting the Schs to the Constitution there was no presumption in favour of either the national legislature or the provincial legislatures. The functional areas had to be purposively interpreted in a manner which would enable the national parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively. Para 17 at 511E-F.

<sup>20</sup> See the Constitution s 41(1), (2), (3) and (4).

- (v) adhering to agreed procedures
- (vi) avoiding legal proceedings against one another.
- An Act of Parliament must
  - (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations
  - (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
- An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose and must exhaust all other remedies before it approaches a court to resolve the dispute.
- If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

In *MEC for Health v TAC*<sup>21</sup> it was stated that the Constitutional Court will rarely grant direct access to the Constitutional Court to organs of state who have not duly performed their obligations to co-operative government. By the same token, the failure to perform those obligations is relevant when deciding whether or not it is in the interests of justice to grant an organ of state leave to appeal directly to the court.<sup>22</sup> See also *Uthukela District Municipality v President of the RSA*.<sup>23</sup> In the *Uthukela* case the Constitutional Court stated that organs of state have the constitutional duty to foster co-operative government, as provided for in chapter 3 of the Constitution. This means that organs of state must avoid legal proceedings against one another. The essence of chapter 3 is that, where possible, disputes should be resolved at a political level rather than through adversarial litigation. It is clear from section 41(4) of the Constitution that courts must ensure that such a duty is duly performed. If it is not satisfied that this duty has been performed, the court may refer a dispute back to the organs of state involved.<sup>24</sup> The court further stated that in view of the important requirements of co-operative government a court, including the Constitutional Court, will rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve the dispute at a political

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<sup>21</sup> 2002 (5) SA 717 (CC).

<sup>22</sup> See para 9 at 720 C.

<sup>23</sup> 2003 (1) SA 678 (CC).

<sup>24</sup> Paras 12 and 13 at 683D/E-684 B.

level. Finally, the court concluded that, apart from the general duty to avoid legal proceedings against one another, section 41(3) of the Constitution places a twofold obligation on organs of state involved in an intergovernmental dispute. First, they must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for. Second, they must exhaust all other remedies before they approach a court to resolve the dispute.<sup>25</sup>

On the basis of the wording of the Constitution and the case law mentioned above it is submitted that the drafters' intention clearly was to create a new form of intergovernmental co-operation in South Africa that would differ radically from the system that existed pre 1993. Many of the founding values of the Constitution are also important in order to establish such a governmental system.<sup>26</sup> However, the Constitution identifies itself as providing only the basic platform for co-operative government on which further structures, procedures and institutions are to be built in accordance with an Act of parliament.<sup>27</sup>

Within a constitutional context, the principles regarding co-operative government constitute a firm commitment to a legal design directed at co-operation, co-ordination and acceptable consensus. It is also notable that this commitment is not merely aspirational, but is a commitment that recognises the complexity of our modern government as well as the existence of possible intergovernmental power struggles and competition. Such a commitment is clearly illustrated in the case of *Hardy Ventures CC v Tshwane Metropolitan Municipality*,<sup>28</sup> where the court held that the principles of co-operative government embodied in section 41(1) of the Constitution and the basic values and principles governing public administration set out in sections 195(1) and (2) were applicable in instances where a municipal government is involved and needed to be adhered to by the respondent municipality in the relevant matter<sup>29</sup>. The court held that it was clear that the municipality had failed to adhere to the principles of good governance and sound administration contained in the Constitution. The undermining of the principles by organs of the state would lead to inefficiency and unfairness and ultimately result in a bureaucratic culture that was inimical to the

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<sup>25</sup> See paras 14 and 19 at 684-685.

<sup>26</sup> See the Constitution s 41(1)(c) and (d) particularly.

<sup>27</sup> Refer to s 41(2)(a) and (b).

<sup>28</sup> 2004 (1) SA 199 (T).

<sup>29</sup> Para 9 at 203E-E/F.

constitutional ethos. Erratic administration often resulted in arbitrariness and undermined qualitative administration in a democratic state.<sup>30</sup> Especially from a local government point of view, the protection given in terms of chapter 3 of the Constitution becomes more significant. The powers of local government are not as strongly protected as the powers of national or even provincial governments. In this weaker position, the provisions of chapter 3 provide significant protection against excessive control on the part of higher spheres of government over the matters of local government. In turn, this protection not only protects and entrenches the newly recognised status of the local sphere of government, it demands that:

- the functional allocation of powers and functions must be adhered to
- the collective harnessing of available and future government resources are done fairly
- the development of strong constitutional bonds between the three spheres is promoted.<sup>31</sup>

#### **9.4 The impact of co-operative government on local government structures**

It has been indicated above that the principles of co-operative government apply to all spheres of government as well as to all organs of state. A strong and mutual respect between the different spheres is to be fostered through the overall applicability of such principles.<sup>32</sup>

Despite the radical changes to the new South African constitutional order and the entrenchment of local government as a distinctive, interrelated and interdependent sphere of government, local authorities are still subjected to the overarching authority of the two higher spheres of government and are often under their final control.<sup>33</sup> In order to further enhance the role and importance of local governments within the overall system of co-operative government, the specific chapter on local government directly incorporates additional provisions regarding municipalities within such a system of co-operation. In this regard the Constitution determines that:<sup>34</sup>

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<sup>30</sup> See para 11 at 203-204.

<sup>31</sup> See also Chaskalson *et al* (1999) 5A–28.

<sup>32</sup> This relationship and obligation to mutual respect is also confirmed in other parts of the Constitution. Refer, eg, to s 154(1), which requires national and provincial governments to support and strengthen the capacity of municipalities to manage their affairs and to exercise their powers.

<sup>33</sup> Eg, a municipal by-law is subject to national or provincial legislation. If a by-law conflicts with either national or provincial legislation, it is invalid. See the Constitution s 156(3).

<sup>34</sup> See the Constitution s 154(1) and (2).

- the national government and provincial governments must support and strengthen by legislative and other measures the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.
- draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

From the abovementioned section it is clear that although the two higher spheres of government have wide powers in respect of local government affairs such powers are not excessive or limitless. Again the Constitution itself provides the circumstances or instances when an intrusion in the powers or functions of a local government by a higher sphere will be constitutionally allowed and when they will not.<sup>35</sup> The section further echoes the support and assistance that is especially needed on local government level in order to make the system of co-operative governance a practical reality and success.<sup>36</sup>

The Constitution also places an *onus* on provincial governments to monitor and support local governments in their provinces and further to promote the development capacity of local authorities to enable them to fulfil their functions and duties.<sup>37</sup> It is further confirmed that national and provincial governments have the legislative and executive authority to see to the municipalities' effective performance of their functions as is listed in parts B of schedules 4 and 5 of the Constitution and by regulating the exercise by municipalities of their executive authority.<sup>38</sup> Subject to the provisions of section 155(7) above, both parliament and provincial legislatures are generally empowered to make laws on all local government matters that are not specifically

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<sup>35</sup> Refer, eg, to s 151(3) and (4), which state that a municipality has the right to govern, subject to national and provincial legislation, but that neither the national government nor a provincial government may compromise or impede a municipality's ability or right to exercise its powers or to perform its functions.

<sup>36</sup> Note again the constitutional obligation in the words "*must* support and strengthen" as set out in the Constitution s 154(1).

<sup>37</sup> See the Constitution s 155(6).

<sup>38</sup> Refer to the Constitution s 155(7). See also *Van der Merwe v Slabbert No 1998 (3) SA 613 (N)*.



dealt with in the Constitution.<sup>39</sup> In light of the above one can say that the Constitution is more prescriptive with regard to the protection and regulation of the local sphere of government within the new system of co-operative governance. The vulnerability of local governments within such a system is not only recognised but is circumscribed. All the traditional local government functions are included in Parts B of Schedules 4 and 5 of the Constitution, and national and provincial governments have concurrent or exclusive legislative competence over such functional areas. Mention should again be made of the fact that local government itself is not a specific functional area that has been included in either Schedule 4 or 5. This significantly entrenches the status of local government, albeit not absolutely.<sup>40</sup>

By referring to the abovementioned provisions, one can clearly see that the principles and the concept of co-operative government are directed at establishing communications and co-ordination between all spheres of government. Such a system of co-operation and co-ordination can be achieved only through intergovernmental support and assistance. On the local sphere, these principles are further curtailed by the powers and duties of the higher spheres to promote, strengthen and oversee municipal fulfilment of their powers and duties.

In the first certification judgment,<sup>41</sup> the Constitutional Court has specifically reflected on some of the important aspects regarding co-operative government and intergovernmental relations. The court stated *inter alia* the following:

- The principles of co-operative government and intergovernmental relations introduce a new philosophy which obliges all organs of government to co-operate with each other and to discharge certain functions. As such the principles impose obligations on all spheres of government.<sup>42</sup>
- The requirements of section 41(1)(g) of the 1996 Constitution require that all spheres must exercise their powers and functions in a manner that do not encroach on the geographical, functional or institutional integrity of a government in

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<sup>39</sup> The Constitution s 164 states that any matter concerning local government not dealt with in the Constitution may be prescribed by national or provincial legislation within the framework of national legislation.

<sup>40</sup> Local governments do not have exclusive powers in this regard, as their powers are shared with both national and or provincial governments.

<sup>41</sup> See *In re: Certification of the Constitution of the RSA 1996*, 1996 (4) SA 744 (CC).

<sup>42</sup> See pages 907-908.

another sphere. This requirement was in accordance with Constitutional Principle XXII of the interim Constitution.

- The co-operative government system included in chapter 3 of the 1996 Constitution was not invasive of the autonomy of spheres of government. The court said that intergovernmental co-operation was implicit in any system where powers had been allocated concurrently to different levels of government.<sup>43</sup>
- Section 41(1) and (4), which provide that the different spheres of government should avoid legal proceedings against each other and should exhaust all other remedies before approaching a court to resolve a dispute, is not inconsistent with the system of co-operative government and does not oust the jurisdiction of the courts.<sup>44</sup>
- The court further explained that section 155 of the 1996 Constitution has the consequence that the ambit of provincial powers in respect of local government has been confined largely to the supervision, monitoring and support of municipalities. The powers of supervision are considerable and facilitate a measure of provincial control over the manner in which municipal administrations administer the matters set out in Part B of both Schedules 4 and 5.

The court furthermore confirmed that the monitoring powers did not bestow additional or residual powers of provincial intrusion on the domain of local government. What the 1996 Constitution seeks to realise is a structure of local government that on one hand reveals a concern for the autonomy and integrity of local government and thereby prescribes a so-called “hands-off” relationship between local governments and other levels of government and on the other acknowledges the requirement that higher levels of government have a monitoring function and can intervene in instances when local government is not complying to its functions. This is regarded as a “hands-on” relationship.<sup>45</sup> Based on the abovementioned conclusions of the Constitutional Court it is submitted that co-operation and intergovernmental relations not only give support and assistance between spheres of government but also involve aspects of supervision and sometimes intervention. For example, if a municipality does not fulfil an executive obligation, the relevant provincial government may intervene to ensure that such an obligation is indeed fulfilled. Within the context of

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<sup>43</sup> See pages 857-858.

<sup>44</sup> P 855.

the Constitution, such a power of provincial supervision has specifically been entrenched. In section 139 the Constitution determines as follows:

- When a municipality cannot or does not fulfil an executive obligation in terms of any legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including
  - (a) issuing a directive to the Municipal Council describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations
  - (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary
    - (i) to maintain essential national standards or meet established minimum standards for the rendering of a service
    - (ii) to prevent the Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole or
    - (iii) to maintain economic unity.
- If a provincial executive intervenes in a municipality in terms of subsection 139(1)(b)
  - (a) the intervention must end unless within 14 days of the intervention it is approved by the Cabinet member responsible for local government affairs
  - (b) notice of the intervention must be tabled in the provincial legislature and in the National Council of Provinces within 14 days of their respective first sittings after the intervention began
  - (c) the intervention must end unless it is approved by the National Council of Provinces within 30 days of its first sitting after the intervention began and
  - (d) the Council must review the intervention regularly and make any appropriate recommendations to the provincial executive.
- National legislation may regulate the process established by this section.

It would seem that the obligation of support and promotion of local government capacity could contribute considerably to restricting instances of drastic intervention by higher spheres. It is only logical that provincial failures to support and promote local authorities would result in municipal incapacity and thereby create a necessity for

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<sup>45</sup> See pages 879-881.

intervention. There is therefore a strong argument that support and promotion precedes intervention.<sup>46</sup>

In the first certification judgement mentioned above the Constitutional Court<sup>47</sup> compared the term “supervision” with a process of provincial review. The power or authority of supervision is normally exercised alongside the power of intervention. Supervision is a continuous process, however, while intervention is *ad hoc* and dependent on the existence of specifically defined circumstances. Intervention must also be conducted in compliance with specific procedures.<sup>48</sup> In light of the above it seems clear that the power to intervene is a considerable power and can be particularly important to local authorities, where administrative and executive structures are more likely to be in need of support and assistance.

### **9.5 The recognition and protection of the obligations to support, strengthen, consult and promote local government matters**

Apart from the provisions of co-operative government set out in chapter 3 of the Constitution, which are applicable to all spheres of government, the Constitution also provides for other instances where local governments must be consulted and informed. These additional provisions should be read in conjunction with the principles of co-operative government. Some of these provisions are summarised as follows:

- Municipalities have the right to govern, on their own initiative, the local government affairs of their communities, subject to national and provincial legislation.<sup>49</sup>
- Neither national nor provincial governments may compromise or impede a municipality’s ability or right to exercise its powers or to perform its functions.<sup>50</sup>
- Municipalities must participate in national and provincial development programmes.<sup>51</sup> This provides for support and strength to such programmes.
- Using legislative or other measures, national and provincial governments must support and strengthen the capacity of municipalities to manage their affairs, to exercise their powers and to perform their functions.<sup>52</sup>

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<sup>46</sup> This position is supported by some commentators. See Chaskalson *et al* (1999) 5A–30.

<sup>47</sup> *In re: Certification of the Constitution of the RSA, 1996 supra* fn 41.

<sup>48</sup> See the Constitution s 139(2)(a)-(d).

<sup>49</sup> Refer to the Constitution s 151(3).

<sup>50</sup> See the Constitution s 151(4).

<sup>51</sup> The Constitution s 153(b).

<sup>52</sup> The Constitution s 154(1).

- Draft national or provincial legislation that affects the status, institutions, powers or functions of local governments must be published for public comment before it is introduced in Parliament or a Provincial Legislature. Such publication must be performed in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to such draft legislation.<sup>53</sup>

The reference to Organised Local Government (OLG) in the Constitution is also of particular importance. The concept of OLG is specifically founded on the principles of co-operative government and intergovernmental participation. For this reason the Constitution specifically entrenches the creation of organised local government structures. The Constitution determines as follows:<sup>54</sup>

An Act of Parliament enacted in accordance with the procedure established by section 76 must:

- provide for the recognition of national and provincial organisations representing municipalities and
- determine procedures by which local government may:
  - (a) consult with the national or a provincial government
  - (b) designate representatives to participate in the National Council of Provinces and
  - (c) participate in the process prescribed in the national legislation envisaged in section 221(1)(c).

During 1997, the Organised Local Government Act (OLGA)<sup>55</sup> was enacted by parliament in compliance with the constitutional obligation of section 163. The purpose and requirements of the Act can be summarised as follows:

- to provide for the recognition of national and provincial organisations representing the different categories of municipalities
- to determine procedures by which local government may designate representatives to participate in the NCoP

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<sup>53</sup> See the Constitution s 154(2). The Constitution places a clear obligation on national and provincial legislatures to inform and provide opportunities for representations in such legislatures when laws are proposed.

<sup>54</sup> See the Constitution s 163.

<sup>55</sup> 52 of 1997.

- to determine procedures by which local government may consult with national and provincial governments and
- to determine procedures by which local government may nominate persons to the Financial and Fiscal Commission.

According to the definitions set out in the OLGA the responsible minister on national level is the minister for Provincial Affairs and Constitutional Development. The responsible members on the various provincial levels are the different MECs responsible for local government in each province.<sup>56</sup> The Act determines that the national minister must recognise one national organisation and nine provincial organisations to represent local government. The national organisation should in turn represent the majority of the provincial organisations. In respect of the provincial organisations, the minister with the concurrence of the MEC of that province must recognise one organisation in each province. The provincial organisation must be representative of the majority of municipalities in that province and should be inclusive of all the different categories of municipalities.<sup>57</sup> The Act further allows each provincial organisation to nominate in writing not more than six members of municipal councils for designation as representatives to participate in the proceedings of the National Council of Provinces (NCoP). When necessary and in accordance with criteria determined by it, the national organisation must then designate not more than 10 persons from the nominees to participate in the proceedings of the NCoP.<sup>58</sup>

Specific provision is also made in the Act for consultation procedures between the national and provincial spheres of government and the national and provincial organisations representing local governments. The national organisation may at any time approach any minister to consult with the national government. The position is similar between a provincial organisation and the provincial government. A provincial organisation may only consult the national government after consultation with the national organisation, however.<sup>59</sup> It would appear that the Act attributes a higher status to the national organisation than to its provincial counterparts, although no substantial basis for such a position is provided for. It is submitted that this marginalisation of the provincial organisations has more negative than positive implications

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<sup>56</sup> See the OLGA s 1.

<sup>57</sup> See the OLGA s 2(1)(a) and (b).

<sup>58</sup> Refer to the OLGA s 3(1) and (2) and also to the Constitution s 67.

<sup>59</sup> See the OLGA s 4(1)–(8).

for the overall co-operative and representative purpose than the Act aims to achieve and that it should be amended. The OLGA also provides for the nomination of persons to the Financial and Fiscal Commission (FFC). Only one person from each provincial organisation may be designated. Further issuing of regulations by the minister is also provided for.<sup>60</sup>

Historically, local government had a weak voice in the participation and development of government policy on national or provincial levels. This aspect has now been addressed to some extent, although the overall system of co-operation and representation is not perfect. All local government organisations must eagerly take part in the representation system and ensure the free flow of important information in respect of local government issues. According to the Organised Local Government Act both the National Minister and provincial MECs are responsible for achieving the purposes of the Act.<sup>61</sup> It should be noted also that Organised Local Government also constitutes the employer component of the South African Local Government Bargaining Council (SALGBC) and thus plays an important role in local government labour matters. Organised Local Government organisations further contribute significantly to the development of local governments by providing specialised services, training programmes and research projects. OLG is primarily funded by membership fees payable by each municipality. This funding arrangement also contributes to the accountability and responsiveness of the different organisations with regard to their respective municipal constituencies.

It is submitted that both the Constitution and national legislation recognise and protect the creation and participation of OLG. This is of particular importance for both the status and autonomy of local governments within the new constitutional system. This protection and recognition adds further spice to the general principles of co-operation and participation. Furthermore, it is important to note that section 163(b) of the Constitution also distinguishes between three instances where local government should play a role. In the first place, certain procedures must be provided for whereby local government may consult with national or provincial governments. This

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<sup>60</sup> See the OLGA ss 5 and 6. Note s 5 was substituted by s 6 of Act 25 of 2003.

<sup>61</sup> The national minister together with the nine MECs of the provinces is often referred to as MINMEC. MINMEC provides for a high degree of inter-provincial co-ordination and representation between the national and provincial spheres of government.



provision for consultation is currently provided and protected in the OLGA.<sup>62</sup> The Act specifically protects and recognises the participation of OLG in other spheres of government through the South African Local Government Association (SALGA). SALGA was established in 1996 to promote and protect the interests of local government, and the association has been recognised by national and provincial governments as the national representative and consultative body for all matters that concern local government.<sup>63</sup> Each provincial government has also established an organisation similar to SALGA on the provincial levels. In the second instance local government may designate representatives to participate in the NCoP. In this instance reference must be made to section 67 of the Constitution. The section states as follows:

Not more than ten part-time representatives designated by organised local government in terms of section 163, to represent the different categories of municipalities, may participate when necessary in the proceedings of the National Council of Provinces, but may not vote.

According to the Constitution the role of the NCoP is to represent the provinces and, by implication, also local governments and to ensure that provincial interests are taken into account in the national sphere of government. The NCoP is thus the most suitable house of the national legislature where provincial and local government interests should be represented.<sup>64</sup> The abovementioned participation by local government representatives in the national sphere of government indeed affords local governments a voice in a forum where it was never heard before.<sup>65</sup> A similar constitutional protection as is set out in section 67 is not afforded to local governments within provincial legislatures, however, which is regrettable. Local governments may also nominate persons to the Financial and Fiscal Commission (FFC). This provision entrenches the important role that local governments are to play with regard to general financial matters. In accordance with section 163(b)(iii) of the Constitution, the FFC had to comprise *inter alia* two persons nominated by OLG.<sup>66</sup> Furthermore, both the FFC and OLG had to be consulted before an Act of parliament which provides for

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<sup>62</sup> 52 of 1997.

<sup>63</sup> See Chaskalson *et al* (1999) 5A-32.

<sup>64</sup> In this regard see the Constitution s 42(4).

<sup>65</sup> Refer to the comments made by Meyer (1997) 14.

<sup>66</sup> See the Constitution s 221(1)(c). See also Financial and Fiscal Commission Act 99 of 1997.

the equitable shares and allocations of revenue could be enacted.<sup>67</sup> This provides a double consultative protection for local government interests, both as represented by the FFC and through OLG structures.<sup>68</sup> The overall importance of the abovementioned provisions regarding the FFC is ultimately to ensure that local government is provided with a voice in fiscal matters. Again this protection enhances and confirms the overall commitment to a new system of co-operation and consultation.

- National government is constitutionally obligated to define the different types of municipality, while provincial legislation must determine the different types of municipality to be established in a province.<sup>69</sup>
- By legislative or other measures, each provincial government must establish municipalities consistent with national legislation. Provincial authorities must further provide for the monitoring and support of local government and must promote the development of the capacity of municipalities in order to enable them to perform their functions and to manage their own affairs.<sup>70</sup> This obligation to monitor, support and promote development capacity is again a strong confirmation of the overall establishment of a co-operative system of governance with specific inter-governmental requirements.
- Municipalities are further supervised by both national and provincial governments to ensure the effective performance of their functions.<sup>71</sup>
- Co-operation is further enhanced through the obligation on national and provincial governments to assign to a municipality the administration of a matter which is listed in Part A of Schedule 4 or 5 and necessarily relates to local government. This must be done by agreement and subject to any conditions. However, this assignment is subjected to a determination of whether the local administration of

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<sup>67</sup> Refer to the Constitution s 214(2).

<sup>68</sup> See also the Constitution s 229(5) for a similar dual participatory role.

<sup>69</sup> The Constitution ss 155(2) and (5).

<sup>70</sup> See the Constitution s 155(6).

<sup>71</sup> According to the Constitution, national government has intervention authority subject to the provisions of the Constitution s 44. It must be remembered that local government competences are incorporated in the Constitution in Part B of Sch 4 and Part B of Sch 5. Sch 4 sets the legislative competences of both national and provincial governments, while Sch 5 proclaims the exclusive legislative competences of the provincial governments. In concurrent matters both national and provincial governments have legislative authority while only the provinces have legislative competence in exclusive matters. S 44(2) however allows parliament to intervene through legislative action in special circumstances. Refer to the Constitution s 44(2)(a)-(e).

such a matter would be most effective and whether or not the relevant municipality has the capacity to administer the matter.<sup>72</sup>

- In the last instance, many aspects of local governments are controlled and regulated in terms of legislative requirements from the two higher levels of government.<sup>73</sup>

From the examples mentioned above it is quite clear that mostly national, but sometimes also provincial, legislation is of significant importance to the functioning of local governments and that these pieces of legislation have an important impact on the relationship between the spheres of government. Legislation of higher spheres not only influences local government activities, but sometimes even elaborates and protects the general system of co-operation.

### **9.6 National legislative protection of the principles of co-operative government**

Specific provision to support the overall constitutional framework of co-operative government has been incorporated into the new legislative framework of local government. Such protection and advancement of the need for co-operation was already evident during the transformation and restructuring process.<sup>74</sup>

In support of the constitutional requirements and in an effort to broaden the provisions of the LGTA, both the Municipal Structures Act and the Municipal Systems Act encapsulate aspects of co-operation. The Municipal Systems Act requires that:

- municipalities must exercise their executive and legislative authority within the overall constitutional system of co-operative government as is envisaged in section 41 of the Constitution
- both national and provincial spheres of government must exercise their executive and legislative authority in a manner that does not compromise or impede a municipality's ability or right to exercise its executive and legislative powers or functions

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<sup>72</sup> See the Constitution s 156(4).

<sup>73</sup> The foundation of such legislative prescriptions is found in the Constitution itself. Refer to ss 157(1) and (6), 160(5) and 161. Even matters concerning local government that are not specifically dealt with in the Constitution may be prescribed by national or by provincial legislation within the framework of national legislation.

<sup>74</sup> According to the LGTA 209 of 1993 as amended, the MEC had to promote and support the development of local government in order to enable municipalities to exercise their powers and perform their duties in the management of their affairs, and the MEC had annually to provide information to the minister in this regard. The MEC and each municipality had to promote and support co-operation between municipalities in order to develop the capacity of each municipality to exercise its powers and perform its duties and thus manage its affairs.

- in furtherance of the purpose of effective co-operative government Organised Local Government must seek to:
  - (a) develop common approaches for local government as a district sphere of government
  - (b) enhance co-operation, mutual assistance and the sharing of resources among municipalities
  - (c) find solutions for problems relating to local government in general
  - (d) facilitate compliance with the principles of co-operative government and inter-governmental relations.<sup>75</sup>

Although the Systems Act does not provide further guidelines on co-operation between local governments themselves and other spheres of government, it particularly emphasises the importance of Organised Local Government to take positive steps in an effort to ensure effective co-operation in general.<sup>76</sup>

Building on the provisions of the Systems Act, the Municipal Structures Act specifically refers to the co-operation between municipalities *inter se*. The Act requires that district municipalities and local municipalities must co-operate with one another through assistance and support. At the request of a local municipality in the area a district municipality may provide financial, technical or administrative support to that local municipality. This provision of support is dependent on the capacity of such district council to provide the support as requested, however.<sup>77</sup> The Structures Act also envisages similar reversed support of a local municipality to a district municipality of a particular area. Mention is also made of the fact that the MEC of the relevant province must assist a district municipality to provide support services to other local municipalities. Provincial involvement and participation is thereby also drawn into the relationship between municipalities within the local sphere of government.

### **9.7 Exploring the roles and responsibilities of national and provincial governments towards municipalities in a system of co-operative governance**

It has been explained above that the Constitution in chapter 3 specifically requires a strong commitment of all three spheres of government to establish a new system of

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<sup>75</sup> See the Municipal Systems Act 32 of 2000 s 3.

<sup>76</sup> See the Municipal Systems Act s 3(a)-(d).

<sup>77</sup> See the Municipal Structures Act 117 of 1998 s 88.

horizontal and vertical co-operation amongst such spheres. All spheres are constitutionally mandated to observe and adhere to the principles and parameters specified in the Constitution. Furthermore, all spheres and all organs of state within each sphere must adhere to the principles of co-operative government and intergovernmental relations as determined by the highest law of the state.<sup>78</sup> According to these principles, all spheres must co-operate with one another in mutual trust and good faith and must foster friendly relations through assistance, support, information sharing, consultation and overall co-ordination. From these strong constitutional obligations various roles and responsibilities of both national and provincial governments can be identified in respect of local government. Most of these roles and responsibilities overlap between the national and provincial governments, while others may differ substantially because of special local circumstances. Some of these mentioned roles and responsibilities can be summarised as follows:

- *Strategic planning and developmental role* Both national and provincial governments are responsible for strategic planning and development. National government is mostly responsible for setting the overall strategic framework for the economic and social development of the nation and thus for all spheres of government. Provincial governments must tailor their strategies and developmental policies according to the specific conditions and needs that are prevalent in their areas. They should also ensure that municipal IDPs combine into a form of sustainable development that forms a framework across the province as a whole and that they are integrated as a unit. In turn, national government must ensure that local and provincial governments operate within the national enabling framework and are structured and capacitated to best promote development and growth as a whole.
- *Legislative/executive regulatory role* The Constitution affords both national and provincial governments the legislative and executive authority to see to the effective performance by municipalities of their functions in matters listed in both schedules 4 and 5 of the Constitution.<sup>79</sup> It is, however, national government that must provide the overall legislative framework for local government in general, which includes legislation regarding municipal demarcation, the division of powers

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<sup>78</sup> See the Constitution ss 40 and 41.

<sup>79</sup> See the Constitution s 155(7).

and functions between the categories of municipality, the electoral system applicable in local governments, the criteria for determining the size of municipal councils and, as was mentioned earlier, providing for the structures of Organised Local Government.<sup>80</sup> Both national and provincial governments are tasked with supporting and strengthening the capacity of municipalities.<sup>81</sup> As part of the process of establishing a new local government system, both national and provincial governments had to scrutinize old-order legislation and reformulate their policies and regulations in respect of local government to ensure that such policies and regulatory requirements are not only constitutional, but are in support of the new vision for local government.<sup>82</sup>

- *A fiscal and financial role* In modern society national governments plays an increasingly important role in local government financial matters. Examples of such roles are the managing of intergovernmental fiscal relations and the determination of each sphere's equitable share of nationally raised revenue.<sup>83</sup> Fiscal control and management of local government is also important to the various provinces, as they have an obligation to intervene in cases when necessary to ensure local financial viability.
- *A monitoring and intervention role* The Constitution envisages a clear role for both national and provincial governments in the monitoring of local government in order to ensure high standards and effective services. In this regard national government should develop and maintain an effective system of monitoring and oversight. It is of importance to note that many institutions that operate within the new constitutional dispensation require regular and accurate information to enable them to evaluate and measure effectiveness and progress.<sup>84</sup> In general, the monitoring and oversight of local governments should be directed at the functions allocated in terms of Schedules 4 and 5 of the Constitution and at those functions that have been assigned to municipalities. Provincial monitoring of the compliancy by municipalities with their specific objectives should also not be neglected. Any

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<sup>80</sup> See the Constitution ss 155(2), 157(2), 160(5) and 163.

<sup>81</sup> See the Constitution s 154.

<sup>82</sup> See White Paper on Local Government (1998) at 62.

<sup>83</sup> See the Constitution ch 13 on Finance.

<sup>84</sup> The Human Rights Commission is but one of such institutions that requires accurate information to assess the progress that municipalities have made towards the realisation of certain fundamental rights.

monitoring function must be supported by an information and communication system that would enable higher spheres of government to determine properly when and where to regulate or even intervene.<sup>85</sup> Intervention is the responsibility primarily of provincial governments, although national government may also intervene in special circumstances.<sup>86</sup> According to the White Paper on Local Government, the powers of intervention by provincial governments in the affairs of local government provide the following safeguards:<sup>87</sup>

- (a) to protect and promote minimum standards of local government delivery and democracy and ensure the compliance by municipalities of their constitutional mandate
- (b) to ensure and if necessary help restore the financial balance and sustainability of local government monetary basis
- (c) to promote accountability and public acceptance and faith in their local government bodies and
- (d) to prevent and detect local corruption and maladministration and to take crucial remedial steps to ensure effective actions are implemented.<sup>88</sup>

The White Paper has further identified the following guidelines, intended to regulate any intervention:

- From the outset, intervention should be avoided if possible. This can be achieved through proper training, support and funding. With good monitoring and communication many municipalities can be informed about potential problems and can take corrective measures.
- Clear responsibility and financial liability regarding cases of mismanagement, maladministration or even fraud must be established.
- National and provincial governments should exercise their powers in terms of section 155(7) of the Constitution to regulate municipal executive authority in or-

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<sup>85</sup> Reference should again be made to the fact that the constitutional requirements regarding cooperative government strongly suggests a new governmental system based on support and assistance, rather than intervention and subordination.

<sup>86</sup> These special circumstances are explained in the Constitution s 44(2).

<sup>87</sup> See White Paper on Local Government (1998) at 63-64.

<sup>88</sup> The powers of provincial intervention and supervision, as set out in s 139 of the Constitution, were discussed in earlier paragraphs. According to the White Paper, intervention powers should be enforced on a uniform basis and should be predictable. To achieve this will require national guidelines on the process of intervention. It is also important to establish a detailed framework to address instances when municipalities encounter financial problems such as bankruptcy. See the White Paper on Local Government (1998) at 65.



der to ensure that municipal functions are effectively performed. This should limit cases of intervention significantly.

- Any intervention that is required should be limited to the extent needed according to the circumstances of each case. To take away a municipality's executive power is a severe sanction and should only be permitted as a last resort and after all other mechanisms have failed.<sup>89</sup> However, one must not lose sight of the fact that municipalities must also contribute to working with the two higher spheres to ensure open and co-operative relations.

### **9.8 National support and assistance to local government through national policies and programmes**

Local government on its own cannot sustain or achieve its constitutional objectives without the support and assistance of especially the national sphere of government. Within the new overall governmental structure of South Africa there are many national departmental programmes and policies that relate and affect local government. In this regard it should be noted that the national policy environment within which municipalities must operate is becoming very complex. Local governments are increasingly seen as a point of integration and co-ordination for the effective implementation of the programmes of the two higher spheres of government. Some important national programmes that relate and affect local government are as follows:

- *The Department of Health* The national Department of Health has many significant functions decentralised to local governments. Local governments are known as District Health Authorities (DHA) and must integrate and co-ordinate health services at local level.
- *The Department of Transport* According to national legislation and policy, municipalities are sometimes regarded as Transport Authorities (TA) with *inter alia* the responsibilities of developing new local transport plans, implementing and co-ordinating national or provincial programmes, regulating and enforcing transport matters and promoting security in public transport instances.
- *The Department of Trade and Industry* Many initiatives of the Department of Trade and Industry have an important impact on the role of local government in

boosting local economies, enhancing local competitiveness and promoting small-scale enterprises and economic growth. Almost all local authorities are now actively drawn into small, medium and micro economic activities and enterprises.<sup>90</sup>

- *The Department of Arts and Culture* However, according to Schedule 4 of the Constitution, culture is listed as a concurrent legislative competence between both national and provincial governments. However, the Constitution also affords provinces exclusive competence over provincial cultural matters.<sup>91</sup> Concurrent competencies not only require the national government to take action, they also place some responsibility on provincial and local authorities to promote and develop such areas of competencies. Thus both provincial and local governments have certain responsibilities in promoting cultural affairs in their respective areas. From an international perspective, many municipalities are the biggest funders and organisers of arts and culture activities in their cities and thus some of the best development agencies of cultural events.<sup>92</sup> In South Africa, many community arts centres and libraries are the responsibility of local government.
- *The Department of Safety and Security* Traditionally, most safety and security matters were regulated by the highest level/sphere of government in the state. In modern South Africa, the position is similar: the provinces have no exclusive competence regarding safety and security matters and only very limited concurrent powers in that regard.<sup>93</sup> In instances where the Constitution does not specifically indicate where a certain legislative competency vests, the national sphere of government is generally empowered to legislate on such matters.<sup>94</sup> In the new local

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<sup>89</sup> In general the powers of intervention should be seen as a last option after the ordinary inter-governmental processes have failed. It is submitted that such exceptional exercise of interventional powers is in compliance with the co-operative principles set out in the Constitution s 41.

<sup>90</sup> Refer to the White Paper on Local Government (1998) at 68.

<sup>91</sup> See the Constitution Sch 5 Part A.

<sup>92</sup> See the White Paper on Local Government *ibid* at 68.

<sup>93</sup> See the Constitution Sch 4 and 5. The provinces have concurrent legislative competence regarding the police but only to the extent that the provisions of the Constitution ch 11 confers upon them a legislative competence.

<sup>94</sup> See s 44(1), which confirms that the national legislative authority, as vested in parliament, confers on the National Assembly the power *inter alia* to pass legislation *with regard to any matter* (own emphasis added), including a matter within a functional area listed in Sch 4, but excluding, subject to s 44(2), a matter within a functional area listed in Sch 5. In light hereof it is submitted that in cases where the Constitution does not specifically vest a functional area to either the national or provincial governments, national government is authorised to legislate on such matters. Attention should however be drawn to s 44(3), which states that legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Sch 4 is, for all purposes, legislation with regard to a matter listed in that Sch.

government structure national legislation will determine and enable municipalities to fulfil a role in maintaining law and order and to provide limited security services. One important new development in this regard is the establishment of so-called municipal police forces in certain municipal areas. In this regard municipalities are to some extent incorporated within the overall safety and security framework.<sup>95</sup> Aspects of disaster management also fall within the ambit of safety and security. Because of its nature, disaster management is important to all spheres of government. Good co-ordination and support is needed in disaster or emergency circumstances. Local governments must plan proactively for the prevention and management of disasters and should seek to minimise the vulnerability of communities and protect people that are at risk.<sup>96</sup> In almost all instances of disaster incidents, the department of safety and security will provide assistance and support, and local governments must work together with such agencies to address the problems as effectively and sufficiently as possible.

- *The Department of Mineral and Energy* This department has overseen and implemented far-reaching changes in South Africa, especially to the electricity industry. In many parts of the country both Eskom and various municipalities are reticulating electricity. New legislative changes regulate this important industry and play an important role in municipal revenue income and cash flow capabilities. It must be pointed out that many municipalities profit from electricity supply and use that profit to cross-subsidise other non-viable services. One can therefore not overemphasise the important impact electricity supply and income have on municipalities all over the country. Ill-considered removal of such a profitable income source from local government will most definitely affect overall municipal asset bases severely and could negatively impact on credit ratings and borrowing abilities.

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<sup>95</sup> For more details on municipal police forces, see South African Police Service Act 68 of 1995 as amended by the South African Police Service Amendment Act 83 of 1998 and also later chapters of this work.

<sup>96</sup> One important example in this regard is the frequent disaster incidents within especially informal settlements. Often many dwellings in informal settlements are totally destroyed by fire or water and many property and lives are at risk. Local governments should not only take preventative action in such cases but must according to their constitutional obligations develop such communities in order to minimise such dangerous circumstances. This type of problem poses severe challenges to local authorities and cannot be addressed in isolation by such governments alone.

- *The Department of Land Affairs* Mention has already been made of the important role that the Facilitation Development Act<sup>97</sup> and the required Land Development Objectives play within the new system of local government. In this regard close co-operation and co-ordination is required on all spheres of government. Apart from the FDA requirements, local governments must also work closely with the Department of Land Affairs in order to ensure that land reform and land redistribution processes are incorporated into local development planning and also that the overall commitment to land reform under the new Constitution is fulfilled.<sup>98</sup>
- *The Department of Public Works* The Department of Public Works has a number of important programmes which directly impact on local government affairs and economic development. Municipalities must ensure that such programmes are implemented and that they obtain the best possible advantages from such initiatives.
- *The Department of Housing:* Within the framework of national and provincial legislation and policy, all municipalities are required to ensure that inhabitants in their areas have access to adequate housing.<sup>99</sup> Housing is a concurrent functional area of legislative competence and can be achieved only through setting realistic housing delivery goals, solid co-ordination between spheres of government, provision of adequate financial support and through a process of identification and development of appropriate land. Municipalities are often required to participate directly in national housing programmes by acting as either developers or administrators. Such participation can also have substantial financial benefits for local authorities.<sup>100</sup>
- *The Department of Water Affairs and Forestry* Similar to most other national departments the Department of Water Affairs and Forestry has significant programmes that affect and influence local governments. Over the last five years many millions of rands have been invested in various programmes directed at supplying water directly to local communities. These programmes have already had a significant impact on the quality of life of many ordinary people of South Af-

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<sup>97</sup> 67 of 1995.

<sup>98</sup> For more on land reform processes see the Extension of Security of Tenure Act 62 of 1997.

<sup>99</sup> Mention has already been made of the fact that local governments, as part of the government in general, have important developmental duties and socio-economic obligations that must be fulfilled. See also s 26 of the Constitution.

<sup>100</sup> Refer to the White Paper on Local Government (1998) at 70.

rica and have contributed immensely to overall upliftment and the development of local circumstances.<sup>101</sup> One must always remember that the provision of safe drinking water is one of the essential services needed to sustain acceptable living conditions.

- *The Department of Environmental Affairs and Tourism* Another important national portfolio that impacts on local government is the department of Environmental Affairs and Tourism. Especially from an environmental point of view, national government has put forward many legislative requirements to ensure a healthy and non-harmful living environment. Local government must often ensure that these legal requirements are complied with and are indeed implemented and enforced.<sup>102</sup> Similar to the environment, tourism is also a concurrent competence and requires good co-ordination and mutual support between all spheres of government. Because of its diverse nature, tourism is strongly emphasised in local communities and all municipalities have important roles to play in developing local tourism, which will ultimately contribute to a better income and socio-economic upliftment.

### **9.9 Some comments on co-operative government in practice**

From the discussion above it is clear that national government and provincial government are increasingly looking to local government as the final institution to ensure the implementation of national/provincial policies and programmes. This aspect is further enhanced through the constitutional obligation that local government must participate in national and provincial development programmes.<sup>103</sup> Both national and provincial programmes have wide-reaching implications for local governments and will most definitely have an impact on municipal capacity and ultimate success. If the overall structure between the different spheres of government is to succeed, substantial support and provision of resources should be made available to municipal authorities. Municipalities are often working in parallel with a range of national or provincial authorities and could usually make good use of their infrastructure and competencies.

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<sup>101</sup> For more on this department's programmes see, eg, the Water Services Act 108 of 1997.

<sup>102</sup> Emphasis must be placed on the fact that although the environment is a concurrent functional area of legislative competence between national and provincial governments, it is also protected as a fundamental right in the Bill of Rights. See the Constitution Sch 4 and s 24.

<sup>103</sup> See the Constitution s 153(b).

According to the Constitution, both national and provincial governments are permitted to devolve powers and functions to local governments.<sup>104</sup> Although decentralisation of functions is often desirable to improve effectiveness, it must be thoroughly investigated and considered. Without proper financial and administrative support the devolution of functions to local government can easily cause more damage than good. Devolution without such support is often referred to as an “unfunded mandate”, which usually puts more strain on the already limited resources of municipalities and can finally result in a lack of proper delivery.<sup>105</sup> In order to avoid unfunded mandates, it is suggested that all legislation or executive actions that deal with the decentralisation or assignment of powers are timeously referred to the Organised Local Government structures for discussion and comment.<sup>106</sup>

### 9.10 Conclusion

It was discussed and explained above that the new constitutional order specifically incorporates and establishes an overall governmental structure based on principles of co-operation and intergovernmental relations.<sup>107</sup> All three spheres of government, which are distinctive, interdependent and interrelated to one another, and all organs of state within each sphere are obligated to comply with the principles set out in the Constitution. An Act of parliament is envisaged to promote and provide for further intergovernmental relations and mechanisms.<sup>108</sup> Although various national Acts provide for co-operation and intergovernmental support,<sup>109</sup> the legislation required in terms of section 41(2) has not been enacted up to date. Within the current system, not all requirements and obligations relating to co-operative government are properly addressed. Some writers argue that the current legislative provisions fall short of the requirements obligated in section 41(2) and that parliament should urgently design a

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<sup>104</sup> According to s 44(1)(iii), the national assembly has the power to assign any of its legislative powers, except the power to amend the Constitution, to any other legislative body in another sphere of government. Not only legislative authority but also executive authority may be assigned. In this regard s 99 states that a cabinet member may assign any power or function that is to be exercised or performed in terms of an Act of parliament to a member of a provincial Executive Council or even to a Municipal Council. The position is very similar on a provincial level. See the Constitution ss 104(1)(b) and 126.

<sup>105</sup> See the White Paper on Local Government (1998) at 73.

<sup>106</sup> For more on this see Malherbe R “The unconstitutionality of unfunded mandates imposed by one sphere of government on another” 2002 (3) *TSAR* 541.

<sup>107</sup> See the Constitution s 41.

<sup>108</sup> See the Constitution s 41(2)(a)-(b).

<sup>109</sup> See, eg, the Housing Act 107 of 1997, the Water Services Act 108 of 1997 and the Facilitation Development Act 67 of 1995.

more comprehensive inter governmental relations plan.<sup>110</sup> In this new plan specific care should be taken not to establish an unequal inter governmental system which would impact negatively on local government participation and acceptance. One must also question the current efficiency of Organised Local Government Structures, as they are often seen to be overshadowed by the two higher spheres of government. Not only should OLG be afforded a voice in governmental relations, that voice should be protected and listened to seriously. Currently the institutional workings regarding co-operative government seem unsatisfactory. In many relevant instances local governments are still excluded or marginalised, and there is a degree of confusion between SALGA and some provincial structures. SALGA is often perceived to be more willing to follow national proposals than to be too critical regarding local government matters.<sup>111</sup>

It should again be emphasised that for the first time in South African constitutional history local government has been afforded participation in the highest governmental structures of the state. This positive development must be exploited and utilised to its fullest potential. This inclusion is a significant constitutional development and should indeed contribute to the success and efficiency of the newly established co-operative system. There can be no doubt that strong local government institutions with adequate capacity will play a critical role in the enhancement and success of national and provincial policies and programmes. This in turn would help municipalities to build and achieve sustainable human settlements and to comply with their constitutional obligations. In the mandated spirit of co-operation and support, national and provincial governments should positively support and promote the developmental role of local governments. In reciprocation those governments should ensure municipal compliance and participation in national or provincial developmental programmes.

It is submitted that the overall constitutional demands regarding co-operative government and intergovernmental relations have significantly strengthened the autonomy of local government structures as a distinct sphere of government. Such autonomy is not without limits, however, and the Constitution itself requires national and provincial oversight and control over the powers and functions of municipal gov-

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<sup>110</sup> Refer to Chaskalson *et al* (1999) 5A–32.

<sup>111</sup> See Chaskalson *et al* (1999) 5A–32.



ernments. Strict requirements are determined if control or intervention is considered. Municipalities thus have a strong but not absolute autonomy. Protection of municipalities as fully flexed spheres of government seems unchangeable by the two higher spheres unless a constitutional amendment is passed and accepted. Furthermore, it would appear that the various national legislative provisions set out in both the Structures Act and the Systems Act go some way towards enhancing the basic constitutional framework regarding co-operation and intergovernmental relations. National government must go further, however, and complete the basic model through a more comprehensive legal measure which should *inter alia* ensure programmes of continuous training and effective communication.<sup>112</sup>

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<sup>112</sup> It should be noted that at the time of writing this chapter the Intergovernmental Relations Bill was still only a bill before parliament. If the bill is enacted, it would significantly enhance some of the areas of concern under the current legal system. Please again take cognacance of fn 10 of the ch. The Intergovernmental Relations Framework Act 13 of 2005 was indeed enacted during the later part of 2005.

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

### 10.1 Introduction

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

- *To create a flexible and effective two-tier system of local governments across the whole country.* It is important for local democracy that all people's interests are represented in their local authority. The new system is therefore directed at ensuring that every person will be governed by a primary or local tier of government. Such local governments are known as Metropolitan Councils and Local Councils. Primary councils must be viable and capacitated to perform and fulfil basic municipal functions and responsibilities. Communities do not exist in total isolation of one

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<sup>1</sup> See the Constitution s 151(1).

another, however, and often need to share scarce resources and expertise with each other. To accommodate such needs, the new system is also committed to a strong secondary or regional tier of local government structures. Such structures are also referred to as "District Councils".<sup>2</sup> It is envisaged that District Councils will play a vital role in the integration of big regions and that they will be best positioned to ensure that services and resources are distributed equitably between all municipal districts.

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

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

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

During the transitional process, and more specifically after the local government elections of 1995/1996, it was found that the system then in place was bureaucratic and slow. In many instances, important decisions within local governments were taken by senior unelected officials, and the often uninterested politicians merely endorsed such decisions without meaningful debate and consideration. It became

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

clear that the whole institutional structure of local governments also required change in order to provide for strong political leadership, effective decision-making procedures and an overall democratic and accountable government. In order to achieve such a system the Constitution provided for the establishment of different categories of municipality as well as various types of municipality that may be established within each category. National legislation was further obligated to define the different types of municipality.<sup>3</sup> In order to comply with the constitutional requirements, the Local Government: Municipal Structures Act<sup>4</sup> was enacted by parliament. The Structures Act specifically provides for five different systems of municipal government and allows for different combinations of these five systems in order to meet the wide range of needs and requirements of municipalities across South Africa. The objectives of the new systems are to allow powers and functions to be delegated and shared among councillors and officials in such a way as to ensure effective decision-making procedures with clear lines of responsibility. They also allow for committed community participation and support. Both the different categories and municipal types are discussed in detail below.

## **10.2 Important requirements regarding the functioning and roles of local governments**

In chapter 7 of this work, mention was made of the fact that a local government consists of a municipal council represented by politicians who are democratically elected by the local residents, a municipal administration that is composed of many different officials employed by the municipal council and which is headed by a Municipal Manager<sup>5</sup> and, finally, the local community. Because of community involvement, municipal councils play a central role in local democracy. Although there are often many different leaders and influential people in local communities, the municipal council is the only institution that is elected by the entire local community.<sup>6</sup> Municipalities have further various wide-ranging functions and responsibilities, and the following should be specifically emphasised:<sup>7</sup>

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<sup>3</sup> See the Constitution s 155(1) and (2).

<sup>4</sup> 117 of 1998 as amended. Hereafter referred to as the Structures Act.

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

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

<sup>7</sup> Refer to the objectives of local government set out in the Constitution s 152.

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

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

One must also remember that Municipal Councils have both legislative and executive authority in their areas.<sup>8</sup> Municipalities are therefore responsible both for formulating legislation<sup>9</sup> and for developing programmes to implement or execute such legislation. However, no municipal council can fulfil all its powers and duties without delegating at least some of its powers and duties.<sup>10</sup> All local governments therefore need to develop municipal systems that are capable of ensuring that delegated powers and functions are properly performed. It must further be noted that not all powers

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<sup>8</sup> This aspect has been confirmed in the Constitution s 151(2).

<sup>9</sup> Also called municipal by-laws.

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

can be delegated. The Constitution specifically disallows certain powers or functions to be delegated.<sup>11</sup> The new institutional model for local government specifically provides for different systems that should each provide different possibilities in the way in which powers and responsibilities are allocated or delegated to individual councillors or specifically designated committees. These different systems and institutional models are identified and explained below.

### **10.3 Categories of municipal government**

#### **10.3.1 *The different categories of municipality***

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

- (1) There are the following categories of municipality:
  - (a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area.
  - (b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.
  - (c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.
- (2) National legislation must define the different types of municipality that may be established within each category.

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

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

<sup>13</sup> The Constitution s 155(1)-(7).

- (3) National legislation must–
- (a) establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;
  - (b) establish criteria and procedures for the determination of municipal boundaries by an independent authority; and
  - (c) subject to section 229, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.
- (4) The legislation referred to in subsection (3) must take into account the need to provide municipal services in an equitable and sustainable manner.
- (5) Provincial legislation must determine the different types of municipality to be established in the province.
- (6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must–
- (a) provide for the monitoring and support of local government in the province; and
  - (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.
- (6A) If the criteria envisaged in subsection (3)(b) cannot be fulfilled without a municipal boundary extending across a provincial boundary–
- (a) that municipality boundary may be determined across the provincial boundary, but only–
    - (i) with the concurrence of the provinces concerned; and
    - (ii) after the respective provincial executive has been authorised by national legislation to establish a municipality within that municipal area; and
  - (b) national legislation may–



- (i) subject to subsection (5), provide for the establishment in that municipal area of a municipality of a type agreed to between the provinces concerned;
  - (ii) provide a framework for the exercise of provincial executive authority in that municipal area and with regard to that municipality; and
  - (iii) provide for the re-determination of municipal boundaries where one of the provinces concerned withdraws its support of a municipal boundary determined in terms of paragraph (a).
- (7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

The wording of the Constitution clearly indicates that a category A municipality, which has exclusive municipal executive and legislative authority, is also the only municipal council in that area. Category A municipalities thus stand alone. The best term for a category A municipality is a Metropolitan Municipality/Council. Within a metropolitan area there is only one municipal council, namely the metropolitan council. As indicated, category B municipalities are municipalities that share municipal executive and legislative authority in a specific area with a category C municipality within whose area such category B municipalities fall. A category B municipality is also referred to as a Local Municipality/Council. Lastly, the Constitution determines that category C municipalities are municipalities which have municipal executive and legislative authority in areas that include more than one municipality.<sup>14</sup> The general term for a category C municipality is a District Municipality/Council. Three distinct categories of municipality are therefore identified within the new local government system as: metropolitan councils, district councils and local councils. Metropolitan councils and local councils are often referred to as primary local governments, while district councils, on the other hand, are regarded as secondary local governments,

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

because they comprise representatives from primary local governments. Within the new local government system, district councils are comparable to the former regional services councils, which were created in terms of the Regional Services Council Act of 1995.<sup>15</sup>

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

The Structures Act furthermore confirms the different categories of municipality that are required in terms of section 155(1) of the Constitution.<sup>18</sup> In compliance with the Constitution,<sup>19</sup> the Structures Act also establishes the criteria for determining when an area should have a single category A municipality or when it should have both category B and C municipalities.

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<sup>15</sup> 109 of 1995. See also Rautenbach and Malherbe (1999) 314.

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

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

<sup>18</sup> The Act determines that a district council, a local council and a metro council refer to the municipal council of a district municipality, local municipality or metropolitan municipality respectively. A *District Municipality* is defined as a municipality that has municipal executive and legislative authority in an area that includes more than one municipality and which is described in s 155(1) of the Constitution as a category C municipality. A *Local Municipality* is a municipality that shares municipal executive and legislative authority in its area with a district municipality within whose area it falls and which is described in the Constitution s 155(1) as a category B municipality. Lastly, a *Metropolitan Municipality* refers to a municipality that has exclusive executive and legislative authority in its area and which is described in the Constitution s 155(1) as a category A municipality.

<sup>19</sup> See the Constitution s 155(3)(a).

### 10.3.1.1 Areas which must have category A municipalities

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

- a conurbation featuring<sup>21</sup>
  - (a) areas of high population density
  - (b) an intense movement of people, goods and services
  - (c) extensive development and
  - (d) multiple business districts and industrial areas
- a centre of economic activity with a complex and diverse economy
- a single area for which integrated development planning is desirable and
- having strong interdependent social and economic linkages between its constituent units.

A closer evaluation of the abovementioned criteria reveals strong similarities between these and the elements that comprise the definition of a “metropolitan area” as defined in the Local Government Transition Act of 1993.<sup>22</sup> Although the Structures Act is not entirely clear on this point, it is suggested that all four main features<sup>23</sup> should be distinguishable before a single category can be determined and a municipality decided upon.<sup>24</sup> When the criteria set out in section 2 of the Structures Act have been met, the Act specifically requires the establishment of a category A or metropolitan municipality.

### 10.3.1.2 Explaining a category A/metropolitan municipality

#### (a) Introduction

Metropolitan areas are large urban settlements with high population densities, often complex and diversified economies, high levels of functional integration over a large geographic area and many economic and social activities that transcend certain municipal boundaries.<sup>25</sup> According to the Constitution, a metropolitan local government is a municipality with exclusive municipal, executive and legislative authority in

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<sup>20</sup> See the Structures Act s 2.

<sup>21</sup> Conurbation also means a conglomeration of urban areas.

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

<sup>23</sup> The Structures Act s 2(a)–(d).

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

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

a particular area.<sup>26</sup> In general, three main reasons have been put forward for metropolitan councils' being needed in modern local government systems:<sup>27</sup>

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

As was explained in the definition above, metropolitan areas have more than one business district and industrial area and their economies are complex and diversified.<sup>28</sup> Because of their size, most metropolitan governments are important contributors to the national economy of the country. Metropolitan areas are therefore key centres in the global economy and should be governed accordingly. It is furthermore important for metro governments to accommodate the intense movement of people and goods in their areas, and they must function as integrated units.<sup>29</sup>

#### **(b) Creating the new metropolitan government system**

The local government dispensation before 1994 was substantially distorted by the former government's policies of segregation. Cities were seen as existing for the

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<sup>26</sup> The Constitution s 155(1)(a).

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

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

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

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

With the introduction of the Local Government Transition Act,<sup>30</sup> metropolitan government appeared for the first time in South African local government history. This was an important step towards changing the inequitable pattern of urban development that had been inherited from the past. Six metropolitan areas were proclaimed,<sup>31</sup> and each metro area had a two-tier local government system which consisted of a Metropolitan Council (MC) and some Metropolitan Local Councils (MLC). Unfortunately the LGTA did not specify clearly which powers and functions were divided between the MC and MLC. The Act in fact allowed for a local negotiation process to determine which functions and powers would rest in MCs and in MLCs respectively.<sup>32</sup> A further problem that was experienced during the transitional period within metropolitan areas was the fact that the establishment of separate administrations for MCs and each MLC led to considerable duplication of functions, and such efforts were both wasteful and inefficient. A final issue that hampered effective and efficient service delivery in the interim system was the fact that each MC and MLC was an employer body in its own right. This caused many inequalities between personnel and led to poor administrative support.<sup>33</sup>

### **(c) Establishing new metropolitan governments**

During the interim phase as determined by the LGTA, the national government consulted widely on the design of the final local government system. Many workshops and conferences were held to discuss and debate the advantages and disadvan-

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<sup>30</sup> 209 of 1993.

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

<sup>32</sup> This was one of the major deficiencies of the LGTA and necessitated later amendments.

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

tages of the interim system. On the basis of these discussions, consultations and research reports, national government was confronted with two main models for future metropolitan governments. The two possible models were:

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

Based on the various discussions and public hearings, the White Paper on Local Government which was published in March 1998 proposed that a single tier of metropolitan government system should be introduced for all metropolitan areas in the country. Certain trial projects were launched, which later confirmed that a single tier of metropolitan government seemed to be the most effective system for metropolitan areas.<sup>35</sup> Accordingly, national government enacted the Local Government: Municipal Structures Act<sup>36</sup> to provide for a single tier of municipal government in metropolitan areas.<sup>37</sup>

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

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

During the transitional process, all transitional metro councils established executive committees, as the mayoral executive system was not known to South Africa. Only

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<sup>34</sup> So-called "unity city".

<sup>35</sup> See the LGIS no 2 "Metropolitan Government" (1999) at 7.

<sup>36</sup> 117 of 1998.

<sup>37</sup> Refer to the Act s 2.

<sup>38</sup> See the Constitution s 155(3)(a).

<sup>39</sup> Refer to the Structures Act s 2.

with the local government elections of December 2000 was the creation of a mayoral executive system legally possible. In the national and provincial executive systems the president or premier is vested with executive authority, which is exercised together with members of cabinet or a provincial executive council.<sup>40</sup> Although the mayoral executive system is very similar to these systems, there are certain differences that should be noted. Firstly, the Constitution confirms that municipal executive authority is vested in the municipal council and not in a mayor. Secondly, the executive mayor and his mayoral committee can exercise only such executive powers as are delegated to him/her by the municipal council.<sup>41</sup> Thirdly, the Structures Act does not proclaim the mayoral committee to be handled and treated differently from the other types of committee possible in local government. This viewpoint was not shared by the majority of justices in the Constitutional Court. In the case of *DA v Masondo No*<sup>42</sup> the court held that the mayoral committee was not a committee of the Municipal Council as contemplated in section 160(8) of the Constitution and therefore did not require minority representation in such a committee.<sup>43</sup>

#### **(d) Administrative transformation in metropolitan areas**

Within the public sector in general, many government functions are increasingly being decentralised to local government level. Examples of such functions are: certain health services, municipal police forces, local housing programmes and transport authorities, to name but a few. Often these functions are decentralised to local governments, without the necessary funds for them to exercise and perform such functions effectively. These functions are then referred to as “unfunded mandates”. Unfunded mandates must be guarded against, as such mandates may be regarded as unconstitutional.<sup>44</sup> In certain instances unfunded mandates and ill-considered decentralisation of functions can be regarded as being against the constitutional requirements to help and assist local governments. Decentralisation has its advan-

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

<sup>41</sup> See the Structures Act s 56.

<sup>42</sup> 2003 (2) SA 413 (CC).

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

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



tages, however, and there is a general realisation in modern governments that functions should be decentralised to the level where they can best be exercised effectively and efficiently.<sup>45</sup>

There seems to be a worldwide technological move towards private sector service providers' rendering traditional municipal services, especially in metropolitan service provision. This tendency is very positive, in the sense that it ensures market competition, use of modern technologies, better operational efficiency, lower unit costs, better overall quality and more customer-orientated services. Notwithstanding the fact that private service providers are used, metropolitan councils still have the final responsibility for ensuring that such services are provided according to certain minimum standards. The outsourcing of services means that the core business of municipalities is less focused on managing trading services and more focus on contract and performance management and supervision. Such a position has both advantages and disadvantages, however, and must be managed with care.

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

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

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

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

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

#### **10.3.1.4 Category B local municipalities and category C district municipalities**

The new system of local government in South Africa promotes a vision of a two-tier system of local councils and region-wide district councils throughout the entire territory of the state, excluding metropolitan areas. It is hoped that this two-tier system will address the many problems facing municipalities outside metropolitan areas. To a large extent the local government dispensation pre 1994 and even under the LGTA was silent on rural local government aspects, and this created a wide range of problems in rural municipal areas.<sup>47</sup> Like all municipalities, the new district local government system had to build municipal institutions that are geared towards meeting the social and economic needs of citizens in an economically feasible, efficient and democratic manner. Together with the White Paper on Local Government, the Municipal Structures Act and the Municipal Demarcation Act provide the new tools whereby local government outside metropolitan areas are created to provide district governments that are strong, decentralised governments with enough powers to fulfil their constitutional obligations. It is submitted that without a combination of municipal institutions in district areas, it will not be possible for one single authority to address all the development challenges and at the same time be responsive to the needs and demands of local residents.

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

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

<sup>48</sup> See LGIS no 2 "District Government" (1999) at 10.

district council have the normal municipal powers and functions, apart from the functions of the district council.<sup>49</sup>

Within the new system envisaged by the Constitution, it is foreseen that some parts of district areas, will not be viable and suitable for local councils to be established. In such areas so-called District Management Areas (DMA) have and can be declared.<sup>50</sup> In a District Management Area, the relevant district council is responsible for all municipal powers and functions in that area. According to the new framework for local government in non-metropolitan areas, a unique opportunity is created to improve the relations between local and district councils. To a large extent, the new rationalisation of municipalities and the re-demarcation of boundaries, have made this interaction much stronger and easier.<sup>51</sup>

### **10.3.2 The application of the relevant criteria**

In the past it was often difficult to determine who was responsible for the application of the criteria and the subsequent determination of the categories of municipality. This uncertainty has led to a specific legal dispute between the national government and some provincial governments. In the case of *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and another* and *Executive Council Kwazulu-Natal v President of the RSA and others*<sup>52</sup> two provincial governments instituted proceedings in the Constitutional Court challenging the constitutional validity of certain sections of the Local Government: Municipal Structures Act 117 of 1998. The constitutional challenges fell into two categories: (a) that certain provisions of the Act encroached on the powers of the provinces, more specifically the power to establish municipalities in their provinces in terms of section 155(6) of the Constitution, and (b) that the Act encroached on the constitutional power of municipalities *inter alia* to elect executive committees or other committees in terms of section 160(1) of the Constitution and to regulate their own internal affairs

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

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

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

<sup>52</sup> 2000 (1) SA 661 (CC).

in terms of section 160(6) of the Constitution. The national government contended that although the Constitution in chapter 7 allocates powers to the provinces and municipalities, it does not deprive parliament of the power to legislate on such matters and that parliament in terms of section 44(1)(a) of the Constitution has concurrent powers over such matters. It was also contended by the applicants that the Act was inconsistent with the Constitution in that section 155(3)(b) of the Constitution required municipal boundaries to be determined by an independent authority and in that the empowerment of the national government to apply the criteria to determine which area should have a category A municipality was usurping a function of the Demarcation Board. The minister's discretion to decide whether to accept the recommendations of the Demarcation Board in terms of municipal boundaries was also impermissible. After weighing up all the circumstances of the case, the court held that:

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

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

<sup>54</sup> *Ibid* para 55 at 690-691.

<sup>55</sup> *Ibid* para 59 at 692A-B.

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

- The Constitution conferred only executive powers on the provinces in terms of section 155(6) and stated that such powers had to be exercised within a framework of legislation. Because of the constitutional silence on such legislative regulation, national legislation could be prescribed in terms of section 164 of the Constitution. The court made it clear that the power to establish municipalities had to be distinguished from the power to determine the types of municipality. The power on municipal types vested in the provinces according to section 155(5) of the Constitution.<sup>57</sup> In relation to the establishment of municipalities<sup>58</sup> the provinces had only executive powers, but in relation to establishing the types of municipality<sup>59</sup> the provinces had both legislative and executive powers. National government could not legislate on matters which fell outside its competence.<sup>60</sup>

Because of this decision, the Structures Act was amended in 1999.<sup>61</sup> According to the amendment Act, section 5 of the Structures Act was repealed and section 4 was amended and now states the following:<sup>62</sup>

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

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

<sup>57</sup> *Ibid* paras 72 and 73 at 694-695.

<sup>58</sup> The Constitution s 155(6).

<sup>59</sup> The Constitution s 155(5).

<sup>60</sup> *Ibid* paras 82 and 83 at 696-697.

<sup>61</sup> See the Local Government: Municipal Structures Amendment Act 58 of 1999.

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

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

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

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

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

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

<sup>65</sup> Own emphasis added.

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

<sup>67</sup> Refer to the Structures Act s 6(1).

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

<sup>69</sup> The Constitution s 151(1).

B<sup>70</sup> municipality in a particular area will not be conducive to the fulfilment of the objects of such a municipality, as is required in section 24 of the Demarcation Act.<sup>71</sup>

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

#### **10.3.4 Special provisions for cross-boundary municipalities**

Apart from the three categories of municipality mentioned above, the Constitution also provides for the establishment of so-called “cross-boundary municipalities”.<sup>73</sup> Cross-boundary municipalities are municipalities that have been established across provincial boundaries. The Constitution states that if the criteria envisaged in subsection 155(3)(b), which is to be found in the Demarcation Act,<sup>74</sup> cannot be fulfilled without a municipal boundary’s extending across a provincial boundary, the particular municipal boundary may be determined across the provincial boundary, but only (i) with the concurrence of the provinces concerned and (ii) after the respective provincial executives have been authorised by national legislation to establish a municipality in that municipal area. In this regard and subject to subsection 155(5), national legislation may provide for the establishment in that area of a municipality of a type agreed to between the provinces concerned. The mentioned national legislation may also provide a framework for the exercise of provincial executive authority in that area and for the re-determination of municipal boundaries where one of the provinces

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<sup>70</sup> Local Council.

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

<sup>72</sup> See the Structures Act s 6(3)(a)–(b).

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

<sup>74</sup> See the Demarcation Act s 24.



concerned withdraws its support of a municipal boundary as has been determined by the Demarcation Board.<sup>75</sup>

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

- Establish in that area, in accordance with section 12 of the Structures Act, a municipality of a type mentioned in section 8, 9 or 10 as agreed to between the provincial legislatures concerned.
- Exercise their executive authority in terms of the Structures Act and any other legislation jointly with regard to that municipality, except when the provincial governments concerned have entered into an agreement which provides for an alternative arrangement envisaged in subsection 90(3) of the Structures Act. The subsection states that the governments of the provinces concerned may enter into an agreement providing for an arrangement which may include:
  - (a) The exercise of their executive authority with regard to that municipality or in that municipal area by functionaries of one of those provincial governments on a delegation or agency basis.
  - (b) The provision of financial and other assistance to the municipality.
  - (c) The suspension of all or any legislation of the one province and the application of all or any of the other province's legislation in that municipal area. It is important to note that an agreement that provides for the application of one province's legislation in a municipal area that falls in another province is enforceable only if the provincial legislature of that other province has passed legislation that provides or allows for such application.<sup>78</sup>

Lastly, it is also confirmed that if a provincial legislature no longer supports the continuation of a cross-boundary municipality and subsequently passes a resolution calling for the disestablishment of that municipality, the Demarcation Board must re-

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<sup>75</sup> See the Constitution s 155(6A)(b)(i)–(iii).

<sup>76</sup> Refer to the Structures Act s 90(1).

<sup>77</sup> Both the Demarcation Act and the Structures Act.

<sup>78</sup> See the Structures Act s 90(4).

determine the boundaries of that municipal area in such a way that no boundary extends across a provincial boundary.<sup>79</sup>

In further compliance with, and to give effect to, section 155(6A) of the Constitution, national government passed the Local Government: Cross-Boundary Municipalities Act<sup>80</sup> in 2000, whereby affected provincial executives are authorised to establish cross-boundary municipalities and to provide for the re-determination of the boundaries of such municipalities under certain circumstances. The preamble of the Act states that this Act was enacted by parliament because the Demarcation Board indicated the desirability for certain municipal boundaries to extend across provincial boundaries and because national legislation must authorise the respective provincial executives to establish a municipality within a municipal area that extends across a provincial boundary. According to the Act, the MECs in the provinces indicated in the annexed schedule to the Act are authorised to establish cross-boundary municipalities as set out in the schedule.<sup>81</sup>

Provision is also made for the re-determination of boundaries of cross-border municipalities, which may be re-determined under circumstances other than those provided for in section 90(5) of the Structures Act only if the legislatures of the provinces involved so concur and if the re-determination is authorised by national legislation.<sup>82</sup> In light of the above it is submitted that any re-determination of the boundaries of a cross-boundary municipality must be done in terms of section 90(5) of the Structures Act, unless section 2 of the Cross-boundary Municipalities Act is complied with. In compliance with the requirement that national legislation must authorise the re-determination of the boundaries of cross-boundary municipalities, national government enacted the re-determination of the Boundaries of Cross-boundary Municipalities Act in 2000.<sup>83</sup>

## **10.4 Systems and types of municipal government**

### **10.4.1 *Why different types of municipality are created***

Apart from defining the different categories of municipality, the Structures Act also defines the different types of municipality that may be established within each cate-

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<sup>79</sup> See the Structures Act s 90(5).

<sup>80</sup> 29 of 2000.

<sup>81</sup> See the Cross-boundary Act s 1.

<sup>82</sup> See the Cross-boundary Act s 2.

<sup>83</sup> 69 of 2000.

gory. This provision is in compliance with the constitutional obligations.<sup>84</sup> The provision of different types of municipality places emphasis on the fact that not all municipal councils are the same and that different ways should be open to municipal councils whereby they can organise themselves to perform their powers and duties effectively. Some flexibility is thus needed to establish the different types of municipality that should be the most effective and efficient in particular circumstances. There is no standard way to organise all municipal councils, and the provision of different municipal types should afford most municipalities the opportunity to establish the system that will be most effective for specific local needs.

#### **10.4.2 The different systems of municipal government**

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

According to the Structures Act, the different types of municipality that may be established within each category of municipality are defined in accordance with five different systems of municipal government or combinations of such systems. It is not mandatory that the different systems be combined to form a particular type. In some instances an individual system can also be used to establish a specific type of municipality, as long as it is one of the five executive systems.<sup>86</sup> These systems are:

- *A collective executive system*, which allows for the exercise of executive authority through an executive committee. Executive leadership of the municipality is collectively vested in the executive committee.
- *A mayoral executive system*, which allows for the exercise of executive authority through an executive mayor. Executive leadership of the municipality is vested in the mayor, who is assisted by a mayoral committee.
- *A plenary executive system*, which limits the exercise of executive authority to the municipal council itself.

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

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

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

- *A sub-council participatory system*, which allows for delegated powers to be exercised by sub-councils that are established for/in parts of the municipality.
- *A ward participatory system*, which allows for matters of local concern within the different wards of a particular municipality to be dealt with by the specific committee that has been established for such wards.

A closer investigation of the different systems of municipal government as mentioned above reveals a clear and important distinction between the different systems. Some systems are called “executive systems”, while others are “participatory systems”. In this regard, it must be remembered firstly that every municipal council has certain executive powers and duties which also allow for the exercise of certain legislative powers.<sup>87</sup> The Constitution further specifically vests both executive and legislative authority of a municipality in its Municipal Council.<sup>88</sup> This vesting of powers in the Municipal Council has very important implications for the different systems and types of municipality. The executive system of government describes the structure through which that government exercises its executive powers and performs its executive duties. Thus the municipal executive system describes the structure through which a particular municipal council must exercise its executive authority. As mentioned above, the Structures Act provides for three systems of executive local government, and it goes without saying that every municipal government must be based on one of the three systems.<sup>89</sup>

In addition to the three executive systems, the Structures Act also provides for two so-called “participatory systems” of municipal government. The provision of the two participatory systems aims to ensure and enhance public participation within the formal executive functioning of municipalities and also to provide for more accountable democratic local governance. The two participatory systems cannot function on their own, however, and must be combined with one of the three executive systems. Various combinations of the executive systems and participatory systems are possi-

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

<sup>88</sup> Refer to s 151(2) of the Constitution.

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

ble. In some instances certain executive systems will function on their own, while in other cases they will be combined with one or even both the participatory systems.<sup>90</sup> The type of municipality that has been established can be determined according to the particular executive municipal system or combination of executive systems with one or both of the participatory systems. In order to determine the best executive system or combination of systems for a particular municipality, each of the systems should be explained briefly.

#### **10.4.2.1 The collective executive system**

In a collective executive system, the municipal council elects an Executive Committee from among the members of the council and then delegates some of the council's executive responsibilities to that executive committee. The executive committee is then empowered to take decisions on matters that fall within its delegated powers and is thus vested with executive leadership responsibilities for that municipality. Most municipal councils existing before the December 2000 local government elections<sup>91</sup> established executive committees to increase the efficiency of their decision-making processes. In essence, the establishment of a separate executive structure enables a small group of councillors who have been elected to the executive committee to deal with the day-to-day business of running the municipality. Without a smaller executive structure, the whole council would be required to meet every time a decision is to be taken. In instances where a municipal council is very large or has many decisions to contemplate, the taking of decisions in plenary would result in a slow decision-making process. A collective executive system with an executive committee should be much more effective and efficient to ensure a more speedy decision-reaching process. The Structures Act specifically provides for the internal structuring and functioning of executive committees, the features of which will be discussed in later chapters of this work.<sup>92</sup>

It is important to note that in the collective executive system the relevant council delegates certain powers to the whole executive committee and not to any individual member of that committee. This therefore means that the executive committee must exercise its powers collectively as a unit, and no individual person can take decisions

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<sup>90</sup> See the Structures Act ss 8, 9 and 10.

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

<sup>92</sup> See the Structures Act ch 4 Part 1.

on behalf of the committee. The collective or team approach is often regarded as one of the key strengths of the collective executive system. The committee has the benefit of being able to draw on the collective experiences and insights of all the members of the committee. The particular system also ensures that proper checks and balances occur in terms of executive decision making. Because no member can take decisions individually, there is a far smaller chance that decisions will be taken in a biased or self-interested manner. Lastly, the collective approach is also beneficial to facilitate problem solving, as it may generate innovative solutions which individual members may not have thought of on their own.<sup>93</sup> Suffice it to say that in instances where a municipal council is very large or has a wide range of responsibilities, such a council should consider the delegation of some of its executive powers to a smaller group of councillors in order to facilitate fast and effective decision making.

#### **10.4.2.2 The mayoral executive system**

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

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

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

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

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<sup>93</sup> Refer to the LGIS no 2 “Types of Municipalities” (1999) at 10–11.

<sup>94</sup> See the Structures Act s 7(b).

<sup>95</sup> See the Structures Act ch 4 Part 2.

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

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

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

- The election of an individual executive leader puts a “face” in local government. Many local residents do not know who is responsible for governing a specific municipal area. Local government is often experienced as a faceless bureaucratic institution. It is not always clear who is accountable for the final decisions and political leadership of a municipal council. In this regard, an executive mayor gives a human face to local government and thereby makes it easier for ordinary residents to relate to the particular leadership of their local area. More certainty is provided to residents as to where final accountability and responsibilities are vested.
- A mayoral executive system should also provide for decisive leadership and rapid decision-making processes. Such positive attributes are particularly useful in larger and more complex municipalities. On the international front, many “international” cities such as London and New York are moving to a mayoral executive system of municipal governance.<sup>97</sup> Many such large metropolitan cities are often home to a diversity of strong local, national and international interests. In dealing effectively with such issues, a charismatic and respected executive mayor can play an important role in inspiring business confidence, attracting foreign investment and building strong relationships between the local municipality and community interest groups.<sup>98</sup>

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<sup>96</sup> Refer to the Structures Act s 60(1)(a).

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

<sup>98</sup> A good example in this regard is the significant role the mayor of New York, mayor Giuliani, played after the 11th of September 2001 terrorist attacks on the USA. His executive leadership not

*continued on next page*



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

#### **10.4.2.3 The plenary executive system**

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

#### **10.4.2.4 The two participatory systems**

The three executive systems of municipal government described above should enable effective and efficient decision making in local government. Each municipal council must have one of these executive systems to ensure that it can exercise its

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only mobilised the local community but also received national and international praise for the manner in which the situation was dealt with.

<sup>99</sup> The word plenary means "full" or "complete".

<sup>100</sup> See the Structures Act s 7(c).

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

<sup>102</sup> See LGIS no 2 "Types of Municipalities" (1999) at 9.

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

#### **(a) The ward participatory system**

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

Most municipal areas were divided into wards for the purposes of the local government elections that took place during December 2000 and the elections that are to be held in the future.<sup>105</sup> In a ward participatory system, matters of local concern are addressed by the various committees that are established in the wards. These committees allow residents a direct voice in the governance of their neighbourhoods.

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

<sup>104</sup> The Structures Act S 7(d) and (e).

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

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

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

#### **(b) The sub-council participatory system**

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

Sub-councils are committees of the metropolitan council and have such powers and duties that have been delegated to them by the Metro Council. Depending on the extent of the powers and duties that have been delegated to sub-councils, they

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<sup>106</sup> Refer to the Structures Act ch 4 Part 4.

<sup>107</sup> See the Structures Act s 73.

<sup>108</sup> See the Structures Act s 7(d).

usually range from being merely consultative in nature to having extensive delegated powers and significance.<sup>109</sup>

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

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

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

### **10.5.1 Introduction**

As was explained above, the different systems of municipal government or combinations of such systems are used to define the various types of municipality that may be established within each category of municipality. It was always the intention of the constitutional drafters not to prescribe the types of municipality in each category, but to leave such determination in part to the national government and provincial gov-

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

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

<sup>111</sup> See the Structures Act s 62(2)(a) and (b).

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

ernments.<sup>113</sup> In all, five different systems were identified. At first, three executive systems which describe the structures through which municipal councils exercise their executive powers and perform their executive duties were mentioned. The last two systems are participatory systems which again describe the structures to which the relevant municipal council may delegate the powers and duties that are then to be exercised in part by the participatory system of the municipal area.

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

- All municipalities must have one of the executive systems of municipal government. It is important to note that the executive systems may not be combined with one another. If a municipality has decided on one of the executive systems but has no participatory system, the municipal type will be the same as the executive system.<sup>114</sup>
- The various executive systems can be combined with one or both of the participatory systems to form new municipal types.<sup>115</sup>
- It is important to note that the participatory systems cannot function on their own; they can be used only in combination with one of the mentioned executive systems. The main reason for this is that every municipality has certain executive powers and duties, which can be exercised or performed only through an executive structure. As is suggested by the name, participatory systems are established to facilitate and enhance participation within the new local government structure.

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

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

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

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

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

### **10.5.2.1 Types of category A (metropolitan) municipality**

The following types of category A municipality can be established:

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

It must be noted that the Structures Act does not allow for the plenary executive system either to stand alone or to be combined with one or both of the participatory systems of municipal government within category A (Metropolitan) municipalities. Because metropolitan councils are very large, the plenary executive system is not appropriate and is therefore not an option in metropolitan areas. Category A or Metropolitan municipalities may therefore have either the collective executive system or the mayoral executive system on its own or one of these combined with one or both

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<sup>116</sup> See the Structures Act s 7.

<sup>117</sup> See the Structures Act ss 8, 9 and 10.

of the participatory systems. It must be emphasised again that the sub-council participatory system has been specifically designed for metropolitan areas. It allows metropolitan councils with large areas of jurisdiction to delegate powers and duties to sub-councils established for certain parts of the metropolitan area. In circumstances where a metropolitan municipality has both a ward participatory system and sub-council participatory system, the council should consider ways in which the ward committees and sub-councils can interact and complement one another in order to achieve effective and efficient local democracy.

#### **10.5.2.2 Types of category B (local) municipality**

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

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

#### **10.5.2.3 Types of category C (district) municipality**

The Structures Act allows for the following types of category C municipality:<sup>120</sup>

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

Because of their specific composition and role, category C municipalities may not combine their executive system with either one or both of the participatory systems.

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

<sup>119</sup> See the Structures Act s 9.

<sup>120</sup> See the Structures Act s 10.



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

### **10.6 Application of municipal types to individual municipalities**

In the new local government structure all three spheres of government play a role in the establishment of the new local government system and municipal types. National government has defined the different types of municipality that may be established within each category of municipal government and has also established the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and C.<sup>121</sup> Provincial governments are involved in introducing the new system of municipal types when they establish new municipalities.<sup>122</sup> Lastly, local governments themselves must be consulted before the MEC for local government of a province determines which municipal type will apply to each municipality. It must be noted that since the new system of types was introduced after the local government elections in December 2000, the MEC for local government in a specific province has had the power to change the type of a municipality at any time. Such a change can be affected only through an amendment to the relevant section 12 notice whereby the municipality was established.<sup>123</sup> If a MEC wants to change the type of a municipality, he or she must again consult with the affected municipalities and organised local government structure in the province.

It is submitted, therefore, that the new systems of municipal government and the types of municipality which they have formed should significantly strengthen political leadership, should establish clear systems for decision making and should encour-

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

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

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

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

## **10.7 Establishing new municipalities – procedures and requirements**

### **10.7.1 Introduction**

The establishment of new municipalities throughout South Africa is a key factor in building a new viable and developmental local environment. Such a move was needed to welcome in the new transformed system of local government according to the new constitutional mandate. When an urban area is in need of a local authority, one of two approaches may be decided upon. The area may either be added to or included in the jurisdiction of an already existing municipality, or a totally new municipal institution can be established.<sup>125</sup> According to the establishment process, all existing municipalities have been replaced with newly established municipalities in terms of the provisions of the Municipal Structures Act. All municipal boundaries were re-determined and re-demarcated by the Demarcation Board in accordance with the requirements of the Demarcation Act.<sup>126</sup> From a practical point of view, it was not possible to facilitate the establishment procedure in a short period of time, and long preparations took place. In general, the establishment procedures had three primary aims:<sup>127</sup>

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

<sup>125</sup> In *Fedsure Life Assurance v Greater JHB TMC* 1998 (2) SA 1115 (SCA) the court held that while the interim Constitution s 174 and the Constitution s 151 created the machinery for the establishment of local authorities through legislation, the respondents had actually been created by the LGTA s 8 and not the Constitution.

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

<sup>127</sup> See LGIS no 2 “Establishing New Municipalities” (1999) at 2.

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

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

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

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<sup>128</sup> See the Structures Act s 14.

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

- The MEC for local government in a province must establish a municipality in each municipal area by notice in the Provincial Gazette. All municipal areas were demarcated by the Demarcation Board according to the provisions of the Demarcation Act.<sup>131</sup>
- The establishment of a municipality must be consistent with the provisions of the Structures Act, and the notice of establishment took effect at the commencement of the first elections of that council, which was generally 5 December 2000. In order for the notice to be consistent with the provisions of the Structures Act, it may not contain powers or functions for that municipality in contrast to what the Structures Act allows for.<sup>132</sup>
- The establishing notice must set out specifically required information. The minimum aspects that must be contained in the notice according to the Structures Act and which form the founding legal provisions of the new municipality are the following:
  - (a) The category of the municipality.
  - (b) The type of municipality as determined in terms of provincial legislation.
  - (c) The name of the municipality. Deciding on a new name can sometimes be a difficult issue. This is especially the case in instances where a new municipality is an amalgamation of two or even more existing municipalities with different names. It should also be taken into account that a change in name will also have an impact on such things as the bank account details, debit accounts, consumer billing and payment procedures, as well as stationary changes, which can be very costly in some instances.
  - (d) In the case of metropolitan or local municipalities, the number of wards in that relevant municipality.

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<sup>129</sup> Refer to the Constitution s 155(6).

<sup>130</sup> See the Structures Act s 12(1)–(4).

<sup>131</sup> 27 of 1998.

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

- (e) The number of councillors that have been determined in terms of section 20 of the Structures Act.
  - (f) In the case of a district municipality, the number of councillors, as determined by section 23 of the Structures Act.
  - (g) An indication as to which councillors of the municipality (if any) may be designated as fulltime according to section 18 of the Act.
  - (h) Any provisions of the Structures Act from which the municipality has been exempted in terms of section 91.
  - (i) Any other relevant details, which could include aspects regarding the status of traditional leaders on the relevant council.
- At the commencement of the process to establish a municipality, the relevant MEC must give written notice of the proposed establishment to Organised Local Government in the province and also to any existing municipalities that may be affected by the establishment. Before a notice is published, the MEC must further consult with OLG and the existing municipalities that may be affected. After the consultations have been conducted, the MEC must publish the particulars of the proposed notice for public comment.

As was mentioned above, the establishment notice takes effect only on the day of the commencement of the first election of a particular council, and only then is the new municipality established. The new municipality becomes the legal successor of the disestablished municipality if there was one – within the specified municipal jurisdiction. The establishment notice in terms of section 12 of the Structures Act serves as a legal document and founding charter for each new municipality in South Africa. Many aspects of municipalities that existed before the establishment process were drastically affected by the process. Accordingly, the Structures Act also had to provide for the regulation of the effects of the establishment of municipalities on existing municipalities. In this regard the Municipal Structures Act provides for the following:<sup>133</sup>

- A municipality established in terms of section 12 in a particular area supersedes the existing municipality or municipalities to the extent that such existing muni-

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

pality or municipalities fall within the area.<sup>134</sup> The superseding municipality becomes the successor in law of the existing municipality, subject to certain requirements. Where a district municipality and one or more local municipalities within the area of the district municipality supersedes the existing municipality(ies) in that area, the district and local municipalities become the successors in law to the existing municipality(ies) depending on the specific assets, liabilities, rights and obligations allocated to the district and local municipalities respectively in terms of the relevant section 12 notice or notices.<sup>135</sup>

- If a municipality established in terms of section 12 supersedes an existing municipality(ies), the relevant section 12 notice, or any amendment of that section 12 notice, must:
  - (a) Provide for the disestablishment of the existing municipality or, if only part of the existing municipality's area is affected, the disestablishment of the existing municipality in that affected area.<sup>136</sup>
  - (b) Regulate the legal, practical and other consequences of the total or partial disestablishment of the existing municipality. Such consequences will include:
    - (i) The vacation of office by councillors of the existing municipality.
    - (ii) The transfer of staff from the existing municipality to the superseding municipality or, if there is more than one superseding municipality, to any of the superseding municipalities. Municipal staff must formally be transferred to a new municipality when their existing municipality is disestab-

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

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

<sup>136</sup> See the Structures Act s 14(2)(a).

lished. In some cases staff are even divided among new succeeding municipalities. In short, the transfer of staff must be regulated by detailed legal provisions, and these must protect their conditions of employment and job security. It should also be noted that the responsibility for staff transfers and other related matters rests with the relevant municipal trade unions and the municipalities themselves and not with the MEC of the province. Staff and labour-related disputes are regulated by the Bargaining Council at both national and regional levels.

- (iii) The transfer of assets, liabilities, rights and obligations and administrative records from the existing municipality to the superseding municipality or municipalities, as the case may be. When the transfer of assets, liabilities, rights, obligations and administrative records are considered, the interests of creditors of the existing municipality must be taken into account.
- (iv) The continued application of any by-law(s) and resolutions of the existing municipality to or in that area, as well as the extent of such application.<sup>137</sup> All existing by-laws, regulations and resolutions are transferred to the superseding municipality(ies) or specifically rescinded by the establishing notice. Where existing municipalities are amalgamated, the geographical extent of their by-laws and resolutions have to be re-evaluated. In cases of conflict between by-laws or resolutions, specific provision is needed to confirm which by-laws would still be applicable and which would be rescinded. The determination of which by-laws and resolutions would apply and which not requires extensive evaluation and oversight and also provides a unique opportunity for all new municipalities to review and tidy up all existing legislative and executive decisions, many of which were inconsistent with the Constitution. The Structures Act specifically provides for the review and rationalisation of existing municipal by-laws. The Act states that if an existing municipality is wholly or partially superseded by another municipality, the by-laws, regulations and resolutions<sup>138</sup> of the existing municipality *must* be reviewed and where necessary rationalised by the superseding municipality, to the extent that such by-laws, regulations

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<sup>137</sup> See the Structures Act s 14(2)(a) and (b).

<sup>138</sup> Including standing delegations.



and resolutions continue to apply in the area or part of the area of the superseding municipality.<sup>139</sup> If the superseding municipality is a district or local municipality, any transfer referred to in (ii) or (iii) above must be effected in a way that would enable the superseding municipality to perform the functions and powers assigned to it in terms of section 84 of the Systems Act.<sup>140</sup>

- According to the Structures Act, the transfer of staff in terms of a section 12 notice must/have to be on conditions of service not less favourable than those under which that staff member served in the existing municipality and must also be in accordance with the provisions of the Labour Relations Act of 1995.<sup>141</sup> It is further provided that a section 12 notice that transfers staff of an existing municipality to a superseding municipality *may* determine that the staff transferred form an administrative unit that functions as such until the superseding municipality has established a staff structure and has appointed staff to positions on that staff structure. Such an administrative unit will function under the control of the municipal manager or acting municipal manager of the superseding municipality.<sup>142</sup>
- On the production of a certificate by a municipality that any asset was transferred to it in terms of a section 12 notice, the relevant registrar of deeds must make such entries or endorsements in or on any relevant register, title deed or document in order to register that asset in the name of that municipality. No duty, fee or charges is payable for such a registration.<sup>143</sup>
- The MEC in a province, by notice in the Provincial Gazette, may also make provision for transitional measures to facilitate the disestablishment of an existing municipality and the establishment of a new municipality. The MEC must consult with the existing municipality before publishing such a notice.<sup>144</sup>

From the provisions discussed above, it becomes clear that the establishment notice is a very important document in the new local government system and that all new municipalities are based on their respective establishment notices. It is important to

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<sup>139</sup> See the Structures Act s 15.

<sup>140</sup> Refer to Act 33 of 2000 s 2(b) and (c).

<sup>141</sup> 66 of 1995.

<sup>142</sup> Refer to the Structures Act s 14(3)(a) and (b).

<sup>143</sup> See the Structures Act s 14(4).

<sup>144</sup> See the Structures Act s 14(5).

note, however, that not all areas in the country fall under the provisions of an establishment notice. Areas that have been declared District Management Areas do not require an establishment notice.

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

It is understandable that although the section 12 establishment notices are regarded as the new founding documents of all municipalities in South Africa, such a foundation should not be cast in stone and must be amendable in order to change with local circumstances and to enhance new initiatives. Should any provision of a particular establishment notice be in need of change,<sup>145</sup> a formal process of amendment of the notice is required. As was stated above, amendments may be necessary from time to time to accommodate changing conditions affecting municipalities or to insert further measures to regulate the new local government system. Again the Structures Act provides for the requirements that must be complied with in order to amend a section 12 notice. Section 16(1)–(3) of the Structures Act states the following:

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

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<sup>145</sup> Eg, to change the name or executive structure of a municipality.

the consultations have been held, the MEC must publish the particulars of the proposed notice for public comment.<sup>146</sup>

As was indicated above, a section 12 notice can also be repealed, amended or replaced in instances when the existing municipal boundaries are altered or re-determined. When in terms of the Demarcation Act the Demarcation Board re-determines a municipal boundary which affects the area of an established municipality, the provisions of section 12 and 14 of the Structures Act are applicable to the extent necessary to give effect to the re-determination. In such cases the MEC concerned must repeal, amend or replace the relevant section 12 notice and he or she *must* consult with the affected municipalities. Any repeal, amendment or replacement of a section 12 notice takes effect on a date mentioned in the notice, subject to section 16 of the Structures Act.<sup>147</sup> Only in one instance is a municipality allowed to perform powers and functions that are not specifically granted to it in terms of its establishment notice: where the MEC has determined that a municipality is likely to collapse or cannot fulfil its functions. The MEC may then reassign any power and function of that municipality to another category of municipality without amending the establishment notice. In such cases the MEC will simply inform the affected municipalities of his/her decision, in writing.<sup>148</sup>

#### **10.7.4 Transitional arrangements in respect of the new local government dispensation**

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

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

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

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

<sup>149</sup> 33 of 2000.

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

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

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

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

#### **10.8 Conclusion**

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

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

<sup>151</sup> See the Structures Amendment Act 33 of 2000 ch 2.

<sup>152</sup> The Constitution s 155(1).

tailed instructions with regard to the local sphere of government. The Constitution has left it mostly to national government to provide for a more detailed framework of the new local government system. Accordingly, the Structures Act<sup>153</sup> has facilitated the establishment of all new municipalities and further regulates various future aspects regarding municipalities. After all the municipalities were legally established in December 2000, the new legal requirements and establishment provisions were formally implemented. Such implementation will require, *inter alia* the introduction of new leadership and management structures for all municipalities; developing co-operative relations between municipalities, especially between district and local municipalities; transferring staff to the new municipal structures and assigning them to their new offices; and also reviewing and rationalising all by-laws, regulations and standing delegations inherited from the old municipalities. It is clear that the process of implementing the provisions of the new legal foundation and the establishment notice will take considerable time and will be an ongoing process.

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

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<sup>153</sup> 117 of 1998 as amended.

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

## Demarcation of new local government boundaries

### 11.1 Introduction

In accordance with the new constitutional foundation, local governments had to be established for the whole territory of the Republic.<sup>1</sup> Before municipalities could be established, however, it was necessary specifically to determine, or in some cases re-determine, existing municipal boundaries. The Constitution demands that national legislation *inter alia* establish criteria and procedures for the determination of municipal boundaries by an independent authority. The relevant national legislation must further take into account the need to provide municipal services in an equitable and sustainable manner.<sup>2</sup> In order to comply with the constitutional requirements, national government enacted the Local Government: Municipal Structures Act<sup>3</sup> which, together with the Local Government: Municipal Demarcation Act,<sup>4</sup> provided for the establishment of an independent municipal demarcation board and for the criteria and procedures for the determination of municipal boundaries.<sup>5</sup>

The determination of municipal boundaries was, and still is, an important process in the successful transformation of local government. Although the demarcation of new municipal boundaries would not suddenly solve the many problems municipalities were facing, it indeed set the structural conditions within which other processes necessary for the transformation and development of local government could occur. Such processes would include the fulfilling of the constitutional objectives set out in section 152 of the Constitution. The way in which municipal boundaries are drawn will be important to ensure that municipalities meet their respective obligations.

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<sup>1</sup> See the Constitution s 151(1).

<sup>2</sup> See the Constitution s 155(3) and (4).

<sup>3</sup> 117 of 1998, hereafter referred to as the Structures Act.

<sup>4</sup> 27 of 1998, hereafter referred to as the Demarcation Act.

<sup>5</sup> For more details regarding the demarcation of local governments under the new constitutional dispensation refer to Bekink (1998) *De Jure* at 319-326.

## 11.2 The importance of local government boundaries

Municipal boundaries have important political, financial and social effects. This is so because municipal boundaries determine what each municipality is responsible for and the extent of such responsibility. Some of the important functions are as follows:

- A municipal boundary determines the size and character of a particular municipal voting population. Depending on the boundary, the electorate can be wealthy or poor, or the area can have good infrastructure or can be underdeveloped. Because political parties tend to appeal to different constituencies, this may also affect the political outcome of a specific local community.<sup>6</sup> It is therefore very important that the demarcation process should not be politically biased or manipulated. Politically motivated manipulation of municipal boundaries would compromise efforts to achieve the overall constitutional objectives.
- Often municipal boundaries determine if a municipal area is financially viable or sustainable. The extent of municipal boundaries therefore has an effect on both the potential income and expected expenditure of that municipality.<sup>7</sup>
- A further important aspect regarding municipal boundaries is the fact that boundaries also determined the size and extent of settlements that must be served. This in turn has important implications for municipal infrastructure and service provision.<sup>8</sup> In short, boundaries have an important influence on social and economic upliftment.
- Many local residents also identify themselves with a specifically demarcated area and its people. If boundaries are drawn in a way that disrupts the social and economic patterns of people's lives, many community members may find it difficult to feel part of a specific municipal entity, because they associate themselves or have interests in other municipal jurisdictions. Such community members may not participate in or commit themselves to the municipality and, by so doing, negatively impact on the effectiveness of that municipal government.<sup>9</sup>

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<sup>6</sup> It must be remembered that the Constitution requires that municipalities provide for democratic and accountable government.

<sup>7</sup> It is obvious that a municipality will have little potential income if most of the local residents are very poor and if the local economy is weak with almost no tax base to draw upon.

<sup>8</sup> Again the Constitution requires each municipality to provide equitable and sustainable services to local communities and also to promote economic development. See the Constitution s 152.

<sup>9</sup> One must remember that community participation is also a constitutional imperative. See the Constitution s 152(2).



- The demarcation of boundaries is also important with regard to the relationship between municipalities themselves. This is particularly true in a system of so-called “wall-to-wall” local government, which South Africa has introduced.<sup>10</sup> In a system of wall-to-wall local government, the way in which municipal boundaries have been demarcated can have very important consequences with regard to the effectiveness and efficiency of some municipalities.<sup>11</sup> Depending on how boundaries are demarcated, the positive and negative effects between neighbouring municipalities can be shared between them. It is therefore clear that the demarcation of boundaries can have a significant cross-boundary impact on neighbouring municipalities. It can play a decisive role in determining whether the relations between municipalities are competitive or co-operative.<sup>12</sup>

Although each municipality must have clearly demarcated boundaries, the incorrect determination of such boundaries may prevent some municipalities from performing their constitutional obligations effectively. In order to ensure that municipalities have a fair chance of achieving their constitutional obligations within the boundaries given to them, the demarcation process had to be carefully considered and many different factors had to be taken into account.<sup>13</sup> In this regard the Municipal Demarcation Act has played a pivotal role in ensuring that the demarcation process was efficient, fair and procedurally correct.<sup>14</sup>

### **11.3 Re-determination of the municipal boundaries of the transitional period**

During 1995, approximately 1260 local government bodies across South Africa were amalgamated into 843 municipalities. These municipalities spent a lot of time and money on adjusting to their new boundaries, organising staff transfers and integrating administrations. In spite of all these efforts, it soon became clear that because of

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<sup>10</sup> Wall-to-wall local government means that every part of the country is covered by a municipality, and every municipality thus shares a border with at least one other municipality. The Constitution s 151(1) confirms the establishment of wall-to-wall municipalities for the whole territory of the Republic of South Africa.

<sup>11</sup> Eg, the infrastructure of one municipality may be impacted by the residents of another municipality's enjoying its facilities. The way in which municipalities and their residents interact with one another can have either positive or negative effects on either or both of the municipalities. A municipality could experience higher traffic volumes and maintenance costs, for example, but benefit from more municipal revenue and local investment.

<sup>12</sup> See Bekink (1998) *De Jure* 319 at 320-321.

<sup>13</sup> Refer to LGIS no 2 “Demarcation” (1999) at 3.

<sup>14</sup> The purpose of the Act is to provide for the criteria and procedures for the determination of municipal boundaries by an independent authority, the Demarcation Board and to provide for other matters that are connected to the demarcation process.

boundary determinations many local governments could not meet their obligated objectives. Some of the problems that arose were the following:<sup>15</sup>

- Some district councils were too large and too removed from local councils to be able to understand and respond to their needs.
- Metropolitan governments were divided between metropolitan councils and metropolitan local councils. This led to the tax base of the metropolitan area being split across settlements rather than being budgeted for as a single integrated area.
- Many municipalities were not financially viable and effective. Often this was the result of municipal boundaries that were not drawn widely enough to include a tax base that could sustain and support a particular municipal authority.
- Many parts of the country have been demarcated under the authority of district councils. As district councils are not directly elected councils, such areas were denied their own democratic and accountable local governments.
- It was also established that many municipalities could not cope with their financial and administrative obligations and that there was an urgent need for further rationalisation within the broad system of local government in South Africa.

For the new structures of local government to be successful, more appropriate and efficient boundaries had to be established. District councils had to be strengthened and metropolitan councils had to be redefined as single local authorities. Outside the metropolitan areas and with the exception of District Management Areas, a two-tier combined system of district and local municipalities had to be introduced. There was also a strong need for the number of councils to be reduced, with an emphasis on some rural and urban municipalities being amalgamated to ensure effective planning and service delivery. In light of the abovementioned background, all municipal boundaries had to be re-evaluated and often re-demarcated before the local government elections in December 2000 could be held.

#### **11.4 The municipal demarcation board**

##### **11.4.1 *Establishment, functions and general powers of the Demarcation Board***

In compliance with the constitutional requirement that an independent authority had to be established by national legislation to determine municipal boundaries, the min-

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<sup>15</sup> See LGIS no 2 "Demarcation" (1999) at 4.

ister Demarcation Act established the Municipal Demarcation Board.<sup>16</sup> The Act affords the Demarcation Board statutory status as a juristic person which is independent and must be impartial. All functions of the board must be performed without fear, favour or prejudice.<sup>17</sup>

The main functions of the board are to determine municipal boundaries in accordance with the provisions of the Demarcation Act and any other appropriate legislation enacted in terms of chapter 7 of the Constitution and to render an advisory service in respect of matters provided for in legislation.<sup>18</sup>

According to the Demarcation Act, the board is given certain general powers. Such powers include all steps necessary or expedient for the board to perform its functions.<sup>19</sup> However, the board may not borrow money.<sup>20</sup> Municipalities should note that the board may require a municipality that may reasonably be affected by a boundary determination to provide the board or any of its committees with facilities for holding meetings.<sup>21</sup>

#### **11.4.2 Membership provisions of the Demarcation Board**

The Demarcation Board consists of no fewer than seven and no more than 10 members that are appointed by the President in accordance with specific requirements. The responsible for local government must determine the number of members of the board. The composition of the board must be broadly representative of South African society and must also represent a pool of knowledge concerning issues relevant to municipal demarcation in each province.<sup>22</sup>

A member of the board must be a South African citizen and must have a qualification or experience in, or knowledge appropriate to, local government matters in gen-

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<sup>16</sup> See the Demarcation Act s 2.

<sup>17</sup> See the Demarcation Act s 3. The independence of the board is a constitutional prerequisite and together with the confirmation of impartiality it should ensure that narrow political interests can be eradicated from the board's functioning. See the Constitution s 155(3)(b).

<sup>18</sup> Such other legislation will include the Structures Act as amended; the Local Government: Cross-boundary Municipalities Act 29 of 2000 as amended. See the Demarcation Act s 4 as substituted by Act 51 of 2002.

<sup>19</sup> See the Demarcation Act s 5(1). These powers of the board include *inter alia* the power to determine its own staff establishment, acquire or dispose of any right in or to property, open and operate its own bank account, insure itself, perform legal acts and also institute or defend any legal action.

<sup>20</sup> The Demarcation Act s 5(2).

<sup>21</sup> See the Demarcation Act s 5(3).

<sup>22</sup> See the Demarcation Act s 6(1)–(3) read with s 8 of the Act.

eral or aspects that are specifically relevant to almost all municipalities.<sup>23</sup> Persons disqualified by the Act from becoming or remaining members of the board are, for example,

- an unrehabilitated insolvent
- someone who is placed under curatorship
- someone who is declared by a court of law of the Republic to be of unsound mind
- a person who was convicted after 4 February 1997 of an offence and sentenced to imprisonment without the option of a fine for a period of not less than 12 months.<sup>24</sup>

Whenever it is necessary to appoint a person as a member of the Board, the minister must invite persons to apply, establish a selection panel to evaluate applications and finally appoint a person.<sup>25</sup> The term of office of a member of the Board is five years, and reappointment is possible.<sup>26</sup> Apart from appointing the members of the Board the President also appoints one member as chairperson and another as deputy chairperson.<sup>27</sup>

Conditions of appointment of members must be determined by the minister with the concurrence of the minister of finance, and members are appointed either as full-time members or part-time members.<sup>28</sup> All members are obliged to adhere to a code of conduct, and any contravention of the code of conduct is regarded as misconduct.<sup>29</sup> Membership of the Board ceases when a person is no longer eligible under section 7, resigns by giving three months' notice or is removed from office by the President.<sup>30</sup>

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<sup>23</sup> Such specialised areas of expertise are: economic development, integrated development planning, community development, traditional leadership, local government administration, municipal finance and services, town and regional planning, legal and constitutional matters affecting local governments; land surveying, public health and also transport planning. See the Demarcation Act s 7(1)(b)(i)–(xii).

<sup>24</sup> See the Demarcation Act s 7(2).

<sup>25</sup> See the Demarcation Act s 8(1)–(5) as amended by Act 51 of 2002.

<sup>26</sup> See the Demarcation Act s 9.

<sup>27</sup> Refer to the Demarcation Act ss 8(7) and 10.

<sup>28</sup> See the Demarcation Act s 11.

<sup>29</sup> See the Demarcation Act s 12.

<sup>30</sup> A member may be removed from the board on grounds of misconduct, incapacity or incompetence only. See the Demarcation Act s 13(4)(a). A decision to remove someone must be based on a finding to that effect by an investigating tribunal appointed by the President. See also s 13(4)(b).

### **11.4.3 Operating procedures of the Demarcation Board**

Meetings of the board are determined by the chairperson unless the majority of the members request the chairperson to convene a meeting. Normally the chairperson or deputy chairperson presides at meetings. The board is further also mandated to determine its own internal procedures.<sup>31</sup> A decision of the board is decided by a supporting vote of at least the majority of members.<sup>32</sup> If the board consists of, for example, ten members, then at least a supporting vote of six members<sup>33</sup> is needed to decide a particular question.<sup>34</sup> The board may further also establish one or more committees to assist it, and when the board is appointing members to a committee, the board is not restricted to board members.<sup>35</sup> In order to perform its functions properly, the board may delegate any of its powers to a board member, a committee or an employee of the board. However, the power to make a final decision on the determination of municipal boundaries may not be delegated.<sup>36</sup> When powers are delegated by the board, the board still retains final responsibility for such powers or performance of such duties.<sup>37</sup> Because of the board's restrictive means, it may conclude an agreement with the Department of Provincial Affairs and Local Government, a provincial department or even a municipality in order to provide administrative and secretarial assistance to the board or its committees.<sup>38</sup>

## **11.5 Requirements regarding municipal demarcation**

### **11.5.1 Specific boundary determinations**

According to the Demarcation Act, the Demarcation Board must determine municipal boundaries in the territory of the Republic and may also re-determine any municipal boundaries. The Board does not have absolute authority during a demarcation process. Any determination or re-determination of a municipal boundary must be consistent with the Demarcation Act and other appropriate legislation enacted in terms of

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<sup>31</sup> See the Demarcation Act ss 15 and 16.

<sup>32</sup> A majority of members in this regard refer to a so-called "absolute majority", which will be 50% + 1 of the total number of members of the board. See also Rautenbach and Malherbe (1999) 159.

<sup>33</sup> 50% of 10 + 1.

<sup>34</sup> See the Demarcation Act s 17.

<sup>35</sup> See the Demarcation Act s 18(1)–(5).

<sup>36</sup> See the Demarcation Act s 19(1)(a).

<sup>37</sup> Refer to the Demarcation Act s 19(2)(a)–(b).

<sup>38</sup> See the Demarcation Act s 20(1).

chapter 7 of the Constitution.<sup>39</sup> Any determination or re-determination of a municipal boundary must be published in the relevant *Provincial Gazette*. A very important aspect provided for in the Demarcation Act is that any person that is aggrieved by a determination or re-determination of a municipal boundary may submit objections in writing to the Board within 30 days of publication of that determination.<sup>40</sup> The Board is obligated to consider any objections and to confirm, vary or withdraw its determinations and publish its decision in the relevant *Provincial Gazette*.<sup>41</sup>

The functions of determining or re-determining municipal boundaries are performed by the board: on its own initiative, on request by the minister or an MEC of a province or on the request of a municipality, with the concurrence of any other affected municipality.<sup>42</sup> Once the Board has determined or redetermined a municipal boundary, it must without delay send such particulars to the Electoral Commission (EC).<sup>43</sup> If the EC is of the view that the boundary determination will affect the representation of voters in the council of any affected municipality, then the determination will take effect only from the date of the next election in that area concerned.<sup>44</sup> If the EC is of the view that a boundary determination will not materially affect the representation of voters in such a council, the determination takes effect from the date determined by the notice in the *Provincial Gazette*. Within 60 days after having received the particulars of the Demarcation Board, the EC must make known its view as set out in subsection 23(2) of the Demarcation Act, by notice in the *Provincial Gazette*.<sup>45</sup>

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<sup>39</sup> See the Demarcation Act s 21(2). Note that s 26 does not apply where the Board re-determines a municipal boundary in respect of which the MEC and all affected municipalities have indicated in writing that they have no objection to the redetermination. See s 8 of Act 51 of 2002.

<sup>40</sup> See the Demarcation Act s 21(4). The subsection does not mention re-determinations, but it is submitted that objections against any re-determinations of municipal boundaries are also included. Persons that may object include both natural and legal persons such as private residents, community groups, private companies and even municipalities themselves.

<sup>41</sup> See the Demarcation Act s 21(5)(a)–(c) as amended. Note that any person may, subject to the Promotion of Access to Information Act 2 of 2000, request the Board to provide reasons for its decisions. See s 21(6) as added by s 8 of Act 51 of 2002.

<sup>42</sup> Refer to the Demarcation Act s 22. The section confirms that municipal boundaries are determined or re-determined either on the initiative of the board self or on request by relevant role players. The instances when the board will act on its own initiative will be discussed below.

<sup>43</sup> The Electoral Commission is the commission established in terms of the Electoral Commission Act 51 of 1996 to oversee and monitor national provincial and local government elections in South Africa. See also s 23(1)–(2) of the Demarcation Act.

<sup>44</sup> See the Demarcation Act s 23(2)(a). This means that the *status quo* is maintained. It is submitted that the reference to the next election does not include any by-elections, as such elections impact on only a specific ward and not the council as a whole.

<sup>45</sup> See the Demarcation Act s 23(3). Note that the MEC in the province concerned must publish the notice within three months of the date of the notice published by the Electoral Commission (EC). See s 10(b) of Act 51 of 2002.

### 11.5.2 Demarcation criteria

When the Demarcation Board is considering whether to determine or re-determine a municipal boundary, it must have an overall objective in mind to establish an area that would adhere to certain requirements. These requirements are:

- to enable the municipality for that area to fulfil its constitutional obligations as set out in section 152 of the Constitution
- to enable effective local governance in that area
- to enable and provide for integrated development and
- to have a tax base as inclusive as possible of all users of municipal services in that municipal area.<sup>46</sup>

In order for the Board to attain the overall objective and to comply to the required criteria of section 24, the Board must take certain factors into account when it is determining a municipal boundary. These factors are the following:<sup>47</sup>

(a) the interdependence of people, communities and economies as indicated by:

- (i) existing and expected patterns of human settlement and migration;
- (ii) employment;
- (iii) commuting and dominant transport movements;
- (iv) spending;
- (v) the use of amenities, recreational facilities and infrastructure; and
- (vi) commercial and industrial linkages;

(b) the need for cohesive, integrated and unfragmented areas, including metropolitan areas;

(c) the financial viability and administrative capacity of the municipality to perform municipal functions efficiently and effectively;

(d) the need to share and redistribute financial and administrative resources;

(e) provincial and municipal boundaries;

(f) areas of traditional rural communities;

(g) existing and proposed functional boundaries, including magisterial districts, voting districts, health, transport, police and census enumerator boundaries;

(h) existing and expected land use, social, economic and transport planning;

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<sup>46</sup> See the Demarcation Act s 24(a)–(d). All the relevant requirements must be considered before the Board makes its determination.

<sup>47</sup> See the Demarcation Act s 25(a)–(e).



- (i) the need for co-ordinated municipal, provincial and national programmes and services, including the needs for the administration of justice and health care;
- (j) topographical, environmental and physical characteristics of the area;
- (k) the administrative consequences of its boundary determination on:
  - (i) municipal creditworthiness;
  - (ii) existing municipalities, their council members and staff; and
  - (iii) any other relevant matter; and
- (l) the need to rationalise the total number of municipalities within different categories and of different types to achieve the objectives of effective and sustainable service delivery, financial viability and macro-economic stability.

From the factors mentioned above one can see that the determination process of a municipal boundary is a very involved and often difficult process. In many instances specialised guidance, expert advice and thorough pre-conducted investigations are required. The Demarcation Act does not specify how the Board should go about ensuring that all of the factors have indeed been complied with. This is perhaps an unfortunate lacuna in the Act, which could enhance the chances of legal challenges to actions of the Board. Such challenges could be minimised if the Board took every possible precaution to ensure that all relevant criteria were taken into account before a decision was finalised.

### **11.5.3 Demarcation procedures**

The Demarcation Act determines specific demarcation procedures that must be followed by the Demarcation Board. The Act requires that before the Board considers any determination of a municipal boundary it must publish a notice in a relevant local newspaper stating the Board's intention and invite written representations and views from the public.<sup>48</sup> Written representations or views must be submitted within a specified period, which period may not be shorter than 21 days.<sup>49</sup> It is further required that when the Board publishes a notice referred to in subsection 1 it must convey the content of the notice by radio or another appropriate means of communi-

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<sup>48</sup> Note that only one notice in one newspaper is required. The Board should ensure that the language of the notice is in the official language that is most used in that area.

<sup>49</sup> See the Demarcation Act s 26(1)(a) and (b).

cation, in the area concerned.<sup>50</sup> The Board is further required to send a copy of the notice to

- the MEC in the province concerned
- each municipality affected by the matter
- the magistrate of the area if any magisterial district is affected
- the provincial house of Traditional Leaders.

This can be carried out by registered post, by electronic means or by hand, and all of these parties are then invited to submit written representations.<sup>51</sup>

As soon as the period for written representations has expired, the Board is obliged to consider all representations submitted to it and may take a decision on the determination. The Board is also permitted to hold a public meeting, to conduct formal investigations or to do both.<sup>52</sup> If the Board decides on holding a public meeting it must publish a notice in a newspaper circulating in the area stating the time, date and place of the meeting and invite the public to attend the meeting. During public meetings a Board's representative must explain the issues at hand, allow the public to air their views and answer relevant questions.<sup>53</sup> When the Board decides to conduct an investigation, however, it may conduct such an investigation itself or designate an investigating committee to conduct the investigation on its behalf. During formal investigations the Board or investigating committee has specific powers.<sup>54</sup> The Demarcation Act further specifically addresses the situation where a demarcation affects existing municipalities. In such cases the legal, practical or other consequences of a municipality's wholly or partially being incorporated into or combined with another municipality must be dealt with in terms of the Municipal Structures Act.<sup>55</sup>

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<sup>50</sup> It is important that the notice should be published as widely as possible to ensure that all interested parties have an opportunity to respond. In this regard it would be advisable for the Board to undertake not only radio publication of the notice but, eg, to send out flyers to all local residents via the relevant municipality concerned. See the Demarcation Act s 26(2).

<sup>51</sup> See the Demarcation Act s 26(3).

<sup>52</sup> Refer to the Demarcation Act s 27.

<sup>53</sup> These aspects are confirmed in the Demarcation Act s 28(1)–(3).

<sup>54</sup> See the Demarcation Act ss 29 and 30. Such powers include to (a) summon by written notice a person who in the Board of Committee's opinion has information which is material to the investigation to appear before the Board or committee and to give evidence or to produce specified documents; (b) call a person present at a Board or committee meeting to give evidence or produce documents; (c) administer the oath or solemn affirmation; (d) question that person or have such person questioned by a person designated by the Board or committee; and (e) retain for a reasonable period a document produced at a meeting.

<sup>55</sup> The Demarcation Act s 31.

## **11.6 General administrative and other matters regarding the Demarcation Board**

### **11.6.1 *Manager of the Board***

The Demarcation Board must appoint a person as the Manager of the Board. Apart from having certain responsibilities, the Manager is also the accounting officer of the Board.<sup>56</sup>

### **11.6.2 *Aspects regarding the finances of the Board***

The Demarcation Board is funded mainly by money appropriated annually by Parliament to enable it to perform its functions. Money from other sources may be received through the National Revenue Fund. During each financial year the Board must submit an estimation of the Board's income and expenditure for the next financial year to the minister of Provincial Affairs and Local Government, as well as to the Minister of Finance. Any money paid to the Board that has not been used at the end of a financial year must be refunded to the National Revenue Fund, unless otherwise agreed by the two Ministers mentioned above.<sup>57</sup> As accounting officer, the Manager of the Board must comply with certain accountability requirements, and the financial statements and records of the Board must be audited annually by the Auditor-General.<sup>58</sup> Lastly the Act confirms that the Board is accountable to Parliament and must annually submit to both houses of Parliament a written report on its activities during a financial year. A copy of the report must also be submitted to each provincial legislature.<sup>59</sup>

### **11.6.3 *Miscellaneous matters concerning the Demarcation Board***

The Demarcation Board is protected against civil liability, as the State Liability Act<sup>60</sup> applies in respect of the Board.<sup>61</sup> No member of the Board is further liable for anything done or omitted in good faith when performing a duty or exercising a power in terms of the Demarcation Act.<sup>62</sup> According to section 41 of the Act, the minister may make regulations under the Demarcation Act if such regulations are not inconsistent

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<sup>56</sup> The responsibilities of the Manager are set out in the Demarcation Act s 33.

<sup>57</sup> See the Demarcation Act s 36(1)–(4).

<sup>58</sup> The Demarcation Act ss 37 and 38.

<sup>59</sup> Refer to the Demarcation Act s 39.

<sup>60</sup> 20 of 1957.

<sup>61</sup> Any reference to minister in the State Liability Act must be construed as a reference to the chairperson of the Board.

<sup>62</sup> See the Demarcation Act s 40.

with the Act or any other Act of Parliament. The Act also makes it an offence if people disrupt, hinder or do not co-operate with the Board in instances where they are legally required to.<sup>63</sup> Lastly, the Act also provides for a transitional arrangement, in that the boundaries of municipalities which existed before the Act took effect would continue to exist until superseded by new boundaries determined under the Act.<sup>64</sup>

### 11.7 Conclusion

During the transitional process of local government in South Africa, the Local Government Transition Act<sup>65</sup> allowed for the establishment of separate Demarcation Boards for each province.<sup>66</sup> Within the new structure of local government there is only one national independent Demarcation Board, which makes independent determinations.<sup>67</sup> The Demarcation Board gets its powers from not only the Demarcation Act, but also from other national legislation.<sup>68</sup>

The demarcation process of the new municipal boundaries was by no means a simple task. Many of the previous boundaries were drawn in a way that divided settlements irrationally and thus prohibited municipalities from providing effective services. In order for municipalities to operate efficiently and effectively, the most appropriate geographical municipal area had to be determined. In general, municipal boundaries should surround a functional area and should not be fragmented.<sup>69</sup> The demarcation process was difficult in many regards, but the process and functions of the Board are far from over. It is submitted that the process of re-demarcation and re-evaluation of existing municipal boundaries is continuous. There can be no doubt that in the new local government system the process of re-determining municipal

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<sup>63</sup> For more on the offence and penalties, see the Demarcation Act s 42.

<sup>64</sup> See the Demarcation Act s 44. According to s 45, the Demarcation Act took effect on the date on which the Municipal Structures Act came into effect.

<sup>65</sup> 207 of 1993.

<sup>66</sup> See the LGTA ss 10E, 10I(3) and 10K. Note that these sections were repealed by a schedule to the Demarcation Act.

<sup>67</sup> During 1999 a total of 11 members were appointed to the Demarcation Board by the President. The Board consists of a chairperson, a deputy chairperson and nine other members, each representing a province. Only the chairperson and deputy chairperson have been appointed on a fulltime bases. See the Demarcation Act and also LGIS no 2 "Demarcation" (1999) at 8.

<sup>68</sup> See, eg, the Structures Act as well as the Cross-boundary Municipalities Act and the Local Government: Municipal Electoral Act 27 of 2000.

<sup>69</sup> See the White Paper on Local Government (1998) at 98–100.

boundaries is a dynamic and ongoing feature of the overall development of local government.<sup>70</sup>

It is also important to remember that it is extremely difficult for the Demarcation Board to determine municipal boundaries that will address all problems in municipal areas; constant monitoring and performance evaluation is needed. In this regard, boundaries are important to ensure financial and administrative prosperity. Often people argue that towns that function well and are financially strong should be left alone when the demarcation of boundaries is considered. It is argued that such towns should not be burdened with the debt or incapability of other nearby towns. Other commentators suggest that such exclusion is unfair and is detrimental to poor areas or towns. It is submitted that after the overall demarcation process has been completed, flourishing municipalities should not be penalised with the burden of struggling and poorly managed municipalities unless the problems are closely linked to the manner in which municipal boundaries have been drawn.

The demarcation process under the Demarcation Act also targeted the total number of municipalities that were to be established. The total number of municipalities had to be reduced. Reality has shown that local democracy is best served by local governments that are effective and sufficient in delivering services and not by the total number of municipalities. In order to achieve a more rationalised system of local government, national government has envisaged a smaller number of municipalities with larger areas to serve. It is hoped that such rationalisation should bring more savings and efficiency if managed properly. The amalgamation process had a considerable impact on municipal administrative structures, and in many cases there is a significant over-capacity of staff with regard to certain expertise while other skills are urgently needed.

It must be remembered that municipal boundaries are not the only important boundary determinations in South Africa. Many other boundary determinations such as provincial boundaries and magisterial jurisdictions are also of significant importance. According to the principle of co-operative government, the different bounda-

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<sup>70</sup> The three broad principles/objectives of the demarcation process are to ensure integration of all areas that belong together, to ensure all municipalities are financially viable and capable of performing their functions and to ensure effective local democracy and local governance.

ries should not be determined independently from each other, and all relevant role players should be included in such processes in the future.<sup>71</sup>

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<sup>71</sup> According to research done in 1998, a total of 777 traditional authorities, 48 health regions, 180 health districts and 4700 magisterial jurisdictions were considered in the demarcation process of local government boundaries. See LGIS no 2 "Demarcation" (1999) at 23.

## **The composition, election and term of municipal councils**

### **12.1 Introduction**

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>10</sup> Refer to the Constitution s 157.

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

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

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

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<sup>11</sup> This can either be directly or indirectly elected members.

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

<sup>13</sup> 2003 (1) SA 495 (CC).

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

The court held *inter alia* that the Constitution as amended contemplated that floor-crossing would be permissible, including on the local sphere of government. It was further held that section 157(1) provided that council members were to be elected in accordance with subsections 157(2) and (3), but subject to Schedule 6A. This did not subordinate the Constitution to the schedule. It simply required section 157(3) to be read consistently with section 157(1) and Schedule 6A. If this were done, then in the light of the reference to Schedule 6A, the reference in subsection (3) to the need for the electoral system to result in general in proportional representation had to be construed as a reference to the voting system and not to the conduct of elected members after the election. Accordingly, the Constitution of the Republic of South Africa Amendment Act<sup>14</sup> and the Local Government: Municipal Structures Amendment Act<sup>15</sup> were not unconstitutional.<sup>16</sup> Members of legislatures representing political parties can lawfully cross the floor to another party without forfeiting their seats. In 2002, when the ruling government of the day decided to provide for floor-crossing legislation, the Constitution already envisaged such legislation as a possibility in future.<sup>17</sup> At local government level, all that was needed to allow for floor-crossing were amendments to the Structures Act.<sup>18</sup> In the national and provincial spheres,

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<sup>14</sup> 18 of 2002.

<sup>15</sup> 20 of 2002.

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

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

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

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

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

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

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

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

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



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

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

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

<sup>22</sup> See the Constitution Sch 6B Item 2.

<sup>23</sup> See the Constitution Sch 6B Item 3.

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

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



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

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

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

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

<sup>27</sup> See the Constitution Sch 6B Item 5.

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

<sup>29</sup> See the Constitution s 157(1)(b)(ii).

<sup>30</sup> See the Constitution s 157(2)(a)-(b).

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

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

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

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

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

<sup>32</sup> 1995 (11) BCLR 1476 (W).

<sup>33</sup> See para D-E at 1482.

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

rect/ward system is that it also allows for individuals who do not belong to a specific political party but who are competent and resourceful to stand as independent candidates. This possibility allows for municipalities to utilise the skills and expertise of people who want to serve their communities and who have obtained support from their communities although they do not favour a specific political manifesto.<sup>35</sup> Although the combination of a ward system<sup>36</sup> and system of proportional representation has been included in the final electoral structure of local governments, the position has changed somewhat from the combined system that was used during the transitional period. Seats are now divided equally between ward seats and proportional representative seats.<sup>37</sup>

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

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

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

<sup>36</sup> Also known as a constituency-based system.

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

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

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

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

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

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

<sup>40</sup> See the Constitution s 157(4)(a).

<sup>41</sup> See Act 27 of 1998 and ch 10 of this work.

<sup>42</sup> See the Demarcation Act ss 4 and 21.

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

<sup>44</sup> See the Structures Act Sch 1 Part 1 Item 4.

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

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

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

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

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

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

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

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

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

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

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<sup>47</sup> This requirement is applicable to regular municipal elections or a by-election.

<sup>48</sup> Own emphasis added.

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

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



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

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

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

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

### **12.3.1 The composition and establishment of municipal councils**

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

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

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

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

<sup>54</sup> This requirement should be read together with the Structures Act s 20.



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

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

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

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

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

<sup>56</sup> The Structures Act s 18(4).

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

<sup>58</sup> See the Structures Act s 19(3).

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

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

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

### **12.3.3 The election procedures of metropolitan, local and district councils**

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

#### **12.3.3.1 The election of metropolitan and local councils**

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

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

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

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

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

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

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

<sup>64</sup> See the Structures Act Sch 1 Item 6.

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

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

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

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

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

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

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

<sup>68</sup> See the Structures Act s 8A(a)–(b).

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

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

*continued on next page*

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

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

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

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

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

**(d) The allocation of seats**

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

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

<sup>71</sup> See the Structures Act Sch 1 Item 10(2).

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

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

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

<sup>75</sup> See the Structures Act Sch 1 Item 12(2).

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

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

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

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

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

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

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

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<sup>76</sup> Thus the total number of seats that party has won.

$$\begin{aligned}
 & \frac{A}{B} = \frac{2000}{5000 - 6000} + 1 \\
 & = \frac{2000}{-1000} + 1 \\
 & = -2 + 1 \\
 & = -1 = \text{thus the number of votes needed to win a seat.}
 \end{aligned}$$

The result is that

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

The seat allocation would be as follows:

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

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

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

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

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

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

#### **(e) Uncontested elections and no party applications**

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

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<sup>77</sup> See the Structures Act Sch 1 Item 13(1)–(5).

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

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

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



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

**(f) Excessive seats and insufficient party lists**

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

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

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

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

<sup>81</sup> See the Structures Act Sch 1 Item 14.

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

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

<sup>84</sup> See the Structures Act Sch 1 Item 17(1)–(3).

<sup>85</sup> See the Structures Act Sch 1 Item 17(4)–(10).

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

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

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

After the new quota of votes has been determined, the total number of valid votes cast for each party<sup>87</sup> *excluding* the party that has forfeited seats, must be divided by the quota. The result is then the total number of seats to which each party is entitled.<sup>88</sup> Any surplus not absorbed by the seats awarded must compete with similar surpluses of other parties, and any undistributed seat or seats must be awarded to the party or parties in sequence of the highest surplus. If the surplus for two or more parties is equal, the seat must be awarded to the party receiving the highest number of valid votes. If a ward candidate representing a party is elected unopposed, for the purposes of factors A and B and sub-item (5) a vote cast by a voter for that candi-

<sup>86</sup> Note that fractions are to be disregarded at this stage.

<sup>87</sup> Both ward and PR votes.

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

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

### **(g) The filling of vacancies**

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

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

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<sup>89</sup> See the Structures Act Sch 1 Items 17(5)–(10).

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

<sup>91</sup> Refer to the Structures Act Sch 1 Item 18.

<sup>92</sup> See the Structures Act Sch 1 Item 19(a)–(f).

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

#### **12.3.3.2 The election and appointment of district councils**

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

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

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

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<sup>93</sup> See the Structures Act Sch 1 Item 20.

<sup>94</sup> See the Structures Act s 23 and Sch 2.

<sup>95</sup> See the Structures Act s 23(1)(a)–(c).

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

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

### **(a) Proportional elections in district councils**

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

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<sup>96</sup> See the Structures Act s 23(3).

<sup>97</sup> See the Act s 23(4) and Sch 2 Part 2.

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

<sup>99</sup> See the Structures Act Sch 2 Item 2.

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

didates are women and that women and men are evenly distributed through the list.<sup>101</sup>

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

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

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

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

<sup>101</sup> Read the Structures Act Sch 2 Item 5.

<sup>102</sup> See the Structures Act Sch 2 Item 6.

<sup>103</sup> *Ibid* Sch 2 Item 6.

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

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

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

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

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

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

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

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

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



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

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

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

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

<sup>110</sup> See the Structures Act Sch 2 Item 15(1)–(4).

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

<sup>112</sup> See the Structures Act Sch 2 Item 16(3).

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

<sup>114</sup> The Structures Act Sch 2 Item 19.

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

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

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

In summary, the following important changes should be noted within the new local government electoral system. First, the new system distinguishes between municipalities that are big enough to have wards and those who don't.<sup>118</sup> In so-called "secondary" cities or towns, cities or towns with more than 7 councillors, each voter will have three votes. Two votes will be for their local council<sup>119</sup> and a third vote will be for the political party that is to represent them proportionally on the relevant district council.<sup>120</sup>

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

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

<sup>117</sup> Refer to the Structures Act Sch 2 Item 24.

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

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

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

*continued on next page*

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

#### **12.4 Membership of municipal councils and the qualifications of councillors**

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

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

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

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

<sup>123</sup> Refer to the Structures Act ss 1 and 6.

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

<sup>125</sup> See the Constitution s 158(1)-(2).

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

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

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

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

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

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

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

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

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

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

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

- Anyone who is disqualified to vote for the National Assembly or who is disqualified in terms of section 47(1)(c), (d) or (e) and therefore may not be a member of a municipal council. In this regard the Constitution determines the following:<sup>132</sup>

- (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except
  - (a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than
    - (i) the President, Deputy President, Ministers and Deputy Ministers; and
    - (ii) other office-bearers whose functions are compatible with the functions of a member of the Assembly, and have been declared compatible with those functions by national legislation;
  - (b) permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council;
  - (c) unrehabilitated insolvents;
  - (d) anyone declared to be of unsound mind by a court of the Republic; or

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<sup>129</sup> 2004 (1) SA 441 (T).

<sup>130</sup> 68 of 1995.

<sup>131</sup> See pages 448-450.

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

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

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

(a) ceases to be eligible; or

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

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

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

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

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<sup>132</sup> Refer to the Constitution s 47.

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



## 12.5 The terms of municipal councils and councillors

### 12.5.1 *Terms of municipal councils*

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

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

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

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

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

<sup>137</sup> See the Constitution s 159(2).

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

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

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

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

<sup>140</sup> See the Structures Act s 34(3)-(4).

<sup>141</sup> Refer to the caretaker provisions set out in the Structures Act s 35.

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

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

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

#### **12.5.2.1 The term of office of councillors**

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

#### **12.5.2.2 Vacation of office by municipal councillors**

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

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

- resigns in writing

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

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

<sup>145</sup> Refer to the Structures Act s 26(1)(b) as amended.

<sup>146</sup> See the Structures Act s 26(2).

<sup>147</sup> See the Structures Act s 27.

- is no longer qualified to be a councillor<sup>148</sup>
- contravenes a provision of the Code of Conduct for councillors set out in Schedule 1 of the LG: Municipal Systems Act, 2000 and is removed from office in terms of such code<sup>149</sup>
- is a representative of a local council in a district council and ceases to be a member of that local council which appointed him/her to the district council or if he/she is replaced by the local council as its representative in the district council.

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

## 12.6 Municipal by-elections

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

- if the Electoral Commission does not declare the result of the election of a municipal council or the results of an election in a district management area or a ward within the time period as is specified in terms of the Electoral Commission Act<sup>152</sup>

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

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

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

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

<sup>152</sup> 51 of 1996.

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

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

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

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

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

<sup>155</sup> See the Structures Act s 25(5).

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

party's proportional representation on a particular municipal council. In instances of a by-election, the votes cast in such by-election do not affect the proportional representation on the municipal council.<sup>157</sup>

## **12.7 General legislative provisions relevant to the local government electoral process and procedures**

It was explained above that the new local government electoral processes are determined and regulated by various different legislative provisions. In the first instance, the Constitution sets the basic framework within which the election and composition of all municipalities must be conducted. The basic constitutional framework is then expanded upon by mainly the Local Government: Municipal Structures Act. Both the Constitution and the Structures Act establish the new basis for all local government elections. Apart from this new basis, there are, however, many other legislative requirements that have either a direct or indirect impact on local government elections and more specifically the electoral procedures.<sup>158</sup> No investigation of the new local government electoral dispensation can therefore be complete without a brief evaluation of such laws.

### **12.7.1 The provisions of the Electoral Commission Act**

The Electoral Commission Act (ECA) was enacted in 1996. The main purpose of the Act is to make provision for the establishment and composition of an Electoral Commission (EC) which in turn is mandated to manage elections for national, provincial and *local legislative* bodies and referenda.<sup>159</sup> The ECA is also aimed at making provision for the establishment, composition, powers, functions and duties of an Electoral Court. Within the new constitutional legislative framework of South Africa, special provision has been made for various state institutions which have the overall responsibility and task to strengthen constitutional democracy in the Republic. One such institution is the Electoral Commission,<sup>160</sup> which is thus constitutionally entrenched and protected. All the state institutions mentioned in chapter 9 of the Constitution, including the EC, must be independent and are subject only to the

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<sup>157</sup> See the Structures Act s 25(7).

<sup>158</sup> In this respect reference must be made to the Electoral Commission Act 51 of 1996, the Electoral Act 73 of 1998 and also the Local Government: Municipal Electoral Act 27 of 2000. These legislative enactments together with the Constitution and the Structures Act complete the overall legal system in respect of municipal elections and election procedures.

<sup>159</sup> Refer to the Electoral Commission Act long title and s 2. Own emphasis is added to highlight the EC role with regards to municipal elections.

<sup>160</sup> See the Constitution s 181(1)(f).



Constitution and the law. They must all be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

The IEC is established as a legal person with all the powers and privileges associated with such status. At this point the Constitutional Court has confirmed the following:<sup>161</sup>

- The IEC, established pursuant to section 190 in chapter 9 of the Constitution, exercises public powers and performs public functions in terms of the Constitution and is therefore an organ of state as defined in section 239 of the Constitution. It is not part of government, however, in that, as an organ of state, it does not fall within the national sphere of government contemplated by chapter 3 of the Constitution. In the first place, the Commission cannot be said to be a department or administration within the national sphere of government in respect of which the national executive has a duty of co-ordination in accordance with section 85(2) of the Constitution. Secondly, in effect the Constitution describes the Commission as a state institution that strengthens constitutional democracy, and nowhere in chapter 9 is there anything from which an inference may be drawn that it is a part of the national government. The term "state" is broader than "national government" and embraces all spheres of government. Thirdly, under section 181(2) the Commission is independent, subject only to the Constitution and the law. It is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government.
- Furthermore, independence cannot exist in isolation, and it is clear that the chapter intends to make a distinction between the state and government, and the independence of the Commission is intended to refer to independence from the government, whether local, provincial or national. The Commission cannot be independent of the national government yet be part of it, although the Commission must manage the elections of national, provincial and municipal legislative bodies in accordance with national legislation. This legislation cannot compromise the independence of the Commission, however; the Commission is clearly a state structure. The fact that a state structure has to perform its functions in accordance with

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<sup>161</sup> See *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC).



national legislation does not mean that it falls within the national sphere of government.

- The very reason the Constitution created the Commission – and the other chapter 9 bodies – was that they should be and manifestly be seen to be outside government. The Commission is not an organ of state within the national sphere of government. The dispute between a local authority and the Commission concerning voting stations cannot therefore be classified as an intergovernmental dispute. There might be good reason for organs of state not being able to litigate against the Commission except as a last resort. However, an organ of state suing the Commission does not have to comply with section 41(3) of the Constitution.<sup>162</sup>

Other organs of state must assist and protect the institutions so as to ensure their independence, impartiality, dignity and effectiveness. No person or organ of state may interfere with the functioning of such institutions.<sup>163</sup>

In more direct terms, the Constitution, apart from the establishment of the EC, requires that the EC has the following functions:<sup>164</sup>

- the EC must manage elections of national, provincial and *municipal* legislative bodies in accordance with national legislation
- it must ensure that those elections mentioned above are free and fair and
- it must declare the results of those elections within a period that must be prescribed by national legislation. Such a period must be as short as reasonably possible.<sup>165</sup>

In order to ensure that the EC is empowered to fulfil and achieve its powers and functions, the Constitution further confirms that the EC has the additional powers and functions prescribed by national legislation.<sup>166</sup> In compliance with the Constitution,

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<sup>162</sup> Paras 22-31 at 936-940.

<sup>163</sup> Although independent and impartial, the different institutions are accountable to the NA and must report on their activities and the performance of the functions to the NA at least once a year. See the Constitution s 181(2)-(5). The EC is thus finally under the supervision of the national legislative authority.

<sup>164</sup> See the Constitution s 190(1)(a)-(c).

<sup>165</sup> It should be self evident, that the EC has an important role to play in all electoral proceedings in our state, inclusive of electoral processes on the third sphere of government. One should also consider the founding values of the new democratic state of the RSA which *inter alia* protects the values of regular elections, a system of democratic government and accountability and openness. See the Constitution s 1(d). It is submitted that included in such values are the principles of free and fair elections, which indirectly are required by the Constitution s 190(1)(b) and which are very important in all modern democratic governments.

<sup>166</sup> See the Constitution s 190(2). Such additional powers are not as strongly protected, as are the powers and functions set out in the Constitution s 190(1), as they do not form part of the supreme law of the state, but are only normal national legislative enactments.

the ECA thus establishes the EC and further expands on the powers, duties and functions of the EC.<sup>167</sup>

Apart from the establishment/creation of the EC, the Constitution also determines other more general provisions that are also important to the EC. In this regard, it is required that the EC be composed of at least three persons. The exact number as well as the terms of office of the members of the EC must be prescribed by national legislation.<sup>168</sup>

The Constitution further requires the members of the EC to be South African citizens, to be fit and proper persons to hold the particular office and to comply with any other requirements prescribed by national legislation.<sup>169</sup> The composition of the EC should reflect broadly the race and gender composition of South Africa, and members of the EC must be appointed by the president on the recommendation of the National Assembly. The National Assembly must also recommend persons that are nominated by a committee of the Assembly to be appointed as members of the EC. The recommendation of persons to be members of the EC must be approved by the NA by a resolution adopted with a supporting vote of a majority of the members of the Assembly.<sup>170</sup> Members of the EC may also be removed from office. However, the Constitution determines only three grounds for such removal.<sup>171</sup> If a ground or grounds for removal exists, then it is further required that a committee of the NA find that such ground(s) indeed exist, and thereafter the NA needs to adopt a resolution that calls for the person(s) to be removed from office. Again, a majority of the NA must support the request for removal of a member of the EC.<sup>172</sup>

In light of the constitutional foundation, it is clear that the EC has a determining role to play in all elections inclusive of municipal elections. In order to strengthen constitutional democracy and to promote electoral processes, the EC has been estab-

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<sup>167</sup> See the Electoral Commission Act (ECA) ss 3 and 5 respectively.

<sup>168</sup> Again the ECA advances on the Constitution and determines that the EC shall consist of five members that are appointed by the president. See the Constitution s 191 and the ECA s 6 respectively.

<sup>169</sup> In this respect the ECA requires that members of the EC should not have a high party political profile. The ECA s 6(2)(b).

<sup>170</sup> Refer to the Constitution s 193(1)-(5). As the NA consists out of 400 members, an absolute majority of the members would be 200 + 1. At least 201 members must thus support the recommendation of nominees to the EC.

<sup>171</sup> See the Constitution s 194(1)(a)-(c). The grounds are: misconduct, incapacity or incompetence.

<sup>172</sup> Refer to the Constitution s 194(1) and (2). The removal is indeed done by the president and not the NA. However, the president is obligated to remove a person from the EC upon the adoption by the NA of the resolution calling for such removal. See the Constitution s 194(3)(b).

lished as an independent institution subject only to the Constitution and the law.<sup>173</sup> In order to fulfil its constitutional objectives, the EC has been given various additional powers and duties.<sup>174</sup> In order to fulfil its obligations and duties, the EC shall acquire the necessary staff and facilities. One of the five members of the EC must be a judge. In light of recent constitutional jurisprudence the constitutionality of this requirement is somewhat in doubt.<sup>175</sup> The term of office of members of the EC is seven years. Reappointments are allowed, but only for one further term of office.<sup>176</sup> Because the independence and impartiality of members of the EC are vital to the role and functions of the institution, strict requirements regarding the conduct of commissioners/members are laid down.<sup>177</sup> According to the ECA, the commission shall appoint a suitably qualified and experienced person as chief electoral officer. The CEO shall be not only the head of the administration but also the accounting officer of the commission.<sup>178</sup> Most importantly, the EC is funded by parliament, but it may receive additional funding from other sources. Such sources could be foreign countries or overseas donor institutions. At the end of each financial year, the commission is required to submit to the National Assembly an audited report of all income and expenditure, as well as a report with regard to the functions, activities and affairs of the commission.<sup>179</sup>

One of the most relevant aspects concerning elections in any sphere is the registration of political parties. In this respect the EC has several functions to fulfil. It is the responsibility of the chief electoral officer to register parties upon application by a party. Any application for party registration shall provide for the name, distinguishing mark, symbol, abbreviation and the constitution of the party. If a party is not represented in a legislature, then it should also submit its deed of foundation and pay a prescribed registration amount.<sup>180</sup> Once a party has been registered, the chief electoral officer shall issue a registration certificate to the party concerned. All parties not

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<sup>173</sup> See the ECA ss 3 and 4.

<sup>174</sup> In this regard see the ECA s 5. Some of these powers and duties include managing any election, ensuring all elections are free and fair, compiling and maintaining voters' rolls by means of a system of registering eligible voters, compiling and maintaining a register of parties, undertaking and promoting research into electoral matters and declaring the results of elections for national, provincial and municipal legislative bodies within 7 days after such elections.

<sup>175</sup> Refer to the ECA s 6(1) and the case of *SAAPIL v Heath* 2001 (1) SA 883 (CC).

<sup>176</sup> See the ECA s 7.

<sup>177</sup> For more detail see the ECA s 9.

<sup>178</sup> See the ECA s 12.

<sup>179</sup> Refer to the ECA ss 13 and 14.

<sup>180</sup> See the ECA s 15(1)-(4).

represented in a legislative body shall annually renew their registration. The ECA specifically provides for the registration of parties for municipal elections. The registration procedure is identical to the procedure mentioned above.<sup>181</sup> If a party has been registered for a particular municipality, it may participate only in the elections for such a municipal council. In special circumstances, the chief electoral officer is prohibited from registering a party.<sup>182</sup> A party aggrieved by a decision either not to register or to register a party may *appeal* against the decision to the EC within 30 days after the official notification of such aspect.<sup>183</sup> If certain circumstances exist, then a party can also be deregistered.<sup>184</sup>

In an effort to resolve electoral disputes, the ECA specifically establishes an Electoral Court for the Republic, which court has a similar status as a supreme court.<sup>185</sup> The court may review *any* decision of the EC relating to an electoral matter. Any review shall be conducted on an urgent basis. The Electoral Court may further hear and determine an appeal against any decision of the EC, but only insofar as such decision relates to the interpretation of any law or any other matter for which an appeal is provided for by law.<sup>186</sup>

Under the heading of general provisions, the ECA provides that certain non-compliance with the provisions of the Act is regarded as an offence and may be punishable with a fine or even imprisonment for a period not exceeding five years. Lastly, the EC is also authorised to make various regulations.<sup>187</sup>

### **12.7.2 The provisions of the Electoral Act**

All democratic states in the world have their own specific rules to regulate the elections of the various legislative bodies relevant to such a state. The modern South African state is no different in this regard. The Electoral Act<sup>188</sup> was enacted to regulate elections of the National Assembly, provincial legislatures and municipal coun-

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<sup>181</sup> See the ECA s 15A.

<sup>182</sup> Refer to the ECA s 16.

<sup>183</sup> Note that the appeal lies to the EC and not the Electoral Court. The court should thus not be approached before internal remedies have been exhausted.

<sup>184</sup> See the ECA s 17.

<sup>185</sup> The Constitution s 166 confirms the judicial system in South Africa. The Constitution no longer refers to the Supreme Courts. Such courts are now referred to as the High Courts. S 166(e) allows for any other court to be established or recognised in terms of an Act of parliament, including any court of a status similar to either the High Courts or the Magistrate Courts. It is submitted that the Electoral Court is an example of a court mentioned in the Constitution s 166(e).

<sup>186</sup> See the ECA s 20(1)-(8). The court may determine its own practice and procedures and have many related powers.

<sup>187</sup> Refer to the ECA s 23.

<sup>188</sup> 73 of 1998.

cils.<sup>189</sup> It is important to note that the Electoral Act must be interpreted in a manner that gives effect to the declarations, guarantees and responsibilities contained in the Constitution. In recent years parliament has been investigating the possibility of changing the electoral system in South Africa, which would consequently require changes to the Electoral Act. A new Electoral Act could be considered future general elections in South Africa. Currently the Electoral Act of 1998 provides for the following:

- The registration of voters and the voters roll.
- The proclamation and preparations for elections, which includes provisions regarding the parties that contest an election and also lists of candidates. The Act also provides for issues relevant to the elections of municipal councils.

Accordingly, when it may be necessary to regulate elections or by-elections for municipal councils further, the EC, subject to the provisions of chapter 7 of the Constitution and other applicable national or provincial legislation, may make regulations regarding various issues:<sup>190</sup>

- The election procedures, such as voting, the counting of votes and the declaration of the final results.
- The appointment and powers and duties of agents.
- The administration of elections, which includes voting districts, voting stations, voting materials and other related aspects.
- General provisions relevant to elections. Such provisions include prohibited conduct, offences and penalties and also additional powers and duties of the EC.
- Election timetable, code of conduct and formulae for the determination of the number of members of the NA and provincial legislatures.<sup>191</sup>

### **12.7.3 The Local Government: Municipal Electoral Act, 2000**

During 2000, the president signed and assented to the Local Government: Municipal Electoral Act (MEA). The main objective of the Act is to regulate municipal elections and to provide for matters that are connected therewith. The MEA is directed to regulate only municipal elections, contrary to the Electoral Act of 1998, which deals with the election of all legislative bodies. Although specifically aimed at local government

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<sup>189</sup> See the long title of the Electoral Act as well as s 1 definitions. An election also means an election of a municipal council or a by-election for a municipal council. Read s 3 of the Act.

<sup>190</sup> See the Electoral Act s 32. Such provision seems to be in line with the provisions set out in the ECA that were mentioned above.

<sup>191</sup> See the Electoral Act Chs 2-7 as well as Schs 1 and 2.

elections, the MEA must be read in conjunction with the Constitution, the ECA, the Electoral Act and also the Local Government: Municipal Structures Act. Apart from the Constitution, all other Acts are equal in status, and it is somewhat uncertain how inconsistencies between the Acts should be addressed.

The MEA addresses broadly the following:

- aspects concerning the voters' roll applicable to municipal elections and election dates
- aspects concerning the preparations for elections, which includes election timetables, parties, ward candidates, voting stations and materials and also elections of officers
- aspects on election observers and voter education providers
- voting procedures
- the counting of votes
- general provisions including prohibited conduct, offences and penalties as well as an electoral code of conduct.<sup>192</sup>

The requirements of both the Electoral Act and the Municipal Electoral Act are not new. Previously applicable electoral legislation and even the LGTA provided for similar aspects.<sup>193</sup>

## 12.8 Conclusion

It is clear that the provisions of the Constitution have a fundamental impact on the election and composition of all local government structures in the modern South African constitutional state. All legislative bodies, including municipal councils, must be elected and composed in such a manner as to fulfil our new constitutional ideals and values. Since local government bodies are the spheres of government closest to

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<sup>192</sup> See the MEA Chs 2-7.

<sup>193</sup> For more on such aspects see the LGTA and the following case law: In *NP v Jamie NO and Another* 1994 (3) SA 483 (E) the court ruled that electoral tribunals are bound by electoral regulations. Such tribunals are creatures of statute and have no inherent jurisdiction. It was further mentioned that a member or supporter of a political party is bound by the applicable electoral code of conduct, and a political party is not usually vicariously liable for the acts committed by members or supporters. Such liability will have to be proved under the existing common law rules. At 494C-E. In *Tumisi and Others v ANC* 1997 (2) SA 741 (O) which concerned alleged irregularities in respect of nomination forms, the court held that the returning officer had to serve a written notice of any defect on the other party; failing which, the returning officer should not be allowed to discard the applicable nomination. Finally in *Mketsu and others v ANC and Others* 2003 (2) SA 1 (SCA) the court held that the procedure in the Municipal Electoral Act s 65, which provides for the selection process by which candidates were chosen for inclusion on a party's list for election was mandatory and that only the Electoral Court has jurisdiction to hear such matters.

the ordinary inhabitants of our state, it is in such spheres where acceptance and support of the new electoral processes and procedures are to be nurtured.

Participation and support of municipal electoral processes and procedures are essential aspects of ensuring an overall prosperous local government dispensation. It is submitted that the new electoral and composition requirements for local governments have been so devised that public support and participation are encouraged and that the new system, as is protected by the supreme law of the state, should indeed facilitate and ensure a true democratic local governance.



## The role and importance of the institution of traditional leadership in local government affairs

### 13.1 Introduction

During the overall restructuring and transformation of the South African constitutional dispensation, strong arguments were forwarded to include and protect the institution of traditional leadership and traditional law (also known as customary law). Following various discussions and consultations, both the interim Constitution of 1993 and the final Constitution of 1996 have made provision for the recognition and the role of traditional leaders.<sup>1</sup>

Although constitutionally recognised and protected, the exact role and involvement of traditional leaders and their participation in the three spheres of government, especially in local government, are unclear and have already caused some conflicts between traditional leaders and government structures.<sup>2</sup> In order to address some of these disputes and to clarify the position, national government has embarked on a process of investigation and consultation, with a final objective being to rationalise legislation and implement new policies pertaining to the role and participation of traditional leaders in official governmental structures.<sup>3</sup> From an African, and more

<sup>1</sup> See the interim Constitution of 1993 ch 11 and the Constitution ss 211 and 212.

<sup>2</sup> Refer to *Contralesa v Minister of Local Government*, EC 1996 (2) SA 898 (TkS). In this case the applicant's essential complaint was that the application of the LGTA to rural areas in the Eastern Cape would deprive traditional leaders of their powers. The court disagreed with the argument and held that the applicant did not have *locus standi* to bring the particular application. See para E-G at 905. See also *ANC v Minister of Local Government and Housing KZN* 1998 (3) SA 1 (CC), where the court held that transition to democratic local government was to take place in terms of the LGTA, which recognised that in the interim phase of transition, areas over which traditional leaders had had authority could be included within the areas of jurisdiction of elected local authorities. This had given rise to a potential tension between democratic local government and traditional leaders in the interim Constitution had sought to resolve this tension in part through the mechanism of s 182. See para A-C at 12.

<sup>3</sup> See the draft discussions document: *Towards a White Paper on Traditional Leadership and institutions: a publication of the department of Provincial and Local Government* April 2000 Pretoria.

specifically a South African perspective, it would be irresponsible and unfortunate if the importance of traditional leadership and traditional law were to be overshadowed by political short-sightedness or the failure to provide for their proper recognition and inclusion. This importance is particularly relevant in the new local government structures, where traditional leaders could have significant influence over their local communities. In order to understand the role and importance of the institution of traditional leadership, it is necessary to examine briefly the historical background of such institutions, and thereafter to evaluate the current legislative protection given to such institutions in the new governmental structure.

### **13.2 A brief historical overview of traditional leadership in South Africa**

Traditional leadership is an institution that has developed over hundreds, if not thousands, of years in Africa. Prior to the introduction of colonialism, social organisation in South Africa was characterised by many tribal regimes that existed and operated within certain areas of jurisdiction. Such tribal regimes were primarily based on the principles of patriarchy and inscriptive norms. Each tribe was led by a particular traditional or tribal leader, who was the central figure in that tribe.<sup>4</sup> The tribal leader or traditional leader was further vested with the highest authority in a particular territory. He had various functions, which he did not exercise as an autonomous individual but rather in collaboration with a so-called “tribal council”, which was representative of the ordinary people of that tribe. The traditional leader played a very important role within tribal customs. He was seen not only as a link between the people of the tribe and their ancestors, but also as a spiritual, cultural and judicial leader and the custodian of the values of his community. The traditional leader was often regarded as the co-ordinator of many aspects of everyday life of his people, the curator of community dreams and aspirations and the protector of harmony between the members of his community in respect of their natural, spiritual, social, physical and economical environment. The traditional leader had the final authority to rule over his tribe, and he was considered by that tribe to be functioning in the role of both father and son.<sup>5</sup> Often his leadership and traditional authority served as a bonding factor for the community, as he was responsible for the common good of all.

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<sup>4</sup> This is still applicable today.

<sup>5</sup> He was father to his people and son of the ancestors of his people.

Traditional leaders ruled over their tribes in accordance with the principles of African democracy and accountability. Their reign was similar to that of a king in council.<sup>6</sup>

With the dawn of colonialism in Africa, the traditional African government was systematically weakened, and the strong and influential bond between traditional leaders and their tribe members was gradually eroded. Many African people were displaced and were evicted from their properties, which in turn caused severance between tribal members and tribal leadership. Another factor which also impacted severely on the tribal relationship, especially between members and leadership, was the rise of urbanisation. Many people, mostly men, left their tribal villages for bigger cities in a quest for work and ultimately a better life.<sup>7</sup> Under colonial rule in South Africa and later National Party domination, new legislation increasingly strengthened tribal divisions and provided traditional leaders with powers and roles they had not possessed before. The institution of traditional leadership was sidetracked to a form of indirect government. General governmental affairs vested in the ruling government of the day, while traditional authorities had control over only predefined traditional or customary affairs.<sup>8</sup> In essence, the laws mentioned above created a system of local self-government which placed traditional leaders in a bureaucratic role. Chieftainship became reduced to a public office which was a mere creature of statute and which made the appointment, suspension or removal of chiefs subject to political manipulation.<sup>9</sup>

### **13.3 Important considerations relating to traditional leadership from a South African perspective**

In order to understand the importance and special role traditional authorities can and should play within government structures, some important considerations should be noted, as outlined below.

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<sup>6</sup> See the draft discussion document on Traditional Leadership and Institutions (2000) at 10 hereafter referred to as the discussion document on Traditional Leadership. The principles of African democracy are of significant importance to the South African legal system. For more on this see *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

<sup>7</sup> It is submitted that not only the colonial policies but also modern urbanisation trends combined caused ancient Southern African societies to be disrupted.

<sup>8</sup> See, eg, the Black Administration Act 38 of 1927, the Black Authorities Act 68 of 1951 and various pieces of legislation of black independent states or self-governing territories.

<sup>9</sup> See the discussion document at 11 and 13. It is safe to say that the successive colonial and later NP governments eroded Traditional Leadership as an institution and compromised its traditional values within the African concept. Although modern South Africa cannot go back to pre-colonial times, there are still definite advantages for the institution of Traditional Leadership in the 21st century South Africa.

### **13.3.1 *The structure of traditional leadership***

Originally traditional leadership was rooted in the notion of a kingship or kingdom. During colonial rule a tendency developed to refer to African rulers as chiefs rather than kings. This tendency obscured the hierarchy of leadership that existed in pre-developed African communities and led to the demise of the formerly strong traditional practices and customs. History indicates that the king in the African context was in principle not an autocrat. He ruled by popular mandate and took decisions after consultation with his councillors.<sup>10</sup> The king's council comprised the headmen and elders, who were normally notable leaders in the respective communities.<sup>11</sup> With the introduction of various legislative reforms, most notably the Black Administration Act,<sup>12</sup> the African system of governance was changed and transformed, and new structures were put in place of old ones.<sup>13</sup> Under the Union of South Africa, the Governor-General became something of a supreme chief over all tribal entities, which position gave him the power to create and divide tribes and to appoint or dismiss any person he wished as a chief or headman. In 1961 this role of "supreme chief" was assumed by the president of the Republic of South Africa.<sup>14</sup>

### **13.3.2 *The appointment/recognition of traditional leaders***

According to customary law, the appointment or recognition of a traditional leader was done mostly through various laws of succession. In principle there were strong hereditary customs along only male lines.<sup>15</sup> In modern South Africa there are many sets of legislation and procedures that are still applicable and used by the different provincial authorities to appoint traditional leaders to different positions of power.<sup>16</sup> As was stated above, the original power to appoint traditional leaders, which was vested in the supreme chieftaincy, was later assigned to the Governor-General by the Black Administration Act and reassigned to the President of South Africa in 1961

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<sup>10</sup> However, there are certain kings that acted autocratically and ruled as dictators.

<sup>11</sup> Headmen were usually members of the extended royal family and were each assigned a section of the tribe to rule on behalf of and with the assistance of the king. The royal family thus extended its power vertically and horizontally. The concept of democratic elections was foreign to a system of traditional rule.

<sup>12</sup> 38 of 1927.

<sup>13</sup> See, eg, the tribal authorities in the former Qwaqwa.

<sup>14</sup> Under the 1993 and 1996 Constitutions, these powers were assigned to the premiers of the nine provinces. See the discussion document on Traditional Leadership at 14.

<sup>15</sup> Females were appointed as regents for their male sons until they have reached the age of maturity. These practices are still followed today. See the discussion document at 25.

and lastly to the homeland governments upon their attainment of self-governing status and to the TBVC states upon receiving independence. Outside self-governing territories and TBVC states, traditional leaders were still being appointed by the South African president. It is commonly accepted that a traditional leader begins his term of office upon official appointment, which is then followed by a customary inauguration.<sup>17</sup> During 1994, under the IC, the power to appoint traditional leaders was assigned to the relevant premiers of six provinces in South Africa, where the institution of traditional leadership was relevant.<sup>18</sup>

Three institutions play a role in the appointment of a traditional leader:

- the customary institutions, which are normally the various royal families
- administrative institutions, for example the provincial government concerned
- statutory institutions, which are responsible for the official appointment.

As indicated above, succession to traditional leadership was, and still is, gender specific. Succession is hereditary in the male lines only, with the exception of the so-called Modjadjis, where succession is hereditary in the female lines. Ordinarily, the identification of the successor is determined by the relevant customary laws of the tribe or the community concerned. If the identified successor is still a minor, an acting chief, who can be a male or female, is appointed to rule, until the minor has reached maturity and can take over the reign himself. With regard to retirement of traditional leaders, it is interesting to note that customary law does not make provision for voluntary retirement.<sup>19</sup>

It is clear from the abovementioned that there are no uniform procedures in the appointment and recognition of traditional leaders. This situation is attributed largely to different norms, values, customs and legislative requirements in different provinces. A much clearer and uniform policy is needed. Apart from a new policy, many com-

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<sup>16</sup> As was indicated above, most powers concerning traditional authorities were assigned in 1994 to the various premiers of the nine provinces in South Africa. For more details on the provisions in each province see the discussion document at 25-28.

<sup>17</sup> It should be pointed out that according to current legislation in South Africa traditional leadership is divided into three categories. There are kings or so-called "paramount chiefs", and then there are chiefs and lastly headmen. These titles sometimes have a different meaning in the different provinces.

<sup>18</sup> The six provinces are: The Eastern Cape, Free State, KwaZulu-Natal, Mpumalanga, Limpopo and the North West Province. See the discussion document on Traditional Leaders at 25-28.

<sup>19</sup> However, in some provinces, eg the Eastern Cape and North West, legislation makes provision for the retirement of traditional leaders.

munities have expressed a strong wish to retain their customary practices; since such practices have a very valuable role to play in modern South Africa.<sup>20</sup>

### **13.3.3 The role of women and children in traditional leadership**

Traditionally South African societies were defined along patriarchal lines, which means that the head of the household was a man, and that his family – wife/wives and children were subordinate to his authority.<sup>21</sup> In tribal relationships, the wives were responsible for the general welfare of the family, which included the upbringing of children. Furthermore, women were responsible for the co-ordination of family rituals and functions.<sup>22</sup>

The colonial and National Party regimes as well as the unprecedented challenges and demands of urbanisation in the 21st century significantly altered the role that women played in traditional communities. The creation of African reserves and, more particularly, migrant labour practices left many women on their own and with many of the responsibilities formerly carried by their husbands. This state of affairs has caused many women in traditional communities to challenge modern practices, which still hinge on discrimination between women and men.<sup>23</sup>

Apart from male domination, age and seniority also played an important part in African traditional culture. The youth were raised knowing that they must respect and honour their seniors. Apart from performing small household tasks, most children were left to fend for themselves. In traditional communities minors were seen to belong to their families firstly, but secondly also to the community as a whole. If parents were unable to care for their children, the community would take over such responsibilities.<sup>24</sup> Customary law also prohibited children from succeeding in posi-

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<sup>20</sup> See the discussion document on traditional leaders at 29.

<sup>21</sup> For many years the position in western countries was very similar to this position.

<sup>22</sup> Refer to the discussion paper on traditional leaders at 33.

<sup>23</sup> Probably the best-known example of such a challenge is directed at the traditional succession laws and customs which discriminates towards women. Accordingly, both the Constitution s 9 and the Promotion of Equality and Prevention of Unfair Discrimination Act prevent any discrimination based on sex or gender. The province of KwaZulu-Natal was the first province where women were acknowledged officially as leaders in predominantly patriarchal traditional communities. During 1990 the AmaKhosi and Iziphakanyiswa Act 9 of 1990 was passed, which provided for any person – including women – to be appointed as an inkosi or siiphakanyiswa.

<sup>24</sup> This practice prevented homeless and orphaned children in traditional communities. This has changed radically and is one of the most concerning issues in the social balance of the broad South African community.

tions of traditional leadership, and often regents were appointed to act on the minor's behalf until he reached maturity.<sup>25</sup>

#### **13.3.4 Party political affiliation and the remuneration of traditional leaders**

Prior to the Union of South Africa in 1910, the former colonial governments had tried to reconstruct the chieftainship and make it conform to colonial rule.<sup>26</sup> Military actions took place in some areas, while in others treaties with tribal authorities were concluded, which allowed for limited tribal autonomy in certain areas. In 1910 and according to the terms of the South African Act of 1909, the Governor-General was conferred as a supreme chief over all African tribes. This led to a gradual reduction of traditional leaders to merely one element in an overall bureaucratic hierarchy.<sup>27</sup> In response to the formation of the Union, black Africans began to express certain political demands, and the formation of the African National Congress (ANC) in 1912 represented the first political instrument by which these new demands were articulated. Although the ANC was organised across ethnic and tribal lines, it nonetheless maintained respect for traditional leadership as an institution.<sup>28</sup> Suffice it to say that in modern South Africa the participation and inclusion of traditional leadership is strongly rooted in South African political history, and the final Constitution affords every citizen the right to make free political choices, which includes the right to form a political party and to participate in political activities.<sup>29</sup>

Apart from their early political inclusion, traditional leaders also enjoyed a position of unique privilege and authority regarding their own remuneration. A traditional leader was regarded as a repository of wealth and a dispenser of gifts. The traditional leader and his family normally took precedence in tribal affairs such as rituals or feasts. The traditional leader also had first choice of land to build his house and graze his cattle. All things considered, the traditional leader was the richest man in

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<sup>25</sup> Today the Constitution prohibits unfair discrimination based on age, and customary law must ensure compliance to the supreme law of the state. See also the discussion document on Traditional Leaders at 35.

<sup>26</sup> Often this objective was pursued through military conquest. The so-called "frontier wars" were good examples of such military actions.

<sup>27</sup> See the discussion document on Traditional Leaders at 36.

<sup>28</sup> When the ANC adopted its first Constitution in 1919 it provided for a forum within its congress known as the Upper House of Chiefs. Through this forum, traditional leaders would have access or representation in the highest political decision-making structure. Apart from showing respect and honouring the status of traditional leaders, the Upper House of Chiefs also served as a mechanism to obtain political consent of all ethnic groupings represented in the political organisation. Refer to the discussion document on Traditional Leaders at 36.

<sup>29</sup> See the Constitution s 19(1)(a)-(c).



his tribe.<sup>30</sup> The most important source of wealth of a traditional leader was his cattle. Through the introduction of new political structures, traditional customs were reformed, and some of the traditional leaders' powers were taken away. To a large extent traditional leaders became instruments in the hands of the governing administrations, for which role they were also remunerated. Thus, with the new democratic developments, the manner of remuneration of traditional leaders has assumed new dimensions. Traditional leaders are now paid by government on a uniform basis without recognition of the size or respect of the tribe.<sup>31</sup>

#### **13.4 The new legislative framework and requirements regarding traditional leadership**

In light of its historical background, traditional leadership as a traditional institution has an important role to play in many rural communities in South Africa. With the complete restructuring of South Africa's constitutional system, traditional leaders insisted on inclusion and protection of not only customary law but also traditional leadership itself. Accordingly, the final Constitution specifically accords constitutional recognition to the institution, status and role of traditional leadership.<sup>32</sup> Although the institution, status and role of traditional leadership are recognised, such aspects are subject to the Constitution in general. However, the Constitution is not clear on exactly what role traditional leaders should play within the overall governmental structure. In debating the role of traditional leaders, two viewpoints have emerged. According to the so-called modernistic view, traditional leaders should play only a ceremonial and advisory role in governmental structures. Traditionalists, on the other hand, argue that traditional leaders should participate directly in all activities of government.<sup>33</sup> Closer investigation of the constitutional text reveals that the Constitution favours the modernistic view and that, although traditional leadership is recognised and protected, it is subject to the Constitution and plays only an advisory role in the new democratic structures.

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<sup>30</sup> Because of his privileged position, traditional leaders were also punished more severely than ordinary tribesmen, when they committed certain offences.

<sup>31</sup> See the Remuneration of Public Office Bearers Act 20 of 1998, which determines the remuneration of *inter alia* traditional leaders. It is important to note that generally only kings and chiefs are paid remuneration, and not headmen. See the discussion document on traditional leaders at 38.

<sup>32</sup> See the Constitution ss 211 and 212.

<sup>33</sup> Refer to Devenish (1998) 295.

### 13.4.1 *The basic constitutional foundation regarding traditional leadership*

As was stated above, the final Constitution specifically recognises aspects of traditional leadership. In this regard, section 211 of the Constitution provides for the following:

- The institution, status and role of traditional leadership according to customary law are recognised, subject to the Constitution.<sup>34</sup> Not all aspects regarding traditional leadership are included; only the aspects that are recorded or part of customary law are recognised. A full investigation or evaluation of customary law principles regarding traditional leadership is therefore needed. Furthermore, the Constitution is very clear that the recognition of the institution, status and role of traditional leadership is not *cart blanche*, but is subject to the Constitution itself.<sup>35</sup>
- The Constitution further determines that a traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which legislation and customs would also include amendments or repeal of such legislation or customs.<sup>36</sup> The Constitution in this instance thus allows for the functioning of a traditional authority which is subject to legislative and customary regulations.<sup>37</sup>
- When disputes arise with regard to traditional leadership, the Constitution obligates the courts to apply customary law when that law is applicable.<sup>38</sup> Traditions

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<sup>34</sup> See the Constitution s 211(1).

<sup>35</sup> This is of course a further outflow of the already accepted and confirmed supremacy principle of the Constitution. See the Constitution s 2. No principles or requirements regarding traditional leadership will be acceptable and enforceable if they are not included in customary law and in complete compliance with all relevant constitutional principles. This would be inclusive of all constitutional requirements, including the Bill of Rights. Any conduct or law that is inconsistent with the Constitution is invalid.

<sup>36</sup> See the Constitution s 211(2).

<sup>37</sup> As the Constitution is silent on what type of legislative regulation is supposed, it is assumed and submitted that both national and provincial legislation can be applicable in these instances. It must also be pointed out that indigenous law and customary law, cultural matters and traditional leadership, subject to the Constitution ch 12, are all matters of functional areas of concurrent national and provincial legislative competence. Thus, both national and provincial governments can legislate over such matters. See the Constitution Sch 4 Part A. See also the case of *Ex parte Speaker of the KZN Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa amendment bill, 1995 1996 (4) SA 653 (CC)*. The case concerned the re-enactment and amendment of the KwaZulu Amakhosi and Iziphakanyiswa Act of 1990. The Act made provision for *inter alia* the payment of a monthly salary, allowances and other privileges to the King of the Zulus. The court held that such payments and allowances to traditional leaders fell within the competence of the provincial legislature. At para 21 at 663F. Refer also to the case of *President of Bophuthatswana v Milsell Chrome Mines (Pty) Ltd 1996 (3) SA 831 (BS)* in which it was confirmed that under the interim Constitution areas such as indigenous law and traditional authorities fell under Sch 6 functional areas of provincial legislative competence. See paras D-F at 844.

<sup>38</sup> See the Constitution s 211(3).

and practices of customary law regarding traditional leadership are therefore specifically protected by the Constitution. However, such customary law must be relevant to the circumstances and must be in compliance with the Constitution as supreme law and any other legislation that specifically deals with customary law. The Constitution hereby allows for customary law to be less valued than new legislative prescriptions, be they constitutional or other legislative requirements.

Apart from recognising the role of traditional leadership, the Constitution also determines that national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.<sup>39</sup> It must be pointed out that the Constitution provides for the possible role for traditional leadership only at local level and on matters affecting local communities; such constitutional possibilities are not envisaged for national or provincial spheres of government. In compliance with this constitutional provision, the Local Government: Municipal Structures Act provides for the participation of traditional leaders in municipal councils.<sup>40</sup>

The Constitution further states that in order to deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities that still observe a system of customary law, national or provincial legislation may provide for the establishment of houses of traditional leaders, and only national legislation may establish a council of traditional leaders.<sup>41</sup> Within the authority given in the Constitution, a national house and various provincial houses of traditional leaders have been established.<sup>42</sup>

#### **13.4.2 The formal recognition and establishment of traditional leadership**

In furtherance of the constitutional mandate, national parliament enacted the Traditional Leadership and Governance Framework Act<sup>43</sup> during 2003. The purposes of the Act are to provide for the recognition of traditional communities, the establishment and recognition of traditional councils, the establishment of a statutory frame-

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<sup>39</sup> See the Constitution s 212(1). The Constitution does not allow provincial legislation to provide for the role of traditional leadership. Through national legislation, a uniform role for traditional leadership is to be established.

<sup>40</sup> See the Structures Act s 81.

<sup>41</sup> See the Constitution s 212(2)(a)-(b).

<sup>42</sup> For more detail see the Council of Traditional Leaders Act 10 of 1997, as well various provincial Acts such as The House of Traditional Leaders Act 1 of 1995 (Eastern Cape), The House of Traditional Leaders Act 6 of 1994 (Free State), The House of Traditional Leaders Act 4 of 1995 (Mpumalanga), The House of Traditional Leaders Act 12 of 1994 (North-West) and The House of Traditional Leaders Act 7 of 1994 (KwaZulu-Natal).

<sup>43</sup> 41 of 2003, hereafter referred to as the TLGFA.

work for leadership positions within the institution of traditional leadership and for aspects such as the general recognition, functions and roles, remuneration, dispute resolution and a code of conduct for traditional leaders.<sup>44</sup> In general, the Act seeks to fulfil and enhance the broad constitutional protection of the institution of traditional leadership. Apart from the confirmation that the institutions of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights, the Act also envisages that such institutions must:

- promote freedom, human dignity and the achievement of equality and non-sexism
- derive their mandates and primary authority from applicable customary law and practices
- strive to enhance tradition and culture
- promote nation building and harmony and peace amongst people
- promote the principles of co-operative governance in their interaction with all spheres of government and organs of state and
- promote an efficient, effective and fair dispute-resolution system, and a fair system of administration of justice, as envisaged in applicable legislation.

The Act specifically provides for aspects concerning traditional communities and traditional councils, leadership positions within the institution of traditional leadership, houses of traditional leaders, the roles and functions of traditional leadership and also aspects relating to dispute resolution and the commission on traditional leadership disputes and claims. Although the Act is of relevance to all three spheres of government, the following aspects are of particular importance for all local government institutions:

- *Partnerships between municipalities and traditional councils* The Act specifically determines that the national government and all provincial governments must promote partnerships between municipalities and traditional councils through legislative or other measures.<sup>45</sup> Any such partnership between a municipality and a traditional council must be based on the principles of mutual respect and the recognition of the status and roles of the respective parties. The partnership must also be guided by and based on the principles of co-operative governance. It is further permitted for a traditional council to enter into a service delivery agreement

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<sup>44</sup> See the long title of the TLGFA.

<sup>45</sup> Refer to s 5(1) of the TLGFA.

with a municipality in accordance with the Local Government Municipal Systems Act and any other applicable legislation.<sup>46</sup> The obligation that any partnership between a municipality and a traditional council should be guided and based on the principles of co-operative governance is somewhat confusing. According to the Constitution, the principles of co-operative government are applicable to all spheres of government and all organs of state within each sphere.<sup>47</sup> Municipalities have been confirmed as a distinctive sphere of government and undoubtedly fall under the obligations set out in section 41 of the Constitution. Although institutions of Traditional Leadership or a traditional council could be classified as an organ of state under the Constitution, they are arguably not organs of state within a sphere of government.<sup>48</sup> In light of the above, it is submitted that the extension of the principles of co-operative government to the partnership between a municipality and a traditional council could well be misguided and unconstitutional. It is also this writer's submission that the constitutional directive incorporated in section 41(2) of the Constitution, does not allow for the extension of the principles of co-operative government to partnerships between municipalities and traditional councils.<sup>49</sup>

- *Referral of Bills to the National House of Traditional Leaders* Under the Act, any parliamentary Bill pertaining to customary law or customs of traditional communities must, before it is passed by the house of parliament where it was introduced, be referred to the National House of Traditional Leaders for its comments. A provincial legislature or a municipal council may adopt the same procedure in respect of the referral of a provincial Bill or a draft by-law to a provincial house of traditional leaders or a local house of traditional leaders.<sup>50</sup>
- *Guiding principles for the allocation of roles and functions of traditional leadership* According to the new legislative provisions, the national government or a provincial government may through legislative or other measures provide a role for traditional councils or traditional leaders. A role may be provided in respect of

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<sup>46</sup> Read ss 5(2)-(3) of the TLGFA together with Act 32 of 2000 as amended.

<sup>47</sup> See s 41(1) of the Constitution.

<sup>48</sup> Read s 239 of the Constitution together with the case of *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC).

<sup>49</sup> S 41(2) of the Constitution determines that an Act of parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations and to provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. Traditional councils are not part of the hierarchy of governmental institutions.

the following issues: arts and culture; land administration; agriculture; health; welfare; administration of justice; safety and security; the registration of births, deaths and customary marriages; economic development; environment; tourism; disaster management; the management of natural resources and the dissemination of information relating to government policies and programmes.<sup>51</sup> The Act further requires that whenever an organ of state within the national government or a provincial government considers allocating a role for traditional councils or traditional leaders, that organ of state must:<sup>52</sup>

- seek the concurrence of either the minister responsible for traditional leadership matters or the MEC responsible for traditional affairs in the province concerned;
- consult with the relevant structures of traditional leadership and SALGA;
- ensure that the allocation of a role or function is consistent with the Constitution and applicable legislation;
- take the customary law and customs of the respective traditional communities into account;
- strive to ensure that the allocation of a role or function is accompanied by resources and that appropriate measures for accounting for such resources are put in place;
- ensure, to the extent that it is possible, that the allocation of roles or functions is implemented uniformly in areas where the institution of traditional leadership exists; and
- promote the ideals of co-operative governance, integrated development planning; sustainable development and service delivery through the allocation of roles and functions.

When an organ of state has allocated a role or function to a traditional council or traditional leaders, that organ of state is obligated to monitor the implementation of the function or role and must also ensure that the implementation of the function is consistent with the Constitution and is indeed performed.<sup>53</sup>

(d) *Code of conduct for traditional leaders and traditional councils* Every traditional leader and members of a traditional council must adhere to a specific code of

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<sup>50</sup> Read s 18 of the TLGFA.

<sup>51</sup> See s 20(1)(a)-(n) of the TLGFA.

<sup>52</sup> See s 20(2)(a)-(g) of the TLGFA.

<sup>53</sup> See s 20(3)-(4) of the TLGFA.

conduct. A provincial code may also be prescribed to complement the national code.<sup>54</sup>

### **13.4.3 Legislative requirements regarding traditional leadership under the Local Government Transition Act**

From the beginning of the restructuring process of Local Government, the importance and role of traditional leadership was never overlooked. The LGTA was enacted mainly to facilitate the restructuring of the then existing municipal government system. During 1995, proclamation R 65 was issued to describe the role of traditional authorities in local government. Both transitional local councils and transitional representative councils provided for *inter alia* the inclusion of traditional authorities within such councils.<sup>55</sup> It should again be noted that a transitional council was deemed to be the successor-in-law of the disestablished local authority and that all existing regulations, bylaws, resolutions etcetera of such authorities remained in force until amended or repealed by the TC.<sup>56</sup> It should also be pointed out that provincial constitutions may also provide for the institution, role, authority and status of a traditional monarch.<sup>57</sup> Provinces are further afforded concurrent legislative competencies together with national government in respect of traditional authorities.<sup>58</sup>

Before the introduction of the 1996 Constitution, the Black Administration Act,<sup>59</sup> the Black Authorities Act<sup>60</sup> and legislation issued in the various former “independent” states and self-governance territories described the various functions of traditional authorities. Some of these functions were similar to local government functions. The various so-called “independent states” and “self-governing territories” also issued their own legislation in this regard. Due to a lack of funding and infrastructure and being unaware of these functions, few traditional authorities were able to exercise their powers in this regard. New local government legislation was issued after the 1993 Constitution to *inter alia* provide for different forms of local government. The pre-1993 legislation was never repealed, however, and exists alongside the 1996

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<sup>54</sup> Read s 27(1)-(2) of the TLGFA together with the schedule to the Act which determines the general conduct of a traditional leader and of a traditional council. See items 1 and 2 of the schedule.

<sup>55</sup> See the LGTA ss 8 and 9.

<sup>56</sup> Refer to the LGTA s 14.

<sup>57</sup> Refer to the Constitution s 143(2).

<sup>58</sup> In this regard the Constitution Sch 4 Part A refers to indigenous law and customary law and traditional leadership. However, these competencies are subject to the Constitution ch 12.

<sup>59</sup> 38 of 1927.

<sup>60</sup> 68 of 1951.



constitutional provisions and the Local Government Transition Act.<sup>61</sup> Under the Black Administration Act traditional leaders had to ensure the enforcement of laws, orders and the government's instructions relating to the administration within their areas. They were therefore "in control" of the people in their area. Various typical local government functions were identified and regulated by the Act.<sup>62</sup>

The Black Authorities Act again provided for the institution of tribal communities and also regional and territorial authorities. Regional authorities had the general function of advising and making representations to the government on all matters affecting the general interests of Blacks within specific jurisdictions, such as maintenance and running of educational institutions.<sup>63</sup> The transition to a new constitutional order changed the old position substantially, and it determined that the main functions of local governments were to provide essential services such as access to water, sanitation, electricity, primary health services, housing and a safe and health environment to all people in their areas. The inclusion of traditional leadership was attributed mainly to the interim Constitution,<sup>64</sup> which stated that:<sup>65</sup>

- (1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.
- (2) Indigenous law shall be subject to regulation by law.

The interim Constitution also confirmed that a traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government referred to in chapter 10 shall *ex officio* be entitled to be a member of that local government and shall be eligible to be elected to any office of such local government.<sup>66</sup> This constitutionally recognised entitlement of traditional leaders signalled important protection for such leaders. In the case of

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<sup>61</sup> 209 of 1993.

<sup>62</sup> Scheepers *et al* "Constitutional provisions on the role of traditional leaders and elected local councillors at rural level" (1998) *Obiter* at 67.

<sup>63</sup> See the Act s 5.

<sup>64</sup> 200 of 1993.

<sup>65</sup> See the Constitution ss 181 and 182.

<sup>66</sup> See the interim Constitution s 182.

the *ANC v Minister of Local Government and Housing, KZN*<sup>67</sup> the Constitutional Court was confronted with exactly such protection of the role of traditional leaders in local structures. The court held that section 182 was an important constitutional entitlement for traditional leaders, whose customary authority and role were being affected by the transition to democracy.

Construed purposively, therefore, section 182 meant that traditional leaders were entitled to *ex officio* representation on local government in their areas. This entitlement arose once elections had been held for local government and once the procedural requirements contained in section 182 had been met. It further ensured that traditional leaders were entitled to representation on a council without having to stand for election. It also ensured that for the period of transition the traditional leaders who had previously been exercising the powers and performing the functions of local government would be represented on the newly established institutions which would now be responsible for those functions.<sup>68</sup> The court also held that the very purpose of including traditional leaders in local government bodies in areas where they lived was to ease the transition from one form of local government to another. Furthermore, the reference to “elected local government” meant that such traditional leaders could be included in a local government only after such government had been elected. The phrase “elected local government” was adopted to make it plain that traditional leaders did not have a constitutional entitlement to membership of local government until after the first elections had been held. Traditional leaders were to be given an *ex officio* entitlement to membership of local government bodies only in the interim phase contemplated by the Local Government Transition Act and not in the pre-interim phase, when elections had not yet been held. Given the restrictions on the number of nominees and the fact that the majority of members of the local government bodies would still be determined by elections, the fact that there were some nominees on those local government councils who were not “elected” did not result in such councils’ not qualifying as elected local governments.<sup>69</sup>

When the interim Constitution was repealed by the final Constitution on 4 February 1997, the final Constitution’s provisions replaced those of the IC. Apart from sections 211 and 212, the final Constitution under its transitional arrangements also deter-

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<sup>67</sup> 1998 (3) SA 1 (CC).

<sup>68</sup> See para 19 at 11-12.

<sup>69</sup> Refer to para 30 at 15.

mined that a traditional leader of a community who is observing a system of indigenous law and who is residing on land within the area of a transitional local council, transitional rural council or a transitional representative council, as was referred to in the LGTA, 1993, and who has been identified as set out in section 182 of the IC, is *ex officio* entitled to be a member of that council until 30 April 1999, or until an Act of parliament provides otherwise.<sup>70</sup> These provisions thus effectively allow for the participation of traditional leaders in the transitional structures of local governments. With the local government elections in December 2000 and the completion of the new national legislative framework concerning local government, the transitional legislative requirements came to an end. The role and inclusion of traditional leaders, especially within the new local government structures, must therefore be determined in terms of the provisions of the Constitution of 1996 and the Municipal Structures Act, which allows for the participation of traditional leaders in the new local government dispensation. In anticipation of the final inclusion of traditional leadership in local government structures, the White Paper on Local Government also identified certain aspects of importance. The White Paper emphasised the fact that chapter 7 and chapter 12 of the final Constitution had to be reconciled with one another. On one hand chapter 7 provides for the establishment of elected local governments across the country, but on the other chapter 12 again recognises traditional leadership as an institution.<sup>71</sup> The White Paper also identified various functions of traditional leaders. Such functions include the following:<sup>72</sup>

- acting as head of the traditional authority, and thus exercising limited legislative powers and certain executive and administrative powers
- presiding over customary law courts and maintaining law and order
- consulting with traditional communities through imbizo/lekgotla
- assisting members of the community in their dealings with the state
- advising government on traditional affairs through the Houses and Council of Traditional Leaders
- convening meetings to consult with communities on needs and priorities and providing information

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<sup>70</sup> See the Constitution Sch 6 Item 26(1)(b).

<sup>71</sup> The Constitution ss 151(1) and 212.

<sup>72</sup> See the White Paper on Local Government (1998) at 95-96.

- protecting cultural values and providing a sense of community in their areas through a communal social frame of reference
- being the spokespersons generally of their communities
- being symbols of unity in the community
- being custodians and protectors of the community's customs and general welfare.

Their role in the development of the local area and community includes:

- making recommendations on land allocation and the settling of land disputes
- lobbying government and other agencies for the development of their areas
- ensuring that the traditional community participates in decisions on development and contributes to development costs
- considering and making recommendations to authorities on trading licences in their areas in accordance with law.

After a thorough evaluation of the various functions of traditional leaders as identified in the White Paper, one comes to realise that traditional leadership as an institution has an important role to play in the new local government system of our country. In this new structure, both traditional and elected local government representatives will be combined into a unique co-operative governance model. The role of traditional leaders also includes attending and participating in council meetings and advising their councils on the needs and interests of their communities. In order to fulfil their responsibilities, traditional leaders must be informed and consulted regarding municipal programmes and projects within their traditional areas.<sup>73</sup> These aspects are now more clearly addressed in terms of the Municipal Structures Act.

The White Paper took a minimalistic approach to traditional leaders in local government matters. Other issues such as customary courts, customary law, communal tenure and land trusteeship were left to national government to regulate.<sup>74</sup> The White Paper finally indeed recognised that although there would be elected local governments in all areas, including traditional authority areas, the traditional leaders, being closest to the people, still have important roles to play. Not all questions on the issue of traditional leaders were addressed by the White Paper. Issues such as the struc-

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<sup>73</sup> See LGIS no 2 'District Councils' (1999) at 25.

<sup>74</sup> See Scheepers *et al* (1998) *Obiter* fn 62 at 84.

ture and role of traditional leadership, remuneration, tribal courts, land tenure and the role of women, to name but a few, should be dealt with under other legislation.<sup>75</sup>

#### **13.4.4 Participation of traditional leaders according to the Municipal Structures Act**

In compliance with the constitutional mandate that national legislation may provide for a role of traditional leadership as an institution at local level on matters affecting their local communities, the Municipal Structures Act determines the following:

- Traditional authorities that observe a system of customary law in the area of a municipality may participate through their leaders in the proceedings of the council of that municipality, and those traditional leaders must be allowed to attend and participate in any meeting of the council.<sup>76</sup> It is also of importance to note that traditional leaders must be allowed attendance and participation *in any meeting*<sup>77</sup> of the council. Because traditional authorities, when properly identified and after compliance with all the legislative requirements, are afforded constitutional protection to participate, such institutions are regarded as part and parcel of the relevant municipal council, and they may not be excluded from any council meeting. This will surely also include special meetings of the council which might not necessarily be open for other interest groups.

Before traditional authorities may participate through their leaders, such leaders must first be properly identified. In this regard, the Structures Act determines that the MEC for local government in the province must identify the traditional leaders who may participate in the proceedings of that municipal council. Such identification must be in accordance with Schedule 6 of the Act and should be published by notice in the relevant *Provincial Gazette*.<sup>78</sup>

It is further also a requirement that the number of traditional leaders that may participate may not exceed 20% of the total number of councillors in that council.

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<sup>75</sup> Such other legislation was enacted by Parliament during 2003. See the Traditional Leadership and Governance Framework Act 41 of 2003.

<sup>76</sup> See the Structures Act s 81(1)-(2). Although the Structures Act is mandatory on attendance and participation in any meeting of an applicable municipal council if the relevant traditional authority so decides, the Act is not mandatory on traditional leadership to actually participate in such affairs. By using the words 'may participate' the legislator seems to have left the decision on participation open for traditional authorities to decide for themselves. This is an aspect of concern, as some traditional leaders might choose not to participate and by doing so could prejudice the interests of their communities. It is submitted that mandatory legislative participation would better serve in the interests of all parties concerned.

<sup>77</sup> Own emphasis added.

<sup>78</sup> Refer to the Structures Act s 81(2).

In instances where a council has fewer than 10 councillors, only one traditional leader may participate in that council. If the number of traditional leaders that have been identified in a municipal area exceeds the limit of 20% of the total number of councillors, the MEC may determine a system for the rotation of participation of the traditional leaders concerned.<sup>79</sup>

- A further important requirement of the Structures Act is that before a municipal council takes a decision on any matter directly affecting the area of a traditional authority the council must give the leader of that authority the opportunity to express a view on that matter. Participation is thus not only a silent attendance to council affairs, but includes an opportunity to express views and address other councillors on issues that affect a traditional area under a traditional authority.<sup>80</sup>
- The Structures Act further provides that, after consulting the Provincial House of Traditional Leaders, the MEC may by notice in the relevant *Provincial Gazette* (a) regulate the participation of traditional leaders in the proceedings of a municipal council and (b) prescribe a role for traditional leaders in the affairs of a municipality.<sup>81</sup>
- A final important requirement regarding the participation of traditional leaders in municipal affairs is the fact that when a traditional leader is participating in the proceedings of a municipal council, such traditional leader is subject to the appropriate provisions of the Code of Conduct set out in Schedule 1 of the Local Government: Municipal Systems Act.<sup>82</sup>
- Under the Structures Act, traditional leaders are definitely more marginalised than before, since either district or local councils exercise legislative and executive powers in areas where traditional authorities have been exercising such authorities. Special efforts to ensure and protect the important role and functioning of traditional authorities should thus be made.

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<sup>79</sup> See the Structures Act s 81(2)(a)-(c).

<sup>80</sup> See the Structures Act s 81(3).

<sup>81</sup> Two aspects are important in this regard. Firstly, the relevant MEC is required to consult with the Provincial House of Traditional Leaders but is not obliged to follow the House's suggestions and, secondly, the MECs have decisive functions to fulfil regarding the role for traditional leaders in municipal affairs. See s 81(4)(a)-(b).

<sup>82</sup> In this regard, s 81 has been amended by s 121 of Act 32 of 2000 and s 18(b) of Act 31 of 2002. Note that a traditional leader who participates in the proceedings of a municipal council is entitled to the payment of out-of-pocket expenses in respect of such participation.

### 13.5 Conclusion

It is submitted that despite colonial, political or constitutional changes to the governmental structure in South Africa, traditional authorities have played a significant role in regulating and maintaining traditional African customs and should continue to play such a role in the future of our country. The exact role and manner of participation are somewhat controversial, however, and need to be determined with more clarity within our new democratic system. Notwithstanding the uncertainties, both the White Paper on Local Government and the new legal framework emphasise the relationship between traditional leadership and local governments. Both institutions are constitutionally recognised. Each institution has its own powers and functions, which differ in some respects but overlap in others. This then demands a new model whereby the roles of both institutions should be harmonised and described.

Some commentators have already expressed the view that there is definitely a need for both institutions to co-exist, even though there are differences in their legal nature and leadership functions.<sup>83</sup> Apart from constitutional recognition and protection, traditional leadership as an institution needs to be accorded its rightful place in the new constitutional dispensation. Irrespective of the 21st century developments, many South Africans, especially those living in rural areas of South Africa, continue to support and owe allegiance to their traditional customs and institutions. The importance of harmonising such customs and institutions with the constitutional foundation is self-evident. The Constitution is very clear on this point: although traditional leadership is protected and should play a role in governmental affairs, the Constitution is still the supreme law of our state and therefore any role or functioning of traditional authorities must comply with the overall constitutional requirements. Traditional leadership is therefore not an autonomous institution that functions separately from the general governmental structure of South Africa.<sup>84</sup> In actual fact, traditional institutions are not directly part of the government structure created by the Constitution. In

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<sup>83</sup> See Scheepers *et al* (1998) *Obiter* fn 62 at 61-62. The writers propose that a specific model for co-operation between local government officials and traditional authorities should be established.

<sup>84</sup> According to the Constitution s 40, the government is constituted as national, provincial and local spheres. S 43 indirectly states that in the Republic of South Africa, the national sphere of government is parliament, the provincial sphere is the nine provincial governments and the local sphere is the different municipal councils.



local areas the legislative and executive powers are vested in municipal councils, and traditional authorities fall under the municipal council's jurisdiction.<sup>85</sup>

In order to facilitate the participation and inclusion of traditional authorities, the Structures Act, mandated by constitutional authority, provides for a basic protection and inclusion of traditional authorities in local government affairs.<sup>86</sup> It is uncertain if such protection and inclusion is adequate and sufficient, and only time will indicate practical success. In this regard it is also important to remember that although traditional leadership is protected, its role and participation is not cast in stone and should be evaluated and adapted through legislative measures, if the need indeed arises.

The importance and co-existence of elected local councils and recognised traditional leaders should be protected. There are indeed differences and also similarities between municipal governments and traditional leaders, but they should not be in competition with one another. The differences in function and nature are heavily outweighed by the positive strengths resulting from this diversity in leadership. Much value can be added through a partnership between local government councillors and traditional leaders, and even more so in rural areas of South Africa.<sup>87</sup> Africa, and South Africa in particular, depend on local leaders to successfully implement and ensure local development. As a creature of history and part of a developing African society, traditional leadership is not a part of the government structure but is rooted in civil society itself. Such leaders are custodians of the values of their people and communities and co-ordinators of various aspects of their communities' dreams and aspirations.

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<sup>85</sup> Because all areas of South Africa fall under the jurisdiction of a municipal government, all traditional areas will also fall under a municipal council. Any disputes and decisions should be addressed through good co-operation, communication and consultation.

<sup>86</sup> See the Structures Act s 81.

<sup>87</sup> See Scheepers *et al* (1998) *Obiter* fn 62 at 88-89.

## The powers and functions of municipal governments

### 14.1 Introduction

Within the new constitutional dispensation, local governments are not only recognised as a distinctive and autonomous sphere of government, but are also accorded specific powers and functions that are unique and appropriate to the lowest sphere of government in the state. Similar to the position with regard to national and provincial spheres, local government powers and functions are constitutionally entrenched and protected and cannot unilaterally be taken away by a higher sphere of government without a constitutional amendment.<sup>1</sup> Notwithstanding the fact that LG is constitutionally protected, the powers and functions of municipalities are not absolute and are subject to both constitutional and national legislative requirements.<sup>2</sup> In essence, there are two broad requirements to which municipal powers and functions are subjected. The first is that municipalities can perform only such powers or functions that are legally permissible for them to perform or exercise. This requires a substantive evaluation of the law – constitutional or otherwise – to determine if a municipal council indeed has a certain power or may exercise a particular function. The second requirement stipulates that if it has been established that a local government indeed has a specific power or may perform a certain function, such power or function must be performed or exercised according to predetermined and procedurally correct legal requirements. This entails a procedural evaluation of the manner in which powers or functions are or were indeed exercised or performed.<sup>3</sup>

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<sup>1</sup> See the Constitution s 156 and Sch 4 and 5 Part B.

<sup>2</sup> Eg, the Constitution requires that municipal legislative actions must conform with national or provincial legislation. See the Constitution s 156(3). Both national and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions as listed in Sch 4 and 5. See also the Constitution s 155(7).

<sup>3</sup> Both the substantive and the procedural requirements are mandatory and must be complied with in order for a municipal council to exercise a power or perform a function lawfully.

Before one begins to investigate the various substantive and procedural requirements regarding the powers and functions of municipal councils, it is important to consider a few background principles. In general, all local governments in the new local government structure are obliged to perform their functions and to exercise their powers in such a manner as to achieve their objectives and fulfil their developmental duties.<sup>4</sup> In essence, the general objectives of local government and the mentioned developmental duties project the basic rationale of local government existence. These objects and duties provide for an overarching set of obligations or sweeping duties that must be achieved, depending on the capacity of municipal councils only. Upon a closer evaluation of the constitutional chapter on local government, one is confronted by other provisions in the Constitution that circumscribe the power and functions of municipalities and thus have a restrictive impact on the fulfilment of the sweeping duties and objectives.<sup>5</sup> A further and equally important fact is that although local governments have their own powers and functions, they ultimately exercise such powers under the watchful eyes of the national and provincial governments.<sup>6</sup>

Similar to all other aspects regarding local governments, the Constitution provides only a basic foundation regarding the power and functions of municipalities. Both the Municipal Structures Act and the Municipal Systems Act further elaborate on this constitutional foundation. Before the Constitution and other relevant national legislative requirements are evaluated it must be pointed out that municipal powers and functions are divided into two categories: executive and legislative. Simply put, legislative authority is the power to make, amend and repeal rules of law, while executive authority is the power to implement and enforce legislation, to manage the administration and to develop policy. Both legislative and executive authority is distributed between all three spheres of government. Contrary to the position on national and provincial spheres, where legislative and executive authorities are vested in different

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<sup>4</sup> According to the Constitution ss 152(2) and 153(a), all municipalities must strive, within their financial and administrative capacities, to achieve the objectives laid down for local governments in general, and must also structure and manage their administrations, budgeting and planning processes to give priority to the basic needs of their communities.

<sup>5</sup> Some commentators have argued that this constitutional curtailment of the duties of local governments is an 'unhappy' position, as it suggests a predominantly more administrative role for local governments in contrast with its newly protected and recognised original and distinctive character with accompanying powers and functions. See Chaskalson *et al* (1999) 5A-34.

<sup>6</sup> See the Constitution s 155(7).

governmental bodies, both executive and legislative authority on the local sphere of government are vested in a municipal council. Only one body is responsible for the proper exercise and performance of municipal legislative and executive authority.<sup>7</sup> The rationale for only one body to exercise both legislative and executive powers is based on greater effectiveness, quicker decision making and performance of functions, as well as money saving. The biggest negative impact of a municipal council's having both executive and legislative powers is the fact that the built-in checks and balances of one government body over the other is lost. For example, in both the national and provincial spheres the executive authority is responsible to the relevant legislatures for the proper performance of its powers and functions. This is not the case at local government level, where the body that exercises executive powers is also the same body responsible for legislative powers. It is suggested, however, that the negative impact of the loss of internal control over the powers and functions of municipalities could be sufficiently countered by other oversight mechanisms such as the control and supervision of both national and provincial governments over the exercise and performance of municipalities of their powers and functions.<sup>8</sup> Before one considers the new constitutional framework concerning the powers and functions of local government, one should note that the exercise of municipal powers and functions is not without challenges. Many local governments face certain key issues regarding the exercise and fulfilment of their powers and functions. Some of these key issues are *inter alia* the following:

- Municipalities are facing a rapid increase in their responsibilities as many issues are assigned or delegated to them.
- Functions are often vaguely defined, especially where services are vertically integrated or shared by other spheres.
- Municipalities are often ignored when decisions are taken by the higher spheres of government and mostly lack the required capacity to perform their functions.

Speedy solutions to the abovementioned issues are of critical importance in order to ensure an effective system of municipal performance and constitutional compliance.

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<sup>7</sup> According to the Constitution s 151(2), both the executive and legislative authority of a municipality are vested in the municipal council.

<sup>8</sup> Again refer to the Constitution s 155(7), which specifically entrenches such power of control and supervision.

## 14.2 The constitutional basis of municipal powers and functions

In light of the aspects mentioned above, the Constitution of the Republic of South Africa now specifically entrenches specific powers and functions applicable to all municipalities in the state. This position was confirmed in the Constitutional Court in the case of *Fedsure Life Assurance v Greater JHB TMC*.<sup>9</sup> The court stated that the constitutional status of local government is thus materially different from what it was when Parliament was supreme and when not only the powers but the very existence of local government depended entirely on superior legislatures. Although the detailed powers and functions of local governments have to be determined by laws of a competent authority, this does not mean that the powers they exercise are “delegated” powers and does not prevent the powers from being regarded as “original” and not “delegated”.<sup>10</sup> It should be pointed out that the Constitution addresses aspects of municipal powers and functions in two categories. On one hand the Constitution directly provides for the powers and functions of municipalities, while on the other the Constitution also indirectly incorporates and mandates certain aspects that are also of importance to municipal powers and functions. For clarification purposes, the various direct and indirect requirements will be discussed separately.

### 14.2.1 *Direct constitutional directives regarding municipal powers and functions*

According to section 156 of the Constitution, municipal powers and functions are now addressed and protected directly in the Constitution. The section states the following:

- (1) A municipality has executive authority in respect of, and has the right to administer
  - (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
  - (b) any other matter assigned to it by national or provincial legislation.
- (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
- (3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or

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<sup>9</sup> 1999 (1) SA 374 (CC).

<sup>10</sup> See paras 35-39 at 393-394.

provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

- (4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if
  - (a) that matter would most effectively be administered locally; and
  - (b) the municipality has the capacity to administer it.
- (5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

On close evaluation of the text of section 156 one can make several comments. The Constitution starts off by confirming and referring to the executive authority of a municipal government without including legislative authority in the same instance. Some commentators see this confirmation of municipal executive authority as placing more emphasis on the executive authority than on municipal legislative authority. It is argued that the Constitution still echoes something of the previous dispensation, when local governments were mere administrative institutions under the control of predominantly the provincial authorities and when their executive and administrative functions were regarded as more important than their legislative authorities.<sup>11</sup> Apart from the constitutional confirmation of municipal executive authority, the Constitution also confirms that all municipalities have the right to administer such executive matters.<sup>12</sup> It is of importance to note that the Constitution distinguishes between executive authority on one hand and the administration of such matters on the other.<sup>13</sup> On this point, it is of interest to note that in national and provincial spheres of government, legislative authority is often perceived to be of more importance than executive authority. Legislative power is stronger and more important than executive powers because legislative powers entail the creation of new laws or the amendment or

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<sup>11</sup> See Chaskalson *et al* (1999) 5A-35, where the writer states that the legislative authority is subsidiary to its executive or administrative functions.

<sup>12</sup> The Constitution s 156(1).

<sup>13</sup> Executive authority has been explained as the power to implement and fulfil legislative requirements and to perform certain related executive functions.

repeal of existing legal rules. To a large extent executive authority is thus subjected to legislative authority unless such executive authority is protected against manipulation by the Constitution. This seems not to be the constitutional intention on local government level, however. It would seem that more emphasis is directed at executive and administrative functioning.

The Constitution also specifically clarifies the matters on which a municipality has executive and administrative authority. Two sources of such authority are identified. The first source is the various local government matters that are listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution. These sources indicate a pre-determined list that encapsulates executive and administrative powers and functions, which cannot be reduced or expanded upon without constitutional amendment. It thus provides an exact indication of such powers and functions. The functional areas of municipal executive and administrative authority as determined by the Constitution are the following:

**Schedule 4**

FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE

PART B

The following local government matters to the extent set out in section 155(6)(a) and (7):

Air pollution

Building regulations

Child care facilities

Electricity and gas reticulation

Fire fighting services

Local tourism

Municipal airports

Municipal planning

Municipal health services

Municipal public transport

Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law



Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto

Storm water management systems in built-up areas

Trading regulations

Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

### **Schedule 5**

#### FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE

##### PART B

The following local government matters to the extent set out for provinces in section 155(6)(a) and (7):

Beaches and amusement facilities

Billboards and the display of advertisements in public places

Cemeteries, funeral parlours and crematoria

Cleansing

Control of public nuisances

Control of undertakings that sell liquor to the public

Facilities for the accommodation, care and burial of animals

Fencing and fences

Licensing of dogs

Licensing and control of undertakings that sell food to the public

Local amenities

Local sport facilities

Markets

Municipal abattoirs

Municipal parks and recreation

Municipal roads

Noise pollution

Pounds

Public places

Refuse removal, refuse dumps and solid waste disposal

Street trading

Street lighting

### Traffic and parking

A striking difference between Part B of Schedule 4 and Part B of Schedule 5 of the Constitution is that the matters listed in Part B of Schedule 4 are areas falling under concurrent national and provincial legislative competence. As such, these matters require a degree of intergovernmental cooperation and coordination. All three spheres of government have certain powers relating to such matters. On the other hand, the matters listed in Part B of Schedule 5 are the functions typically associated with local governments. The provincial authorities have exclusive legislative competence over such matters, and national government may not exercise legislative authority over such matters unless constitutionally authorised to do so under its “emergency powers”.<sup>14</sup> One can thus conclude that the matters mentioned in Part B of Schedule 5 require mainly a strong cooperation and coordination between municipalities and their applicable provincial governments.

The second reference to municipal executive and administrative authority is found in section 156(1)(b) of the Constitution. According to this section, municipalities have authority over any matter that is not included in Part B of Schedule 4 or Part B of Schedule 5 of the Constitution and that has been *assigned* to them in terms of national or provincial legislation. The Constitution thus does not cast the powers and functions of municipalities in stone, but allows the two higher spheres of government to assign certain matters to them when appropriate. It is suggested that such assignment can be a general one, for example national legislation assigning a function to all municipalities, or a specific assignment where a function or matter is assigned to only one or a few municipalities either in a province or in the country as a whole. On this issue, the provisions of section 156(4) are specifically important. National and provincial governments are obligated to assign the administration of one or more matters listed in Part A of Schedule 4 or Part A of Schedule 5, which necessarily relates to local government to municipalities. There are two further requirements that must both be met before such an assignment can take place, however. Firstly, the relevant matter must be of a nature that could be most effectively administered locally and, secondly, the municipality concerned must have the capacity to administer

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<sup>14</sup> Refer to the Constitution s 44(2).

such matter or matters.<sup>15</sup> Emphasis should also be placed on the fact that any assignment in terms of subsection 156(4) must be done by agreement between the assignor and assignee and is subject to any conditions set out in such an agreement. It thus seems possible for a municipality to agree to such an assignment only if certain conditions, for example financial support, are provided for by the assigning higher sphere of government. The Constitution also protects municipalities against unilateral decisions of higher spheres to assign the administration of matters which municipalities cannot or do not want to perform.<sup>16</sup>

A somewhat uncertain aspect in the Constitution is whether subsection 156(4) also affords a municipality executive authority over matters listed in Part A of Schedules 4 and 5 and which have been assigned to it. On one hand the subsection refers only to the administration of such matters and not to the exercise of executive authority related to such matters.<sup>17</sup> A counter argument in this regard is the fact that, apart from matters listed in Part B of Schedules 4 and 5, the Constitution indeed allows for municipal executive authority over any other matter assigned to it by national or provincial legislation.<sup>18</sup> The Constitution further affords a municipality the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. Essentially, this gives municipalities a residual or implied power – either executive or legislative – in order to perform their functions effectively. If Part A matters have been assigned to a municipality, therefore, and the municipality has certain obligations to meet or functions to perform

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<sup>15</sup> It is submitted that an independent evaluation of not only the relevant matter but also the capacity of a municipality concerned should be undertaken. All relevant circumstances should be considered carefully before an assignment is concluded. The higher spheres of government must guard against so-called “unfunded mandates”, where the lowest sphere is burdened with the administration of matters for which they do not have the capacity or the financial support. The assignment of functions specifically relates to the principle of decentralisation, which requires that functions should be allocated to the lowest spheres of government, where such functions can be exercised most effectively. For more detail see Rautenbach and Malherbe (1999) 93 with reference to the principle of subsidiarity.

<sup>16</sup> In this instance it is submitted that if no agreement is reached no assignment can take place. National or provincial government should not be able to force municipalities unwillingly to accept such assignments. In this regard the importance of the principles of cooperative government, as set out in the Constitution ch 3, must not be overlooked.

<sup>17</sup> The distinction between executive authority and the right to administer, as referred to in s 156(1) was mentioned above. It would thus seem possible that if the constitutional drafters also intended to accord executive authority over Part A matters that have been assigned, they would have specifically provided for this in the text of the Constitution.

<sup>18</sup> Refer to the Constitution s 156(1)(b). It should thus be possible to argue that matters listed in Part A of the relevant schedules which have been lawfully assigned to a municipality or municipalities also permit such local authorities to exercise executive authority over such matters.

under such assignment, then such municipality should have the right to exercise *any*<sup>19</sup> power concerning such matters. One can thus conclude that municipalities have not only administrative powers on matters assigned to them but also executive authority, notwithstanding the fact that the matter assigned is a matter falling under either Part A of Schedule 4 or Part A of Schedule 5 of the Constitution. An aspect that is very clear from the Constitution, however, is the fact that if a matter falls outside the matters listed in Part B of Schedule 4 or 5 of the Constitution and has not been lawfully assigned to a municipality, then a municipality has no executive or administrative authority over such matter or matters.<sup>20</sup>

Apart from the executive authority mentioned above, subsection 156(2) specifically provides for constitutional confirmation of the legislative authority accorded to local governments. Municipalities are allowed to make and administer by-laws for the effective administration of the matters which they have the right to administer. In the first instance it should be evident that municipal legislative authority is not without restrictions and that the extent of such authority is in need of careful consideration. The making of a by-law is undoubtedly referring to legislative authority.<sup>21</sup> The Constitution seems to suggest that a municipality may make and administer by-laws in respect of only those matters which it has the right to administer.<sup>22</sup> Municipal legislative authority is further restricted in the sense that the Constitution allows such legislative authority only for the effective administration of the matters which are administered by such a municipality.<sup>23</sup>

The Constitution is also very clear on the fact that municipal by-laws are subordi

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<sup>19</sup> Own emphasis added.

<sup>20</sup> This is, of course, excluding matters that are reasonably necessary for, or incidental to, the effective performance of the functions already entrusted to local governments. The Constitution s 156(5).

<sup>21</sup> The term "by-law" was also used in the previous dispensation. Some writers argue that the term by-law is inappropriate and should rather be called a "local law" or "municipal law", similar to "national laws" or "provincial laws". The term by-law is often still perceived as being subordinate to national or provincial laws, as was the case under the previous dispensation. See Meyer (1997) 116.

<sup>22</sup> To determine which matters a municipality has the right to administer, one must again look at the Constitution s 156(1)(a)-(b). The conclusion is thus that only the matters listed in Sch 4 Part B and Sch 5 Part B or any other matter specifically assigned to a municipality by either national or provincial legislation would qualify as matters over which a municipality has legislative authority. This would also include matters reasonably necessary for, or incidental to, the effective performance of a municipality of its functions. The Constitution s 156(5).

<sup>23</sup> If a by-law is thus enacted for other reasons than to provide for the effective administration of the matter(s) falling under a municipality's jurisdiction, it would seem to fall foul of the constitutional mandate and thus be unconstitutional and invalid.

nate to national or provincial legislation. In this respect it is confirmed that if a by-law conflicts with national or provincial legislation it is invalid.<sup>24</sup> It should be noted that the Constitution defines national or provincial legislation to include subordinate legislation made in terms of an Act of parliament, or a provincial Act, and it also includes legislation that was in force when the Constitution took effect and is administered by either national government or provincial governments respectively.<sup>25</sup> The invalidation of a by-law that conflicts with national or provincial legislation is subjected to the constitutional obligation that neither national nor a provincial governments may compromise or impede a municipality's ability or right to exercise its powers or perform its functions, however.<sup>26</sup> *Prima facie* this situation seems to refer to a *contradictio in terminis*. On one hand, a by-law which represents the constitutionally permitted legislative power of a municipality that conflicts with legislation of the two higher spheres is invalid, but on the other, the Constitution restricts the two higher legislatures from compromising or impeding municipal abilities or the exercise of its functions, through either legislative or executive actions. Both national and provincial legislatures must thus guard against enacting legislation that would compromise or impede municipal powers that would result in a conflict between municipal by-laws and such national or provincial laws. It follows that although municipalities have original legislative authority, such authority cannot be exercised in contradiction with national or provincial legislation. Municipal by-laws are subsequently subordinate in comparison with national or provincial laws. The only protection given to municipalities regarding a total domination by national or provincial laws is that such laws may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. In light of this protection, it would seem that if national or provincial legislation is mainly directed at or has the effect of compromising or impeding a municipality's ability or right to exercise its powers or perform its functions, a municipal by-law should have preference over such national or provincial legislation.<sup>27</sup> Subsection

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<sup>24</sup> See the Constitution s 156(3).

<sup>25</sup> Refer to the Constitution s 239 definitions.

<sup>26</sup> See the Constitution s 156(3) read together with s 151(4).

<sup>27</sup> In this regard it would be of importance to look and evaluate the purpose of the national or provincial legislation. One must remember that the Constitution allows both national and the provincial legislatures to exercise legislative authority over the matters listed in the Constitution Schs 4 and 5 Parts A and B respectively. There is thus no prohibition on such legislatures to legislate on the matters that are also listed and over which municipalities can make by-laws. The purpose of the national or provincial law is a decisive factor, however.

156(3) further requires an investigation of section 149 of the Constitution. Section 149 states that a decision by a court that legislation (either national or provincial) prevails over other legislation, such a decision does not invalidate that other legislation, but such other legislation becomes inoperative for as long as the conflict remains. Because provincial legislatures have both exclusive legislative competencies and concurrent legislative competencies, conflict between a national law and a provincial law is a strong possibility. National legislation does not have automatic dominance over provincial legislation.<sup>28</sup> If such a conflict has occurred and a court has given a decision in favour of either the national law or the provincial law then the other law which is part of the conflict becomes inoperative for as long as the conflict remains. If a municipal by-law in turn conflicts with legislation that is inoperative, the by-law is not invalid and must be regarded as valid for as long as that legislation is inoperative.<sup>29</sup>

#### **14.2.2 Constitutional provisions that indirectly impact on municipal powers and functions**

The Constitution itself provides for various obligations and requirements that have an impact, albeit often indirectly, on the powers and functions of municipal governments. These aspects are briefly identified and discussed as follows:

- The Constitution confirms that both the executive authority and legislative authority of a municipality is vested in its municipal council. There can be no doubt therefore as to the ability of a municipality to exercise or perform executive or legislative authority. Such authority vests only in the municipal council, however.<sup>30</sup>
- Municipalities are also accorded a right to govern the local government affairs of their communities on their own initiative. Once it has been determined that a specific matter(s) is to be classified as part of local government affairs, a municipality has a constitutional right to govern that matter on its own initiative. However, this

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<sup>28</sup> See the Constitution s 146, which indicates how such a dispute is to be resolved.

<sup>29</sup> Take the following practical example: Imagine both a national law and a provincial law on the environment. The two laws are in conflict with one another and a court has decided that the provincial law is to prevail over the national law. The national law becomes inoperative insofar as the conflict remains. If such a national law is also in conflict with a municipal by-law, the by-law will not be invalid and must be regarded as valid for as long as the national legislation is inoperative. See s 156(3). Such circumstances, especially within the constitutional framework of cooperative government, should be very rare, however.

<sup>30</sup> See the Constitution s 151(2).

right is circumscribed by the Constitution to the extent that it is subject to national and provincial legislation, as provided for in the Constitution.<sup>31</sup>

- Municipal powers and functions are also protected through the provision that national or provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.<sup>32</sup> Any consideration of a dispute in this regard would call for an objective evaluation of all relevant facts and circumstances.<sup>33</sup>
- Apart from being subject to national and provincial legislation as mandated by the Constitution, municipal powers and functions are also largely influenced by mostly national legislation.<sup>34</sup> In this regard and subject to section 229, which deals with financial matters, national legislation is required to make provision for an appropriate division of powers and functions between municipalities in areas which have both category B and C municipalities. Such division of powers between category B and C municipalities need not be uniform across a province.<sup>35</sup>
- Mention has already been made of the fact that the Constitution mandates both national and provincial governments to have legislative and executive authority to

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<sup>31</sup> See the Constitution s 151(3). This subsection must be read together with s 156(3), which invalidates a municipal by-law that conflicts with national or provincial legislation. The wording "as provided for in the Constitution" used in s 151(3) is somewhat controversial, however, and in need of clarification. Two possible interpretations seem possible: one is that the Constitution refers only to those national or provincial laws which are specifically mentioned in the Constitution ch 7 and which deal with local government aspects. The other possibility, which suggests a broader interpretation, refers to any national or provincial legislation that is constitutionally legitimate or lawful, evaluated in the broad constitutional framework. The latter interpretation seems to be the one that should be favoured.

<sup>32</sup> Refer to the Constitution s 151(4).

<sup>33</sup> The principles and requirements of cooperative government set out in the Constitution ch 3 are also important in such cases. Such principles require all spheres of government to *inter alia* respect the constitutional status, institutions, powers and functions of governments in the other spheres; not to assume any power or function except those conferred in terms of the Constitution and to exercise their powers and perform their functions in a manner that do not encroach on the geographical, functional or institutional integrity of another sphere of government. See the Constitution s 41(e)-(g).

<sup>34</sup> Throughout the chapter on local government in the Constitution, many obligations are set whereby national legislation must establish criteria, define the types of municipality and determine various other aspects applicable to local governments. See, eg, the Constitution ss 155(3)(2) and (3)(a) and 160(5).

<sup>35</sup> According to s 155(3)(c) the Constitution determines that a division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B and C municipality. All that is constitutionally required is an appropriate division method whereby such powers and functions are divided. It should be noted that the national legislation referred to in this instance is obligated to take into account the need to provide municipal services in an equitable and sustainable manner. See the Constitution s 155(4). The division of powers and functions between category B and C municipalities must thus be carefully considered.



see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5. This national or provincial authority to oversee municipal performance is exercised through a process of regulating the exercise by municipalities of their executive authority referred to in section 156(1).<sup>36</sup>

- In respect of the internal procedures of a municipal council, the Constitution also determines that a municipal council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality. Municipal councils are also permitted to employ personnel that are necessary for the effective performance of municipal functions.<sup>37</sup> The fact that the municipal legislative authority is a function that may not be delegated by a municipal council and must be exercised by the council self is also constitutionally protected.<sup>38</sup> Furthermore, municipal councils are constitutionally authorised to make by-laws, thus exercising legislative authority, through rules and orders for its internal arrangements, its business and proceedings and the establishment, composition, procedures, powers and functions of its committees.<sup>39</sup> *Prima facie* these provisions refer to additional legislative authority of municipal councils apart from the ones mentioned earlier, closer evaluation suggests that such authority is a further elaboration of the so-called “implied powers” of municipalities permitted under section 156(5) of the Constitution.

In the discussion of the constitutional requirements regarding the powers and functions of municipalities, mention was made of the important role that mostly national legislation is obligated to play in the new local government system. Such national legislation is also important in relation to the powers and functions of municipal governments. Both the Local Government: Municipal Structures Act and the Municipal Systems Act contain important legislative requirements in this respect. These are discussed briefly below.

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<sup>36</sup> See the Constitution s 155(7). Through the regulation of municipal executive authority, municipal legislative authority is also regulated. Municipal legislative authority is thus dependent on the existence of municipal executive authority. See the Constitution s 156(2).

<sup>37</sup> See the Constitution s 160(1)(a) and (d) respectively.

<sup>38</sup> Refer to the Constitution s 160(2)(a).

<sup>39</sup> See the Constitution s 160(6)(a)-(c).

### **14.3 National legislation to enhance the constitutional foundation on the powers and functions of municipal councils**

The importance of both national and provincial legislation on the powers and functions of municipalities have been clearly indicated above. Apart from the most obvious influence, namely that national or provincial governments may, or sometimes must, assign other matters to municipalities through legislation,<sup>40</sup> the Constitution also requires national legislation to provide for an appropriate division of powers and functions between category B and C municipalities.<sup>41</sup> Such division is per definition relevant only between a category B municipality (local municipality) and a category C (district municipality). Category A or metropolitan municipalities have exclusive municipal executive and legislative authority within their areas of jurisdiction.<sup>42</sup> In compliance with the abovementioned constitutional requirements, the following national legislative provisions have been enacted.

#### **14.3.1 Functions and powers of municipalities under the Local Government: Municipal Structures Act<sup>43</sup>**

In general, the Municipal Structures Act provides that a municipality has the functions and powers assigned to it in terms of sections 156 and 229 of the Constitution. Such powers must be divided between a district municipality and local municipalities within the area of a district municipality.<sup>44</sup> The Act further obligates a district municipality to achieve the integrated, sustainable and equitable social and economic development of its area as a whole. Such development is to be achieved through exercising or providing the following powers or functions:<sup>45</sup>

- (a) Ensuring integrated development planning for the district as a whole;
- (b) By promoting bulk infrastructural development and services for the district as a whole;
- (c) By building the capacity of local municipalities in its area to perform their functions and to exercise their powers where such capacity is lacking; and

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<sup>40</sup> See the Constitution s 156(1)(b) and 156(4).

<sup>41</sup> This is confirmed in the Constitution s 155(3)(c).

<sup>42</sup> See the Constitution s 155(1)(a)-(c) for an explanation of the three categories of municipalities.

<sup>43</sup> 117 of 1998.

<sup>44</sup> See the Structures Act s 83(1) and (2).

<sup>45</sup> See s 83(3)(a)-(d). It is clear that the Act accords significantly more responsibility and authority to district councils over local councils in its area. This seems to be in line with the Constitution's definition and creation of the two different categories of municipality. The Constitution s 155(1).

- (d) To promote the equitable distribution of resources between the local municipalities in its area and to ensure appropriate levels of municipal services within the area.

Apart from the general emphasis on the responsibilities of district municipalities, the Act also specifically provides for the division of functions and powers between district and local municipalities. Accordingly, all district municipalities are accorded the following functions and powers:<sup>46</sup>

- (a) Integrated development planning for the district municipality as a whole, including a framework for integrated development plans of all municipalities in the area of the district municipality.
- (b) Potable water supply systems.
- (c) Bulk supply of electricity, which includes for the purposes of such supply, the transmission, distribution and, where applicable, the generation of electricity.
- (d) Domestic wastewater and sewage disposal systems.
- (e) Solid waste disposal sites, in so far as it relates to –
  - (i) the determination of a waste disposal strategy;
  - (ii) the regulation of waste disposal;
  - (iii) the establishment, operation and control of waste disposal sites, bulk waste transfer facilities and waste disposal facilities for more than one local municipality in the district.
- (f) Municipal roads which form an integral part of a road transport system for the area of the district municipality as a whole.
- (g) Regulation of passenger transport services.
- (h) Municipal airports serving the area of the district municipality as a whole.
- (i) Municipal health services.
- (j) Fire fighting services serving the area of the district municipality as a whole, which includes –
  - (i) planning, coordination and regulation of fire services;
  - (ii) specialised fire fighting services such as mountain, veld and chemical fire services;
  - (iii) coordination of the standardisation of infrastructure, vehicles, equipment

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<sup>46</sup> See the Structures Act s 84(1)(a)-(p).

and procedures;

(iv) training of fire officers.

- (k) The establishment, conduct and control of fresh produce markets and abattoirs serving the area of a mayor proportion of the municipalities in the district.
- (l) The establishment, conduct and control of cemeteries and crematoria serving the area of a mayor proportion of municipalities in the district.
- (m) Promotion of local tourism for the area of the district municipality.
- (n) Municipal public works relating to any of the above functions or any other functions assigned to the district municipality.
- (o) The receipt, allocation and, if applicable, the distribution of grants made to the district municipality.
- (p) The imposition and collection of taxes, levies and duties as related to the above functions or as may be assigned to the district municipality in terms of national legislation.

All the remaining powers and functions afforded under section 83(1) which have not been vested in terms of section 84(1) in the district municipality of a relevant area will fall under the authority of the relevant local municipalities.<sup>47</sup>

Although section 84(1) of the Structures Act clearly distinguishes between the powers and functions of district and local municipalities, the Act does allow for a local municipality to perform certain powers and functions that have been allocated to district municipalities. In this regard, the Act requires that the minister (responsible for local government) may authorise a local municipality to perform a function or exercise a power mentioned in subsection 84(1)(b), (c), (d) or (i), or any aspect of such function or power, in the area of that local municipality

- by notice in the *Government Gazette*
- after consultation with the cabinet member responsible for the functional area in question
- after consulting the MEC for local government in the provinces and, if applicable,

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<sup>47</sup> The Structures Act s 84(2). A comparison between the Constitution ss 156 and 229 and the functions and powers allocated to district municipalities under s 84(1) shows that only a few powers and functions will remain under local municipalities. In this regard it should be obvious that the authority of local municipalities is severely restricted in favour of district municipalities, which are legally empowered with more powers and functions.

subject to national legislation.<sup>48</sup>

According to subsection 84(3)(a), only the powers and functions regarding potable water supply systems, bulk supply of electricity, domestic waste water and sewage disposal systems and municipal health services can be allocated to local municipalities.<sup>49</sup> It is also required of the Minister of Local Government that if he/she issues a notice in terms of section 84(3)(a), such notice must regulate the legal, practical and other consequences of his/her authorisation. Such consequences may include the transfer of staff, the transfer of assets, liabilities, rights and obligations and administrative and other records, and also the continued application of any by-laws and resolutions in the area of the municipalities concerned. The minister may amend a notice and then regulate the legal, practical and other consequences of such amendment.<sup>50</sup>

The Structures Act also provides for the adjustment of the division of functions and powers between district and local municipalities. The Act states that, subject to section 85 and within a prescribed policy framework, the MEC for local government may adjust the division of functions or powers between a district and local municipality as set out in section 84(1) and (2) by

- allocating any of those functions or powers vested in the local municipality to the district municipality
- allocating any of those functions or powers vested in the district municipality to the local municipality.<sup>51</sup>

An MEC may allocate a function or power mentioned above only if the municipality in which the function or power is vested lacks the capacity to perform that power or

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<sup>48</sup> The Structures Act s 84(3)(a). Strictly speaking, the Minister of Local Government does not have to follow the decision reached after consultation as long as the consultation was held, but from a political and cooperative point of view unilateral decisions should not be accepted.

<sup>49</sup> This would thus require the involvement of the Ministers of Water, Energy and Health respectively.

<sup>50</sup> See the Structures Act s 84(3)(b)-(e) as amended.

<sup>51</sup> Note that a function or power referred to in s 84(1)(a), (b), (c), (d), (i), (o) or (p) is excluded from such allocation from the district municipality to the local municipality. See the Structures Act s 85(1)(b). Note that the MEC may adjust the division of functions and powers between a district and a local municipality by allocating a function or power within a particular policy framework. According to the policy framework for the adjustment of division of functions and powers regulations published under GN 2592 in GG 21370 of 12 July 2000, the allocation of a function or a power must be aimed at specific objectives. Refer to s 2(b)(i)-(xi) of the regulations.

function and the MEC has consulted the Demarcation Board and has considered its assessment of the capacity of the municipality concerned.<sup>52</sup>

Apart from the general role of the Demarcation Board explained in chapter 10 of this work, the Demarcation Board must consider the capacity of a district or local municipality to perform the functions and exercise the powers vested in the municipality as set out in section 84(1) or (2). This consideration must be done in two distinct instances:

- where the Board is determining or re-determining the boundaries of such municipalities
- when requested to do so in terms of subsection 85(2)(b) of the Structures Act by the MEC for Local Government in the relevant province.

The Board must also convey its assessment in writing to the relevant MEC.<sup>53</sup> If an MEC disagrees with the assessment of the Board and still decides to adjust or refuses to adjust the division of powers and functions between the municipalities concerned, the MEC must furnish reasons to the relevant municipalities and the Minister before finalising such an adjustment.<sup>54</sup> An important aspect to note is that any adjustment of the division of powers or functions must be reflected in the section 12 notices whereby the concerned municipalities have been established.<sup>55</sup> The MEC's decision can be vetoed by the Minister because after consulting the MEC and municipalities concerned the Minister is given the power to vary or withdraw any allocation or to adjust the division of powers and functions between a district municipality and local municipality in instances where the MEC has refused to make an adjustment in accordance with the assessment of the Demarcation Board. It is the MEC's responsibility to amend the section 12 notices in order to give effect to any variation or withdrawal of any allocation or reallocation and also regularly to review the capacity of the relevant municipality(s) and to reallocate a function or power to a municipality when it acquires the capacity to perform or exercise that power or function.<sup>56</sup>

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<sup>52</sup> Note that the second requirement does not apply if the Demarcation Board omits to comply with a request from the MEC within a reasonable period. Disputes in this regard will depend on the circumstances of each case. See the Structures Act s 85(2) and (3).

<sup>53</sup> See the Structures Act s 85(4).

<sup>54</sup> The Structures Act s 85(5).

<sup>55</sup> See ch 9 of this work dealing with the establishment of municipalities. See also the Act s 85(6).

<sup>56</sup> See the Act s 85(7)-(9). Any reallocation must be made with the concurrence of the receiving municipality or, if such concurrence cannot be obtained, after consultation with the Demarcation

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According to the Structures Act, if a dispute arises between a district and local municipality concerning the performance of a function or exercise of a power, the MEC may resolve the dispute by defining their respective roles by notice in the *Provincial Gazette*. Such resolve by the MEC may be done after consultation with the municipalities concerned.<sup>57</sup> It is furthermore also provided that if the provision of basic services by a district or local municipality collapses or is likely to collapse because of a lack of capacity or *any other reason*,<sup>58</sup> the MEC, after written notice to the relevant municipality and with immediate effect, may allocate any power or function necessary to restore or maintain those basic services to a local or district municipality, depending on the circumstances of the case.<sup>59</sup> Either the district or local municipality concerned may lodge a written objection against such "emergency" allocation to the minister. In return, the minister has the power to confirm, vary or withdraw the allocation after he/she has consulted the Demarcation Board. A written objection such as that mentioned above must be lodged within 14 days of the date of the official notice of the MEC in the *Provincial Gazette*, and any failure to lodge an objection timeously will be regarded as consent to the allocation by the municipalities concerned. When a municipality has lost a power or function but is again in a position to resume the provision of those basic services, then the MEC must reallocate such power or function to the original municipality.<sup>60</sup>

Mention has been made of the importance of the principles of cooperative government, especially in respect of the powers and functions relating to municipalities. Not only cooperation between municipalities and the two higher spheres of government is important, but also co-operation between municipalities *inter se*. In order to enhance such cooperation, both a district municipality and local municipalities within the area of that district municipality must cooperate with one another by assisting and supporting each other. Cooperation also includes provision of financial, technical and administrative support services, if capacity allows. Support will be requested by

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Board regarding the capacity of that municipality. In this regard, municipalities are protected against being allocated powers or functions which they cannot or do not have the capacity to exercise or perform.

<sup>57</sup> See the Structures Act s 86 as substituted by Act 33 of 2000 s 8.

<sup>58</sup> Own emphasis.

<sup>59</sup> The Structures Act s 87.

<sup>60</sup> See the Structures Act s 87(2)-(4). During difficult times municipalities are thus protected against being deprived of the powers and functions on a permanent basis; they are deprived of

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mostly one municipality from another, and include support between a district municipality or local municipality or *vice versa* or between local municipalities *inter se*.<sup>61</sup>

Lastly, it should be noted that no division of powers and functions is applicable in a category A or metropolitan municipality. All municipal powers and functions assigned in terms of sections 156 and 229 of the Constitution are vested in the metropolitan council itself. The position is similar in district management areas, where all the municipal powers and functions are vested in the relevant district municipality within whose area the district management area falls.<sup>62</sup>

#### **14.3.2 Aspects regarding municipal functions and powers under the Local Government: Municipal Systems Act<sup>63</sup>**

In order to further regulate aspects regarding the powers and functions of municipalities and also to compliment and support the Constitution and Structures Act, the Municipal Systems Act provides that a municipality has all the functions and powers conferred by or assigned to it in terms of the Constitution and must exercise such powers and functions subject to chapter 5 of the Municipal Structures Act.<sup>64</sup> A municipality also has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers.<sup>65</sup>

The Systems Act originally dealt with two types of assignment of powers or functions. The first type was assignments initiated by the national or provincial executives to all municipalities generally. In this regard the Act provided that a cabinet member or depute minister that initiated the assignment of a function or a power by way of national legislation to municipalities in general had, before the draft legislation is introduced in parliament to:

- consult the Minister of Local Government, the National Minister of Finance and

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them only temporarily – until they resume a position of service delivery. Simultaneously the community is also assured of continuous service delivery.

<sup>61</sup> See the Structures Act s 88(1)-(3). When a district municipality is to provide support services to a local municipality, the MEC is obligated to assist that district municipality to provide the relevant support services.

<sup>62</sup> See the Structures Act s 89.

<sup>63</sup> 32 of 2000.

<sup>64</sup> The Municipal Structures Act ch 5 encompasses s 83 to 89 of the Act, which is discussed above.

<sup>65</sup> Refer to the Systems Act s 8(2). This subsection is in confirmation of the Constitution s 156(5).

### Organised Local Government<sup>66</sup>

- consider any assessment by the Financial and Fiscal Commission (FFC) and
- publish the draft legislation in terms of section 154(2) of the Constitution.<sup>67</sup>

The position was very similar when an MEC (thus a provincial executive) initiated the assignment of a function or power in terms of provincial legislation to municipalities in that province. The legislative position was changed, however, during 2003<sup>68</sup>. The Systems Act now allows for the assignment of functions or powers to municipalities generally by Acts of parliament or provincial Acts. According to the amended provisions, a cabinet member or deputy minister who seeks to initiate the assignment of a function or power by way of an Act of Parliament to municipalities in general, or to any category of municipality, must, within a reasonable time before the draft bill is introduced as the following:

- (a) He/she must request the Financial and Fiscal Commission (FFC) to assess the financial and fiscal implications of the proposed legislation. For purposes of the assessment, the FFC must be informed about the possible impact of the assignment on the future division of revenue between the spheres of government in terms of section 214 of the Constitution; the fiscal power, capacity and efficiency of municipalities or any category of municipalities and the transfer, if any, of employees, assets and liabilities.
- (b) He/she must consult with the minister of local government, the ministers of finance and organised local government who represent local government nationally. The consultation should have regard to the assessment by the FFC; the policy goals to be achieved by the assignment and the reasons for utilising assignment as the preferred option; the financial implications of the assignment projected over at least three years; any possible financial liabilities or risks after the three year period; the manner in which additional expenditure as a result of the assignment will be funded; the implications of the assignment for the capacity of municipalities; the assistance and support that will be provided to municipali-

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<sup>66</sup> OLG is represented by SALGA at national level.

<sup>67</sup> According to the Constitution s 154(2), draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in parliament or a provincial legislature. The publication must be done in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to such draft legislation.

<sup>68</sup> See Act 44 of 2003 sec 2.

ties and, finally, any other matter that may be prescribed by regulation under the Act.<sup>69</sup>

When draft legislation, as is mentioned above, is introduced in parliament or a provincial legislature, then the legislation must be accompanied by a memorandum which should give a projection of the financial and fiscal implications, disclose any possible financial liabilities or risks, indicate how any additional expenditure will be funded and indicate the implications of the assignment for the capacity of the municipalities involved. The official assessment of the FFC must also be annexed.<sup>70</sup>

The Systems Act also provides for the assignment of functions or powers to specific municipalities by acts of the executive or by agreement. In this regard it is provided that if a function or power is assigned to any specific municipality in terms of a power contained in an Act of parliament or a provincial Act, or by agreement in terms of section 99 or 126 of the Constitution, then the organ of state assigning the function or power must submit a memorandum to the Minister of Local Government and the National Treasury. The memorandum must give at least a three-year projection of the financial implications of the function or power for the municipality, disclose any possible financial liabilities or risks and indicate how additional expenditure will be funded.<sup>71</sup> It is further provided that the Cabinet member, MEC or other organ of state initiating an assignment of a power or function to a municipality in terms of sections 9 or 10 of the Systems Act must take appropriate steps to ensure sufficient funding and capacity building initiatives for the performance of the assigned power or function, if:

- the assignment imposes a duty on the municipality
- the power or function falls outside the functional areas listed in parts B of Schedules 4 and 5 to the Constitution or is not incidental to any of those functional areas
- the performance of the power or function (duty) has financial implications for the municipality.<sup>72</sup>

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<sup>69</sup> Refer to s 9(1)(a)-(b) of the Systems Act. The position is very similar when an MEC seeks to initiate the assignment of a function or power by way of a provincial Act to municipalities in the province or only certain category of municipalities in the province. Read s 9(2)(a)-(b) of the Act. What is regarded as a reasonable time for purposes of ss 9(1)(a) and 9(2)(a) is, however, unclear.

<sup>70</sup> See s 9(3)(a)-(b) of the Systems Act.

<sup>71</sup> See the Systems Act s 10 as substituted by Act 44 of 2003 s 3.

<sup>72</sup> Read s 10A of the Systems Act as inserted by Act 44 of 2003 s 4.

#### 14.4 Executive and legislative functioning

In support of and in compliance with the Constitution, the Systems Act confirms that both the legislative and executive authority of a municipality are exercised by the council of a municipality and that the council takes all decisions of the municipality subject only to section 59 of the Systems Act, which deals with the delegation of powers and functions to other functionaries within the municipality.<sup>73</sup>

Similar to other instances where executive or legislative authority is exercised or performed, there are various requirements and determinations that must be adhered to. In this regard, it is a common principle that a legislature or executive organ can lawfully exercise only such authority that has been given to it and can do so only within a specific area. In this respect, a municipality is authorised in general to exercise executive and legislative authority within its boundaries only.<sup>74</sup> However, it is possible for a municipality to exercise executive authority in the area of that other municipality by agreement with another municipality and subject to chapter 5 of the Municipal Structures Act and other applicable national legislation.<sup>75</sup>

In order for a municipality to exercise its executive and legislative authority, it must obviously comply with constitutional and other legislative requirements. Many of these requirements have been identified and discussed above. In respect of the exercise of executive authority, it is very important to look at the legislation dealing with the internal procedures and functioning of local governments. Again, the Constitution and other national legislation are prescriptive in this regard and will be discussed in a following chapter. Apart from those requirements, the Systems Act in general determines that a municipality exercises its legislative or executive authority in various ways, and more particularly by doing the following:<sup>76</sup>

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<sup>73</sup> Although the Constitution confirms that executive and legislative authority of a municipality is vested in the municipal council, the Systems Act also confirms that it is the responsibility of a council to take all the executive and legislative decisions and accordingly also the responsibility for such authority. See the Constitution s 151(2) and the Systems Act s 11. Delegated powers or functions are exercised or performed by the delegated functionary, but the municipal council still retains final responsibility. See the Systems Act s 59(2)(e).

<sup>74</sup> Again the boundary determinations and the role of the Demarcation Board should be emphasised in this regard.

<sup>75</sup> See the Systems Act s 11(2). Note that this exception refers only to the exercise of executive authority and is somewhat unclear about the exercise of legislative authority. According to the Constitution, the authority to exercise legislative authority follows from the authority to exercise executive authority. It could thus be argued that even legislative authority can be exercised by one municipality in the jurisdiction of the other.

<sup>76</sup> The Systems Act s 11(3)(a)-(n).

- (a) Developing and adopting policies, plans, strategies and programmes, including setting targets for delivery;
- (b) Promoting and undertaking development;
- (c) Establishing and maintaining an administration;
- (d) Administering and regulating its internal affairs and the local government affairs of the local community;
- (e) Implementing applicable national and provincial legislation and its by-laws;
- (f) Providing municipal services to the local community, or appointing appropriate service providers in accordance with the criteria and process set out in section 78;
- (g) Monitoring and, where appropriate, regulating municipal services where those services are provided by service providers other than the municipality;
- (h) Preparing, approving and implementing its budgets;
- (i) Imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees including setting and implementing tariff, rates and tax and debt collection policies;
- (j) Monitoring the impact and effectiveness of any services, policies, programmes or plans;
- (k) Establishing and implementing performance management systems;
- (l) Promoting a safe and healthy environment;
- (m) Passing by-laws and taking decisions on any of the above mentioned matters; and
- (n) Doing anything else within its legislative and executive competence.

Lastly, it is important to note that a decision taken by a municipal council or any other political structure of the municipality must be recorded in writing.<sup>77</sup>

#### **14.5 Legislative procedures and requirements**

In the preceding paragraphs of this chapter it was mentioned that municipalities have both executive and legislative powers and functions. Municipal legislative powers or functions are restricted to such matters that are necessary for municipalities to ensure an effective administration.<sup>78</sup>

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<sup>77</sup> This requirement is directed more at executive decisions than legislative decisions, as legislative decisions are always in writing.

<sup>78</sup> Refer to the Constitution s 156(1) and (2). It is argued that such legislative authority, ie to make and administer by-laws, depends on the extent of municipality's executive authority and also

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Apart from determining the basis of a municipality's legislative authority, the Constitution also stipulates other procedural considerations that must be complied with when municipalities exercise their legislative powers or functions. The newly enacted national legislative framework gives further content to such requirements. The following constitutional requirements are of importance in this respect:

- Subject to section 151(4), a municipality should not enact by-laws that are in conflict with national or provincial legislation.<sup>79</sup>
- It is the responsibility of the municipal council to make decisions concerning the exercise of all the powers and the performance of all the functions including legislative powers and functions. This responsibility is so important that the Constitution specifically forbids such functioning to be delegated to any other organ or functionary in that council.<sup>80</sup> In *Fedsure Life Assurance v Greater JHB TMC*<sup>81</sup> the Constitutional Court held *inter alia* that [a] [municipal] council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate. Such decisions must, of course, be lawful, but the requirement of legality exists independently. The procedures according to which legislative decisions are to be taken are prescribed by the Constitution, the empowering legislation and the rules of the council. Whilst this legislative framework is subject to review for consistency with the Constitution, the making of by-laws and the imposition of taxes by a council in accordance with the prescribed legal framework cannot appropriately be made subject to challenge by "every person" affected by them. The court also stated that each member of a council is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on po-

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whether it is required for the effective administration of its executive powers or functions. It would seem that the basis of municipal legislative authority is indirect and not original. The Constitution confirms this submission by stating that a municipality has executive authority and the right to administer the local government matters listed in the Constitution Schs 4 and 5 Part B or assigned to it in terms of national or provincial legislation.

<sup>79</sup> The Constitution s 156(3).

<sup>80</sup> See the Constitution ss 160(1)(a) and (2)(a). The passing of by-laws is a function that may not be delegated by a municipal council. This requirement is seen to protect representative and accountable democratic government. Only the properly elected municipal council should have the authority to perform or exercise legislative competencies.

<sup>81</sup> 1999 (1) SA 374 (CC).

litical grounds. It is for the members and not the courts to judge what is relevant in such circumstances.<sup>82</sup>

- A majority of the members of a municipal council must be present before a vote may be taken on any matter. However, all questions concerning the passing of by-laws are determined by a decision taken by that council with the support of a majority of its members.<sup>83</sup>
- The Constitution requires that no by-law may be passed by a municipal council unless all the members of the council have been given reasonable notice of the by-law and the proposed by-law has been published for public comment. Both these requirements must be met before a by-law can lawfully be enacted by a municipal council. What is regarded as reasonable notice is not altogether certain and depends on the circumstances of each case. It is submitted that national legislation should provide for such uncertainties and should, for instance, prescribe a minimum notice period.<sup>84</sup>
- In order to enhance the notification of municipal by-laws, the Constitution requires that a municipal by-law may be enforced only after it has been published in the official gazette of the relevant province. Upon request by a municipality, an official *Provincial Gazette* must publish a municipal by-law. The Constitution also requires that municipal by-laws must be accessible to the public.<sup>85</sup>

In an effort to further enhance the basic constitutional framework regarding the legislative powers and functions of municipalities, a specific chapter on municipal functions and powers was included in the Local Government: Municipal Systems Act.<sup>86</sup> The Act specifically addresses aspects such as legislative procedures, the publication of by-laws, standard draft by-laws and the municipal code.<sup>87</sup> Each of these aspects is discussed briefly below:

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<sup>82</sup> See paras 41-42 at 394-395.

<sup>83</sup> In this regard one should distinguish between a relative majority and an absolute majority. A relative majority/simple majority is the majority of 50% + 1 of the members present who formed a quorum. A quorum is often less than 50% of the total number of members of a particular council. An absolute majority, on the other hand, is a majority of 50% + 1 of the total number of members of a council. If a council thus has 200 members, at least the support of 101 of the members is required to obtain an absolute majority. See the Constitution s 160(3)(a) and (b). See also Rautenach and Malherbe (1999) 159.

<sup>84</sup> Neither national nor provincial legislation seem to address such an important aspect. See the Constitution s 160(4)(a) and (b).

<sup>85</sup> See the Constitution s 162.

<sup>86</sup> See the Systems Act ch 3.

<sup>87</sup> Refer to the Systems Act ss 12-15.



- *Legislative procedures* In respect of legislative procedures, it is legally required that only a member or a committee of a municipal council may introduce a draft by-law in the council.<sup>88</sup>

Furthermore, a by-law must be enacted by a decision taken by a municipal council

(a) in accordance with the rules and orders of the council and

(b) with a supporting vote of a majority of its members.<sup>89</sup>

No by-law may be passed by a municipal council unless

(a) all members have been given reasonable notice and

(b) the proposed by-law has been published for public comment in a manner that allows the public an opportunity to make representations with regard to the proposed by-law.<sup>90</sup>

The legislative procedures mentioned above also apply when a municipal council incorporates by reference, as by-laws, provisions of either legislation passed by another legislative organ of state or standard draft by-laws made in terms of section 14 of the Systems Act.<sup>91</sup>

- *Publication by by-laws* According to the Systems Act, a by-law passed by a municipal council
  - (a) must be published promptly in the relevant *Provincial Gazette* and, when feasible, also in a local newspaper or in any other practical way in order to bring the contents of the by-law to the attention of the local community and
  - (b) takes effect when published or on a future date determined in the by-law.<sup>92</sup>

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<sup>88</sup> This position is similar to provincial legislatures, where only members of the executive council of a province or a committee of the legislature or a member of the provincial legislature may introduce a bill in the legislature. Only the MEC for finance may introduce a money bill. See the Constitution s 119. Because a municipal council is vested with both executive and legislative authority, the functionary that may introduce a by-law in the council is not comparable with the position in provincial legislatures. See also the Systems Act s 12(1).

<sup>89</sup> Thus referring to an absolute majority.

<sup>90</sup> These requirements are directed to ensure compliance with the Constitution ss 160(3) and (4) and 162 (1)-(3). It is also submitted that municipal rules and orders should address issues such as "reasonable notice" and "a manner to allow for public opportunity to make representations". The Constitution allows specifically for the making of by-laws which prescribe rules and orders for the internal arrangements, business and proceedings and aspects concerning committees of a municipal council. See the Constitution s 160(6)(a)-(c) and the Systems Act s 12(2) and (3).

<sup>91</sup> See the Systems Act s 12(4)(a)-(b).

<sup>92</sup> "Promptly" is generally regarded to mean "as soon as possible". Unfounded delays should not be acceptable. One should also take note that other practical ways to inform local residents or community members includes reports by local radio stations, advertisements in local newspapers, community newspapers and leaflets that are sent out by post with each resident's rates and taxes account.

Similar to national or provincial legislation, municipal by-laws take effect either when published or on a date as is determined by the by-law self.

- *Standard draft by-laws* According to section 14 of the Systems Act, at the request of OLG representing LG nationally or after consulting the MECs for local government and OLG and by notice in the national gazette:

(a) The minister of local government may make standard draft by-laws concerning any matter for which a municipal council may make by-laws. This includes aspects mentioned in section 160(6) of the Constitution.

(b) The minister of local government may amend any such standard draft by-laws. Before the minister is to make or amend a standard draft by-law he/she must publish the proposed by-law or amendment in the national gazette for public comment and consult the cabinet member concerned if the by-law or amendment is to affect a particular area of responsibility.<sup>93</sup> As with the national minister, an MEC for local government may make standard draft by-laws or amend such by-laws concerning any matter for which municipal councils in that province may make by-laws, on request by OLG in the province or after consulting the minister of local government and by notice in the *Provincial Gazette*.<sup>94</sup> Again proper publication of the by-laws or amendments and consultation with other MECs in the province is required.<sup>95</sup> In order to protect the constitutionally granted legislative authority, the Systems Act states that a standard draft by-law or an amendment is applicable in a municipality only if, to the extent that, and subject to any modifications and qualifications have been adopted by the council of that municipality.<sup>96</sup>

A somewhat uncertain aspect of the Act is whether a standard draft by-law which is repealed by the national government after it has been adopted by a municipality still applies in the relevant municipal jurisdiction. The intention of the drafters of the Act is uncertain in this regard, and it seems that they intended that it would not be possible to repeal a draft standard by-law once it had been adopted by a mu

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<sup>93</sup> See the Systems Act s 14(1)(b).

<sup>94</sup> This will normally refer to such matters that have been assigned to municipal councils in terms of a provincial legislation and over which that municipality can subsequently exercise legislative authority.

<sup>95</sup> See the Systems Act s 14(2)(a) and (b).

<sup>96</sup> The Act s 14(3)(a). The standard draft by-law can thus not be enforced on a municipal council and only serves as a concept on which a municipality can finalise its own more detailed by-laws, if it so wishes.

municipal council. This would mean that such a standard draft by-law cannot be amended by the council itself and may be amended by only the Minister or MEC as set out in section 14(1) and (2) of the Act. The constitutionality of this section of the Act is somewhat in doubt, as it seems that the Act limits the legislative authority of municipalities, which would also mean the amendment of municipal legislative actions. Nowhere does the Constitution allow for such a restriction; on the contrary, the Constitution specifically requires that neither the national or a provincial government may compromise or impede a municipality's ability or right to exercise its powers or perform its functions.<sup>97</sup> In the last instance, if a municipal council intends to adopt a standard draft by-law with or without modifications or qualifications, the council must follow the same procedure set out in section 12(3) of the Systems Act and also publish the by-law in accordance with section 13 of the Act.<sup>98</sup>

*Municipal code* According to the Systems Act, a municipality must compile and maintain in bound or loose-leaf form or, when feasible also in electronic format, a compilation of all its by-laws and the provisions incorporated by reference as by-laws. This compilation is known as the "municipal code" and must constantly be updated and annotated. Furthermore, the code must be kept at the municipality's head office as its official record of all applicable by-laws. At the request of a member of the public, the municipality must provide that person with a copy or extract from its municipal code against payment of a reasonable fee as determined by the council.<sup>99</sup>

#### **14.6 Municipal financial powers**

Apart from the powers and functions mentioned above, municipal governments also have some limited financial powers. Again, it is important in this regard to refer to the Constitution, which provides the following foundation regarding municipal fiscal powers and functions:<sup>100</sup>

- (1) Subject to subsections (2), (3) and (4), a municipality may impose

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<sup>97</sup> The restrictions set out in the Systems Act s 14(3)(b) thus seem to be contrary to the provisions of the Constitution, and more specifically the Constitution s 151(4).

<sup>98</sup> These requirements are confirmed in the Systems Act ss 14(4) and 12(4).

<sup>99</sup> Refer to s 15(1)-(3) of the Systems Act.

<sup>100</sup> See the Constitution s 229.

- (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
  - (b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.
- (2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties
- (a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and
  - (b) may be regulated by national legislation.
- (3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria:
- (a) The need to comply with sound principles of taxation.
  - (b) The powers and functions performed by each municipality.
  - (c) The fiscal capacity of each municipality.
  - (d) The effectiveness and efficiency of raising taxes, levies and duties.
  - (e) Equity.
- (4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.
- (5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.

From the text of the Constitution it is apparent that local governments have been vested with significant fiscal powers and functions and that national legislation may regulate such powers more extensively. Apart from quite a wide range of fiscal pow-

ers, the Constitution specifically excludes municipalities from imposing income tax, value-added tax, general sales tax or customs duty.<sup>101</sup> Only a constitutional amendment would allow for such powers to be extended to municipalities as well. Municipal financial powers such as the power to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality or other taxes, levies or duties as provided for in national legislation are constitutionally curtailed in two ways:

- Such powers may not be exercised in a way that materially and unreasonably prejudice national economic policies, economic activities across the municipal boundaries or the national mobility of goods, services, capital or labour<sup>102</sup>
- The powers or functions may be regulated by national legislation.<sup>103</sup>

The Constitution further allows for the division of fiscal powers and functions between two municipalities. Again regulation through national legislation is significant after the criteria set out in section 229(3)(a)-(e) of the Constitution has been taken into account. In order to facilitate cooperation and involvement, the national legislation that the Constitution envisages may be enacted only after OLG and the FFC have been consulted and any of the recommendations of the Commission have been considered. For more detail regarding matters concerning municipal finance, such as the raising of loans and the sharing of revenue, see the chapter on finance in this work.

#### **14.7 Municipal powers and functions regarding municipal law enforcement**

In the new local government dispensation municipalities have also been allocated stronger powers and functions regarding municipal law enforcement. Such powers already existed under the LGTA and have been included in the final municipal legal framework.<sup>104</sup> According to the final structure of local government, no direct reference is made to the power or functions regarding municipal law enforcement. Neither Part B of Schedule 4 nor Part B of Schedule 5 of the Constitution refers to the func-

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<sup>101</sup> See the Constitution s 229(1)(b).

<sup>102</sup> This provision is again directed at ensuring uniformity throughout the country and emphasises the importance of cooperation between all spheres of government. The criteria mentioned above are also similar to the provisions employed by the Constitution to determine if national legislation should prevail over provincial legislation in cases of disputes between such legislative enactments. See the Constitution s 146(2) and see also s 44(2).

<sup>103</sup> See the Constitution s 229(2)(a)-(b).

<sup>104</sup> In terms of the LGTA Schs 2 and 2A, certain powers were given to transitional metro councils and transitional local councils in order to establish and control municipal law enforcement agencies. However, such powers were subject to the South African Police Service Act 69 of 1995, as amended.

tional area of municipal law enforcement. The only reference to law enforcement is dealt with under Schedule 4 Part A dealing with police, to the extent that the provisions of chapter 11 of the Constitution confer any competence upon the provincial legislatures. One can conclude, therefore, that municipal law enforcement is not a direct executive, and thus legislative, competence of municipalities and can be exercised by municipalities only if assigned to them in terms of national or provincial legislation.<sup>105</sup>

In order to allow for municipal law enforcement, the South African Police Services Act was amended in 1998<sup>106</sup> and provided for the establishment of a municipal police service.<sup>107</sup> According to section 64A of the Act and in the prescribed manner, any municipality may apply to the MEC for safety and security of a province for the establishment of a municipal police service for its area of jurisdiction. Subject to certain conditions, the MEC may approve an application for the establishment of such a municipal police service if:

- the application complies with the prescribed requirements
- the municipality has the resources at its disposal to provide for a municipal police services which complies with national standards on a 24-hour basis
- traffic policing services by the municipality will not prejudicially be affected by the establishment of a municipal police service
- proper provision has been made by the municipality to ensure civilian supervision of the municipal police service and
- the establishment of the municipal police service will improve effective policing in that part of the province.

The MEC may approve an application only after consultation with the national police commissioner; after consultation with the metro council if the municipality falls in the area of a metropolitan council and with approval of the member or members of the executive council responsible for local government, finance, transport and traffic

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<sup>105</sup> Refer again to the Constitution s 156(1)(a)-(b). One can possibly also argue that limited municipal law enforcement is necessary for all municipalities to ensure the effective performance of their functions. Without a measure of law enforcement powers, municipalities will be toothless to enforce their own or other applicable legal rules and regulations and would thus be severely undermined in respect of their own functions and responsibilities. See also the Constitution s 156(5).

<sup>106</sup> See Act 83 of 1998.

<sup>107</sup> Reference to only a metropolitan police services was deleted by Act 83 of 1998 s 1(a). A "municipal police service" now refers to a municipal police service established under Act 83 of 1998 s 64A. See the Act s 1 definitions.

matters or the premier or member to whom such responsibilities have been assigned. Once an application has been approved, the MEC can establish the municipal police services by notice in the *Gazette*. All expenditure incurred by or in connection with the establishment, maintenance and functioning of a municipal police service shall be for the account of the municipality.<sup>108</sup>

The chief executive officer of a municipality is responsible to the municipal council for the functioning of the municipal police service (MPS). It is the council that incurs final responsibility, however. Once an MPS has been established, a municipal council appoints a member of the MPS as the executive head thereof. This person is required to be a fit and proper person.<sup>109</sup> Subject to the Act, the national standards and the directives of the CEO of the municipality, the executive head of the MPS exercises control over the municipal police service. More specifically, such control includes the following:

- being responsible for maintaining an impartial, accountable, transparent and efficient municipal police service
- being responsible for the recruitment, appointment, promotion and transfer of members of the municipal police service, subject to the applicable laws
- ensuring that traffic policing services by the municipality are not prejudicially affected by the establishment of the municipal police service
- being responsible for the discipline of the municipal police service
- representing the municipal police service on every local policing coordination committee established in terms of section 64k within the area of jurisdiction of the municipality, either personally or through a member or members of the municipal police service designated by him or her for that purpose
- representing the municipal police service on every community police forum or sub-forum established in terms of section 19 within the area of jurisdiction of the municipality, either personally or through a member or members of the municipal police service designated by him or her for that purpose
- developing before the end of each financial year a plan which sets out the priorities and objectives of the municipal police service for the following financial year,

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<sup>108</sup> See the Police Service Act s 64A(3)-(6), as amended.

<sup>109</sup> The Act s 64C and D. It is submitted that such a person should at least have expertise in law enforcement tasks and responsibilities.



provided that such plan, insofar as it relates to the prevention of crime, shall be developed in cooperation with the service

- performing such duties as may from time to time be imposed upon him or her by the chief executive officer of the municipality.

According to the Act, the functions of an MPS are threefold:

- traffic policing, subject to any legislation relating to road traffic
- policing of municipal by-laws and regulations which are the responsibility of the municipality
- prevention of crime.<sup>110</sup>

Furthermore, it is stated that, subject to the Constitution, a member of a municipal police service may exercise such powers and perform such duties as are by law conferred upon or assigned to that member. In this regard the minister of safety and security is empowered to prescribe that any power conferred upon a member of the Police Service may be exercised by a member of the MPS.<sup>111</sup> The Act also confirms that every member of an MPS is an officer of the peace and may exercise the powers conferred upon a peace officer in terms of the law within the area of jurisdiction of the municipality in question. In special circumstances a member may exercise such powers outside the area of jurisdiction if it is done:

- in pursuit of a person whom the member reasonably suspects of having committed an offence, and if the pursuit commenced within the area of jurisdiction of the municipality, and
- in terms of an agreement between municipalities.<sup>112</sup>

When a person is arrested, either with or without a warrant, by a member of an MPS, such person shall be brought as soon as possible to a South African Police station or to the place mentioned in the warrant of arrest, if applicable. Furthermore, any legal proceedings against an MPS or member of such service shall be instituted against the municipal council in question.<sup>113</sup>

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<sup>110</sup> See the Act s 64E.

<sup>111</sup> The Act s 64F(1)-(2).

<sup>112</sup> See the Act s 64F(3)(a)-(b). It appears that both requirements must be met before an extra territorial pursuit will be lawful.

<sup>113</sup> This again confirms the final responsibility of the municipal council. The Limitation of Legal Proceedings Act 94 of 1970 are applicable to disputes involving MPS actions, however. See the Act s 64I(2).

In order to ensure proper control over an MPS, it is required that a municipal council shall appoint a committee consisting of members of the council and such other civilian persons as determined by the council to oversee the MPS. The committee has various functions and shall do the following:

- advise the council on matters relating to the municipal police service, at the request of the municipal council in question
- advise the chief executive officer with regard to the performance of his or her functions in respect of the municipal police service
- perform such functions as the member of the executive council, the municipal council or the chief executive officer may consider necessary or expedient to ensure civilian oversight of the municipal police service
- promote accountability and transparency in the municipal police service
- monitor the implementation of policy and directives issued by the chief executive officer and report to the municipal council or chief executive officer thereon
- perform such functions as may from time to time be assigned to the committee by the municipal council or the chief executive officer and
- evaluate the functioning of the municipal police service and report to the municipal council or chief executive officer thereon.

Both the National Police Commissioner and the Minister of Safety and Security have various powers in respect of the MPS. For example, the National Commissioner may determine national standards of policing for the MPS and in addition to the training prescribed for traffic officers in terms of the Road Traffic Act<sup>114</sup>, may determine national standards with regard to the training of members of a MPS. Failure by an MPS to maintain national standards shall be reported by the commissioner to the minister.<sup>115</sup> Upon receipt of a failure report, the minister may request the MEC concerned to intervene in terms of section 139 of the Constitution and, upon failure of the MEC to intervene as requested, the minister may intervene in terms of section 100 of the Constitution. In such circumstances the national executive authority shall have the same powers as its provincial counterparts in this regard.<sup>116</sup> The MEC for safety and

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<sup>114</sup> 29 of 1989.

<sup>115</sup> Refer to the Act s 64L.

<sup>116</sup> The Act s 64M(1)-(2).

security also has important powers in respect of an MPS and should ensure compliance with national standards.<sup>117</sup>

The Act also provides that the minister may prescribe which other provisions of the Act shall apply to an MPS, and to what extent. The minister is also authorised to make regulations regarding the effective functioning of an MPS.

When the South African Police Service Amendment Act took effect,<sup>118</sup> only one previously established municipal police service had been established, namely the Durban City Police, established under section 83 of the Durban Extended Powers Consolidated Ordinance, 1976.<sup>119</sup> The amendment Act now provides that such a former MPS is deemed to have been established in terms of the Act and shall continue to exist subject to certain requirements.<sup>120</sup> The Act also provides that every person who, on the date of the establishment of an MPS, is registered as a traffic officer and who is employed by that municipality may be appointed as a member of that MPS even though the person may not comply with the training requirements for appointment.<sup>121</sup> However, the Act determines that a member appointed to an MPS shall cease to be a member of that MPS unless before 1 October 2003 he/she has successfully completed a training course which complies with the requirements determined by the National Commissioner.<sup>122</sup> Since the Act took effect, no municipal service has been permitted to include the word "police" in its name unless the service was established as an MPS under the Act.<sup>123</sup>

#### 14.8 Conclusion

From the legal principles and requirements mentioned above, it is evident that the new constitutional framework has a significant impact on the powers and functions of all local governments throughout South Africa. All municipalities have both executive and legislative authority, which authority may be lawfully exercised or performed only within the broader constitutional setting.<sup>124</sup> According to the new system, municipal

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<sup>117</sup> For more details on such powers see the Act s 64N(1)-(7).

<sup>118</sup> 83 of 1998.

<sup>119</sup> Natal Ordinance 18 of 1976.

<sup>120</sup> See the Act s 64Q(1)(a)-(e).

<sup>121</sup> This provision has been included to incorporate traffic officers of relevant municipalities into its MPS.

<sup>122</sup> See the Act s 64Q(2)(a)-(b).

<sup>123</sup> The Act s 64Q(3).

<sup>124</sup> See the case of *Aussenkehr Farms (Pty) Ltd v Walvis Bay Municipality* 1996 (1) SA 180 (C). In the case the applicant had erected a tent on a site in Walvis Bay in order to sell fresh fish and vegetables to the public. It did so with the apparent approval of an official of the respondent municipi-

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by-laws are no longer regarded as subordinate legislation, but as original and direct constitutionally entrenched legislative powers and functions. These newly entrenched legislative powers have important impact in cases where by-laws are part of a legal dispute.<sup>125</sup>

One of the most important and difficult dilemmas faced by local governments in the new dispensation is how to restructure so-called “old order” legislation and substitute such legislation with newly redrafted and constitutionally accepted municipal legislative enactments.<sup>126</sup> During the restructuring of the old local government system and even after the new system was established, many former by-laws and executive decisions were, and still are, applicable in certain areas and are in need of urgent clarification and transformation. It would have been impractical and severely disruptive if all old order legislation were revoked without new legislation’s being put in place simultaneously. In this regard the Constitution provides that all law that was in force when the Constitution took effect continues to be in force subject, however, to any amendments or repeals and consistency with the Constitution. Any old order legislation that continues to be in force does not have a wider application, territorially or otherwise, unless subsequently amended to have a wider application and continues to be administered by the authorities that administered it when the Constitution took effect, subject only to the Constitution.<sup>127</sup> Within this legal framework many old order laws are still applicable within local governments jurisdictions today.<sup>128</sup> Because of the restructuring of provincial boundaries under the interim Constitution of 1993, many difficulties regarding the application and authority of certain legislation

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pality. The applicant was then told to vacate the site. The court held that the applicant was entitled to an interdict against being deprived unlawfully of its *de facto* possession, even if his possession was itself unlawful. See paras B-D at 190.

<sup>125</sup> Eg, under the previous local government dispensation, magistrate courts had the authority to pronounce on the validity of a by-law. By-laws are now constitutionally authorised, however, and their validity must be determined with reference to the Constitution in general. In this regard it is important to note that not all courts have the jurisdiction to rule on constitutional issues. The Constitution itself proclaims that magistrates courts and all other courts may decide any matter determined by an Act of parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of *any legislation*, (including municipal legislation) or any conduct of the president. See the Constitution s 170. Disputes regarding by-laws, which are not of a constitutional nature or that are not based on a constitutional issue should be determined by a court which has been empowered to do so in terms of an Act of parliament. The relevant Acts of parliament are the Magistrates Court Act 32 of 1944 and the Supreme Court Act 59 of 1959.

<sup>126</sup> “Old order legislation” is defined by the Constitution as legislation that was enacted before the interim Constitution Act 200 of 1993 took effect, which was 27 April 1994.

<sup>127</sup> See the Constitution Sch 6(2)(1) and (2).

<sup>128</sup> See, eg, the Transvaal Ordinance on Municipal Administration Ordinance 17 of 1939.

have been experienced. It is proposed that especially provincial and local authorities should work proactively towards a complete overhaul of all legislative enactments applicable in each province and each municipal jurisdiction. Any law or conduct inconsistent with the Constitution, including of the Bill of Rights, will be invalid.<sup>129</sup>

Finally it is submitted that the new framework regarding the executive powers and functions of all municipalities and the overall constitutional protection of such powers and functions should be sufficient to ensure that municipalities can perform their functions effectively and comply with their constitutional obligations and duties. There are, however, significant challenges that must be overcome. For example, local government functions are expected to take responsibility for a set of functions that is growing in complexity and scope. An increasing number of new responsibilities are being added through the processes of assignments and delegations and also through new responsibilities identified in new legislation. Some examples and key issues relating to the way in which municipal functions are undertaken are:

- the establishment of sound relationships between councillors and senior officials
- the implementation of new land reform legislation;
- the integration of health services which are statutorily divided between the national and provincial spheres of government;
- the provision of housing, water and electricity services
- the provisions of functions such as roads and transport, environmental management, community and security services and municipal economic development.

Only a committed municipal corps and administration functioning within an environment of cooperative government would ensure proper fulfilment of the new powers and functions of South African municipalities.

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<sup>129</sup> The Constitution s 2.

## Political structures and internal procedures of municipal councils

### 15.1 Introduction

In modern day societies both urban and rural communities are becoming increasingly complex and often difficult to govern effectively. A wide range of different interests are involved in such communities, and each particular local area is becoming more part of an overall network of social, economical and political transactions, rather than staying a closed society unto itself. Many decisions of a local authority thus transcend its local boundaries and impact on a wide range of other civil and corporate role players. Within this context, the new system of developmental local government is in need of strong political leadership that is able to make difficult policy judgements and decisions and to guide the actions of the municipal administration in order successfully to promote the social and economic well-being of its local communities. Accordingly, the White Paper on Local Government has identified various principles whereby political leadership should be able to fulfil its diverse obligations. These principles can be summarised as follows:<sup>1</sup>

- *To provide community-wide leadership and vision* Many local communities are diverse, with multiple interests combined. New partnerships and coalitions of common interests can be built through a specified local vision which in turn should encourage and promote local government.
- *To constantly build capacity and implement policy initiatives:* Governing is about making choices. Such choices include the prioritisation of interests to the allocation of limited resources. Capacity and progress cannot be achieved if political representatives do not understand the dynamics of a local area and if they do not anticipate changes and learn from past mistakes.

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<sup>1</sup> See White Paper on Local Government (1998) at 101-102.

- *To be accountable and transparent* Apart from being basic constitutional principles, accountability and transparency require political leadership that should account to their community regularly, apart from during normal elections and should do so openly and without personal or political hidden agendas. Both accountability and transparency involve the community, increase legitimacy and deepen democracy.
- *To build partnerships and coalitions* Strong partnerships and coalitions, with local, national and even international actors must be developed in order to achieve positive development.
- *To represent the diversity of interests* First and foremost, municipal representatives should strive for the best interests of the municipality as a whole. Narrow political ideologies do not serve all interests and can be very detrimental to many. Marginalised sections of communities must also be identified and their interests protected.
- *To ensure and demonstrate value for money* Local taxes should be utilised to the maximum benefit of each local community. All local administrations must be efficient and effective and should constantly seek ways to enhance performance and quality services.

In order to achieve and facilitate the abovementioned principles, the Constitution allows and provides for special measures that are directed at supporting the internal procedures and functions of all municipalities. Various options are available to cater for different scenarios. For example, all municipalities must

- decide if powers should be delegated to other functionaries in the council and, if so, which ones
- decide whether to establish an individual or collective executive system
- determine which committees should be established to enhance decision making and ensure effective governance.<sup>2</sup>

Many of these issues have now been given direct constitutional protection or are constitutionally authorised to be prescribed in mostly national legislation. Both the

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<sup>2</sup> With regard to the delegation of executive powers, which is a common phenomenon in most governmental systems, each municipal council should make a careful assessment of its abilities and circumstances. In general, the delegation of powers, enhances both accountability and efficiency. Smaller executive bodies have more ability to act quickly and effectively than larger legislatures, but are not removed from accounting to the full council on executive or administrative obligations.



constitutional and other legislative provisions are subsequently investigated and discussed.

## **15.2 The basic constitutional framework regarding the internal procedures of municipal councils**

In respect of the internal procedures of municipal councils, the Constitution states the following:<sup>3</sup>

- (1) A Municipal Council
  - (a) makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;
  - (b) must elect its chairperson;
  - (c) may elect an executive committee and other committees, subject to national legislation; and
  - (d) may employ personnel that are necessary for the effective performance of its functions.
- (2) The following functions may not be delegated by a Municipal Council:
  - (a) The passing of by-laws;
  - (b) the approval of budgets;
  - (c) the imposition of rates and other taxes, levies and duties; and
  - (d) the raising of loans.
- (3) (a) A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.
  - (b) All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.
  - (c) All other questions before a Municipal Council are decided by a majority of the votes cast.
- (4) No by-law may be passed by a Municipal Council unless
  - (a) all the members of the Council have been given reasonable notice; and
  - (b) the proposed by-law has been published for public comment.
- (5) National legislation may provide criteria for determining
  - (a) the size of a Municipal Council;

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<sup>3</sup> See the Constitution s 160.

- (b) whether Municipal Councils may elect an executive committee or any other committee; or
  - (c) the size of the executive committee or any other committee of a Municipal Council.
- (6) A Municipal Council may make by-laws which prescribe rules and orders for
- (a) its internal arrangements;
  - (b) its business and proceedings; and
  - (c) the establishment, composition, procedures, powers and functions of its committees.
- (7) A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.
- (8) Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that
- (a) allows parties and interests reflected within the Council to be fairly represented;
  - (b) is consistent with democracy; and
  - (c) may be regulated by national legislation.

Although the provisions of the Constitution seem simple and precise, it will become evident that there are many uncertainties and issues that are in need of a more complete and clearer interpretation. Some of these have already been the focus of legal disputes and judicial interpretation.<sup>4</sup> In order to understand the various constitutional provisions regarding the internal procedures of a municipal council, each of the provisions will be investigated and discussed individually. In each instance, the fuller legal framework as provided by national legislation will be highlighted.

### **15.2.1 *Internal procedure with regard to municipal councils***

#### **15.2.1.1 Decisions by municipal councils**

The Constitution makes it very clear that the municipal council is the body that makes the decisions in a municipal jurisdiction in respect of the exercise of all powers and the performance of all the functions of that relevant municipality.<sup>5</sup> As a general rule, it is thus the municipal council that takes responsibility for its powers and

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<sup>4</sup> Refer, eg, to s 160(6) below and the case law on such subsection.

<sup>5</sup> See the Constitution s 160(1)(a).

functions.<sup>6</sup> It is possible, however, for a municipal council to delegate many such powers or functions to other functionaries, such as an executive committee or an executive mayor. Despite such delegations, the relevant municipal council still retains the final responsibility and accountability.

#### **15.2.1.2 Electing a chairperson/speaker**

A municipal council is obligated to elect its own chairperson.<sup>7</sup> This mandatory requirement seems to point to the fact that each municipal council in the new local government systems must elect an internal chairperson and that such a person must be elected by the municipal council itself. This requirement is further expanded upon by the Municipal Structures Act. According to the Structures Act, each municipal council must have a chairperson who is subsequently called the “speaker”, and who is elected from amongst the councillors of the municipal council at the council’s first sitting after its election or when it is necessary for the council to fill a vacancy. The task to elect a speaker is a specific obligation of a municipal council.<sup>8</sup> When a speaker is to be elected, the municipal manager of the municipality or, if he/she is not available, a person designated by the MEC for local government in the province, is to preside over the election process. Schedule 3 of the Structures Act specifically sets out the procedure that is to be followed when a speaker or a mayor is elected.<sup>9</sup> A councillor may not hold office as speaker and mayor or executive mayor at the same time.<sup>10</sup>

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<sup>6</sup> Powers and functions in this respect would seem to include both legislative and executive powers and functions.

<sup>7</sup> See the Constitution s 160(1)(b).

<sup>8</sup> See the Structures Act s 36(1)-(2).

<sup>9</sup> See the Structures Act s 36(3)-(4) and Sch 3. According to Sch 3, the presiding person must first call for the nomination of candidates. A nomination must be carried out in a prescribed manner, signed by two members of the Municipal Council and must be accepted in writing by nominee. Names are then announced, but no debate over names is allowed. If only one candidate is nominated, he/she must be declared elected. If there is more than one candidate, an election procedure is prescribed together with an elimination procedure if no candidate receives a majority of votes. If no election can be achieved, a further meeting must be held within seven days, and the election procedure is applied again.

<sup>10</sup> This is not relevant in all instances. In municipalities with either a plenary executive system or a plenary executive system combined with a ward participatory system, the speaker must be called the mayor. In such municipalities, the mayor and speaker is the same person, although the position is called mayor and not speaker. See the Structures Act s 36(5).

The speaker of a municipal council has specific functions to perform. These functions include the following:<sup>11</sup>

- to preside at meetings of the municipal council
- to perform the duties and exercise the powers delegated to the speaker in terms of section 59 of the Local Government: Municipal Structures Act
- to ensure the council meets *at least* quarterly
- to maintain order during meetings
- to ensure compliance in the council and council committees with the code of conduct of councillors as set out in Schedule 1 of the Local Government: Municipal Systems Act
- to ensure council meetings are conducted in accordance with the rules and orders of the council.

In normal circumstances, the speaker of a municipal council is elected for a term ending when the next council is declared elected. The term thus normally corresponds with the term of the municipal council. However, a speaker will have to vacate office during a term if that person

- resigns as speaker
- is removed from office
- ceases to be a councillor of the relevant municipality.<sup>12</sup>

A speaker may be removed only by a municipal council itself, and only by resolution adopted by the council. Prior notice of an intention/motion to move for the removal of the speaker must be given. Although the Structures Act does not specify the notice period, a reasonable time would seem sufficient. What is to be regarded as a “reasonable time” is not entirely certain, but it is submitted that such time that would allow the different political parties represented in the council to discuss and consider the proposed removal would suffice. It should also be noted that the Structures Act does not require a special majority for the removal of the speaker. It therefore seems acceptable to assume that a normal quorum and a normal majority of votes in favour or against a removal will be lawful.<sup>13</sup> If a speaker is absent or not available to per-

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<sup>11</sup> Refer to the Structures Act s 37. According to this section, it is important for any newly elected speaker to obtain a copy of the rules and orders of the council and to ensure he/she is up to speed with any powers that might be delegated to the office of speaker.

<sup>12</sup> See the Structures Act ss 38 and 39.

<sup>13</sup> See the Structures Act s 40 read together with the Constitution s 160(3).

form the functions of speaker or if there is a vacancy in the office, the municipal council must elect another councillor to act as speaker.<sup>14</sup>

### 15.2.1.3 Executive and other committees or functionaries

Apart from the election of a chairperson, a municipal council may also elect an executive committee and other committees, subject to national legislation. On the point of the establishment of committees subject to national legislation, the Constitutional Court has already determined the following: In the case of *Executive Council, KZN v President of the RSA*,<sup>15</sup> two provincial governments instituted proceedings in the court which challenged the constitutional validity of certain provisions of the Local Government: Municipal Structures Act<sup>16</sup>. It was contended *inter alia*, that the Act encroached on the constitutional powers of municipalities, especially a municipal council's power to elect executive committees or other committees in violation of section 160(1)(c) of the Constitution. The court held that section 160(1)(c) conferred this power "subject to national legislation", which meant that the right of municipalities to elect committees would not prevail where there was national legislation to the contrary. The national legislation referred to in section 160(1)(c) had to include any other legislation passed by Parliament in terms of chapter 7 of the Constitution. If the legislation was within the scope of national legislation sanctioned by chapter 7, the municipal power to elect committees had to be exercised, subject to that legislation. The municipal power to elect executive or other committees was therefore subordinate to these provisions and to the provincial power to select types of municipality. If this had the effect of precluding particular municipalities from electing executive or other committees, that resulted from the provisions of the Constitution itself and could not be challenged as being a breach of section 160(5)(b).<sup>17</sup> It is important to note that a municipal council is not obliged to elect an executive committee, as was the position under the interim Constitution. Subject to the new legislative framework

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<sup>14</sup> The Act is unfortunately somewhat uncertain in this regard, as two different situations can occur. Eg, if a speaker is absent or unavailable, the newly elected speaker will act as only acting speaker, and will be replaced by the usual, elected speaker upon his/her return or availability. When there is a vacancy in the position of the speaker, the next-elected speaker should be the elected speaker of the municipal council until the end of the remaining term of the municipal council. Strictly speaking, the person is thus not acting temporarily as speaker for another person. See the Structures Act s 41.

<sup>15</sup> 2000 (1) SA 661 (CC).

<sup>16</sup> 117 of 1998.

<sup>17</sup> See paras 87-88 at 699-700.

and based on the specific type of municipality that has been established, a municipal council may decide to elect an executive committee.<sup>18</sup> The new legislative framework makes provision for various committees or internal functionaries. Apart from general criteria applicable for the establishment of committees, the Structures Act also contains specific requirements applicable to the various committees or functionaries. Each of the sets of requirements will be discussed below.

#### **15.2.1.4 Criteria for the establishment of committees**

According to the Structures Act, three general criteria are laid down for the establishment of a committee(s). A municipality may establish a committee as provided for in the Act if:

- the municipality is of a type that is empowered in terms of the Act to establish a committee of the desired kind<sup>19</sup>
- the establishment of the committee is necessary.<sup>20</sup> When the necessity of the establishment of a certain committee is evaluated, the following factors should also be taken into account:
  - (a) the extent of the functions and powers of the municipality
  - (b) the need for the delegation of those powers and functions in order to ensure efficiency and effectiveness in their performance
  - (c) the financial and administrative resources of the municipality available to support the proposed committee.<sup>21</sup>
- in the case of the establishment of an executive committee, the municipality has more than nine councillors.<sup>22</sup>

#### **15.2.1.5 Requirements regarding the composition, functions and procedures of executive committees**

Only certain municipalities may establish executive committees. These are municipalities that are defined or classified as municipalities with

- a collective executive system

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<sup>18</sup> See the Structures Act ss 7-11.

<sup>19</sup> In respect of the various types of municipalities, see the Structures Act ss 7-11. According to the Structures Act ss 42, 54, 61 and 72 only municipalities of specific type may establish certain committees or functionaries.

<sup>20</sup> The necessity of a committee will depend on the relevant circumstances of each municipality. Almost all larger municipalities will need certain committees in order to fulfil and execute their functions and duties.

<sup>21</sup> See the Structures Act s 33(b)(i)-(iii).

<sup>22</sup> The Structures Act s 33(c).

- a collective executive system combined with a sub-council participatory system
- a collective executive system combined with a ward participatory system
- a collective executive system that is combined with both a sub-council and a ward participatory system.<sup>23</sup>

If a municipal council establishes an executive committee, it must elect as members of the committee a number of councillors who will ensure effective and efficient municipal government. However, the Structures Act determines that no more members than 20% of the councillors of the council or 10 councillors, whichever is the least, may be elected. It is further also required that an executive committee may not have fewer than three members.<sup>24</sup> The Act further determines that an executive committee be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in substantially the same proportion that they are represented in the council. This section must be read together with section 160(8) of the Constitution, which requires that the members of a municipal council be entitled to participate in the proceedings of the council and of its committees, allows parties and interests reflected in the council to be fairly represented, is consistent with democracy and may be regulated by national legislation.<sup>25</sup> The Structures Act also provides that a municipal council may determine any alterna-

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<sup>23</sup> See the Structures Act s 42(1) read together with ss 8(a), (b), (c) and (d), 9(a) and (b) and 10(a). It is clear from the Act that any municipality that has a collective executive system or combination with such an executive system may establish an executive committee.

<sup>24</sup> See the Structures Act s 43. It thus seems clear that an executive committee can never have more than 10 members. Eg, if a municipal council consists of 30 councillors and decides to establish an executive committee, the committee will consist of 6 councillors.  $30 \times 20\% = 6$ . Six is fewer than 10, thus only 6 members. If a municipal council consists of 100 members, the executive committee will have 10 members.  $100 \times 20\% = 20$ , whichever is fewer than 10 = 10.

<sup>25</sup> This requirement has caused several legal disputes both under the interim Constitution and the Constitution. See also the Structures Act s 43. See, eg, the case of *Democratic Party and Others v Brakpan TLC and Others* 1999 (4) SA 339 (W), where it was mentioned that it is not the function of the court to prescribe to a council the number of members which must comprise its executive committee or what system of proportional representation it should adopt in electing such members; such a function has been entrusted to the legislature. The court is however obligated to intervene if the exercise of such powers negates the right[s] conferred on members in terms of the Constitution s 160(8)(a). It was further stated that the objective and purpose of s 160(8)(a) is to ensure, as far as is practically possible, that members that are representing political parties in the council participate fairly in the committees of the council. Such fairness is then determined according to the representation of the parties on the council and not according to political support amongst the electorate. It is the parties and interests within the council that must be fairly represented. The court finally held that the decision to appoint an executive committee of only ANC and NP members, notwithstanding the fact that the DP had equal representation to the NP within the council, was unconstitutional. See at 344-345.



tive mechanism for the election of an executive committee, provided that it complies with section 160(8) of the Constitution.<sup>26</sup>

Executive committees have specific powers and functions, and thus play an important role in the overall performance and exercise of municipal obligations and duties. In this regard the Structures Act determines the following:

- An executive committee is regarded as the *principal committee* of a municipal council. It is also the committee of a municipal council which receives reports from all other committees, which must then be forwarded by the executive committee, together with its recommendations to the municipal council itself. This requirement is applicable only when it (the executive committee) cannot dispose of such matters in terms of its delegated powers.<sup>27</sup>
- The executive committee is obligated to
  - (a) identify the needs of the municipality
  - (b) review and evaluated those needs in order of priority
  - (c) recommend to the municipal council strategies, programmes and services to address priority needs through the integrated development plan and estimates of revenue and expenditure. The executive committee should in such instances take any applicable national and provincial developmental plans into account.
  - (d) recommend or determine the best methods possible to deliver its strategies, programmes and services to the maximum benefit of the community.<sup>28</sup>
- An executive committee, when performing its duties, must comply with various legislative requirements. In this regard, the Structures Act determines that an executive committee must:<sup>29</sup>
  - (a) identify and develop criteria in terms of which progress in the implementation of the council's strategies, programmes and services can be evaluated. Such criteria can include Key Performance Indicators (KPI) relevant to the municipal council or that are common to local government in general

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<sup>26</sup> See the Structures Act s 43(3). It thus seems that while the composition of an executive committee is strictly determined, alternative procedures for the election of the members of such executive committee can be provided for.

<sup>27</sup> See the Structures Act s 44(1)(a)-(b).

<sup>28</sup> Such recommendations or determinations may include partnerships and other approaches. See the Structures Act s 44(2)(a)-(d).

<sup>29</sup> See the Structures Act s 44(3)(a)-(h).

- (b) evaluate progress against the KPI
- (c) review the performance of the municipality in order to improve the economy, efficiency, effectiveness, efficiency of credit control, revenue and debt collection services and also the implementation of the municipality's relevant by-laws
- (d) monitor the management of the municipality's administration in terms of the policy directions of the municipal council
- (e) oversee the provision of services to communities in a sustainable manner
- (f) perform such duties and exercise such powers as the municipal council may delegate to it
- (g) report annually on the involvement of communities and community organisations in the affairs of the municipality
- (h) ensure that regard is given to public views and report on the effect of consultation on the decisions of the council.

Apart from the reporting duties mentioned above, an executive committee is generally obligated to report to the municipal council on all decisions taken by the committee.<sup>30</sup>

Members of an executive committee must be elected from among the members of a municipal council and by the municipal council itself within 14 days of the council's election or, if it is a district council, within 14 days after the last of the local councils has appointed its representatives to that district council.<sup>31</sup> If the type of municipality has been changed to a type that may establish an executive committee, within 14 days the municipal council of the new type of municipality must also elect the members of the executive committee.<sup>32</sup> Subject to any vacancies, members of an executive committee are elected for a term ending when the next municipal council is declared elected.<sup>33</sup> Members of an executive committee are not always elected for

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<sup>30</sup> This relates to all aspects where an executive committee has the power or authority to take certain decisions itself and thus to bind the municipal council. One must remember that the municipal council is always ultimately responsible for all decisions taken within that municipality's structures. It speaks for itself therefore that a municipal council must be updated regularly and informed of all decisions that the municipal council itself has not taken directly. See the Structures Act s 44(4).

<sup>31</sup> See the Structures Act s 45(a)-(b).

<sup>32</sup> See the Structures Act s 45(c) as substituted by Act 1 of 2003 s 1.

<sup>33</sup> In essence, the term of members of an executive committee is similar to the term of a municipal council in normal circumstances. Refer to the Structures Act s 46. The term of office as an ex-

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the full term of office, as vacancies can occur. A member of an executive committee must vacate his/her office during a term if that member

- resigns as a member of the executive committee
- is removed from office as member of the executive committee in terms of section 53 of the Act
- ceases to be a councillor.

When a vacancy has occurred and needs to be filled, such filling is subject to section 43 of the Act.<sup>34</sup>

Although the new legislative framework for local government makes provision for the election of an executive mayor in certain circumstances, the election of a mayor is not restricted to such executive systems of municipality only. Accordingly, a municipal council must elect a member of its executive committee as the mayor, and if so approved by the MEC in the province, also a deputy mayor.<sup>35</sup> The election of a mayor or deputy mayor takes place according to the procedure set out in Schedule 3 of the Act. When a mayor or deputy mayor is elected, he/she is elected for the duration of that person's term of office as member of the executive committee.<sup>36</sup> Similar to membership of the executive committee, a mayor or deputy mayor must vacate his/her office during a term if that person

- resigns as mayor or deputy mayor
- is removed from office as a member of the executive committee;
- ceases to be a member of the executive committee.<sup>37</sup>

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ecutive committee member can also be shortened if the type of municipality has been changed to a type which does not allow for the establishment of an executive committee. See Act 1 of 2003 s 2.

<sup>34</sup> This again emphasises the fact that if vacancies do occur, the proportional representation systems must still apply. If, eg, a member of political party A resigns, a fellow member of that party should take up such membership. The reflection of parties and interests in the executive committee as a committee of the municipal council should be maintained, as was determined according to the election results. The filling of vacancies cannot be used by the majority party in the municipal council to strengthen its own representation in the executive committee. See the Structures Act s 47(2).

<sup>35</sup> It is important to note that a mayor or deputy mayor is not elected by the executive committee itself, but by the municipal council. The mayor or deputy mayor must be a member of the executive committee before he/she is elected, however. The facts thus speak for themselves that the election of a mayor or deputy can take place only once the executive committee has been elected or when it is necessary to fill a vacancy. See the Structures Act s 48(1)-(2).

<sup>36</sup> Although the new legislative framework does not directly make mention of the time when a mayor or deputy is to be elected, it is submitted that such election should take place simultaneously with the election of the members of the executive committee, or very shortly thereafter. Because of the important role that a mayor plays within the executive structures of a municipality, a quick and speedy election of such a person is essential. The election of mayor or deputy mayor is conducted in terms of the procedures set out in the Structures Act Sch 3. See also the Act s 48(2).

<sup>37</sup> See the Structures Act s 48(4)(a)-(c).

No person may hold office as mayor or deputy mayor in the same council for more than two consecutive terms.<sup>38</sup> If a person is elected to fill a vacancy in the office of mayor or deputy mayor, the period between that election and the next election of a mayor or deputy mayor *was originally regarded* as a term of office.<sup>39</sup> During 2003 the Structures Act was amended to determine that when a vacancy in the office of mayor or deputy mayor is to be filled, the period between such election and the next election of mayor or deputy mayor is not regarded as a term. Any time served by a person in order to fill a vacancy or when the type of municipality has been changed to one which requires a mayor or deputy mayor, such a term is also not regarded as a term of office as mayor or deputy mayor. A mayor whose two consecutive terms have expired may not immediately after the expiry be elected as deputy mayor.<sup>40</sup>

The person elected as mayor in an executive committee system has specific powers and functions. The mayor normally presides at meetings of the executive committee and performs the necessary duties, including any ceremonial functions, and he/she exercises the powers delegated to the office of mayor by the municipal council or executive committee. If a mayor is absent or not available, the deputy mayor will exercise the powers and perform the duties of the mayor. It should be noted that the mayor may also delegate duties to the deputy mayor.<sup>41</sup>

Generally speaking, it is the mayor that decides where and when the executive committee should meet. However, if a majority of the members of an executive committee requests the mayor in writing to convene an executive committee, the mayor is obligated to convene such a meeting at a time and place set out in the

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<sup>38</sup> The position is the same regarding a deputy mayor or deputy executive mayor. A person may hold office for only two consecutive terms.

<sup>39</sup> This position is now similar to the position or office of president or premier. When a person is elected to fill a vacancy in the office of the president on national level or the office of premier on a provincial level, the period between that election and the next election of either the president or the premier *is not regarded* as a term of office. See the Constitution ss 88(2) and 130(2). See the Structures Act s 48 as amended by Act 1 of 2003 s 3.

<sup>40</sup> See the Structures Act s 48(6). The time period that is required is not certain, however. It is submitted that a term should pass before a former mayor who has served two consecutive terms as such can be elected as a deputy mayor. Arguably, the position should not be the same with regard to a deputy mayor who has served consecutive terms as deputy and now stands to be elected as mayor. If the legislator intended such requirements, it would have been included in the legislation. The elevation from deputy mayor to mayor should not be restricted/delayed by a certain time period.

<sup>41</sup> If a mayor is absent or not available and there is no deputy mayor, or he/she is also absent or not available, then the members of the executive committee designated as such by the mayor in writing will act as mayor, or if the mayor has not designated anyone, the members of the Executive

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written request.<sup>42</sup> If both the mayor and deputy mayor are absent from a meeting and if there is a quorum of members present, the members present must elect another member to preside at the meeting.<sup>43</sup>

It is standard practice for an executive committee to determine its own internal procedures and functioning. Accordingly, an executive committee, by resolution taken with a supporting vote of a majority of its members, may determine its own procedures subject, however, to any directions and the rules and orders of the relevant municipal council.<sup>44</sup> The Structures Act determines not only the rules and orders of a municipal council, but also the fact that a majority of the members of an executive committee constitutes a quorum for a meeting. Decisions or questions before the executive committee are further decided if there is agreement/consensus among at least the majority of the members present that form a quorum. If there is an equality of votes on any question (an equal number of votes against and in favour of a matter), the person presiding must exercise a casting vote. Such a casting vote is in addition to that member's normal vote as a member of the executive committee.<sup>45</sup>

Lastly, it is important to note that members of an executive committee may be removed from office as members of the executive committee. A municipal council is authorised to remove one or more or all members of its executive committee by resolution. The municipal council must ensure that it acts within the ambit of the law, however. Before a member or members of an executive committee are removed, prior notice of the intention to move for a motion for removal must be given.<sup>46</sup> If all the members of an executive committee are removed, a new election of members and of the mayor or deputy mayor, if applicable, must be held in terms of sections 45

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Committee can elect someone from amongst its members to act as mayor. The Structures Act s 49(1)-(3).

<sup>42</sup> It is submitted that the majority in such instances refers to an absolute majority, which requires a 50% + 1 of all the members of the executive committee. See the Structures Act s 50(1).

<sup>43</sup> The Structures Act s 50(2).

<sup>44</sup> In this respect the Constitution s 160(6) determines that a municipal council may make by-laws which prescribe rules and orders for the council's internal arrangements, business and proceedings and the establishment, composition, procedures, powers and functions of its committees. See also the Structures Act s 51.

<sup>45</sup> To illustrate by way of an example: If an executive committee consists of 8 members, at least (4 + 1) 5 members will constitute a quorum, and at least 3 members should be in agreement in terms of a decision. See the Structures Act s 52(1)-(3).

<sup>46</sup> See the Structures Act s 53(1). Note also that according to the Constitution s 160(3) a majority of members of the municipal council must be present and that such a decision will be decided by majority votes of the members present. Refer also the Structures Act s 30.

and 48 respectively. Any new election will subsequently also be subject to the requirements of section 43 of the Structures Act.<sup>47</sup>

#### **15.2.1.6 Requirements regarding the composition, functioning and procedures of executive mayors**

In the new local government system, only municipalities with a mayoral executive system or such a system combined with a sub-council participatory system or ward participatory system are allowed to have or establish an executive mayor.<sup>48</sup> If a municipal council has decided to choose an executive mayor, it must elect an executive mayor from among its members. If the MEC for local government so approves, an executive deputy mayor may also be elected from among the members of the municipal council. Furthermore, an executive mayor must be elected within 14 days after the date from which the type of municipality has been changed to a type that allows for an executive mayor.<sup>49</sup> The election of an executive mayor must be held at a meeting of the municipal council within 14 days of the council's election or, in the case of a district council, within 14 days after the last one of the local councils has appointed its representatives to the district council. The election of an executive mayor or deputy mayor is prescribed in Schedule 3 of the Structures Act. Any vacancy in the office of executive mayor or deputy executive mayor must be filled when necessary.<sup>50</sup>

Similar to the position of an executive committee, an executive mayor has specific powers and functions. In this respect an executive mayor is entitled to receive reports from committees of the municipal council and forward such reports together with a recommendation to the municipal council in instances when the matter cannot be disposed of by the executive mayor himself/herself in terms of the powers delegated to his/her office. An executive mayor has the same obligations as an executive committee.<sup>51</sup> In municipalities that have established an executive mayor, such an executive mayor is obligated to perform ceremonial functions if the municipal council so determines, and he/she must report to the municipal council on all decisions

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<sup>47</sup> See the Structures Act s 53.

<sup>48</sup> See the Structures Act ss 54(1) and 8(e), (f), (g), (h), 9(c) and 10(b).

<sup>49</sup> See the Structures Act s 55(1)(c) as substituted by Act 1 of 2003 s 4.

<sup>50</sup> See the Structures Act s 55. According to Sch 3, certain formal requirements and procedures must be complied with.

<sup>51</sup> See s 56(2)(a)-(c) and (3)(a)-(h). The mayor must identify the needs of the municipality, prioritise needs and make recommendations to the municipal council.



taken by his/her office. If the executive mayor is absent, not available or if the office is vacant, the deputy mayor, if applicable, exercises all powers and performs the duties and functions of the executive mayor.<sup>52</sup>

An executive mayor and deputy executive mayor must be elected for a term ending when the next council is declared elected or when the type of municipality is changed to one not allowing for an executive mayoral system. No executive mayor or deputy mayor may serve as such for more than two consecutive terms. When filling a vacancy, such a vacancy period is not regarded as a term. This position is the same regarding the term of office as mayor or deputy mayor in both the executive committee system or the mayor executive system. The period served as mayor or deputy mayor in instances where the type of municipality has been changed is also not regarded as a term of office. As in the executive committee system, an executive mayor whose two consecutive terms have expired may not be elected as deputy executive mayor immediately after such expiry.<sup>53</sup> The term of an executive mayor is not always fixed until the next council is declared elected. By resolution, a municipal council may remove its executive mayor or deputy mayor from office. Prior notice of an intention to propose a motion for removal must be given.<sup>54</sup> Apart from removal, an executive mayor or deputy will also have to vacate his/her office during a term if he/she resigns, is removed or ceases to be a councillor of the municipal council.<sup>55</sup>

An important addition to an executive mayor system is the appointment of a mayoral committee. According to the Structures Act, if a municipal council has more than

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<sup>52</sup> See the Structures Act s 56(4)-(6). In a system with an executive mayor, the office of executive mayor is vested with both the executive authority and ceremonial duties. Note that if the executive mayor is absent or not available to perform his/her functions and there is no deputy mayor or such a deputy mayor is also absent or unavailable, then the council must designate a councillor to act as executive mayor. See the Act s 56(7) as amended by Act 51 of 2002 s 16(b).

<sup>53</sup> The reasoning for such provisions seems to be to allow other members of a municipal council an opportunity to obtain experience as mayor and deputy mayor, to allow for new leadership and to ensure that powers are not fixed in one or two individuals. An aspect that is unclear is if an executive mayor, after serving two consecutive terms, and after he/she has sat out a term, can be elected again as mayor or deputy mayor. In this regard it is submitted that should a person be allowed to serve as mayor or deputy again, this would be contrary to the intention of the legislator. In both national and provincial spheres, once a president or premier has served his/her consecutive terms, such a person cannot again be elected to that office or position. See the Constitution ss 88 and 130. This should also be the position on local government level. However, the position is different if a mayor is elected as deputy mayor or *vice versa*. Only the requirement of s 57(2) is relevant to such situations.

<sup>54</sup> Refer to the Structures Act s 58.

<sup>55</sup> See the Structures Act s 59.



nine members and has established an executive mayoral system, then its executive mayor.<sup>56</sup>

- must appoint a mayoral committee from among the councillors to assist the executive mayor
- may delegate specific responsibilities to each member of the mayoral committee
- may delegate any of the executive mayor's powers to the members of the committee and
- may dismiss a member of the mayoral committee.

The mayoral committee is comparable with the cabinet of the president on a national level or an executive council on a provincial level.<sup>57</sup> A mayoral committee must consist of the deputy executive mayor, if applicable, and as many councillors as may be necessary for effective and efficient government. However, no mayoral committee may have more members than 20% of the councillors of a municipal council or 10 councillors, whichever is the least.<sup>58</sup>

The powers and functions of an executive mayor as may be designated by the municipal council must be exercised and performed by the executive mayor *together* with the other members of the mayoral committee.<sup>59</sup> Generally speaking, the members of a mayoral committee will remain in office for the term of the executive mayor who has appointed them. However, if the executive mayor vacates office, the mayoral committee will also dissolve.<sup>60</sup>

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<sup>56</sup> See the Structures Act s 60(1)(a)-(d).

<sup>57</sup> In both the national and provincial spheres of government the members of cabinet or members of executive councils are appointed by the president or premier and are given tasks by them and can be dismissed by them respectively. See the Constitution ss 91 and 132. There seems to be uncertainty, however, if a mayoral committee must be appointed in a manner that allows parties and interests reflected in the municipal council to be fairly represented. In light of the Constitution s 160(8), it seems that such appointment should indeed be proportional.

<sup>58</sup> Eg, if a municipal council has 40 members, a mayoral committee can consist out of 8 members.  $40 \times 20\% = 8$ . A municipal council with 150 members can have a mayoral committee of only 10 members.  $150 \times 20\% = 30$ . The least between 30 and 10 is 10. See the Structures Act s 60(2). The mayor is also a member of the mayoral committee and must be calculated within the membership total.

<sup>59</sup> See the Structures Act s 60(3). The wording "together with the other members" indicates that the mayoral committee should act on consensus. The executive mayor should consult the other members and should act on their advice. He/she is not merely obligated to consult such members and then act on his/her own accord. The decision-making process of a mayoral committee seems to be left for such committee self to decide. Normally majority decision making or sufficient consensus would be employed.

<sup>60</sup> Read the Structures Act s 60(5) together with s 59.

### **15.2.1.7 The establishment, powers and internal arrangement of metropolitan sub-councils**

Apart from an executive committee and an executive mayor, the Structures Act also provides for the establishment of metropolitan sub-councils and ward committees. Only metropolitan municipalities with a collective executive system or mayoral executive system that is combined with a sub-council system may establish metropolitan sub-councils.<sup>61</sup>

If a metropolitan municipality decides to establish metropolitan sub-councils, it must do so by passing a by-law which should:

- determine the number of sub-councils to be established
- determine an area within the municipal area that will consist out of a cluster of adjoining wards for each sub-council
- establish a sub-council under a distinct name in each area
- determine a mechanism that complies with Part 2 of Schedule 4 for the appointment of councillors in terms of section 63 of the Structures Act
- provide for an equitable financial framework in terms of which the sub-councils must function and
- regulate any other relevant matters.<sup>62</sup>

When wards are clustered together to determine the area of a metropolitan sub-council, the municipal council must apply the criteria set out in sections 24 and 25 of the Demarcation Act, insofar as they can be applied, and must also consult the Demarcation Board regarding such exercise.

After metropolitan sub-councils have been established, each of such sub-councils shall consist of

- the councillors representing the wards in the sub-council area
- an additional number of councillors that are allocated in terms of Part 1 of Schedule 4 of the Structures Act.<sup>63</sup>

Schedule 4 determines that the component of seats in section 63(1)(b) of the Structures Act, which refers to the allocating of seats to parties, is allocated to each party

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<sup>61</sup> See the Structures Act s 61(1) read with s 8(b), (d), (f) and (h).

<sup>62</sup> Note that before the by-law is passed, a process of public consultation must have been undertaken. See the Structures Act s 62 as amended by Act 20 of 2002.

<sup>63</sup> See the Structures Act s 63(1)-(2).

in accordance with the following formula:<sup>64</sup>

$$\frac{A}{B} \times C$$

If the equation results in fractions, such fractions are to be disregarded. The seats allocated in terms of section 63(1)(b) must be allocated to parties represented in the metro council in a manner that will allow parties and interests reflected in the council to be fairly represented in the metro sub-council and that is consistent with the principle of democracy. In order to facilitate party representatives on the metro sub-council, each party represented in the metro council must designate their representatives to each metro sub-council from amongst their councillors not representing wards. No councillor may serve on more than one sub-council, and vacancies must be filled as they occur. Schedule 4 does not apply in cases where

- metropolitan sub-councils are established;
- the *areas* of existing metro sub-councils are changed; or
- the *number* of existing metro sub-councils are changed, after the composition of a metro council has changed as a result of the provisions of Schedule 6B of the Constitution.

In such cases, the additional number of councillors is determined by the metro council, so as far as possible the seats held by proportional representative councillors are equally distributed amongst all the metro sub-councils.<sup>65</sup>

The councillors referred to in section 63(1)(b) must consist of councillors elected to the metro council from party lists in terms of Part 3 of Schedule 1 and must be appointed in terms of Part 1 of Schedule 4 or section 62(1)(cA) of the Act. It must be emphasised that item 3 of the code of conduct for councillors as set out in Schedule 1 to the Systems Act, which deals with the attendance at meetings, does not apply to the speaker, executive mayor, a member of the mayor committee or a member of the

<sup>64</sup> A = total number of valid votes cast for each party on the party vote in the area of the metropolitan *sub-council*; B = the total number of valid votes cast for each party on the party vote in the total area of the metro council; and C = the total number of seats allocated to each party in the metro council in accordance with Sch 1 Part 3.

<sup>65</sup> See the Structures Act s 63(1)(b) as amended by Act 2 of 2003 s 9.

executive committee in respect of meetings of a metro sub-council of which such an office bearer is a member.<sup>66</sup>

In respect of powers and functions, a metro sub-council has such duties and powers as the metro council may delegate to it, and it may make recommendations to the metro council on any matter affecting its area. In respect of delegated powers, a metro sub-council may advise the metro council on what duties and powers should be delegated to it.<sup>67</sup>

A metro sub-council must further elect one of its members to be the chairperson of that sub-council. In normal circumstances the term of members of a metro sub-council will be until the next metro council is declared elected. However, where a section 63(1)(b) member of a metro sub-council is replaced as a result of the provisions of item 6(b) of Schedule 6B to the Constitution, the newly appointed member is appointed for the remainder of the replaced member's term, subject to section 67. Vacancies in sub-council membership can occur if a councillor resigns as a member of the sub-council or ceases to be a councillor in general, however.<sup>68</sup>

Subject to any directions of the metro council, the chairperson of a metro sub-council decides when and where the sub-council will meet. However, if a majority of members makes a request to the chairperson in writing, the chairperson must convene a meeting as requested. At meetings of the sub-council, the chairperson will preside. If the chairperson is absent but a quorum is present, then the members present must elect a member to preside at that meeting. With a supporting vote of a majority of its members, all metro sub-councils are allowed to determine their own internal procedures. Such procedures are subject to any directions of the metro council, however. Quorums in sub-councils are achieved when a majority of the members are present. Questions or decisions before the sub-council are then decided if there is agreement among at least the majority of the members present that form a quorum.<sup>69</sup> If there is an equality of votes on any question, the member presid-

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<sup>66</sup> See the Structures Act s 63(3).

<sup>67</sup> It is important that a proper evaluation of the capacity and capabilities of the metro sub-councils be undertaken before unrealistic and unachievable powers or duties are delegated. One must remember that the metro council will ultimately have the responsibility regarding the duties and provision of services. Refer to the Structures Act s 64.

<sup>68</sup> Refer to the Structures Act ss 65-67, as amended by Act 20 of 2002 and Act 2 of 2003.

<sup>69</sup> Again, this refers to a normal majority of 50% + 1. If a sub-council consists of 12 members, at least (6 + 1 =) 7 members must be present to form a quorum and at least 50% + 1 of the members present must agree or vote in favour of a question. See the Structures Act ss 68-70.

ing must exercise a casting vote in addition to that member's normal vote as a member. Lastly, all metro sub-councils are permitted to appoint internal committees, including a management committee. Members of the committees are appointed from among the members of the sub-council itself, and the main purpose of such committees is to assist the sub-council in the performance of its duties and the exercise of its powers.<sup>70</sup>

#### **15.2.1.8 The establishment, powers and functions of ward committees**

Similar to the position mentioned above, only metropolitan and local municipalities with a collective executive system or a mayoral executive system may establish ward committees. The main objective of a ward committee is to enhance participatory democracy in local government.<sup>71</sup>

If a metro or local council decides to have ward committees, it must establish a ward committee for each ward in the municipality. A ward committee consists of

- the ward councillor, who must also be the chairperson of the ward committee
- not more than 10 other members.

A metro or local council must further make rules regulating the election procedure of the ward committee members other than the chairperson. Such rules must take into account the need for women to be equitably represented in the ward committee and also the need to represent the diversity of interests in the ward. The rules must furthermore regulate the circumstances under which a ward committee member must vacate his/her office and the frequency of meetings of ward committees.<sup>72</sup>

In an effort to enhance participatory democracy, ward committees have been given specific powers and functions. A ward committee may make recommendations on any matter affecting its ward to either the ward councillor or through the ward councillor, to the relevant municipal council or its executive committee or executive mayor, or even the metro sub-council if applicable. All ward committees have such duties and powers as the municipal council may delegate to it.<sup>73</sup>

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<sup>70</sup> See the Structures Act s 71.

<sup>71</sup> See the Structures Act s 72(1)-(3) read together with ss 8(c), (d), (g) and (h) and 9(b), (d) and (f).

<sup>72</sup> See the Structures Act s 73(1)-(4). The Act also allows a metro or local council to make administrative arrangements to enable ward committees to perform their function and exercise their powers effectively. Such arrangements should include technical and administrative support through the provision of advice or infrastructure.

<sup>73</sup> Refer to the Structures Act s 74.

Generally speaking, the members of a ward committee are elected for a term as is determined in terms of the rules of the metro or local council.<sup>74</sup> Vacancies in membership of ward councillors, apart from a vacancy in the office of the elected ward councillor himself/herself, must be filled in terms of a procedure determined by the relevant municipal council. It is important to note that no remuneration is payable to members of a ward committee apart from the relevant ward councillor. Again, emphasis should be placed on the fact that ward committees are directed at achieving and enhancing participation by local residents in ward-related matters. Such committee members are not official office bearers of the relevant municipal council and are thus not remunerated for their services. It is lastly also possible for a metro or local council to dissolve a ward committee if that committee fails to fulfil its objectives.<sup>75</sup>

#### **15.2.1.9 Other committees of municipal councils**

Apart from the committees mentioned above, a municipal council may also establish one or more committees necessary for the effective and efficient performance of any of its powers or functions.<sup>76</sup> The members of such committees are appointed from among the members of the municipal council by the municipal council, and the municipal council is also permitted to dissolve a committee at any time.<sup>77</sup> When so-called section 79 committees are established, the municipal council must adhere to the various legislative requirements:

- It must determine the functions of the committee.
- It may delegate duties and powers to the committee.
- It must appoint the chairperson of the committee.
- It may authorise a committee to co-opt advisory members to the committee, who are not members of the council, within the limits determined by the municipal council.
- It may remove a member of a committee at any time.
- It may determine a committee's procedure.<sup>78</sup>

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<sup>74</sup> See the Structures Act ss 73(3)(b) and 75 read together.

<sup>75</sup> Refer to the Structures Act ss 77-78 respectively.

<sup>76</sup> Such committees are often referred to as "s 79 committees" or "portfolio committees".

<sup>77</sup> The establishment of such committees should comply with s 160(6)(c) regarding the establishment of *inter alia* committees and the Constitution s 160(8), which requires proportionality in such committees. See also the Structures Act s 79.

<sup>78</sup> See the Structures Act s 79(2)(a)-(f).

If a municipal council has an executive committee or an executive mayor, it may appoint, in terms of section 79, certain committees of councillors to assist the executive committee or the executive mayor respectively. The number comprising such committees may not exceed the number of members of the executive committee or the mayoral committee, as was discussed above.<sup>79</sup> Depending on the circumstances, either the executive committee or the executive mayor:

- appoints a chairperson for each committee
- may delegate any power and duties to such committees
- is not divested of responsibility of such powers or duties, however
- may vary or revoke any decision taken by a committee, subject to any vested rights.<sup>80</sup>

All section 80 committees must report to either the executive committee or the executive mayor in accordance with the directions given by the executive committee or executive mayor, whichever is applicable.<sup>81</sup>

#### **15.2.1.10 The employment of municipal personnel**

The Constitution specifically entrenches the authority of a municipal council to employ personnel that are necessary for the effective performance of its functions. Each municipal council must therefore decide which personnel should be appointed and if such personnel can be afforded by the municipality concerned. Although generally speaking it is open for a municipal council to employ personnel, every municipal council is obligated to appoint a municipal manager who is to head the administration and also the accounting officer for the municipality. When necessary, a municipal council must also appoint an acting municipal manager. A person that is appointed as a municipal manager must have the relevant skills and expertise to perform the duties and functions associated with such a post.<sup>82</sup>

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<sup>79</sup> Where a municipal council has established an executive mayor, the mayor must appoint a mayor committee if the council have more than 9 members. Such mayor committee may never have more than 10 members. See s 60 of the Structures Act. Therefore, a s 80 committee, appointed in terms of s 79, can never have more than 10 members as a maximum. See the Structures Act s 80(2).

<sup>80</sup> Refer to the Structures Act s 80(3)(a)-(d).

<sup>81</sup> In the former local government dispensation a distinction was made between committees with authority to bind the municipal council through its decisions and committees that performed only administrative functions without binding authority. See, eg, the Transvaal Ordinance on Municipal Administration, O17 of 1939 ss 59 and 60.

<sup>82</sup> Apart from sophisticated managerial skills, a municipal manager should also have wide knowledge of local government matters as well as experience in public administration. See the Structures Act s 82.



### **15.2.2 Aspects regarding the delegation of powers and functions in local government structures**

It is an accepted practice in many governmental systems and public departments to allow and provide for the delegation of powers by one functionary to another. Generally speaking, the power or authority to delegate a power or function entails the lawful transfer of such a power or function from a structure which has legally been vested with a power or performance of such a power or function to another structure. Such delegation of authority is directed mainly at ensuring more effective and sufficient decision making within governmental structures. Because of its importance, the Constitution specifically entrenches the principles of agency and delegation.<sup>83</sup> In this regard, section 238 of the Constitution states as follows:

An executive organ of state in any sphere of government may-

- (a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or
- (b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

In its position as an executive organ of state in the third sphere of government, a municipal council is therefore constitutionally authorised to delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state. Such delegation must be consistent with the legislation in terms of which the power is exercised or the function is performed. Consequently, any delegation of authority must be evaluated against either the Constitution or other legislation applicable to such delegation.

Apart from section 238, a further constitutional provision regarding the delegation of powers on local government sphere is found in section 160(2) of the Constitution. According to the subsection and notwithstanding the provisions of section 238, certain functions may not be delegated by a municipal council. Such functions include

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<sup>83</sup> In the case of *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC) the Constitutional Court *inter alia* held that there was nothing in the interim Constitution prohibiting parliament from delegating subordinate regulatory authority to other bodies. The court stated that the power to delegate authority was necessary for effective law making. See para 51 at 899D-E.

- the passing of by-laws
- the approval of budgets
- the imposition of rates and other taxes, levies and duties and
- the raising of loans.

All such functions must be taken by the municipal council itself and may not be delegated to another functionary such as an executive committee or an executive mayor.<sup>84</sup> See the case of *Executive Council, Western Cape v Minister of Provincial Affairs*,<sup>85</sup> where the Constitutional Court per Ngcobo J held that section 160(2) of the Constitution simply prohibited municipalities from delegating certain matters. Section 160(2) did not give municipalities an unqualified right to delegate any other matter, however. Section 160(2) indeed provided how the power to delegate might be exercised and to which structures it might be delegated. The section did not in any way take away from municipalities the power to delegate matters except those excluded by the subsection. The court further confirmed that section 154(1) of the Constitution conferred wide legislative authority on the national government in respect of municipalities, and it authorised both national and provincial governments to enact legislation to empower municipalities to manage their affairs. According to the court, such legislative authority was wide enough to confer authority on the national government/parliament to enact section 32 of the Structures Act. The enactment of section 32, which required a municipal council to develop a system of delegation that would maximise administrative and operational efficiency was therefore not inconsistent with section 160(2) of the Constitution.<sup>86</sup>

#### **15.2.2.1 The new system for delegation in local government**

Apart from the constitutional requirements regarding the delegation of powers, the new legislative framework for local government established under the Constitution also contains several aspects regarding the delegation system that must be developed. In this regard the Local Government: Municipal Systems Act determines that a municipal council must develop a system of delegation that will maximise the admin-

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<sup>84</sup> Cf the case of *Kritzinger v Newcastle Local Transitional Council and Others* 2000 (1) SA 345 (N), where the court held that the Constitution s 160 did not mention the right to delegate to the executive committee the power to determine whether civil proceedings should be instituted or defended as one of those aspects which municipal councils were precluded from delegating. See at 350B-H.

<sup>85</sup> 2000 (1) SA 661 (CC).

<sup>86</sup> Refer to paras 126-129 at 711-712.

istrative and operational efficiency of the municipality. The system of delegation must also provide for adequate checks and balances.<sup>87</sup> The Systems Act furthermore determines that, according to the system of delegation, appropriate powers may be delegated to any of the municipality's other political structures, political office bearers, councillors or staff members. Certain powers may not be delegated to such functionaries, however. These powers are:

- a power mentioned in terms of section 160(2) of the Constitution
- the power to set tariffs
- the power to decide to enter into a service delivery agreement in terms of section 76(b) of the Systems Act
- the power to approve or amend the municipality integrated development plan (IDP).<sup>88</sup>

The system of delegation may also instruct any political structure, political office bearer, councillor or staff member to perform any of the municipality's duties.<sup>89</sup> Notwithstanding the fact that certain powers or duties have been delegated to other functionaries by a municipal council, such delegation authority is not absolute, and accordingly the system of delegation may also provide for the withdrawal of any delegation or instruction.

When a delegation or instruction is given, there are specific requirements that legally must be met. These requirements can be summarised as follows:<sup>90</sup>

- A delegation or instruction must not conflict with the Constitution, the Systems Act or Structures Act.
- It must be in writing.
- It is subject to any limitations, conditions and directions that the municipal council may impose.
- It may include the power to sub-delegate a already delegated power.

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<sup>87</sup> See the Systems Act s 59(1).

<sup>88</sup> See the Systems Act s 59(1)(a).

<sup>89</sup> Delegation therefore refers not only to the exercise of certain powers, but also to the performance of certain duties. See the Systems Act s 59(1)(b)-(c).

<sup>90</sup> See the Systems Act s 59(2)(a)-(f). Refer also to the case of *Nelson Mandela Metropolitan Municipality v Greyvenouw* CC 2004 (2) SA 81 SECLD, where the court held that the delegation of non-discretionary decisions, such as giving effect to a discretionary decision taken by a Municipal Manager to institute legal proceedings, did not offend against the purpose of the system of delegation of authority. If the Municipal Manager was authorised to exercise the decision, he/she could then legally authorise someone else to fulfil such authority. See para 49-51 and 98-99.

- It does not divest the municipal council of the responsibility concerning the exercise of the power or duty.
- It must be reviewed when a new council is elected or, in the case of a district council, when such council has been elected and appointed.

In order to strengthen and enhance accountability and to ensure a proper check on delegated powers or duties, a municipal council may, in accordance with its internal procedures, review any decision taken by a political structure, political office bearers, councillor or staff member in consequence of a delegation or instruction. Upon such review, the municipal council may either confirm, vary or revoke the decision taken by such functionary, subject to any rights that may have accrued to a person. Apart from a municipal council's authority to review *mero moto* the exercise of a delegated power or duty, a municipal council must review a decision taken in consequence of a delegation or instruction if at least one quarter of the councillors of the council request the municipal council to do so, in writing.<sup>91</sup> A municipal council may also require its executive committee or executive mayor to review any decision taken by a functionary in consequence of a delegation or instruction.<sup>92</sup>

However, according to the new legislative framework, certain delegations are restricted to executive committees or executive mayors only. In this regard, the powers to:

- take decisions to expropriate immovable property or rights in or to immovable property and
- determine or alter the remuneration, benefits or other conditions of service of the municipal manager or managers directly responsible to the municipal manager

may only be delegated to the executive committee or executive mayor, which ever is applicable within a policy framework determined by the municipal council.<sup>93</sup> It is also determined that a municipal council may delegate only to an executive committee or executive mayor or chief financial officer the authority to make investments on behalf

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<sup>91</sup> See the Systems Act s 59(3)(a).

<sup>92</sup> The Systems Act s 59(3)(b). It is important to note that any delegation or sub-delegation to a staff member of a power conferred on a municipal manager must be approved by the municipal council in accordance with the system of delegation that has been established in terms of the Act s 59(1). See s 59(4) as added by Act 51 of 2002 s 36.

<sup>93</sup> See the Systems Act s 60(1)(a)-(b).

of the municipality, within the policy framework determined by the national minister of finance.<sup>94</sup>

In order to ensure control over delegated matters, it is determined that a political structure, a political office bearer, a councillor or a staff member of a municipality to whom a delegating authority has been delegated or sub-delegated may or sometimes must refer the matter to the relevant delegating authority for a decision.<sup>95</sup> Furthermore, any person whose rights are affected by a decision taken by a functionary in terms of a power or duty delegated or sub-delegated may appeal against that decision by giving written notice of the appeal and reasons therefore to the municipal manager within 21 days of the date of the notification of the decision. Upon receipt of a notice of appeal, the municipal manager must promptly submit the appeal to the appropriate appeal authority, which must consider the appeal and confirm, vary or revoke the decision.<sup>96</sup> According to the Systems Act, various persons or a combination of persons will be regarded as an appropriate appeal authority, depending on the particular circumstances. For example, if the appeal is against a decision by a staff member other than the municipal manager, then the municipal manager is the appeal authority. If the appeal is against a decision by the municipal manager, then the executive committee or executive mayor is the relevant appeal authority. If a municipality does not have an executive committee or executive mayor, then the municipal council of the municipality is the appeal authority. Lastly, if an appeal is against a decision by a political structure such as an executive committee or executive mayor, or a political office bearer or a councillor, then the municipal council is the appeal authority. This will be the case only where the council comprises less than 15 councillors. Where the council comprises more than 15 councillors, a committee of councillors must be appointed and will be the appropriate appeal authority.<sup>97</sup> It is further required that an appeal authority commence with an appeal within six weeks from the date of referral of the appeal to it and decide the appeal within a reasonable

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<sup>94</sup> The Systems Act s 60(2).

<sup>95</sup> See the Systems Act s 61.

<sup>96</sup> In this respect it is of importance to note that no variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision. See the Systems Act s 62(3).

<sup>97</sup> A special appeal committee must be appointed by the municipal council for such a purpose and must involve councillors who were not involved in the original decision. See the Systems Act s 62(4)(a)-(c).

period. It should be noted that an internal appeal does not detract from any appropriate appeal procedure that is provided for in any other applicable law.<sup>98</sup>

In an effort to further ensure accountability and oversight in respect of delegated powers, it is determined that a political structure, office bearer, councillor or staff member to whom an authority has been delegated or sub-delegated must report to the delegating authority in such intervals as the delegating authority may require. A delegation or sub-delegation may also be withdrawn or amended, or can even lapse. It is, however, important to note that the withdrawal, amendment or lapsing of a delegation or sub-delegation does not invalidate anything done as a consequence of a decision taken in terms of that delegation or sub-delegation.<sup>99</sup>

Delegations or sub-delegations should also be reviewed at regular intervals.<sup>100</sup> In this regard, and whenever it becomes necessary to review a municipality's delegations, the municipal manager must submit to the municipal council the following:

- a report on the existing delegations issued in terms of section 59 of the Systems Act and all other delegating authorities and
- recommendations on any changes to the existing delegations which the municipal manager may consider necessary.

If the municipality has an executive committee or an executive mayor, then the municipal manager must submit his/her report and recommendations to the municipal council through such executive committee or executive mayor.<sup>101</sup>

### **15.2.3 Quorums and majorities necessary to take lawful municipal decisions**

Similarly to the two higher spheres of government, all municipal councils must comply with certain basic procedural requirements in order to take lawful decisions. In this regard the Constitution requires that a majority of the members of a municipal council be present before a vote may be taken on *any matter*.<sup>102</sup> A majority in this respect seems to refer to a normal or simple majority. Such a majority would equate to 50% + 1 of the members of a particular municipal council.<sup>103</sup> The Constitution thus

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<sup>98</sup> See the Systems Act s 62(6).

<sup>99</sup> See the Systems Act ss 63 and 64.

<sup>100</sup> According to s 59(2)(f), a delegation or instruction must be reviewed when a new council is elected.

<sup>101</sup> See the Systems Act s 65(1)-(2).

<sup>102</sup> Own emphasis added.

<sup>103</sup> Eg, if a municipal council consists of 100 members, then 50 + 1 members must be present to form a quorum and before a vote may be taken.



seems clear that a quorum of at least 50% + 1 of the members of a municipal council must be present before a decision is taken. This requirement is relevant for all matters before the council.<sup>104</sup>

If a majority of the members of a municipal council is present, then such council may take lawful decisions. There are exceptions to the general rule, however. If an aspect is considered that falls within the ambit of section 160(2) of the Constitution, then it is required that the matter can be determined only by a decision taken by the municipal council with a supporting vote of a majority of its members.<sup>105</sup> This subsection seems to indicate a so-called “absolute majority”, which in turn refers to a majority vote/supporting vote of the total number of members of a municipal council. All questions before the municipal council are decided by a majority of the votes cast.<sup>106</sup>

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<sup>104</sup> See the Constitution s 160(3)(a). During the restructuring of local government, similar provisions were applicable under the LGTA. See the case of *MEC, Development Planning and Local Government v DP* 1998 (4) SA 1157 (CC). In this case a dispute arose between members of the Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council (“the Council”) as to whether or not a simple majority or a two-thirds majority was required for the approval of its budget for the forthcoming financial year. The Council and the appellant brought an urgent application in a High Court for an order declaring a simple voting majority to be sufficient. The application was dismissed with costs. The appellant then applied for leave to appeal directly to the Constitutional Court or, in the event of such leave being refused, to the Supreme Court of Appeal or to a Full Bench of the High Court. The substance of the appeal was the constitutionality of the LGTA 209 of 1993 s 15(5), which provided that the budget of a municipal council had to be approved by a two-thirds majority of that council and that, if the budget for any financial year was not approved by 30 June of that year, the member of the executive council of a province responsible for local government could exercise the power to approve the budget. The basis of the challenge was that s 16(5) was inconsistent with the 1996 Constitution, in that it violated the Constitution s 160(3)(b) read with s 160(2)(b), which required the budget of a municipal council to be approved by a majority of the members of that council. The dispute turned on the meaning of the second sentence of Constitution Sch 6 Item 26(2), which provided that the LGTA s 16(5) and (6) may not be repealed before 30 April 1999. The court finally held that the LGTA s 16(5) could not be repealed and remained in force until 30 April 1999 despite the provisions of the Constitution s 160(3)(b), which would not apply during this limited period. S 16(5) was accordingly consistent with the Constitution s 160(3)(b). See para 53 at 1178 B-D.

<sup>105</sup> Refer to the Constitution s 160(3)(b).

<sup>106</sup> See the Constitution s 160(3)(c). The following example can be used to illustrate the practical effect of the abovementioned requirements. Imagine a municipal council that consists of 100 members. According to the Constitution s 160(3)(a), at least 50% + 1 (51 or more) members must be present before a vote may be taken. If a vote is to be taken on any matter which falls outside the functions mentioned in the Constitution s 160(2)(a)-(d), then such matters are to be decided by a majority of the votes cast of the members that are present. If we accept that 60 members out of the 100 members are present, then it would seem that the Constitution requires a majority of 50% + 1, thus equating to 30 + 1 = 31 or more votes to decide the matter. It is unclear, however, what the position would be if certain members, although present, abstained from voting. Let's say that four members of the 60 present do not vote. In this regard it is submitted that the decision is to be taken on the votes cast. If only 56 votes were cast, then the majority of such votes would determine the final outcome. If the matter before the council referred to a s 160(2) matter, then a supporting vote of [the] majority members of the municipal council would be mandated. This would mean that within a council with a total of 100 members, at least 51 (50% + 1) of the members would have to vote in

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An important principle to mention here is that municipal decisions such as those taken under the LGTA are not classified as administrative actions, and municipal councils are subsequently not required to provide reasons for their decisions. It seems that municipal decisions cannot legally be attacked on grounds of content; only on grounds of required procedures. This writer does not agree with such an hypothesis, however. Under the new constitutional dispensation, municipalities are required not only to comply with procedural requirements, but also to ensure that the result of certain actions or decisions comply with constitutional obligations.<sup>107</sup> This writer agrees that municipal decisions do not fall under the definition of administrative action, however.<sup>108</sup>

Apart from the mentioned constitutional requirements regarding internal quorums and majorities necessary to take lawful decisions, there is other national legislation which sets out certain requirements. According to the Local Government: Municipal Structures Act,<sup>109</sup> the speaker of a municipal council decides when and where the council should meet, subject to section 18(2) of the Act.<sup>110</sup> However, the speaker must convene a meeting if a majority of the councillors request in writing that the speaker convene a council meeting. The meeting must then be convened at a time

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support of the proposal. It should be clear from the abovementioned explanation that an absolute majority requires more votes than a normal majority.

<sup>107</sup> Refer again to the positive obligations set out in the Bill of Rights and also the Constitution ss 152 and 153. See also the constitutional case of the *Minister of Health v TAC (No 2)* 2002 (5) SA 721 (CC).

<sup>108</sup> See *Steele v South Peninsula Municipal Council* 2001 (3) SA 640 (C). In the case the respondent municipality decided by a majority vote to remove about half of the speed bumps which had been constructed in two "collector roads" in a suburb within its area of jurisdiction. The applicants, who were dissatisfied with the decision, applied in a Provincial Division for an order reviewing and setting aside the resolution so taken. The applicants contended that the resolution was an administrative act of the kind contemplated by the Constitution s 33 and was therefore subject to review. The court held that, although the council's resolution, apart from that portion of it which related to the allocation of expenditure, could not properly be regarded as legislation, it did not fit comfortably into the notion of administrative action either. The decision by the council rather constituted the exercise of its constitutional authority and "right to govern ... the local government affairs of its community" as intended in of the LGTA 209 of 1993 s 10C(3) read with the Act Sch 2A Items 6 and 7. The court further held that the resolution of the council could not be categorised as administrative action: the council passed a resolution pursuant to its statutory obligation to see to traffic control and road safety within its area of jurisdiction and it did not implement any particular law. The council resolution was carried by a majority. It was not a decision taken by a functionary who could be expected to furnish reasons but was a decision taken by a politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted. See at 643-644.

<sup>109</sup> The Act s 29.

<sup>110</sup> According to the Structures Act s 18(2), a municipal council must meet at least quarterly.

set out in the written request.<sup>111</sup> This position was affirmed by the Pretoria High Court in 2001 in the case of *Oelofse and others v Sutherland and others*.<sup>112</sup> The background to the case was the following: The second respondent, a municipal council established in terms of the Municipal Structures Act 117 of 1998, had 12 councillors, elected in the local government elections in November 2000. Six of the councillors (the applicants) formed a group or block in the second respondent council, while the other six formed another group or block. The first respondent, who had been elected the speaker of the second respondent council, was a member of the latter group or block. One of the members of the latter group resigned as a councillor in March 2001, leaving only 11 incumbent councillors. The first respondent then wrote to the other councillors informing them that as "all political parties and interest groups will need ... to prepare themselves for the by-election" he "will not be calling any council meeting before the by-election takes place". The six applicants thereupon signed a written notice calling upon the first respondent to convene a council meeting for 24 April 2001. The first respondent, claiming that the applicants lacked the requisite number of councillors to give a valid notice, declined to convene a council meeting. Relying on section 29(1) of the Act (which provided that "if the majority of the councillors requests the speaker in writing to convene a council meeting, the speaker must convene a meeting at a time set out in the request"), the six applicants applied in a Provincial Division for an urgent order compelling the first respondent to convene the council meeting. The first respondent, in opposing the application, contended that the phrase "a majority of councillors" in section 29(1) did not mean the majority of incumbents without counting any vacancies in the council and that the applicants therefore did not constitute a majority of councillors. The court, as per Bertelsmann J, held that although there was no definition of the word "quorum" in the Act, the legislature had provided in section 35 that a quorum of members was required before a valid meeting of a council could be held. None of the sections of the Act provided a number or formula for the calculation of the relevant quorum. Consequently, the quorum consisted of half the total number of members plus one. From this it followed that a municipal council had to have at least one half

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<sup>111</sup> See the Municipal Structures Act s 29(1). It is submitted that a majority of the councillors would seem to refer to an absolute majority, which would require a majority (50% + 1) of the total number of councillors of the particular municipal council.

<sup>112</sup> 2001 (4) SA 748 (T).

plus one of the number of potential council seats allocated to it by the MEC for local government to be filled by incumbents before the council could function.<sup>113</sup> The court further held in regard to section 160 of the Constitution that "members" referred to incumbents and that it was clear that a majority of incumbents could request a meeting of the municipal council. The Act clearly provided that, once a council was quorate, the majority of incumbents held sway. The court held accordingly that the application had to succeed. The applicants represented the majority of incumbents ('the majority of the councillors' referred to in section 29(1)) and were entitled to demand that a meeting be convened.<sup>114</sup>

Furthermore, the municipal manager of a municipality or, in the absence of the municipal manager, a person designated by the MEC for local government in the province, must call the first meeting of the council within 14 days after the council has been declared elected or after all the members of a district council have been appointed.<sup>115</sup> Where the composition of a municipal council has been changed as a result of the provisions of item 2, 3 or 7 of Schedule 6B of the Constitution, then, subject to item 6(b) of Schedule 6B of the Constitution, the speaker, must convene council meetings to deal with council matters. The first meeting must be held within 7 days.<sup>116</sup>

According to section 30 of the Structures Act, the basic constitutional requirements regarding municipal council quorums and decisions, as is set out in section 160(3) of the Constitution, are reiterated. However, the Act also provides that if there is an equality of votes on any question, the councillor presiding must exercise a casting vote in addition to his/her normal vote as a councillor.<sup>117</sup> It is further also legislated that before a municipal council is to take a decision on

- any matter mentioned in section 160(2) of the Constitution
- the approval of an integrated development plan for the municipality or any amendment to that plan
- the appointment and conditions of service of the municipal manager and a head of a department of the municipality

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<sup>113</sup> See pages 751-752.

<sup>114</sup> At 752-753.

<sup>115</sup> See the Structures Act s 29(2).

<sup>116</sup> See the Constitution Sch 6B read in conjunction with the Structures Act s 29(3)(a) and (b).

<sup>117</sup> See the Structures Act s 30(4).

the council must first require from its executive committee or executive mayor, whichever is applicable, to submit to it [the council] a report and a recommendation on the relevant matter.<sup>118</sup>

#### **15.2.4 Internal procedures regarding municipal by-laws**

With regard to the internal procedures of municipal councils, the Constitution further requires that no by-law may be passed by a municipal council unless

- all the members of the council have been given reasonable notice of such by-law
- the proposed by-law has been published for public comment.<sup>119</sup>

The enactment of by-laws forms part of a municipality's legislative powers and is discussed more fully in chapter 14 in this work.

#### **15.2.5 Procedures relating to the size of a municipal council and its committees**

The size of a municipal council or of its committees is a very important factor in determining the effectiveness and success of any municipal government. Very large municipal councils tend to be more ineffective than smaller, more compact, councils. The most effective municipal government would need a council that is ideally balanced and that is not too large but also not too small to be unrepresentative of community interests.

In relation to the size of a municipal council, the Constitution determines that national legislation may provide for criteria for determining the size of a municipal council, whether the council may elect an executive committee or other committees and also the size of the executive committee or other committees, if so permitted.<sup>120</sup> Again the Constitution seems to confirm a need for uniformity regarding the sizes of municipal councils and the committees operating within such councils. This uniformity is then achieved through national legislation, and it is not left to the provinces to determine differently in each province.<sup>121</sup>

#### **15.2.6 The making of by-laws to regulate internal procedures**

The Constitution specifically authorises a municipal council to enact or make a by-law which prescribes rules and orders for the internal arrangements of the council. The by-law also regulates the council's business and proceedings and should further

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<sup>118</sup> See the Structures Act s 30(5).

<sup>119</sup> See the Constitution s 160(4)(a)-(b).

<sup>120</sup> The Constitution s 160 (5)(a)-(c).

<sup>121</sup> See the Structures Act ch 3, as was discussed above.

deal with the establishment, composition, procedures, powers and functions of the committees within the relevant council.<sup>122</sup> In this regard it is important to note that the Constitution seems to enhance some sort of autonomy for municipalities regarding its internal procedures, as well as the functioning and operation of its committees. This position was confirmed in the case of *Executive Council's WC and KZN v Minister of Provincial Affairs*,<sup>123</sup> where the court held that the constitutional power of legislatures to regulate the internal proceedings of committees was a narrow power, not a broad one, and was related not to the executive committees of these legislatures, but rather to other committees entrusted with specific tasks or portfolios. Section 160(6) of the Constitution had to be interpreted in a similar fashion: although the section conferred an important power upon municipalities, its scope was relatively narrow and did not relate to the power to regulate the establishment or functioning of the executive of municipal councils, whatever form that executive might take, or any other committee of the municipality which was a key part of its democratic structure. It related only to task and working committees which might be established and disestablished from time to time. The court held further that the committees which fell within those contemplated in section 160(6)(c) were those regulated by sections 71, 79 and 80 of the Structures Act. The power of municipalities to appoint committees was subject to section 160(1)(c). Municipalities had the power to elect "an executive committee or other committees subject to national legislation". The effect of section 160(1)(c) was that the power of the municipalities to appoint committees contemplated in section 160(1)(c) was subject to national legislation. Therefore, there could be no objections to sections 71, 79 and 80. Apart from this, these provisions largely repeated the provisions of the Constitution, which afforded municipal councils the power to determine whether to establish committees or not.<sup>124</sup>

When one is dealing with a municipal council, one should have due regard to such by-laws as regulate the internal functioning. However, it is equally important to remember that municipal by-laws may not be in conflict with national or provincial legislation.<sup>125</sup> It is therefore safe to say that no by-laws that prescribe rules and orders

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<sup>122</sup> See the Constitution s 160(6)(a)-(c).

<sup>123</sup> 2000 (1) SA 661 (CC).

<sup>124</sup> See paras 100-104 at 703-705.

<sup>125</sup> See again the Constitution s 156(3). A by-law that conflicts with either national or provincial legislation is invalid.

for internal arrangements, business or proceedings or relating to municipal committees, may be different from the provisions regarding such aspects that have been determined in the legislation of the two higher spheres of government.

#### **15.2.7 Procedures regarding the manner of conducting the internal business of municipal councils**

All municipal councils are obligated by the Constitution to conduct their business in an open manner.<sup>126</sup> In essence this means that all activities of municipalities are open for public scrutiny and oversight. This obligation is applicable to not only the municipal council but to all of its committees. Only when it is reasonable to do so may a municipal council or a committee of a council close its sittings. Such closure would mean no publicity regarding the content or outcome of a particular issue or issues.<sup>127</sup> An interesting aspect is that neither the Structures Act nor the Systems Act deals further with the issue of closure of sittings. In the absence of any other such legislative provisions, it is up to each individual municipality to enact by-laws which prescribe rules and orders relating *inter alia* to its internal arrangements and its business and proceedings.<sup>128</sup>

#### **15.2.8 Internal procedures regarding the participation of members of municipal councils in council proceedings**

The final constitutional provision dealing with internal council proceedings relates to the participation of members in council or committee proceedings. In this respect the Constitution states that members of a municipal council are entitled to participate in the proceedings of the council or in the proceedings of the committees within the council.<sup>129</sup> The Constitution however circumscribes the entitlement to participate in three ways: firstly, members are entitled to participate in a manner that allows parties and interests reflected within the council to be fairly represented. What is or should constitute fair representation is somewhat uncertain and needs better clarification.

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<sup>126</sup> See the Constitution s 160(7).

<sup>127</sup> In order to determine the reasonability of closing a council or committee sitting, the council or committee must determine the circumstances objectively and after due regard to all relevant aspects has been given. The Constitution specifically requires due regard to be given to the nature of the business that is being transacted. See s 160(7). Eg, when a council is considering implementing a strategic law enforcement operation, it is obvious that the nature of such business requires secrecy and non-disclosure.

<sup>128</sup> See s 160(6)(a)-(b) above.

<sup>129</sup> It should be noted that the Constitution does not exclude certain members or certain committees. The Constitution therefore seems to suggest that all the members of a council should participate in all proceedings of the council, if they so wish.

As a starting point, one can argue that fair representation would equate to proportional representation. The *prima facie* wording of the Constitution seems to suggest that the requirement of proportional representation is applicable to all committees of a municipal council. The wording of section 160(8) of the Constitution does not distinguish directly between different municipal councils or any of its committees. When the issue regarding the requirement of fair representation in a council or a committee came before the courts, the highest court in our state held a different view. See the matter of the *DA v Masondo No and another*<sup>130</sup>. The main issue in the case was whether or not minority parties in the Johannesburg municipal council were entitled to representation on a mayoral committee established under the provisions of the Local Government: Municipal Structures Act. Section 60 of the Act provided that “if a municipal council has more than nine members, its executive mayor (a) must appoint a mayoral committee from among the councillors to assist the executive mayor”. Section 160(8) of the Constitution provided that “members of a municipal council are entitled to participate in its proceedings and those of its committees in a manner that (a) allows parties and interest reflected within the council to be fairly represented”. The appellants argued that on a proper construction of section 60(1)(a) of the Structures Act, read with section 160(8)(a) of the Constitution, the representation of minority parties is a requirement even if the subsection does not expressly say so. The respondents contended that neither the Constitution nor the Structures Act required a mayoral committee to have minority party representation. Chapter 7 of the Constitution, which contained the framework for local government, provided for three types of executive system in municipal government: a plenary executive system, an executive committee system and the executive mayoral system. The Johannesburg municipal council has the latter system.

The majority members of the Constitutional Court held that the primary function of the mayoral committee was the rendering of assistance to the mayor in the exercise of his authority. This view was supported by the provisions of section 160(6)(c) and (8) of the Constitution which, in context, referred only to committees elected by the municipal council.<sup>131</sup> It also held that, although the democratic principle and the requirement of minority party representation in the deliberative processes of local gov-

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<sup>130</sup> 2003 (2) SA 413 (CC).

<sup>131</sup> See paras 19-20 at 420-421.



ernment were important, so was the need for effective delivery of services. A mayoral committee, which was personally chosen by the mayor to assist in the discharge of his duties as mayor, was simply not the type of committee contemplated by section 160(8). The mayor was entitled to choose that committee because he or she was personally responsible for what it did. To force the mayor to choose a multiparty committee to discharge these responsibilities would be to blur the distinction between an executive mayoral system and an executive committee system.<sup>132</sup> The Structures Act did not describe the mayoral committee as a committee of the municipal council; nor did it expressly require that the mayoral committee should have minority party representation. There were a number of factors pointing to a deliberate distinction in the Act between committees of the municipal council and a mayoral committee. First, the powers granted in section 60(1) of the Act to appoint, dismiss and delegate were given to the mayor, not the municipal council; secondly, the Act expressly required that the composition of the executive committee be representative of parties and interests in the council (section 43(2) of the Act) when dealing with the executive committee system, but not so when dealing with mayoral committees; and, thirdly, there is a deliberate distinction between the mayoral committee and the municipal committees appointed under section 80 of the Act.<sup>133</sup>

The court continued that the power of the municipal council under section 60(3) of the Act to insist that the mayor exercise certain powers or perform certain functions in conjunction with the mayoral committee did not mean that the mayoral committee was a committee of the council. The mayoral committee was accountable to and controlled by the executive mayor only.<sup>134</sup> The mayoral committee was not a committee of the municipal council as contemplated in section 160(8) of the Constitution, and the provisions of the section were thus not applicable to the composition of the mayoral committee.<sup>135</sup> Finally the contention of the appellants that section 60(1)(a) fell foul of section 160(8) of the Constitution because it did not require minority representation on a mayoral committee had to be rejected: since it was clear that the provisions of section 160(8) had no relevance to the appointment of a mayoral committee, it followed that neither the Structures Act nor the Constitution required minor-

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<sup>132</sup> Paras 22-23 at 421D/E-422A.

<sup>133</sup> Paras 24-27 at 422A/B-I, paraphrased.

<sup>134</sup> Paras 28-30 at 422I/J-423H, paraphrased.

<sup>135</sup> Para 33 at 424D.

ity representation on a mayoral committee. Accordingly, section 60(1)(a) was not in conflict with the Constitution.<sup>136</sup>

This writer disagrees with the reasoning of the court, however. Although the conclusion of the court that a mayoral committee is different from other committees and should not allow for proportional representation should be accepted, the basis for the court's decision is wrong. It is clear that the wording of the Constitution, read together with the Structures Act, is vague and uncertain and that the position should have been corrected through legislative amendments and clarification.<sup>137</sup> It is submitted that it is very dangerous for our courts to decide and read things into the legislation where the legislature has failed to express its legislative intentions clearly. Such an assumption of legislative authority could in itself be contrary to the Constitution and could be unconstitutional when tested against the principle of separation of powers. Rather, the courts should demand clarification of an issue from the legislature. Secondly, participation should be allowed in a manner that is consistent with democracy and, thirdly, such participation may be regulated by national legislation.<sup>138</sup>

### **15.3 The privileges and immunities of municipal councils and their members**

The protection of members of legislative organs of the state is not new to South Africa's constitutional system. During the development of the parliamentary system in England, many privileges developed to protect members against interference or pressures from outside the legislature. Although the protection of privileges was originally directed at members of parliament, over the years such protection was also extended to members of other legislatures. Within the new constitutional dispensation in South Africa such privileges have been entrenched on all three spheres of government.<sup>139</sup> In respect of local government, the Constitution confirms that provincial legislation within the framework of national legislation may provide for privileges and immunities of municipal councils and their members.<sup>140</sup>

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<sup>136</sup> Para 34 at 424E-G.

<sup>137</sup> See the minority decision of the *Masondo* case *supra* fn 130 at 429 *et seq.*

<sup>138</sup> Refer to the Constitution s 160(8)(a)-(c). See also the Structures Act chs 3 and 4.

<sup>139</sup> According to the Constitution ss 58, 71 and 117, both members of parliament and of provincial legislatures have certain privileges such as freedom of speech in the legislature or its committees and are also exempted from civil or criminal proceedings in relation to anything they have said or produced before the legislature or any of its committees.

<sup>140</sup> See the Constitution s 161. It is conspicuous that the Constitution does not directly entrench the privileges of members of municipal councils in a similar fashion as the protection afforded to the

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A closer evaluation of section 161 of the Constitution indicates that the constitutional drafters intended to give more authority to the provincial legislatures in respect of municipal privileges, although not a *carte blanche* power. The provincial legislatures could each provide for privileges or immunities of municipal councils and their members in each province, but such legislative provisions have to fall within the framework of national legislation. The autonomy regarding privileges and immunities is thus circumscribed by national framework directions. In compliance with the Constitution, the Municipal Structures Act determines that provincial legislation enacted in terms of section 161 of the Constitution provide for at least the following:<sup>141</sup>

- that councillors have freedom of speech in a municipal council and in its committees, subject to the relevant council's rules and orders as is envisaged in section 160(6) of the Constitution and
- that councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything that they have said in, produced before or submitted to the council or any of its committees or for anything revealed as a result of anything that they have said in, produced before or submitted to the council or any committee of the council.

On the point of freedom of speech in municipal council meetings, two particular aspects are of importance. In the first instance, freedom of speech is a constitutionally recognised fundamental right and may only be limited in accordance with the Constitution.<sup>142</sup> Secondly, freedom of speech is important to allow for fair and free political criticism and is a core component of the principle of a democratic government. Confirmation of this position was given in various court decisions.<sup>143</sup>

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members of the two higher spheres of government. Such diminution in the protection of local government affairs is somewhat unfortunate. It is submitted, as is the case in respect of other issues, that the Constitution could indeed have provided equal protection to certain constitutional issues for all three spheres of government. The protection given by the Constitution in respect of local government matters merely confirms that national or provincial legislation may provide for certain aspects. Such legislative provisions are much easier to amend and thus provide less protection than the Constitution itself.

<sup>141</sup> See the Structures Act s 28(1)(a)-(b).

<sup>142</sup> See the Constitution ss 16 and 36 respectively.

<sup>143</sup> See, eg, *Waters v Khayalami Metropolitan Council* 1997 (3) SA 476 (W), where the court held that the censuring of applicant who criticised and requested information regarding other councillors stifled freedom of expression and restricted debate in the respondent's meetings. The action of the respondent militated against the fundamentals of democracy. The court held that in an open and accountable society those who held power and were responsible for public administration ought to be open to criticism. See at 491C-D. See also the case of *De Lille v The Speaker of the National Assembly* 1998 (3) SA 430 (C).

It should be noted that the enactment of provincial legislation in terms of section 161 of the Constitution is not compulsory. Provinces may enact such legislation if they so wish. It is thus quite possible that some provincial legislatures will not opt to enact such legislation. To address such situations, the Structures Act provides that until such provincial legislation has been enacted, the privileges referred to in section 28(1) of the Act will apply to all municipal councils in the province concerned.<sup>144</sup> Apart from the legislative provisions mentioned above, it is advisable for all municipal councils to make provision for the privileges and immunities of council members in their own internal rules and orders. This is particularly important since the protection given in the Structures Act is made subject to a council's rules and orders.<sup>145</sup>

It seems that the Act wants to protect a certain measure of autonomy for municipalities in respect of the privileges and immunities of their members. However, one must emphasise the constitutional provision that any municipal by-law that is in conflict with a national or provincial law is invalid. The autonomy is therefore relatively restricted. Only a limited measure of autonomy regarding privileges is given to municipalities within a national regulatory framework.

#### **15.4 Internal municipal functionaries and procedures**

In accordance with the new legal framework, all municipalities are obligated to define the specific role and area of responsibility of each political structure and each political office bearer of the municipality. This also includes the role and responsibilities of the municipal manager.<sup>146</sup> The respective roles and areas of responsibility must be

- defined in precise terms by way of separate terms of reference and must be in writing
- acknowledged and given effect to in the rules, procedures, instructions, policy statements and other written instruments of the specific municipality.<sup>147</sup>

The terms of reference mentioned above may also include the delegation of powers and duties to the relevant functionary(ies).

When the respective roles and areas of responsibility of each political structure, political office bearer or the municipal manager are being defined by the relevant

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<sup>144</sup> See the Structures Act s 28(2).

<sup>145</sup> Cf the case of *Herselman No v Botha* 1994 (1) SA 28 (A).

<sup>146</sup> See the Systems Act s 53(1).

<sup>147</sup> Refer to the Systems Act s 53(2)(a)-(b).

municipality, the municipality must determine five aspects:<sup>148</sup>

- the relationship among those political structures, office bearers and the municipal manager and also the manner in which they must interact
- the appropriate lines of accountability and reporting procedures for the functionaries
- the mechanisms, processes and procedures for minimising cross-referrals and prevention of unnecessary overlapping of responsibilities between the functionaries
- the mechanisms, processes and procedures for resolving disputes between the functionaries *inter se*
- the mechanisms, processes and procedures to ensure interaction between the functionaries and other staff members of the municipality and between the councillors and the municipal manager and other staff members of the municipality.

It is further important to note that if a specific municipality has a decentralised regional administration in any part of its area, the municipality must determine mechanisms, processes and procedures for interaction between the regional management structures and

- the ward councillor or other councillors responsible for that part of the municipal area
- any sub-council or ward committee where applicable
- the local community in that area.<sup>149</sup>

### **15.5 Code of conduct for councillors**

Within the new legal system for local government, specific provision has been made for a code of conduct for political office bearers/councillors. The main aim of this code of conduct is to enhance the overall principles of accountability and responsiveness that are entrenched in the Constitution.<sup>150</sup> The inclusion of a specific code of conduct for councillors is not a new aspect, but has always been included in the legal structure of the third sphere of government.<sup>151</sup> A code of conduct for political

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<sup>148</sup> See the Systems Act s 53(5)(a)-(e).

<sup>149</sup> The Systems Act s 53(6)(a)-(c).

<sup>150</sup> The Constitution s 1 provides the basic values on which the new democratic state is founded.

<sup>151</sup> See, eg, the LGTA of 1993 Sch 7.

members of a legislature is not only required on the lowest level of government in a state but is also prescribed for the higher spheres of government.<sup>152</sup>

On local government level, the Systems Act determines that the code of conduct that is contained in Schedule 1 of the Act applies to every member of a municipal council. This code of conduct thus applies only to the political component of a municipality, as a municipal council comprises elected representatives only.<sup>153</sup> According to the preamble of the code of conduct, councillors are elected to represent local communities on municipal councils, to ensure that municipalities have structured mechanisms of accountability to local communities and to meet the priority needs of communities by providing effective, equitable and sustainable services. In the fulfilment of their roles, councillors must be accountable to local communities and must report back at least quarterly to constituencies on council matters, including the performance of the municipality. In an effort to ensure that councillors fulfil their obligations and to support the achievement by a municipality of its objectives as set out in the Constitution and section 19 of the Municipal Structures Act, a detailed code of conduct has been established.<sup>154</sup>

#### **15.5.1 General conduct of municipal councillors**

According to the code of conduct for councillors, every councillor must:

- perform the functions of his/her office in good faith, honestly and in a transparent manner
- act in the best interests of the municipality at all times and in such a way that the credibility and integrity of the municipality are not compromised.

Conduct relating to aspects of good faith, honesty, transparency and best interests are not defined, and it is submitted that an objective determination of all relevant circumstances will be required in order to determine whether or not a councillor has breached these requirements in specific circumstances.<sup>155</sup>

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<sup>152</sup> See, eg, the Constitution ss 96 and 136. Both the members of cabinet and deputy ministers as well as the members of the executive council of a province must act in accordance with a code of ethics that is prescribed by national legislation. According to internal house rules, both national and provincial executive members act in a prescribed manner. See also the Executive Members Ethics Act 82 of 1998.

<sup>153</sup> Officials and the public are excluded from such code of conduct, and the code applies only to municipal councillors.

<sup>154</sup> Refer to the preamble of the code of conduct for councillors set out in the Systems Act Sch 1.

<sup>155</sup> See the Systems Act Sch 1 Item 2.

### **15.5.2 Attendance at meetings**

Every councillor must attend each meeting of the municipal council and of a committee of which that councillor is a member. Exceptions to this obligation will be accepted only when

- leave of absence is granted in terms of an applicable law or as may be determined by the rules and orders of the council or
- if the councillor is required in terms of this code to withdraw from the meeting.<sup>156</sup>

Provision is further made that a municipal council may impose on a councillor a fine as is determined by its standing rules and orders for

- not attending a meeting as is required or
- failing to remain in attendance at such a meeting.

If a councillor is absent from three or more consecutive meetings of the council or a committee meeting which he/she is required to attend, then he/she must be removed from office as a councillor.<sup>157</sup> Any proceeding for the imposition of a fine or the removal of a councillor must be conducted in accordance with a uniform standing procedure, which procedure each municipal council must have in place for the purposes of this item. Such procedure must naturally comply with the rules of natural justice, which in turn form part of the constitutional right to just administrative action.<sup>158</sup>

### **15.5.3 Disclosure of interests and personal gain**

According to item 5 of the code of conduct, a councillor must

- disclose to the municipal council, or to any committee of which the councillor is a member, any direct or indirect personal or private business interest that that councillor, his or her spouse, partner or business associate may have in any matter before the council or the committee
- withdraw from the proceedings of the council or committee when that matter is considered, unless the council or the committee decides that the councillor's direct or indirect interest is trivial or irrelevant.<sup>159</sup>

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<sup>156</sup> Refer to the Systems Act Sch 1 Item 3.

<sup>157</sup> It is evident that the Act is very strict and severe on this point. Councillors should be well advised to note that the Act is mandatory in this regard.

<sup>158</sup> See the Systems Act Sch 1 Item 4 as well as the Constitution s 33.

<sup>159</sup> It is important to note that the Act Item 1 of the code of conduct defines a "partner" as a person who permanently lives with another person in a manner as if married. This inclusion is to be welcomed, as a much wider disclosure of interests is required. In a country where corruption is the order of the day, strict and extensive measures of anti-corruption prevention are indeed needed.



It is furthermore legislated that a councillor who or whose spouse, partner, business associate or close family member acquired or stands to acquire any direct benefit from a contract concluded with the municipality must disclose full particulars of the benefit of which the councillors is aware.<sup>160</sup> Such disclosure is to be done at the first meeting of the municipal council at which it is possible for the councillor to make such disclosure. Such disclosure is not required in instances where an interest or benefit has been acquired in common with other residents of the municipality, however.<sup>161</sup>

A councillor is further prohibited from using his/her position or privileges as a councillor or from using confidential information obtained as a councillor for private gain or to improperly benefit another person. Furthermore, no councillor, except with the prior consent of the municipal council, may

- be a party to or beneficiary under a contract for the provision of goods or services to the municipality or for the performance of any work other than the work as a councillor for the municipality
- obtain a financial interest in any business of the municipality and
- appear on behalf of any other person before the council or a committee for a fee or other consideration.

Prior consent of the municipal council can be vetoed by more than a quarter of the councillors of a particular council.<sup>162</sup>

The code of conduct for councillors also requires that when a councillor is elected or appointed, he/she must declare to the municipal manager in writing and within 60 days of the date of such election or appointment the following financial interests which he/she holds:

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<sup>160</sup> See the case of *Mpakathi v Kghotso Development CC and Others* 2003 (3) SA 429 (W). The essential question in the case was whether or not a councillor of a local authority may purchase property at a sale in execution where the local authority was the judgment creditor. According to the Local Government Ordinance 17 of 1939 (T) s 40, a councillor could not enter into a contract with the council in which he had any direct or indirect pecuniary interest unless prior approval had been obtained from the administrator. The court held that, in selling the property, a contract came into existence between the sheriff and the purchaser. The judgment creditor was not a party to the contract. The argument of the plaintiff that the contract should be declared void had to be dismissed. See paras E-F at 438.

<sup>161</sup> See the Systems Act Sch 1 Item 5(3).

<sup>162</sup> If more than one quarter of the councillors of a municipal council object to consent's being given to a councillor that has requested consent pertaining to an aspect where personal gain is involved, then such consent may be given to the councillor only with the approval of the MEC for local government in the specific province. See the Systems Act Sch 1 Item 6.

- shares and securities in any company
- membership of any close corporation
- interests in any trust
- directorships
- partnerships
- other financial interest in any business undertaking
- his/her employment and remuneration
- interest in property
- pension
- subsidies, grants and sponsorships by any organisation.

Apart from declaring the abovementioned interests, a councillor is also obligated to declare to the municipal manager any change in the nature or detail of his/her financial interests, in writing and on an annual basis.<sup>163</sup> Furthermore, a councillor must also declare all gifts received that are above a prescribed amount.<sup>164</sup>

#### **15.5.4 Undertaking of other paid work and the acceptance of rewards, gifts and favours**

The code of conduct further determines that a full-time councillor may not undertake any other paid work except with the consent of the relevant municipal council. Such consent should not be withheld unreasonably.<sup>165</sup>

No councillor may request, solicit or accept any reward, gift or favour for

- voting or not voting in a particular manner on any matter before the council or a

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<sup>163</sup> See the Systems Act Sch 1 Item 7(1) and (2). On close consideration of the various interests that must be declared, one can justifiably question whether such declaration is too extensive and whether it is indeed unnecessary. Keeping in mind the purpose of such declaration, it seems inevitable that after having been elected or appointed some councillors will be legally obligated to declare to the municipal manager certain personal or private interests that do not relate to his or her position as a councillor. To what extent these provisions may limit a councillor's other rights, such as a right to personal privacy, is not absolutely certain and may well cause legal disputes in future. In an attempt to obviate some of these problems, the Systems Act determines that the municipal council must determine which of the financial interests mentioned above should be made public. Such determination must take into account the need for confidentiality of certain matters, as well as the importance of the public interest for disclosures.

<sup>164</sup> The amount is not fixed by the Act but is prescribed by regulations. According to the Local Government: Municipal Systems Regulations as published under GNR 459 in GG 22328 of 25 May 2001, gifts received by a councillor must be declared where:

- the value of the gift exceeds R1 000, and
- the value of gifts received from a single source in any calendar year exceeds R1 000.

A declaration of gifts received by a councillor must also contain a description of such gift/gifts and must indicate the value and source of such gift/gifts.

<sup>165</sup> See the Systems Act Sch 1 Item 8.

committee of the council

- persuading the council or any committee to exercise any power, function or duty in a certain regard
- making a representation to the council or any committee of the council
- disclosing privileged or confidential information.<sup>166</sup>

**15.5.5 *The unauthorised disclosure of information, intervention in the administration of the municipality and aspects concerning council property***

Without the permission of the municipal council or a committee, a councillor may not disclose any privileged or confidential information of the council or committee to any unauthorised person. For the purposes of this item, privileged or confidential information includes any information:

- determined by the municipal council or committee to be privileged or confidential
- discussed in closed session by the council or committee
- whose disclosure would violate a person's right to privacy
- that is declared to be privileged, confidential or secret in terms of the law.<sup>167</sup>

It is further also provided that, except if provided by law, no councillor may:<sup>168</sup>

- interfere in the management or administration of any department of the council unless mandated by the council to do so
- give or purport to give any instruction to any employee of the council, except when authorised to do so
- obstruct or attempt to obstruct the implementation of any decision of the council or a committee by an employee of the municipality
- encourage or participate in any conduct which would cause or contribute to the mal-administration in the relevant council.

A councillor may also not use, take, acquire or benefit from any property or asset owned, controlled or managed by the municipality to which that councillor has no

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<sup>166</sup> See the Systems Act Sch 1 Item 9(a)-(d).

<sup>167</sup> See the Systems Act Sch 1 Item 10(2)(a)-(d). It should be noted that according to Item 10(3) the prohibition of privileged or confidential information does not derogate from the right of any person to access to information in terms of national legislation. This item is really unnecessary, as it is obvious that such prohibitions must comply with the law of the state in general. Reference in this instance to national legislation is also incorrect and should rather refer to the protection given in terms of the provisions of the Constitution.

<sup>168</sup> See the Systems Act Sch 1 Item 11.

right. Furthermore, no councillor may be in arrears to the municipality for rates and service charges for a period longer than three months.<sup>169</sup>

#### **15.5.6 Breaches of the code of conduct**

According to item 13 of the code of conduct of councillors, if the chairperson of a municipal council, on reasonable suspicion, is of the opinion that a provision of the code has been breached, the chairperson must:

- authorise an investigation of the facts and circumstances of the alleged breach
- give the councillor concerned a reasonable opportunity to reply in writing regarding the alleged breach
- report back to a meeting of the municipal council after the requirements of the investigation and reply from the councillor have been complied with. Such report to the municipal council is open to the public, and the chairperson must report the outcome of the investigation to the MEC for local government in the province concerned.<sup>170</sup>

Because of the serious consequences that can follow when the code has been breached, not only for the councillors of a municipal council but ultimately also for the principle of democracy, the chairperson of each municipal council must ensure that, when each councillor is taking office, he/she is given a copy of the code of conduct and also that a copy of the code is available in every room or place where the council meets.<sup>171</sup>

It is further permitted for a municipal council to investigate and make a finding on any alleged breach of a provision of the code of conduct or to establish a special committee to investigate and make a finding on any alleged breach, and also to make appropriate recommendations to the relevant municipal council.<sup>172</sup> If the council or special committee has found that a councillor has breached the code, the council may do any of the following:

- issue a formal warning to the councillor
- reprimand the councillor

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<sup>169</sup> Refer to the Systems Act Sch 1 Items 12 and 12A. Item 12A was inserted by Act 51 of 2002 s 45. In light of a councillor's sufficient remuneration packages, there should be no acceptable reason why such a councillor is not up to date with his/her own municipal rates and taxes. Councillors have a duty to set an example in terms of punctual payment for services received.

<sup>170</sup> See the Systems Act Item 13(1), (2) and (3).

<sup>171</sup> See the Systems Act Item 13(4).

<sup>172</sup> See the Systems Act Sch 1 Item 14(1)(a)-(b).

- request the MEC for local government in the province to suspend the councillor for a period
- fine the councillor or
- request the MEC to remove the councillor from office.<sup>173</sup>

Any councillor who has been warned, reprimanded or fined may appeal to the MEC in writing within 14 days of having been notified of the decision of the municipal council. The appeal should set out the reasons on which the appeal is based. If an appeal is lodged, a copy thereof must be provided to the council, which may in turn within 14 days of receipt of the appeal make any representation thereto to the MEC in writing.<sup>174</sup>

After having considered the appeal, the MEC may then confirm, vary or set aside the decision of the council and inform both parties of the outcome. The MEC may also appoint a person or a committee to investigate any alleged breach of the code and to make a recommendation on whether the councillor should be suspended or removed from office.<sup>175</sup> Lastly, it is also provided that if the MEC is of the opinion that a councillor has breached a provision of the code and that such contravention warrants a suspension or removal, the MEC may

- suspend the councillor for a period and on conditions determined by the MEC or
- remove the councillor from office.

Any investigation or decision must be in accordance with the rules of natural justice and obviously also any other applicable laws.<sup>176</sup> According to case law, nothing in item 13 or 14 permits an MEC to act *mero motu*, particularly in a case where the

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<sup>173</sup> Two aspects should be noted in this regard. First is that the municipal council must decide on an appropriate action against a councillor who has breached the code of conduct. The Act does not allow for the special committee to decide on an appropriate punishment. Secondly, it is only the MEC that can remove a councillor from office. The municipal council may only request such removal. See the Systems Act Sch 1 Item 14(2).

<sup>174</sup> It should be of interest to note the decision in *Van der Merwe and others v Slabbert NO and Others* 1998 (3) SA 613 (N). In the case, which concerned allegations of breaches of the code of conduct for councillors promulgated under the LGTA, the court held that investigating bodies in code breach investigations do not necessarily need to apply the rules of natural justice during their investigations, depending on the circumstances. However, whenever a statute empowered a public official or body to do something or to give a decision which would affect an individual's liberty, property or other existing rights, then the rules of natural justice come into play and the investigating body does not have an unfettered discretion to determine the procedure that should be followed. See at 624D-H.

<sup>175</sup> The Systems Act Sch 1 Item 14(3) and (4). If the MEC appoints a one man or other committee to investigate a breach of the code of conduct, then the Commissions Act 8 of 1947 as amended, or where appropriate, applicable provincial legislation may be applied.

<sup>176</sup> See the Systems Act Item 14(6)-(7).

municipal council has taken definite steps to investigate an alleged breach of the code of conduct. The MEC is obliged to await the outcome of the council's own investigation and recommendation before he/she acts in terms of item 14(1) and (6).<sup>177</sup>

#### **15.5.7 Application of the code of conduct to traditional leaders**

An important addition to the code of conduct is that most of the items also apply to a traditional leader who participates in or who has participated in the proceedings of a municipal council in terms of section 81 of the Municipal Structures Act. The code of conduct applies to traditional leaders in the same way as it applies to councillors. If a traditional leader has breached the code, the council may either issue a formal warning to him or request the MEC to suspend or cancel his right to participate in the proceedings of the council. It should be noted, however, that the suspension or cancellation of a traditional leader's right to participate in the proceedings of a council does not affect that traditional leader's right to address the council in terms of section 81(3) of the Municipal Structures Act.<sup>178</sup>

#### **15.6 The procedures regarding the election of municipal office-bearers**

A specific procedure has been determined in Schedule 3 of Municipal Structures Act, which should be applied whenever a municipal council meets to elect a speaker, an executive mayor, a deputy executive mayor, a mayor or a deputy mayor.<sup>179</sup> In short, the procedure requires the presiding person at a meeting of the municipal council to call for the nomination of candidates. A nomination must be made on the form determined by the municipal manager and it must be signed by two members of the municipal council. All nominees must also indicate their acceptance of the relevant nomination by signing either the nomination form or any other form of written confirmation.<sup>180</sup>

After the nominations have been called for, the person presiding at the meeting must announce the names of the persons who have been nominated as candidates. No debate on such nominations is permitted. If only one candidate is nominated, then the presiding person must declare that candidate elected. If there is more than one candidate, then a vote by secret ballot must be taken at the meeting. During

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<sup>177</sup> See *Van Wyk v Uys No 2002 (5) SA 92 (C)* at 99-100.

<sup>178</sup> See the Structures Act Sch 1 Item 15(1)-(8).

<sup>179</sup> See the Structures Act Sch 3 Item 1 as amended.

<sup>180</sup> See the Structures Act Sch 3 Item 3. A nominee can thus accept his/her nomination through any form of written confirmation. Oral acceptance is not permitted, however.

such a vote each councillor present at the meeting may cast one vote, and the presiding person must declare the candidate who has received a majority of the votes to be elected.<sup>181</sup>

A specific elimination procedure is provided for if no candidate has received a majority of the votes. In such a case the candidate who has received the lowest number of votes must be eliminated from the procedure and a further vote taken on the remaining candidates in accordance with item 6 of the schedule. Such an elimination procedure must be repeated until a candidate receives a majority of votes for the position nominated.<sup>182</sup>

If only two candidates are nominated or remain after an elimination procedure and those two candidates receive the same number of votes during an election to decide between them, then a further meeting must be held within seven days, at a time determined by the presiding person. The same procedure mentioned above is to be applied during the follow-up meeting as if it were the first meeting for the election of a specific position. If at this further meeting only two candidates are nominated or remain after an elimination procedure and the two candidates receive the same number of votes, then the presiding person must determine by lot who of the two candidates will hold the office for which the election has taken place.<sup>183</sup>

## 15.7 Conclusion

It is submitted that the new legal framework that has been enacted to regulate and control the internal functioning and procedures of all municipal councils has established a firm foundation for municipalities to conduct their affairs and fulfil their obligations and functions properly. Similar to the position in a private company or business, no municipality will be in a position to fulfil its overall constitutional duties effectively and sufficiently without strict internal control and management. Local

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<sup>181</sup> See the Structures Act Sch 3 Items 4-6. Again, the Act seems to refer to a normal majority of votes that is needed to elect a nominee for a certain position. A normal majority does not refer to 50% + 1 of the total number of councillors represented in the relevant municipal council.

<sup>182</sup> If two or more candidates have each received the lowest number of votes during the taking of a vote, then a separate vote must be taken on those candidates alone, and should be repeated as often as may be necessary to determine which candidate is to be eliminated. See the Structures Act Sch 3 Item 7(2).

<sup>183</sup> The purpose of the first postponement is to give the councillors a chance to re-think their votes and to determine the issue afresh. If the same result is obtained, the presiding person must determine the outcome by lot. A determination by lot is generally understood to mean the two names will be put in a hat and the presiding person will at random select one name from the hat, which person will then be elected to hold office in the specific position. Determination by lot can also be conducted by flipping a coin.



governments are not private companies or business institutions *per se*, however, and their functioning is often complicated with policy considerations and political objectives. In this regard it is important for all municipalities that a balanced approach between political idealism and private realism is achieved. Again, strong emphasis should be placed on the main reasons for local government's existence and their constitutional objectives. All internal structures and procedures must be directed at ensuring compliance with the predetermined constitutional duties and obligations. This writer is of the opinion that the new legal framework regarding the internal structures and functioning of municipal councils can indeed succeed in ensuring that municipal duties and obligations are met. Such success is dependant on the proper and unbiased enforcement of all the newly enacted legal rules, however.

## **Municipal services and service delivery and the basic functional activities of municipal governments**

### **16.1 Introduction**

In their capacity as the third and lowest sphere of government and the one that functions closest to local communities, municipal governments have often been described as comprising the sphere of government that is tasked mainly with the development and provision of services to communities. Some writers have even commented that if a municipality cannot or does not perform its service provision obligations, it should forfeit its right to exist.<sup>1</sup> This idealism is strongly entrenched in the new constitutional framework that has been devised for local government.<sup>2</sup>

Although all municipalities have been constitutionally tasked with providing sustainable and effective services, such a realisation is not as easy as it may seem. There are many different aspects that must integrate with one another before a municipality will be able to succeed in this mammoth task. One should therefore look not only at the different services that should be provided by local governments but also to the various obstacles and problems to their fulfilling their mandate. Factors that influence services and service delivery change drastically from one municipal term to the next, and continuous and long term planning is of the order of the day.<sup>3</sup>

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<sup>1</sup> See Craythorne (1997) 391.

<sup>2</sup> According to the Constitution s 152(b), one of the main objectives of local government is to ensure the provision of services to communities in a sustainable manner. The provision of services is thus a cardinal function, if not the most important function, of every municipal government.

<sup>3</sup> New demands on services and service provisions are especially relevant in many formerly underdeveloped areas and also in areas where drastic urbanisation is taking place. Without proper planning, future service delivery objectives will most definitely be jeopardised.

## **16.2 The new vision of local government service delivery**

### **16.2.1 Assessing basic needs**

It has been mentioned above that local government administrations have been undergoing radical changes under the new constitutional dispensation of South Africa. Unfortunately many of such changes have not been driven by clear and precise visions of the role and responsibilities that all municipalities should play. A practice that was introduced during the process of amalgamating and restructuring municipal administrations and which was subsequently proceeded with in the new local government system was to adopt and extent the structures and functioning of the former established municipal administrations without significant changes.<sup>4</sup>

On the contrary, it must be said that many municipalities indeed used the amalgamation process to initiate processes of review of their administrative organisation. This is how many innovative approaches to especially strategic management procedures were introduced, for example. Such approaches focussed mainly on technical problems, however, and little attention was given to rethinking the basic principles on which the administrations were organised. For the transformation and new local government system to be successful, a process of administrative reorganisation is required. This is particularly essential if all municipalities are to achieve the new constitutional obligations.<sup>5</sup> In order to enhance service delivery, almost all municipalities have wide-ranging options. Most prominent, however, is the need to assess and plan strategically for the most appropriate and effective forms of service delivery mechanisms within each particular municipal area. Municipal administrations must choose those delivery options that would ensure maximum benefit and efficiency.

### **16.2.2 Basic principles and approaches on service delivery**

In order to achieve optimal service delivery, each municipal government should choose a delivery system that is best suited to the type of municipality concerned and after taking into account all the special needs of the local communities. When municipalities are deciding on the particular delivery options for their areas, they

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<sup>4</sup> In order to minimise administrative disruption, minimal changes were made to many municipality's organisational structures. This aspect was, and still is, not absolutely favoured by the ruling government, as it perceives the old structures as ineffective and disruptive to the new local government vision. See the White Paper on Local Government (1998) at 111.

<sup>5</sup> Again, emphasis should be placed on the fact that the central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all South African commu-

*continued on next page*

should be guided by certain basic principles.<sup>6</sup> The principles can be summarised as follows:

- *Accessibility* All communities should have access to at least a minimum level of services. This is not a goal, but a constitutional obligation. The many imbalances that still exist regarding equal access to services should be addressed through the development of new infrastructure and the rehabilitation and upgrading of existing infrastructure.
- *Simplicity* Municipal services should not only be accessible, they should also be easy and convenient to use. In this regard it is of special importance that municipalities should aim to ensure that people with disabilities or that are illiterate should be able to access and use municipal services with ease.
- *Affordability* It is a given that many services remain unaffordable for many South African residents. In order to enhance quality of life, municipalities should strive to make services as affordable as possible. This is not an easy task, as many factors have an impact on the pricing of services.<sup>7</sup>
- *Quality* Services should not be rendered below a certain determined quality. In this regard, services should be suitable for their purpose, should be timeously provided, should be safe and should be accessible on a continuous basis. Service users will not pay and support their municipal service providers promptly if services are sub-standard and of a poor quality. Not only the services themselves but also back up maintenance and support should comply with the minimum quality standard.
- *Accountability* The new South African state, which includes local governments, is founded on, *inter alia*, the values of a democratic government, which includes principles of accountability and responsiveness.<sup>8</sup> Whenever a delivery system is adopted by a particular municipal government, therefore, it remains the responsi-

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nities. The provision of basic services enhances the quality of life of all citizens, and it increases many new economic opportunities and productive initiatives.

<sup>6</sup> See the White Paper on Local Government (1998) at 113-114. The principles mentioned in the White Paper should not be regarded as a *numerus clausus*, but should serve as a basic point of departure.

<sup>7</sup> Again one must remember that municipalities have a constitutional obligation to provide at least certain minimum services to people, even though they cannot pay for such services. See, eg, the socio-economic rights set out in the Constitution ch 2, as well as ch 7 ss 152 and 153. In compliance with these requirements, many municipalities have introduced so-called "sliding scale payment schemes", where all residents are provided with a predetermined quantity of water and electricity free of charge.

bility of that municipality to be accountable for all its activities, which includes the assurance of service provision of an acceptable quality.

- *Integration* All municipalities should adopt an integrated approach to planning and ensuring municipal service provision. The integration of municipal services requires specifically that each municipality take into account the economic and social impact of service provision in relation to overall municipal policy objectives such as poverty eradication and job creation.
- *Sustainability* The provision of services to local communities in a sustainable manner is also a constitutional imperative for all municipal governments.<sup>9</sup> In light of this constitutional requirement, service provision is an ongoing process. However, ongoing service provision depends on municipal institutions that are properly managed both financially and administratively.
- *Value for money* Municipal services should account for value for money. Municipalities should strive to provide not only sustainable services but services that provide value for money for all services users. In this respect, value for money and affordability goes hand in hand.
- *Promotion of competitiveness* All municipalities should take cognisance of the fact that job generation and the competitive nature of local commerce and industry could be adversely affected by imposing higher rates and service charges on such industries in order to subsidise domestic users. Such practices could have a negative impact on local economic development, as many potential investors or businesses could be scared or lured away to other jurisdictions. In this regard, sufficient transparency is needed to ensure that all investors are aware of the costs of doing business in a particular local area.
- *Promotion of the new constitutional values* Lastly, it is not only a legal prerequisite for all municipalities to comply and adhere to the new constitutional values and requirements, it is also an essential recipe for all local governments to achieve optimal sufficiency and support. Municipal administrations must therefore fulfil and promote the democratic and other administrative values and principles that are enshrined in the Constitution.

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<sup>8</sup> See the Constitution s 1(d).

<sup>9</sup> Refer to the Constitution s 152(1)(b).

After the abovementioned criteria have been taken into account, a municipality should be in a good position to determine which service delivery options would be best for its particular area of jurisdiction. In appropriate circumstances, a special mixture of different delivery options can be implemented. Apart from the delivery option or options, most municipalities can further enhance service delivery through the implementation of specific delivery mechanisms. Such mechanisms include the following:<sup>10</sup>

- *Building on existing capacity* It is a known fact that municipal governments throughout South Africa have different levels of administrative capacity. Many municipalities have however a sound existing infrastructure and established municipal capacity. Without ignoring new initiatives, it is very important for all municipal governments to build on their already existing capacity and potential. Reinvention of the wheel so to speak will only result in poor service delivery and unnecessary expenditure. Not all existing capacities are however suitable for expansion. In many instances drastic reform measures should be introduced as a matter of urgency. Such measures could include the introduction of performance-based contracts for senior staff members, the development of new codes of conduct, the implementation of reform policies such as affirmative action programmes, training and empowering the skills of frontline workers to interact with the communities, the decentralisation of operational management responsibilities and, lastly, the development of new strategies through consultation and communication.
- *Corporatisation* In essence the term corporatisation refers to the separation of service delivery units from the specific municipal council. This in turn should enable a council to determine specific policy goals and to set service standards to which corporate units can be held responsible. Corporatisation also offers greater autonomy and flexibility to the management of the different service units which could allow for commercial management practices to be introduced.<sup>11</sup>
- *Establishment of public-public partnerships* The establishment of public-public partnerships or so-called public joint ventures can allow for horizontal co-operation between municipalities. Such partnerships are often common in other countries

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<sup>10</sup> See the White Paper on Local Government (1998) at 115-121.

<sup>11</sup> Corporatisation can take a number of forms, from public institutions such as Water Boards or Town Planning Boards to joint ventures between municipalities. Corporatisation is of particular value in large municipal jurisdictions.

especially in areas such as joint purchasing, training initiatives and technical support.<sup>12</sup> Within the new local government scheme of South Africa, municipalities should begin to explore these innovative partnership agreements with other state institutions or parastatals such as the Post Office for the collection of municipal revenue. Obvious benefits can be derived from such partnerships, not only for the municipalities concerned, but also for the benefit of local residents.

- *Establishment of partnerships with community-based organisations and non-governmental organisations* Partnerships with community-based organisations (CBOs) and non-governmental organisations (NGOs) can be very effective in involving local communities and also to stimulate local economic development. Often such organisations have particular skills that could enhance and facilitate new development initiatives and serve as an effective intermediary in local initiatives. In the new area of local government development, municipalities should consider involving CBOs and NGOs in partnerships with other public or private institutions. Even so-called three-way-partnerships between a public, a private and a CBO/NGO can be very effective.<sup>13</sup>
- *Public-private partnerships* Municipalities should also explore the possibilities of entering into partnerships with local businesses. Apart from stimulating the local economy, such partnerships should also ensure effective services and less financial expenditure for the local authority.
- *Out sourcing/out contracting* For many years already, many municipalities have benefited from the practice to contract certain services out to specialist private companies. Such specialist companies can often provide such services more effectively than in-house municipal departments can. It is however important for municipalities that when services are contracted out the municipality should protect and ensure minimum standards, contract specifications and an overall control and monitoring capacity. The modern trend in local government seems to be that services are outsourced by way of tender procedures and not by subjective unilateral decision making, or even auction procedures. During a tender process, the lowest

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<sup>12</sup> Refer to the White Paper on Local Government (1998) at 117.

<sup>13</sup> In such a partnership a municipality can, eg, provide funding for a project, a private contractor can provide skills and equipment, whilst a CBO can facilitate the recruitment and management of local labour and community support. The advantage of such a partnership is that skills are effectively transferred, employment is created and effective services are provided without exhausting municipal capacity.



bidder is not always the best contractor. Various factors such as the financial standing of the contractor, the inclusion of local labour and technical capacity and quality control should be taken into account. Municipalities must ensure that all legal requirements are adhered to in this regard. Contracting out should be most effective when municipalities are clear about the services they are seeking from a private contractor, and when they have the capacity to manage the tender process and monitor the rendering of the services to ensure that municipal objectives are met.

- *Leases and concessions* A further approach to service delivery is the conclusion of either lease or concession agreements. Such agreements are forms of public-private partnerships that are most common for services where large-scale capital investment is required. The agreements are characterised by an often long contractual period extending over many years, a contractor that is required to take charge of the assets and infrastructure associated with the service for the duration of the contract, which requires substantial investment from the contractor's side. Because the contractor is taking on more risk, it normally demands the transfer of the responsibility for revenue collection in order to minimise financial losses. The long contract period is usually long enough to allow the contractor to recover its initial investment through the revenue that is generated from the provision of the services. In almost all instances the contractor will require ownership of the assets for the duration of the contract period. When the contract lapses, ownership and infrastructure is then transferred to the municipality.<sup>14</sup> Lease and concession agreements can be concluded in various formats. There are so-called build-operate-transfer (BOT) agreements, where a contractor builds an asset, operates it for a period of time and then transfers it to a municipality. Then there is the build-own-operate-transfer (BOOT) agreement, which further gives ownership of

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<sup>14</sup> Although this form of service provision is not entirely new to government institutions, it has only recently started to take effect. A good example of such a partnership is the partnership between the department of correctional services and private institutions to build and manage new correctional facilities. The private companies have agreed and contracted with government to build new prisons, which they will then manage for a certain period in lieu of payment for such services. After the contract period has lapsed, the prison and other assets will fall back on the government. There are many areas in local government service provision, where such partnerships can be very effective. One such example is the possible upgrading and management of old power stations in municipal areas. Private companies can reinvest in such stations and then sell the electricity to the local municipality. After a certain period, the power station and new infrastructure will again be owned by the municipality, to utilise to the benefit of its local communities.

the assets or infrastructure to the contractor for the length of the contract period. Lastly, there is also a build-operate-train-transfer (BOTT) variation which specifically provides for training for municipal employees during the contract period, which will then operate and manage the facilities and services, after the contract period has come to an end. Apart from the obvious benefits of such partnerships, there are high financial risks if such partnerships are managed or structured poorly. To avoid such negative possibilities, national government has put forward certain regulatory requirements to ensure public accountability and consumer protection. Some of these requirements will be discussed elsewhere in this chapter.

- *Privatisation/transfer of ownership* The last procedure to enhance service delivery refers to the transfer of ownership from municipalities to private or community-based entities. The transfer of ownership in this respect particularly refers to the sale of municipal assets, together with the transfer of responsibilities for the management of such services. Such a process is more generally referred to as privatisation. Although privatisation should not easily be considered with reference to primary/core municipal services such as water, electricity and solid waste disposal, it certainly could have positive outcomes in respect of secondary services such as municipal maintenance, parks and recreation and even refuse removal services.<sup>15</sup> All in all, the privatisation of non-core assets can boost municipal capacity and revenue in order for municipalities to focus on the delivery of strategic and core municipal services. Although there seems to be no clear consensus on which municipal services should be regarded as core or non-core services, national guidelines provide more clarity in this respect. It is, however, the final responsibility of each municipal council to make its own assessments in relation to what services are core services and what are not. In this regard, municipalities should be guided by the strategic policies put forward in each municipally integrated development plan.

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<sup>15</sup> With special emphasis on the central role that municipalities are constitutionally obligated to play in meeting the material, social and economic needs of communities, it is undesirable that ownership of core infrastructure and assets is removed from the municipal/public sphere.

### **16.2.3 Some basic administrative capacities that will enhance municipal development**

In order to play and ensure a developmental role effectively and to improve performance in respect of service delivery, all municipalities will need to develop at least the following capacities:

- Municipalities will have to become more strategic in their orientation. They should be open and flexible to new or unforeseen demands.
- They will have to maximise integrated capacity, both inside and outside the municipal jurisdiction.<sup>16</sup>
- They will have to become much more community orientated.

Municipal councils need to develop mechanisms to interact with community groups and to identify service needs and priorities. Without the capacity to strategise, integrate and interface with non-municipal groups, many local governments are unlikely to be sustainable in the future. The implementation of new strategies and policies requires a strong municipal leadership, with the necessary support and belief of the municipal council. Continuous communication between all role players and regular oversight and training should be provided.<sup>17</sup>

Suffice it to say that the approaches to improving service delivery efficiency and quality, which build on existing capacity, are more likely to succeed if they are structured as a partnership between council, management, labour and the community. Although labour protects particular interests, such interests should not prevent effective service delivery to communities. In this respect the South African Local Government Bargaining Council (SALGBC) will play a critical role in achieving new service delivery standards and development objectives. The SALGBC will have to look specifically at new measures to ensure more flexibility in the retraining and redeployment of municipal staff, the introduction of a more customer- and performance-orientated service system and the improvement of accountability and commitment to delivery within municipal administrations. Finally, one should remember that it is

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<sup>16</sup> The vertical integration of national and provincial programmes with municipal administrative systems may be a particularly effective way for rural municipalities to build their administrative capacity.

<sup>17</sup> It should be noted that the training of municipal councillors falls under SALGA, which in turn should ensure that an intensive councillor training programme is provided for after every election of new municipal councillors. See the White Paper on Local Government (1998) at 125.

ultimately the responsibility of national and provincial governments to monitor and oversee the effective performance by municipalities of their functions.<sup>18</sup>

### **16.3 The new legislative requirements regarding municipal services and service provision**

#### **16.3.1 *The constitutional legal basis***

According to the new constitutional framework, all municipalities are obligated to provide certain services and to achieve certain objectives. In this regard there is a strong relationship between the functions that municipalities should fulfil and the services and objectives that they should achieve and provide. It is interesting to note that the Constitution itself does not go into much detail regarding all the services that a modern municipal government should provide. The Constitution merely states that all municipalities must strive, within their financial and administrative capacities, to achieve the objectives of:

- a democratic and accountable government
- the provision of services in a sustainable manner
- social and economic development
- safe and healthy environments
- community involvement in local government matters.<sup>19</sup>

The Constitution also mandates all municipalities to structure and manage their administrations, budgets and planning processes to give priority to the basic needs of their communities and to promote social and economic development.<sup>20</sup> What the basic needs of communities are is not altogether certain. Some core/basic needs are universal, however, and should take centre stage in any municipal service provision planning. Such basic services would normally include water and electricity provision, as well as solid waste disposal and general municipal infrastructure. These services must be provided in an equitable and sustainable manner.<sup>21</sup> The Constitution again does not provide more guidance regarding specific services that should be rendered.

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<sup>18</sup> See again the Constitution ss 154(1) and 155(6).

<sup>19</sup> Refer again to the Constitution s 152(1)(a)-(e). It is self evident that without the necessary financial and administrative capacity the mentioned objectives will not be achieved. Various strategic programmes and initiatives should be implemented in order to enhance both financial and administrative capacities.

<sup>20</sup> See the Constitution s 153(a)-(b).

<sup>21</sup> In terms of s 155(4) of the Constitution, national legislation must take into account the need of municipalities to provide municipal services in an equitable and sustainable manner.

Apart from the fact that municipalities are obligated to provide certain core services to their residents, a municipality must be legally authorised to provide such a service or to impose fees or tariffs for such services. Without legal authorisation, a municipal government will not be entitled to render particular services or to impose fees for such services.<sup>22</sup>

In an effort to further enhance the achievement and fulfilment of their obligations towards service provision, the Constitution requires provincial governments to establish municipalities in a manner that will promote the development of local government capacity in each province so as to enable municipalities to perform their functions and manage their own affairs.<sup>23</sup> Only time will tell if the different types of municipality that have been established under provincial authorisation will indeed promote the development capacities as is required. On this point, it is also important to mention that both national and provincial governments, through their legislative and executive powers, should see to the effective performance by a municipality of its functions in relation to the matters listed in Schedules 4 and 5 of the Constitution.<sup>24</sup> Furthermore, a municipality, in the effective performance of its functions, has the right to exercise any power concerning a matter that is reasonably necessary for or incidental to the performance of its normal functions.<sup>25</sup> In this respect one should remember that it is the municipal council itself that makes decisions concerning the exercise of powers

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<sup>22</sup> See, eg, the case of *Kajee v Stanger Borough Town Council* 1994 (3) SA 9 (A). In this case the appellant's property was situated outside the municipal area and not connected to the respondent's electricity system. The respondent's main electricity cable, however, passed within 23 metres of appellant's property; accordingly, the respondent alleged, the appellant was liable in terms of the Local Authorities Ordinance 25 of 1974 (N) s 266(1)(f), which provides that the town council can make by-laws prescribing, *inter alia*, "an availability electricity charge in respect of properties ... which are not connected to the council's electricity scheme if such properties can reasonably be so connected". These charges were purportedly fixed and levied in terms of two municipal notices promulgated by a resolution of the council. However, on appeal the respondent was unable to produce a by-law authorising the council to impose such charges, but referred instead to s 268 of the ordinance (as it existed prior to its amendment in 1985), which, after dealing with the procedure to be followed for the making of valid by-laws, provided in ss (4) that "notwithstanding anything in s 266 contained, the council shall impose fees and frame tariffs of charges only by resolution". The court held that before the council could impose fees or frame tariffs it had to be properly empowered to do so. Because no valid by-law had been passed, the municipality had no power to prescribe or recover the particular tariff. See paras C-D at 14.

<sup>23</sup> See the Constitution s 155(6)(b). This establishment took place during the 2000 local government elections and with the beginning of the final phase of the restructuring process.

<sup>24</sup> See the Constitution s 155(7).

<sup>25</sup> This aspect is confirmed in the Constitution s 156(5).

and the performance of all functions of a municipality and also employing the necessary personnel to perform its functions effectively.<sup>26</sup>

In light of the abovementioned, it seems acceptable to argue that the constitutional drafters did not want to address extensively all the various legal aspects and specific services that municipalities in the new legal scheme have to comply with. Basically they left it open for parliament to address these issues in more detail and with more certainty, and created only a broad framework wherein such services had to be identified and sufficiently provided for. In this respect the Municipal Systems Act contains numerous legal requirements relating to municipal service provision and fulfilment.

### **16.3.2 General provisions regarding municipal services according to national legislation**

#### **16.3.2.1 The general duty on municipalities in respect of municipal services and basic aspects concerning service tariffs**

In compliance with the basic constitutional provisions and requirements in respect of municipal service provision, the Local Government: Municipal Systems Act<sup>27</sup> determines specific duties and requirements for all municipalities, which must be complied with. As a general duty, a (or all) municipality must give effect to the provisions of the Constitution and must:

- give priority to the basic needs of the local community
- promote the development of the local community
- ensure that all members of the local community have access to at least the minimum level of basic municipal services.<sup>28</sup>

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<sup>26</sup> The Constitution S 160(1)(a) and (d).

<sup>27</sup> 32 of 2000 as amended.

<sup>28</sup> See the Systems Act s 73. According to s 1 of the Act, the term "basic municipal services" is defined to mean a municipal service that is necessary to ensure an acceptable and reasonable quality of life and that, if not provided, would endanger public health or safety or the environment. Although the definition provides some guidance, an exact determination of what should be regarded as a basic municipal service is very open ended and will have to be determined on a case-to-case basis and after consideration of all relevant circumstances. See the case of *Manqele v Durban TMC* 2002 (6) SA 423 (D). The Water Services Act 108 of 1997 s 2(a) sets out that one of the main objectives of the Act is to provide for "the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being". In terms of the Act s 3 everyone has "a right of access to basic water supply and basic sanitation", and every water service institution must take reasonable measures to realise these rights. In terms of the definitions in the Act s 1, "basic water supply" means the "prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene", whilst "prescribe" itself means "prescribe by regulation". In the absence of regulations defining the extent of the right of access to a basic water supply, the court has no guidance from the legislature

*continued on next page*



The Systems Act furthermore identifies five specific requirements that municipal services must adhere to. These requirements are:<sup>29</sup>

Municipal services must be:

- equitable and accessible
- provided in a manner that is conducive to prudent, economic, efficient and effective use of available resources and the improvement of standards of quality over time
- financially sustainable
- environmentally sustainable
- regularly reviewed with a view to upgrading, extension and improvement.<sup>30</sup>

The Act is unfortunately silent on ways or mechanisms whereby municipalities are to achieve and adhere to the mentioned requirements. It seems that the main initiatives in this regard should come from individual municipalities themselves. All municipal councils should therefore take full cognisance of the listed requirements and put policies and programmes in place in order that they do not fall foul of the broad and more specific legal obligations. It is also submitted, however, that national and provincial governments should do more to assist and support municipalities in comply-

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or the executive to enable it to interpret the content of the right to basic water supply embodied in the Act s 3. The applicant approached a Local Division after the discontinuation by the respondent of the water supply to the premises she occupied together with four of her own children and three other children, as a result of non-payment of the applicant's water account. The relief sought was predicated on the existence of the applicant's "right" to a basic water supply as referred to in the Act s 3. The court held that, in the absence of prescription of the minimum standard of water supply services necessary to constitute a basic water supply, the interpretation that the applicant wanted the court to place on the Act s 3 required it to pronounce upon and enforce upon the respondent, a local authority, the quantity of water that the applicant was entitled to have access to, the quality of such water and acceptable parameters for "access" to such basic water supply. Those were policy matters which fell outside the purview of the court's role and function and were inextricably linked to the availability of resources. See also *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T), where the court held *inter alia* that the attitude adopted by the respondents in their answering affidavits reflected a certain contempt for the plight of the people whose water supply had been cut off; a degree of unwillingness to co-operate that was unacceptable on the part of an organ of state.

<sup>29</sup> See the Systems Act s 73(2)(a)-(e).

<sup>30</sup> It is interesting to note that according to recent case law it was stated that there is no language anywhere in the Act which expressly requires one to confine the ordinary meaning of the wide expression "municipal services", where it appears in the Act, to municipal services which are charged for or which are notionally capable of being charged for and which have identifiable users. It cannot be accepted that throughout the whole of the Act any reference to municipal services must be taken to be confined to services which are chargeable to individual users. See *SAMWU v City of Cape Town* 2004 (1) SA 548 (SCA) para 8 at 550.



ing with their general service delivery duties. This can be achieved through the enactment of more detailed legislative or even executive guidelines.<sup>31</sup>

Apart from the basic duties and requirements on local governments in respect of municipal services, the Systems Act further determines that all municipal councils must adopt and implement a tariff policy on the levying of fees for municipal services that are provided by the municipality itself or by way of service delivery agreements. Such a tariff policy must then comply with the provisions of the Systems Act, the MFMA, as well as with any other applicable legislation.<sup>32</sup> The Act then determines that the mentioned tariff policy must reflect at least a certain minimum principles. These minimum requirements are the following:<sup>33</sup>

- (a) users of municipal services should be treated equitably in the application of tariffs;
- (b) the amount individual users pay for services should generally be in proportion to their use of that service;
- (c) poor households must have access to at least basic services. This can be achieved through tariffs that cover only operating and maintenance costs, by introducing special tariffs or life line tariffs for low levels of use or consumption or for basic levels of service, or by any other direct or indirect method of subsidisation of tariffs;
- (d) the tariff policy must reflect the costs reasonably associate with rendering the service, including capital, operating, maintenance, administration and replacement costs, and also interest charges;
- (e) tariffs must be set at levels that facilitate the financial sustainability of the service, taking into account the subsidisation from sources other than the particular service concerned;
- (f) provision may be made in appropriate circumstances for a surcharge on the tariff for a particular service;

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<sup>31</sup> In this regard, emphasis should again be placed on the constitutional obligations placed on national or provincial governments as set out in the Constitution ss 151(3) and (4), 154(1), 155(4), (6)(b) and (7). Even if such provisions are viewed to be inadequate, then s 164 should be helpful, which determines that any matter concerning local government that has not been dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.

<sup>32</sup> See the Systems Act s 74(1) as substituted by Act 44 of 2003 s 10.

<sup>33</sup> See the Systems Act s 74(2)(a)-(i).

- (g) provision may be made for the promotion of local economic development through special tariffs for certain categories of commercial and industrial users;
- (h) the policy must also encourage the economical, efficient and effective use of resources, the recycling of waste and other appropriate environmental objectives to be achieved;
- (i) the policy should also fully disclose the extent of subsidisation of tariffs for poor households and other categories of users.<sup>34</sup>

Apart from the basic tariff policy principles mentioned above, special cognisance should be taken of the fact that a tariff policy may lawfully differentiate between various categories of service user, debtor, service provider, service, service standard, geographical area and other matter, as long as such differentiation does not amount to unfair discrimination.<sup>35</sup>

When the tariff policy has been finalised, a municipal council must adopt by-laws to give effect to the implementation and enforcement of such a tariff policy. Again, such by-laws may differentiate between different categories of user, debtor, service provider, service, service standard and geographical area as long as such differentiation does not amount to unfair discrimination.<sup>36</sup>

Apart from the tariff policy, municipalities are afforded a general power to levy and recover fees, charges and tariffs. Accordingly, the Systems Act determines that a municipality may

- levy and recover fees, charges or tariffs in respect of any function or service of the municipality

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<sup>34</sup> It is submitted that this provision should have the positive support of the tariff policy in general. Many South African citizens do accept that there are enormous gaps between average households and very poor households, which in turn requires special measures in order to provide basic life-supporting services to such households. However, when municipalities are not clear and transparent about their policies and reasons for special measures to support such poor households, many other service users can feel that they are not being treated equally and fairly, and thus they object and do not support such initiatives.

<sup>35</sup> See the Systems Act s 74(3). This reasoning seems in line with the general principle of the rule of law which requires a legitimate governmental purpose to exist if people are treated differently as well as direct provisions set out in the Constitution. The Bill of Rights s 9 allows for the unequal treatment of people in certain circumstances. Such treatment would be constitutionally sanctioned and would not be unjustifiable and unreasonable in terms of the Constitution s 36. However, care must be taken not to exceed the constitutional provisions and thus allow for unconstitutional policies or conduct. When the provisions of the Constitution are breached, such conduct or actions would be invalid. Refer to the Constitution s 2.

<sup>36</sup> See the Systems Act s 75.

- recover collection charges and interest on any outstanding amount.

The mentioned fees, charges and tariffs are levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members.<sup>37</sup> After such a resolution has been passed, the municipal manager must do the following without delay:

- Conspicuously display a copy of the resolution for a period of at least 30 days at the main administrative office of the municipality and at such other places within the municipality to which the public has access. Such other places may be determined by the municipal manager.
- Publish in a newspaper of general circulation in the municipal jurisdiction a notice stating that a resolution in respect of fees, charges or tariffs has been passed by the municipal council and that a copy thereof is available for public inspection during office hours at the main administrative office of the municipality and at other places specified in the notice. The notice must also indicate the date on which the determination will come into operation.
- Seek to convey the information of the notice to the local community by means of radio broadcasts covering the area of municipal jurisdiction.<sup>38</sup> As soon as the notice of any fees, charges or tariffs has been published in a newspaper, the municipal manager must forthwith send a copy of the notice to the MEC for local government in the province concerned.<sup>39</sup>

#### **16.3.2.2 National legislative requirements regarding the provisions of municipal services**

According to the new national legislative framework for local government, a municipality may provide a municipal service in its area or a part of its area. Such a service or services may be provided through an internal mechanism or external mechanism.

*Internal mechanisms* include

- a department or other administrative unit within the municipal administration
- any business unit devised by the municipality, provided that such a unit operates within the municipality's administration and under the control of the municipal council in accordance with its operational and performance criteria

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<sup>37</sup> See the Systems Act s 75A(1) and (2). It is submitted that the section refers to an absolute majority of 50% + 1 of the total number of members of the relevant municipal council.

<sup>38</sup> Refer to the Systems Act s 75A(3)(c).

<sup>39</sup> The Systems Act s 75A(4).

- any other component of the municipal administration.<sup>40</sup>

On the other hand, an *external mechanism* refers to a service delivery agreement that has been entered into between a municipality and any of the following institutions:

- a municipal entity
- another municipality
- an organ of state, including a water services committee established in terms of the Water Services Act of 1997, a traditional authority or any other registered service provider registered or recognised in terms of national legislation
- a CBO or NGO that are legally competent to enter into such an agreement
- any other institution, entity or person legally competent to operate a business activity.

It is striking and rather unfortunate that the Act does not require the partners in an external service delivery agreement to be competent and able to provide the municipal service relevant to the contract. It is therefore left to a municipality itself to determine if a party to a service delivery agreement is indeed competent to provide a specific municipal service in the municipal area or a part thereof. Municipalities are therefore obligated to review or decide on an appropriate mechanism to provide a municipal service. In cases of a service provision which is provided through an internal mechanism, municipalities must review or decide on an appropriate service provision mechanism when:

- an existing municipal service is to be significantly upgraded, extended or improved
- a performance evaluation requires a review of the existing mechanism
- the municipality is restructured or re-organised in terms of the Municipal Structures Act.<sup>41</sup>

When a municipal service is provided through an external mechanism, a municipality must review or decide on an appropriate mechanism to provide a particular service when:

- a performance evaluation requires a review of the particular service delivery agreement<sup>42</sup>

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<sup>40</sup> See the Systems Act s 76(a)(i)-(iii).

<sup>41</sup> See the Systems Act s 77(a)(i)-(iii).

<sup>42</sup> In order to determine if such a performance evaluation is required, refer to the Systems Act ch 6.

- the service delivery agreement is anticipated to expire or be terminated within the next 12 months or
- an existing municipal service or part thereof is to be significantly upgraded, extended or improved and such an event is not addressed in the relevant service delivery agreement.<sup>43</sup>

A municipality must also review and decide on an appropriate mechanism in order to provide a municipal service when a review of such a service is required by an intervention in terms of section 139 of the Constitution. The same obligation is required when a new municipal service is to be provided or when the local community has requested such review or when a review of the municipalities IDP also requires a review of the delivery mechanisms regarding a service or services.<sup>44</sup>

Apart from the obligation placed on municipalities to review and decide on mechanisms to provide municipal services, certain criteria and processes for deciding on such mechanisms have been statutorily provided for. Accordingly, when a municipality has decided on a particular mechanism to provide a municipal service or to review any existing mechanism, it must first assess five particular criteria. These criteria are the following:<sup>45</sup>

- The direct and indirect costs and benefits associated with the project if the service is provided by the municipality through an internal mechanism. Part of this assessment must also include the expected effect the mechanism could have on the environment, on human health and well-being, as well as safety.
- The municipality's capacity and potential future capacity to furnish the skills, expertise and resources that are necessary or will become necessary for the provision of the service through an internal mechanism.
- The extent to which the re-organisation of the municipality's administration and the development of the human resource capacity within that administration could be utilised to provide a service through an internal mechanism.
- The likely impact the decision could have on aspects such as development, job creation and employment patterns in the municipality.
- The views of organised labour.

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<sup>43</sup> See the Systems Act s 77(b)(i)-(iii).

<sup>44</sup> See the Systems Act s 77(c)-(f). The procedure for review on request by the local community is determined in terms of the Act ch 14.

<sup>45</sup> See the Systems Act s 78(1)(a)(i)-(v).

It is important to note that all of the abovementioned aspects must be assessed. After thorough assessment has taken place a municipality may also take into account any developing trends that are generally applicable to the sustainable provision of municipal services.<sup>46</sup> After the abovementioned criteria have been applied, a municipality may decide on an appropriate internal mechanism to provide the service or, before it takes a decision on an appropriate mechanism, explore the possibility of providing such a service through an external mechanism. If it decides to explore an external mechanism, the municipality must give notice to the local community of its intention to explore the provision of the service through an external mechanism and must also assess the various delivery options as are mentioned in section 76(b) of the Systems Act. When assessing such options, the municipality must take into account similar criteria, as would be the case under section 78(1)(a) of the Systems Act.<sup>47</sup> The municipality must also conduct or commission a feasibility study which must be taken into account before a final decision is taken. The feasibility study must include the following:<sup>48</sup>

- a clear identification of the municipal service for which the municipality intends to consider an external mechanism
- an indication of the number of years for which the provision of the service through an external mechanism might be considered
- the projected outputs which the provision of the service might be expected to produce
- an assessment as to the extent to which the provision of the service will provide value for money, address the needs of the poor, be affordable for the municipality and residents and impact of the transfer of appropriate technical, operational and financial risk
- the projected impact on the municipality's staff, assets and liabilities
- the projected impact on the municipality's integrated development plan

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<sup>46</sup> Refer to the Systems Act s 78(1)(b).

<sup>47</sup> See the Systems Act s 78(2) and (3). The mentioned criteria are: (i) the direct and indirect costs and benefits associated with the project, including the expected effect of any service delivery mechanism on the environment and on human health, well-being and safety; (ii) the capacity and potential future capacity of prospective service providers to furnish the skills, expertise and resources necessary for the provision of the service; (iii) the views of the local community; (iv) the likely impact on development and employment patterns in the municipality; and (v) the view of organised labour.

<sup>48</sup> See s 78(3)(c)(i)-(viii) of the Systems Act.

- the projected impact on the municipality's budget including impacts on revenue, expenditure, borrowing, debt and tariffs
- any other matter that may be prescribed.

After having applied and assessed the mentioned criteria, a municipality must decide on an appropriate internal or external mechanism that would ultimately result in or achieve the best outcome.<sup>49</sup>

On the question of whether a municipality is obligated to assess or take into account the views of organised labour before making a decision to establish a (municipal police) service, the Supreme Court of Appeal stated that while provisions 16-21 of the Systems Act, which foster participation by the community in municipal decision-making processes, are expressed in relatively wide and general terms, the provisions of section 78 of the Act are not. Section 78 provisions are applicable only when a municipality has decided on a mechanism to provide or review a municipal service in terms of section 77. Section 78 provisions are not applicable to the anterior decision to provide or extend a municipal service. Sections 77 and 78 of the Act are concerned with the question of how things (services) are to be done and not whether they should be done. The purpose of sections 77 and 78 of the Act is to compel a municipality to consider how a particular service can be done and through which appropriate internal mechanism it can be done. Only after that has been done may the provision of a service through an external mechanism be considered. It is in considering these questions that section 78(1)(a)(v) and (3)(b)(v) oblige the municipality to assess and take into account the views of *inter alia* organised labour. Section 78 also postulates that a decision has already been made to provide or review a municipal service.<sup>50</sup>

Apart from the determining criteria discussed above, a further important obligation on municipalities is that, if a municipality has decided to provide a municipal service through an internal mechanism, it must allocate sufficient human, financial and other resources to the particular unit that might be necessary for the proper provision of

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<sup>49</sup> It is important to note that when a municipality is following the abovementioned requirements, it must comply with any applicable legislation that is relating to the appointment of a service provider other than the municipality itself and also any other additional requirements that may be prescribed by regulations. See the Systems Act ss 78(4)-(5).

<sup>50</sup> Refer to *SAMWU v City of Cape Town* 2004 (1) SA 548 (SCA). The court held that the provisions of ss 77 and 78 do not have to be complied with before a decision to provide a new service or to upgrade or review an existing service is reached. Paras 11-14 at 551-552 and also at 555.



such service and must also transform the actual provision of that service in accordance with, and thus in compliance with, the provisions of the Systems Act.<sup>51</sup> If a municipality decides to provide a service through a service delivery agreement in terms of section 76(b) of the Systems Act with:

- a municipal entity or another municipality, it may, subject to subsection (3) of the Act, negotiate and enter into such an agreement with the relevant municipal entity or municipality without applying part 3 of chapter 8 of the Systems Act which refers to service delivery agreements involving competitive bidding
- a national or provincial organ of state, it may enter into such an agreement with the relevant organ of state without applying the principles of competitive bidding
- any institution or entity, or any person, either juristic or natural, which was not mentioned above in either paragraphs (a) or (b), then it must apply part 3 referring to competitive bidding before entering into an agreement with such institution, entity or person.<sup>52</sup>

It is further provided that before a municipality enters into a service delivery agreement with an external service provider it must establish a programme for community consultation and information dissemination regarding the appointment of the external service provider and the contents of the service delivery agreement. The contents of a service delivery agreement must be communicated to the local community through the media. In instances where a municipality decides to enter into a service delivery agreement with another municipality, that other municipality must conduct or commission a feasibility study and take it into account before the agreement is entered into.<sup>53</sup>

The new legislative framework also establishes specific responsibilities of municipalities when they provide services through service delivery agreements with other

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<sup>51</sup> See the Systems Act s 79(a)-(b). In determining what would be sufficient resources, all relevant circumstances should be taken into account. Various factors can have an impact on such a determination. It is suggested that if a municipality makes an objective and informed determination, such a determination would hardly fall foul of the requirements of the Act.

<sup>52</sup> See s 80(1)(a)-(b) of the Systems Act as substituted by Act 44 of 2003 s 12. Note that a 'municipal entity' means a private company, a service utility or a multi-jurisdictional service utility. A 'multi-jurisdictional service utility' again means a body established in terms of s 87 of the Systems Act. Refer to the definitions of the Act, s 1 as amended by Act 44 of 2003.

<sup>53</sup> Read ss 80(3)(a)-(b) of the Systems Act. Note that the feasibility study must include an assessment on the impact on the budget and other assets, liabilities and staff expenditure, an assessment whether staff should be increased, an assessment on the ability of the other municipality to absorb any commitments, liabilities or employees involved, when the appointment ends and finally any other relevant information as may be prescribed.

external mechanisms. In such instances it is required that if a municipal service is provided through a service delivery agreement with an external mechanism the municipality remains responsible for ensuring that such service is provided to the local community in accordance with new legal standards.<sup>54</sup> In order to oversee and ensure its obligations of final service provision, all municipalities must do the following:<sup>55</sup>

- regulate the provision of the service in accordance with section 41 of the Systems Act, which sets certain core components for performance management
- monitor and assess the implementation of the service agreement and performance management of the particular service provider<sup>56</sup>
- perform its functions and exercise its powers according to the Systems Act if the municipal service falls within a development priority or objective of the municipality's IDP
- control the setting and adjustment of tariffs by the service provider for the service, within the council's tariff policy
- general exercise its service authority to ensure uninterrupted delivery of service in the best interests of the local community.

Through its conclusion of a service delivery agreement, a municipality is legally authorised to do the following<sup>57</sup> in order to ensure effective, sustainable and uninterrupted municipal services:

- It may assign to a service provider the responsibility for
  - (a) developing and implementing detailed service delivery plans (SDP) within the framework of the municipality's IDP
  - (b) the operational planning, management and provision of the municipal service
  - (c) the undertaking of social and economic development that is directly related to the provision of the service
  - (d) customer management
  - (e) managing its own accounting, financial management, budgeting, investment and borrowing activities within the framework of transparency, accountability,

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<sup>54</sup> Such provisions confirm the new constitutional obligations in terms of accountability and sustainable service provisions. Municipalities cannot contract their responsibilities away regarding service provision.

<sup>55</sup> See the Systems Act s 81(1)(a)-(e).

<sup>56</sup> Such evaluation of performance by a service provider must be done in terms of s 41 provisions.

<sup>57</sup> See the Systems Act s 81(2)(a)-(e).

reporting and financial control determined by the municipality, all of which are subject to the MFMA.<sup>58</sup>

- (f) the collection of service fees for its own account from users of services, in accordance with the municipality's tariff policy and credit control measures.<sup>59</sup>
- It may pass on funds for the subsidisation of services to the poor to the service provider through a transparent system, which must be subject to performance monitoring and audit.
  - It must ensure that the agreement provides for a dispute-resolution mechanism to settle disputes between the municipality and the service provider.
  - It may transfer or second any staff members to the service provider, with the concurrence of the staff member concerned and in accordance with applicable labour legislation.
  - It must ensure continuity of the service if the service provider is placed under judicial management, becomes insolvent, is liquidated or for any other reason is unable to continue performing its functions and obligations in terms of the particular service delivery agreement.
  - It must, where applicable, take over the service, including all assets, when the service delivery agreement expires or is terminated.

The municipal council is also permitted to set, review or adjust the tariffs within its tariff policy. The service delivery agreement may further provide for the adjustment of tariffs by the service provider, within certain limits set by the municipal council<sup>60</sup> It is further possible for a service delivery agreement to be amended by agreement between the parties, except where an agreement has been concluded, following a competitive bidding process. Where a service agreement has been concluded following a competitive bidding process, an amendment can be made only after the local community has been given:

- reasonable notice of the intention to amend the agreement, including the reasons for the proposed amendment
- sufficient opportunity to make representations to the municipality.<sup>61</sup>

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<sup>58</sup> See the Local Government: Municipal Finance Management Act 56 of 2003.

<sup>59</sup> See also the Act ch 9 which deals with aspects concerning credit control and debt collection.

<sup>60</sup> See the Systems Act s 81(3).

<sup>61</sup> See the Systems Act s 81(4)(a)-(b).

It is important to note that no councillor or staff member may share in any profits or improperly receive any benefits from a service provider providing or proposing to provide any municipal service in terms of a service delivery agreement.<sup>62</sup>

### **16.3.2.3 Service delivery agreements that involve competitive bidding**

The Systems Act further provides that if a municipality decides to provide a municipal service through a service delivery agreement with a person referred to in section 80(1)(b) of the Act, it is obliged to select such a service provider through a selection process which

- complies with chapter 11 of the MFMA
- allows all prospective service providers to have equal and simultaneous access to information relevant to the bidding process
- minimises the possibility of fraud and corruption
- makes the municipality accountable to the local community with regard to the progress of selecting a service provider and the reasons for any decision in this regard
- takes into account the need to promote the empowerment of small and emerging enterprises.<sup>63</sup>

It is also provided for, but subject to the provisions of the Preferential Procurement Policy Framework Act,<sup>64</sup> that a municipality may determine a preference for categories of service providers in order to advance the interests of persons disadvantaged by unfair discrimination, as long as such preference is exercised in a manner that does not compromise or limit the quality, coverage cost and developmental impact of the services.<sup>65</sup> The selection of preferential service provider contenders must be fair, equitable, transparent, cost-effective and competitive.<sup>66</sup> Such requirements may be

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<sup>62</sup> Such prohibition on receiving any profits or benefits is in line with new procedures to eradicate corruption and bribery. Apart from possible criminal prosecution, councillors and staff members that receive such profits or benefits will also contravene their respective codes of conduct and can also be held punishable under such codes.

<sup>63</sup> See the Systems Act s 83(1)(a)-(e).

<sup>64</sup> Act 5 of 2000, which aims at giving effect to the Constitution s 217(3) by providing a framework for the implementation of a procurement policy.

<sup>65</sup> In other words, preferential service providers such as affirmative action appointments or black empowerment groups may be preferred, as long as certain minimum standards and obligations are not compromised.

<sup>66</sup> See *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) where it was submitted that the Preferential Procurement Policy Framework Act requires organs of state to establish a procurement policy, and also makes it obligatory for organs of state to follow a tender procedure for the procurement of goods and services. If such requirements are not met, then the tender process, if any, was unlawful.

provided for in other applicable national legislation. Even in cases of the consideration of a municipality to select a service provider, the selection process must also apply with the criteria listed in section 78 of the Systems Act in addition to the preferences for certain categories referred to in this subsection.<sup>67</sup>

It is also required that on the basis of the bidding documents, any addenda, amendments or variations that were provided to all bidders after a prospective service provider has been selected, the municipality must negotiate the final terms and conditions of the service delivery agreement with the preferred service provider. If the negotiations are successful, the municipality must then enter into the agreement on such terms and conditions that were specified in the bidding documents, together with additions thereto. It should be noted that modifications to the bidding process must not materially affect the bid in any manner that would compromise the integrity of the bidding process. If the terms and conditions of an agreement cannot be agreed upon within a reasonable time, the municipality may negotiate a possible agreement with the next-ranked prospective service provider.<sup>68</sup> When a municipality has entered into a service delivery agreement it must

- make copies of the agreement available at its offices for public inspection
- give notice in the media of the particulars of the service that will be provided in terms of the agreement, the name of the selected service provider and the place and period where copies of the agreement will be available for public inspection.<sup>69</sup>

#### **16.3.2.4 The legal requirements relating to internal municipal service districts**

It is generally understood that the provision of municipal services, according to the new constitutional and other legal requirements, is not an easy task. Even more difficult is the provision of services in large metropolitan or district municipal jurisdictions. In an effort to lighten the burden on service delivery and in order to ensure effective and sustainable service provision, the new legislative framework on local

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<sup>67</sup> See the Systems Act s 83(2) and (3).

<sup>68</sup> The bidding process is therefore not to be repeated because the first preferred service provider did not accept the conditions of the agreement. The reference to a reasonable time for the negotiations will depend on the circumstances of each case. The more urgent the service that should be provided, the less time would be regarded as reasonable. It is, however, advisable for municipalities to communicate in writing the circumstances and urgency of each case and to put the preferred bidder on terms to either accept or withdraw from the bidding process.

<sup>69</sup> Refer to the Systems Act s 84(1)-(3).

government allows for the establishment of so-called “internal municipal service districts”. In this regard and in accordance with its policy framework, a municipality is allowed to establish part of the municipality as an Internal Municipal Service District (IMSD) to facilitate the provision of a municipal service in that part of the municipality. Before an IMSD is established, the municipality must:

- consult the local community on the following matters:
  - (a) the proposed boundaries of the service district
  - (b) the proposed nature of the municipal service
  - (c) the proposed method of financing the service
  - (d) the proposed mechanism for provision of the service and
- obtain the consent of the majority of the members of the local community in the proposed IMSD that will be required to contribute to the provision of the municipal service.<sup>70</sup>

Following on subsection 85(2), when a municipality establishes an IMSD, the municipality must determine the boundaries of the district, the mechanism to provide the service and establish a separate accounting system and other record-keeping systems in respect of the service. The municipality may also set a tariff or levy for the service, impose a special surcharge in the district for the service or increase the tariff in the district for the service. The municipality may further establish a committee comprising persons representing the community of the IMSD to act as a consultative or advisory forum regarding the management and other matters of the service.<sup>71</sup> In areas where IMSDs are considered, a municipality must develop and adopt a policy framework for the establishment, regulation and management of such an IMSD. Such a policy framework must reflect at least the following aspects:

- the development needs and priorities of designated parts of the municipality which must be balanced against the needs and priorities of the municipality as a whole and
- the extent to which the establishment of one or more IMSDs will promote the local economic development of the municipality as a whole, will contribute to enhancing the social, economic and spatial integration of the municipality and which may not

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<sup>70</sup> See the Systems Act s 85(1) and (2).

<sup>71</sup> See the Systems Act s 85(3)(a)-(e). Note that the committee proposed in s 3(e) should be established on the basis of gender representivity.

entrench or contribute to further disparities in service provision in the municipal jurisdiction.<sup>72</sup>

According to wide-ranging amendments to the Systems Act during 2003, various new issues have been incorporated under section 86 of the Act. Section 86A provides now for the following:

The Minister may for purposes of municipal services, make regulations or issue guidelines in accordance with section 120 of the Act, in order to provide for or regulate the following matters:

- The preparation, adoption and implementation of a municipal tariff policy
- the subsidisation of tariffs for poor households through cross-subsidisation within and between services, equitable share allocations to municipalities and national and provincial grants to municipalities
- limits on tariff increases
- criteria to be taken into account by municipalities when imposing surcharges on tariffs for services and determining the duration thereof
- incentives and penalties to encourage the economical, efficient and effective use of resources when providing services; the recycling of waste and other environmental objectives
- criteria to be taken into account by municipalities when assessing options for the provision of a municipal service
- measures against malpractice in selecting and appointing service providers, including measures against the stripping of municipal assets
- mechanisms and procedures for the co-ordination and integration of sectoral requirements in terms of legislation and the manner in which municipalities must comply with these
- standard draft service delivery agreements
- the minimum content and management of service delivery agreements
- additional matters that must be included in a feasibility study in terms of section 78(3)(c) of the Act, which may include the strategic and operational costs and benefits of an external mechanism in terms of the municipality's strategic objectives, an assessment of the municipality's capacity to effectively monitor the provi-

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<sup>72</sup> Refer to the Systems Act s 86(1) and (2).



sion of the municipal service through an external mechanism and to enforce the service delivery agreement

- performance guarantees by service providers and
- any other matter that would facilitate the effective and efficient provision of municipal services or the application of the provisions of the Act.<sup>73</sup>

The Minister may make regulations and issue guidelines relating to fiscal matter only after consulting with the Minister of Finance and any other Cabinet member whose portfolio is affected by such regulations and guidelines. When making regulations or issuing guidelines, the Minister must take into account the capacity of municipalities to comply with such regulations and guidelines and differentiate between different kinds of municipality according to their respective capacities.<sup>74</sup>

The Act specifically determines that there are the following kinds of municipal entity:

- a private company established by one or more municipalities in terms of Part 2 of the Act or in which one or more municipalities have acquired or hold an interest according to Part 2 of the Act
- a service utility established by a municipality in terms of Part 3 of the Act and
- a multi-jurisdictional service utility established by two or more municipalities in terms of Part 4.<sup>75</sup>

It is specifically provided that no municipality may establish, or participate in the establishment of, or acquire or hold an interest in, a corporate body, including a trust, except where such corporate body is a private company, service utility or multi-jurisdictional service utility referred to above or a fund for the benefit of its employees in terms of a law regulating pensions or medical aid schemes. However, such requirements do not apply to the acquisition by a municipality for investment purposes of securities in a company listed on the Johannesburg Securities Exchange in accordance with the investment framework envisaged in section 13 of the Municipal Finance Management Act.<sup>76</sup>

It is further provided that a municipality may, subject to subsection 86C (2), establish or participate in the establishment of a private company in accordance with the

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<sup>73</sup> See s 86A(1)(a)-(m) of the Systems Act.

<sup>74</sup> Refer to ss 86A(2)-(3) of the Systems Act.

<sup>75</sup> Read s 86B(a)-(c) of the Systems Act.

<sup>76</sup> See ss 86B(2)-(3) of the Systems Act.

Companies Act,<sup>77</sup> or acquire or hold an interest in a private company in accordance with the Companies Act. In this regard it is further permitted that:

- A municipality may in terms of subsection 86C(1)(a) or (b) either acquire or hold full ownership of a private company or acquire or hold a lesser interest in a private company.
- A municipality may acquire or hold such a lesser interest in a private company only if all the other interests are held by (i) another municipality or municipalities, (ii) a national or provincial organ of state or organs of state or (iii) any combination of institutions referred to in (i) and (ii).
- A municipality may, despite paragraph (b), acquire or hold an interest in a private company in which an investor other than another municipality or a national or provincial organ of state has an interest, but only if effective control in the private company vests in that municipality, another municipality, or that municipality and another municipality collectively.<sup>78</sup>

It is also important to note that a private company referred to in section 86C(1) is a municipal entity if a municipality, or two or more municipalities collectively, have effective control of that private company or is a public entity to which the Public Finance Management Act applies, if ownership control in the company is held by a national or provincial organ of state.<sup>79</sup> A private company which is a municipal entity must further restrict its activities to the purpose for which it is used by its parent municipality in terms of section 86E(1)(a) of the Systems Act and it has no competence to perform any activity which falls outside the functions and powers of its parent municipality contemplated by section 8 of the Act.<sup>80</sup>

Municipalities may further establish a private company or acquire an interest in such a company only for the purpose of utilising the company as a mechanism to assist it in the performance of any of its functions or powers or if the municipality can demonstrate that there is a need to perform that function or power in accordance with business practices in order to achieve the strategic objectives of the municipality

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<sup>77</sup> 61 of 1973.

<sup>78</sup> Refer to ss 86C(1)-(3) of the Systems Act. Note that if a municipality establishes a private company or acquires or holds an interest in such a company, it must comply with the Companies Act and any other law regulating companies. If any conflict however arises between the Companies Act or other law and a provision of the Systems Act, then the Systems Act prevails.

<sup>79</sup> See Act 1 of 1999 read together with s 86D(1) of the Systems Act.

<sup>80</sup> Read ss 86D(1)-(2) of the Systems Act.

more effectively and that the company would benefit the local community. It is also imperative that all other conditions that may be prescribed have been complied with. It should be noted however that if a municipality establishes a private company or acquires an interest in such a company for the purpose of using that company as a mechanism to provide a municipal service, then the provisions of Chapter 8 of the Systems Act are applicable.<sup>81</sup>

According to the new amendments, if two or more municipalities intend to establish a private company or to acquire interests in the same private company, each of those municipalities must:

- comply with section 86E of the Systems Act
- consider and reach agreement on proposals for shared control of the company and
- consider cash flow projections of the company's proposed operations for at least three financial years.<sup>82</sup>

A municipality may further transfer ownership or otherwise dispose of a wholly owned private company, subject to the Municipal Finance Management Act, or an interest in a private company subject to section 14 of the Municipal Finance Management Act and only if that transfer or disposal would not result in an infringement of section 86C (2) of the Systems Act by another municipality which holds an interest in the company.<sup>83</sup>

In respect of the establishment of a service utility, it is now statutorily permitted for a municipality to pass a by-law establishing such a service utility. A by-law establishing a service utility must: state the purpose for which the service utility is established, confer the powers and impose the duties on the service utility which are necessary for the attainment of such purpose and provide for the following aspects:

- a board of directors to manage the service utility
- the number of directors to be appointed
- the appointment of directors, the filling of vacancies and the replacement and recall of directors by the parent municipality
- the terms and conditions of appointment of directors

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<sup>81</sup> Ss 86E(1)-(2) of the Systems Act.

<sup>82</sup> See s 86F of the Systems Act.

<sup>83</sup> Read s 86G of the Systems Act.

- the appointment of a chairperson
- the operating procedures of the board of directors
- the delegation of powers and duties to the board of directors
- any other matter necessary for the proper functioning of the board of directors
- the acquisition of infrastructure, goods, services, supplies or equipment by the service utility, or the transfer of infrastructure, goods, services, supplies or equipment to the service utility
- the appointment of staff by the service utility or the transfer or secondment of staff to the service utility in accordance with applicable labour legislation
- the terms and conditions on which any acquisition, transfer, appointment or secondment is made
- the governance of the service utility and
- any other matter necessary for the proper functioning of the service utility.

The by-law may also determine budgetary and funding arrangements for its implementation. No by-law may confer on a service utility any functions or powers falling outside the competence of the parent municipality contemplated by section 8 of the Systems Act.<sup>84</sup> It should also be noted that a service utility is a juristic person and a municipal entity under the sole control of the municipality which established it. All service utilities must restrict their activities to the purpose for which they were established and have no competence to perform any activity which falls outside their functions or powers as are determined in terms of the by-law of the municipality.<sup>85</sup>

Apart from establishing IMSDs, municipalities may also establish so-called Multi-jurisdictional Municipal Service Utilities (MMSUs).<sup>86</sup> In this regard it is provided that two or more municipalities, by written agreement, may establish a multi-jurisdictional service utility to perform any function or power envisaged by section 8 of the Systems Act, in their municipal areas or in any designated parts of their municipal areas. The Minister may, in the national interest and in consultation with the Cabinet member responsible for the functional area in question, request two or more municipalities to establish a multi-jurisdictional service utility to conform to the requirements of national legislation applicable to the provision of a specific municipal service. The

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<sup>84</sup> Read ss 86H(1)-(4) of the Systems Act.

<sup>85</sup> See s 86I(1)-(2) of the Systems Act.

<sup>86</sup> See s 87 of the Systems Act as substituted by s 19 of Act 4 of 2003.

municipalities that receive such a request must within two months decide whether to accede to the request, and convey their decision to the Minister.<sup>87</sup> An agreement establishing a multi-jurisdictional service utility must describe the rights, obligations and responsibilities of the parent municipalities, and must :

- determine the boundaries of the area for which the multi-jurisdictional service utility is established
- identify the municipal service or other function to be provided in terms of the agreement
- determine budgetary and funding arrangements for implementation of the agreement
- provide for a board of directors for the multi-jurisdictional service utility, the appointment of directors by the respective parent municipalities, the filling of vacancies and the replacement and recall of directors, the number of directors appointed by each parent municipality, the terms and conditions of appointment of directors, the appointment of a chairperson, the operating procedures of the board of directors, the delegation of powers and duties to the board of directors and any other matter relating to the proper functioning of the board of directors
- provide for the acquisition of infrastructure, goods, services, supplies or equipment by the multi-jurisdictional service utility or the transfer of infrastructure, goods, services, supplies or equipment to the multi-jurisdictional service utility; the appointment of staff by the multi-jurisdictional service utility or the transfer or secondment of staff to the multi-jurisdictional service utility in accordance with applicable labour legislation and the terms and conditions on which any acquisition, transfer, appointment or secondment is made
- determine the conditions for, and consequences of, the withdrawal from the agreement of a parent municipality
- determine the conditions for, and consequences of, the termination of the agreement, including the method and schedule for winding-up the operations of the multi-jurisdictional service utility; the distribution of the proceeds and the allocation among the parent municipalities of any assets and liabilities
- provide for the governing of the multi-jurisdictional service utility, compulsory written reports regarding the activities and performance of the multi-jurisdictional ser-

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<sup>87</sup> See s 88 as amended by s 20 of Act 44 of 2003.

vice utility to a parent municipality, information that may be requested from the multi-jurisdictional service utility by a parent municipality, the amendment of the agreement and any other matter necessary for the proper functioning of the multi-jurisdictional service utility.<sup>88</sup>

A multi-jurisdictional service utility is further accountable to the parent municipality(ies) and must comply with the Municipal Finance Management Act. Parent municipalities are again entitled to receive such regular written reports from the multi-jurisdictional service utility with respect to its activities and performance, as may be set out in the agreement establishing the multi-jurisdictional service utility. They may also request the multi-jurisdictional service utility to furnish them with such information regarding its activities as the parent municipality(ies) may reasonably require. Parent municipalities may also appoint a nominee to inspect, at any time during normal business hours, the books, records, operations and facilities of the multi-jurisdictional service utility and those of its contractors relating to the performance of the function or power for which the multi-jurisdictional service utility is established.<sup>89</sup>

Multi-jurisdictional service utilities terminate automatically, when there is only one remaining parent municipality or by written agreement among all of the parent municipalities or upon the termination date or the fulfilment of any condition for termination contained in the agreement establishing the multi-jurisdictional service utility.<sup>90</sup>

The parent municipality(ies) of a municipal entity have specific duties towards such a municipal entity and must:

- exercise any shareholder, statutory, contractual or other rights and powers it may have in respect of the municipal entity to ensure that both the municipality and the municipal entity comply with this Act, the Municipal Finance Management Act and any other applicable legislation and that the municipal entity is managed responsibly and transparently and meets its statutory, contractual and other obligations
- allow the board of directors and chief executive officer of the municipal entity to fulfil their responsibilities and

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<sup>88</sup> See s 90 of the Systems Act as substituted by s 22 of Act 44 of 2003. A (MMSU) is a juristic person and falls under the control/shared control of the parent municipalities. All (MMSU) must restrict their actions to the object of their establishment and they have no other competencies outside the functions set out in their establishment agreement.

<sup>89</sup> Read s 92 as substituted by s 24 of Act 44 of 2003.

<sup>90</sup> S 92 as substituted.

- establish and maintain clear channels of communication between the municipality and the municipal entity.<sup>91</sup>

In instances where a parent municipality, which has sole control of a municipal entity, or effective control in the case of a municipal entity which is a private company, the parent municipality must ensure that annual performance objectives and indicators for the municipal entity are established by agreement with the municipal entity and included in the municipal entity's multi-year business plan in accordance with section 87 (5) (d) of the Municipal Finance Management Act. The parent municipality is further obligated to monitor and annually review, as part of the municipal entity's annual budget process, the performance of the municipal entity against the agreed performance objectives and indicators and may liquidate and disestablish the municipal entity if the performance of the municipal entity is unsatisfactory, if the municipality does not impose a financial recovery plan in terms of the Municipal Finance Management Act and the municipal entity continues to experience serious or persistent financial problems or if the municipality has terminated the service delivery agreement or other agreement it had with the municipal entity.<sup>92</sup> Parent municipalities that have shared control of a municipal entity must enter into a mutual agreement determining and regulating the following:

- their mutual relationships in relation to the municipal entity
- the exercise of any shareholder, contractual or other rights and powers they may have in respect of the municipal entity
- the exercise of their powers and functions in terms of the Systems Act and the Municipal Finance Management Act with respect to the municipal entity
- measures to ensure that annual performance objectives and indicators for the municipal entity are established by agreement with the municipal entity and included in the municipal entity's multi-year business plan in accordance with section 87 (5) (d) of the Municipal Finance Management Act
- the monitoring and annual review, as part of the municipal entity's annual budget process as set out in section 87 of the Municipal Finance Management Act, of the performance of the municipal entity against the established performance objectives and indicators

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<sup>91</sup> Refer to s 93A as inserted by s 26 of Act 44 of 2003.

<sup>92</sup> See s 93B of the Systems Act.



- the payment of any monies by the municipalities to the municipal entity or by the municipal entity to the municipalities
- procedures for the resolution of disputes between those municipalities
- procedures governing conditions for and consequences of withdrawal from the municipal entity by a municipality
- procedures for terminating the appointment and utilisation of the municipal entity as a mechanism for the performance of a municipal function
- the disestablishment of the municipal entity, the division, transfer or liquidation of its assets and the determination of the responsibility for its liabilities and
- any other matter that may be prescribed.

Parent municipalities may further liquidate and disestablish the municipal entity if the performance of the municipal entity is unsatisfactory, if the municipality does not impose a financial recovery plan in terms of the Municipal Finance Management Act and the municipal entity continues to experience serious or persistent financial problems, or if the municipality has terminated the service delivery agreement or other agreement it had with the municipal entity.<sup>93</sup>

In respect of municipal representatives, it is now determined that the council of a parent municipality must designate a councillor or an official of the parent municipality, or both, as the representative or representatives of the parent municipality. The functions of such representative(s) are to represent the parent municipality as a non-participating observer at meetings of the board of directors of the municipal entity concerned and to attend shareholder meetings and exercise the parent municipality's rights and responsibilities as a shareholder, together with such other councillors or officials that the council may designate as representatives. It is further important to note that the official lines of communication between a municipal entity and the parent municipality exist between the chairperson of the board of directors of the municipal entity and the mayor or executive mayor, as the case may be, of the parent municipality. The mayor or executive mayor, as the case may be, of a parent municipality may at any time call or convene any meeting of shareholders or other general meeting comprising the board of directors of the municipal entity concerned and the representatives of the parent municipality, in order for the board of directors to give

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<sup>93</sup> Read s 93C as inserted by s 26 of Act 44 of 2003.

account for actions taken by it. The council of a parent municipality may also determine the reporting responsibilities of a municipal representative. A municipal representative is strictly obligated to represent the parent municipality faithfully at shareholder meetings, without consideration of personal interest or gain, and must keep the council informed of how voting rights were exercised and of all relevant actions taken on behalf of the municipality by the representative. A municipal representative must further act in accordance with the instructions of the council and may be reimbursed for expenses in connection with his or her duties as a municipal representative. The municipal representative may not receive any additional compensation or salary for such duties, however.<sup>94</sup>

It is also provided that the board of directors of a municipal entity must have the requisite range of expertise to effectively manage and guide the activities of the municipal entity. The board must consist also of at least a third non-executive directors and must have a non-executive chairperson. Before nominating or appointing a director, it is the responsibility of the parent municipality of a municipal entity to establish a process through which applications for nomination or appointment are widely solicited, to compile a list of all applicants and any prescribed particulars concerning applicants and to ensure that the municipal council makes the appointment or nomination from such list.<sup>95</sup> A person is not eligible to be a director of a municipal entity if he or she:

- holds office as a councillor of any municipality
- is a member of the National Assembly or a provincial legislature
- is a permanent delegate to the National Council of Provinces
- is an official of the parent municipality of that municipal entity
- was convicted of any offence and sentenced to imprisonment without the option of a fine, and a period of five years since completion of the sentence has not lapsed
- has been declared by a court to be of unsound mind or
- is an unrehabilitated insolvent.

If a director of a municipal entity during that person's term of office becomes disqualified on a ground mentioned above, then such a person ceases to be a director from

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<sup>94</sup> See s 93D of the Systems Act as amended.

<sup>95</sup> See s 93E of the Systems Act.

the date of becoming disqualified.<sup>96</sup> The parent municipality of a municipal entity is further authorised to remove or recall a director appointed or nominated by that municipality. Such removal or recall is permitted only when the performance of the director is unsatisfactory; when the director, either through illness or for any other reason is unable to perform the functions of office effectively or if the director, whilst holding office, is convicted of fraud or theft or any offence involving fraudulent conduct or has failed to comply with or breached any legislation regulating the conduct of directors, including any applicable code of conduct.<sup>97</sup>

The board of directors of a municipal entity has also been afforded specific duties and responsibilities. As such, the board must provide effective, transparent, accountable and coherent corporate governance and conduct effective oversight of the affairs of the municipal entity. It must also ensure that it and the municipal entity comply with all applicable legislation and agreements and communicate openly and promptly with the parent municipality of the municipal entity. In general, the board must deal in good faith with the parent municipality of the municipal entity. A director of a municipal entity is further obligated to disclose to the board of directors and to the representative of the parent municipality any direct or indirect personal or business interest that the director or his or her spouse or partner may have in any matter before the board, and must withdraw from the proceedings of the board when that matter is considered, unless the board decides that the director's direct or indirect interest in the matter is trivial or irrelevant. Directors must at all times act in accordance with the Code of Conduct for directors referred to in section 93L of the Systems Act, which is referred below.<sup>98</sup> In respect of meetings of the board of directors it is provided that such meetings must be open to the municipal representatives referred to in section 93D of the Systems Act. Municipal representatives have non-participating observer status in a meeting of the board of directors of a municipal entity.<sup>99</sup> It is also determined that the board of directors of a municipal entity must appoint a chief executive officer of the municipal entity. Such a chief executive officer

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<sup>96</sup> Refer to s 93F of the Systems Act.

<sup>97</sup> Read s 93G of the Systems Act as inserted by s 26 of Act 44 of 2003.

<sup>98</sup> See s 93H of the Systems Act.

<sup>99</sup> Refer to s 93I of the Systems Act.

is accountable to the board of directors for the management of the municipal entity.<sup>100</sup>

Municipal entities may not establish or participate in the establishment of a company or any other corporate body, including a trust, or acquire or hold an interest in a company or any other corporate body, including a trust. This prohibition does not apply, however, to the acquisition by a municipal entity of securities in a company listed on the Johannesburg Securities Exchange for investment purposes, subject to any applicable provisions of the Municipal Finance Management Act or a fund for the benefit of employees of a municipal entity in terms of a law regulating pensions or medical aid schemes.<sup>101</sup>

Mention was made earlier in this chapter that the Systems Act now provides for a specific Code of Conduct for directors and members of staff of a municipal entity. In this regard, it is provided that the Code of Conduct for councillors contained in Schedule 1 of the Act also applies, with the necessary changes, to directors of a municipal entity. In the application of item 14 of Schedule 1 of the Act to directors of a municipal entity, that item must be regarded as providing that:

- the board of directors of a municipal entity may investigate and make a finding on any alleged breach of a provision of this Code by a director or establish a special committee to investigate and make a finding on any alleged breach of a provision of this Code by a director or make appropriate recommendations to the board of directors
- if the board of directors or special committee finds that a director has breached a provision of this Code, the board of directors may issue a formal warning to the director, reprimand the director, fine the director or recommend to the parent municipality that the director be removed or recalled
- the board of directors of a municipal entity must inform a parent municipality of that entity of any action taken against a director in terms of the Code of Conduct.

The Code of Conduct for municipal staff members contained in Schedule 2 of the Systems Act applies, with the necessary changes, to the members of staff of a municipal entity. For purposes of this provision, any reference in Schedule 1 or 2 of the Act to a 'councillor', 'MEC for local government in the province', 'municipal council',

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<sup>100</sup> S 93J of the Systems Act.

<sup>101</sup> Read s 93K of the Systems Act.

'municipality' and 'rules and orders' must, unless inconsistent with the context or otherwise clearly inappropriate, be construed as a reference to a director of a municipal entity, parent municipality, board of directors, municipal entity and procedural rules, respectively.<sup>102</sup>

## **16.4 An overview of services that are generally provided by local governments**

### **16.4.1 General factors that impact on municipal services**

It has been explained in the introductory chapters of this work that the provision of municipal services is arguably the most important reason for the existence and creation of local government structures. So important and fundamental is the provision of municipal services to local communities that it has been incorporated and entrenched within the new constitutional framework of South Africa. Before one investigates the basic services that municipalities should provide, it is important to look briefly at specific factors that have an impact on service provision and service levels, however. To a large extent these factors are determining factors in achieving a system of effective and sustainable service provision. The factors can be summarised as follows:

- *Financial resources* Finance is often regarded as the oil that keeps the engine of government running smoothly.<sup>103</sup> Without financial resources there can be no effective and sustainable provision of municipal services. All municipalities should maximise their potential financial income and should utilise such resources sparsely and diligently. Municipal finances are generated mainly via two sources:
  - (a) the sharing in revenue that is raised nationally
  - (b) revenue that is generated locally through the collection of rates, taxes and surcharges on services.
- *Training and municipal planning* The restructuring of municipal governments since 1993 has had a somewhat negative impact on skilled municipal employees. Many municipalities have lost the services of highly skilled and experienced municipal personnel. Coupled with the reality of a new legal and administrative framework, all municipalities are in need of extensive training and education programmes to ensure services are provided in compliance with the new legal foundation. Local governments should not be short sighted in respect of the

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<sup>102</sup> Refer to s 93L of the Systems Act as inserted by s 26 of Act 44 of 2003.

<sup>103</sup> See Craythorne (1997) 391.

importance of new training initiatives. The new local government systems must be supported by a comprehensive and continuous programme of training and skills development. Without proper attention to such aspects, sustainable service provision might be an unattainable ideal. Equally important to training is the principle of municipal planning. Planning in general is an inseparable part of the processes of public administration and accordingly requires specific consideration.<sup>104</sup> In basic terms, municipal planning means looking ahead by anticipating and making arrangements for dealing with future problems by projecting trends. One such trend is, for example, the migration of people. Migration of people from mostly rural areas to more developed areas such as towns or cities is a universal phenomenon. People migrate from one place to another in the hope of obtaining work and achieving a better quality of life. The most important consideration in municipal planning in terms of accommodating migration trends is to anticipate future demand for basic municipal services such as water, sanitation, refuse removal and primary health care facilities and means. Often migration patterns are difficult to anticipate, because many informal settlements are established almost anywhere. In light of such sudden municipal demands, municipal planning is a *sine qua non* for a successful local government system. Planning thus has its roots in the past, but with a view to deciding the future in the present.<sup>105</sup>

- *Accountability, effective decision making and local democratic governance* The new constitutional dispensation of South Africa, which includes local governments, is founded *inter alia* on the values of a democratic, accountable, responsive and open government.<sup>106</sup> All municipal governments must therefore structure and manage their affairs in compliance with such values. Municipalities must take decisive steps to eradicate all forms of maladministration and corruption and must align themselves with the new supreme values in the state. Without a concerted effort to establish a new, clean and accountable local governance, there is little

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<sup>104</sup> See Craythorne (1997) 400-402. The writer refers to certain definitions of the term "planning", which in essence means that objectives need to be clarified, whereafter specific actions should be implemented to achieve the desired goals. Planning involves not only the financial inputs necessary but also who the various role players should be.

<sup>105</sup> See Craythorne (1997) 402.

<sup>106</sup> See the Constitution s 1(d).

chance that the newly established local government structures will secure and fulfil their obligations towards effective and sustainable service delivery.<sup>107</sup>

- *Public participation and social and economic development* Public participation within all spheres of government is a constitutional prerequisite. This is of particular importance since the former local government dispensation excluded many people from its processes and decision-making procedures. Without proper participation of all the role players in local communities, the new local government dispensation is stillborn from the outset. In general, participation leads to information, which in turn ensures support. It is further a well-known fact that people generally support and participate in processes in which they have a direct or even an indirect stake. Communities need to realise that local governments are there mainly to provide services and to manage and control the local area to the benefit of all that are living or working there. As a counterweight, municipalities must assure and provide their services so as to ensure social and economic development which in turn will ensure a better future for all residents. The importance of this objective has been given constitutional protection.<sup>108</sup>

#### **16.4.2 Municipal services to be provided under the Constitution**

##### **16.4.2.1 Distinguish between functions and services**

Before one looks at the different services a municipality is required to provide, it is of value to distinguish between the terms functions and services. As defined by Craythorne,<sup>109</sup> a municipal function is something that is linked to the nature of governance. A government must govern, and in order to govern it must perform certain functions, such as making laws, levying taxes, employing personnel and allocating resources. On the other hand, a service is something that is provided by one person or institution to another person or groups of persons. In this regard, a service is something that is to be rendered to others.<sup>110</sup>

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<sup>107</sup> The more money is lost or wasted because of maladministration and corruption, the fewer resources are available to provide much-needed services and infrastructure to service hungry local communities.

<sup>108</sup> See the Constitution s 152.

<sup>109</sup> See Craythorne (1997) 409.

<sup>110</sup> The main objective of municipalities, not only historically, but also according to the Constitution, is to provide effective and sustainable services to their respective communities. In order to provide such services, a municipality must also perform certain functions. The provision of services is therefore dependent on the ability to perform certain functions.



### 16.4.2.2 Specific municipal services

It is interesting to note that within the new constitutional dispensation no direct or specific mention is made with regard to the specific services that municipalities should ordinarily render to their communities. On the contrary, the new legal framework refers to the powers, functions, objects and duties of municipalities. A closer evaluation of such powers, functions, objects and duties the terms seem to indicate reveals, albeit indirectly, certain services that should be rendered. However, it is submitted that it is not altogether certain whether certain powers, functions or duties also require municipalities specifically to render services regarding such matters.<sup>111</sup> In summary, municipalities have executive and legislative powers with regard to the matters listed in Part B of Schedule 4 and 5 of the Constitution, as well as with regard to those matters that have been assigned to them in terms of national or provincial legislation.<sup>112</sup> Apart from the functional areas mentioned above, all municipalities have to strive, within their financial and administrative capacities, to achieve the objects set out in section 152(1)(a)-(e) of the Constitution.<sup>113</sup> Seen in context, the areas or matters mentioned in Part B of Schedules 4 and 5 indicate the type of service that local government should provide for. These seem to be areas that neither the national nor the provincial government would be able to provide without unnecessary bureaucratic growth. Before the different services are discussed briefly, it must be remembered that, according to item 2 of Schedule 6 of the Constitution, much old order legislation, for example old provincial ordinances, are still in force, and many of them require extra services or functions to be rendered.<sup>114</sup>

Upon a close evaluation of the different municipal services that should be rendered, two broad categories of such service are recognisable. Some services are

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<sup>111</sup> The Constitution Sch 4 Part B and Sch 5 Part B identify the functional areas of municipal executive authority and also indirectly municipal legislative authority. Only a few of these functional areas refer to a service or services that are to be rendered. Sch 4 Part B refers only to fire fighting services, municipal health services and water and sanitation services. Sch 5 Part B does not refer to any services that should be provided. In this regard it is somewhat uncertain if the other functional areas also refer to a service that should be rendered regarding such areas or if they are only to be regulated through executive and legislative actions.

<sup>112</sup> See the Constitution s 156(1)(a)-(b). Again reference should be made to the obligation on the two higher spheres of government to assign to municipalities those matters listed in Schs 4 and 5 Part A, which necessarily relates to local government. See the Constitution s 156(4)(a)-(b).

<sup>113</sup> See the Constitution s 152(2).

<sup>114</sup> Only if such old-order laws are contrary to the Constitution or have been repealed would they be of no further force. See, eg, also the matters listed in the LGTA Schs 2 and 2A. The LGTA has been revoked, however, and is no longer applicable.

regarded as *support services*, while others are classified as *operational services*. Support services refer broadly to those services that are vital for the efficient and effective operation of the overall municipal machine and differ from one municipality to another, according to size and capacity. Operational services again refer to those services that are generally considered to be services that a municipality should render to its local community. The different services in each category can be summarised briefly as follows:

**(a) General municipal support services**

- *Legal services* All municipalities need legal advice and support in order to ensure that they operate within the Constitution and the law in general. Basically all the different branches of the law are applicable and relevant to municipal operations and activities. There are hardly any legal aspects, apart from aspects such as international relations, that are not applicable within some municipal situation. In order to deal with the many legal aspects, municipalities appoint either their own legal staff or make use of various private legal advisors.
- *Financial services* Internal financial advice services are indispensable for all municipalities. Without such advice, municipalities will not be able to plan and realise their other responsibilities according to the new constitutional requirements.<sup>115</sup> The importance of financial services therefore speaks for itself.
- *Personnel services* As a legal person, no municipality can act without natural persons that act on behalf of the municipality. This municipal corps or administration is thus vital to any local government. All in all personnel services refers to the recruitment, selection, appointment, placement, promotion and disciplinary procedures relating to the members of staff of a particular municipal government.
- *Secretarial services* These services refer mainly to the overall administration of a municipality. All internal procedural aspects are handled mostly through such services which include internal correspondence and also the finalisation of council agendas and the keeping of council minutes.
- *Repair and maintenance services* Municipalities need a very large infrastructure to operate effectively. This infrastructure requires various movable assets, which assets should be maintained and repaired from time to time. Basically all municipi

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<sup>115</sup> See again the Constitution ss 152(2) and 153.

palties therefore provide for internal repair and maintenance services.

- *Information and technology services* In the 21st century, no government can operate effectively and sufficiently without the modern world's new technological development. It is especially the computerised information services that have revolutionised all institutions. No local government can afford to be without such services.
- *Supply services* All municipalities must provide for a certain number of supplies that should be available for effective and smooth operations. Such services are a vital support service to municipal operations. Supplies include aspects such as stationery, furniture, and other supplies, to name but a few.

**(b) Municipal operational services:**<sup>116</sup>

- *Air pollution* Municipalities similar to the two higher spheres of government are also responsible for environmental protection. Air pollution from car exhaust fumes or industrial smoke is an important environmental concern and should be addressed and controlled on a local level.<sup>117</sup>
- *Building regulations* The control and oversight of building activities is generally regarded as one of the so-called "inspection services". All municipalities should control and inspect compliance to building regulations and standards. This is a very important service to the public in general, as substandard building or dwellings can have life-threatening consequences. Although building regulations and standards are set nationally, it is their enforcement and control on a municipal level that ensures a safe and acceptable system.<sup>118</sup>
- *Childcare facilities* The provision and control of childcare facilities is also a municipal matter. Neither national government nor the provincial governments are in an ideal position to address and control such a functional area. It is for municipalities themselves to determine local needs and expectations and to provide for them as may be required. Although childcare facilities and services have also been allocated to local governments, the specific role of such governments is not

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<sup>116</sup> See the Constitution Schs 4 and 5 Parts B.

<sup>117</sup> Municipalities are constitutionally obliged to promote a safe and healthy environment. The Constitution s 152(d).

<sup>118</sup> See the National Building Regulations and Building Standards Act 103 of 1977. Many municipalities also provide for their own town-planning schemes, which also require certain standards regarding building activities. Some municipal by-laws are also important in this regard.

clearly explained. Some commentators have already suggested that new legislative guidance is needed to rectify such a position.<sup>119</sup>

- *Electricity and gas reticulation* Arguably one of the most common and important services that are provided for by municipalities is electricity and/or gas reticulation. This is an example of a traditional service that has become indispensable within a modern society. The service does not necessarily relate to the generation of electricity or exploitation of gas, but rather to providing such commodities to local premises for utilisation.

In a similar way to water provision, electricity is normally rendered to local residents after such residents have concluded a service-provision agreement with their local municipality. When such services are received, residents are normally responsible for paying for such services.<sup>120</sup> Most municipalities are mere suppliers of electricity to local residents. In order to become a supplier, a municipality must become a licensee, as is intended in national legislation.<sup>121</sup> Once a municipality has started to supply electricity to consumers, it is prohibited from disconnecting such supply if such a consumer has paid the full amount due in respect of the supply of electricity. This is the position regardless of whether the consumer owes any other amount to the municipality for other services or other causes of action.<sup>122</sup> Generally a municipality is required to supply electricity to consumers. To supply means to make available rather than to actually deliver. Electricity is nor-

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<sup>119</sup> See Zaal and Matthais "Local Government and the Provision of Childcare Services: An Essential area for legislative reform" *SALJ* 119 (1) 138 *et seq.* The writers mention that the potential importance of the role of local authorities was recognised by the drafters of the 1996 Constitution: therefore its inclusion in Sch 4B. They finally reiterate that local government authorities have a constitutional obligation to provide services for children but that such an obligation has largely gone unrecognised, and needs urgent attention. They conclude by suggesting that the best way to redress this serious inadequacy is for the national legislature to promulgate additional legislation. At 153-154.

<sup>120</sup> See *Wellington Court Shareblock v Johannesburg City Council* 1995 (3) SA 827 (A). In the case the appellants, each of whom owned immovable property within the respondent's municipal jurisdiction, concluded agreements with the respondent in terms of which the respondent was to supply the properties in question with electricity and water. In its particulars of claim in an action in a local division the respondent alleged that the appellants were liable to it for the payment of certain amounts in respect of such services. The appellants excepted to these particulars on the ground that the agreements were *ultra vires* the relevant by-laws and could accordingly not support a claim for payment. The local division assumed, for the sake of argument, that the agreements were indeed *ultra vires*, but held, on the authority of a long line of cases, that the appellant, having received benefits under the contract, was estopped from raising the *ultra vires* defence.

<sup>121</sup> See the Electricity Act 41 of 1987.

<sup>122</sup> See *Senekal Inwonersvereniging v Plaaslike Oorgangsraad* 1998 (3) SA 719 (O). The court held that the disconnection of the electricity supply of residents who had not paid all accounts in respect of services or rates in full could not be valid. At 727 paras H-I.

mally also supplied to consumers and not a property. There can thus be more than one consumer on a particular erf.<sup>123</sup> Generation or exploitation is normally done nationally, although it is not entirely uncommon for certain municipalities to generate electricity for themselves.<sup>124</sup> Generally municipalities are responsible for the establishment and maintenance of the electricity provision network and for providing support services thereto. Local authorities must note that they are not generally allowed to discontinue one service because of arrear rates for another. In the case of *Hartzenberg v Nelson Mandela Metropolitan Municipality (Despatch admin unit)*,<sup>125</sup> the court held that although the applicants were in unlawful occupation of houses and were in arrears with payments for water supplies, the respondent municipality could not disconnect the electricity supply to the properties. The court held that neither the relevant Electricity Supply by-law nor the Local Government: Municipal Systems Act gave the respondent such authority. The respondent was thus not entitled to discontinue the electricity supply because of the arrears on the water accounts.<sup>126</sup>

- *Fire fighting services* The provision of fire fighting services is the first service that is specifically referred to in Part B of Schedule 4 of the Constitution. It is self-explanatory that this service is of cardinal importance to all residents of municipal areas. Every day local residents are at risk in respect of fires. In this respect, such services are often lifesaving. Municipalities should ensure that fire stations are ideally located within each particular municipal jurisdiction, in order to provide a rapid and effective service. The nature of the service at hand requires the quickest response possible. The personnel that provide the service must be properly trained and should be effectively equipped to handle any foreseeable situation. Emphasis should be placed not only on corrective fire-fighting services, but also on preventative initiatives. Such initiatives and responsibilities are especially important in high-risk areas such as informal settlements. Fire-fighting services are controlled mainly through national legislation.<sup>127</sup> It should be noted that fire-

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<sup>123</sup> See *Omtter (Edms) Bpk v Welkom Stadsraad* 1999 (3) SA 787 (SCA).

<sup>124</sup> See the Electricity Act 41 of 1987 and the Gas Act 48 of 2001 for more details.  
<sup>125</sup> 2003 (3) SA 633 (SE).

<sup>126</sup> See at 638E-F.

<sup>127</sup> See the Fire Brigade Services Act 99 of 1987.

fighting services are not free of charge and that fees could be recovered by the service provider.<sup>128</sup>

- *Local tourism* In an effort to attract national or even international investment, all municipalities should explore local investment opportunities. Tourism is one such opportunity that could be a significant enhancement in municipal financial income and one which should be explored thoroughly. Local tourism is something that cannot be done locally on an isolated basis, however; it needs to tie in with an overall national programme for the country as a whole.
- *Municipal airports* In some municipal areas there might be a need to provide and or maintain a municipal airport. To this extent, such a service should be provided to fulfil local needs, depending on financial resources and overall strategic programmes. When such a service is indeed provided for, municipal governments should take note of the various responsibilities and possible liabilities that accompany the provision of such a service.
- *Municipal planning* It has been stated several times in this work that all municipalities are obligated to provide and ensure proper municipal planning services. Such services refer mainly to various aspects of the management and control of land use or land use rights. There are many laws applicable in relation to municipal planning services, ranging from national laws such as the Physical Planning Act<sup>129</sup> and the Development Facilitation Act<sup>130</sup>, provincial laws and ordinances and also relevant local by-laws and town planning schemes.<sup>131</sup>
- *Municipal health services* All municipalities are involved in ensuring and providing certain minimum health services to their local communities. Such service provision is essential to everyday life, and municipalities are best suited to provide and en-

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<sup>128</sup> See, eg, *Tuinroete Klein Karoo Distriksmunisipaliteit v Lategan* 2003 (2) SA 683 (C). The Fire Brigade Services Act 99 of 1987 (the Act) s 10 creates a statutory obligation to pay for fire brigade services, coupled with an effective debt-recovery mechanism. The Act s 10(1) authorises a controlling authority (which is a local authority in terms of the Act s 1) to determine the fees payable by a person on whose behalf fire-fighting services were rendered. The subsection creates a *sui generis* cause of action. It does not exclude the recovery of compensation for the rendering of services on common-law grounds. The chief fire officer who wishes to recover compensation from a person on whose behalf fire-fighting services were rendered has a choice to institute action for compensation on a common-law cause of action or to recover the moneys as determined by the controlling authority.

<sup>129</sup> 88 of 1967 and also the Physical Planning Act 125 of 1991.

<sup>130</sup> 67 of 1995.

<sup>131</sup> See, eg, the old Transvaal ordinance on town planning and towns, ordinance 15 of 1986 and the former Pretoria town-planning scheme 1974, which was enacted in accordance and on the authority of s 19 of the ordinance.



sure such services. Again, one should remember that such services interact with national and provincial programmes on health services.

- *Municipal public transport* Public transport is an indispensable service to the public at large. Depending on the size and density of a local area, municipalities should plan and make provision for public transport facilities. These services are very expensive and need to be justified according to local needs.
- *Municipal public works* Municipalities should also provide for certain municipal public works. Such works refer only to facilities or services that are required in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under the Constitution or any other law. Most other public works services are to be provided by the higher spheres of government.
- *Municipal services relating to pontoons, ferries, jetties, piers and harbours* Depending on location and geographical features, some municipalities are required to provide, maintain and control certain services where water is applicable. Often such services are also regulated in terms of higher legislative provisions. In some instances municipal involvement is entirely excluded. The regulation of, for example, international and national shipping and matters related thereto are exempt from local government control.
- *Storm water management systems in built-up areas* As municipal jurisdictions are becoming more and more developed, the management, provision and maintenance of storm-water systems are becoming ever so troublesome. Urbanisation with complaisant modern infra-structure such as tarred roads and roofed buildings increasingly causes severe flooding in residential areas. Municipalities therefore need to plan and provide for sufficient infrastructure to handle and control such higher volumes of storm water.
- *Trading regulations* The modern 21st century city has undergone significant changes from its humble beginnings a few hundred years ago. Many changes in society, especially in some third world countries and economies, have led to new approaches regarding trading patterns in especially highly populated areas. In many towns and cities, residents have become accustomed to informal trading practices that are permitted throughout the municipal area. However, such trading habits can sometimes have a negative impact on long-established and more tradi-



tional business establishments, which in turn could negatively affect new job creation and sustainable enterprises.<sup>132</sup>

- *Water and sanitation services* The provision of water, and more specifically drinking water, to local residents is generally accepted as one of the most basic of services that municipalities must render.<sup>133</sup> Without water and basic sanitation infrastructure and services, it is difficult to imagine how such settlements can sustain and survive. Accordingly, water and sanitation services are seen to tie in strongly with the developmental duties and objectives of municipalities that have been entrenched in the Constitution.<sup>134</sup>
- *Beaches and amusement facilities* Coastal municipalities have an additional service to their communities, in that they must control and manage local beaches in their areas. Apart from beachfront management, all municipalities are to a greater or lesser degree responsible for the control and management of amusement facilities.
- *Billboards and the display of advertisements in public places* The advertising industry has become a very competitive and fast-growing business. Every municipal administration is therefore regularly confronted with new developments regarding advertisement initiatives. Because of factors such as traffic safety, environmental considerations and an overall aesthetic presentation of a particular area, proper management and control over billboards and the display of advertisements in public is necessary. Under the Constitution, special attention should be given to the regulation of billboards and the display of advertisements in public places. In light of the fact that the Bill of Rights protects the right to freedom of expression, which right also includes commercial free speech, municipalities must ensure that their policies and by-laws do not limit such a right unreasonably. For more on such aspects see *African Billboard Advertising v NSS Central Local*

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<sup>132</sup> Most informal or so-called "street trader" do not pay levies for being able to trade in certain areas and it is the responsibility of formal business owners to cross-subsidise for loss in municipal revenue. These practices not only create unequal trading standards but they often also pose environmental and safety hazards. The trading of goods and services within municipal areas should therefore be regulated and controlled, to the benefit of all parties concerned.

<sup>133</sup> See the Water Services Act 108 of 1997. See also *Manqele v Durban TMC* 2002 (6) SA 423 (D).

<sup>134</sup> Refer to the Constitution ss 152(d) and 153. Water is an essential life-sustaining commodity and is also indispensable to ensure a healthy environment. Municipal water and sanitation services are, however, limited to portable water supply systems and domestic wastewater and sewage dis-

*continued on next page*

*Councils.*<sup>135</sup> In this case the applicant erected certain advertising signs on property in the Durban area which was owned by Spoornet. Acting in terms of its local building by-laws, the respondent objected to the presence of the signs on the basis that they had been erected either in contravention of its by-laws or without the requisite permission to do so, and it placed the applicant on terms to remove them. When the applicant failed to oblige, the respondent engaged the services of a contractor to remove them. The applicant demanded its property back. The court held that the removal of the billboards was unlawful and that the by-law in question had not intended that such signs be removed without a court order. The respondent was subsequently ordered to re-erect the signs.<sup>136</sup>

- *Cemeteries, funeral parlours and crematoria* Providing for cemeteries, crematoria and funeral parlours has always been a function of local governments. Such services are important in the day-to-day living experiences of all communities and should thus be provided on a continuous basis.
- *Cleansing services* According to the Constitution, the provision of cleansing services is also regarded as a local government matter that falls within the functional areas of exclusive provincial legislative competence. What is included under such services is not clear. It is submitted that cleansing services are closely related to municipal health services, however, and that a strong link between the two types of services is self-evident.
- *Control of public nuisances* Municipalities are also responsible for controlling public places within their relevant municipal jurisdiction, and they must therefore also provide for control measures to ensure that public nuisances are addressed. Typical examples of public nuisances that should be controlled are matters that relate to noise control, zoning-scheme contraventions and aspects that have their origin in bad neighbour relations. Municipalities should ensure that community members live as far as possible in harmony with one another and that clear and effective mechanisms exist in order to address any negative or nuisance-like actions or activities that do arise.

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positional systems. As is the case with many other services, water and sanitation services should link up with national and provincial programmes and initiatives.

<sup>135</sup> 2004 (3) SA 223 (N).

<sup>136</sup> See pages 228-229.

- *Control of undertakings that sell liquor to the public* The selling of liquor to the public has always been a contentious and often difficult issue, as there are many negative consequences attached to such activities. Because of the enormous extent of the liquor industry and liquor consumption in our country, control over the liquor trade is something that must be exercised in all three spheres of government. Various national and provincial laws are directed at the liquor trade, and municipalities must also do their bit in order to complete and enhance the overall regulatory framework.<sup>137</sup>
- *Facilities for the accommodation, care and burial of animals* The keeping of animals for farming or as pets is part of human life all over the world. To accommodate aspects relating to animals, especially within modern urbanised areas, certain services should be provided to address issues such as the accommodation, care and disposal of animals. Often the neglect of such services could lead to health risks or could even cause the outbreak of infectious diseases, which in turn could have enormous consequences, not only within a particular municipal area but even for the country as a whole.<sup>138</sup>
- *Fencing and fences* Depending on local circumstances, issues relating to fencing and fences within a municipal area could also have important implications. Not only are fences and issues relating to fencing important for private and public safety reasons, they often also assist in preventing damage to property or even disputes relating to ownership of goods or animals. The control and services relating to fences are therefore often more important in rural or farming communities than in some urban developments.
- *Licensing of dogs* Mention was made of the fact that many people keep so-called “domestic animals” as pets on their properties. The control over such animals is much less of a problem in rural communities, as they are within modernised towns or cities. Arguably the most common domesticated pet and security measure is a dog. In light of the nature of such animals, certain minimum controls should be exercised, and thus municipalities are empowered to insist that dogs within their areas of jurisdiction be licensed.

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<sup>137</sup> Eg, see the Liquor Act 27 of 1989 as amended.

<sup>138</sup> One should recall the attention that was given to the outbreak of mad cow disease and foot and mouth disease in Britain, eg, to see what devastation such diseases can create within a country.

- *Licensing and control of undertakings that sell food to the public* In an effort to ensure and enhance public health standards, municipalities should provide for measures that regulate the licensing and the control over undertakings that sell food to the public. There are various standards and requirements that must be enforced to ensure and promote a safe and healthy environment.<sup>139</sup> Municipalities are often best suited to ensuring and enforcing such standards and requirements.
- *Local amenities* Municipalities should make a determination with regard to local needs in respect of possible amenities and should then provide, manage and control such amenities. The availability of resources and budget priorities would impact considerably on the variety and extent of local amenities provided. General amenities are municipal pools, picnic areas, caravan parks and even resorts.
- *Local sport facilities* South Africa is generally recognised as a sporting nation. Our climate and weather patterns allow for favourable outdoor sporting activities. Sport forms an important part of many people's private lives and social interactions. Most people do not have the financial capacity to build and maintain their own private sporting facilities. Local governments are therefore tasked and best suited to provide, manage and maintain such facilities.
- *Markets* In large metropolitan areas, some municipalities also provide and manage market facilities. A market is a place where people trade in various items, but mostly in foodstuff. The existence of fresh produce markets or wholesale flower markets is well known in this respect.
- *Municipal abattoirs* In some instances, and depending on local circumstances, some municipalities are also required to provide and control municipal abattoirs. An abattoir is a place where animals are slaughtered and meat is prepared for public consumption. Strict hygiene and health requirements must be adhered to at all times.
- *Municipal parks and recreation* All municipalities should provide so-called "open spaces" or municipal parks where members of local communities can relax and

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<sup>139</sup> Note the case of *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City council* 1994 (3) SA 170 (A). The appellant, a bottler and distributor of soft drinks, was convicted in a magistrate's court of contravening by-law 18(c) of the City of Durban Food By-Laws, which had been promulgated in terms of the Local Government Ordinance 21 of 1942 (N) s 197(1)(f). The conviction was based on an admission at the appellant's trial that it had sold a bottle of carbonated mineral water which contained a bee to a supermarket in Durban. The magistrate found that by-law 18(c)

*continued on next page*

where children can meet and play. In modern urbanised areas, many residents in high-rise compartment blocks do not have gardens or play areas of their own. It is thus a responsibility of municipal governments to create and maintain such public recreational areas.

- *Municipal roads* Municipal infrastructure plays an important role in achieving social and economic development and ensuring that other essential services can also be rendered. In this regard, the proper control and maintenance of municipal roads are of paramount importance. The control and maintenance of municipal roads cannot be done on an isolated basis and must interact with national and provincial initiatives and schemes. Maintenance of municipal roads also includes the provision and maintenance of storm-water systems citywide.
- *Noise pollution* Within the new constitutional scheme, environmental issues are the responsibility of all three spheres of government. Various national and provincial laws are applicable in order to enhance the protection of environmental demands and requirements. Noise pollution, especially in urban areas, is an aspect that ties in with other environmental interests, and municipalities are best suited within their local jurisdictions to address and control such a matter.
- *Pounds* It is advisable for municipalities to provide for so-called “municipal pounds” where stray animals, illegally parked vehicles or other unauthorised goods can be stored and secured. Pounds vary accordingly to what is to be secured. Proper measures should be introduced to ensure that municipal councils do not incur civil liability for goods or property that have been impounded.
- *Public places* The provision and maintenance of public places is also an important local service that should be provided to local communities. The availability of finances will determine to what extent such places can be afforded.
- *Refuse removal, refuse dumps and solid waste disposal* It is an essential service for municipalities to provide for both domestic and industrial refuse or solid waste removal and dumping facilities. Such services are needed in every community and must be rendered and controlled effectively in order to prevent possible health risks. Because of environmental importance, services relevant to refuse removal,

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imposed a strict liability. The court held that the contamination was foreseeable and that the appellant had been negligent in preventing foreign objects from passing into the consumable products.

dumps and solid waste disposal mechanisms must comply with legislative requirements from the higher spheres of government.

- *Street trading* Many municipal functions and services are interrelated with other services. The control and management of street trading is a good example. Street trading also ties in with general trading regulations and is directed at controlling and managing trading activities that are conducted next to municipal streets. Other functions such as traffic, parking and municipal roads are also relevant to trading services.
- *Street lighting* Apart from addressing the services relating to municipal roads and public transport, municipalities should also provide street lighting in certain areas. The provision of street lighting is particularly important for road safety and personal security. Not all municipal roads can be provided with lighting facilities, and municipalities should conduct investigations to determine which streets require lighting.
- *Traffic and parking* Traffic control and parking facilities are among the most common municipal services that have been rendered over the years. Such services must interrelate with other similar services such as municipal transport and municipal roads. Various national and provincial laws also exist regarding such matters and must be complied with in the fulfilment or rendering of such services. Traffic control is regarded as an area-bound service and should be managed through strict command and control procedures.

The abovementioned areas of municipal service provision have been entrenched within the new constitutional dispensation of South Africa and cannot be taken away unless the Constitution so permits.<sup>140</sup> Apart from the areas mentioned in the Constitution, some older laws that are still in place and in effect also identify and confirm certain services or functions to be fulfilled by local governments. Some such services or functions are the following:

- *Civil protection services* All municipalities should plan and provide for emergency protection or even disaster management services. In this regard, all possible scenarios should be investigated and potential crisis areas or hazards should be identified. Common aspects that should be provided for are, for example, floods or

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<sup>140</sup> See the Constitution Sch 4 and 5 Part B.

other natural disasters, outbreaks of infectious diseases and possible human-made emergency situations such as terrorist attacks or arson incidents. The prevention and management of such incidents is very important and should not be neglected.<sup>141</sup>

- *Housing* All spheres of government are involved in providing housing services in South Africa. Therefore, housing is one of the most needed commodities in our new state. Many people are living in extreme poverty and with no roof over their heads. Because of the special need of new houses, the national government has introduced various housing schemes.<sup>142</sup> Broadly speaking, the provision of housing services includes aspects such as low-cost housing, modern township developments, retirement homes and facilities, as well as rental properties. Municipalities must interact with the programs of the two higher spheres of government and must also assess and evaluate local housing needs. It is submitted that without the provision of proper housing services there can be no real social and economic development. Housing is thus a high priority service in the new governmental systems in South Africa.
- *Licensing services* In many instances municipalities are tasked with certain licensing services that are to be performed within their areas of jurisdiction. Such services are often required by either national and provincial laws, which in turn mandate local authorities to act as a so-called “controlling” or “inspection” authorities. Examples of these services include business- and vehicle-licensing services, inspection of the premises of liquor-selling businesses and also building regulation fulfilments.
- *Civic centres, city halls and public libraries* Over the years, it has been customary for local authorities to provide and maintain civic centres and city halls. Such centres play an important role in building a local symbolic identity. City halls or civic centres provide a place for public gatherings, official and ceremonial functions and also cultural activities. It is obvious that such centres fulfil an important role in local community activities. Such services are very expensive, however, and careful pri-

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<sup>141</sup> In South Africa special attention must be given to frequent fires that occur within rural areas and also within informal settlements. As prevention is better than cure, local governments should not be unaware of the devastating effect such incidents could have on local communities.

<sup>142</sup> See, eg, the Redistribution and Development Program, which specifically provides for the provision of housing developments.



orisation should be done locally. Building town halls or city halls is very costly, but most towns or cities in South Africa already possess one, and these should be maintained and controlled.<sup>143</sup> Providing a library service is not a specific function of municipalities, but many municipalities often provided such a service. A library service is directed at serving the local population through the provision of educational and recreational information. In light of modern electronic development, such centres should also provide internet and even e-mail facilities.

- *Law enforcement and municipal police services* It was explained above that municipalities have various law-enforcement obligations and services that must be rendered. Such services differ from building inspections, town planning scheme control, various health and safety measures and also road traffic law enforcement. Apart from providing such services, municipalities are also permitted to establish and maintain a municipal police service.<sup>144</sup> It should be pointed out that local governments do not have an automatic right to establish a municipal police service.<sup>145</sup> Specific requirements must be met before permission can be granted for the establishment of a municipal police service.

## 16.5 Conclusion

As is the case with many other aspects of the new local government dispensation, it is imperative that municipal services and service provision should comply and conform to the new constitutional vision and requirements. Municipal services must be equitable and accessible for all local residents and must enable all municipalities to achieve and fulfil their objectives and duties.

The basic municipal services are set out in Part B of Schedules 4 and 5 of the Constitution. Apart from such services, national or provincial governments may as-

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<sup>143</sup> City halls are often rich with local heritage and traditions.

<sup>144</sup> According to the Constitution s 205(1), the national police services must be structured to function in the national, provincial and, where appropriate, local spheres of government. S 206(7) further states that national legislation must provide a framework for the establishment, powers, functions and control of municipal police services. For more detail, see the South African Police Service Act 68 of 1995.

<sup>145</sup> *In re Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) the Constitutional Court held that whereas the interim Constitution required provision to be made for the establishment by a local government of a municipal or metropolitan police service whose functions would be restricted to crime prevention and the enforcement of municipal and metropolitan by-laws, there was no comparable provision in the new text. Local policing was a matter to be dealt with by an Act of parliament. See paras 395-401 at 888-890.

sign other matters to municipalities via legislation.<sup>146</sup> One can thus conclude that municipal services are not absolutely defined or identified and can differ from one municipality to another as circumstances may require. Within the new local government legislative framework there seems to be rediscovery of the basic essential services that a municipality is supposed to render. This development has caused almost all local governments to focus mainly on the core services and to deregulate or even privatise many other secondary services.

The Constitution compels all municipalities to strive within their financial and administrative capacities to achieve the objectives and therefore the services that were identified above. Services should be provided and rendered to uplift and enhance the quality of life of all local people without a sacrifice in quality or sustainability. In many cases services should be decentralised or even privatised in order to allow local governments all over South Africa to focus and achieve their main constitutional service objectives.

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<sup>146</sup> See the Constitution s 156(1)(b). Subs (4) further enhances such assignment as national and provincial governments must assign to a municipality the administration of a matter listed in the Constitution Sch 4 or 5 Part A, which matter necessarily relates to local government.

## Municipal personnel, labour relations and staffing matters

### 17.1 Introduction

It is an obvious observation that no municipality would be able to fulfil its obligations and duties without basic personnel administration and management. Not only are employees necessary, they have to be motivated, dedicated and properly trained. In light of their vast and diverse functions, municipalities need a mix of personnel that vary from general administrative officials, such as administrative clerks and office personnel, to highly qualified experts such as engineers, town planners, lawyers, accountants and personnel managers. Without the abovementioned personnel corps in place, no municipal government will be able to perform and fulfil its constitutional duties and obligations, and the Constitution specifically states that a municipal council may employ personnel that are necessary for the effective performance of its functions.<sup>1</sup> All municipalities therefore have to evaluate and determine their specific personnel needs in order to perform their functions. It goes without saying that it is not only the appointment of personnel that is important in this regard; so is the management, control and performance measurement of such personnel.

According to the Constitution, municipalities have significant powers regarding personnel matters.<sup>2</sup> One must be aware of the fact that other national or provincial legislation also impacts on personnel matters or even labour relations, however, and that municipalities may not act contrary to such laws.<sup>3</sup> When municipal personnel, also often referred to as the municipal administration, is discussed, it is again important to remember the three components that together complete a local government. All

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<sup>1</sup> See the Constitution s 160(1)(c).

<sup>2</sup> The Constitution s 156(5) states that a municipality has the right to exercise *any power* concerning a matter that is reasonable necessary for, or incidental to, the *effective performance of its functions* (own emphasis added). Since the appointment of personnel is essential for the effective performance of municipal functions, municipalities should be able to exercise strong powers in this respect.

<sup>3</sup> See the Constitution s 156(3).

municipal governments consist of a combination of political functionaries, administrative personnel and a specific local community.<sup>4</sup> Together the three components comprise a municipal government. The importance of a municipal personnel corps is thus self-evident. However, one should guard against possible confusion between municipal administrative personnel and office bearers representing political structures. Municipal personnel are not elected political representatives; they are employees in the normal sense of a municipal council.<sup>5</sup>

## **17.2 The broad organisational structure and overall personnel administration of local governments**

### **17.2.1 Basic organisational systems**

In the past the organisational structure of a municipal government could be compared with a human body:

- A particular structure (the skeleton) exists to ensure effectiveness.
- Staff (the muscles) are needed to perform functions and ensure movement
- A decision-making body (the brain) is required, through which communication is achieved between the decision-making body and the staffing component, which must then perform the instruction given.<sup>6</sup>

Broadly speaking, two types of organisational structure have been identified. There is the *mechanistic/closed type* of structure, in which duties are precisely defined and where a high value is placed on precision, specified job descriptions and strong loyalty to the organisation. Functional tasks are differentiated, and there is a hierarchical structure of command. The manager or head of the organisation is often deemed to be omniscient, as he or she possesses all important knowledge. Factors such as authority, coordination and efficiency are strongly emphasised. Job responsibilities are mainly routine, with most decisions and knowledge coming from the top. Contrary to the closed organisational structure, one finds the *organic or open type* of organisational structure. Such a structure was developed and adopted to handle

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<sup>4</sup> See ch 7 of the work and also the Systems Act s 2(b)(i) and (ii).

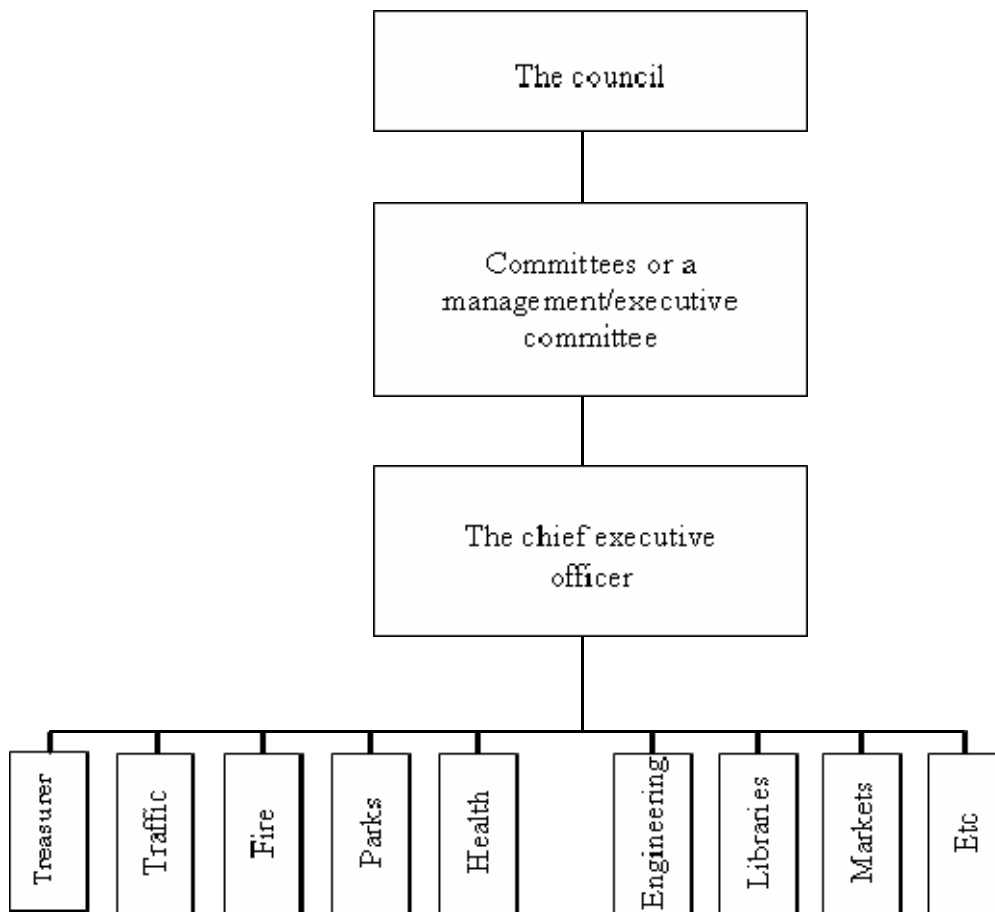
<sup>5</sup> Again notice should be taken of the fact that it is a municipal council, as a legal entity that acts as an employer and that appoints or concludes services/employment contracts with potential employees. The position regarding political office bearers, as was discussed elsewhere, is quite different. Anyone who is appointed by or in the service of a municipality is normally not eligible to be a member of the political component of that municipal council. Refer to the Constitution s 58(1)(a) and (b).

<sup>6</sup> See Craythorne (1997) 279.

unstable and continuously changing conditions. Many internal jobs have little formal definition, and functions are not precisely demarcated. Responsibilities and tasks are constantly redefined. In an organic structure the emphasis is on getting the job done, and thus individual responsibilities are not precisely defined.<sup>7</sup> It is also possible to find institutions that incorporate a combination of the two types of organisational structure.

From a municipal government point of view, municipalities exist to provide services to their inhabitants. They must therefore have a structure within which staff can be deployed and organised to ensure that the required services are indeed provided. Craythorne mentions that in the South African local government of the past it was usual to encounter two forms of organisational structure. One was identified as a long, flat organisation with many departments. The other form was more of a pyramidal type, with fewer departments.<sup>8</sup>

(A)

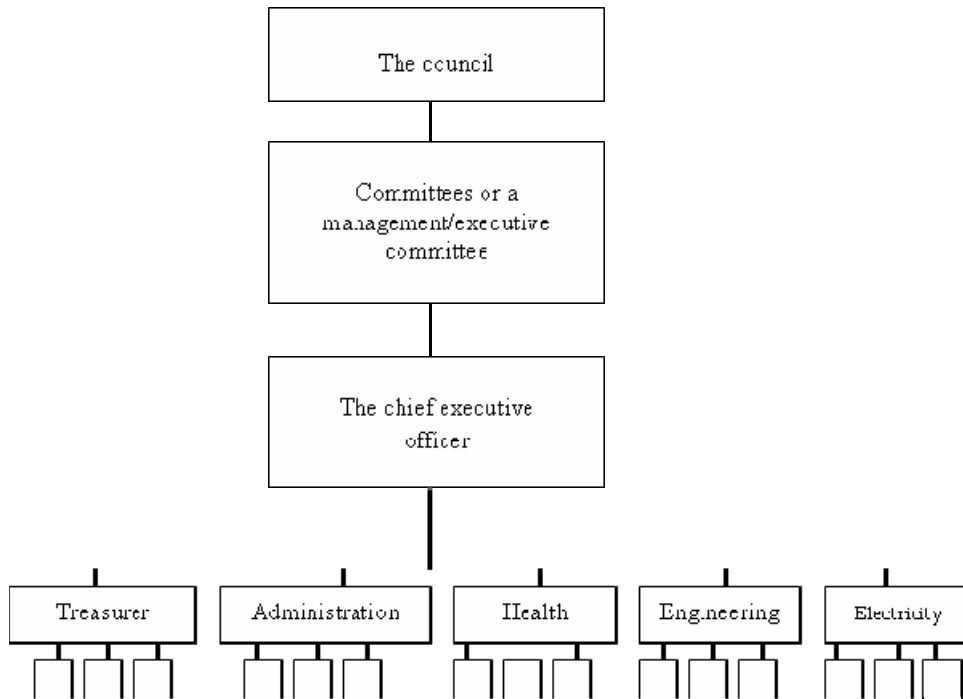


<sup>7</sup> See Craythorne (1997) 282-283.

<sup>8</sup> See Craythorne (1997) 283-285.

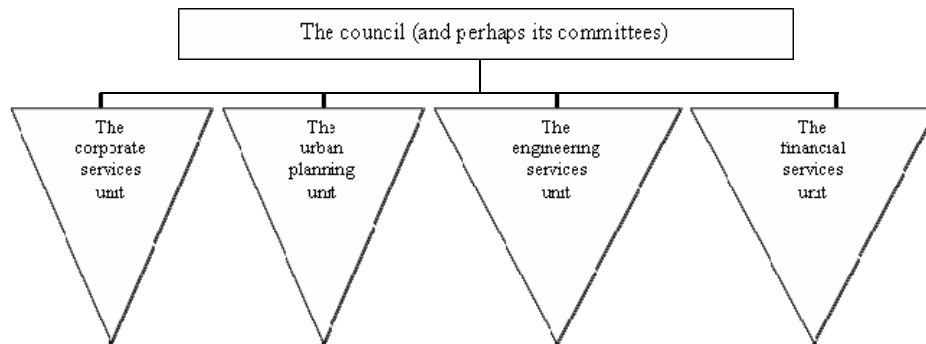
In more recent years, a new local government organisational structure, generally termed the business unit model, was developed. In such a model, the municipal organisation is divided into semi-autonomous business units. Especially from a concentration of skills and expertise point of view, the business unit model has definite advantages.

(B)



Specialised branches within departments

(C)



It is important to remember, however, that in a public-sector body, where control over policy and decision making is necessarily political, it is not possible to have a truly decentralised structure. Although many decisions should be delegated to strategic officials, ultimately the overall policy and political decisions must be made at municipal council level.

In the new local government dispensation, municipalities have been established and are constitutionally required to render effective, efficient and sustainable services. Depending on the services, this obligation often requires professional experts and technicians and a careful preplanning and evaluation of the organisational structure is thus essential. It is also generally accepted that the personnel of specialised services such as engineering, town planning, accounting and also legal services should not be lumped together, but should rather be placed within separate specialised units, which are then tasked with only that specialised service.<sup>9</sup>

### **17.2.2 Internal mechanisms to enhance organisational efficiency**

No organisation can be efficient and effective without certain control measures' being put in place. It is a fact of any organisational structure that not all members or staff can be expected to meet standards voluntarily. Measures of control in local governments arise from various sources, such as from the political leadership, internal leadership structures and even through public complaints and requests. The main objective of control within the public sector is to ensure accountability for everything the public authority does.<sup>10</sup> Another form of external control over the public sector is via the law and judicial structures. Many legal rules have been developed to ensure that the public service is regulated within certain minimum standards. The judicial structures are also properly empowered to oversee public sector compliance with the law.<sup>11</sup>

Local governments should further also guard against the familiar concept of empire building in public structures. Empire building arises mostly from personal motivations such as ambition, a desire for status, a lust for power and also professional jealousy. Status-driven and power-orientated personnel see the organisation in which they work merely as a tool for achieving personal goals. Ineffective and unnecessary empires are commonly developed through a process of lengthening work outputs

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<sup>9</sup> See Craythorne (1997) 290. In many instances, professional personnel are controlled and supervised by their professional body (eg the South African Law Society for attorneys, and a minimum standard of professionalism is required which may not be reduced or limited by political intervention. A municipality can therefore not prescribe to a professional employee such as a civil engineer to design structures that would not comply with minimum safety requirements but would save the municipality lots of money. Minimum professional standards may never be compromised.

<sup>10</sup> For more on this point see Cloete (1997) 184, and also Craythorne (1997) 297.

<sup>11</sup> Within the new constitutional dispensation of South Africa, the importance of control and minimum standard setting within the public sector is strongly echoed in the Constitution ch 10, which sets basic values and principles to which the public administration must adhere. See the Constitution s 195 in particular.



and by creating the impression that a certain post has more responsibilities than it really has. This is then followed by requests for additional posts and the upgrading of the original post to a unit supervisor or leader.

One should not mistake genuine personnel enlargements with the concept of empire building, however. Many municipalities in South Africa are facing severe shortages of qualified and properly trained personnel. There are many internal departments that are functioning with only 50% or even less of the minimum staff that are required to perform the particular workload. This situation has become critical since the commencement of the final phase of the new local government restructuring. Many newly established municipalities have lost vast numbers of highly trained and experienced municipal personnel and do not have appropriate replacements on hand. This situation has resulted in many inexperienced personnel being appointed to often strategic positions or municipal councils being indecisive in appointing and filling urgently needed vacant posts.

Since the beginning of the restructuring of local governments, it has always been envisaged that the overall internal organisational structures of all municipalities should be reviewed and reorganised. This is a difficult and ongoing process, however, and many local governments are in need of professional assistance to achieve a genuinely effective and streamlined municipal corps. Most jobs will have to be re-analysed to ensure that they are suitably defined.

Another important aspect of a municipal organisation is municipal leadership. Every municipal structure must have a leader that is not only knowledgeable in terms of local government affairs but who is also followed and respected by the general personnel corps. Municipalities differ from many other organisations in that they have a number of leaders, such as the councillors, the municipal manager, heads of department and sub-units. Each official in charge of a unit is a leader, but at a different level.<sup>12</sup>

No organisation can establish and maintain a successful organisational structure without a proper personnel administration in place. Personnel administration is a key activity in local government administrations and, if handled effectively, it will contribute significantly to the existence and maintenance of a healthy municipal organisa

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<sup>12</sup> See Craythorne (1997) 302-303.

tion. Even the smallest local authority must devote some of the time allocated to administrative duties to employment-related matters such as conditions of service and remuneration and recruitment/appointment procedures. Municipal councils should provide for at least the following regarding personnel management:

- a written service contract which explains the general conditions of service
- an employee file setting out the date of appointment, the position and basic remuneration package
- basic job description lists
- grievance and disciplinary procedures.

Every council should have a data base containing a record of all the posts and jobs in that council's service. In planning and improving on the structure of a municipal organisation, posts should be ranked and grouped together in appropriate departments or sectors. It is also a good policy to review the staff establishment periodically in order to ensure that the administrative structure is still streamlined and effective.<sup>13</sup> In recent years, many questions have been asked about the overall remuneration packages that are paid to municipal personnel. According to media reports, some municipal managers have even bigger remuneration packages than the president of the country. It follows, therefore, that an urgent investigation of how such remuneration rates are determined should be undertaken. Craythorne identifies methods that can be used to determine an acceptable remuneration rate for a particular post.<sup>14</sup> The methods are:

- to compare a post with a similar post in the private sector
- to compare posts between different municipal councils
- to use a cost of living index
- to look at customary or trade rates in a particular area.

Apart from establishing an effective administrative personnel corps, municipalities should also ensure that proper manpower planning initiatives are put in place. According to Craythorne, personnel planning is concerned with identifying the personnel needs of a particular organisation. Proper planning is required to replace those staff mem-

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<sup>13</sup> It is of interest to note that the staff component of a municipality constitutes a large proportion of the costs of that council's operating budget and that there has to be proper control over the number of posts permitted. Employee remuneration comprises a large part of a municipal budget, and it includes not only the basic salary packages but also issues such as housing subsidies, pension or provident scheme contributions, medical aid, life insurance, bonuses and long-service awards.

<sup>14</sup> See Craythorne (1997) 310-312.

bers who leave the organisation by resigning, retiring, or for other reasons. Personnel planning is essential if municipalities are to fulfil their objectives and duties.<sup>15</sup> Apart from personnel planning, municipal councils as employers should also spend considerable time on the motivation and development of their human resources. Often municipal employees work in unpleasant and highly stressful circumstances, and it is important for the managerial structures to ensure that employees are motivated. Without a motivated personnel corps the desired, and indeed required, results are not likely to be achieved. Various practical steps have been developed to motivate employees.<sup>16</sup>

One of the most important challenges facing the new local government dispensation is ensuring and building properly trained local government administrations. South Africa requires trained municipal employers in order to meet the needs of local populations. Without adequately trained personnel, many service standards will decline, and some municipal governments will not be able to fulfil and adhere to their new constitutional obligations. In an effort to enhance the training of municipal personnel, various initiatives have been introduced which, through proper application, could significantly boost training targets.<sup>17</sup>

### **17.3 New legislative provisions regarding municipal staff matters**

#### **17.3.1 *The appointment and employment conditions of municipal managers***

Under the new local government legislative framework, the head of the municipal administration is called the “municipal manager”.<sup>18</sup> In his/her capacity as the head of the administration of a municipality, the municipal manager is tasked with a wide range of responsibilities and is also the final accountable official for many municipal affairs. Both the responsibilities and accountable duties are subject to the policy directions of the particular municipal council, however.<sup>19</sup> It is generally accepted that

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<sup>15</sup> See Craythorne (1997) 317. In essence, personnel planning ensures that an organisation will have and continue to have a certain required number and quality of personnel that are able to perform the tasks of the organisation in order for it to be successful.

<sup>16</sup> Some of these steps are: to ensure that the organisation has a shared objective or mission statement; to enhance aspects of team spirit or esprit de corps; by sharing responsibility and authority; by rewarding excellence; by allowing inputs from employees in relation to work procedures; through proper training initiatives; by clearly identifying expectations and tasks; by introducing regular performance appraisals and by treating employees as human beings. See Craythorne (1997) 322-323.

<sup>17</sup> See Craythorne (1997) 323 *et seq.*

<sup>18</sup> This office was formerly known as the Chief Executive Officer (CEO) during the transitional phases, and the Town or City Clerk under the old dispensation.

<sup>19</sup> See the Systems Act s 55(1).

the municipal manager is the chief of a municipal administration and that he/she is also the chief agent of that municipality. This position has already been confirmed in a number of judicial decisions. In *Gcali NO v MEC for Housing & Local Government, EC*<sup>20</sup> the court held that in authorising the institution of legal proceedings, a town clerk acted as an agent for the municipality. Furthermore, when the interests of the municipality so demanded, the town clerk had to act as a *negotiorum gestor* on behalf of the municipality and had no authority to institute legal action on behalf of the municipality without instructions to do so.<sup>21</sup> In the case of *King William's Town TLC v Border Alliance Taxi Association (Bata)*<sup>22</sup> it was mentioned that the town clerk as chief executive officer was not merely the recipient of instructions, he/she was

- privy to the council's deliberations, debates and decisions
- in as good a position as any other to give evidence of the collective mind of the council over years
- the proper person/functionary to testify to the reasons for council decisions.

Such evidence is admissible and relevant to show that the council applied its corporate mind to a particular issue.<sup>23</sup> According to the new legal order, a municipal manager is responsible and accountable for the following:<sup>24</sup>

- the formation and development of an economical, effective, efficient and accountable administration that is equipped to carry out the task of implementing the municipality's IDP, to operate in accordance with the municipality's performance management system and to be responsive to the needs of the local community in order to participate in the affairs of the municipality<sup>25</sup>
- the management of the municipal administration in general
- the implementation of the municipality's IDP as well as the monitoring of progress with the implementation of the plan
- the management of the provision of services to the local community in a sustainable and equitable manner

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<sup>20</sup> 1996 (4) SA 456 (TkS).

<sup>21</sup> See paras E-H at 463.

<sup>22</sup> 2002 (4) SA 152 (E).

<sup>23</sup> See paras B-E at 156.

<sup>24</sup> See the Systems Act s 55(1)(a)-(q).

<sup>25</sup> It is therefore the municipal manager's responsibility to ensure that a proper municipal administration is established and maintained in order for that municipality to fulfil its obligations and duties.

- the appointment of staff other than the staff that are appointed by the municipal council itself<sup>26</sup>
- the management, effective utilisation and training of staff
- the maintenance of discipline of staff
- the promotion of sound labour relations and compliance by the municipality with applicable labour legislation
- advising the political structures and political office bearers of the municipality
- managing the communications between the administration and political structures
- carrying out the decisions of the political structures
- overseeing the administration and implementation of the municipal by-laws and other legislation
- the exercise of any power or performance of any duties delegated by the municipal council or other body under a sub-delegation to the (office of the) municipal manager
- facilitating the participation by the local community in the affairs of the municipality
- developing and maintaining a system whereby community satisfaction with municipal services is assessed
- ensuring or overseeing the implementation of national and provincial legislation applicable to the municipality
- performing any other function that may be assigned by the municipal council to the municipal manager.

A further important responsibility of the municipal manager is to ensure and oversee the municipality's financial and fiscal matters. The municipal manager is *ex officio* and *ex lege* the accounting officer of a municipality and as accounting officer he/she is responsible and accountable for

- all income and expenditure of the municipality
- all assets and the discharge of all liabilities of the municipality
- the proper and diligent compliance with the Municipal Finance Management Act.<sup>27</sup>

In light of the aforementioned, it is clear that from an administrative point of view the municipal manager is the final responsible and accountable person in relation to the

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<sup>26</sup> See the Systems Act s 55(1)(e) read with s 56(a). Note that the appointment of staff is subject to various legislative requirements, including the Employment Equity Act 55 of 1998.

<sup>27</sup> See the Systems Act s 55(2)(a)-(c) as amended by Act 44 of 2003. Refer also to ch 17 of this work.

general obligations and duties of a municipality. It goes without saying that the tasks and responsibilities of the municipal manager are enormous and that, unless he/she is assisted by a dedicated and effective municipal administration, it is difficult to imagine how all the responsibilities falling under such a post can properly be fulfilled.

In an effort to assist a municipal manager in the fulfilment of his/her responsibilities, the new legislative system developed for local government specifically envisages the appointment of managers that are directly accountable to the municipal manager. In this regard it is required that after consultation with the municipal manager a municipal council should appoint a manager (or managers) that are directly accountable to the municipal manager. The appointment of managers should enable a municipal manager to fulfil the diverse responsibilities vested in the position.<sup>28</sup> A person that is appointed as a manager must have the relevant skills and expertise to perform the duties that are associated with the post in question. For example, if a manager is appointed to manage municipal finance, that person must have the necessary skills and expertise to perform such duties. These are usually acquired through academic studies and practical experience.<sup>29</sup>

The appointment of municipal managers and other managers accountable to the municipal managers is further regulated through various legislative provisions. In this respect, it is required that a municipal manager or other managers be appointed to such posts only in terms of written employment contracts with the municipality and subject to separate performance agreements that are concluded annually between the council and the incumbents.<sup>30</sup> The performance agreement must be concluded within a reasonable time after a person is appointed and thereafter within one month after the beginning of the municipality's next financial year. When a performance agreement is concluded with a municipal manager, the agreement must be entered into with the municipality as represented by the mayor or executive mayor, and when

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<sup>28</sup> Note that it is the responsibility of the municipal council to appoint the managers under the municipal manager. Although prior consultation between the council and the municipal manager should take place, it is still the council's decision whom to appoint as managers. Only consultation is required; not consensus or agreement. It would be unwise to appoint managers with whom the municipal manager is not satisfied or comfortable, however. A strong and united managerial team should be pursued. Although the Systems Act refers only to the appointment of a manager, it is submitted that the intention of the legislator was the appointment of one or more such managers. See the Systems Act s 56(a).

<sup>29</sup> When managers or other personnel are appointed, the requirements of any applicable affirmative action policy should be considered. See the Systems Act s 56(b).

<sup>30</sup> See the Systems Act s 57(1)(a)-(b).

entered into with other managers, as represented by the municipal manager.<sup>31</sup> With regard to the performance agreement, it is required that such an agreement include:

- the performance objectives and targets that must be met, as well as the time frames within which targets must be met
- the standards and procedures for evaluating performance and intervals for evaluation
- the consequences of substandard performance.<sup>32</sup>

Finally, it is required that the employment contract for a municipal manager be concluded for a fixed term of employment, which term may not exceed a period ending two years after the election of the next council of the municipality. The term may thus be no longer than seven years.<sup>33</sup> The contract must also provide for a cancellation clause should there be non-compliance with the employment conditions.<sup>34</sup> Although the term of the contract must be fixed, it is possible for the renewal of the employment relationship. The only statutory requirements in this regard are that although the renewal of the employment contract is permitted it can be done only by agreement between the relevant parties. In the last instance, the municipal manager's employment contract must reflect the values and principles referred to in section 50 of the Systems Act, the code of conduct for municipal staff members as well as the management standards and practices that are contained in section 51 of the Systems Act. On this point it should be noted that the requirements relating to the em-

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<sup>31</sup> See the Systems Act s 57(2) and (3). The employment contract mentioned above must include details of duties, remuneration, benefits and other terms and conditions of the employment. All related employment particulars are subject to applicable labour legislation. It should be noted that under old-order laws, many of which are still applicable, issues such as medical aid schemes, pension schemes etc. were also addressed. Such aspects should be closely considered. See, eg, the case of *Munimed v Premier, Gauteng and Others* 1999 (4) SA 351 (T), where the court held that by establishing a medical aid scheme contrary to the provisions of s 79bis(1) of the Local Government Ordinance 17 of 1939 (T), the administrator had acted beyond the scope of his powers.

<sup>32</sup> The performance objectives and targets must be practical, measurable and based on the key performance indicators set out in the municipality's IDP. The provisions of the MFMA conferring responsibilities on the accounting officer of a municipality must be regarded as forming part of the performance agreement of a municipal manager. It should also be noted that bonuses based on performance may be awarded to a municipal manager or a manager directly accountable to the municipal manager after the end of the financial year and only after an evaluation of performance and approval of such evaluation by the municipal council. See ss 4A and 4B as inserted by Act 44 of 2003 s 8. Refer also to s 57(5) of the Systems Act.

<sup>33</sup> The normal term of a municipal council is 5 years plus the maximum 2 years mentioned above.

<sup>34</sup> Such conditions may also include the fulfilment or compliance with the relevant performance agreement conditions as were agreed upon. See the Systems Act s 57(6)(b).



ployment contract of a municipal manager may also be extended to the contract of any other manager that is directly accountable to the municipal manager.<sup>35</sup>

An aspect that has become very controversial in recent times is the remuneration packages that are paid to municipal managers and other managers. It is reported that in some instances, particularly where metropolitan councils are involved, the municipal managers earn very high remuneration packages; in some cases these are even more than members of the national government. This situation seems somewhat distorted and is currently under investigation. One must remember, however, that a municipal manager is not a political functionary in a municipal government, but is part of the administrative component. A comparison between the salary of such a person and a political functionary is therefore not necessary. Salaries of municipal staff members, including a municipal manager, form part of the public administration and should be regulated under such principles. In principle, it is advisable for government to structure the remuneration of the public service in a uniform manner within all spheres of government and after all relevant considerations have been taken into account. With regard to the remuneration of municipal managers or other managers, the Systems Act required that on or before 31 October of each year a municipality had to publish in the media the salary scales and benefits of the municipal manager and other managers directly accountable to the municipal manager.<sup>36</sup>

### ***17.3.2 Basic principles relating to local public administration and internal municipal organisation***

It was mentioned above that issues concerning the local public administration and internal municipal organisational structures are also regulated within the framework of national legislation and that compliance to such requirements must also form part of the conditions of employment of a municipal manager. With reference to the values and principles of local public administration, the new legislative framework states that the local public administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution. Furthermore, in the administra-

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<sup>35</sup> See the Systems Act s 57(7). Note that the Act ss 50 and 51 deals with the basic values and principles relevant to local public administration and organisational requirements of municipal administrations respectively. Such requirements are discussed below.

<sup>36</sup> There seems to be no legislative regulation in relation to what such salaries or benefits should be. It is thus up to especially national government to regulate such issues via uniform legislative provisions. Note that s 58 was repealed by Act 44 of 2003 s 9.

tion of its affairs a municipality must strive to achieve the objectives of local government and the general duties of municipalities.<sup>37</sup>

Apart from the general principles that regulate public administration, all municipalities must establish and organise their administration, within their administrative and financial capacity, in a manner that would enable a municipality to achieve and comply with certain objectives/requirements. These objectives are the following:<sup>38</sup>

- to be responsive to the needs of the local community
- to facilitate a culture of public service and accountability amongst municipal staff
- to be performance orientated and focused on the objectives and duties of local government in general
- to ensure that political structures, political office bearers and managers and other staff members align their roles and responsibilities with the priorities and objectives set out in the municipality's IDP
- to establish clear relationships and to facilitate co-operation, co-ordination and communication between political structures, office bearers and the administration and the local community
- to organise the political structures, office bearers and the administration in a flexible way in order to respond to changing priorities and circumstances
- to perform municipal functions through operationally effective and appropriate administrative units and mechanisms, including through departments and other functional or business units; such functions, when necessary, may also be performed on a decentralised basis
- to assign clear responsibilities for the management and co-ordination of the administrative units and mechanisms
- to hold the municipal manager accountable for the overall performance of the administration
- to maximise efficiency of communication and decision making within the administration
- to delegate responsibility to the most effective level within the administration
- to involve staff in management decisions as far as is practicable

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<sup>37</sup> See the Systems Act s 50(1) and (2). The values set out in s 195 will be discussed in a separate chapter dealing with the basic principles concerning the public administration.

<sup>38</sup> See the Systems Act s 51(a)-(m).

- to provide an equitable, fair, open and non-discriminatory working environment.

Suffice it to say that the structuring and management of a municipal administration is quite a complex and extensive exercise. The internal arrangements are therefore likely to differ from one municipality to another as circumstances may require or depending on the category of municipality in question. There seem to be no uniform models of how a municipal administration should be established. What is certain, however, is that municipalities must establish and organise their administrations to ensure compliance with the set criteria, and the way in which the administration is structured and organised may vary from one municipality to another, as long as the minimum objectives are attained. Because of a possible conflict between municipal staff affairs and labour legislation in general, it is determined that in the event of any inconsistency between a provision in the Systems Act relating to municipal organisational matters, including the code of conduct for municipal staff members and any applicable labour legislation, such labour legislation should prevail.<sup>39</sup> In this regard it should be obvious that all municipalities under the new local government dispensation must familiarise themselves with applicable labour laws and developments and must ensure compliance with such laws.<sup>40</sup>

### **17.3.3 Municipal staff matters**

According to the Systems Act, it is the responsibility of the municipal manager to

- approve a staff structure for the municipality
- provide a job description for each post
- attach to the posts the remuneration and service conditions as may be determined
- establish a process or mechanism to evaluate the staff establishment regularly and, if necessary, to review such establishment and the remuneration or conditions of service.<sup>41</sup>

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<sup>39</sup> See the Systems Act s 52. In situations of conflict, provisions of the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997 or other labour legislation will prevail over the aspects directed at the structuring and management of internal municipal administrations set out in the Systems Act or regulations made under the Act.

<sup>40</sup> For examples of such labour disputes see the cases of *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) and also *Ntshotsho v Umtata Municipality* 1998 (3) SA 102 (Tk). Even part-time employees of municipalities are protected under labour laws, and they cannot be dismissed contrary to their employment contracts and without proper cause.

<sup>41</sup> These obligations do not apply to the employment contracts of managers directly accountable to the municipal manager. See the Systems Act s 66(1)-(2). The obligations on the municipal manager are subject to any applicable legislation and the policy framework that has been determined by the relevant municipal council. The protection given under any applicable legislation is to ensure

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All municipalities are obligated to develop and adopt appropriate systems and procedures that are directed at achieving fair, efficient, effective and transparent personnel administrations. Such systems and procedures must comply with applicable laws and are also subject to any applicable collective agreements that are in effect. The systems and procedures should provide for the following aspects:<sup>42</sup>

- the recruitment, selection and appointment of persons as staff members
- service conditions of staff
- supervision and management of staff
- monitoring, measuring and evaluating the performance of staff
- the promotion and demotion of staff
- the transfer of staff
- grievance and disciplinary procedures
- investigations of allegations of misconduct or complaints against staff
- the dismissal and retrenchment of staff
- any other matter prescribed by regulation.

It is the responsibility of the municipal manager to ensure that every staff member or relevant trade union has easy access to a copy of the staff systems and procedures. On the written request of a staff member, a copy or part of the relevant staff systems and procedures must be made available to that staff member. It is also the responsibility of the municipal manager to ensure that all staff members have been informed about the systems and procedures.<sup>43</sup>

Municipalities should also develop various capacity-building initiatives. All municipalities are obligated to develop their human resources capacities in order to perform their functions and to exercise their powers as is required by the Constitution and other applicable legislation. In this respect, the provisions of the Skills Development Act,<sup>44</sup> as well as the Skills Development Levies Act,<sup>45</sup> are of particular importance and must be complied with. Apart from any training levies required by law, a municipality may in addition provide in its budget for the development and training pro-

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that a municipal manager cannot unilaterally change or amend conditions of employment of members of staff. Strict requirements are set in this regard by mainly the Labour Relations Act.

<sup>42</sup> See the Systems Act s 67(1)(a)-(k).

<sup>43</sup> Refer to the Systems Act s 67(4)(a)-(c). Special attention must be given to informing staff members who cannot read.

<sup>44</sup> 97 of 1998.

<sup>45</sup> 9 of 1999.

grammes of municipal personnel. If a municipality does not have the financial means to provide additional funds for training, it may apply to the Sector Education and Training Authority (SETA) for local government for such funds. The SETA was established in terms of the Skills Development Act to assist municipalities in training programmes.<sup>46</sup>

#### **17.3.4 The code of conduct for municipal staff members**

Similar to the position regarding political office bearers of municipalities, all municipal staff members must adhere to a particular code of conduct that is very similar to the code of conduct applicable to municipal councillors. The code of conduct is set out in Schedule 2 of the Systems Act, and it states the following:

- *General conduct* All staff members of municipalities must at all times:
  - (a) execute loyally the lawful policies of the municipal council
  - (b) perform the functions of office in good faith, diligently, honestly and in a transparent manner
  - (c) act in such a way that the spirit, purport and objects of a municipal administration are promoted<sup>47</sup>
  - (d) act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised
  - (e) act impartially and treat all people, including other staff members, equally without favour or prejudice.<sup>48</sup>
- *Commitment to serving the public interest* In light of the fact that every municipal staff member is recognised as a public servant in a developmental local system, all staff members must:
  - (a) implement the provisions of organisational systems as is set out in section 50(2), (b)
  - (b) foster a culture of commitment to serving the public, together with a sense of responsibility for performance in terms of standards and targets
  - (c) promote and implement the basic values and principles of the public administration

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<sup>46</sup> For more details see both the Skills Development Act and Skills Development Levies Act mentioned above. Refer also to the Systems Act s 68(1)-(3).

<sup>47</sup> See the Systems Act s 50 for such objects.

<sup>48</sup> Refer to the Systems Act Sch 2 Item 2.

- (d) seek to implement the objectives of the municipal IDP and to achieve the performance targets set for each performance indicator
- (e) participate in the overall performance management system as well as the individual performance appraisal and reward system.<sup>49</sup>
- *Personal gain* A staff member of a municipality may not use his/her position or privileges or confidential information for private gain or to improperly benefit another person. Personnel may also not take a decision on behalf of the municipality concerning a matter in which that staff member, his/her spouse, partner or business associate has a direct or indirect personal or private business interest.<sup>50</sup> Furthermore, and unless a staff member has obtained prior consent from the council, no staff member may be a party to a contract for the provision of goods or services to the municipality or may not perform any other work for the municipality apart from the duties associated with his/her employment contract. Staff may also not obtain a financial interest in any business of the municipality or be engaged in any business, trade or profession, other than his/her work for the municipality.<sup>51</sup>
  - *Disclosure of benefits* Any direct benefit from a contract concluded between the municipality and a staff member or spouse, partner or business associate of such a staff member must be disclosed in writing and with full particulars. This disclosure does not apply to a benefit which a member of staff has acquired in common with all other residents of the municipality, however.<sup>52</sup>
  - *Unauthorised disclosure of information* Without permission, members of a municipal staff may not disclose to an unauthorised person any privileged or confidential information obtained. On this point, privileged or confidential information includes any information that
    - (a) is determined as such by the municipal council or any of its structures or functionaries
    - (b) is discussed in closed session by the council or a committee
    - (c) would violate a person's right to privacy

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<sup>49</sup> See the Systems Act Sch 2 Item 3.

<sup>50</sup> According to the Act, a "partner" refers to a person who permanently lives with another person in a manner as if they are married.

<sup>51</sup> See the Systems Act Sch 2 Item 4.

<sup>52</sup> See the Systems Act Sch 2 Item 5.

(d) is declared to be privileged, confidential or secret in terms of the law.<sup>53</sup>

- *Unduly influence* A staff member of a municipality may not unduly influence or attempt to influence the council, a structure, functionary, or councillor with a view to obtaining any appointment, promotion, privilege, advantage or benefit, or for such a benefit or advantage for a friend, associate or family member. Furthermore, members of staff may not mislead or attempt to mislead the council, municipal structures or functionaries in their consideration of any matter. No member of staff may be involved in a business venture with a councillor unless prior written consent of the council has been obtained.<sup>54</sup>
- *Receiving gifts, favours or rewards* Municipal staff may not request, solicit or accept any reward, gift or favour in return for
  - (a) persuading the council or any structure or functionary to exercise any power or perform any duty
  - (b) making a representation to the council or any structure
  - (c) disclosing any privileged or confidential information
  - (d) doing or not doing anything within that staff member's powers or duties.<sup>55</sup>

It seems from the wording of the item that an innocent gift received by a staff member for having done his/her work well or because he/she has "gone the extra mile" would not be in contravention of the code of conduct. Personnel should be very careful, however, and should not accept gifts from the public or immediately report such a gift or favour to their superiors or the speaker of the council. It is common practice for municipal staff to receive flowers, a box of chocolates, a bottle of wine or free tickets for a meal or sports happening as a gesture of appreciation from a member of the local community. The acceptance of such gifts should not be seen as a contravention of the code, but staff should be careful not to create a wrong impression. It is advisable for municipalities to establish a clear policy on such matters.

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<sup>53</sup> See the Systems Act Sch 2 Item 6. It should be noted that the prohibition to disclose information does not derogate from a person's right to access to information, which is provided for in terms of national legislation. For more, see the Promotion of Access to Information Act 2 of 2000.

<sup>54</sup> See the Systems Act Sch 2 Item 7.

<sup>55</sup> All staff must report to either a superior official or to the speaker of the council without delay any offer which, if accepted, would constitute a breach of this subitem. Municipal staff are thus obligated to report any attempts from other persons or institutions to solicit a bribe or to try and buy favours. Refer to the Systems Act Sch 2 Item 8.



- *Council property, payment in arrears and staff participation in elections* No member of a municipal staff may use, take, acquire or benefit from any property or asset owned, controlled or managed by that municipality. Again it is submitted that the circumstances of each case will be indicative of whether or not there is a real contravention of this prohibition. Innocent usage, without real benefit to the staff member, should not be regarded as a breach of this item.<sup>56</sup>

Similar to municipal councillors, no member of staff may be in arrears to the municipality for rates and services charges, for a period longer than three months. After this period, municipalities are permitted to deduct any outstanding amounts from staff members' salaries. This stipulation is somewhat controversial, however. Although it is acceptable that staff members and councillors should set an example regarding payment for municipal rates and service charges, it is not clear why outstanding amounts may be deducted from staff members' salaries but not from the salaries of councillors.<sup>57</sup> Furthermore, it seems unlawful to recover outstanding debts without an investigation regarding the merits of each case.<sup>58</sup> It is submitted that such automatic recovery of outstanding amounts should not be permitted, as it raises several legal and even constitutional issues. Municipalities should be obligated to follow the normal procedure applicable for the recovery of outstanding rates and services charges under the law in general.

A further and somewhat unclear provision in the code of conduct is that municipal staff are prohibited from participating in an election of the council of the municipality, other than in an official capacity or pursuant to any constitutional right. Staff members also have constitutional rights regarding the participation in municipal elections, and the purpose of this item is not clear.<sup>59</sup>

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<sup>56</sup> Eg, if a staff member uses the internet and prints a report for a personal use, or if member uses stationery that belongs to the council, such events should not constitute a breach of the code. The well-known maxim of South African law, namely *de minimus non curat lex*, should be applicable in such instances. See the Act Sch 2 Item 9.

<sup>57</sup> Cf Sch 2 Item 10 and Sch 1 Item 12A as inserted by Act 51 of 2002.

<sup>58</sup> It is quite possible for a municipal staff member to be in a dispute with his/her local municipality and subsequent employer regarding the correctness of a municipal account. To allow a council to deduct any amounts it deems outstanding from the salary of the staff member would not only negatively prejudice such a staff member, but would probably also not pass the test under the Bill of Rights s 36. A staff member should be able to argue that he/she is being treated unequally and that normal recourse under the law has been restricted.

<sup>59</sup> See the Systems Act Sch 2 Item 11. See also the Constitution s 19, which refers to the political rights of every adult citizen.

- *Sexual harassment* Following on other legislative prohibitions, no staff member of a municipality may embark on any action amounting to sexual harassment. The purpose of this item is self-evident, and breaches will depend on the circumstances of each case.<sup>60</sup>

Finally, the code of conduct obligates all staff members to report such possible breach without delay to a superior officer or to the speaker of the council whenever staff members have reasonable grounds to believe that there has been a breach of this code. Any breach or breaches of the code must be dealt with in terms of the relevant disciplinary procedures that are in force within the relevant municipality.<sup>61</sup> It is the responsibility of the municipal manager to ensure that a copy of the code of conduct or any amendments thereof have been provided to every member of the staff, if applicable. The municipal manager must also ensure that the purpose, content and consequences of the code have been explained to staff members who cannot read and furthermore to communicate to the local community the sections of the code that affect the public.<sup>62</sup>

#### **17.3.5 Miscellaneous aspects relevant to municipal staff members and the organisational structure of a municipal administration**

In order to address any shortcomings in the new legislative framework enacted to regulate the internal organisational structures of municipalities as well as related staff matters, the Systems Act allows the minister responsible for local government to make regulations or to issue guidelines covering a vast array of matters. In relation to the making of regulations, the Systems Act confirms that the following matters may be extended by regulations:<sup>63</sup>

- the procedure to be followed in appealing against decisions taken in terms of delegated powers and the disposal of such appeals
- the suspension of decision on appeal

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<sup>60</sup> See the Systems Act Sch 2 Item 12.

<sup>61</sup> It is thus safe to conclude that a *prima facie* breach of the code does not (allow or) permit a municipality to act against such a staff member other than according to the normal disciplinary processes. A breach of the code thus creates a ground or grounds for further disciplinary action and does not allow immediate termination of the employment relationship between the parties. See the Systems Act Sch 2 Items 13 and 14 as amended. Note that a breach of the code is not only a ground for dismissal or other disciplinary steps, but that such steps may include a suspension without pay for no longer than three months; a demotion; a transfer to another post; a reduction in salary, allowances or benefits or an appropriate fine. See item 14A as added by Act 44 of 2003 s 29.

<sup>62</sup> See the Systems Act s 70(1) and (2).

<sup>63</sup> See the Act s 72(1)(a)(i)-(vi).

- the setting of uniform standards for municipal staff establishments, municipal staff systems and any other matters concerning municipal personnel administration
- capacity building within municipal administrations
- training of staff, including in-house-training subject to national legislation<sup>64</sup>
- any other matter that may facilitate the application of the chapter and requirements regarding local public administration and human resources.

On the other hand, it is also provided that the minister may issue guidelines to provide for the following matters:<sup>65</sup>

- the establishment of job evaluation systems
- the regulation of remuneration and other conditions of service of staff members of municipalities
- the measuring and evaluation of staff performance
- the development of remuneration grading and incentive frameworks for staff members
- corrective steps in cases of substandard performance by staff members
- any other matter that may facilitate the implementation by a municipality of an efficient and effective system of personnel administration.

When making regulations or issuing guidelines, the minister must take into account the capacity of municipalities to comply with such matters and differentiate between the different kinds of municipality, according to their capacities. Issues regarding local public administration and human resources which place a financial or administrative burden on municipalities may be phased in by the minister. Such phasing in is done by notice in the *Government Gazette*.<sup>66</sup> Finally, it is also important to note that apart from relevant labour legislation that must be adhered to, municipalities are also obliged to comply with any collective agreements that have been concluded by organised local government within its mandate on behalf of local government in the specific bargaining council that has been established for municipalities.<sup>67</sup>

#### **17.4 Conclusion**

It can be concluded that municipalities, in similar fashion to all other private or public entities, need an effective and efficient personnel corps in order to fulfil their vast array

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<sup>64</sup> See again the Skills Development Act and Skills Development Levies Act.

<sup>65</sup> See the Systems Act s 72(1)(b)(i)-(vi).

<sup>66</sup> See the Systems Act s 72(2)-(4).

<sup>67</sup> See the Systems Act s 71.

of municipal services and obligations. There is no doubt therefore that municipalities must make every possible effort to maintain, control, educate, train and motivate their respective administrative functionaries. In the past, local governments too often neglected their personnel obligations and political ambitions overshadowed people-related interests.

Under the new local government dispensation a rejuvenated effort has been launched to protect and enhance municipal labour- and staff-related matters. Local government does not operate in an exclusive environment, however, and therefore must adhere to standard labour laws and practices. In light of the specific tasks and obligations of all local governments, it is very important for all municipal administrations to organise and structure their respective administrations in such a manner that optimal efficiency is obtained. Bureaucratic institutions should be avoided and regular evaluation of the organisational structure must be undertaken.

Various new initiatives have been incorporated into the new legal framework to ensure more professional and skilled local government administrations. Such initiatives include *inter alia* the introduction of key performance indicators to measure overall performance, fixed term service contracts for senior personnel and a comprehensive code of conduct for all administrative staff. A municipal manager as head and chief of the municipal administration has been legally entrenched and is finally tasked with overall personnel accountability. All municipal managers should have strong leadership and human relations qualities, and municipal councils must ensure that properly trained and suitably experienced candidates are appointed to such positions. The influence of the municipal manager is of fundamental importance to the overall success of a particular local government.

With due regard to the various constitutional requirements, such as the principles of the public administration and financial management, read together with the new criteria on municipal administrative management, it is submitted that local governments should be able to perform and fulfil their legal functions and obligations. There seems to be a stronger realisation that without effective and efficient municipal administrations most, if not all, local governments will not be able to succeed in their roles as the third branch of the overall governmental structure of a new and truly democratic state.

## Issues relating to municipal finance and municipal fiscal management

### 18.1 Introduction

The overall reform and transformation of the new local government dispensation has not only affected the composition and internal functioning of all local governments in South Africa, it has also significantly impacted on municipal financial affairs. It is clear that municipalities need adequate financial resources to achieve their new constitutional objectives. From the outset it is important to note not only that municipal income sources should be protected, but also sound expenditure policies and financial control mechanisms must be implemented.<sup>1</sup> In light of the new constitutional dispensation, all governmental expenditure and financial management practices must adhere to the basic values of accountability and transparency.<sup>2</sup> Strict control over municipal financial matters is thus a *sine quo non* for a successful and effective local government sphere.

Against this background, a new legal framework has been developed to manage and control the financial affairs of all municipalities. At the centre of the new framework is the Constitution, which specifically requires that all local governments must be developmentally orientated and that they aim at meeting the basic needs of their respective communities in their budgeting and administrations.<sup>3</sup> Furthermore, municipalities must also strive to achieve various constitutional objectives, which spe-

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<sup>1</sup> No local government will be able to fulfil its overall constitutional objectives and duties without effective and strict monetary control. See also Cloete (1997) 108.

<sup>2</sup> These values are the basic foundations upon which the new governmental structure, including the new local government dispensation, is based. Refer also to the Constitution s 1.

<sup>3</sup> See the Constitution ss 152 and 153 respectively.

cifically include the provision of basic services to local residents in a sustainable manner.<sup>4</sup>

In order for the new framework of municipal finance to be effective, the White Paper on local government has identified three aspects which the new financial framework had to incorporate:

- The new system had to be developmentally orientated and had to address the root causes of current financial problems.
- A balance had to be achieved between programmes for poverty eradication combined with strategies of growth and job creation.
- All local governments had to be empowered to fulfil their overall constitutional mandates.<sup>5</sup>

It is further imperative that the new framework recognises and accommodates the difference between the three categories of municipality. In this respect it is important to take cognisance of the fact that urban and rural municipalities have very different financial circumstances and capacities.<sup>6</sup> In light of the abovementioned factors, the Department of Constitutional Development and Local Government has embarked on a programme to establish and enact various legislative provisions in order to establish a broad financial framework for local governments. Although it is hoped that the new legal framework will be effective in order to secure the responsibilities that local governments must meet, the department has encountered many delays in finalising the proposed legal framework.<sup>7</sup>

## **18.2 The new legislative framework for municipal financial management**

Within the new constitutional dispensation of South Africa, all local governments are specifically entrenched as being part of the government of the Republic, and their existence and functioning are thus constitutionally controlled and regulated. This is also the position regarding the principles of municipal finance. The Constitution pro-

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<sup>4</sup> In this regard it is submitted that sustainable services refer to services that can be continued on a day-to-day basis. Apart from sustainability, services should also be affordable to all members of local communities which in turn often require some form of local cross-subsidisation within a matrix of affordability, efficiency and constitutional effectiveness. See Craythorne (1997) 342.

<sup>5</sup> See the White Paper on Local Government (1998) at 129.

<sup>6</sup> See the three categories of municipality set out in the Constitution s 155. Against the backdrop of a combination of various factors, such as the system of segregation, poor administration and inadequate control measures, many local governments, especially in rural areas, do not have adequate tax bases to fund and sustain basic service delivery.

<sup>7</sup> It took nearly five years to finalise the new Local Government: Municipal Property Rates Act, and the Local Government: Municipal Finance Management Act.

vides the basic foundation and directives which have to be observed and complied with by all spheres of government, including municipalities. In relation to municipal finance, the Constitution incorporates various directives, and accordingly the new restructured system of municipal finance needs to be founded on the supreme constitutional foundation. Apart from such constitutional provisions, both national and provincial legislatures are authorised to enact further legal rules in order to complete the new envisaged system. Each of the new legislative sources is discussed below.

### **18.2.1 The broad constitutional foundation relevant to municipal finance**

According to the Constitution, all municipalities are obligated to structure and manage their administrations, budgeting and planning processes in such a way as to give priority to the basic needs of their respective communities and also to promote the social and economic development of such communities. In order to achieve these constitutional duties, all municipalities are obligated to participating in national and provincial development programmes.<sup>8</sup> A further important constitutional requirement that impacts on municipal financial affairs is the fact that neither national government nor provincial governments may compromise or impede a municipality's ability or right to exercise its powers or perform its functions. Both higher spheres of government must support and strengthen the capacity of municipalities to manage their own affairs and to exercise and perform their powers and functions.<sup>9</sup> It is clear from the constitutional text that the two higher spheres of government have a significant responsibility to ensure that municipalities are capacitated and able to perform their powers and functions. Apart from the provisions mentioned above, the chapter on local government in the Constitution contains no requirements regarding the system of municipal finance. However, the broad requirements relating to municipal finance are set out in chapter 13 of the Constitution, which deals with the financial affairs of all three spheres of government. In this regard, the Constitution deals with the following:

- *National revenue fund* The Constitution determines that a national revenue fund be established and that all money which is received by the national government

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<sup>8</sup> Refer to the Constitution s 153. This section must be read together with s 152, which confirms the various objects that municipalities must strive to achieve, depending on their financial and administrative capacities.

<sup>9</sup> See the Constitution s 151(4) read with s 154(1).



be paid into such national revenue fund. Only money that is reasonably excluded by an Act of parliament may be deposited in another fund(s).<sup>10</sup>

- *Equitable shares and allocations of revenue* According to the Constitution, an Act of parliament must provide for *inter alia*, the equitable division of revenue that has been raised nationally among the national, provincial and local spheres of government and also for any other allocations of revenue to provinces. The Act must also provide for any other allocations to the provinces or *local government or municipalities* from the national government's share of that revenue and any conditions on which those allocations may be made.<sup>11</sup> The Act of parliament that regulates the equitable share and allocation of revenue raised nationally may be enacted only be after the provincial governments, Organised Local Government (OLG) and the Financial and Fiscal Commission (FFC) have been consulted, and after any recommendations of the commission have been considered. Furthermore, the Act must take various factors into account, such as *inter alia*:
  - (a) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them
  - (b) the fiscal capacity and efficiency of the provinces and municipalities
  - (c) the developmental and other needs of provinces and municipalities
  - (d) the various obligations of the provinces and municipalities that have been allocated to them in terms of national legislation.<sup>12</sup>

In essence, the Constitution addresses intergovernmental fiscal relations in two broad respects. On one hand the Constitution entitles the local sphere of government to an equitable share of revenue raised nationally. Such sharing of national revenue is generally referred to as "intergovernmental transfers" (IGTs). Apart from the entitlement to share in revenue, the Constitution specifically entrenches oversight and regulation of the financial affairs of municipalities in the national government.<sup>13</sup>

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<sup>10</sup> See the Constitution s 213(1)-(3).

<sup>11</sup> Refer to the Constitution s 214(1)(a)-(b). In compliance with s 214(1)(a) national parliament has enacted the Division of Revenue Act 7 of 2003. The Act specifically provides for the equitable division of revenue between the three spheres of government.

<sup>12</sup> For more details see the Constitution s 214(2)(a)-(j). The use of the terms "local governments" and "municipalities" in s 214 is somewhat unclear and unnecessary, as both terms are synonymous with one another.

<sup>13</sup> This oversight and control is protected in various sections of the Constitution. For more details, refer to the Constitution ss 100, 139, 155(7), 229 and 230A. Many other sections regarding

- *National, provincial and municipal budgets* The new constitutional dispensation envisages an overall financial system for all spheres of government that is transparent, effective and accountable and regards it as obligatory. All national, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.<sup>14</sup> Again, the Constitution itself requires national legislation to further complete and regulate such financial processes. The national legislation must prescribe the form of the budgets in all three spheres of government, and all budgets must show the sources of revenue and the way in which proposed expenditure will comply with national legislative requirements.<sup>15</sup> The Constitution further determines that each budget in each sphere of government, including all municipal budgets, must contain specific information. For example, each budget must contain estimates of revenue and expenditure, proposals for financing any anticipated deficit and an indication of intentions regarding borrowing and also other forms of public liability that will increase public debt.<sup>16</sup>
- *Treasury control and procurement* The Constitution also requires national legislation to establish a national treasury and to prescribe measures to ensure both transparency and expenditure control in each sphere of government. Such measures are to be achieved by introducing generally recognised accounting practices, by uniform expenditure classifications and through uniform treasury norms and standards. It is the responsibility of the national treasury to enforce compliance with the measures that have been mentioned above. If an organ of state commits a serious or persistent material breach of the mentioned measures, then the national treasury may stop the transfer of funds to that organ or organs.<sup>17</sup> It is evident that the Constitution, as with other issues, vests the final oversight and control with the national sphere of government, within which sphere the national treasury operates. This is also the case concerning municipal treasury control.

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finance such as ss 215 and 216 grant further powers to the national treasury to regulate municipal financial affairs. The Act will therefore set financial controls for all spheres of government and will impose responsibilities and penalties on not only accounting officers, but also on the municipal manager and political heads. Refer also to the White Paper on Local Government (1998) at 130-131.

<sup>14</sup> See the Constitution s 215(1).

<sup>15</sup> Refer to the Constitution s 215(2)(a)-(c).

<sup>16</sup> See the Constitution s 215(3)(a)-(c).

<sup>17</sup> See the Constitution s 216(1) and (2).

*Requirements regarding aspects of procurement* These are also constitutionally entrenched. When an organ of state in any sphere or any other institution so identified in national legislation contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and also cost effective. Procurement procedures or policies may further provide for categories of preference in the allocation of contracts and also for the protection or advancement of persons or categories of persons that have been disadvantaged by unfair discrimination.<sup>18</sup> National legislation must again prescribe a framework within which the procurement policy is to be implemented.<sup>19</sup>

In accordance with the abovementioned constitutional imperative set out in section 217 of the Constitution, national parliament has enacted the Preferential Procurement Policy Framework Act (PPPFA).<sup>20</sup> The main aim of the Act is to give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2). The PPPFA determines that organs of state, including municipalities, must determine their preferential procurement policies and also implement them within the following framework:<sup>21</sup>

- (a) A preference points system must be followed.
- (b) For contracts with a rand value above a prescribed amount, a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d), provided that the lowest acceptable tender scores 90 points for price. For contracts with a rand value equal to or below a prescribed amount, a maximum of 20 points may be allocated for specific goals, provided that the lowest acceptable tender scores 80 points for price.<sup>22</sup>

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<sup>18</sup> This preferential treatment is a good example of so-called "affirmative action" initiatives. It is submitted that although such initiatives are constitutionally permitted, the relevant institutions do not have a carte blanche freedom over the contract requirements with outside institutions. Such appointments or awarding of contracts must also comply with other constitutional requirements. See, eg, the provisions of s 9 (equality) and s 33 (fair administration action) set out in the Bill of Rights.

<sup>19</sup> See the Constitution s 217(1)-(3).

<sup>20</sup> 5 of 2000.

<sup>21</sup> See the PPPFA s 2(1)(a)-(g).

<sup>22</sup> "Prescribed" in this sense means prescribed by regulation by the Minister of Finance. See the PPPFA ss 1 and 5 respectively. Read also with the Act s 2(1)(d). Note also that an "acceptable tender" means any tender which in all respects complies with the specifications and conditions of tender set out in the tender document.

- (c) Any other acceptable tenders which are higher in price must score fewer points, on a *pro rata* basis. Points are calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula.
- (d) The specific goals may include the contracting with persons or categories of persons that have been historically disadvantaged by unfair discrimination on the basis of race, gender or disability and the implementing of the programmes of the Reconstruction and Development Programme.<sup>23</sup>
- (e) Any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender.<sup>24</sup>
- (f) The contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer.
- (g) Any contract awarded on account of false information by a tenderer to secure preference may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have in terms of the law.

On request, however, the Minister of Finance may exempt an organ of state from any or all of the provisions of the Act. Such exemption is permitted only if it is in the interests of national security, if the likely tenderers are international suppliers or if it is in the public interest to grant exemption.<sup>25</sup> Any procurement processes implemented under a preferential procurement policy, where the invitation to tender was advertised before the commencement of the PPPFA, must be finalised as if the Act had not come into operation. Furthermore, the minister may make regulations regarding any matter that may be necessary or expedient in order to achieve the objectives of the Act.<sup>26</sup> With reference to the tender processes of municipalities, the supreme court of appeal in *Metro Projects CC and Another v Klerksdorp Local Municipality and Others*<sup>27</sup> held that any tender process must be fair, equitable and cost effective. As an organ of state in the local government sphere, a municipality, in awarding a tender, is obliged to comply with section

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<sup>23</sup> See *Government Gazette* 16085 of 23/11/1994.

<sup>24</sup> Such goals must be measurable, quantifiable and monitored for compliance. See the Act s (2).

<sup>25</sup> Read the PPPFA s 3(a)-(e).

<sup>26</sup> Refer to the PPPFA ss 4 and 5.

<sup>27</sup> 2004 (1) SA 16 (SCA).

10G(5)(a) of the Local Government Transition Act,<sup>28</sup> read with section 217(1) of the Constitution. These provisions mandate it to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The PPPFA requires organs of State to establish a procurement policy, and also makes it obligatory for the first respondent, as an organ of state in the local sphere, to follow a tender procedure for the procurement of goods and services.

There is also another reason why the tender procedure of a local authority must be fair. Invitations by organs of state to tender and the awarding of tenders where it is done in the exercise of public power is an administrative process. Section 3(2)(a) of the Promotion of Administrative Justice Act<sup>29</sup> requires the process to be lawful, procedurally fair and justifiable. Fairness must be decided on the circumstances of each case. In given circumstances it may be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake and, particularly in a complex tender, it may be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.<sup>30</sup>

- *Government guarantees* Governments, including municipalities, may guarantee a loan or loans only if the guarantee complies with the conditions set out in national legislation.<sup>31</sup> In order to ensure accountability and transparency, the Constitution demands that every government publish a report each year on the guarantees it has granted. This is an important requirement, since a government guarantee is a legally binding instrument whereby such government has financially bound itself to the extent of that guarantee.
- *The remuneration of persons that are holding public office* In the former system for local government in South Africa, the remuneration of municipal office bearers had a significant impact on municipal finance. According to the Act on the remuneration of town clerks,<sup>32</sup> the town clerk was the highest paid official of a municipality, and his or her salary scale was the sealing of all salaries for a particular

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<sup>28</sup> 209 of 1993.

<sup>29</sup> 3 of 2000.

<sup>30</sup> See pages 20-21.

<sup>31</sup> See the Constitution s 218. The national legislation referred to in this section may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

<sup>32</sup> 115 of 1984.

municipality. Municipalities were further divided into categories, rated from 1 to 14, 1 being the smallest municipality and 14 the biggest. The top salary, that of the town clerk, was determined according to the specific category. Town clerks of category 14 municipalities earned much more than their counterparts in smaller local government structures. Under the new dispensation, the Constitution requires that an Act of parliament establish a framework for determining the upper limits of salaries, allowances or benefits of *inter alia* municipal councils of the different categories of municipality.<sup>33</sup> In order to make recommendations concerning the salaries, allowances and benefits mentioned above, the Constitution obligates national parliament to enact national legislation, which must then establish an independent commission to undertake such tasks. The provisions of such a national law may be implemented only by government institutions, including municipalities, after the consideration of any recommendations of the independent commission.<sup>34</sup>

- *The establishment of the Financial and Fiscal Commission* Under the new financial framework, the Constitution confirms that there is a Financial and Fiscal Commission (FFC) for the Republic of South Africa which makes recommendations on government fiscal matters to parliament, provincial legislatures or other authorities. The commission is independent and subject only to the Constitution and the law. It must also be impartial and must perform its functions in terms of an Act of parliament.<sup>35</sup> The commission consists out of a chairperson and a deputy chairperson, one person nominated by the executive councils of each of the nine provinces, two persons nominated by organised local government and nine other

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<sup>33</sup> See the Constitution s 219(1)(b). It is interesting to note that only the *upper limit of salaries, allowances or benefits* of members of provincial legislatures, MECs and members of municipal councils must be established in terms of national legislation. See the Constitution s 219(1)(a). The Constitution does not require the national Act to prescribe only the upper limits of salaries or benefits of members of the NA or NCoP, cabinet, deputy ministers, traditional leaders or members of councils of traditional leaders. The Act must establish the specific salaries or benefits that are applicable. This position seems to indicate that a similar system as was used under the Act for the remuneration of town clerks is proposed for local government.

<sup>34</sup> Refer to the Constitution s 219(2) and (4). In compliance with this requirement, parliament has enacted the Independent Commission for the Remuneration of Public Office-bearers Act 92 of 1997.

<sup>35</sup> See the Constitution s 220. Furthermore, the Financial and Fiscal Commission Act 99 of 1997 has been enacted to give effect to the constitutional requirements that relates to the FFC.



persons.<sup>36</sup> Finally the FFC is obligated to report regularly, both to parliament and to the provincial legislatures.<sup>37</sup>

- *Provincial revenue funds and national sources of provincial and local government funding* Apart from the national revenue fund, the Constitution also determines that there should be a provincial revenue fund for each of the provinces into which all money received by a provincial government must be paid.<sup>38</sup> Money may be withdrawn from a provincial revenue fund only in terms of an appropriation allowed by a provincial Act. More importantly is the provision that revenue allocated through a province to local governments in terms of section 214(1) of the Constitution is a direct charge against that province's revenue fund.<sup>39</sup> It is furthermore determined that local government and each province is entitled to:
  - (a) an equitable share of revenue raised nationally to enable it to provide basic services and to perform the functions allocated to it
  - (b) receive other allocations from national government revenue, either conditionally or unconditionally.<sup>40</sup>

An important provision in this regard is that the Constitution protects additional revenue raised by provinces or municipalities. Such additional revenue may not be deducted from their share of revenue raised nationally or from any other allocations made to them. If a municipality is thus entitled to a specific share of revenue, but it has also earned additional revenue, by whatever means, such revenue may not be deducted from its original share amount. The intention of the constitutional

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<sup>36</sup> There should thus be in total 22 members of the commission. Members must also have appropriate expertise, which would include financial and public affairs expertise. See the Constitution s 221.

<sup>37</sup> Refer to the Constitution s 222.

<sup>38</sup> Exceptions may be provided for through an Act of parliament.

<sup>39</sup> Refer to the Constitution s 226. The Constitution further states that national legislation may determine a framework within which revenue allocated through a province to local government in that province, must be paid to municipalities in the province. In this regard the Intergovernmental Fiscal Relations Act 97 of 1997 has been enacted. The purposes of the act are to promote co-operation between the spheres of government relating to fiscal and budgetary matters, and to ensure equitable sharing and the allocation of revenue.

<sup>40</sup> See the Constitution s 227(1)(a)-(b). It is of interest to note that in the case of *In re: Certification of the Constitution of the RSA 1996*, 1996 (4) SA 744 (CC) the Constitutional Court held that the absence in the new text of the Constitution of a provision equivalent to the interim Constitution s 158(b), which provided that [the] financial allocations by the national government to local government shall ordinarily be made through the provincial government of the province in which the local government is situated was not a material diminution in the powers of provincial governments. S 158(b) established [only] the possibility, not the certainty, that provincial government could be utilised as a conduit through which funds raised nationally could be allocated to local government.

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drafters seems to be to promote and encourage provinces and municipalities to implement initiatives, so as to earn additional income. If such income were to be deducted from a municipality's share in income then there would be no motivation or purpose for it to secure additional revenue. By protecting additional revenue, municipalities are encouraged to devise new initiatives in order to raise more money for themselves and to thus be more able to fulfil and perform their functions and duties. As a counter protection, the Constitution also determines that there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.<sup>41</sup> It is submitted that although national government is under no obligation to compensate the two lower spheres of government for their own ineffectiveness to raise revenue which they should have raised, national government, being the highest sphere of government, is still constitutionally obligated to intervene and oversee the fulfilment of the duties and functions of the lower spheres.<sup>42</sup>

- *Municipal fiscal powers and functions* The chapter on finance in the Constitution specifically determines certain fiscal powers and functions for municipalities. In this regard municipalities may impose:
  - (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality
  - (b) other taxes, levies and duties appropriate to local government or the specific category concerned if so authorised by national legislation.<sup>43</sup>

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Such a section did not purport to create provincial powers in respect of such revenue. See para 430 at 897.

<sup>41</sup> See the Constitution s 227(2).

<sup>42</sup> See the Constitution ss 100, 139 and 154 respectively. Refer also to the case of *Member of the Executive Council for Local Government, Mpumalanga v IMATU and Others* 2002 (1) SA 76 (SCA). The court stated that the Constitution ss 139 and 154 do not impose on a provincial government the constitutional duty towards a local authority to provide it with funds to enable it to pay its debts. See paras 8-10 at 79.

<sup>43</sup> Refer to the Constitution s 229(a)-(b). National legislation must therefore determine such other taxes or levies before local governments may impose them. See also *Gerber and others v Member of the Executive Council for Development, Planning and Local Government, Gauteng and Another* 2003 (2) SA 344 (SCA). The case concerned an appeal regarding the legality of land rates imposed on owners of agricultural land. The local authority argued that it was entitled to impose a flat rate under the provisions of the Ordinance for the Transvaal Board for the Development of Peri-Urban Areas 20 of 1943 (T). The court held that the original powers granted to municipalities in terms of the Constitution s 229(1)(a) were to impose a property rate. "Rate" referred to rate on property in relation to size or value of property. S 229 did not depart from such a meaning. The LGTA s 10G(6) stated in pre-emptory terms that if not feasible to value or measure a property, rates could be determined as prescribed. Data of the properties was provided. The court held that there was no correlation between the size of the property and the rate imposed, thus the rate imposed

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It is, however, specifically determined that no municipality may impose income tax, value-added tax, general sales tax or customs duty. Such taxes may be imposed only by the national government; not even by provincial governments.<sup>44</sup> Municipalities clearly have the authority to impose rates on property and surcharges on fees for services and other taxes, levies or duties. However, such power or authority may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries or the national mobility of goods, services, capital or labour. National legislation is again envisaged to regulate such powers of municipalities.<sup>45</sup> When two municipalities have the same fiscal powers and functions in an area, an appropriate division of such powers and functions must be made in terms of national legislation. The division may be made only after at least the following criteria have been taken into account:<sup>46</sup>

- (a) the need to comply with sound principles of taxation
- (b) the powers and functions performed by each municipality
- (c) the fiscal capacity of each municipality
- (d) the effectiveness and efficiency of raising taxes, levies and duties
- (e) equity.

There is no prohibition on the sharing of revenue raised between municipalities that have fiscal powers in the same area. It is important that division of powers and the sharing of revenue between municipalities in the same area should be carefully considered and monitored. National legislation as well as the involve-

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treated landowners unequally. Owners of smaller pieces of land paid as much as owners of larger tracts of land within same area. Since the council relied on the Constitution s 229(1)(a) and not s 229(1)(b), which allowed a levy on property, its basis for calculation of the levy/rate was irrational, unfair and discriminatory. The rates were thus set aside. See para 25-28 at 354 and para 36 at 357. Refer also to *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (CPD). The case concerned the validity of a municipality levying service charges comprising part property rates and part service fees. The court held that there was nothing in the Constitution or other legislation that precluded a municipality from levying service charges that comprise both property rates and user fees. The court concluded that such authority is permitted under the LGTA, s 229 of the Constitution and ss 74-75 of the LG: Municipal Systems Act. See pages 560-561.

<sup>44</sup> See the Constitution s 228(1), which determines that provincial legislatures may impose taxes, levies and duties *other than* income tax, value-added tax, general sales tax, rates on property or customs duties. See the Constitution s 228(1)(a) read with s 229(1)(a).

<sup>45</sup> See the Constitution s 229(2).

<sup>46</sup> Refer to the Constitution s 229(3)(a)-(e).

ment of the FFC should play a vital role in creating an effective and equitable system of sharing revenue.<sup>47</sup>

- *Municipal loans* The Constitution determines that a municipal council may, in accordance with national legislation:
  - (a) raise loans for capital or current expenditure for the municipality
  - (b) bind itself and a future council in the exercise of its legislative and executive authority in order to secure loans or investments for the municipality.

It must be noted, however, that loans for current expenditure may be raised only when it is necessary for bridging purposes during a fiscal year.<sup>48</sup> The national legislation that authorises municipal loans may be enacted only after recommendations of the FFC have been considered.

It is clear from sections 229 and 230A of the Constitution that the Constitution grants municipalities considerable taxation and borrowing powers, but subject such powers to national legislative control and regulation. Municipal taxation powers are further also limited, in that they may not unreasonably prejudice national economic policies and activities. Finally, the prohibition that borrowings may not fund budget deficits effectively outlaws deficit budgeting on local government level. It is quite evident that the new constitutional framework specifically demands that local authorities adhere to specific constitutional directives when dealing with financial matters. These basic directives may be expanded upon by parliament through the enactment of new national legislation.

### **18.2.2 The new basic policy objectives**

In order to meet the new supreme objectives as set out in the Constitution, a new system of municipal finance had to be created. Such reconstruction had to conform

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<sup>47</sup> The sharing of revenue between municipalities in the same area is applicable only between category B and C municipalities, and national legislation must regulate the position. Such national legislation may be enacted only after organised local government and the FFC have been consulted and any of their recommendations have been considered, however. See the Constitution s 229(5). See also *Robertson & Another v City of Cape Town and Another* 2004 (5) SA 412 (CPD), where the court held that bilateral consultation had to take place between the FFC and the Minister or Parliament regarding the provisions of the Structures Act as amended, before such provisions could be enacted. Refer to para 109-110 at 446-448.

<sup>48</sup> The importance of municipal loans should not be underestimated, and such loans could have a significant impact on the fulfilment of the powers and functions of future councils. Because of this important impact, only the municipal council may conclude loans and may not delegate such authority. See the Constitution s 160(2)(d) read together with s 230A.

to a number of basic policy principles. According to the White Paper on local government, the principles for the new system can *inter alia* be summarised as follows:<sup>49</sup>

- *Revenue adequacy and certainty* All municipalities need to have access to adequate revenue sources to fulfil their powers and functions. Such sources should then be fully exploited in order for municipalities to meet their developmental objectives. In order to ensure compliance with their objectives, municipalities will need certainty regarding their revenue so as to allow them to plan realistically for the future.
- *Sustainability* Financial sustainability requires municipalities to ensure that their budgets are balanced. Income should cover expenditure adequately. In order to achieve sustainability, services should be provided at affordable levels, and municipalities must recover the costs of service delivery. Bail-outs for overspending on budgets or improper financial management will not be provided by higher spheres. In this regard, it is the responsibility of the political leadership to ensure that realistic budgets are set.
- *Effective and efficient use of resources*: Generally speaking, municipal resources are scarce and should be used in the best possible way to ensure maximum benefit for local communities. All communities should ensure through participation that their elected municipal council adheres to this important principle.
- *Accountability, transparency and good governance* Municipalities should be held responsible and accountable to local taxpayers for the use of public funds. Expenditure decisions must be explained in detail. The overall fiscal system should be designed to encourage accountability and should be open to public scrutiny. Community participation in the budgeting processes should be encouraged, and people should understand why decisions or priorities were taken. In general, the accounting procedures should allow for minimal opportunities for corruption and malpractice.
- *Equity and redistribution* Citizens must be treated equitably and within the ambit of the law. This treatment is also relevant to the provision of services. Municipalities themselves should also be treated equitably by the higher spheres of government regarding intergovernmental transfers. In order to ensure equity, municipalities are allowed to cross-subsidise between high and low-income con-

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<sup>49</sup> See the White Paper on Local Government (1998) at 131-132.

sumers. The extent of cross-subsidisation is a local choice and needs to be exercised very carefully within the overall framework of a municipality's integrated development plan.

- *Adhering to national policies* Municipalities form an important part of the public sector in South Africa. Many actions or decisions of local governments can substantially affect national policy. Municipalities thus need to operate and fulfil the obligations within the national macro-economic framework of the state.

### **18.2.3 Financial matters under the Local Government Transition Act**

Under the provisions of the LGTA, every municipality had to adhere to certain principles in respect of the management of its financial affairs. In this regard municipalities had to:<sup>50</sup>

- conduct their affairs in an effective, economical and efficient manner with a view to optimising the use of their resources in addressing the needs of the community
- conduct their financial affairs in an accountable and transparent manner
- prepare a financial plan in accordance with the IDP
- structure and manage their administration, budgeting and planning processes to give priority to the basic needs of their communities, to promote social and economic development and to support the implementation of national and provincial development programmes
- manage their financial resources so as to meet and sustain their objectives
- regularly monitor and assess their performance against their IDP
- annually report to and receive comments from their community regarding the objectives set out in their IDPs.

According to the LGTA, the chief executive officer (CEO) was responsible for keeping accounting records that reflected the transactions and financial state of affairs of a municipality. All money received had to be deposited in a banking account in the name of the municipality. Every municipality was also obligated to establish and maintain a system of internal financial control. Furthermore, all municipal financial years were to end on 30 June of each year, and all accounts had to be audited by the Auditor-General.<sup>51</sup> The report of the Auditor-General had to be submitted to the council, and notice of such referral to the council had to be given in a newspaper

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<sup>50</sup> See LGTA s 10G(1)(a)-(g).

<sup>51</sup> See the LGTA s 10G(2)(c)-(d).

circulating in the area. The council meeting on the report had to be open to the public, and the CEO had to be present to answer possible questions in his/her capacity as accounting officer.<sup>52</sup>

On the point of accountability, the LGTA stated that if a person who is or was in the employ of a municipality caused a loss or damage for the municipality because he/she:

- failed to collect money owing to the municipality for which collection he/she was responsible
- was responsible for an irregular payment of money or payment not supported by a proper voucher
- was responsible for fruitless expenditure due to an omission
- was responsible for the destruction or damage to council property or
- was responsible, due to an omission, for a claim against the municipality, the CEO or the council, who had to determine the amount of such loss or damage, had to take disciplinary action where possible and had to recover the loss or damage in appropriate cases.

Any fraudulent and corrupt actions by employees had to be reported to the SANPS.<sup>53</sup> According to the Act, an expenditure was unauthorised if payment was made:

- by the CEO without provision having been made therefore by any budget or if payment resulted in the total amount of the approved annual operating or capital expenditure budget was exceeded
- if the CEO was unable to produce to the Auditor General (AG) or MEC or council authority for the payment as was required by law or where the CEO made a payment inconsistent with a provision by any law.

Any unauthorised expenditure had to be disallowed until approved by the responsible authority. Any unauthorised expenditure had to be recovered from the CEO if he/she was unwilling to recover such from either the beneficiary or person responsible for the expenditure. An interesting provision on this point was that in instances where unauthorised expenditure has been effected on a written instruction of a councillor or as a result of a council resolution in favour of which a councillor voted,

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<sup>52</sup> Refer to the LGTA s 10G(e)(i)-(iii).

<sup>53</sup> See the LGTA s 10G(2)(f)-(i).

unless it was recorded that the councillor voted against such resolution, the expenditure had to be recovered from the councillor(s) concerned.<sup>54</sup>

The LGTA also provided for strong oversight procedures regarding the financial management of municipalities. If the MEC was of the opinion that the finances of a municipality were or became unsound, he/she could instruct the council to take certain steps specified in writing.<sup>55</sup>

In respect of municipal budgets, the LGTA stated that a municipality had to compile and approve annually a budget with a two-thirds majority of all members of its council. The budget had to provide for operating income and expenditure and for capital expenditure which had to reflect the sources of finance, future capital charges, operating and maintenance costs as well as the consequential influence thereof on levies, rates and services charges. All municipalities had to ensure that they did not budget for a year-end deficit on their operating accounts and that their budgets were in accordance with their IDPs. Expenditure could be incurred only in accordance with the approved budget. Any decision to incur expenditure had to be taken by a majority of votes cast in council. It was also possible for the Minister of Finance to determine maximum expenditure limits for municipal budgets.<sup>56</sup> If a budget did not comply with the maximum expenditure limits, it had to be referred back to the council for reconsideration and amendment. In some cases, certain exceptions were allowed.

A further important provision in the LGTA was that municipalities had to award contracts for goods and services in accordance with a system which had to be fair, equitable, transparent, competitive and cost-effective. Preference could be given to persons previously disadvantaged by unfair discrimination. In cases of emergency, municipalities could dispense with the calling of tenders or if such option was allowed by law. Properties had to be valued and a single valuation roll for all properties had to be compiled, which had to be open to the public. Councils could levy and recover property rates, and metropolitan councils had to determine a common rating system.

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<sup>54</sup> Refer to the LGTA s 10G(2)(k)-(l).

<sup>55</sup> See the LGTA s 10G(2)(m)(i)-(iii). The term "unsound" also included any failure to claim or collect income, to control expenditure or to compile and approve an operating budget. If a municipality did not comply to the instructions of the MEC, the MEC could take such steps as he/she deemed necessary to restore the finances to a sound footing.

<sup>56</sup> See the LGTA s 10G(3)-(4). A municipal budget had to be submitted to the minister of Finance within 14 days of its adoption. The minister could delegate this monitoring power to the MEC.



Municipalities could also levy and recover levies, fees, taxes and tariffs, also known as charges. A municipality could also

- differentiate between different categories of user or property on such grounds as it deemed reasonable
- in respect of charges, amend or withdraw previous determinations
- recover any charges, including interest on any outstanding amount.<sup>57</sup>

Municipalities could also obtain money and raise loans for capital expenditure. The Minister of Finance could determine reasonable conditions and criteria regarding loans, however. Loans for bridging finance, which included bank overdrafts, could be raised by a municipality during a financial year only in order to finance current expenditure in anticipation of the receipt of revenue in that year. Municipalities could not raise loans denominated in a foreign currency and were not permitted to incur any other liability or risk payable in a foreign currency without approval by the minister of Finance. Any money borrowed by a municipality was a financial obligation of the municipality and was chargeable and payable from the revenues and assets of that municipality.<sup>58</sup>

In respect of investment policies, a municipality could make investment in various instruments with the concurrence of the minister of Finance. Such instruments included *inter alia*

- deposits with registered banks
- securities issued by the national government
- municipal stock
- long-term securities offered by insurance companies.<sup>59</sup>

With the concurrence of the Minister of Finance, the minister of Local Government could determine other investment instruments. Full details of any investments had to be published. Finally, municipalities had to ensure that the acquisition, disposal, utilisation, control and maintenance of its assets were carried out in an economic, efficient and effective manner.<sup>60</sup>

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<sup>57</sup> See the LGTA s 10G(7)(a)-(b). Decisions regarding charges had to be passed on to the MEC and to the public, who could lodge objections.

<sup>58</sup> See the LGTAs 10G(8).

<sup>59</sup> See the LGTA s 10G(9)(a)(i)-(ix).

<sup>60</sup> Refer to the LGTA s 10G(10)-(12). No claim of any creditor of any municipality could attach or be paid out of the national revenue fund or be paid by the national or any provincial government, unless this was specifically authorised by such government.

## **18.3 Legislative control mechanisms over municipal finance matters**

### **18.3.1 Parliamentary control**

In compliance with the new constitutional demands and in order to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government and furthermore to establish treasury norms and standards for the local sphere of government, the national parliament has enacted the Local Government: Municipal Finance Management Act (MFMA).<sup>61</sup> The object of the MFMA is to be achieved by establishing norms and standards and other requirements for the following issues:<sup>62</sup>

- (a) ensuring transparency, accountability and appropriate lines of responsibility in the financial and fiscal affairs of municipalities and municipal entities;
- (b) the management of revenues, expenditures, assets, liabilities and the handling of municipal financial dealings;
- (c) budgetary and financial processes and the co-ordination of those processes with the processes of organs of state in other spheres of government;
- (d) borrowing;
- (e) the handling of financial problems in municipalities;
- (f) supply chain management; and
- (g) other financial matters.

#### **18.3.1.1 The broad requirements of the Local Government: Municipal Finance Management Act**

##### **(a) Application and aspects of supervision over local government financial management**

The MFMA applies to

- all municipalities
- all municipal entities<sup>63</sup>
- national and provincial organs of state to the extent of their financial dealings with municipalities.<sup>64</sup>

In the event of any inconsistency between a provision of the MFMA and any other legislation in force when the MFMA took effect and which regulates any aspect of the

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<sup>61</sup> 56 of 2003, hereafter referred to as the MFMA. See also the long title of the MFMA.

<sup>62</sup> See the MFMA s 2(a)-(g).

<sup>63</sup> A municipal entity is defined in terms of the Municipal Systems Act s 1.

<sup>64</sup> The MFMA s 3(1)(a)-(c).

fiscal and financial affairs of municipalities or municipal entities, the provision of the MFMA prevails.<sup>65</sup> Draft national legislation directly or indirectly amending the MFMA or providing for the enactment of subordinate legislation that may conflict with the Act may be introduced in Parliament only after the Minister of Finance and the Financial and Fiscal Commission have been consulted in writing on the contents of the draft legislation, and after they have responded in writing.<sup>66</sup>

The MFMA further determines general functions of the National Treasury and provincial treasuries. The National Treasury must:

- fulfil its responsibilities in terms of Chapter 13 of the Constitution and the Act
- promote the object of the Act as stated in section 2
  - (a) within the framework of co-operative government set out in chapter 3 of the Constitution and
  - (b) when coordinating intergovernmental financial and fiscal relations in terms of the Intergovernmental Fiscal Relations Act, the annual Division of Revenue Act and the Public Finance Management Act<sup>67</sup> and
- enforce compliance with the measures established in terms of section 216(1) of the Constitution, including those established in terms of the MFMA.<sup>68</sup>

To the extent necessary to comply with the general functions mentioned above, the National Treasury may:

- (a) monitor the budgets of municipalities to establish whether they:
  - (i) are consistent with the national government's fiscal and macro-economic policy; and
  - (ii) comply with chapter 4;
- (b) promote good budget and fiscal management by municipalities, and for this purpose monitor the implementation of municipal budgets, including their expenditure, revenue collection and borrowing;
- (c) monitor and assess compliance by municipalities and municipal entities with—
  - (i) the act; and
  - (ii) any applicable standards of generally recognised accounting practice and uniform expenditure and revenue classification systems;

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<sup>65</sup> The MFMA s 3(2).

<sup>66</sup> See the MFMA s 4.

<sup>67</sup> The Act provided for under the Constitution s 214(1) and also Act 97 of 1997 respectively.

<sup>68</sup> See the MFMA s 5(1)(a)-(c).

- (d) investigate any system of financial management and internal control in any municipality or municipal entity and recommend improvements;
- (e) take appropriate steps if a municipality or municipal entity commits a breach of the act, including the stopping of funds to a municipality in terms of section 216(2) of the Constitution if the municipality, or a municipal entity under the sole or shared control of that municipality, commits a serious or persistent material breach of any measures referred to in that section; and
- (f) take any other appropriate steps necessary to perform its functions effectively.<sup>69</sup>

In turn, a provincial treasury must in accordance with a prescribed framework

- fulfil its responsibilities in terms of the Act
- promote the object of the Act as stated in section 2 within the framework of co-operative government set out in chapter 3 of the Constitution and
- assist the National Treasury in enforcing compliance with the measures established in terms of section 216(1) of the Constitution, including those established in terms of the Act.<sup>70</sup>

To the extent necessary to comply with the abovementioned requirements, a provincial treasury:

- (a) must monitor –
  - (i) compliance with the act by municipalities and municipal entities in the province;
  - (ii) the preparation by municipalities in the province of their budgets;
  - (iii) the monthly outcome of those budgets; and
  - (iv) the submission of reports by municipalities in the province as required in terms of the act;
- (b) may assist municipalities in the province in the preparation of their budgets;
- (c) may exercise any powers and must perform any duties delegated to it by the National Treasury in terms of the act; and
- (d) may take appropriate steps if a municipality or municipal entity in the province commits a breach of the act.<sup>71</sup>

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<sup>69</sup> See the MFMA s 5(2)(a)-(f).

<sup>70</sup> See the MFMA s 5(3)(a)-(c).

<sup>71</sup> The MFMA s 5(4)(a)-(d).

It should be noted that the functions assigned to the National Treasury or a Provincial Treasury in terms of the MFMA are additional to those assigned to the National Treasury or a Provincial Treasury in terms of the Public Finance Management Act.<sup>72</sup> The Minister of Finance, as the head of the National Treasury, takes all decisions of the National Treasury in terms of the Act, except those decisions taken as a result of a delegation in terms of section 6(1). Similarly, the MEC for finance in a province, as the head of the provincial treasury, takes all decisions of the provincial treasury in terms of the Act, except those decisions taken as a result of a delegation in terms of section 6(4). A provincial treasury must submit all information submitted to it in terms of the MFMA to the National Treasury on a quarterly basis, or when so requested.<sup>73</sup>

According to the MFMA, both the National Treasury and provincial treasuries are authorised to delegate their powers. On a national level the minister may delegate any of the powers or duties assigned to the National Treasury in terms of the MFMA to

- the Director-General of the National Treasury or
- the MEC responsible for a provincial department, as the minister and the MEC may agree.<sup>74</sup>

It should be noted, however, that the minister may not delegate the National Treasury's power to stop funds to a municipality in terms of section 5(2)(e).<sup>75</sup> A delegation authorised under section 6(1) is restricted as follows:

- (a) must be in writing;
- (b) is subject to any limitations or conditions which the minister may impose;
- (c) may, subject to any such limitations or conditions, authorise –
  - (i) the Director-General of the National Treasury to sub-delegate a delegated power or duty to a staff member of the National Treasury; and
  - (ii) the MEC responsible for the relevant provincial department to sub-delegate a delegated power or duty to a staff member of that department; and
- (d) does not divest the National Treasury of the responsibility concerning the

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<sup>72</sup> 1 of 1999.

<sup>73</sup> See the MFMA s 5(5)-(8).

<sup>74</sup> Refer to the MFMA s 6(1)(a)-(b).

<sup>75</sup> The MFMA s 6(2).

exercise of the delegated power or the performance of the delegated duty.<sup>76</sup>

The MEC for finance in a province may also delegate any of the powers or duties assigned to a provincial treasury in terms of the Act to the head of the relevant provincial department of which the provincial treasury forms part. Such delegation is subjected to the same conditions as are required on national level.<sup>77</sup> Both the minister or MEC for finance in a province may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.<sup>78</sup>

### **(b) Aspects relating to municipal revenue**

Under the new legislative framework, every municipality must open and maintain at least one bank account in the name of the municipality. All money received by a municipality must be paid into its bank account or accounts, and this must be done promptly and in accordance with the MFMA and any requirements that may be prescribed. A municipality may not open a bank account:

- abroad
- with an institution not registered as a bank in terms of the Banks Act<sup>79</sup> or
- otherwise than in the name of the municipality.<sup>80</sup>

Money may be withdrawn from a municipal bank account only in terms of the procedure set out in section 11(1) of the MFMA.

It is further required for each municipality to have a primary bank account. If a municipality has only one bank account, that account is its primary bank account. If it has more than one bank account, it must designate one of those bank accounts as its primary bank account.<sup>81</sup> Specific moneys must be paid into a municipality's primary bank account. Such moneys include:

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<sup>76</sup> See the MFMA s 6(3)(a)-(d).

<sup>77</sup> Read the MFMA ss 6(3) and 6(5) together.

<sup>78</sup> The MFMA s 6(6).

<sup>79</sup> 94 of 1990.

<sup>80</sup> See the MFMA s 7(1)-(2).

<sup>81</sup> The MFMA s 8(1)(a)-(b).

- all allocations to the municipality, including those made to the municipality for transmission to a municipal entity or other external mechanism assisting the municipality in the performance of its functions<sup>82</sup>
- all income received by the municipality on its investments
- all income received by the municipality in connection with its interest in any municipal entity, including dividends
- all money collected by a municipal entity or other external mechanism on behalf of the municipality and
- any other moneys as may be prescribed.<sup>83</sup>

The accounting officer of a municipality must submit to the National Treasury, the relevant provincial treasury and the Auditor-General, in writing, the name of the bank where the primary bank account of the municipality is held and the type and number of the account. If a municipality wants to change its primary bank account, it may do so only after the accounting officer has informed the National Treasury and the Auditor-General, in writing, at least 30 days before effecting the change.<sup>84</sup>

Each accounting officer of a municipality must submit to the relevant provincial treasury and the Auditor-General, in writing, the following information:

- within 90 days after the municipality has opened a new bank account, the name of the bank where the account has been opened, and the type and number of the account and
- annually before the start of a financial year, the name of each bank where the municipality holds a bank account, and the type and number of each account.<sup>85</sup>

It is the responsibility of the accounting officer of a municipality to

- administer all the municipality's bank accounts

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<sup>82</sup> "Allocation" in relation to a municipality means: (a) a municipality's share of the local government's equitable share referred to in the Constitution s 214(a); (b) an allocation of money to a municipality in terms of the Constitution s 214(1)(c); (c) an allocation of money to a municipality in terms of a provincial budget; or (d) any other allocation of money to a municipality by an organ of state, including by another municipality, otherwise than in compliance with a commercial or other business transaction. See the MFMA s 1 definitions.

<sup>83</sup> Refer to the MFMA s 8(2)(a)-(e). A municipality must take all reasonable steps to ensure that all moneys referred to above are paid into its primary bank account. Furthermore, no organ of state in the national, provincial or local sphere of government may transfer an allocation of money referred to above to a municipality, except through the municipality's primary bank account. All allocations due by an organ of state to a municipal entity must be made through the parent municipality, or if there is more than one parent municipality, any of those parent municipalities as may be agreed between the parent municipalities.

<sup>84</sup> Refer to the MFMA s 8(5).

<sup>85</sup> See the MFMA s 9(a)-(b).



- account to the municipal council for the municipality's bank accounts
- enforce compliance with the requirements of the MFMA.

The accounting officer may delegate the duties referred to above to the municipality's chief financial officer only.<sup>86</sup>

Only the accounting officer or the chief financial officer of a municipality or any other senior financial official acting on the written authority of the accounting officer may withdraw money or authorise the withdrawal of money from any of the municipality's bank accounts, and may do so only:

- (a) to defray expenditure appropriated in terms of an approved budget;<sup>87</sup>
- (b) to defray expenditure authorised in terms of section 26(4) of the MFMA;
- (c) to defray unforeseeable and unavoidable expenditure authorised in terms of section 29(1) of the MFMA;
- (d) in the case of a bank account opened in terms of section 12 of the MFMA, to make payments from the account in accordance with subsection (4) of that section;
- (e) to pay over to a person or organ of state money received by the municipality on behalf of that person or organ of state, including –
  - (i) money collected by the municipality on behalf of that person or organ of state by agreement; or
  - (ii) any insurance or other payments received by the municipality for that person or organ of state;
- (f) to refund money incorrectly paid into a bank account;
- (g) to refund guarantees, sureties and security deposits;
- (h) for cash management and investment purposes in accordance with section 13 of the MFMA;
- (i) to defray increased expenditure in terms of section 31 of the act; or
- (j) for such other purposes as may be prescribed.<sup>88</sup>

Any authorisation to a senior financial official to withdraw money or to authorise the withdrawal of money from a bank account must be in accordance with a framework

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<sup>86</sup> See the MFMA s 10(1)-(2).

<sup>87</sup> An "approved budget" means an annual budget (a) approved by a municipal council or (b) approved by a provincial or the national executive following an intervention in terms of the Constitution s 139 and includes such an annual budget as revised by an adjustments budget in terms of the MFMA s 28. See s 1 definitions.

<sup>88</sup> See the MFMA s 11(a)-(j).

as may be prescribed. The accounting officer may not authorise any official other than the chief financial officer to withdraw money or to authorise the withdrawal of money from the municipality's primary bank account if the municipality has a primary bank account which is separate from its other bank accounts.<sup>89</sup>

Within 30 days after the end of each quarter, it is the responsibility of the accounting officer to table in the municipal council a consolidated report of all withdrawals made in terms of subsection 11(1)(b) to (j) of the Act during that quarter and to submit a copy of the report to the relevant provincial treasury and the Auditor-General.<sup>90</sup>

No political structure or office-bearer of a municipality may set up a relief fund, charitable fund, trust or other fund of whatever description, except in the name of the municipality. Only the municipal manager may be the accounting officer of any such fund. A municipality may open a separate bank account in the name of the municipality for the purpose of a relief fund, charitable fund, trust or other fund, however. All money received by the municipality for the purpose of such a fund must be paid into a bank account of the municipality or into a separate bank account if one has been opened. Money in a separate account may be withdrawn from the account without appropriation in terms of an approved budget, but only by or on the written authority of the accounting officer acting in accordance with decisions of the municipal council and also only for the purposes for which the fund was established or the money in the fund was donated.<sup>91</sup>

The MFMA further provides that the minister, acting in concurrence with the Cabinet member responsible for local government, may prescribe a framework within which municipalities must conduct their cash management and investments and invest money not immediately required. Each municipality must establish *an appropriate and effective cash management and investment policy* in accordance with any framework that may be prescribed.<sup>92</sup> A bank where a municipality holds a bank account at the end of a financial year, or held a bank account at any time during a financial year, must:

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<sup>89</sup> Note that money may be withdrawn from a bank account in terms of s 11(1)(b) to (j) without appropriation in terms of an approved budget. See the MFMA s 11(3).

<sup>90</sup> Refer to the MFMA ss 11(4)(a)-(b). A "quarter" is defined under the MFMA as any of the following periods in a financial year: (a) 1 July to 30 September, (b) 1 October to 31 December, (c) 1 January to 31 March, or (d) 1 April to 30 June. See s 1 definitions.

<sup>91</sup> See the MFMA s 12(1)-(4).

<sup>92</sup> See the MFMA s 13(1)-(2).

- within 30 days after the end of that financial year notify the Auditor-General, in writing, of such bank account, including
  - (a) the type and number of the account and
  - (b) the opening and closing balances of that bank account in that financial year and
- promptly disclose information regarding the account when so requested by the National Treasury or the Auditor-General.

A bank, insurance company or other financial institution which at the end of a financial year holds, or at any time during a financial year held, an investment for a municipality, must also

- within 30 days after the end of that financial year, notify the Auditor-General, in writing, of that investment, including the opening and closing balances of that investment in that financial year and
- promptly disclose information regarding the investment when so requested by the National Treasury or the Auditor-General.<sup>93</sup>

Under the new legislative dispensation a municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.<sup>94</sup> A municipality may transfer ownership or otherwise dispose of a capital asset other than one mentioned above, but only after the municipal council in a meeting open to the public:

- has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services and
- has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.<sup>95</sup>

After a decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services, such decision may not be reversed by the municipality after that asset has been sold, transferred or otherwise disposed of. A municipal council may delegate to the accounting officer of the mu-

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<sup>93</sup> Refer to the MFMA s 13(3)-(4).

<sup>94</sup> A "basic municipal service" means a municipal service that is necessary to ensure an acceptable and reasonable quality of life and which, if not provided, would endanger public health or safety or the environment. See the MFMA s 1 definitions.

<sup>95</sup> See the MFMA s 14(1)-(2).

municipality its power to make the determinations referred to in subsection (2) (a) and (b) of the MFMA in respect of movable capital assets below a value determined by the council. Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent, competitive and consistent with the *supply chain management policy* which the municipality must have and maintain in terms of section 111 of the MFMA.<sup>96</sup>

### **(c) Aspects relating to municipal budgets**

A municipality may, except where otherwise provided in the MFMA, incur expenditure or appropriate funds only:

- in terms of an approved budget and
- within the limits of the amounts appropriated for the different votes in an approved budget.<sup>97</sup>

For each financial year, the council of a municipality must approve an annual budget for the municipality before the start of that financial year.<sup>98</sup> In order for a municipality to approve an annual budget, the mayor of the municipality must table the annual budget at a council meeting at least 90 days before the start of the budget year.<sup>99</sup>

According to the MFMA, an annual budget of a municipality must be a schedule in the prescribed format and must incorporate the following:

- (a) setting out realistically anticipated revenue for the budget year from each revenue source;
- (b) appropriating expenditure for the budget year under the different votes of the municipality;
- (c) setting out indicative revenue per revenue source and projected expenditure by vote for the two financial years following the budget year;
- (d) setting out –
  - (i) estimated revenue and expenditure by vote for the current year; and

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<sup>96</sup> These requirements do not apply to the transfer of a capital asset to another municipality or to a municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework. See the MFMA s 14(4)-(6).

<sup>97</sup> See the MFMA s 15(a)-(b).

<sup>98</sup> "Financial year" means a year ending on 30 June of a particular year. See the MFMA s 1 definitions.

<sup>99</sup> Refer to the MFMA s 16(1)-(2). It should be noted that the approval of an annual budget does not preclude the appropriation of money for capital expenditure for a period exceeding three financial years, provided that a separate appropriation is made for each of those financial years. The

*continued on next page*

- (ii) actual revenue and expenditure by vote for the financial year preceding the current year; and
- (e) a statement containing any other information required by section 215(3) of the Constitution or as may be prescribed.<sup>100</sup>

An annual budget must generally be divided into a *capital and an operating budget* in accordance with international best practice, as may be prescribed. When an annual budget is tabled, it must be accompanied by the following documents:

- (a) Draft resolutions –
  - (i) approving the budget of the municipality;
  - (ii) imposing any municipal tax and setting any municipal tariffs as may be required for the budget year; and
  - (iii) approving any other matter that may be prescribed;
- (b) measurable performance objectives for revenue from each source and for each vote in the budget, taking into account the municipality's integrated development plan;
- (c) a projection of cash flow for the budget year by revenue source, broken down per month;
- (d) any proposed amendments to the municipality's integrated development plan following the annual review of the integrated development plan in terms of section 34 of the Municipal Systems Act;
- (e) any proposed amendments to the budget-related policies of the municipality;
- (f) particulars of the municipality's investments;
- (g) any prescribed budget information on municipal entities under the sole or shared control of the municipality;
- (h) particulars of all proposed new municipal entities which the municipality intends to establish or in which the municipality intends to participate;
- (i) particulars of any proposed service delivery agreements, including material amendments to existing service delivery agreements;
- (j) particulars of any proposed allocations or grants by the municipality to –
  - (i) other municipalities;

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MFMA s 16(3). A budget year seems to be the year from 1 July of a year until 30 June of the next year.

<sup>100</sup> See the MFMA s 17(1)(a)-(e).

- (ii) any municipal entities and other external mechanisms assisting the municipality in the exercise of its functions or powers;
- (iii) any other organs of state;
- (iv) any organisations or bodies referred to in section 67 (1);
- (k) the proposed cost to the municipality for the budget year of the salary, allowances and benefits of –
  - (i) each political office-bearer of the municipality;<sup>101</sup>
  - (ii) councillors of the municipality; and
  - (iii) the municipal manager, the chief financial officer, each senior manager of the municipality and any other official of the municipality having a remuneration package greater than or equal to that of a senior manager;
- (l) the proposed cost for the budget year to a municipal entity under the sole or shared control of the municipality of the salary, allowances and benefits of –
  - (i) each member of the entity's board of directors; and
  - (ii) the chief executive officer and each senior manager of the entity; and
- (m) any other supporting documentation as may be prescribed.<sup>102</sup>

It is further required that an annual budget may be funded only from

- realistically anticipated revenues to be collected
- cash-backed accumulated funds from previous years' surpluses not committed for other purposes
- borrowed funds, but only for the capital budget referred to in section 17(2).

All revenue projections in the budget must be realistic, taking into account the projected revenue for the current year based on collection levels to date and also the actual revenue collected in previous financial years.<sup>103</sup> Under the new financial dispensation a municipality may spend money on a capital project only if:

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<sup>101</sup> Note that a political office-bearer in relation to a municipality means (a) the speaker, executive mayor, deputy executive mayor, mayor, deputy mayor or a member of the executive or mayoral committee of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act or (b) a councillor referred to in the MFMA s 57(1). See s 1.

<sup>102</sup> See the MFMA s 17(3)(a)-(m). Note that according to the definitions set out in the MFMA, "shared control" means the rights and powers a municipality has over a municipally entity which is (a) a private company in which effective control as defined in the Municipal Systems Act s 1 is vested in that municipality and one or more other municipalities collectively or (b) a multi-jurisdictional service utility in which that municipality participates, and "sole control" means the rights and powers a municipality has over a municipal entity which is (a) a private company in which effective control as defined in the Municipal Systems Act s 1 is vested in that municipality alone or (b) a service utility established by the municipality.

<sup>103</sup> Refer to the MFMA s 18(1)-(2).

- (a) the money for the project, excluding the cost of feasibility studies conducted by or on behalf of the municipality, has been appropriated in the capital budget referred to in section 17(2);
- (b) the project, including the total cost, has been approved by the council;
- (c) section 33 has been complied with, to the extent that that section may be applicable to the project; and
- (d) the sources of funding have been considered, are available and have not been committed for other purposes.<sup>104</sup>

Before approving a capital project the council of a municipality must consider various issues. Such issues include:

- (a) the projected cost covering all financial years until the project is operational; and
- (b) the future operational costs and revenue on the project, including municipal tax and tariff implications.<sup>105</sup>

The MFMA specifically provides that the minister, acting with the concurrence of the Cabinet member responsible for local government, must prescribe the form of the annual budget of municipalities and may prescribe matters such as:

- the form of resolutions and supporting documentation relating to the annual budget
- the number of years preceding and following the budget year for which revenue and expenditure history or projections must be shown in the supporting documentation
- inflation projections to be used with regard to the budget
- uniform norms and standards concerning the setting of municipal tariffs, financial risks and other matters where a municipality uses a municipal entity or other external mechanism for the performance of a municipal service or other function
- uniform norms and standards concerning the budgets of municipal entities or
- any other uniform norms and standards aimed at promoting transparency and expenditure control.<sup>106</sup>

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<sup>104</sup> Read the MFMA s 19(1)(a)-(d).

<sup>105</sup> See the MFMA s 19(2)(a)-(b). A municipal council may approve capital projects below a prescribed value, however. Such approval may be done either individually or as part of a consolidated capital programme. S 19(3).

<sup>106</sup> See the MFMA s 20(1)(b)(i)-(vi). See also the Municipal Investment Regulations and the Municipal Public-Private Partnership Regulations published under the MFMA.



The minister may further take appropriate steps to ensure that a municipality in the exercise of its fiscal powers as is set out in section 229 of the Constitution does not materially and unreasonably prejudice:

- national economic policies, particularly those on inflation, administered pricing and equity
- economic activities across municipal boundaries and
- the national mobility of goods, services, capital or labour.<sup>107</sup>

With regard to the budget preparation processes, the MFMA determines that the mayor of a municipality must:

- (a) co-ordinate the processes for preparing the annual budget and for reviewing the municipality's integrated development plan and budget-related policies to ensure that the tabled budget and any revisions of the integrated development plan and budget-related policies are mutually consistent and credible;<sup>108</sup>
- (b) at least 10 months before the start of the budget year, table in the municipal council a time schedule outlining key deadlines for –
  - (i) the preparation, tabling and approval of the annual budget;
  - (ii) the annual review of –
    - (aa) the integrated development plan in terms of section 34 of the Municipal Systems Act; and
    - (bb) the budget-related policies;
  - (iii) the tabling and adoption of any amendments to the integrated development plan and the budget-related policies; and
  - (iv) any consultative processes forming part of the processes referred to in subparagraphs (i), (ii) and (iii).<sup>109</sup>

When preparing the annual budget, the mayor of a municipality must also:

- (a) take into account the municipality's integrated development plan;

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<sup>107</sup> The MFMA s 20(2)(a)-(c).

<sup>108</sup> A budget-related policy means a municipal policy affecting or affected by the annual budget of the municipality, including (a) the tariffs policy which the municipality must adopt in terms of section 74 of the Municipal Systems Act, (b) the rates policy which the municipality must adopt in terms of legislation regulating municipal property rates or (c) the credit control and debt collection policy which the municipality must adopt in terms of s 96 of the Municipal Systems Act. Refer to the MFMA s 1.

<sup>109</sup> Read the MFMA s 21(1)(a)-(b).

- (b) take all reasonable steps to ensure that the municipality revises the integrated development plan in terms of section 34 of the Municipal Systems Act, taking into account realistic revenue and expenditure projections for future years;
- (c) take into account the national budget, the relevant provincial budget, the national government's fiscal and macro-economic policy, the annual Division of Revenue Act and any agreements reached in the Budget Forum;
- (d) consult –
  - (i) the relevant district municipality and all other local municipalities within the area of the district municipality, if the municipality is a local municipality;
  - (ii) all local municipalities within its area, if the municipality is a district municipality;
  - (iii) the relevant provincial treasury, and when requested, the National Treasury; and
  - (iv) any national or provincial organs of state, as may be prescribed; and
- (e) provide, on request, any information relating to the budget –
  - (i) to the National Treasury;<sup>110</sup> and
  - (ii) subject to any limitations that may be prescribed, to –
    - (aa) the national departments responsible for water, sanitation, electricity and any other service as may be prescribed;
    - (bb) any other national and provincial organ of states, as may be prescribed; and
    - (cc) another municipality affected by the budget.<sup>111</sup>

Immediately after an annual budget is tabled in a municipal council, the accounting officer of the municipality must:

- (a) in accordance with chapter 4 of the Municipal Systems Act –
  - (i) make public the annual budget and the documents referred to in section 17(3); and
  - (ii) invite the local community to submit representations in connection with the budget; and
- (b) submit the annual budget –

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<sup>110</sup> Note that reference to the National Treasury means the National Treasury established by the Public Finance Management Act s 5. See the MFMA s 1.

<sup>111</sup> See the MFMA s 21(2)(a)-(e).

- (i) in both printed and electronic formats to the National Treasury and the relevant provincial treasury; and
- (ii) in either format to any prescribed national or provincial organs of state and to other municipalities affected by the budget.<sup>112</sup>

In an effort to further accountability and public participation, the MFMA requires that when the annual budget has been tabled, the municipal council must consider any views of:

- the local community and
- the National Treasury, the relevant provincial treasury and any provincial or national organs of state or municipalities which made submissions on the budget.

After considering all budget submissions, the council must give the mayor an opportunity:

- to respond to the submissions and
- if necessary, to revise the budget and table amendments for consideration by the council.<sup>113</sup>

The National Treasury may issue guidelines on the manner in which municipal councils should process their annual budgets, including guidelines on the formation of a committee of the council to consider the budget and to hold public hearings. No guidelines issued in terms the MFMA are binding on a municipal council unless adopted by the council.<sup>114</sup>

At least 30 days before the start of their budget years, all municipal councils must consider approval of the annual budget. An annual budget:

- (a) must be approved before the start of the budget year;
- (b) is approved by the adoption by the council of a resolution; and
- (c) must be approved together with the adoption of resolutions as may be necessary –
  - (i) imposing any municipal tax for the budget year;
  - (ii) setting any municipal tariffs for the budget year;
  - (iii) approving measurable performance objectives for revenue from each source and for each vote in the budget;

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<sup>112</sup> The MFMA s 22(a)-(b).

<sup>113</sup> The MFMA s 23(2)(a)-(b).

<sup>114</sup> Read the MFMA s 23(3)-(4).

(iv) approving any changes to the municipality's integrated development plan;  
and

(v) approving any changes to the municipality's budget-related policies.<sup>115</sup>

The accounting officer of a municipality must submit the approved annual budget to the National Treasury and the relevant provincial treasury. If a municipal council fails to approve an annual budget, including revenue-raising measures necessary to give effect to the budget, the council must reconsider the budget and again vote on the budget or on an amended version thereof. This must be done within seven days of the council meeting that failed to approve the budget. The process provided for must be repeated until a budget is approved, including revenue-raising measures necessary to give effect to the budget. If a municipality has not approved an annual budget, including revenue-raising measures necessary to give effect to the budget, by the first day of the budget year, the mayor must immediately comply with section 55 of the MFMA.<sup>116</sup>

If by the start of the budget year a municipal council has not approved an annual budget or any revenue-raising measures necessary to give effect to the budget, the provincial executive of the relevant province must intervene in the municipality in terms of section 139(4) of the Constitution by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the council and

- appointing an administrator until a newly elected council has been declared elected
- continued functioning of the municipality.<sup>117</sup>

When approving a temporary budget for a municipality, the provincial executive is not bound by any provision relating to the budget process applicable to a municipality in terms of the MFMA or other legislation. Such a budget must, after the intervention has ended, be replaced by a budget approved by the newly elected council, provided that the provisions of the Chapter relating to annual budgets in the MFMA are substantially complied with and are in line with any revised time frames approved by the MEC for finance in the province. Until a new budget for the municipality is

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<sup>115</sup> Read the MFMA s 24(1)-(3).

<sup>116</sup> Read the MFMA s 25(1)-(3). According to s 55, the mayor must send a report to the MEC.

<sup>117</sup> See the Municipal Structures Act s 26(1)(a)-(b), read together with ss 34(3) and (4) and 35. The Structures Act applies when a provincial executive dissolves a municipal council.

approved, with the approval of the MEC for finance in the province, funds for the requirements of the municipality may be withdrawn from the municipality's bank accounts in accordance with certain provisions. Such funds may:

- be used only to defray current and capital expenditure in connection with votes for which funds were appropriated in the approved budget for the previous financial year
- may not:
  - (a) during any month, exceed eight per cent of the total amount appropriated in that approved budget for current expenditure, which percentage must be scaled down proportionately if revenue flows are not at least at the same level as the previous financial year
  - (b) exceed the amount actually available.<sup>118</sup>

Upon becoming aware of any impending non-compliance by the municipality of any provisions of the MFMA or any other legislation pertaining to the tabling or approval of an annual budget or compulsory consultation processes, the mayor of a municipality must inform the MEC for finance in the province, in writing, of such impending non-compliance in an effort to ensure effective control and accountability. If the impending non-compliance pertains to a time provision, except section 16(1), the MEC for finance may, on application by the mayor and on good cause shown, extend any time limit or deadline contained in that provision, provided that no such extension may compromise compliance with section 16(1). An MEC for finance must

- exercise the power contained in the MFMA in accordance with a prescribed framework
- promptly notify the National Treasury, in writing, of any extensions given, together with the name of the municipality concerned and the reasons for the extensions.<sup>119</sup>

Upon becoming aware of any actual non-compliance by the municipality of any required provisions, the mayor of a municipality must also inform the council, the MEC for finance and the National Treasury, in writing, of

- such non-compliance

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<sup>118</sup> The funds provided for above are not additional to funds appropriated for the budget year, and any funds so withdrawn must be regarded as forming part of the funds appropriated in a subsequently approved annual budget for the budget year. See the MFMA s 26(3)-(6).

<sup>119</sup> See the MFMA s 27(1)-(2).

- any remedial or corrective measures the municipality intends to implement to avoid a recurrence.<sup>120</sup>

It should again be noted that the provincial executive may intervene in terms of section 139 of the Constitution if a municipality cannot or does not comply with the provisions of this chapter, including a provision relating to process.

A municipality may revise an approved annual budget through an adjustments budget. In this regard an adjustments budget:

- (a) must adjust the revenue and expenditure estimates downwards if there is material under-collection of revenue during the current year;<sup>121</sup>
- (b) may appropriate additional revenues that have become available over and above those anticipated in the annual budget, but only to revise or accelerate spending programmes already budgeted for;
- (c) may, within a prescribed framework, authorise unforeseeable and unavoidable expenditure recommended by the mayor of the municipality;
- (d) may authorise the utilisation of projected savings in one vote towards spending under another vote;
- (e) may authorise the spending of funds that were unspent at the end of the past financial year where the under-spending could not reasonably have been foreseen at the time to include projected roll-overs when the annual budget for the current year was approved by the council;
- (f) may correct any errors in the annual budget; and
- (g) may provide for any other expenditure within a prescribed framework.<sup>122</sup>

Only the mayor may table an adjustments budget in the municipal council. When an adjustments budget is tabled, it must be accompanied by:

- (a) an explanation how the adjustments budget affects the annual budget;
- (b) a motivation of any material changes to the annual budget;
- (c) an explanation of the impact of any increased spending on the annual budget and the annual budgets for the next two financial years; and

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<sup>120</sup> The MFMA s 27(3)-(4). It should be noted that the non-compliance by a municipality with a provision of the chapter relating to the budget process or a provision in any legislation relating to the approval of a budget-related policy does not affect the validity of an annual or adjustments budget.

<sup>121</sup> A current year refers to the financial year which has already commenced, but not yet ended. See the MFMA s 1.

<sup>122</sup> The MFMA s 28(1)-(3). An adjustments budget must be in a prescribed form.

(d) any other supporting documentation that may be prescribed.<sup>123</sup>

It is important to note that municipal tax and tariffs may not be increased during a financial year, except when required in terms of a financial recovery plan.<sup>124</sup> The mayor of a municipality may in emergency or other exceptional circumstances authorise unforeseeable and unavoidable expenditure for which no provision was made in an approved budget. Any such expenditure:

- (a) must be in accordance with any framework that may be prescribed;
- (b) may not exceed a prescribed percentage of the approved annual budget;
- (c) must be reported by the mayor to the municipal council at its next meeting;
- and
- (d) must be appropriated in an adjustments budget.<sup>125</sup>

The appropriation of funds in an annual or adjustments budget lapses to the extent that those funds are unspent at the end of the financial year to which the budget relates, except in the case of an appropriation for expenditure made for a period longer than that financial year in terms of section 16(3).<sup>126</sup> It is further also determined that when funds for a capital programme are appropriated in terms of section 16(3) for more than one financial year, expenditure for that programme during a financial year may exceed the amount of that year's appropriation for that programme, provided that:

- (a) the increase does not exceed 20 per cent of that year's appropriation for the programme;
- (b) the increase is funded within the following year's appropriation for that programme;
- (c) the municipal manager certifies that –
  - (i) actual revenue for the financial year is expected to exceed budgeted revenue; and
  - (ii) sufficient funds are available for the increase without incurring further

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<sup>123</sup> Read the MFMA s 28(5)(a)-(d).

<sup>124</sup> See the MFMA s 28(6)-(7). Ss 22(b), 23(3) and 24(3) apply in respect of an adjustments budget. "Municipal tax" means property rates or other taxes, levies or duties that a municipality may impose. "Municipal tariff" refers to a tariff for services which a municipality may set for the provision of a service to the local community and includes a surcharge on such tariff. See the MFMA s 1.

<sup>125</sup> Read the MFMA s 29(1)-(3). If such adjustments budget is not passed within 60 days after the expenditure was incurred, the expenditure is unauthorised and s 32 applies.

<sup>126</sup> See the MFMA s 30.



- borrowing beyond the annual budget limit;
- (d) prior written approval is obtained from the mayor for the increase; and
- (e) the documents referred to in paragraphs (c) and (d) are submitted to the relevant provincial treasury and the Auditor-General.<sup>127</sup>

Without limiting liability in terms of the common law or other legislation, the MFMA specifically provides for personal accountability and liability over both political office bearers and officials of a municipality that work with financial matters. The MFMA states that:

- a political office-bearer of a municipality is liable for unauthorised expenditure if that office-bearer knowingly or after having been advised by the accounting officer of the municipality that the expenditure is likely to result in unauthorised expenditure, instructed an official of the municipality to incur the expenditure<sup>128</sup>
- the accounting officer is liable for unauthorised expenditure deliberately or negligently incurred by the accounting officer, subject to subsection (3) of the MFMA
- any political office-bearer or official of a municipality who deliberately or negligently committed, made or authorised an irregular expenditure<sup>129</sup> is liable for that expenditure or

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<sup>127</sup> The MFMA s 31(a)-(e).

<sup>128</sup> Note that “unauthorised expenditure” means any expenditure incurred by a municipality otherwise than in accordance with s 15 or 11(3) and includes (a) overspending of the total amount appropriated in the municipality’s approved budget, (b) overspending of the total amount appropriated for a vote in the approved budget, (c) expenditure from a vote unrelated to the department or functional area covered by the vote, (d) expenditure of money appropriated for a specific purpose, otherwise than for the specific purpose, (e) spending of an allocation referred to in para (b), (c) or (d) of the definition of “allocation” otherwise than in accordance with any conditions of the allocation, or (f) a grant by the municipality otherwise than in accordance with this Act. “Overspending” is further defined thus: (a) in relation to the budget of a municipality, it means causing the operational or capital expenditure incurred by the municipality during a financial year to exceed the total amount appropriated in that year’s budget for its operational or capital expenditure, as the case may be, (b) in relation to a vote, it means causing expenditure under the vote to exceed the amount appropriated for that vote or (c) in relation to expenditure under s 26, it means causing expenditure under the section to exceed the limits allowed in ss (5) of that section. See the MFMA s 1.

<sup>129</sup> “Irregular expenditure” means (a) expenditure incurred by a municipality or municipal entity in contravention of, or not in accordance with, a requirement of this Act, and which has not been condoned in terms of s 170, (b) expenditure incurred by a municipality or municipal entity in contravention of, or not in accordance with, a requirement of the Municipal Systems Act and which has not been condoned in terms of that Act, (c) expenditure incurred by a municipality in contravention of, or not in accordance with, a requirement of the Public Office-Bearers Act 20 of 1998 or (d) expenditure incurred by a municipality or municipal entity in contravention of, or not in accordance with, a requirement of the supply chain management policy of the municipality or entity or any of the municipality’s by-laws giving effect to such policy and not condoned in terms of such policy or by-law. Irregular expenditure excludes expenditure by a municipality which falls within the definition of “unauthorised expenditure”. See the MFMA s 1.

- any political office-bearer or official of a municipality who deliberately or negligently made or authorised a fruitless and wasteful expenditure is liable for that expenditure.<sup>130</sup>

A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure unless the expenditure

(a) in the case of unauthorised expenditure, is –

- (i) authorised in an adjustments budget; or
- (ii) certified by the municipal council, after investigation by a council committee, as irrecoverable and written off by the council; and

(b) in the case of irregular or fruitless and wasteful expenditure, is, after investigation by a council committee, certified by the council as irrecoverable and written off by the council.

If the accounting officer becomes aware that the council, the mayor or the executive committee of the municipality, as the case may be, has taken a decision which, if implemented, is likely to result in unauthorised, irregular or fruitless and wasteful expenditure, the accounting officer is not liable for any ensuing unauthorised, irregular or fruitless and wasteful expenditure provided that the accounting officer has informed the council, the mayor or the executive committee, in writing, that the expenditure is likely to be unauthorised, irregular or fruitless and a wasteful expenditure.<sup>131</sup> The accounting officer must further promptly inform the mayor, the MEC for local government in the province and the Auditor-General, in writing, of:

- (a) any unauthorised, irregular or fruitless and wasteful expenditure incurred by the municipality;
- (b) whether any person is responsible or under investigation for such unauthorised, irregular or fruitless and wasteful expenditure; and
- (c) the steps that have been taken –
  - (i) to recover or rectify such expenditure; and
  - (ii) to prevent a recurrence of such expenditure.<sup>132</sup>

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<sup>130</sup> The MFMA s 32(1)(a)-(d). “Fruitless and wasteful expenditure” means expenditure that was made in vain and would have been avoided had reasonable care been exercised. See the MFMA s 1.

<sup>131</sup> See the MFMA s 32(2)-(3).

<sup>132</sup> The MFMA s 32(4)(a)-(c).

It should be noted that the writing off of any unauthorised, irregular or fruitless and wasteful expenditure as irrecoverable is no excuse in criminal or disciplinary proceedings against a person charged with the commission of an offence or a breach of the MFMA relating to such unauthorised, irregular or fruitless and wasteful expenditure. The accounting officer is further obligated to report to the South African Police Service all cases of alleged

- irregular expenditure that constitutes a criminal offence
- theft and fraud that occurred in the municipality.

The council of a municipality must take all *reasonable steps* to ensure that all cases of irregular expenditure, theft or fraud are reported to the South African Police Service if

- the charge is against the accounting officer or
- the accounting officer fails to report such matters.<sup>133</sup>

Under the new financial requirements, a municipality may enter into a contract which will impose financial obligations on the municipality beyond a financial year, but if the contract will impose financial obligations on the municipality beyond the three years covered in the annual budget for that financial year, it may do so only if:

- (a) the municipal manager, at least 60 days before the meeting of the municipal council at which the contract is to be approved –
  - (i) has, in accordance with section 21A of the Municipal Systems Act:
    - (aa) made public the draft contract and an information statement summarising the municipality's obligations in terms of the proposed contract; and
    - (bb) invited the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed contract; and
  - (ii) has solicited the views and recommendations of:
    - (aa) the National Treasury and the relevant provincial treasury;
    - (bb) the national department responsible for local government; and
    - (cc) if the contract involves the provision of water, sanitation, electricity, or any other service as may be prescribed, the responsible national de

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<sup>133</sup> The MFMA s 32(5)-(8). The minister, acting with the concurrence of the cabinet member responsible for local government, may regulate the application of these provisions by regulation. Read also the MFMA s 168.

partment;

(b) the municipal council has taken into account:

- (i) the municipality's projected financial obligations in terms of the proposed contract for each financial year covered by the contract;
- (ii) the impact of those financial obligations on the municipality's future municipal tariffs and revenue;
- (iii) any comments or representations on the proposed contract received from the local community and other interested persons; and
- (iv) any written views and recommendations on the proposed contract by the National Treasury, the relevant provincial treasury, the national department responsible for local government and any national department referred to in paragraph (a) (ii) (cc); and

(c) the municipal council has adopted a resolution in which:

- (i) it determines that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the contract;
- (ii) it approves the entire contract exactly as it is to be executed; and
- (iii) it authorises the municipal manager to sign the contract on behalf of the municipality.<sup>134</sup>

The process set out in subsection 33(1) of the MFMA does not apply to:

- (a) contracts for long-term debt regulated in terms of section 46(3) of the MFMA;
- (b) employment contracts; or
- (c) contracts:
  - (i) for categories of goods as may be prescribed; or
  - (ii) in terms of which the financial obligation on the municipality is below:
    - (aa) a prescribed value; or
    - (bb) a prescribed percentage of the municipality's approved budget for the year in which the contract is concluded.<sup>135</sup>

All contracts referred to above and all other contracts that impose a financial obligation on a municipality:

- must be made available in their entirety to the municipal council and

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<sup>134</sup> Refer to the MFMA s 33(1)(a)-(c).

<sup>135</sup> See the MFMA s 33(2).

- may not be withheld from public scrutiny, except as provided for in terms of the Promotion of Access to Information Act.<sup>136</sup>

**(d) Aspects concerning municipal financial co-operative government**

It is a constitutional prerequisite that the national and provincial governments must by agreement assist municipalities in building their capacities for efficient, effective and transparent financial management. The national and provincial governments must support the efforts of municipalities to identify and resolve their financial problems. When performing its monitoring function in terms of section 155(6) of the Constitution, a provincial government:

- (a) must share with a municipality the results of its monitoring to the extent that those results may assist the municipality in improving its financial management;
- (b) must, upon detecting any emerging or impending financial problems in a municipality, alert the municipality to those problems; and
- (c) may assist the municipality to avert or resolve financial problems.<sup>137</sup>

In an effort to promote co-operative government on a local government level, both national and provincial departments and public entities must:

- (a) in their fiscal and financial relations with the local sphere of government, promote co-operative government in accordance with chapter 3 of the Constitution;
- (b) promptly meet their financial commitments towards municipalities;
- (c) provide timely information and assistance to municipalities to enable municipalities:
  - (i) to plan properly, including in developing and revising their integrated development plans; and
  - (ii) to prepare their budgets in accordance with the processes set out in chapter 4 of this Act; and
- (d) comply with the Public Finance Management Act, the annual Division of Revenue Act and the Intergovernmental Fiscal Relations Act,<sup>138</sup> to the extent

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<sup>136</sup> See Act 2 of 2000 read together with the MFMA s 33(3)-(4).

<sup>137</sup> See the MFMA s 34(1)-(4). Non-compliance with this section or any other provision of this Act by the national or a provincial government does not affect the responsibility of a municipality, its political structures, political office-bearers and officials to comply with this Act.

<sup>138</sup> 97 of 1997.

that those acts regulate intergovernmental relations with the local sphere of government.<sup>139</sup>

In order to provide predictability and certainty about the sources and levels of intergovernmental funding for municipalities, the accounting officer of a national or provincial department and the accounting authority of a national or provincial public entity responsible for the transfer of any proposed allocations to a municipality must, by no later than 20 January of each year notify the National Treasury or the relevant provincial treasury, as may be appropriate, of all proposed allocations, and the projected amounts of those allocations, to be transferred to each municipality during each of the next three financial years. The minister or the MEC responsible for finance in a province must, to the extent possible when tabling the national annual budget in the National Assembly or the provincial annual budget in the provincial legislature, make public particulars of any allocations due to each municipality in terms of that budget, including the amount to be transferred to the municipality during each of the next three financial years.<sup>140</sup>

Municipalities are themselves also required to promote co-operative government. In doing so, municipalities are obligated to:

- promote co-operative government in accordance with chapter 3 of the Constitution and the Intergovernmental Fiscal Relations Act in their fiscal and financial relations with the national and provincial spheres of government and other municipalities
- provide budgetary and other financial information to relevant municipalities and national and provincial organs of state
- promptly meet all financial commitments towards other municipalities or national and provincial organs of state.

In order to enable municipalities to include allocations from other municipalities in their budgets and to plan effectively for the spending of such allocations, the accounting officer of a municipality responsible for the transfer of any allocation to another municipality must notify the receiving municipality of the projected amount of any allocation proposed to be transferred to that municipality during each of the next

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<sup>139</sup> Read the MFMA s 35(a)-(d).

<sup>140</sup> Refer to the MFMA s 36(1)-(2).

three financial years, by no later than 120 days before the start of its budget year.<sup>141</sup> In certain instances the transfer of funds to municipalities may be stopped. In this regard the MFMA determines that the National Treasury may stop:

- the transfer of funds due to a municipality as its share of the local government's equitable share referred to in section 214(1)(a) of the Constitution, but only if the municipality commits a serious or persistent breach of the measures established in terms of section 216(1) of the Constitution or
- the transfer of funds due to a municipality as an allocation referred to in section 214(1)(c) of the Constitution, but only if the municipality or the municipal entity for which the funds are destined
  - (a) commits a serious or persistent breach of the measures established in terms of section 216(1) of the Constitution or
  - (b) breaches or fails to comply with any conditions subject to which the allocation is made.

Before the National Treasury stops the transfer of funds to a municipality, it must:

- (a) give the municipality an opportunity to submit written representations with regard to the proposed stopping of the funds;
- (b) inform the MEC for local government in the province; and
- (c) consult the Cabinet member responsible for the national department making the transfer.<sup>142</sup>

If the stopping of funds affects the provision of basic municipal services in the municipality, the provincial executive must monitor the continuation of those services. Section 139 of the Constitution applies if the municipality cannot or does not fulfil its obligations with regard to the provision of those services. When considering whether to stop the transfer of funds to a municipality, the National Treasury must take into account all relevant facts, including:

- (a) the municipality's compliance with the requirements of this act, in particular those relating to:
  - (i) annual financial statements, including the submission to the Auditor-General of its annual financial statements; and

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<sup>141</sup> See the MFMA s 37(1)-(2).

<sup>142</sup> See the MFMA s 38(1)-(2).



(ii) budgets, including the submission of information on the budget and implementation of the budget to the National Treasury and the relevant provincial treasury; and

(b) the municipality's co-operation with other municipalities on fiscal and financial matters, in the case of district and local municipalities.<sup>143</sup>

A decision by the National Treasury to stop the transfer to a municipality of funds

- lapses after the expiry of 120 days
- may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 75 of the Constitution.

Such a procedure should be prescribed by the joint rules and orders of Parliament. This process must be completed within 30 days of the decision by the National Treasury to stop the transfer of the funds.<sup>144</sup>

Parliament may further renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection 39(1)(b) of the MFMA. Before Parliament approves or renews a decision to stop the transfer of funds to a municipality, the Auditor-General must report to Parliament, if requested to do so by Parliament, and the municipality must be given an opportunity to answer the allegations against it and to state its case before a committee.<sup>145</sup> If the transfer of funds to a municipality has been stopped in terms of section 38(1)(b) for the rest of the relevant financial year, then the accounting officer of the national or provincial department responsible for the transfer must reflect such stopping of funds, together with reasons, in the annual financial statements of the department.<sup>146</sup>

The National Treasury is further obligated to monitor:

- the pricing structure of organs of state for the supply of electricity, water or any other bulk resources that may be prescribed, to municipalities and municipal entities for the provision of municipal services and
- payments made by municipalities and municipal entities for such bulk resources.<sup>147</sup>

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<sup>143</sup> Read the MFMA s 38(3)-(4).

<sup>144</sup> The MFMA s 39(1)(a)-(b).

<sup>145</sup> Read the MFMA s 39(2)-(3).

<sup>146</sup> The MFMA s 40.

<sup>147</sup> Refer to the MFMA s 41(1).

Each organ of state providing such bulk resources to a municipality must within 15 days after the end of each month furnish the National Treasury with a written statement setting out, for each municipality or for each municipal entity providing municipal services on behalf of such municipalities, the following information:

- the amount to be paid by the municipality or municipal entity for such bulk resources for that month, and for the financial year up to the end of that month
- the arrears owing and the age profile of such arrears and
- any actions taken by that organ of state to recover arrears.<sup>148</sup>

In relation to price increases of bulk resources for the provision of municipal services, it is stated that if a national or provincial organ of state which supplies water, electricity or any other bulk resource as may be prescribed to a municipality or municipal entity for the provision of a municipal service intends to increase the price of such resource for the municipality or municipal entity, it must first submit the proposed amendment to its pricing structure to its executive authority within the meaning of the Public Finance Management Act and secondly to any regulatory agency for approval, if national legislation requires such approval.<sup>149</sup> At least 40 days before making a submission, the organ of state referred to above must request the National Treasury and organised local government to provide written comments on the proposed amendment. Any submission must also be accompanied by:

- a motivation of the reasons for the proposed amendment
- an explanation of how the amendment takes account of
  - (a) the national government's inflation targets and other macroeconomic policy objectives
  - (b) steps taken by the organ of state to improve its competitiveness or efficiency in order to reduce costs
  - (c) any objectives or targets as outlined in any corporate or other governance plan applicable to that organ of state
- any written comments received from the National Treasury, organised local government or any municipalities and
- an explanation of how such comments have been taken into account.<sup>150</sup>

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<sup>148</sup> See the MFMA s 41(1)-(2).

<sup>149</sup> See the MFMA s 42(1)(a)-(b).

<sup>150</sup> Read the MFMA s 42(3)(a)-(d).

The executive authority of the organ of state must table the amendment and the documents referred to above either in Parliament or the relevant provincial legislature, as may be appropriate. Unless approved otherwise by the Minister, an amendment to a pricing structure which is tabled in Parliament or the relevant provincial legislature on or before 15 March in any year does not take effect for the affected municipalities or municipal entities before 1 July in that year or after 15 March in any year, does not take effect for the affected municipalities or municipal entities before 1 July the next year.<sup>151</sup>

If a national or provincial organ of state in terms of a power contained in any national or provincial legislation determines the upper limits of a municipal tax or tariff, such determination takes effect for municipalities on a date specified in the determination. Unless the minister approves otherwise on good grounds, the date specified in a determination referred to above may:

- (a) if the determination was promulgated on or before 15 March in a year, not be a date before 1 July in that year; or
- (b) if the determination was promulgated after 15 March in a year, not be a date before 1 July in the next year.<sup>152</sup>

If a municipality has in accordance with section 33 or 46(3) of the MFMA entered into a contract which provides for an annual or other periodic escalation of payments to be made by the municipality under the contract, no determination in terms of a power referred to in subsection 43(1) of the MFMA regarding the upper limits of a municipal tax or tariff applies to that municipality insofar as such upper limits would impair the municipality's ability to meet the escalation of its payments under the contract.

Whenever a dispute of a financial nature arises between organs of state, the parties concerned must as promptly as possible take all reasonable steps that may be necessary to resolve the matter out of court. If the National Treasury is not a party to the dispute, the parties must report the matter to the National Treasury and may request the National Treasury to mediate between the parties or to designate a per-

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<sup>151</sup> See the MFMA s 42(5)(a)-(b).

<sup>152</sup> See the MFMA s 43(1)-(2).

son to mediate between them. If the National Treasury accedes to a request, it may determine the mediation process.<sup>153</sup>

**(e) Aspects concerning municipal debt**

A municipality may incur short-term debt only in accordance with and subject to the provisions of the MFMA and only when necessary to bridge shortfalls within a financial year during which the debt is incurred. Such debt may be incurred only in expectation of specific and realistic anticipated income to be received within that financial year or capital needs within a financial year, to be repaid from specific funds to be received from enforceable allocations or long-term debt commitments.<sup>154</sup> Furthermore, a municipality may incur short-term debt only if a resolution of the municipal council, signed by the mayor, has approved the debt agreement and the accounting officer has signed the agreement or other document which creates or acknowledges the debt. For the purpose of obtaining a resolution to incur short term debt, a municipal council may:

- (a) approve a short-term debt transaction individually; or
- (b) approve an agreement with a lender for a short-term credit facility to be accessed as and when required, including a line of credit or bank overdraft facility, provided that—
  - (i) the credit limit must be specified in the resolution of the council;
  - (ii) the terms of the agreement, including the credit limit, may be changed only by a resolution of the council; and
  - (iii) if the council approves a credit facility that is limited to emergency use, the accounting officer must notify the council in writing as soon as practical of the amount, duration and cost of any debt incurred in terms of such a credit facility, as well as options for repaying such debt.<sup>155</sup>

A municipality must pay off short-term debt within the financial year and may not renew or refinance short-term debt, whether its own debt or that of any other entity, where such renewal or refinancing will have the effect of extending the short-term debt into a new financial year. No lender may wilfully extend credit to a municipality

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<sup>153</sup> See the MFMA s 44(1)-(4). These provisions apply only if at least one of the organs of state is a municipality or municipal entity. Refer again to the principles of co-operative government set out in the Constitution s 41.

<sup>154</sup> Read the MFMA s 45(1)(a)-(b). "Short-term debt" means debt payable over a period not exceeding one year. See the MFMA s 1.

<sup>155</sup> See the MFMA s 45(2)-(3).

for the purpose of renewing or refinancing short-term debt that must be paid off. If a lender wilfully extends credit to a municipality in contravention of the abovementioned provision, then the municipality is not bound to repay the loan or interest on the loan.<sup>156</sup>

With reference to long-term debt,<sup>157</sup> a municipality may incur such debt only in accordance with and subject to any applicable provisions of the MFMA, including section 19. Such debt may be incurred only for the purpose of:

- (a) capital expenditure on property, plant or equipment to be used for the purpose of achieving the objects of local government as set out in section 152 of the Constitution, including costs referred to in subsection 46(4); or
- (b) re-financing existing long-term debt subject to subsection 46(5). A municipality may incur long-term debt only if a resolution of the municipal council, signed by the mayor, has approved the debt agreement and the accounting officer has signed the agreement or other document which creates or acknowledges the debt.<sup>158</sup>

Furthermore, a municipality may incur long-term debt only if the accounting officer of the municipality:

- (a) has, in accordance with section 21A of the Municipal Systems Act:
  - (i) at least 21 days prior to the meeting of the council at which approval for the debt is to be considered, made public an information statement setting out particulars of the proposed debt, including the amount of the proposed debt, the purposes for which the debt is to be incurred and particulars of any security to be provided; and
  - (ii) invited the public, the National Treasury and the relevant provincial treasury to submit written comments or representations to the council in respect of the proposed debt; and

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<sup>156</sup> See the MFMA s 45(4)-(6). It should be noted that the non-repayment of a loan to a lender does not apply if the lender (a) relied in good faith on written representations of the municipality regarding purpose of the borrowing, and (b) did not know and had no reason to believe that the borrowing was for the purpose of renewing or refinancing short-term debt. A "lender" in relation to a municipality, means a person who provides debt finance to a municipality. Refer to s 1 definitions.

<sup>157</sup> "Long-term debt" means debt repayable over a period exceeding one year. See the MFMA s 1.

<sup>158</sup> See the MFMA s 46(1)-(2). Note that debt means (a) a monetary liability or obligation created by a financing agreement, note, debenture, bond or overdraft, or by the issuance of municipal debt instruments or (b) a contingent liability such as that created by guaranteeing a monetary liability or obligation of another. See the MFMA s 1.

- (b) has submitted a copy of the information statement to the municipal council at least 21 days prior to the meeting of the council, together with particulars of-
- (i) the essential repayment terms, including the anticipated debt repayment schedule; and
  - (ii) the anticipated total cost in connection with such debt over the repayment period.<sup>159</sup>

Capital expenditure contemplated in subsection 46(1)(a) may include:

- financing costs, including
  - (a) capitalised interest for a reasonable initial period
  - (b) costs associated with security arrangements in accordance with section 48 of the MFMA
  - (c) discounts and fees in connection with the financing
  - (d) fees for legal, financial, advisory, trustee, credit rating and other services directly connected to the financing and
  - (e) costs connected to the sale or placement of debt, and costs for printing and publication directly connected to the financing
- costs of professional services directly related to the capital expenditure and
- such other costs as may be prescribed.<sup>160</sup>

Municipalities are further allowed to borrow money for the purpose of re-financing existing long-term debt, provided that:

- the existing long-term debt was lawfully incurred
- the re-financing does not extend the term of the debt beyond the useful life of the property, plant or equipment for which the money was originally borrowed
- the net present value of projected future payments (including principal and interest payments) after re-financing is less than the net present value of projected future payments before re-financing and
- the discount rate used in projecting net present value referred to above, and any assumptions in connection with the calculations, must be reasonable and in accordance with criteria set out in a framework that may be prescribed.<sup>161</sup>

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<sup>159</sup> Read the MFMA s 46(2).

<sup>160</sup> Read the MFMA s 46(3)-(4).

<sup>161</sup> Note that a municipality's long-term debt must be consistent with its capital budget referred to in s 17(2). Read the MFMA s 46(5)-(6).

Both short-term and long-term debt may be incurred only if the debt is denominated in Rand and is not indexed to, or affected by, fluctuations in the value of the Rand against any foreign currency and section 48(3) of the MFMA has been complied with, if security is to be provided by the municipality. With reference to security of debt, the MFMA provides that a municipality may, by resolution of its council, provide security for:

- (a) any of its debt obligations;
- (b) any debt obligations of a municipal entity under its sole control; or
- (c) contractual obligations of the municipality undertaken in connection with capital expenditure by other persons on property, plant or equipment to be used by the municipality or such other person for the purpose of achieving the objects of local government in terms of section 152 of the Constitution.<sup>162</sup>

A municipality may provide any appropriate security, including by:

- (a) giving a lien on, or pledging, mortgaging, ceding or otherwise hypothecating, an asset or right, or giving any other form of collateral;
- (b) undertaking to effect payment directly from money or sources that may become available and to authorise the lender or investor direct access to such sources to ensure payment of the secured debt or the performance of the secured obligations, but this form of security may not affect compliance with section 8(2) of the MFMA;
- (c) undertaking to deposit funds with the lender, investor or third party as security;
- (d) agreeing to specific payment mechanisms or procedures to ensure exclusive or dedicated payment to lenders or investors, including revenue intercepts, payments into dedicated accounts or other payment mechanisms or procedures;
- (e) ceding as security any category of revenue or rights to future revenue;
- (f) undertaking to have disputes resolved through mediation, arbitration or other dispute resolution mechanisms;
- (g) undertaking to retain revenues or specific municipal tariffs or other charges, fees or funds at a particular level or at a level sufficient to meet its financial obligations;

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<sup>162</sup> Refer to the MFMA ss 47 and 48(1)(a)-(c).



- (h) undertaking to make provision in its budgets for the payment of its financial obligations, including capital and interest;
- (i) agreeing to restrictions on debt that the municipality may incur in future until the secured debt is settled or the secured obligations are met; and
- (j) agreeing to such other arrangements as the municipality may consider necessary and prudent.<sup>163</sup>

A council resolution authorising the provision of security must determine whether the asset or right with respect to which the security is provided is necessary for providing the minimum level of basic municipal services and, if so, must indicate the manner in which the availability of the asset or right for the provision of that minimum level of basic municipal services will be protected. If the resolution has determined that the asset or right is necessary for providing the minimum level of basic municipal services, neither the party to whom the municipal security is provided nor any successor or assignee of such party may deal with the asset or right in a manner that would preclude or impede the continuation of that minimum level of basic municipal services in the event of a default by the municipality.<sup>164</sup>

When interacting with a prospective lender or when preparing documentation for consideration by a prospective investor, any person involved in the borrowing of money by a municipality must disclose all information in that person's possession or within that person's knowledge that may be material to the decision of that prospective lender or investor and take reasonable care to ensure the accuracy of any information disclosed. Any lender or investor may rely on written representations of the municipality signed by the accounting officer, if the lender or investor did not know and had no reason to believe that those representations were false or misleading.<sup>165</sup>

With reference to municipal guarantees, a municipality may not issue any guarantee for any commitment or debt of any organ of state or person, except on the following conditions:

- (a) The guarantee must be within limits specified in the municipality's approved budget;
- (b) a municipality may guarantee the debt of a municipal entity under its sole

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<sup>163</sup> See the MFMA s 48(2)(a)-(j).

<sup>164</sup> See the MFMA s 48(3)-(4) and also s 48(5) of the Act.

<sup>165</sup> The MFMA s 49(1)-(2).

control only if the guarantee is authorised by the council in the same manner and subject to the same conditions applicable to a municipality in terms of this chapter if it incurs debt;

- (c) a municipality may guarantee the debt of a municipal entity under its shared control or of any other person, but only with the approval of the National Treasury, and then only if (i) the municipality creates, and maintains for the duration of the guarantee, a cash-backed reserve equal to its total potential financial exposure as a result of such guarantee; or (ii) the municipality purchases and maintains in effect for the duration of the guarantee, a policy of insurance issued by a registered insurer, which covers the full amount of the municipality's potential financial exposure as a result of such guarantee.<sup>166</sup>

**(f) Responsibilities of mayors under the MFMA**

Under the new financial legislative framework, the mayor of a municipality must provide general political guidance over the fiscal and financial affairs of the municipality. In providing such general political guidance, the mayor may monitor and, to the extent provided in the MFMA, oversee the exercise of responsibilities assigned in terms of the Act to the accounting officer and the chief financial officer, but may not interfere in the exercise of those responsibilities. The mayor must take all reasonable steps to ensure that the municipality performs its constitutional and statutory functions within the limits of the municipality's approved budget and must, within 30 days of the end of each quarter, submit a report to the council on the implementation of the budget and the financial state of affairs of the municipality. Finally, all mayors must exercise the other powers and perform the other duties assigned to them in terms of the MFMA or delegated by the council to them.<sup>167</sup>

With regard to the budget processes and other related matters the mayor must do the following:

- (a) provide general political guidance over the budget process and the priorities that must guide the preparation of a budget;
- (b) co-ordinate the annual revision of the integrated development plan in terms of section 34 of the Municipal Systems Act and the preparation of the annual

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<sup>166</sup> Read the MFMA s 50(a)-(c). Note that neither the national nor a provincial government may guarantee the debt of a municipality or municipal entity except to the extent that the Public Finance Management Act ch 8 provides for such guarantees. See the MFMA s 51.

<sup>167</sup> See the MFMA s 52(a)-(e).

budget, and determine how the integrated development plan is to be taken into account or revised for the purposes of the budget; and

(c) take all reasonable steps to ensure:

- (i) that the municipality approves its annual budget before the start of the budget year;
- (ii) that the municipality's service delivery and budget implementation plan is approved by the mayor within 28 days after the approval of the budget; and
- (iii) that the annual performance agreements as required in terms of section 57(1)(b) of the Municipal Systems Act for the municipal manager and all senior managers:
  - (aa) comply with this act in order to promote sound financial management;
  - (bb) are linked to the measurable performance objectives approved with the budget and to the service delivery and budget implementation plan; and
  - (cc) are concluded in accordance with section 57(2) of the Municipal Systems Act.<sup>168</sup>

The mayor must further promptly report to the municipal council and the MEC for finance in the province any delay in the tabling of an annual budget, the approval of the service delivery and budget implementation plan or the signing of the annual performance agreements. He/she must also ensure that the revenue and expenditure projections for each month and the service delivery targets and performance indicators for each quarter, as set out in the service delivery and budget implementation plan, are made public no later than 14 days after the approval of the service delivery and budget implementation plan and that the performance agreements of the municipal manager, senior managers and any other categories of officials as may be prescribed are made public no later than 14 days after the approval of the municipality's service delivery and budget implementation plan. Copies of such performance agreements must be submitted to the council and the MEC for local government in the province.<sup>169</sup>

On receipt of a statement or report submitted by the accounting officer of the municipality in terms of sections 71 or 72 of the MFMA, the mayor must:

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<sup>168</sup> See the MFMA s 53(1)(a)-(c).

<sup>169</sup> The MFMA s 53(2)-(3).

- (a) consider the statement or report;
- (b) check whether the municipality's approved budget is implemented in accordance with the service delivery and budget implementation plan;
- (c) consider and, if necessary, make any revisions to the service delivery and budget implementation plan, provided that revisions to the service delivery targets and performance indicators in the plan may only be made with the approval of the council following approval of an adjustments budget;
- (d) issue any appropriate instructions to the accounting officer to ensure:
  - (i) that the budget is implemented in accordance with the service delivery and budget implementation plan; and
  - (ii) that spending of funds and revenue collection proceed in accordance with the budget;
- (e) identify any financial problems facing the municipality, including any emerging or impending financial problems; and
- (f) in the case of a section 72 report, submit the report to the council by 31 January of each year.<sup>170</sup>

If the municipality faces any serious financial problems, the mayor must

- promptly respond to and initiate any remedial or corrective steps proposed by the accounting officer to deal with such problems, which may include
  - (a) steps to reduce spending when revenue is anticipated to be less than projected in the municipality's approved budget;
  - (b) the tabling of an adjustments budget
  - (c) steps in terms of chapter 13 of the MFMA
- alert the council and the MEC for local government in the province to those problems.

The mayor must ensure that any revisions of the service delivery and budget implementation plan are made public promptly.<sup>171</sup>

If a municipality has not approved an annual budget by the first day of the budget year or if the municipality encounters a serious financial problem referred to in section 136 of the MFMA, then the mayor of the municipality

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<sup>170</sup> See the MFMA s 54(1)(a)-(f).

<sup>171</sup> See the MFMA s 54(2)-(3).

- must immediately report the matter to the MEC for local government in the province
- may recommend to the MEC an appropriate provincial intervention in terms of section 139 of the Constitution.<sup>172</sup>

It is further provided that the mayor of a municipality which has sole or shared control over a municipal entity must guide the municipality in exercising its rights and powers over the municipal entity in a way:

- that would reasonably ensure that the municipal entity complies with this act and at all times remains accountable to the municipality and
- that would not impede the entity from performing its operational responsibilities.

In guiding the municipality in the exercise of its rights and powers over a municipal entity, the mayor may monitor the operational functions of the entity, but may not interfere in the performance of those functions.<sup>173</sup> The council of a municipality which does not have a mayor must designate a councillor to exercise the powers and duties assigned by the MFMA to a mayor. In the case of a municipality which does not have a mayor, a reference in the MFMA to the mayor of a municipality must be construed as a reference to a councillor designated by the council of the municipality to bear the specific responsibilities.<sup>174</sup> In the case of a municipality which has an executive committee, the powers and functions assigned by the MFMA to a mayor must be exercised by the mayor in consultation with the executive committee.<sup>175</sup>

The powers and duties assigned in terms of the MFMA to the mayor of a municipality may be delegated by:

- the executive mayor in terms of section 60(1) of that Act to another member of the municipality's mayoral committee in the case of a municipality which has an executive mayor referred to in section 55 of the Municipal Structures Act
- the council of the municipality to another member of the executive committee in the case of a municipality which has an executive committee referred to in section 43 of the Structures Act or

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<sup>172</sup> Read the MFMA s 55.

<sup>173</sup> Refer to the MFMA s 56(1)-(2).

<sup>174</sup> The MFMA s 57(1)-(2).

<sup>175</sup> The MFMA s 58. It is submitted that "in consultation with" means that the executive committee must be consulted on the matter and that the parties have followed a specified decision-making process. See also Rautenbach and Malherbe (1999) 214-216.

- the council to any other councillor in the case of a municipality which has designated a councilor in terms of section 57(1) of the MFMA.<sup>176</sup>

Any delegation mentioned above:

- must be in writing;
- is subject to any limitations or conditions that the executive mayor or council, as the case may be, may impose; and
- does not divest the mayor of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.

Finally, the mayor may confirm, vary or revoke any decision taken in consequence of a delegation in terms of this section, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.<sup>177</sup>

### **(g) General responsibilities of municipal officials**

According to the MFMA, the municipal manager of a municipality is the accounting officer of the municipality for the purposes of the Act and, as accounting officer, must exercise the functions and powers assigned to an accounting officer in terms of the Act and provide guidance and advice on compliance with the Act to

- the political structures, political office-bearers and officials of the municipality<sup>178</sup>
- any municipal entity under the sole or shared control of the municipality.<sup>179</sup>

The accounting officer of a municipality is obligated to comply with certain fiduciary responsibilities. In this regard the officer must:

- act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs
- disclose to the municipal council and the mayor all material facts which are available to the accounting officer or reasonably discoverable and which in any way might influence the decisions or actions of the council or the mayor and
- seek, within the sphere of influence of the accounting officer, to prevent any

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<sup>176</sup> See the MFMA s 59(1)(a)-(c).

<sup>177</sup> Read the MFMA s 59(2)-(3).

<sup>178</sup> An official in relation to a municipality or municipal entity means (a) an employee of a municipality or municipal entity, (b) a person seconded to a municipality or municipal entity to work as a member of the staff of the municipality or municipal entity or (c) a person contracted by a municipality or municipal entity to work as a member of the staff of the municipality or municipal entity otherwise than as an employee. See the MFMA s 1. Political structures again refer to (a) the council of a municipality or (b) any committee or other collective structure of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act.

<sup>179</sup> The MFMA s 60.

prejudice to the financial interests of the municipality.<sup>180</sup>

An accounting officer may not act in a way that is inconsistent with the duties assigned to accounting officers of municipalities in terms of the MFMA or use the position or privileges of, or confidential information obtained as, accounting officer for personal gain or to improperly benefit another person.<sup>181</sup> The accounting officer of a municipality is further also responsible for managing the financial administration of the municipality and must, for this purpose, take all reasonable steps to ensure that:

- the resources of the municipality are used effectively, efficiently and economically
- full and proper records of the financial affairs of the municipality are kept in accordance with any prescribed norms and standards
- the municipality has and maintains effective, efficient and transparent systems:
  - (a) of financial and risk management and internal control and
  - (b) of internal audit operating in accordance with any prescribed norms and standards
- unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented
- disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of chapter 15 of the MFMA and
- the municipality has and implements:
  - (a) a tariff policy referred to in section 74 of the Municipal Systems Act
  - (b) a rates policy as may be required in terms of any applicable national legislation
  - (c) a credit control and debt collection policy referred to in section 96(b) of the Municipal Systems Act and
  - (d) a supply chain management policy in accordance with chapter 11 of the MFMA.

The accounting officer is responsible for and must account for all bank accounts of the municipality, including any bank account opened for:

- any relief fund, charitable fund, trust or other fund set up by the municipality in terms of section 12 of the MFMA or

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<sup>180</sup> Refer to the MFMA s 61(1).

<sup>181</sup> See the MFMA s 61(2)(a)-(b).



- a purpose referred to in section 48(2)(d) of the Act.<sup>182</sup>

In respect of asset and liability management the accounting officer of a municipality is responsible for the management of the assets of the municipality, including the safeguarding and the maintenance of those assets and the liabilities of the municipality. The accounting officer must for the purposes of these responsibilities take all reasonable steps to ensure that the municipality has and maintains a management, accounting and information system that accounts for the assets and liabilities of the municipality; that the municipality's assets and liabilities are valued in accordance with standards of generally recognised accounting practice and that the municipality has and maintains a system of internal control of assets and liabilities, including an asset and liabilities register, as may be prescribed.<sup>183</sup>

The accounting officer of a municipality is responsible also for the management of the revenue of the municipality. For the purposes of revenue management, the accounting officer must take all reasonable steps to ensure the following:

- (a) that the municipality has effective revenue collection systems consistent with section 95 of the Municipal Systems Act and the municipality's credit control and debt collection policy;
- (b) that revenue due to the municipality is calculated on a monthly basis;
- (c) that accounts for municipal tax and charges for municipal services are prepared on a monthly basis, or less often as may be prescribed where monthly accounts are uneconomical;
- (d) that all money received is promptly deposited in accordance with this act into the municipality's primary and other bank accounts;
- (e) that the municipality has and maintains a management, accounting and information system which:
  - (i) recognises revenue when it is earned;
  - (ii) accounts for debtors; and
  - (iii) accounts for receipts of revenue;
- (f) that the municipality has and maintains a system of internal control in respect of debtors and revenue, as may be prescribed;

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<sup>182</sup> See the MFMA s 62(1)-(2).

<sup>183</sup> Read the MFMA s 63(1)-(2).

- (g) that the municipality charges interest on arrears, except where the council has granted exemptions in accordance with its budget-related policies and within a prescribed framework; and
- (h) that all revenue received by the municipality, including revenue received by any collecting agent on its behalf, is reconciled at least on a weekly basis.<sup>184</sup>

The accounting officer must immediately inform the National Treasury of any payments due by an organ of state to the municipality in respect of municipal tax or for municipal services, if such payments are regularly in arrears for periods of more than 30 days. The accounting officer must also take all reasonable steps to ensure that any funds collected by the municipality on behalf of another organ of state is transferred to that organ of state on at least a weekly basis and that such funds are not used for purposes of the municipality.<sup>185</sup>

The accounting officer of a municipality is also responsible for the management of the expenditure of the municipality. The accounting officer must for such purposes take all reasonable steps to ensure:

- (a) that the municipality has and maintains an effective system of expenditure control, including procedures for the approval, authorisation, withdrawal and payment of funds;
- (b) that the municipality has and maintains a management, accounting and information system which:
  - (i) recognises expenditure when it is incurred;
  - (ii) accounts for creditors of the municipality;<sup>186</sup> and
  - (iii) accounts for payments made by the municipality;
- (c) that the municipality has and maintains a system of internal control in respect of creditors and payments;
- (d) that payments by the municipality are made:
  - (i) directly to the person to whom it is due unless agreed otherwise for reasons as may be prescribed; and

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<sup>184</sup> See the MFMA s 64(1)(a)-(h).

<sup>185</sup> The MFMA s 64(3)-(4).

<sup>186</sup> In relation to a municipality, "creditor" means a person to whom money is owing by the municipality. See the MFMA s 1.

- (ii) either electronically or by way of non-transferable cheques, provided that cash payments and payments by way of cash cheques may be made for exceptional reasons only, and only up to a prescribed limit;
- (e) that all money owing by the municipality be paid within 30 days of receiving the relevant invoice or statement, unless prescribed otherwise for certain categories of expenditure;
- (f) that the municipality complies with its tax, levy, duty, pension, medical aid, audit fees and other statutory commitments;
- (g) that any dispute concerning payments due by the municipality to another organ of state is disposed of in terms of legislation regulating disputes between organs of state;
- (h) that the municipality's available working capital is managed effectively and economically in terms of the prescribed cash management and investment framework;
- (i) that the municipality's supply chain management policy referred to in section 111 of the MFMA is implemented in a way that is fair, equitable, transparent, competitive and cost-effective; and
- (j) that all financial accounts of the municipality are closed at the end of each month and reconciled with its records.<sup>187</sup>

In a format and for periods as may be prescribed, the accounting officer of a municipality must report to the council on all expenditure incurred by the municipality on staff salaries, wages, allowances and benefits, and in a manner that discloses such expenditure per type of expenditure, namely:

- salaries and wages
- contributions for pensions and medical aid
- travel, motor car, accommodation, subsistence and other allowances
- housing benefits and allowances
- overtime payments
- loans and advances and
- any other type of benefit or allowance related to staff.<sup>188</sup>

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<sup>187</sup> See the MFMA s 65(1)-(2).

<sup>188</sup> The MFMA s 66(a)-(g).

Before transferring funds of the municipality to an organisation or body outside any sphere of government otherwise than in compliance with a commercial or other business transaction, the accounting officer must be satisfied that the organisation or body:

- (a) has the capacity and has agreed:
  - (i) to comply with any agreement with the municipality;
  - (ii) for the period of the agreement to comply with all reporting, financial management and auditing requirements as may be stipulated in the agreement;
  - (iii) to report at least monthly to the accounting officer on actual expenditure against such transfer; and
  - (iv) to submit its audited financial statements for its financial year to the accounting officer promptly;
- (b) implements effective, efficient and transparent financial management and internal control systems to guard against fraud, theft and financial mismanagement; and
- (c) has in respect of previous similar transfers complied with all the requirements of this section.<sup>189</sup>

The accounting officer of a municipality must assist the mayor in performing the budgetary functions assigned to the mayor and provide the mayor with the administrative support, resources and information necessary for the performance of those functions.<sup>190</sup> The accounting officer is further responsible for implementing the municipality's approved budget, including taking all reasonable steps to ensure that the spending of funds is in accordance with the budget and is reduced as necessary when revenue is anticipated to be less than projected in the budget or in the service

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<sup>189</sup> See the MFMA s 67(1)(a)-(c). If there has been a failure by an organisation or body to comply with the requirements of ss 67(1) in respect of a previous transfer, the municipality may, despite s 67(1)(c) make a further transfer to that organisation or body, provided that s 67(1)(a) and (b) is complied with and the relevant provincial treasury has approved the transfer. Through contractual and other appropriate mechanisms, the accounting officer must enforce compliance with s 67(1). Furthermore, s 67(1)(a) does not apply to an organisation or body serving the poor or used by government as an agency to serve the poor, provided that the transfer does not exceed a prescribed limit and that the accounting officer: (i) takes all reasonable steps to ensure that the targeted beneficiaries receive the benefit of the transferred funds and (ii) certifies to the Auditor-General that compliance by that organisation or body with ss 67(1)(a) is uneconomical or unreasonable. Read also the MFMA s 67(2)-(4).

<sup>190</sup> The MFMA s 68.

delivery and budget implementation plan and that revenue and expenditure are properly monitored. When necessary, the accounting officer must prepare an adjustments budget and submit it to the mayor for consideration and tabling in the municipal council. No later than 14 days after the approval of an annual budget, the accounting officer must submit to the mayor a draft service delivery and budget implementation plan for the budget year and drafts of the annual performance agreements as required in terms of section 57(1)(b) of the Municipal Systems Act for the municipal manager and all senior managers.<sup>191</sup>

In respect of impending shortfalls, overspending and overdrafts, the accounting officer of a municipality must report in writing to the municipal council any

- impending shortfalls in budgeted revenue
- overspending of the municipality's budget
- steps taken to prevent or rectify such shortfalls or overspending.

If the balance in a municipality's bank account or the consolidated balance in the municipality's bank accounts if the municipality has more than one bank account, shows a net overdrawn position for a period exceeding a prescribed period, then the accounting officer of the municipality must promptly notify the National Treasury in the prescribed format of

- the amount by which the account or accounts are overdrawn
- the reasons for the overdrawn account or accounts
- the steps taken or to be taken to correct the matter.<sup>192</sup>

The accounting officer of a municipality is further obligated to submit, by no later than 10 working days after the end of each month, to the mayor of the municipality and the relevant provincial treasury a statement in the prescribed format on the state of the municipality's budget, which statement should reflect the following particulars for that month and for the financial year up to the end of that month:

- (a) Actual revenue, per revenue source;
- (b) actual borrowings;
- (c) actual expenditure, per vote;
- (d) actual capital expenditure, per vote;

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<sup>191</sup> See the MFMA s 69(1)-(3).

<sup>192</sup> See the MFMA s 70(1)-(3). When determining the net overdrawn position, the accounting officer must exclude any amounts reserved or pledged for any specific purpose or encumbered in any other way.

- (e) the amount of any allocations received;
- (f) actual expenditure on those allocations, excluding expenditure on (i) its share of the local government equitable share; and (ii) allocations exempted by the annual Division of Revenue Act from compliance with this paragraph; and
- (g) when necessary, an explanation of:
  - (i) any material variances from the municipality's projected revenue by source, and from the municipality's expenditure projections per vote;
  - (ii) any material variances from the service delivery and budget implementation plan; and
  - (iii) any remedial or corrective steps taken or to be taken to ensure that projected revenue and expenditure remain within the municipality's approved budget.<sup>193</sup>

The statement mentioned above must include a projection of the relevant municipality's revenue and expenditure for the rest of the financial year and any revisions from initial projections and the prescribed information relating to the state of the budget of each municipal entity as provided to the municipality in terms of section 87(10) of the MFMA. The amounts reflected in the statement must in each case be compared with the corresponding amounts budgeted for in the municipality's approved budget.<sup>194</sup>

The accounting officer of a municipality which has received an allocation referred to in subsection 71(1)(e) of the MFMA during any particular month must submit, by no later than 10 working days after the end of that month, that part of the statement reflecting the particulars referred to in subsection 71(1)(e) and (f) to the national or provincial organ of state or municipality which transferred the allocation. By no later than 22 working days after the end of each month, the provincial treasury must submit to the National Treasury a consolidated statement in the prescribed format on the state of the municipalities' budgets, per municipality and per municipal entity. Within 30 days after the end of each quarter, the provincial treasury must also make public as may be prescribed, a consolidated statement in the prescribed format on the state of municipalities' budgets per municipality and per municipal entity. The MEC for

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<sup>193</sup> The MFMA S 71(1)(a)-(g).

<sup>194</sup> See the MFMA s 71(2)(a)-(b). Note that the statement to the provincial treasury must be in the format of a signed document and in electronic format.

finance must submit such consolidated statement to the provincial legislature no later than 45 days after the end of each quarter.<sup>195</sup>

By 25 January of each year all accounting officers of municipalities must

- assess the performance of the municipality during the first half of the financial year, taking into account
  - (a) the monthly statements referred to in section 71 of the MFMA for the first half of the financial year
  - (b) the municipality's service delivery performance during the first half of the financial year, and the service delivery targets and performance indicators set in the service delivery and budget implementation plan
  - (c) the past year's annual report, and progress on resolving problems identified in the annual report
  - (d) the performance of every municipal entity under the sole or shared control of the municipality, taking into account reports in terms of section 88 of the MFMA from any such entities
- submit a report on such assessment to
  - (a) the mayor of the municipality
  - (b) the National Treasury
  - (c) the relevant provincial treasury.<sup>196</sup>

As part of the review process, the accounting officer must make recommendations as to whether an adjustments budget is necessary and recommend revised projections for revenue and expenditure to the extent that this may be necessary.<sup>197</sup>

The accounting officer of a municipality is obligated to inform the provincial treasury in writing of any failure by the council of the municipality to adopt or implement a budget-related policy or a supply chain management policy referred to in section 111 of the MFMA or any non-compliance by a political structure or office-bearer of the municipality with any such policy.<sup>198</sup> Apart from such obligations, the accounting officer of a municipality must also submit to the National Treasury, the provincial treasury, the department for local government in the province or the Auditor-General

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<sup>195</sup> Read the MFMA s 71(5)-(7).

<sup>196</sup> Refer to the MFMA s 72(1)(a)-(b). The statement referred to in s 71(1) for the sixth month of a financial year may be incorporated into the report referred to in subs (1)(b) of this section.

<sup>197</sup> The MFMA s 72(2)-(3).

<sup>198</sup> See the MFMA s 73(a)-(b).



such information, returns, documents, explanations and motivations as may be prescribed or as may be required. If the accounting officer of a municipality is unable to comply with any of the responsibilities in terms of this Act, he or she must report the inability promptly, together with reasons, to the mayor and the provincial treasury.<sup>199</sup>

In order to facilitate accountability, openness and public participation, the MFMA requires that various aspects of information should be placed on each municipal website. In this regard, the accounting officer of a municipality must place on the website referred to in section 21A of the Municipal Systems Act the following documents of the municipality:

- (a) the annual and adjustments budgets and all budget-related documents;
- (b) all budget-related policies;
- (c) the annual report;
- (d) all performance agreements required in terms of section 57(1)(b) of the Municipal Systems Act;
- (e) all service delivery agreements;
- (f) all long-term borrowing contracts;
- (g) all supply chain management contracts above a prescribed value;
- (h) an information statement containing a list of assets over a prescribed value that have been disposed of in terms of section 14(2) or (4) during the previous quarter;
- (i) contracts to which subsection (1) of section 33 apply, subject to subsection (3) of that section;
- (j) public-private partnership agreements referred to in section 120;
- (k) all quarterly reports tabled in the council in terms of section 52(d); and
- (l) any other documents that must be placed on the website in terms of this act or any other applicable legislation, or as may be prescribed.<sup>200</sup>

All accounting officers are afforded special protection under the MFMA. In this regard the Act determines that any action taken by a political structure or office-bearer of a municipality against the accounting officer of the municipality solely because of that

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<sup>199</sup> Read the MFMA s 74(1)-(2).

<sup>200</sup> See the MFMA s 75(1)(a)-(e). A document referred to in ss 75(1) must be placed on the website not later than five days after its tabling in the council or on the date on which it must be made public, whichever occurs first.

accounting officer's compliance with a provision of this Act is an unfair labour practice for the purposes of the Labour Relations Act.<sup>201</sup>

The MFMA further determines that the top management of a municipality's administration consists of:

- the accounting officer
- the chief financial officer
- all senior managers who are responsible for managing the respective votes of the municipality and to whom powers and duties for this purpose have been delegated and
- any other senior officials designated by the accounting officer.<sup>202</sup>

Each senior manager of a municipality and each official of a municipality exercising financial management responsibilities must take all reasonable steps within their respective areas of responsibility to ensure:

- (a) that the system of financial management and internal control established for the municipality is carried out diligently;
- (b) that the financial and other resources of the municipality are utilised effectively, efficiently, economically and transparently;
- (c) that any unauthorised, irregular or fruitless and wasteful expenditure and any other losses are prevented;
- (d) that all revenue due to the municipality is collected;
- (e) that the assets and liabilities of the municipality are managed effectively and that assets are safeguarded and maintained to the extent necessary;
- (f) that all information required by the accounting officer for compliance with the provisions of this act is timeously submitted to the accounting officer; and
- (g) that the provisions of this act, to the extent applicable to that senior manager or official, including any delegations, are complied with.<sup>203</sup>

The accounting officer of a municipality must, for the proper application of the MFMA in the municipality's administration, develop an appropriate system of delegation that

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<sup>201</sup> See the MFMA s 76 read together with Act 66 of 1995.

<sup>202</sup> The MFMA s 77(1)(a)-(d). The top management must assist the accounting officer in managing and co-ordinating the financial administration of the municipality. It should be remembered that the municipal manager is also the accounting officer of a municipality and thus part of top management.

<sup>203</sup> Note that a senior manager or such official must perform the functions referred to in s 78(1) subject to the directions of the accounting officer of the municipality. See also the MFMA s 78(1)-(2).

will both maximise administrative and operational efficiency and provide adequate checks and balances in the municipality's financial administration. In accordance with that system, such officer may further delegate to a member of the municipality's top management or any other official of the municipality

- any of the powers or duties assigned to an accounting officer in terms of the MFMA
- any powers or duties reasonably necessary to assist the accounting officer in complying with a duty which requires the accounting officer to take reasonable or appropriate steps to ensure the achievement of the aims of a specific provision of the MFMA.

An accounting officer must regularly review delegations issued and, if necessary, amend or withdraw any of those delegations.<sup>204</sup> A delegation in terms of subsection 79(1) of the MFMA:

- must be in writing
- is subject to such limitations and conditions as the accounting officer may impose in a specific case
- may either be to a specific individual or to the holder of a specific post in the municipality
- may, in the case of a delegation to a member of the municipality's top management, authorise that member to sub-delegate the delegated power or duty to an official or the holder of a specific post in that member's area of responsibility and
- does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.<sup>205</sup>

#### **(h) Aspects relating to municipal budget and treasury offices**

Under the MFMA every municipality must have a budget and treasury office. A budget and treasury office consists of a chief financial officer designated by the accounting officer of the municipality, officials of the municipality allocated by the ac-

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<sup>204</sup> Note that the accounting officer may not delegate to any political structure or political office-bearer of the municipality any of the powers or duties assigned to accounting officers in terms of the MFMA. Read also the MFMA s 79(1)-(2).

<sup>205</sup> See the MFMA s 79(3)(a)-(e). The accounting officer may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation in terms of this section, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

counting officer to the chief financial officer and any other persons contracted by the municipality for the work of the office.<sup>206</sup>

Within a treasury office, the chief financial officer of a municipality:

- is administratively in charge of the budget and treasury office
- must advise the accounting officer on the exercise of powers and duties assigned to the accounting officer in terms of the MFMA
- must assist the accounting officer in the administration of the municipality's bank accounts and in the preparation and implementation of the municipality's budget
- must advise senior managers and other senior officials in the exercise of powers and duties assigned to them in terms of section 78 or delegated to them in terms of section 79 of the MFMA and
- must perform such budgeting, accounting, analysis, financial reporting, cash management, debt management, supply chain management, financial management, review and other duties as may be delegated by the accounting officer to the chief financial officer.<sup>207</sup>

The chief financial officer of a municipality may sub-delegate any of the duties referred to in section 81(1)(b), (d) and (e) of the MFMA:

- to an official in the budget and treasury office
- to the holder of a specific post in that office or
- with the concurrence of the accounting officer to
  - (a) any other official of the municipality or
  - (b) any person contracted by the municipality for the work of the office.<sup>208</sup>

If the chief financial officer sub-delegates any duties to a person who is not an employee of the municipality, the chief financial officer must be satisfied that effective systems and procedures are in place to ensure control and accountability. A sub-delegation in terms of subsection (1):

- must be in writing
- is subject to such limitations or conditions as the chief financial officer may impose and

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<sup>206</sup> The MFMA s 80(1)-(2).

<sup>207</sup> See the MFMA s 81(1)(a)-(e). Note that the chief financial officer of a municipality is accountable to the accounting officer for the performance of the duties referred to in the Act s 81(1).

<sup>208</sup> The MFMA s 82(1)(a)-(c).

- does not divest the chief financial officer of the responsibility concerning the delegated duty.<sup>209</sup>

In order to fulfil the vast array of duties and responsibilities, the MFMA sets specific competency levels for financial officials. In this regard the accounting officer, senior managers, the chief financial officer and other financial officials of a municipality must meet the prescribed financial management competency levels. A municipality must provide resources or opportunities for the training of officials referred to above to meet the prescribed competency levels. Both the National Treasury or a provincial treasury may assist municipalities in the training of officials referred to in subsection 83(1) of the MFMA.<sup>210</sup>

#### **(i) Aspects concerning municipal entities**

When considering the establishment of, or participation in, a municipal entity, a municipality must first

- determine precisely the function or service that such entity would perform on behalf of the municipality and
- make an assessment of the impact of the shifting of that function or service to the entity on the municipality's staff, assets and liabilities, including an assessment of:
  - (i) the number of staff of the municipality to be transferred to the entity;
  - (ii) the number of staff of the municipality that would become redundant because of the shifting of that function or service;
  - (iii) the cost to the municipality of any staff retrenchments or the retention of redundant staff;
  - (iv) any assets of the municipality to be transferred to the entity;
  - (v) any assets of the municipality that would become obsolete because of the shifting of that function or service;
  - (vi) any liabilities of the municipality to be ceded to the entity; and
  - (vii) any debt of the municipality attributed to that function or service which the municipality would retain.<sup>211</sup>

A municipality may establish or participate in a municipal entity only if:

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<sup>209</sup> Read the MFMA s 82(2)-(3). Note also that the chief financial officer may confirm, vary or revoke any decision taken in consequence of a sub-delegation, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

<sup>210</sup> See the MFMA s 83(1)-(3).

<sup>211</sup> The MFMA s 84(1)(a)-(b).

- (a) the municipal manager, at least 90 days before the meeting of the municipal council at which the proposed establishment of the entity, or the municipality's proposed participation in the entity, is to be approved –
- (i) has, in accordance with section 21A of the Municipal Systems Act:
    - (aa) made public an information statement setting out the municipality's plans for the municipal entity together with the assessment which the municipality must conduct in terms of subsection (1); and
    - (bb) invited the local community, organised labour and other interested persons to submit to the municipality comments or representations in respect of the matter; and
  - (ii) has solicited the views and recommendations of –
    - (aa) the National Treasury and the relevant provincial treasury;
    - (bb) the national and provincial departments responsible for local government; and
    - (cc) the MEC for local government in the province; and
- (b) the municipal council has taken into account –
- (i) the assessment referred to in subsection (1);
  - (ii) any comments or representations on the matter received from the local community, organised labour and other interested persons;
  - (iii) any written views and recommendations on the matter received from the National Treasury, the relevant provincial treasury, the national department responsible for local government or the MEC for local government in the province.<sup>212</sup>

A municipal entity must open and maintain at least one bank account in the name of the entity. All money received by a municipal entity must be paid into its bank account or accounts, and this must be done promptly and in accordance with any requirements that may be prescribed. A municipal entity may not open a bank account:

- abroad
- with an institution not registered as a bank in terms of the Banks Act<sup>213</sup>
- otherwise than in the name of the entity and

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<sup>212</sup> The MFMA s 84(2)(a)-(b). For the purposes of this section, “establish” includes the acquisition of an interest in a private company that would render that private company a municipal entity.

<sup>213</sup> 94 of 1990.

- without the approval of its board of directors.

Money may be withdrawn from a municipal entity's bank account only in accordance with requirements that may be prescribed. The accounting officer of a municipal entity:

- must administer all the entity's bank accounts
- is accountable to the board of directors of the entity for the entity's bank accounts and
- must enforce any requirements that may be prescribed.<sup>214</sup>

The accounting officer of a municipal entity must submit to the entity's parent municipality, in writing and within 90 days after the entity has opened a new bank account, the name of the bank where the account has been opened and the type and number of the account, and annually before the start of a financial year, the name of each bank where the entity holds a bank account and the type and number of each account. The accounting officer of the municipal entity's parent municipality, or if there is more than one parent municipality, any one of the accounting officers of those municipalities as may be agreed between them must, upon receipt of the information referred to above, submit that information to the Auditor-General, the National Treasury and the relevant provincial treasury, in writing.<sup>215</sup>

In respect of budgets, it is required that for each financial year the board of directors of a municipal entity must submit a proposed budget for the entity to its parent municipality not later than 150 days before the start of the entity's financial year or earlier if requested by the parent municipality. The parent municipality must consider the proposed budget of the entity and assess the entity's priorities and objectives. If the parent municipality makes any recommendations on the proposed budget, the board of directors of the entity must consider those recommendations and, if necessary, submit a revised budget to the parent municipality not later than 100 days before the start of the financial year. The mayor of the parent municipality must table the proposed budget of the municipal entity in the council when the annual budget of the municipality for the relevant year is tabled. The board of directors of a municipal entity must approve the budget of the municipal entity not later than 30 days before

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<sup>214</sup> See the MFMA s 85(1)-(5).

<sup>215</sup> Read the MFMA s 86(1)-(2).



the start of the financial year, taking into account any hearings or recommendations of the council of the parent municipality.<sup>216</sup>

The budget of a municipal entity must conform to the following requirements. It must:

- (a) be balanced;
- (b) be consistent with any service delivery agreement or other agreement between the entity and the entity's parent municipality;
- (c) be within any limits determined by the entity's parent municipality, including any limits on tariffs, revenue, expenditure and borrowing;
- (d) include a multi-year business plan for the entity that –
  - (i) sets key financial and non-financial performance objectives and measurement criteria as agreed with the parent municipality;
  - (ii) is consistent with the budget and integrated development plan of the entity's parent municipality;
  - (iii) is consistent with any service delivery agreement or other agreement between the entity and the entity's parent municipality; and
  - (iv) reflects actual and potential liabilities and commitments, including particulars of any proposed borrowing of money during the period to which the plan relates; and
- (e) otherwise comply with the requirements of section 17(1) and (2) of the MFMA to the extent that such requirements can reasonably be applied to the entity.<sup>217</sup>

With the approval of the mayor, the board of directors of a municipal entity may revise the budget of the municipal entity, but only for the following reasons:

- to adjust the revenue and expenditure estimates downwards if there is material under-collection of revenue during the current year
- to authorise expenditure of any additional allocations to the municipal entity from its parent municipality
- to authorise, within a prescribed framework, any unforeseeable and unavoidable expenditure approved by the mayor of the parent municipality
- to authorise any other expenditure within a prescribed framework.<sup>218</sup>

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<sup>216</sup> Refer to the MFMA s 87(1)-(4).

<sup>217</sup> See the MFMA s 87(5)(a)-(e).

Any projected allocation to a municipal entity from its parent municipality must be provided for in the annual budget of the parent municipality and, to the extent not so provided, the entity's budget must be adjusted. A municipal entity may incur expenditure only in accordance with its approved budget or an adjustments budget. The mayor must table the budget or adjusted budget and any adjustments budget of a municipal entity as approved by its board of directors, at the next council meeting of the municipality. A municipal entity's approved budget or adjusted budget must be made public in substantially the same way as the budget of a municipality must be made public. The accounting officer of a municipal entity must by no later than seven working days after the end of each month submit to the accounting officer of the parent municipality a statement in the prescribed format on the state of the entity's budget reflecting the following particulars for that month and for the financial year up to the end of that month:

- (a) actual revenue, per revenue source;
- (b) actual borrowings;
- (c) actual expenditure;
- (d) actual capital expenditure;
- (e) the amount of any allocations received;
- (f) actual expenditure on those allocations, excluding expenditure on allocations exempted by the annual Division of Revenue Act from compliance with this paragraph; and
- (g) when necessary, an explanation of –
  - (i) any material variances from the entity's projected revenue by source, and from the entity's expenditure projections;
  - (ii) any material variances from the service delivery agreement and the business plan; and
  - (iii) any remedial or corrective steps taken or to be taken to ensure that projected revenue and expenditure remain within the entity's approved budget.<sup>219</sup>

The statement mentioned above must include a projection of revenue and expenditure for the rest of the financial year and any revisions from initial projections.

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<sup>218</sup> The MFMA s 87(6)(a)-(d).

<sup>219</sup> See the MFMA s 87(7)-(11).

Amounts reflected in the statement must in each case be compared with the corresponding amounts budgeted for in the entity's approved budget. Finally, the statement to the accounting officer of the municipality must be in the format of a signed document and in electronic format.<sup>220</sup>

The accounting officer of a municipal entity must by 20 January of each year

- assess the performance of the entity during the first half of the financial year, taking into account the monthly statements referred to in section 87 of the MFMA for the first half of the financial year and the targets set in the service delivery, business plan or other agreement with the entity's parent municipality and the entity's annual report for the past year, and progress on resolving problems identified in the annual report
- submit a report on such assessment to
  - (a) the board of directors of the entity
  - (b) the parent municipality of the entity.<sup>221</sup>

The parent municipality of a municipal entity must determine the upper limits of the salary, allowances and other benefits of the chief executive officer and senior managers of the entity and monitor and ensure that the municipal entity reports to the council on all expenditure incurred by that municipal entity on directors and staff remuneration matters and in a manner that discloses such expenditure per type of expenditure. This should include:

- salaries and wages
- contributions for pensions and medical aid
- travel, motor car, accommodation, subsistence and other allowances
- housing benefits and allowances
- overtime payments
- loans and advances
- any other type of benefit or allowance related to directors and staff.<sup>222</sup>

A municipal entity may not transfer ownership as a result of a sale or other transaction or otherwise dispose of a capital asset needed to provide the minimum level of basic municipal services. Municipal entities may transfer ownership or otherwise

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<sup>220</sup> Read the MFMA s 87(12)-(14).

<sup>221</sup> See the MFMA s 88(1)-(2). A report referred to above must be made public.

<sup>222</sup> Read the MFMA s 89(a)-(b).

dispose of a capital asset other than an asset contemplated in subsection 90(1) of the MFMA, but only after the council of its parent municipality, in a meeting open to the public has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services and has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset. A decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services may not be reversed by the municipality or municipal entity after that asset has been sold, transferred or otherwise disposed of. Furthermore, a municipal council may delegate to the accounting officer of a municipal entity its power to make the determinations referred to in subsection 90(2)(a) and (b) in respect of movable capital assets of the entity below a value determined by the council. Any transfer of ownership of a capital asset in terms of subsection 90(2) or (4) of the MFMA must be fair, equitable, transparent and competitive and consistent with the supply chain management policy which the municipal entity must have and maintain in terms of section 111 of the MFMA.<sup>223</sup>

The financial year of a municipal entity must be the same as that of municipalities and the Auditor-General must audit and report on the accounts, financial statements and financial management of each municipal entity.<sup>224</sup> The chief executive officer of a municipal entity is the accounting officer of the entity. The accounting officer of a municipal entity has various fiduciary duties. He or she must:

- (a) exercise utmost care to ensure reasonable protection of the assets and records of the entity;
- (b) act with fidelity, honesty, integrity and in the best interest of the entity in managing the financial affairs of the entity;
- (c) disclose to the entity's parent municipality and the entity's board of directors all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the parent municipality or the board of directors; and

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<sup>223</sup> Note that s 90 does not apply to the transfer of a capital asset to a municipality or another municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework. See the MFMA s 90(1)-(6).

<sup>224</sup> Refer to the MFMA ss 91 and 92.

(d) seek, within the sphere of influence of that accounting officer, to prevent any prejudice to the financial interests of the parent municipality or the municipal entity.<sup>225</sup> The accounting officer may not act in a way that is inconsistent with the responsibilities assigned to accounting officers of municipal entities in terms of this act or use the position or privileges of, or confidential information obtained as accounting officer, for personal gain or to improperly benefit another person.<sup>226</sup>

The accounting officer of a municipal entity is responsible for managing the financial administration of the entity and must for this purpose take all reasonable steps to ensure:

- (a) that the resources of the entity are used effectively, efficiently, economically and transparently;
- (b) that full and proper records of the financial affairs of the entity are kept;
- (c) that the entity has and maintains effective, efficient and transparent systems-
  - (i) of financial and risk management and internal control; and
  - (ii) of internal audit complying with and operating in accordance with any prescribed norms and standards;
- (d) that irregular and fruitless and wasteful expenditure and other losses are prevented;
- (e) that expenditure is in accordance with the operational policies of the entity; and
- (f) that disciplinary or, when appropriate, criminal proceedings, are instituted against any official of the entity who has allegedly committed an act of financial misconduct or an offence in terms of chapter 15 of the MFMA.<sup>227</sup>

The accounting officer of a municipal entity is responsible for the management of the assets of the entity, including the safeguarding and maintenance of those assets and the liabilities of the entity. For the purposes of subsection 96(1) of the MFMA, the accounting officer must take all reasonable steps to ensure that the entity has and maintains a management, accounting and information system that accounts for proper assets and liabilities of the management systems of the municipal entity and

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<sup>225</sup> See the MFMA s 94(1)(a)-(d).

<sup>226</sup> The MFMA s 94(2)(a)-(b).

<sup>227</sup> Read the MFMA s 95(a)-(f).

a system of internal control of assets and liabilities, including an asset and liabilities register, as may be prescribed.<sup>228</sup> Furthermore, the accounting officer of a municipal entity must take all reasonable steps to ensure:

- (a) that the entity has and implements effective revenue collection systems to give effect to its budget;
- (b) that all revenue due to the entity is collected;
- (c) that any funds collected by the entity on behalf of a municipality-
  - (i) are transferred to that municipality strictly in accordance with the agreement between the entity the municipality; and
  - (ii) are not used for the purposes of the entity;
- (d) that the municipal entity has effective revenue collection systems consistent with those of the parent municipality;
- (e) that revenue due to the entity is calculated on a monthly basis;
- (f) that accounts for service charges are prepared on a monthly basis, or less often as may be prescribed where monthly accounts are uneconomical;
- (g) that all money received is promptly deposited in accordance with this act into the municipal entity's bank accounts;
- (h) that the municipal entity has and maintains a management, accounting and information system which:
  - (i) recognises revenue when it is earned;
  - (ii) accounts for debtors; and
  - (iii) accounts for receipts of revenue;
- (i) that the municipal entity has and maintains a system of internal control in respect of debtors and revenue, as may be prescribed; and
- (j) that all revenue received by the municipal entity, including revenue received by any collecting agent on its behalf, is reconciled at least on a weekly basis.<sup>229</sup>

Monthly reconciliation of revenue and accounts is also required. The accounting officer of a municipal entity must take all reasonable steps to ensure that all revenue received by the entity, including revenue received by any collecting agency on its

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<sup>228</sup> See the MFMA s 96(1)-(2).

<sup>229</sup> See the MFMA s 97(2)(a)-(j). The accounting officer must immediately inform the parent municipality of any payments due by an organ of state to the entity in respect of service charges, if such payments are regularly in arrears for periods of more than 30 days.

behalf, is reconciled on a monthly or more regular basis, and all accounts of the entity are reconciled each month.<sup>230</sup>

Each accounting officer of a municipal entity is responsible for the management of the expenditure of the entity. Such an officer must for the purpose of subsection 99(1) of the MFMA take all reasonable steps to ensure:

- (a) that the entity has and maintains an effective system of expenditure control including procedures for the approval, authorisation, withdrawal and payment of funds;
- (b) that all money owing by the entity is paid within 30 days of receiving the relevant invoice or statement unless prescribed otherwise for certain categories of expenditure;
- (c) that the entity has and maintains a management, accounting and information system which:
  - (i) recognises expenditure when it is incurred;
  - (ii) accounts for creditors of the entity; and
  - (iii) accounts for payments made by the entity;
- (d) that the entity has and maintains a system of internal control in respect of creditors and payments;
- (e) that payments by the entity are made –
  - (i) directly to the person to whom it is due unless agreed otherwise only for reasons as may be prescribed; and
  - (ii) either electronically or by way of non-transferable cheques, provided that cash payments and payments by way of cash cheques may be made for exceptional reasons only, and only up to a prescribed limit;
- (f) that the entity complies with its tax, duty, pension, medical aid, audit fees and other statutory commitments;
- (g) that the entity's available working capital is managed effectively and economically in terms of any prescribed cash management and investment framework; and
- (h) that the entity has and implements a supply chain management policy in accordance with section 111 of the MFMA in a way that is fair, equitable, trans

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<sup>230</sup> The MFMA s 98(a)-(b).



parent and cost-effective.<sup>231</sup>

The accounting officer of a municipal entity is also responsible for implementing the entity's budget, including taking effective and appropriate steps to ensure that

- the spending of funds is in accordance with the budget
- revenue and expenditure are properly monitored
- spending is reduced as necessary when revenue is anticipated to be less than projected in the budget.<sup>232</sup>

It is furthermore required that the accounting officer of a municipal entity must report, in writing, to the board of directors of the entity, at its next meeting, and to the accounting officer of the entity's parent municipality any financial problems of the entity, including:

(a) any impending or actual-

- (i) under collection of revenue due;
  - (ii) shortfalls in budgeted revenue;
  - (iii) overspending of the entity's budget;
  - (iv) delay in the entity's payments to any creditors; or
  - (v) overdraft in any bank account of the entity for a period exceeding 21 days;
- and

(b) any steps taken to rectify such financial problems.<sup>233</sup>

On discovery of any irregular expenditure or any fruitless and wasteful expenditure, the board of directors of a municipal entity must promptly report, in writing, to the mayor and municipal manager of the entity's parent municipality and the Auditor-General

- particulars of the expenditure
- any steps that have been taken
  - (a) to recover the expenditure
  - (b) to prevent a recurrence of the expenditure.

The board of directors of a municipal entity must promptly report to the South African Police Service any irregular expenditure that may constitute a criminal offence and

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<sup>231</sup> Read the MFMA s 99(2)(a)-(h).

<sup>232</sup> The MFMA s 100(a)-(c).

<sup>233</sup> The accounting officer of the municipality must table a report referred to in s 101(1) in the municipal council at its next meeting. See the MFMA s 101(1)-(2).

other losses suffered by the municipal entity which resulted from suspected criminal conduct.<sup>234</sup>

The accounting officer of a municipal entity must promptly report to the speaker of the council of the entity's parent municipality any interference by a councillor outside that councillor's assigned duties in the financial affairs of the municipal entity or the responsibilities of the board of directors of the municipal entity.<sup>235</sup> Except where otherwise provided in the MFMA, the accounting officer of a municipal entity is responsible for the submission by the entity of all reports, returns, notices and other information to the entity's parent municipality as may be required by the Act and must submit to the accounting officer of the entity's parent municipality, the National Treasury, the relevant provincial treasury, the department of local government in the province or the Auditor-General such information, returns, documents, explanations and motivations as may be prescribed or as may be required.<sup>236</sup>

Each official of a municipal entity exercising financial management responsibilities must take all reasonable steps within that official's area of responsibility to ensure that:

- (a) the system of financial management and internal control established for the entity is carried out diligently;
- (b) the financial and other resources of the entity are utilised effectively, efficiently, economically and transparently;
- (c) any irregular expenditure, fruitless and wasteful expenditure and other losses are prevented;
- (d) all revenue due to the entity is collected;
- (e) the provisions of this Act to the extent applicable to that official, including any delegations in terms of section 106 of the MFMA, are complied with; and
- (f) the assets and liabilities of the entity are managed effectively, and that assets are safeguarded and maintained to the extent necessary.<sup>237</sup>

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<sup>234</sup> The MFMA s 102(1)-(2).

<sup>235</sup> The MFMA s 103.

<sup>236</sup> If the accounting officer of a municipal entity is unable to comply with any of the responsibilities in terms of the MFMA, he or she must report the inability to the council of the entity's parent municipality promptly, together with reasons. See the MFMA s 104(1)-(2).

<sup>237</sup> An official of a municipal entity must perform the functions referred to above, subject to the directions of the accounting officer of the entity. Refer to the MFMA s 105(1)-(2).

In respect of the delegation of authority, it is provided that the accounting officer of a municipal entity may delegate to an official of that entity:

- any of the powers or duties assigned or delegated to the accounting officer in terms of the MFMA or
- any powers or duties reasonably necessary to assist the accounting officer in complying with a duty which requires the accounting officer to take reasonable or appropriate steps to ensure the achievement of the aims of a specific provision of the MFMA.

The accounting officer must also regularly review delegations issued and, if necessary, amend or withdraw any of those delegations. A delegation must be in writing, is subject to any limitations and conditions the accounting officer may impose, may be either to a specific individual or to the holder of a specific post in the municipal entity and does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.<sup>238</sup> The accounting officer, senior managers, any chief financial officer and all other financial officials of a municipal entity must meet the prescribed financial management competency levels.<sup>239</sup>

A municipal entity may borrow money, but only in accordance with the entity's multi-year business plan and the provisions of chapter 6 of the MFMA to the extent that those provisions can be applied to a municipal entity. In applying chapter 6 to a municipal entity, a reference in that chapter to a municipality, a municipal council or an accounting officer must be read as referring to a municipal entity, the board of directors of a municipal entity or the accounting officer of a municipal entity, respectively.<sup>240</sup> If a municipal entity experiences serious or persistent financial problems and the board of directors of the entity fails to act effectively, the parent municipality must either

- take appropriate steps in terms of its rights and powers over that entity, including its rights and powers in terms of any relevant service delivery or other agreement

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<sup>238</sup> See the MFMA s 106(1)-(2). Note that an accounting officer may confirm, vary or revoke any decision taken by an official in consequence of a delegation, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

<sup>239</sup> The MFMA s 107.

<sup>240</sup> See the MFMA s 108(1)-(2).

- impose a financial recovery plan, which must meet the same criteria set out in section 142 of the MFMA for a municipal financial recovery plan or
- liquidate and disestablish the entity.<sup>241</sup>

**(j) Issues relating to goods and services**

Each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this part. The supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least the following:

- (a) The range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;
- (b) when a municipality or municipal entity may or must use a particular type of process;
- (c) procedures and mechanisms for each type of process;
- (d) procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;
- (e) open and transparent pre-qualification processes for tenders or other bids;
- (f) competitive bidding processes in which only pre-qualified persons may participate;
- (g) bid documentation, advertising of and invitations for contracts;
- (h) procedures and mechanisms for:
  - (i) the opening, registering and recording of bids in the presence of interested persons;
  - (ii) the evaluation of bids to ensure best value for money;
  - (iii) negotiating the final terms of contracts; and
  - (iv) the approval of bids;
- (i) screening processes and security clearances for prospective contractors on tenders or other bids above a prescribed value;

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<sup>241</sup> Read the MFMA s 109(a)-(c).

- (j) compulsory disclosure of any conflicts of interests prospective contractors may have in specific tenders and the exclusion of such prospective contractors from those tenders or bids;
- (k) participation in the supply chain management system of persons who are not officials of the municipality or municipal entity, subject to section 117 of the MFMA;
- (l) the barring of persons from participating in tendering or other bidding processes, including persons:
  - (i) who were convicted for fraud or corruption during the past five years;
  - (ii) who wilfully neglected, reneged on or failed to comply with a government contract during the past five years; or
  - (iii) whose tax matters are not cleared by South African Revenue Service;
- (m) measures for:
  - (i) combating fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management; and
  - (ii) promoting ethics of officials and other role players involved in municipal supply chain management;
- (n) the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced, including recommendations or decisions that were made, taken or in any way influenced by –
  - (i) councillors in contravention of item 5 or 6 of the Code of Conduct for Councillors set out in Schedule 1 to the Municipal Systems Act; or
  - (ii) municipal officials in contravention of item 4 or 5 of the Code of Conduct for Municipal Staff Members set out in Schedule 2 to that act;
- (o) the procurement of goods and services by municipalities or municipal entities through contracts procured by other organs of state;
- (p) contract management and dispute settling procedures; and
- (q) the delegation of municipal supply chain management powers and duties, including to officials.<sup>242</sup>

With respect to unsolicited bids, a municipality or municipal entity is not obliged to consider an unsolicited bid received outside its normal bidding process. If a municipi-

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<sup>242</sup> See the MFMA ss 111-112. Note that the regulatory framework for municipal supply chain management must be fair, equitable, transparent, competitive and cost effective.

pality or municipal entity decides to consider an unsolicited bid received outside a normal bidding process, it may do so only in accordance with a prescribed framework. Such a framework must strictly regulate and limit the power of municipalities and municipal entities to approve unsolicited bids received outside their normal tendering or other bidding processes.<sup>243</sup>

In respect of the approval tenders, it is stated that if a tender other than the one recommended in the normal course of implementing the supply chain management policy of a municipality or municipal entity is approved, the accounting officer of the municipality or municipal entity must, in writing, notify the Auditor-General, the relevant provincial treasury and the National Treasury and, in the case of a municipal entity, also the parent municipality of the reasons for deviating from such recommendation.<sup>244</sup>

The accounting officer of a municipality or municipal entity must implement the supply chain management policy of the municipality or municipal entity and must take all reasonable steps to ensure that proper mechanisms and separation of duties in the supply chain management system are in place to minimise the likelihood of fraud, corruption, favouritism and unfair and irregular practices. No person may impede the accounting officer in fulfilling this responsibility.<sup>245</sup>

A contract or agreement procured through the supply chain management system of a municipality or municipal entity must

- be in writing
- stipulate the terms and conditions of the contract or agreement, which must include provisions providing for:
  - (a) the termination of the contract or agreement in the case of non- or under-performance
  - (b) dispute resolution mechanisms to settle disputes between the parties
  - (c) a periodic review of the contract or agreement once every three years in the case of a contract or agreement for longer than three years and
  - (d) any other matters that may be prescribed.

The accounting officer of a municipality or municipal entity must also:

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<sup>243</sup> Read the MFMA s 113(1)-(3).

<sup>244</sup> S 114(1) does not apply if a different tender was approved in order to rectify an irregularity. See the MFMA s 114(1)-(2).

<sup>245</sup> The MFMA s 115(1)-(2).

- take all reasonable steps to ensure that a contract or agreement procured through the supply chain management policy of the municipality or municipal entity is properly enforced
- monitor the performance of the contractor under the contract or agreement on a monthly basis
- establish capacity in the administration of the municipality or municipal entity:
  - (a) to assist the accounting officer in carrying out the above duties and
  - (b) to oversee the day-to-day management of the contract or agreement and
- report regularly to the council of the municipality or the board of directors of the entity, as may be appropriate, on the management of the contract or agreement and the performance of the contractor.<sup>246</sup>

A contract or agreement procured through the supply chain management policy of the municipality or municipal entity may be amended by the parties, but only after

- (a) the reasons for the proposed amendment have been tabled in the council of the municipality or, in the case of a municipal entity, in the council of its parent municipality; and
- (b) the local community:
  - (i) has been given reasonable notice of the intention to amend the contract or agreement; and
  - (ii) has been invited to submit representations to the municipality or municipal entity.<sup>247</sup>

According to the MFMA, no councillor of any municipality may be a member of a municipal bid committee or any other committee evaluating or approving tenders, quotations, contracts or other bids, nor attend any such meeting as an observer. No person may further interfere with the supply chain management system of a municipality or municipal entity or amend or tamper with any tenders, quotations, contracts or bids after their submission.<sup>248</sup>

The accounting officer and all other officials of a municipality or municipal entity involved in the implementation of the supply chain management policy of the municipality or municipal entity must meet the prescribed competency levels. A municipality

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<sup>246</sup> The MFMA s 116(2).

<sup>247</sup> See the MFMA s 116(1)-(3).

<sup>248</sup> Read the MFMA ss 117 and 118.



and a municipal entity must for the purposes of subsection 119(1) of the MFMA provide resources or opportunities for the training of officials referred to in that subsection to meet the prescribed competency levels. The National Treasury or a provincial treasury may assist municipalities and municipal entities in the training of officials.<sup>249</sup>

A municipality may enter into a public-private partnership agreement, but only if the municipality can demonstrate that the agreement will:

- provide value for money to the municipality
- be affordable for the municipality and
- transfer appropriate technical, operational and financial risk to the private party.

A public-private partnership agreement must comply with any prescribed regulatory framework for public-private partnerships. If the public-private partnership involves the provision of a municipal service, chapter 8 of the Municipal Systems Act must also be complied with. Before a public-private partnership is concluded, the municipality must conduct a feasibility study that:

- (a) explains the strategic and operational benefits of the public-private partnership for the municipality in terms of its objectives;
- (b) describes in specific terms:
  - (i) the nature of the private party's role in the public-private partnership;
  - (ii) the extent to which this role, both legally and by nature, can be performed by a private party; and
  - (iii) how the proposed agreement will:
    - (aa) provide value for money to the municipality;
    - (bb) be affordable for the municipality;
    - (cc) transfer appropriate technical, operational and financial risks to the private party; and
    - (dd) impact on the municipality's revenue flows and its current and future budgets;
- (c) takes into account all relevant information; and
- (d) explains the capacity of the municipality to effectively monitor, manage and enforce the agreement.<sup>250</sup>

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<sup>249</sup> Refer to the MFMA s 119(1)-(3).

<sup>250</sup> The MFMA s 120(1)-(4).

National government may assist municipalities in carrying out and assessing the feasibility studies referred to above. When a feasibility study has been completed, the accounting officer of the municipality must:

- (a) submit the report on the feasibility study together with all other relevant documents to the council for a decision, in principle, on whether the municipality should continue with the proposed public-private partnership;
- (b) at least 60 days prior to the meeting of the council at which the matter is to be considered, in accordance with section 21A of the Municipal Systems Act-
  - (i) make public particulars of the proposed public-private partnership, including the report on the feasibility study; and
  - (ii) invite the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed public-private partnership; and
- (c) solicit the views and recommendations of-
  - (i) the National Treasury;
  - (ii) the national department responsible for local government;
  - (iii) if the public-private partnership involves the provision of water, sanitation, electricity or any other service as may be prescribed, the responsible national department; and
  - (iv) any other national or provincial organ of state as may be prescribed.<sup>251</sup>

**(k) Requirements regarding financial reporting and auditing**

For each financial year, every municipality and every municipal entity must prepare an annual report in accordance with the MFMA. Within nine months after the end of a financial year the council of a municipality must deal with the annual report of the municipality and of any municipal entity under the municipality's sole or shared control in accordance with section 129 of the Act. The purpose of an annual report is:

- to provide a record of the activities of the municipality or municipal entity during the financial year to which the report relates
- to provide a report on performance against the budget of the municipality or municipal entity for that financial year and

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<sup>251</sup> Note that the MFMA ss 110-119 apply to the procurement of public-private partnership agreements. S 33 also applies if the agreement will have multi-year budgetary implications for the municipality within the meaning of that section. Read also s 110 with reference to the application of the MFMA ss 110-119.

- to promote accountability to the local community for the decisions made throughout the year by the municipality or municipal entity.<sup>252</sup>

The annual report of a municipality must include the following information:

- (a) the annual financial statements of the municipality,<sup>253</sup> and in addition, if section 122(2) of the MFMA applies, consolidated annual financial statements, as submitted to the Auditor-General for audit in terms of section 126(1) of the act;
- (b) the Auditor-General's audit report in terms of section 126(3) on those financial statements;
- (c) the annual performance report of the municipality prepared by the municipality in terms of section 46 of the Municipal Systems Act;
- (d) the Auditor-General's audit report in terms of section 45(b) of the Municipal Systems Act;
- (e) an assessment by the municipality's accounting officer of any arrears on municipal taxes and service charges;
- (f) an assessment by the municipality's accounting officer of the municipality's performance against the measurable performance objectives referred to in section 17(3)(b) of the MFMA for revenue collection from each revenue source and for each vote in the municipality's approved budget for the relevant financial year;
- (g) particulars of any corrective action taken or to be taken in response to issues raised in the audit reports referred to in paragraphs (b) and (d);
- (h) any explanations that may be necessary to clarify issues in connection with the financial statements;
- (i) any information as determined by the municipality;
- (j) any recommendations of the municipality's audit committee; and
- (k) any other information as may be prescribed.<sup>254</sup>

The annual report of a municipal entity must include:

- (a) the annual financial statements of the entity, as submitted to the Auditor-General for audit in terms of section 126(2);

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<sup>252</sup> Read the MFMA s 121(1)-(2).

<sup>253</sup> Such financial statements include statements consisting of at least (a) a statement of financial position, (b) a statement of financial performance, (c) a cash-flow statement, (d) any other statements that may be prescribed and (d) any notes to these statements. See the MFMA s 1.

<sup>254</sup> The MFMA s 121(3)(a)-(k).

- (b) the Auditor-General's audit report in terms of section 126(3) on those financial statements;
- (c) an assessment by the entity's accounting officer of any arrears on municipal taxes and service charges;
- (d) an assessment by the entity's accounting officer of the entity's performance against any measurable performance objectives set in terms the service delivery agreement or other agreement between the entity and its parent municipality;
- (e) particulars of any corrective action taken or to be taken in response to issues raised in the audit report referred to in paragraph (b);
- (f) any information as determined by the entity or its parent municipality;
- (g) any recommendations of the audit committee of the entity or of its parent municipality; and
- (h) any other information as may be prescribed.<sup>255</sup>

For each financial year, every municipality and every municipal entity must prepare annual financial statements which fairly present the state of affairs of the municipality or entity, its performance against its budget, its management of revenue, expenditure, assets and liabilities, its business activities, its financial results and its financial position as at the end of the financial year and disclose the information required in terms of sections 123, 124 and 125 of the MFMA. A municipality which has sole control of a municipal entity or which has effective control of a municipal entity which is a private company within the meaning of the Municipal Systems Act must, in addition to complying with subsection 122(1) of the MFMA, prepare consolidated annual financial statements incorporating the annual financial statements of the municipality and of such entity. Such consolidated annual financial statements must comply with any requirements as may be prescribed. Both annual financial statements and consolidated annual financial statements must be prepared in accordance with generally recognised accounting practice prescribed in terms of section 91(1)(b) of the Public Finance Management Act.<sup>256</sup>

The annual financial statements of a municipality must disclose information on

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<sup>255</sup> The MFMA s 121(4)(a)-(h).

<sup>256</sup> See the MFMA s 122(1)-(3). "Standards of generally recognised accounting practice" refers to an accounting practice complying with standards applicable to municipalities or municipal entities and issued in terms of the Public Finance Management Act ch 11.

- any allocations received by the municipality from
  - (a) an organ of state in the national or provincial sphere of government or
  - (b) a municipal entity or another municipality
- any allocations made by the municipality to
  - (a) a municipal entity or another municipality or
  - (b) any other organ of state
- how any allocations were spent, per vote, excluding allocations received by the municipality as its portion of the equitable share or where prescribed otherwise because of the nature of the allocation
- whether the municipality has complied with the conditions of
  - (a) any allocations made to the municipality in terms of section 214(1)(c) of the Constitution and
  - (b) any allocations made to the municipality other than by national organs of state
- the reasons for any non-compliance with the two conditions referred to directly above and
- whether funds destined for the municipality in terms of the annual Division of Revenue Act were delayed or withheld, and the reasons advanced to the municipality for such delay or withholding.

The annual financial statements of a municipal entity must also disclose information on:

- any allocations received by the entity from any municipality or other organ of state
- any allocations made by the entity to a municipality or other organ of state and
- any other information as may be prescribed.<sup>257</sup>

The notes to the annual financial statements of a municipality must include particulars of

- the salaries, allowances and benefits of political office-bearers and councillors of the municipality, whether financial or in kind, including a statement by the accounting officer whether or not those salaries, allowances and benefits are within the upper limits of the framework envisaged in section 219 of the Constitution
- any arrears owed by individual councillors to the municipality, or a municipal entity under its sole or shared control, for rates or services and which at any time during

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<sup>257</sup> Read the MFMA s 123(1)-(2).

the relevant financial year were outstanding for more than 90 days, including the names of those councillors and

- the salaries, allowances and benefits of the municipal manager, the chief financial officer, every senior manager and such categories of other officials as may be prescribed.

The notes to the annual financial statements of a municipal entity must include particulars of the salaries, allowances and benefits of

- the members of the board of directors of the entity and
- the chief executive officer of the entity, every senior manager and such categories of other officials as may be prescribed.<sup>258</sup>

The notes to the financial statements of a municipality must include:

- a list of all municipal entities under the sole or shared control of the municipality during the financial year and as at the last day of the financial year.
- the total amount of contributions to organised local government for the financial year, and the amount of any contributions outstanding as at the end of the financial year; and
- the total amounts paid in audit fees, taxes, levies, duties and pension and medical aid contributions, and whether any amounts were outstanding as at the end of the financial year.<sup>259</sup>

The notes to the annual financial statements of a municipality or municipal entity must disclose the following information:

- (a) In respect of each bank account held by the municipality or entity during the relevant financial year:
  - (i) the name of the bank where the account is or was held, and the type of account; and
  - (ii) year opening and year end balances in each of these bank accounts;
- (b) a summary of all investments of the municipality or entity as at the end of the financial year;<sup>260</sup>

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<sup>258</sup> See the MFMA s 124(1)-(2).

<sup>259</sup> The MFMA s 125(1).

<sup>260</sup> Investment in relation to funds of a municipality means (a) the placing on deposit of funds of a municipality with a financial institution or (b) the acquisition of assets with funds of a municipality not immediately required, with the primary aim of preserving those funds. See the MFMA s 1.

- (c) particulars of any contingent liabilities of the municipality or entity as at the end of the financial year;
- (d) particulars of:
- (i) any material losses and any material irregular or fruitless and wasteful expenditures, including in the case of a municipality, any material unauthorised expenditure, that occurred during the financial year, and whether these are recoverable;
  - (ii) any criminal or disciplinary steps taken as a result of such losses or such unauthorised, irregular or fruitless and wasteful expenditures; and
  - (iii) any material losses recovered or written off;
- (e) particulars of non-compliance with this act; and
- (f) any other matters that may be prescribed.<sup>261</sup>

It is further determined that the accounting officer of a municipality must prepare the annual financial statements of the municipality and, within two months after the end of the financial year to which those statements relate, submit the statements to the Auditor-General for auditing and in addition, in the case of a municipality referred to in section 122(2) of the MFMA, must prepare consolidated annual financial statements in terms of that section and submit the statements to the Auditor-General for auditing within three months after the end of the financial year to which those statements relate.<sup>262</sup>

It is the responsibility of the accounting officer of a municipal entity to prepare the annual financial statements of the entity and submit the statements to

- the parent municipality of the entity
- the Auditor-General

for auditing within two months after the end of the financial year to which those statements relate. The Auditor-General must audit those financial statements and submit an audit report on those statements to the accounting officer of the municipality or entity within three months of receipt of the statements. If the Auditor-General is unable to complete an audit within three months of receiving the financial statements from an accounting officer, the Auditor-General must promptly submit a report outlining the reasons for the delay to the relevant municipality or municipal entity and to

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<sup>261</sup> See the MFMA s 125(1)-(2).

<sup>262</sup> The MFMA s 126(1)(a)-(b).



the relevant provincial legislature and Parliament. Once the Auditor-General has submitted an audit report to the accounting officer, no person other than the Auditor-General may alter the audit report or the financial statements to which the audit report relates.<sup>263</sup>

According to the MFMA, within six months after the end of a financial year or on such earlier date as may be agreed between the entity and its parent municipality, the accounting officer of a municipal entity must submit the entity's annual report for that financial year to the municipal manager of the entity's parent municipality. Within seven months after the end of a financial year the mayor of a municipality must table in the municipal council the annual report of the municipality and of any municipal entity under the municipality's sole or shared control. If, for whatever reason, the mayor is unable to table in the council the annual report of the municipality or the annual report of any municipal entity under the municipality's sole or shared control within seven months after the end of the financial year to which the report relates, the mayor must promptly submit to the council a written explanation referred to in section 133(1)(a) of the MFMA, setting out the reasons for the delay, together with any components of the annual report listed in section 121(3) or (4) of the Act that are ready, and also submit to the council the outstanding annual report or the outstanding components of the annual report as soon as possible.<sup>264</sup>

The Auditor-General may submit the financial statements and audit report of a municipality directly to the municipal council, the National Treasury, the relevant provincial treasury, the MEC responsible for local government in the province and any prescribed organ of state, if the mayor fails to comply with subsection 127(2) or (3) of the MFMA or directly to the parent municipality, the National Treasury, the relevant provincial treasury, the MEC responsible for local government in the province and any prescribed organ of state, if the accounting officer of the entity fails to comply with subsection 127(1). In accordance with section 21A of the Municipal Systems Act, the accounting officer of the municipality must make public the annual report and invite the local community to submit representations in connection with the annual report immediately after an annual report is tabled in the council. He or she must also submit the annual report to the Auditor-General, the relevant provincial

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<sup>263</sup> Read the MFMA s 126(2)-(5).

<sup>264</sup> Refer to the MFMA s 127(1)-(3).

treasury and the provincial department responsible for local government in the province.<sup>265</sup>

It is the responsibility of the accounting officer of a parent municipality to monitor whether the accounting officer of any municipal entity under the sole or shared control of the municipality has complied with sections 121(1) and 126(2) of the MFMA, to establish the reasons for any non-compliance and to promptly report any non-compliance, together with the reasons for such non-compliance, to the council of the parent municipality, the relevant provincial treasury and the Auditor-General.<sup>266</sup>

The council of a municipality must consider the annual report of the municipality and any municipal entity under the municipality's sole or shared control, and by no later than two months from the date on which the annual report was tabled in the council in terms of section 127, adopt an oversight report containing the council's comments on the annual report, which must include a statement whether the council:

- has approved the annual report with or without reservations
- has rejected the annual report or
- has referred the annual report back for revision of those components that can be revised.

The accounting officer must also attend council and council committee meetings where the annual report is discussed, for the purpose of responding to questions concerning the report and submit copies of the minutes of those meetings to the Auditor-General, the relevant provincial treasury and the provincial department responsible for local government in the province.<sup>267</sup>

Furthermore and in accordance with section 21A of the Municipal Systems Act, the accounting officer must make public an oversight report referred to above within seven days of its adoption. The National Treasury may issue guidelines on the manner in which municipal councils should consider annual reports and conduct public hearings and the functioning and composition of any public accounts or oversight committees established by the council to assist it to consider an annual report. No

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<sup>265</sup> S 127(5), with the necessary modifications as the context may require, is also applicable if only components of the annual report are tabled in terms of s 127(3). See the MFMA s 127(4)-(6).

<sup>266</sup> Read the MFMA s 128(a)-(c).

<sup>267</sup> The MFMA s 129(1)-(2).

guidelines issued in terms of subsection 129(4) of the MFMA are binding on a municipal council unless adopted by the council.<sup>268</sup>

The meetings of a municipal council at which an annual report is to be discussed or at which decisions concerning an annual report are to be taken must be open to the public and any organs of state, and a reasonable time must be allowed for the discussion of any written submissions received from the local community or organs of state on the annual report and for members of the local community or any organs of state to address the council. Representatives of the Auditor-General are entitled to attend and to speak at any council meeting referred to above.<sup>269</sup>

All municipalities must address any issues raised by the Auditor-General in an audit report. The mayor of a municipality must ensure compliance by the municipality with this requirement. The MEC for local government in the province must also assess all annual financial statements of municipalities in the province, the audit reports on such statements and any responses of municipalities to such audit reports and determine whether municipalities have adequately addressed any issues raised by the Auditor-General in audit reports and within 60 days must report to the provincial legislature any omission by a municipality to address those issues adequately.<sup>270</sup> Various documents must also be submitted to provincial legislatures. Such documents include:

- the annual report of each municipality and each municipal entity in the province or, if only components of an annual report were tabled in terms of section 127(3) of the MFMA, those components and
- all oversight reports on those annual reports adopted in terms of section 129(1) of the MFMA.

The accounting officer of a municipality must submit the documents to the provincial legislature within seven days after the municipal council has adopted the relevant oversight report. The MEC for local government in a province must monitor whether municipalities in the province comply with these requirements. A provincial legisla-

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<sup>268</sup> Read the MFMA s 129(3)-(4). S 129 with the necessary modifications as the context may require, is also applicable if only components of the annual report were tabled in terms of the Act s 127(3).

<sup>269</sup> Again s 130, with the necessary modifications as the context may require, is also applicable if only components of the annual report were tabled in terms of s 127(3). See also the MFMA s 130(1)-(3).

<sup>270</sup> Read the MFMA s 131(1)-(2).

ture may in turn deal with the documents in accordance with its constitutional powers.<sup>271</sup>

If the accounting officer of a municipality or municipal entity fails to submit financial statements to the Auditor-General in accordance with section 126 (1) or (2) of the MFMA, or if the mayor fails to table the annual report of the municipality or a municipal entity in the council in accordance with section 127(2) of the Act, then the mayor must promptly table in the council a written explanation setting out the reasons for the failure. Furthermore, the Auditor-General, in the case of any failure to submit financial statements for auditing, must promptly

- inform the speaker of the council, the National Treasury and the MEC for local government and the MEC for finance in the province of such failure and
- issue a special report on the failure to the relevant provincial legislature.

The municipal council then

- must request the speaker or any other councillor to investigate the reasons for the failure and report to the council
- must take appropriate steps to ensure that the financial statements are submitted to the Auditor-General or that the annual report, including the financial statements and the audit report on those statements, is tabled in the council, as the case may be
- may order that disciplinary steps be taken against the accounting officer or other person responsible for the failure.<sup>272</sup>

The provincial executive may also intervene in the municipality in terms of section 139 of the Constitution. Even the National Treasury and also the provincial treasury may take appropriate steps against the municipality in terms of section 5 of the MFMA.

The Auditor-General must submit to Parliament and the provincial legislatures by no later than 31 October of each year the names of any municipalities or municipal entities which have failed to submit their financial statements to the Auditor-General in terms of section 126 of the MFMA and at quarterly intervals thereafter, the names

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<sup>271</sup> See the MFMA s 132(1)-(5). The National Treasury may issue guidelines on the manner in which provincial legislatures should consider the annual reports of municipalities. No guidelines issued in terms of this subsection are binding on a provincial legislature unless adopted by the legislature.

<sup>272</sup> See the MFMA s 133(1)(a)-(c).

of any municipalities or municipal entities whose financial statements are still outstanding at the end of each interval.<sup>273</sup> As part of the report referred to in section 48 of the Municipal Systems Act, it is also mandatory for the cabinet member responsible for local government to report annually to parliament on actions taken by MECs for local government to address issues raised by the Auditor-General in audit reports on financial statements of municipalities and municipal entities.<sup>274</sup>

### **(l) Resolution of financial problems**

The primary responsibility to avoid, identify and resolve financial problems in a municipality rests with the municipality itself. A municipality must meet its financial commitments. If a municipality encounters a serious financial problem or anticipates problems in meeting its financial commitments, it must immediately seek solutions to the problem, notify the MEC for local government in the province and the MEC for finance in the province and notify organised local government.<sup>275</sup> Apart from the municipality itself, if the MEC for local government in a province becomes aware that there is a serious financial problem in a municipality, the MEC must promptly

- consult the mayor of the municipality to determine the facts
- assess the seriousness of the situation and the municipality's response to the situation
- determine whether the situation justifies or requires an intervention in terms of section 139 of the Constitution.

If the financial problem has been caused by or has resulted in a failure by the municipality to comply with an executive obligation in terms of legislation or the Constitution, and the conditions for an intervention in terms of section 139(1) of the Constitution are met, the provincial executive must promptly decide whether or not to intervene in the municipality. If the provincial executive decides to intervene, section 137 of the MFMA applies. In cases where the municipality has failed to approve a budget or any revenue-raising measures necessary to give effect to the budget, as a result of which the conditions for an intervention in terms of section 139 (4) of the Constitution are met, the provincial executive must intervene in the municipality in accordance with section 26 of the MFMA. Finally, if the municipality, as a result of a

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<sup>273</sup> The MFMA s 133(2)(a)-(b).

<sup>274</sup> Read the MFMA s 134.

<sup>275</sup> See the MFMA s 135(1)-(3).

crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments or admits that it is unable to meet its obligations or financial commitments, as a result of which the conditions for an intervention in terms of section 139(5) of the Constitution are met, the provincial executive must intervene in the municipality in accordance with section 139 of the MFMA.<sup>276</sup>

If the conditions for a provincial intervention in a municipality in terms of section 139(1) of the Constitution are met and the provincial executive decides in terms of section 136(2) of the MFMA to intervene in the municipality, the provincial executive may take any appropriate steps referred to in section 139 (1) of the Constitution, including:

- (a) assessing the seriousness of the financial problem in the municipality;
- (b) seeking solutions to resolve the financial problem in a way that would be sustainable and would build the municipality's capacity to manage its own financial affairs;
- (c) determining whether the financial problem, singly or in combination with other problems, is sufficiently serious or sustained that the municipality would benefit from a financial recovery plan and, if so, requesting any suitably qualified person:
  - (i) to prepare an appropriate financial recovery plan for the municipality;
  - (ii) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and
  - (iii) to submit the recovery plan and any recommendations referred to in subparagraphs (i) and (ii) to the MEC for local government in the province within a period determined by the MEC; and
- (d) consulting the mayor of the municipality to obtain the municipality's cooperation in resolving the financial problem, and if applicable, implementing the financial recovery plan.<sup>277</sup>

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<sup>276</sup> See the MFMA s 136(1)-(4).

<sup>277</sup> Note that the MEC must submit any assessment in terms of ss 137(1)(a), any determination in terms of ss (1)(c) and a copy of any request in terms of ss (1)(c) to the municipality and the Cabinet member responsible for local government. This obligation does not apply to a provincial intervention which is unrelated to a financial problem in a municipality. See the MFMA s 137(1)-(3).

When determining for the purposes of section 137 of the MFMA the seriousness of a financial problem, all relevant facts must be considered, and the following factors, singly or in combination, may indicate a serious financial problem:

- (a) The municipality has failed to make payments as and when due;
- (b) the municipality has defaulted on financial obligations for financial reasons;
- (c) the actual current expenditure of the municipality has exceeded the sum of its actual current revenue plus available surpluses for at least two consecutive financial years;
- (d) the municipality had an operating deficit in excess of five per cent of revenue in the most recent financial year for which financial information is available;
- (e) the municipality is more than 60 days late in submitting its annual financial statements to the Auditor-General in accordance with section 126 of the MFMA;
- (f) the Auditor-General has withheld an opinion or issued a disclaimer due to inadequacies in the financial statements or records of the municipality, or has issued an opinion which identifies a serious financial problem in the municipality;
- (g) any of the above conditions exists in a municipal entity under the municipality's sole control, or in a municipal entity for whose debts the municipality may be responsible, and the municipality has failed to intervene effectively; or
- (h) any other material condition exists which indicates that the municipality, or a municipal entity under the municipality's sole control, is likely to be unable for financial reasons to meet its obligations.<sup>278</sup>

The MFMA also provides for mandatory intervention by provincial governments into the affairs of a municipality. If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the provincial executive must promptly:

- (a) request the Municipal Financial Recovery Service-
  - (i) to determine the reasons for the crisis in its financial affairs;
  - (ii) to assess the municipality's financial state;

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<sup>278</sup> Read the MFMA s 138(a)-(h).



- (iii) to prepare an appropriate recovery plan for the municipality;
- (iv) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and
- (v) to submit to the MEC for finance in the province:
  - (aa) the determination and assessment referred to in subparagraphs (i) and (ii) as a matter of urgency; and
  - (bb) the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) within a period, not to exceed 90 days, determined by the MEC for finance; and
- (b) consult the mayor of the municipality to obtain the municipality's co-operation in implementing the recovery plan, including the approval of a budget and legislative measures giving effect to the recovery plan.<sup>279</sup>

The MEC for finance in the province must submit a copy of any request in terms of subsection 139(1)(a) of the MFMA and of any determination and assessment received in terms of subsection 139(1)(a)(v)(aa) of the Act to the municipality, the Cabinet member responsible for local government and the Minister of Finance. A mandatory intervention supersedes any discretionary provincial intervention, provided that any financial recovery plan prepared for the discretionary intervention must continue until replaced by a recovery plan for the mandatory intervention.<sup>280</sup>

The new financial dispensation also provides certain criteria for determining the seriousness or persistent material breach of financial commitments. When determining whether the conditions for a mandatory intervention referred to in section 139 of the MFMA are met, all relevant facts must be considered. The following factors, singly or in combination, may indicate that a municipality is in serious material breach of its obligations to meet its financial commitments:

- (a) The municipality has failed to make any payment to a lender or investor as and when due;
- (b) the municipality has failed to meet a contractual obligation which provides security in terms of section 48 of the MFMA;
- (c) the municipality has failed to make any other payment as and when due, which individually or in the aggregate is more than an amount as may be pre-

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<sup>279</sup> See the MFMA s 139(1)(a)-(b).

<sup>280</sup> See the MFMA s 139(2)-(3).

scribed or, if none is prescribed, more than two per cent of the municipality's budgeted operating expenditure; or

- (d) the municipality's failure to meet its financial commitments has impacted, or is likely to impact, on the availability or price of credit to other municipalities.<sup>281</sup>

Any recurring or continuous failure by a municipality to meet its financial commitments which substantially impairs the municipality's ability to procure goods, services or credit on usual commercial terms, may indicate that the municipality is in persistent material breach of its obligations to meet its financial commitments.<sup>282</sup>

In respect of the preparation of a financial recovery plan, the MFMA determines that any suitably qualified person may, on request by the provincial executive, prepare a financial recovery plan for a discretionary provincial intervention referred to in section 137 of the MFMA. Only the Municipal Financial Recovery Service may prepare a financial recovery plan for a mandatory provincial intervention referred to in section 139 of the MFMA. When preparing a financial recovery plan, the person referred to in subsection 141(1) of the Act or the Municipal Financial Recovery Service must:

- (a) consult:

- (i) the relevant municipality;
- (ii) the municipality's principal suppliers and creditors, to the extent they can reasonably be contacted;
- (iii) the MEC for finance and the MEC for local government in the province; and
- (iv) organised labour;

- (b) take into account:

- (i) any financial recovery plan that has previously been prepared for the municipality; and
- (ii) any proposed financial recovery plan, or proposals for a financial recovery plan, that may be advanced by the municipality or any creditor of the municipality; and

- (c) at least 14 days before finalising the plan:

- (i) submit the plan for comment to:

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<sup>281</sup> The MFMA s 140(1)-(2).

<sup>282</sup> Note that s 140(2) and (3) do not apply to disputed obligations to which there are pending legal actions between the municipality and the creditor, provided that such actions are not instituted to avoid an intervention or obligations explicitly waived by the creditor.

- (aa) the municipality;
  - (bb) the MEC for finance and the MEC for local government in the province;
  - (cc) organised local government in the province;
  - (dd) organised labour; and
  - (ee) any supplier or creditor of the municipality, on request; and
- (ii) publish a notice in a newspaper of general circulation in the municipality:
- (aa) stating the place, including any website address, where copies of the plan will be available to the public free of charge or at a reasonable price; and
  - (bb) inviting the local community to submit written comments in respect of the plan.<sup>283</sup>

The person charged with preparing the financial recovery plan or the Municipal Financial Recovery Service must

- consider any comments received
- finalise the financial recovery plan and
- submit the final plan to the MEC for finance in the province for approval in terms of section 143 of the MFMA.<sup>284</sup>

A financial recovery plan must be aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, and such a plan, whether for a mandatory or discretionary intervention, must:

- identify the financial problems of the municipality
- be designed to place the municipality in a sound and sustainable financial condition as soon as possible
- state the principal strategic objectives of the plan, and ways and means for achieving those objectives
- set out a specific strategy for addressing the municipality's financial problems, including a strategy for reducing unnecessary expenditure and increasing the collection of revenue, as may be necessary
- identify the human and financial resources needed to assist in resolving financial problems, and where those resources are proposed to come from

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<sup>283</sup> The MFMA s 141(1)-(3).

<sup>284</sup> Read the MFMA s 141(4)(a)-(c).

- describe the anticipated time frame for financial recovery, and milestones to be achieved and
- identify what actions are necessary for the implementation of the plan, distinguishing between actions to be taken by the municipality and actions to be taken by other parties.<sup>285</sup>

The plan may also:

- provide for the liquidation of specific assets, excluding those needed for the provision of the minimum level of basic municipal services
- provide for debt restructuring or debt relief in accordance with the MFMA
- provide for special measures to prevent unauthorised, irregular and fruitless and wasteful expenditures and other losses and
- identify any actual and potential revenue sources.<sup>286</sup>

In addition, a financial recovery plan

- for a mandatory intervention must
  - (a) set spending limits and revenue targets
  - (b) provide budget parameters which bind the municipality for a specified period or until stated conditions have been met and
  - (c) identify specific revenue-raising measures that are necessary for financial recovery, including the rate at which any municipal tax and tariffs must be set to achieve financial recovery and
- for a discretionary intervention may suggest, for adoption by the municipality,
  - (a) spending limits and revenue targets
  - (b) budget parameters for a specified period or until stated conditions have been met and (c) specific revenue-raising measures that are necessary for financial recovery.<sup>287</sup>

On receipt of a financial recovery plan pursuant to a discretionary intervention, the MEC for local government in the province may approve the recovery plan with or without amendments, as the MEC considers appropriate. On receipt of a financial recovery plan pursuant to a mandatory intervention, the MEC for finance must verify that the process set out in section 141 of the MFMA has been followed and that the

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<sup>285</sup> See the MFMA s 142(1)(a)(i)-(vii).

<sup>286</sup> The MFMA s 142(1)(b)(i)-(iv).

<sup>287</sup> Read the MFMA s 142(2)(a)-(b).

criteria contained in section 142 of the Act are met and if so approve the recovery plan or if not direct what defects must be rectified. The responsible MEC must submit an approved recovery plan to the municipality, the Minister and the Cabinet member responsible for local government, the Auditor-General and organised local government in the province.<sup>288</sup>

The MEC for local government or the MEC for finance in the province may at any time, but subject to section 141(1) and (2) of the MFMA, request any suitably qualified person or the Municipal Financial Recovery Service to prepare an amended financial recovery plan in accordance with the directions of the MEC. Section 141 of the Act, read with such changes as the context may require, apply to the amendment of a financial recovery plan in terms of this section. No amendment of a recovery plan may impede the implementation of any court order made or agreement reached in terms of the plan before the amendment.<sup>289</sup>

If a financial recovery plan was prepared in a discretionary provincial intervention, the municipality must implement the approved recovery plan and report monthly to the MEC for local government in the province on the implementation of the plan, in such manner as the plan may determine. The financial recovery plan binds the municipality in the exercise of its executive authority, but only to the extent to resolve the financial problems of the municipality. If the municipality cannot or does not implement the approved recovery plan, the provincial executive may in terms of section 139(1) or (4) of the Constitution take further appropriate steps to ensure implementation of the plan.<sup>290</sup> If the recovery plan was prepared in a mandatory provincial intervention referred to in section 139 of the MFMA

- the municipality must implement the approved recovery plan
- all revenue, expenditure and budget decisions must be taken within the framework of, and subject to the limitations of, the recovery plan and
- the municipality must report monthly to the MEC for finance in the province on the implementation of the plan in such manner as the plan may determine.

The financial recovery plan binds the municipality in the exercise of both its legislative and executive authority, including the approval of a budget and legislative meas-

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<sup>288</sup> See the MFMA s 143(1)-(3).

<sup>289</sup> See the MFMA s 144(1)-(3).

<sup>290</sup> Note that the Municipal Structures Act ss 34(3) and (4) and 35 apply if a provincial executive dissolves a municipal council in terms of s (3). See also the MFMA s 145(1)-(4).

ures giving effect to the budget, but only to the extent necessary to achieve the objectives of the recovery plan. The provincial executive must in terms of section 139(5)(b) of the Constitution either

- dissolve the council of the municipality, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures necessary to give effect to the recovery plan within the time frames specified in the plan and
  - (a) appoint an administrator until a newly elected council has been declared elected and
  - (b) approve a temporary budget and revenue-raising measures, and other measures to give effect to the recovery plan and to provide for the continued functioning of the municipality.
- assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not take executive measures to give effect to the recovery plan.<sup>291</sup>

At least every three months the MEC for local government or the MEC for finance in a province must review any discretionary provincial intervention referred to in section 137 or any mandatory provincial intervention referred to in section 139 of the MFMA, including progress with resolving the municipality's financial problems and its financial recovery and the effectiveness of any financial recovery plan. He/she must also submit progress reports and a final report on the intervention to the municipality, the Minister, the Cabinet member responsible for local government, the provincial legislature and organised local government in the province.<sup>292</sup> A discretionary intervention must end if it is terminated in terms of section 139(2)(b) of the Constitution or when the municipality is able and willing to fulfil the executive obligation in terms of legislation or the Constitution that gave rise to the intervention and the financial problem that has been caused by or has caused the failure by the municipality to comply with that obligation is resolved.<sup>293</sup> A mandatory intervention must end when the crisis in the municipality's financial affairs has been resolved and the municipality's ability to

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<sup>291</sup> See the MFMA s 146(1)-(4). The Municipal Structures Act ss 34(3) and (4) and 35 apply when a provincial executive dissolves a municipal council in terms of the Constitution s 139(5)(b)(i).

<sup>292</sup> The MEC for local government or the MEC for finance may request the person who prepared the recovery plan, or the Municipal Financial Recovery Service, to assist the MEC in complying with s 147(1). See the MFMA s 147(1)-(2).

<sup>293</sup> The MFMA s 148(1)(a)-(b).

meet its obligations to provide basic services or its financial commitments is secured.<sup>294</sup>

When a provincial intervention ends, the MEC for local government or the MEC for finance in the province must notify:

- (a) the municipality;
- (b) the Minister, in the case of a mandatory intervention;
- (c) the Cabinet member responsible for local government;
- (d) any creditors having pending litigation against the municipality;
- (e) the provincial legislature; and
- (f) organised local government in the province.<sup>295</sup>

In respect of national interventions, the MFMA determines that if the conditions for a provincial intervention in a municipality in terms of section 139(4) or (5) of the Constitution are met and the provincial executive cannot or does not adequately exercise the powers or perform the functions referred to in that section, then the national executive must consult the relevant provincial executive and act or intervene in terms of that section in the stead of the provincial executive. If the national executive intervenes in a municipality in terms of subsection 150(1) of the MFMA, then:

- (a) the national executive assumes for the purposes of the intervention the functions and powers of a provincial executive in terms of this chapter;
- (b) the Minister assumes for the purposes of the intervention the functions and powers of an MEC for finance in terms of this chapter; and
- (c) a reference in this chapter:
  - (i) to a provincial executive must be read as a reference to the national executive;
  - (ii) to an MEC for finance must be read as a reference to the Minister; and
  - (iii) to a provincial intervention must be read as a reference to a national intervention.<sup>296</sup>

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<sup>294</sup> See the MFMA s 148(2)(a)-(b).

<sup>295</sup> Read the MFMA s 148(3)(a)-(f). Note that if a provincial executive intervenes in a municipality in terms of the Constitution s 139, the provincial executive and its representatives have access to such information, records and documents of the municipality or of any municipal entity under the sole or shared control of the municipality as may be necessary for the intervention, including for identifying or resolving the financial problem of the municipality. Refer also to the MFMA s 149.

<sup>296</sup> See the MFMA s 150(1)-(2).



Apart from the possibility of national interventions, the MFMA also protects the rights of third parties. The MFMA determines that, except as expressly provided for in the Act, nothing in the Act limits or affects:

- the rights of any creditor or other person having a claim against a municipality
- any person's access to ordinary legal process in accordance with the common law and relevant legislation or
- the rights of a municipality or municipal entity, or of the parties to a contract with a municipality or municipal entity, to alternative dispute resolution mechanisms, notice procedures and other remedies, processes or procedures.<sup>297</sup>

Furthermore, if a municipality is unable to meet its financial commitments, it may apply to the High Court for an order to stay, for a period not exceeding 90 days, all legal proceedings, including the execution of legal process, by persons claiming money from the municipality or a municipal entity under the sole control of the municipality. Notice of such an application must be given to:

- the MEC for local government and the MEC for finance in the province
- the Minister
- the Cabinet member responsible for local government
- organised local government and
- to the extent that they can reasonably be contacted, all persons to whom the municipality or the municipal entity owes an amount in excess of a prescribed amount, or if no amount is prescribed, in excess of R100 000.<sup>298</sup>

A municipality may also apply to the High Court for an order:

- to stay, for a period not exceeding 90 days at a time, all legal proceedings, including the execution of legal process, by persons claiming money from the municipality
- to suspend the municipality's financial obligations to creditors, or any portion of those obligations, until the municipality can meet those obligations or
- to terminate the municipality's financial obligations to creditors, and to settle claims in accordance with a distribution scheme referred to in section 155.<sup>299</sup>

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<sup>297</sup> The MFMA ss 151(a)-(c).

<sup>298</sup> Note that an application in terms of s 152(1) may for the purposes of the Constitution s 139(5) be regarded as an admission by the municipality that it is unable to meet its financial commitments. See the MFMA s 152(1)-(3).

<sup>299</sup> The MFMA s 153(1)(a)-(c).

The court may make an order in terms of subsection 153(1) of the MFMA only if

- the provincial executive has intervened in terms of section 139 and a financial recovery plan to restore the municipality to financial health has been approved for the municipality
- the financial recovery plan is likely to fail without the protection of such an order
- section 154 of the MFMA has been complied with, in the case of an application for an order referred to in subsection 153(1)(b) and
- section 155(1) has been complied with, in the case of an application for an order referred to in subsection 153(1)(c).<sup>300</sup>

Notice of an application in terms of subsection 153(1) must be given to

- all creditors to whom the municipality owes an amount in excess of a prescribed amount, or if no amount is prescribed, in excess of R100 000, insofar as those creditors can reasonably be contacted
- the MEC for finance and the MEC for local government in the province
- the Minister
- the Cabinet member responsible for local government and
- organised labour.<sup>301</sup>

Before issuing an order in terms of section 153(1)(b) of the MFMA for the suspension of a municipality's financial obligations to creditors, the court must be satisfied that

- the municipality cannot currently meet its financial obligations to creditors and
- all assets not reasonably necessary to sustain effective administration or to provide the minimum level of basic municipal services have been or are to be liquidated in accordance with the approved financial recovery plan for the benefit of meeting creditors' claims.<sup>302</sup>

Before issuing an order for the termination of a municipality's financial obligations to creditors in terms of section 153(1)(c) of the MFMA, the court must be satisfied that

- the municipality cannot meet its financial obligations to its creditors and is not likely to be able to do so in the foreseeable future
- all assets not reasonably necessary to sustain effective administration or to provide the minimum level of basic municipal services have been liquidated in accor-

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<sup>300</sup> The MFMA s 153(2)(a)-(d).

<sup>301</sup> Read the MFMA s 153(3)(a)-(e).

<sup>302</sup> Refer to the MFMA s 154(a)-(b).

dance with the approved financial recovery plan for the benefit of meeting creditors' claims and

- all employees have been discharged except those affordable in terms of reasonably projected revenues as set out in the approved financial recovery plan.

If the court issues an order referred to subsection 155(1) of the Act, the MEC for finance in the province must appoint a trustee to prepare a distribution scheme for the proportional settlement of all legitimate claims against the municipality as at the date of the order. Those claims must be settled against the amount realised from the liquidation of assets referred to in subsection 155(1)(b) of the Act.<sup>303</sup>

A distribution scheme must

- determine the amount available for distribution
- list all creditors with claims which qualify for the purposes of the distribution scheme, indicating which of those are secured and the manner in which they are secured and
- provide for the distribution of the amount available amongst creditors in the following order of preference:
  - (i) First preference must be given to the rights of secured creditors as to the assets with which they are secured in terms of section 48, provided the security in question was given in good faith and at least six months before the mandatory provincial intervention in terms of section 139 began;
  - (ii) thereafter the preferences provided for in the Insolvency Act,<sup>304</sup> read with the necessary changes as the context may require, must be applied; and
  - (iii) thereafter non-preferent claims must be settled in proportion to the amount of the different claims.<sup>305</sup>

The Minister, acting with the concurrence of the Cabinet member responsible for local government, must by regulation in terms of section 168 of the MFMA provide for an equitable process for the recognition of claims against a municipality for the purposes of sharing in a distribution scheme, provided that rejection of any claim does not prevent a creditor from proving the claim in a court and provide for public

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<sup>303</sup> See the MFMA s 155(1)-(2).

<sup>304</sup> 24 of 1936.

<sup>305</sup> Note that a distribution scheme may not be implemented unless approved by the court. See the MFMA s 155(3)-(4).

access to a distribution scheme.<sup>306</sup> The MFMA also establishes a so-called Municipal Financial Recovery Service (MFRS). According to section 157 of the Act a Municipal Financial Recovery Service is established as an institution within the public service. The Municipal Financial Recovery Service forms part of, and functions within, the National Treasury.<sup>307</sup> The Municipal Financial Recovery Service:

- must perform the duties and may exercise the powers assigned to the Service in terms of this Act
- may, on request by the MEC for finance in a province, prepare a financial recovery plan for a municipality or, with the approval of the Director-General of the National Treasury, instruct any suitably qualified person to prepare the plan in accordance with the directions of the Service
- may, on request by the MEC for finance in the province, monitor the implementation of any financial recovery plans that it has prepared, and may recommend such amendments and revisions as are appropriate
- may, on request by any municipality that is experiencing financial problems, and in co-ordination with any other provincial or national efforts, assist the municipality to identify the causes of, and potential solutions for, these financial problems
- may, with the approval of the Director-General of the National Treasury, obtain the services of any financial expert to perform any specific work for the Service; and
- may collect information on municipal financial problems and on best practices in resolving such problems.<sup>308</sup>

It is the responsibility of the Minister of Finance to appoint a person as the Head of the MFRS, subject to subsection 159(2) of the MFMA and legislation governing the public service. A person appointed as the Head of the Service holds office in the National Treasury on terms and conditions set out in a written employment contract, which must include terms and conditions setting performance standards.<sup>309</sup> The Head of the Service is responsible for the performance by the Service of its functions and the exercise of its powers and takes all decisions of the Service in the performance of its functions and the exercise of its powers, except those decisions of the

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<sup>306</sup> The MFMA s 156(a)-(b).

<sup>307</sup> Read the MFMA s 157(1)-(2).

<sup>308</sup> See the MFMA s 158(a)-(f).

<sup>309</sup> The MFMA s 159(1)-(2).

Service taken in consequence of a delegation in terms of section 162 of the Act.<sup>310</sup> The staff of the Municipal Financial Recovery Service consists of the Head of the Service, persons in the service of or contracted by the National Treasury and designated by the Director-General of the National Treasury for the work of the Service and persons seconded from an organ of state or organisation to the Service by agreement between the Director-General and that organ of state or organisation.<sup>311</sup> Finally, the Head of the Service may delegate any of the powers or duties of the Service to a member of the staff of the Service. Such a delegation must be in writing, is subject to the limitations or conditions which the Head of the Service may impose and does not divest the Head of the Service of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty. The Head of the Service may confirm, vary or revoke any decision taken in consequence of a delegation in terms of subsection 162(1), provided that no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.<sup>312</sup>

**(m) General treasury matters, financial misconduct and miscellaneous provisions**

No municipality or municipal entity may incur a liability or risk payable in a foreign currency. Subsection 163(1) does not apply to debt regulated in terms of section 47 of the MFMA or to the procurement of goods or services denominated in a foreign currency but the Rand value of which is determined at the time of procurement or, where this is not possible and risk is low, at the time of payment.<sup>313</sup> Furthermore, no municipality or municipal entity may:

- conduct any commercial activities
  - (a) otherwise than in the exercise of the powers and functions assigned to it in terms of the Constitution or national or provincial legislation
  - (b) outside the borders of the Republic
- provide a municipal service in an area outside its jurisdiction except with the approval of the council of the municipality having jurisdiction in that area or

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<sup>310</sup> Note that the Head of the Service performs the functions of office subject to the directions of the Director-General of the National Treasury. Read the MFMA s 160(1)-(2).

<sup>311</sup> Refer to the MFMA s 161(a)-(c).

<sup>312</sup> Read the MFMA s 162(1)-(3).

<sup>313</sup> The MFMA s 163(1)-(2).

- make loans to
  - (a) councillors or officials of the municipality;
  - (b) directors or officials of the entity or
  - (c) members of the public.<sup>314</sup>

Each municipality and each municipal entity must have an internal audit unit, subject to subsection 165(3) of the MFMA. The internal audit unit of a municipality or municipal entity must:

- prepare a risk-based audit plan and an internal audit program for each financial year
- advise the accounting officer and report to the audit committee on the implementation of the internal audit plan and matters relating to internal audit, internal controls, accounting procedures and practices, risk and risk management, performance management, loss control and compliance with the MFMA, the annual Division of Revenue Act and any other applicable legislation and
- perform such other duties as may be assigned to it by the accounting officer.<sup>315</sup>

Apart from an internal audit unit, each municipality and each municipal entity must have an audit committee, subject to subsection 166(6) of the MFMA. An audit committee is an independent advisory body which must:

- advise the municipal council, the political office-bearers, the accounting officer and the management staff of the municipality or the board of directors, the accounting officer and the management staff of the municipal entity on matters relating to:
  - (a) internal financial control and internal audits
  - (b) risk management
  - (c) accounting policies
  - (d) the adequacy, reliability and accuracy of financial reporting and information
  - (e) performance management
  - (f) effective governance

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<sup>314</sup> Note that if on the date on which this section takes effect a municipality or municipal entity is engaged in any activity prohibited by s 164(1)(a) or (b) and which is otherwise lawful, the municipality or entity must take all reasonable steps to rectify its position and to comply with that subsection as soon as may be reasonable in the circumstances. See the MFMA s 164(1)-(2).

<sup>315</sup> The internal audit function may be outsourced if the municipality or municipal entity requires assistance to develop its internal capacity and the council of the municipality or the board of directors of the entity has determined that this is feasible or cost-effective. Read the MFMA s 165(1)-(3).

- (g) compliance with this Act, the annual Division of Revenue Act and any other applicable legislation
- (h) performance evaluation and
- (i) any other issues referred to it by the municipality or municipal entity
- review the annual financial statements to provide the council of the municipality or, in the case of a municipal entity, the council of the parent municipality and the board of directors of the entity, with an authoritative and credible view of the financial position of the municipality or municipal entity, its efficiency and effectiveness and its overall level of compliance with this Act, the annual Division of Revenue Act and any other applicable legislation
- respond to the council on any issues raised by the Auditor-General in the audit report
- carry out such investigations into the financial affairs of the municipality or municipal entity as the council of the municipality, or in the case of a municipal entity, the council of the parent municipality or the board of directors of the entity may request and
- perform such other functions as may be prescribed.<sup>316</sup>

In performing its functions, an audit committee has access to the financial records and other relevant information of the municipality or municipal entity and must liaise with the internal audit unit of the municipality and the person designated by the Auditor-General to audit the financial statements of the municipality or municipal entity. An audit committee must also consist of at least three persons with appropriate experience, of whom the majority may not be in the employ of the municipality or municipal entity and meet as often as is required to perform its functions, but at least four times a year.<sup>317</sup>

A municipality may remunerate its political office-bearers and members of its political structures, but only within the framework of the Public Office-Bearers Act,<sup>318</sup>

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<sup>316</sup> The MFMA s 166(1)-(2).

<sup>317</sup> Note that the members of an audit committee must be appointed by the council of the municipality or, in the case of a municipal entity, by the council of the parent municipality. One of the members who is not in the employ of the municipality or municipal entity must be appointed as the chairperson of the committee. No councillor may be a member of an audit committee. Furthermore, a single audit committee may be established for a district municipality and the local municipalities within that district municipality and a municipality and municipal entities under its sole control. See the MFMA s 166(3)-(6).

<sup>318</sup> 20 of 1998.



setting the upper limits of the salaries, allowances and benefits for those political office-bearers and members and in accordance with section 219(4) of the Constitution. Any remuneration paid or given in cash or in kind to a person as a political office-bearer or as a member of a political structure of a municipality otherwise than in accordance with subsection 167(1) of the MFMA, including any bonus, bursary, loan, advance or other benefit, is an irregular expenditure, and the municipality must, and has the right to, recover that remuneration from the political office-bearer or member and may not write off any expenditure incurred by the municipality in paying or giving that remuneration.<sup>319</sup>

Relating to treasury regulations and guidelines, the MFMA determines that the Minister of Finance, acting with the concurrence of the Cabinet member responsible for local government, may make regulations or guidelines applicable to municipalities and municipal entities, regarding:

- (a) any matter that may be prescribed in terms of this act;
- (b) financial management and internal control;
- (c) a framework for regulating the exercise of municipal fiscal and tariff-fixing powers;
- (d) a framework regulating the financial commitments of municipalities and municipal entities in terms of public-private partnership agreements;
- (e) the establishment by municipalities of, and control over-
  - (i) municipal entities; and
  - (ii) business units contemplated in section 76(a)(ii) of the Municipal Systems Act;
- (f) the safe-guarding of the financial affairs of municipalities and of municipal entities when assets, liabilities or staff are transferred from or to a municipality or a municipal entity;
- (g) the alienation, letting or disposal of assets by municipalities or municipal entities;
- (h) internal audit units and their functioning;

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<sup>319</sup> See the MFMA s 167(1)-(3). The MEC for local government in a province must report to the provincial legislature any transgressions of ss 167(1) and any non-compliance with the MFMA ss 17(3)(k)(i) and (ii) and 124(1)(a).

- (i) the information to be disclosed when municipalities or municipal entities issue or incur debt and the manner in which such information must be disclosed, including by way of a prospectus or other document;
- (j) the circumstances under which further or specific disclosures are required after money has been borrowed by a municipality or municipal entity;
- (k) the circumstances under which documentation or information pertaining to municipal debt must be lodged or registered;
- (l) the establishment of a registry for the registration of documentation and information pertaining to municipal borrowing;
- (m) the settlement of claims against a municipality following an order of court in terms of section 153;
- (n) the information that must be placed on the websites of municipalities;
- (o) a framework regulating investments by municipal entities; and
- (p) any other matter that may facilitate the enforcement and administration of this act.<sup>320</sup>

A regulation or guideline may:

- differentiate between different
  - (a) kinds of municipality, which may, for the purposes of this section, be defined either in relation to categories, types or budgetary size of municipalities or in any other manner
  - (b) categories of municipal entity
  - (c) categories of accounting officer or
  - (d) categories of official or
- may be limited in its application to a particular:
  - (a) kind of municipality, which may, for the purposes of this section, be defined either in relation to a category, type or budgetary size of municipality or in any other manner
  - (b) category of municipal entity
  - (c) category of accounting officer or
  - (d) category of official.<sup>321</sup>

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<sup>320</sup> the MFMA s 168(1)(a)-(p).

<sup>321</sup> The MFMA s 168(2)(a)-(b). No guidelines issued in terms of ss (1) are binding on a municipality unless adopted by its council or a municipal entity unless adopted by the council of the entity's parent municipality. The MFMA s 168(3)(a)-(b).

Before regulations in terms of section 168 of the MFMA are promulgated, the Minister must consult organised local government on the substance of those regulations and publish the draft regulations in the *Government Gazette* for public comment. Regulations made must be submitted to Parliament for parliamentary scrutiny at least 30 days before their promulgation.<sup>322</sup> The National Treasury may on good grounds approve a departure from a treasury regulation or from any condition imposed in terms of the Act. Non-compliance with a regulation or with a condition imposed by the National Treasury in terms of the Act may, on good grounds shown, be condoned by the Treasury.<sup>323</sup>

The MFMA also provides for aspects regarding the financial misconduct by municipal officials and entities. The Act thus provides that the accounting officer of a municipality commits an Act of financial misconduct if that accounting officer deliberately or negligently:

- (a) contravenes a provision of the act;
- (b) fails to comply with a duty imposed by a provision of the act on the accounting officer of a municipality;
- (c) makes or permits, or instructs another official of the municipality to make, an unauthorised, irregular or fruitless and wasteful expenditure; or
- (d) provides incorrect or misleading information in any document which in terms of a requirement of the act must be (i) submitted to the mayor or the council of the municipality, or to the Auditor-General, the National Treasury or other organ of state; or (ii) made public.<sup>324</sup>

Furthermore, the chief financial officer of a municipality commits an act of financial misconduct if that officer deliberately or negligently:

- (a) fails to carry out a duty delegated to that officer in terms of section 79 or 81(1)(e) of the MFMA;
- (b) contravenes or fails to comply with a condition of any delegation of a power or duty in terms of section 79 or 81(1)(e) of the MFMA;
- (c) makes or permits, or instructs another official of the municipality to make, an unauthorised, irregular or fruitless and wasteful expenditure; or

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<sup>322</sup> Read the MFMA s 169(1)-(2).

<sup>323</sup> The MFMA s 170(1)-(2).

<sup>324</sup> See the MFMA s 171(1)(a)-(d).

(d) provides incorrect or misleading information to the accounting officer for the purposes of a document referred to in subsection 171(1)(d) of the MFMA.<sup>325</sup>

A senior manager or other official of a municipality exercising financial management responsibilities and to whom a power or duty was delegated in terms of section 79 of the MFMA commits an act of financial misconduct if that senior manager or official deliberately or negligently:

- fails to carry out the delegated duty
- contravenes or fails to comply with a condition of the delegated power or duty
- makes an unauthorised, irregular or fruitless and wasteful expenditure or
- provides incorrect or misleading information to the accounting officer for the purposes of a document referred to in subsection 171(1)(d) of the Act.

A municipality must investigate allegations of financial misconduct against the accounting officer, the chief financial officer, a senior manager or other official of the municipality unless those allegations are frivolous, vexatious, speculative or obviously unfounded. If the investigation warrants such a step, a municipality must institute disciplinary proceedings against the accounting officer, chief financial officer or that senior manager or other official in accordance with systems and procedures referred to in section 67 of the Municipal Systems Act, read with Schedule 2 of that Act.<sup>326</sup>

In respect of offences, it is determined that the accounting officer of a municipality is guilty of an offence if that accounting officer:

- deliberately or in a grossly negligent way:
  - (a) contravenes or fails to comply with a provision of section 61(2)(b), 62(1), 63(2)(a) or (c), 64(2)(a) or (d) or 65(2)(a), (b), (c), (d), (f) or (i) of the MFMA
  - (b) fails to take reasonable steps to implement the municipality's supply chain management policy referred to in section 111
  - (c) fails to take all reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure or
  - (d) fails to take all reasonable steps to prevent corruptive practices:
    - (i) in the management of the municipality's assets or receipt of money or

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<sup>325</sup> Read the MFMA s 171(2)(a)-(d).

<sup>326</sup> See the MFMA s 171(3)-(4). Similar requirements have been laid down regarding financial misconduct by officials of municipal entities. See the MFMA s 172(1)-(4).

(ii) in the implementation of the municipality's supply chain management policy

- deliberately misleads or withholds information from the Auditor-General on any bank accounts of the municipality or on money received or spent by the municipality or
- deliberately provides false or misleading information in any document which in terms of a requirement of this Act must be:
  - (a) submitted to the Auditor-General, the National Treasury or any other organ of state or
  - (b) made public.<sup>327</sup>

A senior manager or other official of a municipality or municipal entity exercising financial management responsibilities and to whom a power or duty was delegated in terms of section 79 or 106 of the MFMA is guilty of an offence if that senior manager or official deliberately or in a grossly negligent way contravenes or fails to comply with a condition of the delegation. A councillor of a municipality is guilty of an offence if that councillor:

- (a) deliberately influences or attempts to influence the accounting officer, the chief financial officer, a senior manager or any other official of the municipality to contravene a provision of the act or to refrain from complying with a requirement of the act;
- (b) interferes in the financial management responsibilities or functions assigned in terms of the act to the accounting officer of the municipality or delegated to the chief financial officer of the municipality in terms of the act;
- (c) interferes in the financial management responsibilities or functions assigned in terms of the act to the accounting officer of a municipal entity under the sole or shared control of the municipality; or
- (d) interferes in the management or operational activities of a municipal entity under the sole or shared control of the municipality.<sup>328</sup>

A councillor, an official of a municipality or municipal entity, a member of the board of directors of a municipal entity or any other person is guilty of an offence if that per

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<sup>327</sup> See the MFMA s 173(1)(a)-(c). Similar offences are created for the accounting officer of a municipal entity. See the MFMA s 173(2)(a)-(c).

<sup>328</sup> See the MFMA s 173(2).

son deliberately or in a grossly negligent way:

- impedes an accounting officer from complying with a provision of the Act
- gives incorrect, untrue or misleading information material to an investment decision relating to borrowing by a municipality or municipal entity
- makes a withdrawal in contravention of section 11 of the MFMA
- fails to comply with section 49 of the Act
- contravenes a provision of section 115(2), 118 or 126(5) of the Act or
- provides false or misleading information for the purposes of any document which must in terms of a requirement of the Act be:
  - (a) submitted to the council, mayor or accounting officer of a municipality or to the Auditor-General or the National Treasury or
  - (b) made public.<sup>329</sup>

A person is liable on conviction of an offence in terms of section 173 of the MFMA to imprisonment for a period not exceeding five years or to an appropriate fine determined in terms of applicable legislation.<sup>330</sup>

The Minister, acting with the concurrence of the Cabinet member responsible for local government, may make regulations prescribing:

- (a) the manner, form and circumstances in which allegations and disciplinary and criminal charges of financial misconduct must be reported to the National Treasury, the MEC for local government in the province and the Auditor-General, including (i) particulars of the alleged financial misconduct; and (ii) steps taken in connection with such financial misconduct;
- (b) matters relating to internal investigations by municipalities and municipal entities of allegations of financial misconduct;
- (c) the circumstances in which the National Treasury or the MEC for local government in the province may direct that disciplinary steps be taken or criminal charges be laid against a person for financial misconduct;
- (d) criteria for the composition and functioning of a disciplinary board which hears a charge of financial misconduct;

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<sup>329</sup> Refer to the MFMA s 173(3)-(5).

<sup>330</sup> The MFMA s 174.

- (e) the circumstances in which the findings of a disciplinary board and any sanctions imposed by the board must be reported to the National Treasury, the MEC for local government in the province and the Auditor-General; and
- (f) any other matters to the extent necessary to enforce the provisions of the act.

A regulation in terms of subsection (1) may:

- differentiate between different:
  - (a) kinds of municipality, which may, for the purposes of this section, be defined either in relation to categories, types or budgetary size of municipalities or in any other manner
  - (b) categories of municipal entity
  - (c) categories of accounting officer or
  - (d) categories of other official or
- be limited in its application to a particular:
  - (a) kind of municipality, which may, for the purposes of this section, be defined either in relation to a category, type or budgetary size of municipality or in any other manner
  - (b) category of municipal entity
  - (c) category of accounting officer or
  - (d) category of other official.<sup>331</sup>

No municipality or any of its political structures, political office-bearers or officials, no municipal entity or its board of directors or any of its directors or officials and no other organ of state or person exercising a power or performing a function in terms of the MFMA is liable in respect of any loss or damage resulting from the exercise of that power or the performance of that function in good faith. Without limiting liability in terms of the common law or other legislation, a municipality may recover from a political office-bearer or official of the municipality, and a municipal entity may recover from a director or official of the entity, any loss or damage suffered by it because of the deliberate or negligent unlawful actions of that political office-bearer or official when performing a function of office.<sup>332</sup> Various cases concerning the recovery of damages caused by municipal office bearers or political representatives have

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<sup>331</sup> Read the MFMA s 175(a)-(b).

<sup>332</sup> Refer to the MFMA s 176(1)-(2).



already been decided. On this point, the new legal system has significantly increased and enhanced the accountability of municipal politicians and officials.<sup>333</sup>

The Minister may by notice in the *Gazette*:

- delay the implementation of a provision of the Act for a transitional period not exceeding five years from the date when this section takes effect or
- where practicalities impede the strict application of a specific provision of the Act, exempt any municipality or municipal entity from, or in respect of, such provision for a period and on conditions determined in the notice. A delay or exemption in terms of subsection (1) may:
  - (a) apply to:
    - (i) municipalities generally; or
    - (ii) municipal entities generally; or
  - (b) be limited in its application to a particular-
    - (i) municipality;
    - (ii) kind of municipality, which may, for the purposes of this section, be defined either in relation to a category, type or budgetary size of municipality or in any other manner;
    - (iii) municipal entity; or
    - (iv) category of municipal entities.<sup>334</sup>

To facilitate the restructuring of the electricity industry as authorised by the Cabinet member responsible for such restructuring, the Minister, acting with the concurrence of the Cabinet member responsible for local government and after consultation with organised local government, may, by notice in the *Gazette*, exempt any municipality or municipal entity from any specific provision of the MFMA for a period of not more than four years and on conditions determined in the notice, provided that such ex-

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<sup>333</sup> See, eg, the case of *Moodley v Umzinto North Town Board* 1998 (2) SA 188 (SCA). In this case the town treasurer made certain investments on behalf of the Town Board. A claim for damages was instituted against him for the recovery of R300 000, which was lost as a result of an investment in a company which was subsequently liquidated. In his defence, the treasurer argued that his liability was exempted by virtue of the Local Authorities Ordinance 25 of 1974 (N) s 99, which stated that an official of a council, acting under the direction of the council and in the scope of his authority, could not be held liable for losses incurred. The court found that the treasurer exceeded his authority, however, and thus rendered himself vulnerable. He could not rescue himself by simply stating that he had acted within the course of his employment. See paras G-I at 194.

<sup>334</sup> The MFMA s 177(1)-(2).

emption may not be understood as obligating any municipality to transfer any staff, assets or liabilities.<sup>335</sup>

#### **(n) Transitional provisions and the amendment of other legislation**

The MFMA specifically determines that anything done in terms of a provision repealed by section 179(1) of the Act, which can be done in terms of a provision of the Act, must be regarded as having been done in terms of the Act. Within three months of the date on which this section takes effect, all municipalities must submit to the National Treasury a list of:

- all corporate entities in which the municipality or a municipal entity under its sole or shared control has an interest, specifying:
  - (a) the name and address of the corporate entity
  - (b) the purpose, extent and other particulars of the interest
  - (c) if such corporate entity is a municipal entity, whether the entity is under the sole or shared control of the municipality and
  - (d) such other information as may be required by the National Treasury
- all public-private partnerships to which the municipality is a party, with a value of more than one million Rands in total or per annum, specifying:
  - (a) the name and physical address of the private party participating in the public-private partnership
  - (b) the purpose and other particulars of the public-private partnership and
  - (c) such other information as may be required by the National Treasury and
- all other types of contract of the municipality for a period beyond 1 January 2007 and with a value of more than one million Rands in total or per annum.<sup>336</sup>

According to the new financial system for local government in South Africa and subject to the provisions of the supreme Constitution, parliament is confirmed as the highest legislature as far as public finance in general is concerned. In this regard, parliament will and has already enacted various pieces of legislation which affect the financial affairs of all three spheres of government. Some of these legislative enact-

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<sup>335</sup> See the MFMA s 177(3).

<sup>336</sup> See the MFMA s 178(1)-(2). Note that the legislation referred to in the second column of the schedule to the MFMA is hereby amended or repealed to the extent indicated in the third column of the schedule. Despite the repeal of s 10G of the LGTA 209 of 1993 by s 179(1) of this section, the provisions contained in ss (6), (6A) and (7) of s 10G remain in force until the legislation envisaged in the Constitution s 229(2)(b) is enacted. The repeal of the Municipal Accountants Act 21 of 1988 takes effect on a date determined by the Minister by notice in the *Gazette*.

ments were put in place before the new constitutional dispensation commenced, and others have recently been finalised by parliament.<sup>337</sup> Many Acts passed by parliament before the new Constitution took effect still affect the financial affairs of local governments today. In many instances, such Acts still compel municipalities to undertake specific functions, with or without financial assistance.<sup>338</sup>

### **18.3.2 Provincial control over municipal financial matters**

Before the former provincial councils were abolished in July 1986, all of them passed various ordinances which, *inter alia*, contained important provisions regarding the financial management and financial affairs of local authorities within their territories.<sup>339</sup> Many of these ordinances have not yet been repealed or replaced and, in accordance with the Constitution, they still remain in force and effect. It is submitted that all legislatures, especially parliament, should take cognisance of the laws that are still in place and should ensure that no duplication or lacunas in the law occur when new laws are promulgated.

### **18.3.3 Financial control by local authorities**

Apart from the control over municipal finance by the two higher spheres of government, each local government has also been afforded significant powers and duties concerning the management and control of its own financial affairs. Arguably the most important local control mechanism is the passing and implementation of municipal by-laws on financial matters. The existence and scope of such by-laws must be passed in each specific case and must be in compliance with the general legal requirements relevant and applicable to the lawful enactment of municipal legislative authority.

## **18.4 General comments on the principles relating to municipal fiscal management**

In view of all the activities and functions of municipalities, it is submitted that municipal fiscal management is a vast and complicated exercise. There are many aspects

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<sup>337</sup> Reference should again be made to the Constitution Sch 6 Item 2, which provides that all legislation which was in force when the new Constitution became effective will continue to be in force until amended or if such legislation is inconsistent with the Constitution.

<sup>338</sup> See, eg, the Health Act 63 of 1977, which compels local authorities to perform specific health services. Refer also to the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>339</sup> See Cloete (1997) 116. The most important ordinances are the Local Authorities Ordinance, 1974 (O 25 of 1974) applicable in the former province of Natal; Local Government Ordinance, 1939 (O 17 of 1939) applicable in the former Transvaal province; Local Government Ordinance, 1962 (O

*continued on next page*

in relation to financial management that must be fulfilled, and the overall financial system consists of a number of distinct and important activities. Some of such activities are summarised briefly below.

#### **18.4.1 *Municipal budgeting***

One of the most important financial activities of each municipal government is the annual preparation of a municipal budget. Before the commencement of the new local government dispensation, the preparation and handling of all municipal budgets were controlled by various provincial ordinances. Although such ordinances are still applicable in the new dispensation, they are subject to the new constitutional requirements and demands of new order national and provincial legislation. In the past a municipal budget had to be prepared for 12 months for all municipalities, but the budget procedures differed from one province to another because of the different legislative provisions. Every municipality should realise that its municipal budget is regarded as the foremost financial statement of the municipality, as it reflects the financial capacity and state of affairs within the municipality. It was general practice in the past for the municipal executive to prepare and submit a municipal budget. In practice the former town clerk in co-operation with the city treasurer prepared draft sections of the budget and then submitted them to a council-in-committee. Only once such a council-in-committee has considered the draft budget is it formally discussed and approved by the council. Such council meeting was usually open to the public.<sup>340</sup> The MFMA now determines and regulates the main aspects of a municipal budget.

#### **18.4.2 *Financial records, auditing and financial management***

It is imperative for all municipalities to keep proper records of all its financial affairs. This was also the position under the former provincial ordinances and is continued under the new local government system. Apart from the financial records, municipalities must also submit their accounts for proper auditing procedures. Previously, auditing had to be undertaken by the Auditor-General or by auditors that were registered in terms of the Public Accountants and Auditors Act.<sup>341</sup> More specific

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8 of 1962) applicable in the Free State and Municipal Ordinance, 1974 (O 29 of 1974), which applied in the Cape Province.

<sup>340</sup> See Cloete (1997) 118. The writer mentions that some of the former ordinances specifically prescribed that the budgets had to be open for inspection by the public. According to the Constitution s 215(1) all budgetary processes must promote transparency.

<sup>341</sup> 80 of 1991.

details regarding the auditing procedures, as well as the duties and responsibilities of auditors of municipal accounts, were contained in the relevant provincial ordinances. Under the new local government system, both parliament and the provincial legislatures are required to enact legislation to deal with municipal financial affairs.<sup>342</sup>

#### **18.4.3 *Municipal expenditure***

It is self evident that all municipalities have enormous expenses in order to fulfil their duties and perform their functions. All municipalities therefore use funds from their revenue accounts to purchase materials and equipment and to employ personnel.<sup>343</sup>

All former provincial ordinances had specific requirements regarding the expenditure of municipalities in each province, which laws must now be read together with both national and provincial laws dealing with such issues.

#### **18.4.4 *Loan funds, stocks and capital goods***

In order to perform their functions, many municipalities are forced to take up certain loans. Often municipalities do not have sufficient income to pay for extensive developments or infrastructure upgrading. In the past the powers of municipalities to negotiate and raise loans were strictly controlled in terms of the provisions of the relevant provincial ordinances.<sup>344</sup> Strict control over loans by municipalities is essential to safeguard the public and future residents of a particular municipal jurisdiction from negative loan-repayment obligations and unpopular service fees increases. Loans can also be negotiated as bank overdrafts or by issuing stocks or debentures. In order to prevent maladministration and ineffective financial control, municipalities are nowadays required to keep and prepare separate budgets for loan funds. This was also the position in the former local government dispensation.<sup>345</sup> It is also a common occurrence that many municipalities have extensive pieces of land at their disposal which land can be sold. One must, however, remember that such land is regarded as public property that belongs to the general public or residents of that municipal area and may thus be disposed of only by the municipality under strict control. In general

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<sup>342</sup> Again one should remember that the Constitution Sch 6 provides for the continuation of 'old order legislation' subject to amendment and consistency with the Constitution.

<sup>343</sup> In general about 30% of revenue is spent on materials and equipment, 35% on salaries and allowances and 25% on interest on loans.

<sup>344</sup> See, eg, the Provincial Ordinances read together with other national legislative enactments such as the Health Act 63 of 1984 and the Housing Act 4 of 1966.

<sup>345</sup> See, eg, the Transvaal Municipal Consolidated Loans Fund Ordinance, O 9 of 1952.

municipalities have the authority to buy, sell or even expropriate land should such expropriation be essential in rendering a municipal/public service.

#### **18.4.5 Municipal credit control and debt collection**

It is of obvious importance, especially for the long-term financial viability of all municipalities, to collect revenues due to them effectively. Such effective collection programmes presupposes that appropriate credit control mechanisms must be established. As a first step, all municipalities must be able to measure the number of services that they must render and bill their consumers accordingly. It is essential that consumers receive regular and accurate bills for the services rendered to them in a format which is easy and clear to understand. Municipalities must also establish mechanisms to enable poor households to apply and qualify for rebates on service charges. Effective measures should be in place, however, to deal with those households or consumers who can afford to pay for services but neglect to do so timeously. It is of fundamental importance that municipalities retain the authority to discontinue certain services to consumers who do not fulfil their responsibilities to their relevant municipalities. Strict credit control measures are thus essential for municipalities to maintain effective and equitable financial management practices. It is this writer's submission that the new legal order adequately addresses such requirements.

Under the new local government legal system, various legislative provisions have been enacted in order to ensure effective credit control and debt collection measures. According to the Local Government: Municipal Systems Act,<sup>346</sup> various requirements have been laid down to enhance effective credit control and municipal debt collection. The measures are briefly discussed below.

##### **18.4.5.1 Customer care and management**

Municipalities are obligated within their financial and administrative capacities and in relation to the levying of rates and other taxes and the charging of fees for municipal services to establish, provide and ensure specific aspects. These aspects are:<sup>347</sup>

- (a) establish a sound customer management system that aims to create a positive and reciprocal relationship between persons liable for these payments and the municipality, and where applicable, a service provider;

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<sup>346</sup> 32 of 2000.

<sup>347</sup> See the Systems Act s 95(a)-(i).

- (b) establish mechanisms for users of services and ratepayers to give feedback to the municipality or other service provider regarding the quality of the services and the performance of the service provider;
- (c) take reasonable steps to ensure that users of services are informed of the costs involved in service provision, the reasons for the payment of service fees, and the manner in which monies raised from the service are utilised;
- (d) where the consumption of services has to be measured, take reasonable steps to ensure that the consumption by individual users of services is measured through accurate and verifiable metering systems;
- (e) ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due;
- (f) provide accessible mechanisms for those persons to query or verify accounts and metered consumption, and appeal procedures which allow such persons to receive prompt redress for inaccurate accounts;
- (g) provide accessible mechanisms for dealing with complaints from such persons, together with prompt replies and corrective action by the municipality;
- (h) provide mechanisms to monitor the response time and efficiency in complying with paragraph (g); and
- (i) provide accessible pay points and other mechanisms for settling accounts or for making pre-payments for services.

It is clear from these requirements that the legislator intended that all municipalities create a financial system that is directed at effective and sufficient service provision but which also provides for customer care and public involvement in respect of municipal rates, taxes and service charges.

#### **18.4.5.2 Debt collection and credit control policy**

Without a system in place which can ensure effective debt collection, all municipalities will encounter financial restraints in varying degrees. In light of the fact that municipal income is dependent largely on regular and up-to-date payment for services rendered, every municipality must provide and enforce proper debt collection procedures. According to the new legislative framework, all municipalities must collect all money that is due and payable to them. This obligation is subject to the provisions of applicable legislation. Furthermore, all municipalities, for the purpose of debt collection, must adopt, maintain and implement a credit-control and debt-collection policy which is consistent with their rates and tariffs policies and which complies with the



provisions of the Municipal Systems Act.<sup>348</sup> There is thus a clear and direct responsibility on municipalities to collect debt and to do so in a clear and informative manner. It is further also provided that the contents of a credit control and debt collection policy must provide for various issues.<sup>349</sup> The policy must include at least the following:

- (a) credit control procedures and mechanisms;
- (b) debt collection procedures and mechanisms;
- (c) provision for indigent debtors that is consistent with its rates and tariff policies and any national policy on indigents;
- (d) realistic targets consistent with-
  - (i) general recognised accounting practices and collection ratios; and
  - (ii) the estimates of income set in the budget less an acceptable provision for bad debts;
- (e) interest on arrears, where appropriate;
- (f) extensions of time for payment of accounts;
- (g) termination of services or the restriction of the provision of services when payments are in arrears;
- (h) matters relating to unauthorised consumption of services, theft and damages; and
- (i) any other matters that may be prescribed by regulation in terms of section 104 of the Systems Act.

Apart from the minimum requirements mentioned above, it is important to note that the policy may differentiate between different categories of ratepayer, user of services, debtor, tax, service, service standard and other matter, as long as the differentiation does not amount to unfair discrimination. It seems that the intention is to give municipalities a broad discretion to differentiate between different municipal debtors. In this respect, emphasis should again be placed on the provisions of the Constitution, which in section 9 of the Bill of Rights outlaws unfair discrimination. Where municipalities thus differentiate between municipal debtors, such differentiation must

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<sup>348</sup> See the Systems Act s 96(a)-(b).

<sup>349</sup> Refer to the Systems Act s 97.

be lawful under the Constitution and may not amount to unfair discrimination.<sup>350</sup> To ensure the effective application and enforcement of a municipal credit control and debt collection policy, municipalities are obligated to adopt by-laws to give effect to such policies.<sup>351</sup> Again provision is made that such by-laws may differentiate between categories of municipal debtor, as long as such differentiation does not amount to unfair discrimination. It is submitted that an evaluation of a policy, whether it amounts to unfair discrimination or not, requires an objective assessment of the relevant circumstances of each case.<sup>352</sup>

#### 18.4.5.3 Supervisory and implementing authority

According to the new legislative framework, specific provision is made for the supervisory and implementing authority of a municipality's credit control and debt collection policy and by-laws. The Systems Act specifically determines that a municipality's executive committee or executive mayor, or if there is no executive committee or executive mayor, then the municipal council itself or a committee appointed by the council, is designated as the supervisory authority and must oversee and monitor the implementation and enforcement of the municipality's credit control and debt collec-

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<sup>350</sup> See the Systems Act s 97(2), read together with the Constitution s 9. Many precedents have also been established in dealing with aspects concerning whether or not particular differentiation practices amounted to unconstitutional conduct.

<sup>351</sup> See the Systems Act s 98(1) and (2).

<sup>352</sup> Debt collection has always been a contentious issue and has often been the focus of legal disputes. Various cases concerning issues of municipal debt collection were reported in recent years. In *Cape Town Transitional Metropolitan Substructure v ILCO Homes Ltd* 1996 (3) SA 492 (C) the court was faced with legal proceedings in terms of the Municipal Ordinance 20 of 1974 (C) s 93(1) for the recovery of rates. The section required authorisation by the Administrator or Premier of the province to institute legal proceedings after the expiration of a period of 12 months from the date upon which the rates became due and payable. It was held that such authorisation could be given before or after the expiration date. Authorisation could further be given after the institution of legal proceedings and could thus be ratified. In *Midrand/Rabie Ridge/Ivory Park Metro Substructure v Lanmer (Pty) Ltd* 2001 (2) SA 516 (T) the court was faced with the issue concerning the recovery of interest on outstanding rates. With reference to debt due to a local authority, the Local Government Ordinance 17 of 1939 (T) provided that a local authority could recover interest at a rate not more than the rate determined by the Local Authorities Loans Fund Board in terms of the Local Authorities Loans Fund Act 67 of 1984 s 11(2)(b). The board determined such maximum interest to be equal to the prime rate charged by the commercial banking industry at the time. The court concluded that such a determination of the interest rate was not vague and required only an investigation into the prime rate applicable at the time. See also *Eastern Metropolitan Substructure v Peter Klein Investments* 2001 (4) SA 661 (W). The case concerned the Local Government Ordinance 17 of 1939 (T) s 49, which permitted the recovery of moneys due for sanitary services from both the owner and occupier jointly and severally of the applicable premises. Refer also to *De Beer NO v North-Central Local Council ETC* 2002 (1) SA 429 (CC). The case concerned the Durban Extended Powers Consolidated Ordinance 18 of 1976 (N) s 105. According to the ordinance, a municipal council had to send out three notices to a delinquent ratepayer before it could institute court proceedings against him/her. The court confirmed *inter alia* that municipal money had to be raised as

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tion policy and related by-laws. The designated supervisory authority is also obligated to oversee and monitor the performance of the municipal manager in implementing the policy and applicable by-laws.<sup>353</sup> The supervisory authority must also, when necessary, evaluate or review the policy and by-laws or the implementation thereof in order to improve the efficiency of its credit-control and debt-collection mechanisms, processes and procedures. Regular reports to the municipal council in respect of the policy are also required.<sup>354</sup> In contrast with the supervisory authority, it is required that the municipal manager or particular service provider, if applicable, must implement and enforce the municipality's credit-control and debt-collection policy and by-laws; must establish effective administrative mechanisms, processes and procedures to collect money that is due and payable to the municipality and must also report to the supervisory authority at such intervals as may be determined by the municipal council.<sup>355</sup>

#### **18.4.5.4 Additional powers of municipalities in respect of their credit control and debt collection procedures**

The Systems Act states that at all reasonable hours the occupier of a premises in a municipality must give an authorised representative of that municipality or of a service provider access to the premises in order to read, inspect, install or repair any meter or service connection for the reticulation of a service or to disconnect, stop or restrict the provision of any service.<sup>356</sup> Municipalities are furthermore allowed to consolidate any separate accounts of persons liable for payments to the municipality, to credit a payment by a person against any account of that person and to implement any of the debt-collection and credit-control measures in relation to any arrears on any of the accounts of such a person.<sup>357</sup> If a person that is liable to the municipality for the payment of rates, taxes or fees consents to it, a municipality may enter into an agreement with that person's employer to deduct from his or her salary or wages:

- any outstanding amounts due to the municipality or

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speedily as possible because it was used by the council to fulfil its constitutional obligations in relation to the delivery of services.

<sup>353</sup> See the Systems Act s 99(a)(i)-(ii).

<sup>354</sup> Refer to the Systems Act s 99(b)-(c).

<sup>355</sup> See the Systems Act s 100(a)-(c).

<sup>356</sup> See the Systems Act s 101.

<sup>357</sup> See the Systems Act s 102(1)(a)-(c). It should be noted that the provisions of the subsection do not apply to cases where there is a dispute between the municipality and the debtor concerning any specific amount claimed by the municipality from that person. S 102(2).

- such monthly amounts/instalments as may be agreed between the parties.

The effect of such an agreement can be regarded as a so-called “emolument attachment order”.<sup>358</sup> Municipalities may also provide for special incentives for employers to enter into such agreements and for employees to consent to such agreement.<sup>359</sup> It is submitted that such incentives could contribute significantly to the collecting of bad debt, which so many municipalities are facing in South Africa. The aim of such incentives is to collect *some* bad debt rather than nothing at all.

#### **18.4.5.5 Regulations and guidelines in respect of credit control and debt collection provisions**

In respect of credit control and debt collection measures, the minister responsible for local government may make regulations or issue guidelines to provide for or to regulate various matters. The matters are the following:<sup>360</sup>

- (a) the particulars that must be contained in the municipal manager’s report in terms of section 100(c);
- (b) the identification of municipal services provided by the municipality or other service providers to users of services where the use of the service by the user can reasonably be determined, measured or estimated per quantity used or per frequency of such use;
- (c) the determination, measurement or estimate of the use by each user of each service so identified;
- (d) user agreements, and deposits and bank guarantees for the provision of municipal services;
- (e) the rendering of accounts to ratepayers and users and the particulars to be contained in the accounts;
- (f) the action that may be taken by municipalities and service providers to secure payment of accounts that are in arrear, including –
  - (i) the termination of municipal services or the restriction of the provision of services;
  - (ii) the seizure of property;
  - (iii) the attachment of rent payable on a property; and

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<sup>358</sup> See the Systems Act s 103(a)(i)-(iii).

<sup>359</sup> Refer to the Systems Act s 103(b)(i)-(iii).

<sup>360</sup> Read the Systems Act s 104(1)(a)-(n).

- (iv) the extension of liability to a director, a trustee or a member if the debtor is a company, a trust or a close corporation;
- (g) appeals against the accuracy of accounts for municipal taxes or services;
- (h) the manner in and time within which such appeals must be lodged and determined and the consequences of successful and unsuccessful appeals;
- (i) extensions for the payment of arrears and interest payable in respect of such arrears;
- (j) service connections and disconnections, and the resumption of discontinued services;
- (k) the combating of unauthorised consumption, connection and reconnection and theft of municipal services;
- (l) the development and implementation of an indigent policy;
- (m) the tampering with or theft of meters, service supply equipment and reticulation network and any other fraudulent activity in connection with the provision of municipal services; and
- (n) any other matter that may facilitate –
  - (i) effective and efficient systems of credit control and debt collection by municipalities; or
  - (ii) the application of this chapter.

When the minister makes regulations or issues guidelines, he or she must take into account the capacity of municipalities to comply with such regulations or guidelines and must differentiate between different kinds of municipality according to their respective capacities.<sup>361</sup>

### **18.5 Important revenue sources of local governments**

The success of the new local government system is dependent largely on the availability of resources and, more so, financial resources. Without appropriate financial capacity, most municipalities will not be able to provide or sustain essential services to their respective communities. Municipal revenue sources are therefore just as important as proper financial management and control. Within the new local government system, municipalities have been afforded various ways of ensuring and enhancing local revenue sources. On the issue of municipal revenue sources, it is

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<sup>361</sup> See the Systems Act s 104(2)(a)-(b).

important to distinguish between so-called *own revenue sources* and *outside sources*. Own sources refer to sources of income that a municipality can or must create for itself. Outside sources again refer to revenue that is not directly generated by the municipality itself but falls under examples such as grants from provincial or national governments to local governments.

One of a municipality's most important revenue sources is the *power of taxation*. The power to tax is regarded as an essential prerequisite to ensuring a system of sustainable and accountable local government. According to the White Paper on local government, there are four areas of local decision-making that are important to municipal taxation. These areas are:

- the choice of tax to be imposed
- the definition of the tax base
- the choice of the tax rate and
- the administration of the tax system.<sup>362</sup>

It is also important for municipalities to have freedom and be able to vary their tax rates. Such a situation will not only strengthen local accountability but will also enable communities to challenge municipalities about the value-for-money of the services that they provide. Any *local tax policy* should be seen within the framework of the total tax system of a country, however, and not in isolation. There is a strong need for a coherent and transparent tax system in general. A particular taxation policy should always take into account any adverse or negative consequences which such a system could have on the productiveness of the economy of the region and/or country as a whole. It was thus envisaged that the new legal dispensation with regard to local government matters would specifically incorporate such important aspects within national legislation. Such a national legislative framework would then ensure uniform standards and practices between the various different types of municipality across the country.

### **18.5.1 Property taxation**

Arguably the most important source of local taxation is so-called "property tax" (rates). This type of taxation requires owners of property located within a municipal area to pay a tax to the municipality based on a valuation of their property. The term

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<sup>362</sup> See the White Paper on Local Government (1998) at 133.

*property tax* is generally used to refer to all taxes relating to immovable property (land).<sup>363</sup> The main reasons property tax is regarded as a very suitable local tax are:

- it is easy to collect
- it produces a predictable and stable income
- it is fixed in location and
- it is impossible to conceal.<sup>364</sup>

Property tax is directed mainly at financing municipal service provision, and it is therefore an important source of so-called “discretionary own-revenue” for local governments that enables municipalities to function effectively.

Historically, property rating in South Africa has been done differently in the various provinces. Each of the former four provinces had its own legislation in this regard. Such provincial legislative requirements were never properly co-ordinated, although the legal requirements were very similar in each province. For various reasons the old property rates/tax system was inadequate and ineffective. Such is the importance of municipal property taxation that the Constitution specifically addresses it. According to section 229(2) of the Constitution, all municipalities have the power to impose rates on property. Such a system may be regulated by national legislation, however.<sup>365</sup> Since property taxation was conducted under the former provincial ordinances regulating such property rating and taxation, such enactments stay in force until such time as they are replaced by national legislation. From the outset of the restructuring of the entire local government dispensation, it was envisaged that the old system relevant to municipal property taxation also had to be overhauled.

According to the White Paper on Local Government, national government had to address four main issues with regard to property taxes. These issues can be summarised as follows:

- *To bring untaxed areas into the tax net* Many former black areas are outside the property tax net and effective measures to integrate them must be implemented.

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<sup>363</sup> From an international perspective, property tax is regarded as the single most important tax at local government level, especially in developing countries. The more developed a country becomes, the less dependent it becomes on property taxes as a source of local revenue.

<sup>364</sup> See Franzen RCD “Property tax: Alive and well and Levied in SA” (1996) 8 *SA Merc LJ* at 351.

<sup>365</sup> See the Constitution s 229(2)(b).



- *To establish a uniform property valuation and tax system* An optimal valuation system should be established. The White Paper has identified various possible rating systems.<sup>366</sup>
- *To determine valuation periods* Properties should be valued regularly.
- *To determine relief or partial exemption for the poorest people who genuinely cannot afford such taxes* Any rebates or grants-in-aid should be clearly indicated in the budget of a municipality.

It has also been argued that local governments should have some latitude in decisions apart from those mentioned above with regard to aspects of property taxes in their area, in order to reflect their own unique circumstances and local economic objectives.

### **18.5.2 The valuation of property**

It was mentioned above that the new constitutional scheme entrenches the fact that municipalities are allowed to impose rates on property. Property rates can be levied only on the basis of some or other form of property valuation, however. Although the Constitution is silent on the issue of property valuations, such aspects are normally set out in national legislation.<sup>367</sup> It is also obvious that apart from the requirements set out in national legislation, any valuation of property must be done within the parameters of South Africa's supreme constitution. Any valuation or recovery of rates on property contrary to the provisions of the Constitution are invalid.<sup>368</sup> In the past valuation had to be done by qualified and registered valuers.<sup>369</sup>

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<sup>366</sup> See the White Paper on Local Government (1998) at 135. The systems include *site rating*, or the valuation of land only, the *combined rating* of land and buildings, and *differential or composite rating*, where both land and buildings are rated together but at different rate levels, and where the rate levied on land is higher than that on improvements. A rating system where a uniform rate is used for areas which were not previously rated, irrespective of the value of the property. (This is often called 'flat-rating' in South Africa). The rate is usually lower than the actual value of the property.

<sup>367</sup> The LGTA s 10G(6), eg, required local councils, metro councils and rural councils to ensure that properties within their areas of jurisdiction had to be valued at intervals prescribed by law and that a single valuation roll had to be compiled and had to be open for public inspection.

<sup>368</sup> See, eg, the case of *Lotus River Etc Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C). The court held that increases in rates under the LGTA s 10G(6) and Property Valuation Ordinance 29 of 1944 (C) may not be in limitation of constitutional rights such as the right to equality unless such limitation is permitted under the limitation clause s 36. However, the court mentioned that its role is not to second-guess the legislature but to assess the lawfulness of any limitation. The court was also aware that municipalities inherited several valuation rolls with differing base dates as a result of the restructuring of local government. The court concluded that the uniform rates increase was carefully considered and was adopted only as an interim measure, thereby justifying the limitation.

<sup>369</sup> See, eg, the Valuers Act 23 of 1982.

### **18.5.3 The basis of property valuations**

There are many important aspects that influence the actual basis upon which property valuations are determined. From the outset it is important to distinguish between valuations on land and valuations on buildings. In all the former provincial ordinances the intention was that the value of land should be the amount which the land would have realised had a willing buyer and seller agreed on a free and voluntary sale. This seems to refer to market value. The value of buildings, on the other hand, was determined as the cost of erection at the time of valuation less depreciation. Another option was to value the land/property inclusive of all the improvements and then to subtract one value from the other.<sup>370</sup> In the past, when reference was made to valuation in legislation it usually referred to immovable property (land) and improvements on the land. It was thus often important to determine whether an object on land was fixed to the land permanently or not.<sup>371</sup> Generally speaking the determination of land values is usually done by reference to sale prices of similar land in a particular area, while the estimation of building replacement or erection/building costs can be calculated according to a standard rate per square meter.

Prior to the new local government dispensation, it was a general rule that valuations had to be done every four to five years. If the time gap was too large, then the valuations would no longer relate to the market value, and distortions would appear in the tax base. Furthermore, all former provincial ordinances have prescribed a basic format for a valuation roll in each municipal area. There were also specific requirements regarding valuations courts or boards and the procedures for making a valuation roll.<sup>372</sup>

### **18.5.4 The levying of municipal property rates**

Today it is a constitutional fact that municipalities have the right to levy property rates.<sup>373</sup> Prior to the new legal system, all former provincial ordinances provided for

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<sup>370</sup> See Craythorne (1997) 351.

<sup>371</sup> See, eg, the case of *Standard-Vacuum Refinery of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A).

<sup>372</sup> See Craythorne (1997) 352-354. See also the cases of *Crawford and Others v Borough of Eshove and Another* 1956 (1) SA 147 (N) and *Helderberg Butcheries v Municipal Valuation Court, Somerset West* 1977 (4) SA 99 (C).

<sup>373</sup> See the Constitution s 229. See also *Msunduzi Municipality v MEC for Housing, KZN* 2004 (6) SA 1 (SCA).

the levying of property rates.<sup>374</sup> The levying of property rates was also allowed under the LGTA.<sup>375</sup>

Under the legal system prior to the new constitutional dispensation, various methods of rating existed. Three broad rating methods were generally known. The first method was the so-called “site rating” method. According to this method a rate was levied only on the rateable valuation of the particular land. This method encouraged the development of vacant land or the continuous development of occupied land to its fullest potential. To a great extent speculation in land was minimised, although the method produced less income than others. A second method used was the so-called “flat rating” method. Such a method requires that both land and buildings be rated together. It was a very productive method, as it brought in more revenue. This particular method required more detailed administration, however, and it often discouraged the improvement of property. The third method of rating was known as the “differential” (composite) rating method. This method entailed rating both land and buildings, but at different rates: land was levied at a higher rate than improvements on the land.<sup>376</sup> Within a particular rating system, all the prior provincial ordinances

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<sup>374</sup> Various rates such as general rates, town rates, health rates, water rates, sewerage rates, special rates, sanitary rates and local rates were applicable. See Craythorne (1997) 354-355. See also the cases of *Weenen TLC v Van Dyk* 2000 (3) SA 435 (N), which required that rates and taxes had to be properly promulgated before their introduction. In *Midrand/Rabie Ridge/Ivory Park Metropolitan Substructure v Strydom and Others* 2001 (1) SA 98 (SCA) the case concerned the levying of a rate on property only once a year in terms of the Ordinance on Property Tax 11 of 1977 (T). The court held that under the ordinance a general property tax on property based on the site value was authorised only once a year and the taxpayer was entitled to be informed in advance of such taxes. It should be noted that if the required legal procedure to impose rates or taxes was not followed, then such rates are not eligible. Read *Weenen TLC v Van Dyk* 2002 (4) SA 653 (SCA).

<sup>375</sup> According to the Act s 10G(7)(b) a municipality could even differentiate between different categories of property on such grounds as it deemed reasonable. It is important to note, however, that any differentiation could not amount to unfair discrimination. This would be contrary to the Constitution and thus invalid. For more on this position see *PE Municipality v Prut NO* 1996 (3) SA 533 (SE) and also *Beukes v Krugersdorp Transitional Local Council and Another* 1996 (3) SA 467 (W). The interim Constitution s 178(2) required that municipal rates and taxes had to be levied according to a uniform structure. See also *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374 (CC). Note the case of *Robertson v City of Cape Town/Truman-Baker v City of Cape Town* 2004 (5) SA 412 (CPD). The applicants in the case were dissatisfied with the increase of rates levied on their properties, which were levied on the basis of property valuations contained in a provisional valuation roll. The municipality relied on both the Property Valuation Ordinance 1993 (C) and ss 93(7)-(10) of the Structures Act as amended. The court held *inter alia* that the municipality did not fall within the definition of local authority in s 1 of the Ordinance and could therefore not exercise a power to levy rates on the basis of a provisional valuation roll. The court also held that the amendments to the Structures Act violated ss 154(2) and 229(5) of the Constitution and were unconstitutional and invalid. Refer to para 154 at 459-460.

<sup>376</sup> See Craythorne (1997) 355-356. The writer points out that the site-rating method seems to be the least popular in South Africa and that the flat rating method is used mostly in western countries.

provided for the exemption of certain property from the payment of rates. Exemptions commonly included land that was used for agricultural purposes, education (schools) and religious practices (church buildings).<sup>377</sup>

Under the LGTA,<sup>378</sup> councils were authorised to levy and recover property rates in respect of immovable property within their respective jurisdictions. Specific legal requirements were laid down which had to be followed. The LGTA was only a transitional piece of legislation and would be substituted by a uniform national Act once the restructuring process came to a close. This national Act was finally enacted in 2004, and parts of the Act commenced at such time. The new legal system regulating municipal property taxation is significantly different from the old systems that were applicable under the former four provincial ordinances.

#### **18.5.5 Some important aspects concerning municipal property assessment and taxation**

The adoption and finalisation of new legislative provisions regarding the levying and recovery of property taxes in South Africa was preceded by a strong public outcry about new proposals and suggestions. Many people have called new property taxation proposals a “hidden wealth tax” aimed at over-taxing the already heavily taxed average taxpayer.<sup>379</sup> Other commentators have expressed the view that without a complete overhaul of the property taxation system in South Africa, local governments will not be able to fulfil their constitutional mandates, however.<sup>380</sup> Therefore, the aim of a new system for property taxation is to do away with the previously ambiguous situation of having various property rating systems in the country and to replace them with a uniform system applicable equally throughout the territory of the state.<sup>381</sup>

##### **18.5.5.1 A brief history of property taxation in South Africa**

It is reported that the first land-related tax was introduced into South Africa in 1677. The Cape Ordinance of 1836 introduced the first formal property tax in the Cape

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<sup>377</sup> See, eg, *Mosowitz v Johannesburg City Council* 1957 (4) SA 569 (T); *PE Municipality v Marist Brothers* 1948 (1) SA 637 (E); *De Aar Divisional Council v Convent of the Holy Cross* 1952 (1) SA 495 (C) and *St John's Diocese v Umtata Municipality* 1968 (3) SA 55 (E).

<sup>378</sup> S 10G(7).

<sup>379</sup> Refer to Ratiba MM “The Good, the bad or the ugly? Comments on the property rates bill” (2000) *DR* October at 27-29.

<sup>380</sup> See Franzsen RCD “Property tax: Alive and well and levied in South Africa” (1996) 8 *SA Merc LJ* at 348 *et seq.*

<sup>381</sup> The dual local government system of pre 1994 has created various fiscal disparities between municipalities. White local authorities were financially strong because of fiscal autonomy, which in-

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Province, however, and by the end of the 19<sup>th</sup> century, such a system of taxation, based on capital values, was in place throughout the territories.<sup>382</sup> Property tax was levied on the owner of land, irrespective of whether such land was zoned for residential, commercial or industrial purposes, and the tax could be levied on either the value of the land (site rating), the value of the land and improvements (composite rating) or on a uniform or flat rating system. Land was valued at market value, and all provincial valuation rolls had to include minimum information such as identification of the owner of land, the size and description of land as well as the value of the land together with improvements. It was also possible for land owners to appeal decisions of property valuation to a specific tribunal. Finally, the old system also provided for effective measures to recover outstanding levies. Properties could be sold via public auction, and the Registrar of Deeds was prohibited from transferring property from one owner to another unless a clearance certificate had been obtained from the relevant local authority and submitted to the Registrar.<sup>383</sup> It will become clear that many of the old provisions have been incorporated into the new property rates legislative framework.

#### **18.5.5.2 Reasons for changing the old property rates systems**

There are various reasons for the former legal system of levying and collecting property rates and taxes' having to be overhauled. The following examples are a brief summary of such reasons:

- The entire social and legal framework of local government *per se* has changed. Property taxation now operates within a new supreme constitutional framework. Apart from the structural requirements of the Constitution, the Bill of Rights also determines various substantive compliance.<sup>384</sup> In light of the new constitutional requirements, all local government structures were amalgamated which, in turn, required amendments to the former provincial tax legislation.

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cluded trading account surpluses on water and electricity and property taxes. Black local authorities did not have such income sources and thus had poor financial capabilities.

<sup>382</sup> See Franzsen *supra* fn 380 at 352-353.

<sup>383</sup> The clearance certificate had to verify that all rates and taxes on the property in question was paid in full. This provision provided a significant safeguard for local authorities that property taxes would not be lost when a property was sold.

<sup>384</sup> See, eg, the Bill of Rights s 9. Different tax regimes often militate against individual rights and values. Tax payers must be treated equally. Equality does not imply exactly the same tax liability, however, but rather equal tax for equal value. A proper division of the tax burden among tax or ratepayers is required. Vertically taxpayers must be treated in a similar way to other taxpayers simi-

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- According to the newly established municipal structures, the tax base of many municipalities was extended to areas outside of the boundaries of urban municipalities. Such areas include farmland, state-owned land and also tribal land, on which rates had never before been levied. Provision had to be made to incorporate such areas within the taxation legislation.<sup>385</sup>
- The former system of property taxation was fragmented and ineffective. No uniform system was in place, as property rates and taxes were levied and collected in terms of four different provincial ordinances. Such different rating systems caused financial differences between municipalities which, in turn, created a stumbling block for the implementation of a constitutionally sanctioned fiscal system.
- The two-tier model of local government outside metropolitan areas requires a division of fiscal powers between local municipalities and district municipalities.
- The taxation of so-called “public infrastructure” had to be addressed in new legislation. Previously, public infrastructure such as railways and power stations was exempted from paying property taxes. Such income sources had to be brought into the tax system.<sup>386</sup>
- It was also time to re-evaluate aspects such as the exclusion of certain properties from rates and taxes and the former system of rate-capping for certain property owners, since rates and taxes are an extremely important source of municipal revenue and such exclusion and capping could have significant financial implications for an municipality.<sup>387</sup>
- Different rates for different properties had to be reconsidered. The categories of property and the rates applicable to such properties was in need of re-evaluation. On this point it is reported that there seems to be a trend internationally to levy business property more highly than residential property.<sup>388</sup> Uncontrolled differen-

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larly situated. See Franzsen *supra* fn 380 at 355. Refer also to Franzsen RCD “The present status of property tax in SA” (1999) 4 *Journal of Property Tax Assessment and Administration* at 3-13.

<sup>385</sup> For more on such aspects see Franzsen RCD “Some questions about the introduction of a land tax in rural areas” (1999) 11 *SA Merc LJ* at 259 *et seq.*

<sup>386</sup> It is reported that international practices show that public entities should be rated on at least their operational land. See Franzsen RCD and McCluskey WJ “Some policy issues regarding the Local Government: Property Rates Bill” (2000) 12 *SA Merc LJ* at 213.

<sup>387</sup> Rate-capping refers to a maximum limit that is set on the amount of a particular rate. Rate-capping has been implemented mainly to protect ratepayers against unreasonable rates and taxes.

<sup>388</sup> Refer to McCluskey WJ (ed) “Property tax: An international comparative review” (1999) at 305-307.



tiation between rates for different properties can lead to taxation competition between municipalities, however. Special care should be taken in such instances since the Constitution prohibits the exercise of a rating power that materially and unreasonably prejudices national economic policies and activities.<sup>389</sup> Most businesses are not as concerned about higher rates or taxes, however, since they usually pass such costs on to their consumers or employees.<sup>390</sup>

- Exemptions from property taxes or the possible deduction from income tax of property taxes had to be re-evaluated. Property tax was traditionally allowed as a deduction from income tax when the tax was incurred for the purposes of trade or the production of income. This position has shifted the property tax burden to the national sphere of government. Since property taxes are also extended to rural areas, including commercial farming properties, the South African Revenue Service will have to calculate carefully the taxes that will be lost if property taxes are still income tax deductible.<sup>391</sup>

In light of *inter alia* the abovementioned factors, it became necessary to amend and re-evaluate the system of property taxation in South Africa. It should also be pointed out that the enforcement of property tax also influences and interacts with the land use policies of a state. The sustainability of property taxes depends strongly on stable property values. Such values in turn depend on multiple market factors such as the state of the economy, political policies and programmes and investment initiatives.<sup>392</sup>

Furthermore, property rates are also influenced by the maintenance of up-to-date valuation rolls, regular assessment, billing and rates collection, accountability and transparency and a consumer acceptance of value for money. In South Africa in particular, the issue/culture of payment for services has often been somewhat contentious. Payment was used pre 1994 to force political change, but post 1994 such payment is required to ensure municipal development and the sustainability of ser

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<sup>389</sup> See the Constitution s 229(2).

<sup>390</sup> See Franzsen and McCluskey *supra* fn 386 at 215.

<sup>391</sup> The question of whether property tax should be income-tax deductible or not is a policy consideration for the national government and does not directly need incorporation in the property rates legislation. Deductions will be provided in the Income Tax laws.

<sup>392</sup> It is generally accepted that factors such as land invasions, land reform and settlement programmes, as well as land claims could significantly influence property values and therefore also property rates and taxes. See Franzsen *supra* fn 385 at 358.



vices. There is a general need to build tax morality in local communities which is aimed at ensuring payment for services rendered.<sup>393</sup> Tax morality will be improved only if taxes are fair and acceptable. Before the amalgamation of local authorities under the new legal system, property taxes were regarded as fair and not too burdensome.<sup>394</sup>

It is thus very important that property rates and taxes be carefully researched and evaluated holistically within the broader tax system. The importance of public participation and educational programmes regarding property taxation in general can therefore not be overemphasised.

### **18.5.6 Introduction to the new Municipal Property Rates Act**

The Municipal Property Rates Act (MPRA)<sup>395</sup> was assented to by the president on the 11<sup>th</sup> of May 2004. The main aims of the Act are:

- to regulate the power of a municipality to impose rates on property
- to exclude certain properties from rating in the national interest
- to make provision for municipalities to implement a transparent and fair system of exemptions, reductions and rebates through municipal rating policies
- to make provision for fair and equitable valuation methods of property
- to make provision for objections and appeals processes and
- to amend certain legislation and to provide for matters connected with the Act.<sup>396</sup>

According to the preamble of the Act, it is confirmed that the Constitution entitles municipalities to impose rates on property in their areas, subject to regulation in terms of national legislation. Furthermore, municipalities must be developmentally

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<sup>393</sup> During 1995, national government launched the so-called Operation Masakhane campaign, with the specific aim of enhancing a culture of payment for services. Despite some success, non-payment is still very high. Three main reasons for non-payment have been identified: in the first place many residents are so poor that they do not have the ability to pay for services; secondly, many areas lack proper infrastructure and service delivery is not up to standard and, thirdly, some local residents have unrealistically high and immediate expectations regarding service delivery.

<sup>394</sup> See Franzsen *supra* fn 382 at 352-361. The writer mentions the following reasons for property taxes' being accepted under the former property taxation dispensation: (a) relatively low rates and substantial rebates for residential property owners; (b) relatively low rates and income tax deductibility for commercial property owners; (c) conservative assessed values (generally below fair market value) and well-structured objection and appeal procedures; (d) payment by way of monthly instalments, often in combination with the rest of the municipal bill (electricity and water), which rendered property tax relatively invisible; (e) a general preoccupation with high-profile taxes such as income and value-added tax; and (f) property tax fared well as a perceived benefit tax – services of a high standard were received in return for taxes paid.

<sup>395</sup> 6 of 2004, hereafter referred to as MPRA.

<sup>396</sup> Refer to the long title of the Act.

orientated, and must address service delivery priorities and promote economic and financial municipal viability. Local government needs a sufficient and buoyant source of revenue, and property rates have been identified as a critical source of revenue for municipalities to achieve their constitutional objectives. In light of the fact that the Constitution confers on parliament the power to regulate the exercise by municipalities of their fiscal powers and in order to ensure uniformity and simplicity in property rates collection, the Act has been enacted.<sup>397</sup> The Act has been divided into nine chapters and will be discussed briefly below.

#### **18.5.6.1 Issues concerning the rating of property**

According to the Act, only a metropolitan or local municipality may levy a rate on property in its area. In general, a district municipality may levy a rate on property only if it is in a district management area.<sup>398</sup> The power of a municipality to levy a rate on property is subject to three main prerequisites. Such power must be exercised subject to:

- section 229 of the Constitution and other constitutional provisions
- to the MPRA itself and
- to the rates policy which each municipality must adopt when levying property rates.<sup>399</sup>

#### **18.5.6.2 A municipal rates policy**

The council of a municipality must adopt a rates policy consistent with the MPRA with regard to the levying of rates on rateable property in the municipality.<sup>400</sup> Such a rates policy will take effect on the effective date of the first valuation roll prepared by the municipality in terms of the Act and must accompany the municipality's budget for the financial year concerned, when the budget is tabled in the municipal coun-

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<sup>397</sup> See the preamble of the Act.

<sup>398</sup> See the Act s 2(10) and (2)(a). It should be clear from this wording that all property in SA is subject to a possible property tax unless specifically exempted. One must remember that the whole territory of SA has been demarcated under one form or another of local government. The reference to the area of a municipality also includes a district management area. Refer to the Act s 2(b).

<sup>399</sup> See the Act s (3)(a)-(c). Note that according to the MPRA (a) as a corporate entity, "municipality" means a municipality described in the Municipal Systems Act s 2 and (b) as a geographical area "municipality" means a municipal area demarcated in terms of the Local Government: Municipal Demarcation Act 27 of 1998. See s 1 definitions.

<sup>400</sup> Rateable property means property on which a municipality may in terms of s 2 levy a rate, excluding property fully excluded from the levying of rates in terms of the MPRA s 17. Refer to s 1 definitions.

cil.<sup>401</sup> The MPRA further requires that every rates policy must incorporate the following:<sup>402</sup>

- Treat persons liable for rates equitably.
- Determine the criteria to be applied by the municipality if it levies different rates for different categories of property, if it exempts specific owners from payment of rates, if it grants specific owners of properties a rebate or a reduction in the payable rate or if it increases rates.<sup>403</sup>
- Determine or provide criteria for the determination of categories of property for the purpose of levying different rates and categories of owner of properties or categories of properties for the purpose of granting exemptions, rebates and reductions.
- Determine how the municipality's powers in terms of section 9(1) of the MPRA must be exercised in relation to properties used for multiple purposes.
- Identify and quantify in terms of costs to the municipality and any benefit to the local community any exemptions, rebates and reductions, any exclusions referred to in section 17(1)(a), (e), (g), (h) and (i) of the Act and also rates on properties that must be phased in in terms of section 21.<sup>404</sup>
- Take into account the effect of rates on the poor and include appropriate measures to alleviate the rates burden on them.
- Take into account the effect of rates on organisations conducting specified public benefit activities and registered in terms of the Income Tax Act<sup>405</sup> for tax reductions and which own property in the area.
- Take into account the effect of rates on public service infrastructure.<sup>406</sup>

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<sup>401</sup> See the Act s (2), read with the Municipal Finance Management Act 56 of 2003 s 16(2), which regulates *inter alia* aspects concerning municipal budgets.

<sup>402</sup> Refer to the Act s (3)(a)-(j).

<sup>403</sup> A "rebate" refers to a discount granted in terms of s 15 on the amount of the rate payable on the property. A "reduction" means the lowering in terms of s 15 of the amount for which the property was valued and the rating of the property at that lower amount. See the MPRA s 1 definitions.

<sup>404</sup> "Local community", in relation to a municipality (a) means that body of persons comprising (i) the residents of the municipality, (ii) the ratepayers of the municipality, (iii) any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality and (iv) visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality and (b) includes, more specifically, the poor and other disadvantaged sections of such body of persons. See the MPRA s 1.

<sup>405</sup> 58 of 1962.

<sup>406</sup> Public service infrastructure means publicly controlled infrastructure of the following kinds: (a) national, provincial or other public roads on which goods, services or labour move across a municipal boundary; (b) water or sewer pipes, ducts or other conduits, dams, water supply reservoirs, water treatment plants or water pumps forming part of a water or sewer scheme serving the public; (c)

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- Allow the municipality to promote local, social and economic development.
- Identify all rateable properties in the municipal area that are not rated in terms of section 7(2)(a) of the Act.

The MPRA specifically requires that when a municipality is considering the criteria to be applied in respect of any exemptions, rebates and reductions on property used for agricultural purposes, a municipality must take account of the following:<sup>407</sup>

- (a) the extent of services provided by the municipality for such properties;
- (b) the contribution of agriculture to the local economy;
- (c) the extent to which agriculture assists in meeting the service delivery and development obligations of the municipality; and
- (d) the contribution of agriculture to the social and economic welfare of farm workers.

It is further provided that any exemptions, rebates or reductions provided for in the rates policy must comply with and be implemented in accordance with a national framework that may be prescribed after consultation with Organised Local Government (OLG). No municipality may grant relief in respect of payment of a rate to a category of owners of properties or to the owners of a category of properties, other than by way of an exemption, rebate or reduction provided for in the rates policy and granted in terms of section 15 of the Act. No relief may be granted to owners of properties on an individual basis.<sup>408</sup>

Before it adopts its rates policy, a municipality must also follow a process of community participation.<sup>409</sup> The municipality must also ensure that the municipal manager, who is obligated to do so, has conspicuously displayed the draft rates policy for

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power stations, power substations or power lines forming part of an electricity scheme serving the public; (d) gas or liquid fuel plants or refineries or pipelines for gas or liquid fuels, forming part of a scheme for transporting such fuels; (e) railway lines forming part of a national railway system; (f) communication towers, masts, exchanges or lines forming part of a communications system serving the public; (g) runways or aprons at national or provincial airports; (h) breakwaters, sea walls, channels, basins, quay walls, jetties, roads, railway or infrastructure used for the provision of water, lights, power, sewerage or similar services of ports, or navigational aids comprising lighthouses, radio navigational aids, buoys, beacons or any other device or system used to assist the safe and efficient navigation of vessels; (i) any other publicly controlled infrastructure as may be prescribed; or (j) rights of way, easements or servitudes in connection with infrastructure mentioned in para (a)-(i). See the MPRA s 1 definitions.

<sup>407</sup> S 3(4)(a)-(d). Note that agricultural purpose, in relation to the use of a property, excludes the use of a property for the purpose of eco-tourism or for the trading in or hunting of game. S 1 definitions.

<sup>408</sup> See ss 3(5) and (6)(a)-(b).

<sup>409</sup> Such a process is set out in the Local Government: Municipal Systems Act ch 4.

a period of at least 30 days at the municipality's head an satellite offices and libraries and, if the municipality has an official website, on that website.<sup>410</sup> The municipal manager must also advertise in the media a notice stating that a draft rates policy has been prepared for submission to the council, that the draft rates policy is available for public inspection during office hours and that the local community is invited to submit comments and representation to the municipality within a period specified in the notice.<sup>411</sup> A municipal council must take into account all comments and representations made or received when it considers the draft rates policy. A rates policy must be reviewed annually by a municipal council and must be amended if necessary. Any amendments to such a policy must be annexed to the municipality's annual budget when tabled. The requirements of section 3(3)-(6) of the MPRA also apply to any amendment of a rates policy. It should be noted, however, that community participation in amendments to a rates policy is not facilitated under section 4 of the Act, but must be effected through the municipality's annual budget process in terms of sections 22 and 23 of the Municipal Finance Management Act.<sup>412</sup>

Finally, all applicable municipalities must adopt by-laws to give effect to the implementation of their rates policies. Such a by-law may differentiate between different categories of property and also between different categories of property owner liable for the payment of rates.<sup>413</sup>

### **18.5.6.3 Aspects concerning the levying of rates**

In general, when rates are levied, a municipality must levy rates on all rateable property in its area. However, a municipality is not obliged to levy rates on

- property which the municipality owns
- public service infrastructure owned by the municipality
- properties defined as a right registered against immovable property in the name of a person, excluding a mortgage bond registered against the property and properties in respect of which it is impossible or unreasonably difficult to establish a mar-

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<sup>410</sup> Refer in this instance also to the Systems Act s 21B.

<sup>411</sup> The notice period may not be less than 30 days, however. See the Act s 4(2)-(3).

<sup>412</sup> See Act 56 of 2000 read with the MPRA s 5(1)-(2).

<sup>413</sup> Refer to the Property Rates Act s (6)(1)-(2). It would seem that the intention of the legislator is that a rates policy, even if adopted by a council, cannot be enforced and implemented if it has not been included and adopted as a municipal by-law. If such interpretation is indeed correct, then it is obvious that the implementation of a rates policy is more cumbersome than a normal municipal by-law. A municipality must first complete all the legal requirements mentioned above before the by-law, which also requires specific procedures, is adopted.

ket value because of legally insecure tenure resulting from past racially discriminatory laws or practices.<sup>414</sup>

Although rateable property must be levied, a municipality is not prevented from granting exemptions, rebates or deductions.<sup>415</sup> Under the new legal dispensation a municipality may, in terms of the criteria set out in its rates policy, levy different rates for different categories of rateable property, which may include categories determined according to

- the use of the property
- the permitted use of the property or
- the geographical area in which the property is situated.<sup>416</sup>

The levying of different rates is subject to section 19 of the MPRA, however.<sup>417</sup> According to the Act, the categories of rateable property include the following:<sup>418</sup>

- (a) Residential properties;
- (b) Industrial properties;
- (c) Business and commercial properties;
- (d) Farm properties used for agricultural purposes; other business and commercial purposes; residential purposes or other purposes;
- (e) Farm properties not used for any purpose;
- (f) Smallholdings used for agricultural, residential, industrial, business, commercial or other purposes;

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<sup>414</sup> See the MPRA s 7(1)-(2).

<sup>415</sup> Read the MPRA s 7(2)(b) with s 15. This was also the position under previous laws. Refer to the case of *Association for the Aged v Ethekwini Municipality* 2004 (3) SA 81 (D). In this case, the Association/applicant sought an order declaring certain properties to be exempt from rates according to the Local Authorities Ordinance 25 of 1974 (KZN) s 153. The applicant was registered as a *bona fide* welfare organisation. The court held that the onus was on the applicant to show that it qualified for an exemption under the ordinance. The court also held that an exemption clause should be restrictively interpreted. Since the applicant sold life rights and used the premises exclusively to alleviate distress amongst aged persons and to promote their welfare, security and happiness, the properties were exempt from rates under the ordinance. See paras D-E at 87.

<sup>416</sup> "Permitted use in relation to a property" means the limited purposes for which the property may be used in terms of (a) any restrictions imposed by (i) a condition of title, (ii) a provision of a town planning or land use scheme or (iii) any legislation applicable to any specific property or properties or (b) any alleviation of any such restrictions. Refer to the MPRA s 1.

<sup>417</sup> See the MPRA s 8(1)(a)-(c).

<sup>418</sup> See the Act s 8(2)(a)-(r). Note that property in general means (a) immovable property registered in the name of a person, including, in the case of sectional title scheme, a sectional title unit registered in the name of a person, (b) a right registered against immovable property in the name of a person, excluding a mortgage bond registered against the property, (c) a land tenure right registered in the name of a person or granted to a person in terms of legislation or (d) public service infrastructure. Note also that reference to a person also includes an organ of state. See the MPRA s 1.



- (g) State-owned properties;
- (h) Municipal properties;
- (i) Public Service Infrastructure properties;
- (j) Privately owned towns serviced by the owner
- (k) Formal and informal settlements;
- (l) Communal land defined in the Communal Land Rights Act;<sup>419</sup>
- (m) State trust land;<sup>420</sup>
- (n) Properties acquired through the Provision of Land and Assistance Act<sup>421</sup> or the Restitution of Land Rights Act<sup>422</sup> or which properties are subject to the Communal Property Associations Act;<sup>423</sup>
- (o) Protected areas;<sup>424</sup>
- (p) Properties on which national monuments are proclaimed;
- (q) Properties owned by public benefit organisations and which are used for any specific public benefit activities listed in part 1 of the ninth schedule to the Income Tax Act;
- (r) Properties used for multiple purposes. According to section 9 of the PRA a property used for multiple purposes must, for rates purposes, be assigned to a category determined by the municipality for properties used for:
  - (a) a purpose corresponding with the permitted use of the property if so regulated;
  - (b) a purpose corresponding with the dominant use of the property; or
  - (c) as a multiple purposes category in terms of section 8(2)(r) of the act.<sup>425</sup>

The Act contains a specific provision regarding the levying of a rate on property in sectional title schemes. Sectional title schemes are created to cater for mainly resi-

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<sup>419</sup> 11 of 2004.

<sup>420</sup> "State trust land" refers to land owned by the state (a) in trust for persons communally inhabiting the land in terms of a traditional system of land tenure, (b) over which land tenure rights were registered or granted or (c) which is earmarked for disposal in terms of the Restitution of Land Rights Act 22 of 1994. The MPRA s 1 definitions.

<sup>421</sup> 126 of 1993.

<sup>422</sup> 22 of 1994.

<sup>423</sup> 28 of 1996.

<sup>424</sup> Such areas mean an area that is or has to be listed in the register referred to in the Protected Areas Act s 10, which refers to the National Environmental Management: Protected Areas Act 57 of 2003.

<sup>425</sup> Refer to the MPRA s 9(1)(a)-(c). A rate levied on a property categorised for use for multiple purposes must be determined by apportioning the market value of the property to the different use purposes and by applying the rates applicable to the categories for properties used for these purposes to the different market value apportionments. See the MPRA s 9(2)(a)-(b).



dential and sometimes business or commercial uses. According to the MPRA, a rate on sectional-title properties must be levied on the individual sectional-title units and not on the property as a whole.<sup>426</sup>

It is further provided that rates levied by municipalities must be in a rand amount and must be based on:

- the market value of the property or
- in the case of public service infrastructure, on the market value thereof, less 30% of that value or on such a lower percentage as the minister for Local Government may determine.<sup>427</sup>

Property mentioned in section 17(1)(h) of the MPRA is to be levied on the market value less the amount allowed in the section or by the minister.<sup>428</sup> An important confirmation is that properties with a market value below a prescribed valuation level may be levied at a uniform fixed amount per property. This provision thus allows the imposition of a so-called flat rate on certain properties. Municipalities are not obligated to implement a flat rate or uniform fixed rate, but if they do opt for such a rate on a specific category of properties, then such fixed amount may not exceed a prescribed percentage of the amount due for rates payable on a property in that category with a market value equal to the prescribed valuation level.<sup>429</sup>

When rates are being levied, a municipality must levy them for a financial year. Rates lapse at the end of the financial year for which they were levied. The levying of rates must further form part of a municipality's annual budget process and annually, at the time of its budget process, a municipality must review the amount in the rand of its current rates in line with its annual budget for the next financial year. Rates levied for a financial year may be increased during the year only in terms of section 28(6) of the Municipal Finance Management Act.<sup>430</sup> Rates further become payable as of the start of a financial year or, if the municipality's annual budget is not approved by the start of a financial year, then from such later date when the budget,

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<sup>426</sup> See the MPRA s 10 read with s 92.

<sup>427</sup> See the MPRA s 11(1)(a)-(b) read with s 17.

<sup>428</sup> The MPRA s 11(1)(c). According to the definitions in the Act, "market value" in relation to a property means the value of the property as determined in the Act s 46. Refer to the MPRA s 1 read with s 46.

<sup>429</sup> See the MPRA s 11(2)(3).

<sup>430</sup> It is imperative to read both the MPRA and the MFMA together in respect of a period of levying of rates. See the MPRA s 12(1)-(3).

including a resolution to levy rates, is approved by the provincial executive in terms of the Municipal Finance Management Act.<sup>431</sup>

A rate is levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members. This apparently refers to an absolute majority of the members of a council.<sup>432</sup> A resolution to levy rates must further be promulgated by publishing the resolution in the *Provincial Gazette*. The municipality must also without delay conspicuously display the resolution for 30 days at the head and satellite offices and libraries and on the municipal website if applicable. An advertisement in the media is also required, stating that a resolution to levy rates has been passed and that it is available for inspection.<sup>433</sup>

According to section 15 and in terms of the criteria set out in its rates policy, a municipality may exempt a specific category of owners of properties or the owners of specific categories of properties from payment of a levied rate. Rebates or reductions in rates may also be granted. When granting exemptions, rebates or reductions in respect of owners of categories of property, a municipality may determine such categories in accordance with section 8(2) of the MPRA and in respect of categories of owners of properties may include in such categories:

- indigent owners
- owners dependant on pensions or social grants
- owners temporarily without income
- owners of property situated within an area affected by disaster or any other serious adverse social or economic conditions<sup>434</sup>
- owners of residential properties with a market value lower than an amount determined by the municipality or
- owners of agricultural properties who are *bona fide* farmers.<sup>435</sup>

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<sup>431</sup> The term “annually” means once every financial year and “financial year” again means the period starting from 1 July in a year to 30 June the next year. See the MPRA s 1 definitions as well as s 13(1)-(2). The payment of rates per year can further be regulated. See also the MPRA ss 17, 55 and 78(4) respectively.

<sup>432</sup> An “absolute majority” refers to a majority of 50% + 1 of the total number of members of a municipal council. If, eg, a council thus consists of 100 members, at least 51 members must vote in favour of levying rates. An absolute majority is more difficult to obtain than a normal majority, as the latter requires only 50% + 1 of the members forming a quorum, which is normally 50% of the total number of members of a council.

<sup>433</sup> See the MPRA s 14(2)-(3).

<sup>434</sup> “Disaster” is defined in terms of the Disaster Management Act 57 of 2002.

<sup>435</sup> The MPRA s 15(2)(a)-(f).

Again it is the responsibility of the municipal manager annually to table in the council a list of exemptions, rebates and reductions during the previous financial year and also to submit a statement reflecting the income forgone by way of such exemptions, rebates and reductions, or exclusions in terms of section 17 of the Act or phasing-in discounts in terms of section 21.<sup>436</sup> Finally, all exemptions, rebates and reductions projected for a financial year must be reflected in the municipality's annual budget for that year as income on the revenue side and expenditure on the expenditure side.<sup>437</sup>

#### **18.5.6.4 Limitations on levying of rates and additional rates**

The MPRA reiterates the constitutional requirements set out in section 229(2)(a) of the Constitution. Municipalities may not exercise powers to levy rates on property that would materially and unreasonably prejudice national economic policies, economic activities across municipal boundaries or the national mobility of goods, services, capital or labour. If a rate is contra the constitutional prescriptions, then the Minister of Local Government, after notifying the Minister of Finance, should give notice to a municipality by notice in the national *Gazette* that the rate must be limited to an amount in rand that is specified in the notice. A municipality must then give effect to the notice and, if necessary, accordingly adjust its budget for the next financial year.<sup>438</sup> The determination of whether a rate is contra the Constitution is not a clear-cut case, and it is submitted that an objective test is required to make such a finding. However, the MPRA states that any sector of the economy, after consulting the applicable municipality(s) and OLG, may request the minister to evaluate evidence to the effect that a rate is materially and unreasonably prejudicing any of the matters listed above.<sup>439</sup> If the minister is convinced of any material and unreasonable effect, he/she must act as set out in subsection 16(2) of the Act. Any notice issued under subsection 16(2) of the Act must be accompanied by reasons why a rate is contra subsection 16(1) and thus also contra section 229 of the Constitution. In order to help municipalities, the minister of Local Government, after consultation with the minister of finance, may by notice issue guidelines to assist municipalities in the exercise of their power to levy rates.<sup>440</sup>

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<sup>436</sup> Refer to the MPRA s 15(3)(a)-(b).

<sup>437</sup> The MPRA s 15(4)(a)-(b).

<sup>438</sup> See the MPRA s 16(1)-(2).

<sup>439</sup> Read the Constitution ss 16(1) and (3)(a) with s 229.

<sup>440</sup> See the MPRA s 16(4)-(5).

The new legal framework also determines other impermissible rates that a municipality may not levy. Such impermissible rates include the following:<sup>441</sup>

- (a) a rate on the first 30% of the market value of public service infrastructure;<sup>442</sup>
- (b) a rate on any part of the seashore;<sup>443</sup>
- (c) a rate on any part of the territorial waters of the RSA;<sup>444</sup>
- (d) a rate on any island of which the state is owner;<sup>445</sup>
- (e) a rate on those parts of a special nature reserve, national park or nature reserve or of a national botanical garden, which are not developed or used for commercial, business, agricultural or residential purposes;
- (f) a rate on mineral rights;<sup>446</sup>
- (g) a rate on a property belonging to a land reform beneficiary or his/her heirs, provided that such an exclusion lapses after ten years from the date on which such title was registered in the office of the registrar of deeds;<sup>447</sup>
- (h) a rate on the first R15 000 of the market value of a property assigned in the municipal valuation roll to a category determined by the municipality for (i) residential properties; or (ii) for properties used for multiple purposes of which one purpose is for residential purposes;<sup>448</sup>
- (i) a rate on a property registered in the name of and used primarily as a place of public worship by a religious community, including an official residence regis-

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<sup>441</sup> See the MPRA s 17(1)(a)-(i).

<sup>442</sup> Note the minister for Local Government may lower the percentage, but only after consultation. See the MPRA s 17(4)(a)-(c).

<sup>443</sup> Refer to the definition of the "seashore" as defined in the Seashore Act 21 of 1935.

<sup>444</sup> See the definition of "territorial waters" determined in terms of the Maritime Zones Act 15 of 1994.

<sup>445</sup> This includes the Prince Edward Islands referred to in the Prince Edward Islands Act 43 of 1948.

<sup>446</sup> See the definition of "property" in the MPRA s 1.

<sup>447</sup> "Land reform beneficiary", in relation to a property, means a person who (a) acquired the property through (i) the Provision of Land and Assistance Act 126 of 1993 or (ii) the Restitution of Land Rights Act 22 of 1994, (b) holds the property subject to the Communal Property Associations Act 28 of 1996 or (c) holds or acquires the property in terms of such other land tenure reform legislation as may pursuant to the Constitution s 25(6) and (7) be enacted after this Act has taken effect. See the MPRA s 1.

<sup>448</sup> The aim of the legislator is clearly to benefit poor households by not levying rates on property below R15 000 market value. In order to be equitable, every owner will receive such an exemption. Similar provisions have been made in respect of a minimum free water and electricity supply. One must note that such an exemption is applicable only to property being used for residential purposes. Business and commercial properties do not receive the same exemption and are thus treated indifferently. There seems to be a legitimate reason for exempting residential property in this manner and, more specifically, in light of the constitutional objects and demands on local government, a constitutional attack on equality grounds will not easily suffice. The minister of Local Government may increase the monetary threshold. See the MPRA s 17(3).

tered in the name of that community which is occupied by an office bearer of that community.<sup>449</sup>

The exclusion from rates lapses if the status of a property changes, from national land to something else, for example. If an exemption is withdrawn, rates by a private owner that would have been payable were it not for the exemption become payable.<sup>450</sup> The amount payable when an exemption is withdrawn must be regarded as rates in arrears, and interest is applicable on such an amount. Such a position seems somewhat unreasonable. Why should an owner be liable for rates which have been legally exempted and for the interest on such rates? The MPRA clarifies the situation somewhat by stating that such rates and interest are applicable only if the declaration of the property was withdrawn because of a decision of the private owner to withdraw from the agreement regarding the property or because of a decision by the state to withdraw from the agreement because of a breach of the agreement by the private owner.<sup>451</sup> It is of interest to note that a municipality is permitted to apply, in writing, to the minister of Local Government, to be exempted from paragraph 17(a), (e), (g) or (h) of the MPRA if it can demonstrate that an exclusion to levy such rates is compromising or impeding its ability or right to exercise its powers or to perform its functions within the meaning of the Constitution.<sup>452</sup> What this position really means is that, in certain instances, municipalities may be permitted to levy rates on property which are usually regarded as impermissible/exempted rates. Any exemption granted by the minister must be in writing and is subject to such limitations or conditions as he/she may determine.<sup>453</sup>

In order to protect owners of properties, the MPRA determines that a municipality may not levy:

- different rates on residential property, except as provided for in sections 11, 21 and 89 of the Act

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<sup>449</sup> Although such exemption was also allowed under the previous legal dispensation, religious communities should note the requirements of the MPRA s 16(1)(i) regarding the exemption of official residences of religious communities. Exclusion from these rates also lapses if the property is disposed of by the religious community or if the residence is not used as required. See the MPRA s 17(5).

<sup>450</sup> See the MPRA s 17(2).

<sup>451</sup> The MPRA s 17(d)(i)-(ii).

<sup>452</sup> Read the MPRA s 18(1) with the Constitution s 151(4).

<sup>453</sup> The MPRA s 18(2)(a)-(b).

- a rate on non-residential properties that exceeds a prescribed ratio to the rate on residential properties<sup>454</sup>
- rates which unreasonably discriminate between categories of non-residential properties or
- any additional rates except as provided for in section 22 of the Act.<sup>455</sup>

It is further the responsibility of the minister of Local Government, with the concurrence of the minister of finance, to set an upper limit on the percentage by which rates on properties or a rate on a specific category of properties may be increased. However, different limits may be set for:

- different kinds of municipality or
- different categories of property, subject to section 19.<sup>456</sup>

The MPRA also determines a compulsory phasing-in of certain rates. According to the Act, a rate levied on newly rateable property must be phased in over a period of three financial years, subject to subsection 21(5) of the Act.<sup>457</sup> Furthermore, a rate levied on property belonging to a land reform beneficiary must be phased in over a period of three financial years after the exclusion period set out in section 17(1)(g) has lapsed, subject to section 21(5). A rate levied on newly rateable property owned and used by organisations conducting specified public benefit activities and who are registered in terms of the Income Tax Act for those activities must be phased in over a period of four financial years.<sup>458</sup> In the first year, the phasing-in discount on newly rateable properties or on properties belonging to a land reform beneficiary must be at least 75% of the rate otherwise applicable to the property for that year, in the second year at least 50%, and in the third year at least 25%.<sup>459</sup> During the first year no rate may be levied on newly rateable property owned and used by organisations conducting specified public benefit activities. After the first year, the phasing-in discount on

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<sup>454</sup> See the MPRA s 19(a)(b) read with s 11(1)(a). The ratio may only be prescribed with the concurrence of the minister of finance. S 19(2).

<sup>455</sup> See the MPRA s 19(1)(a)-(d).

<sup>456</sup> The minister may on application by a municipality and on good cause exempt a municipality from a set limit. See the MPRA s 20(1)-(4) read together with the MFMA s 43.

<sup>457</sup> Note that according to the definitions in the MPRA s 1, "newly rateable property" means any rateable property on which property rates were not levied before the end of the financial year preceding the date on which the Act took effect. Properties which were (a) incorrectly omitted from the valuation roll or (b) identified by the minister where the phasing-in of a rate is not justified, are excluded from the definition.

<sup>458</sup> Refer to the MPRA s 21(a)-(c).

<sup>459</sup> The MPRA s 21(2)(a)-(e).

such property must be at least 75% in the second year, at least 50% in the third year and at least 25% in the fourth year.<sup>460</sup> A rate levied may also not be higher than a rate levied on similar property or category of property. On written request by a municipality, the MEC for Local Government may extend the phasing-in periods mentioned above. No phasing-in period may exceed six financial years, however.<sup>461</sup> If the MEC has extended a phasing-in period, he/she must determine the minimum phasing-in discount during each financial year of the extended period.

The new rating legislation also provides for additional rates and special rating areas. According to section 22 of the MPRA and by resolution of its council, a municipality may:

- determine an area as a special rating area
- levy an additional rate on property in that area for the purpose of raising funds for improving or upgrading that area
- differentiate between categories of properties when levying an additional rate.<sup>462</sup>

Since additional rates would place a more significant financial burden on certain property owners, it is required that before a municipality determines a special rating area, it must first consult the local community on the proposed boundaries of the area and also on the proposed improvement or upgrading required. Apart from this mandatory consultation obligation, the municipality must also obtain the consent of the majority of members of the local community in the proposed special rating area, who will be liable for paying the additional rate.<sup>463</sup> When a municipality determines a special rating area, it must:

- determine the boundaries of the area

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<sup>460</sup> See the MPRA s 21(3)(a)-(c). It must be noted that according to the definitions of the Act that specified public benefit activity means an activity listed in the Income Tax Act Ninth Sch Part 1 Item 1 (welfare and humanitarian), Item 2 (health care) and Item 4 (education and development).

<sup>461</sup> See the MPRA s 21(4)-(6).

<sup>462</sup> Refer to the MPRA s 22(1)(a)-(c). Since the resolution of the council concerns the levy of rates, it is submitted that such a resolution requires also an absolute majority of members to vote in favour thereof. The differentiation mentioned in s 22(1)(c) could, eg, result in business properties' bearing the brunt of an additional levy, while residential properties in the particular area are excused from such additional levies. It seems clear that additional levies may be levied only if funds are needed to improve or upgrade a particular area. Cross-subsidising through additional levies are not allowed. An objective assessment of all relevant factors must be conducted in this regard.

<sup>463</sup> "A majority" in this respect seems to refer to 50% + 1 of the total number of members of the relevant local community. It should be noted that not all members of the community need to be consulted, but only those members who will be liable for paying the additional rate. The intention of the legislator thus seems only to obtain a majority decision from persons/institutions responsible for pay property rates. See the MPRA s 2(a)-(b).



- determine how the area is to be improved or upgraded from the additional funds
- establish separate accounting and other record-keeping systems regarding the revenue generated by the additional rate and the improvement or upgrading of the particular area(s).

A municipality may further establish a committee comprising persons representing the community in the area as a consultative/advisory forum for the municipality on the improvement/upgrading. Representivity must be taken into account when the committee is established. The committee must then further be a subcommittee of the ward committee(s) in the area, if ward committees are applicable.<sup>464</sup> A special rating area must not be used to reinforce existing inequities in the development of the municipality and must also be consistent with the objectives of the municipality's integrated development plan.<sup>465</sup>

#### **18.5.6.5 The municipal register of properties**

All municipalities levying rates on property are obligated to establish and maintain a property register in respect of all properties situated within the municipal area. Such a register must consist of two parts: a part A and a part B. Part A should consist of the current valuation roll of the municipality and, if applicable, supplementary valuation rolls. Part B must specify which properties are subject to exemption, rebate, reduction in phasing-in rate or an exclusion.<sup>466</sup> The register must be open for inspection by the public during office hours and displayed on the municipal website if applicable. Finally, a municipality must regularly, but at least once a year, update part B of the register.<sup>467</sup>

#### **18.5.6.6 Liability for property rates**

A rate levied on property must be paid by the owner of the property.<sup>468</sup> Joint owners are normally jointly and severally liable for the amounts due for rates on that property. In respect of agricultural property owned by more than one owner in individual

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<sup>464</sup> The MPRA s 22(3)(a)-(d).

<sup>465</sup> See the MPRA s 22(4). Read also the Systems Act s 85 if additional rates are applied to providing funding for an internal municipal service district.

<sup>466</sup> Read the MPRA s 23(1)-(3) with ss 15, 21 and 17.

<sup>467</sup> The MPRA s 23(4)-(5). Part A must be updated in accordance with the provisions of the MPRA relating to the updating and supplementary of valuation rolls. Refer to the MPRA ch 8 for more details. Note that the term "register" generally means (a) to record in a register in terms of (i) the Deeds Registries Act 47 of 1937 or (ii) the Mining Titles Registration Act 16 of 1967 and (b) includes any other formal Act in terms of any other legislation to record (i) a right to use land for or in connection with mining purposes or (ii) a land tenure right. See the MPRA s 1.

<sup>468</sup> See the MPRA s 24(1) read with the Systems Act ch 9.

shares as legally allowed before the commencement of the Subdivision of Agricultural Land Act,<sup>469</sup> a municipality is allowed to hold any one of the joint owners liable for all rates or hold any joint owner liable for only that portion of the rates that represents his/her undivided share in the property.<sup>470</sup> One must note that the term “owner” has an expansive meaning. According to section 1 of the MPRA, the term *owner* means:

- a person in whose name ownership of property is registered
- a person in whose name a right to property is registered
- a person in whose name a land tenure right is registered or to whom the right was granted
- the organ of state which owns or controls a public service infrastructure. Apart from the abovementioned categories, the following persons/functionaries may for the purposes of the MPRA be regarded by a municipality as the owner of property in the following circumstances:
  - (a) a trustee of property in a trust<sup>471</sup>
  - (b) an executor or administrator of property in a deceased estate
  - (c) a trustee or liquidator of property in an insolvent estate/liquidation
  - (d) a judicial manager of property of a person under judicial management
  - (e) a curator of property of a person under curatorship
  - (f) a person in whose name a usufruct or other personal servitude is registered regarding property subject to such usufruct or personal servitude
  - (g) a lessee of a property that is registered in the name of a municipality and is leased by it<sup>472</sup>
  - (h) a buyer of a property sold by a municipality and of which possession was given to the buyer pending registration of ownership in the name of the buyer.<sup>473</sup>

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<sup>469</sup> 70 of 1970.

<sup>470</sup> See the MPRA s 25(a)-(b).

<sup>471</sup> State trust land is however excluded in this regard.

<sup>472</sup> In this regard, lessees and a lawyer advising such lessees should take into account that the lessee could be held liable for property rates even though the property belongs to a municipality. A clear compromise or deduction from rent should be negotiated and contractually confirmed.

<sup>473</sup> Again this provision requires careful consideration by prospective buyers, property lawyers and estate agents. Buyers must be advised of this liability. In cases where properties which do not belong to a municipality are sold, it would appear that the seller/current registered owner will stay liable for property rates up until the registration of transfer of the property to the new

*continued on next page*

Rates levied on a sectional title unit are payable by the owner of the unit. Municipalities may not recover the rates on sectional title units or any parts thereof from the body corporate, except when the body corporate is the owner of any specific sectional-title unit. Body corporates are equally not permitted to apportion and collect rates from owners of units.<sup>474</sup>

In respect of the method and time of payment, it is determined that a municipality may recover a rate on a monthly basis or annually, as may be agreed to with the property owner. Rates are payable on or before a date(s) determined by the municipality. Only in special circumstances may the payment of a rate be deferred.<sup>475</sup> A municipality is obligated to furnish each person/owner liable for the payment of a rate with a written account, which account must specify the following:

- the amount due for rates
- the date for payment
- how the amount was calculated
- the market value of the property
- the phasing-in discount, if applicable
- any additional rates, if applicable.<sup>476</sup>

Delivery of an account is no prerequisite for collecting the applicable rate, however. A person/owner is liable for payment whether or not he/she has received an account. If no account is received, the onus is on the person/owner to make the necessary inquiries from the municipality.<sup>477</sup> If an amount due for rates is unpaid after the determined date, then the municipality may recover the amount in whole or in part from a tenant or occupier of the property, despite any contractual obligation to the contrary on the tenant or occupier.<sup>478</sup> The amount may be recovered only after the municipality has served a written notice on the tenant or occupier. The amount recoverable from a tenant/occupier is limited to the amount of rent or other money

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owner/purchaser. Parties will be well advised to specify and address such issues in clear terms in their agreements of sale.

<sup>474</sup> See the MPRA s 25(1)-(4) read with s 92.

<sup>475</sup> See the MPRA s 26(1)-(3). Recovery of rates may also take place less often than a month as prescribed in terms of the MFMA.

<sup>476</sup> Refer to the MPRA s 27(1)(a)-(f).

<sup>477</sup> Read the MPRA s 27(2)-(3). Note also that the furnishing of accounts is subject to the Systems Act s 102.

<sup>478</sup> "An occupier", in relation to a property, means a person in actual occupation of a property, whether or not that person has a right to occupy the property.

due and payable, but which has not yet been paid to the owner of the property, however. The tenant must set off any such amount paid to the municipality against any money owed by the tenant/occupier to the owner.<sup>479</sup> A further method of recovery of rates is provided through section 29 of the MPRA. According to this section and despite the Estate Agents Affairs Act,<sup>480</sup> a municipality may recover the amount due for rates on a property in whole or in part from the agent of the owner, if such a way is more convenient for the municipality. Again the agent must be served with a written notice to recover the due rates, and the amount recoverable is limited to the amount of any rent or other money received by the agent on behalf of the owner, less any commission due to the agent.<sup>481</sup> On request, the agent must furnish the municipality with a written statement specifying all payments received by the agent on behalf of the owner.<sup>482</sup>

#### **18.5.6.7 General aspects concerning the valuation of rateable property**

In accordance with the MPRA, a municipality that intends to levy a rate on property must cause a general valuation to be made of all properties in its area and prepare a valuation roll of such properties.<sup>483</sup> All the rateable properties in a municipal area must be valued during a general valuation exercise, including all properties fully or partially excluded from rates. Properties referred to in section 7(2) of the Act must be valued only to the extent that rates are to be levied on them. The minister of Local Government may further fully or partially exempt a municipality from the obligation to value properties excluded from rates in section 17(1)(e), (g) and (i) of the Act, if the municipality can demonstrate that the valuation of such properties is too onerous for

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<sup>479</sup> It is clear that the legislator's intention is to allow municipalities a quick mechanism to recover non-levy payments by property owners. Although such mechanism is laudable, it is somewhat uncertain if such statutory form of recovery and obligation for set off by the tenant/occupier will withstand constitutional or other legal challenges. It is very likely that tenants/occupiers in such circumstances will suffer victimisation and other pressures from property owners. To what extent a tenant and property owner can be forced to make public the content and value of a private lease agreement or to what extent the contractual freedom between the parties can be overruled from the outside is unknown and somewhat problematic. There seems also to be an unnecessary burden on tenants/occupiers in cases where property owners default on the rates payments. In this regard, eg, a tenant/occupier must on request by a municipality furnish it with a written statement specifying all payments to be made by the tenant/occupier to the owner of the property for rent or other money payable on the property. See the MPRA s 28(4).

<sup>480</sup> 112 of 1975.

<sup>481</sup> "An agent", in relation to the owner of a property, means a person appointed by the owner of the property (a) to receive rental or other payments in respect of the property on behalf of the owner or (b) to make payments in respect of the property on behalf of the owner. See the MPRA s 1.

<sup>482</sup> See the MPRA s 29(1)-(4).

<sup>483</sup> Read the MPRA s 30(1)(a)-(b) with ss 30(2) and (3).

it, given its financial and administrative capacity. All valued properties must be included in the valuation roll.<sup>484</sup> For purposes of the general valuation, a municipality must determine a date that may not be more than 12 months before the start of the financial year in which the valuation roll is first to be implemented. The general valuation must reflect the market value of the properties in accordance with market conditions at the date of the valuation and other statutory requirements.<sup>485</sup>

A valuation roll mentioned above will take effect from the start of the financial year following the completion of the public inspection period set out in section 49 of the MPRA. The valuation roll further remains valid for that financial year or for one or more subsequent financial years as the municipality may decide. In normal circumstances, no valuation roll may remain valid for longer than four financial years.<sup>486</sup> The MEC for local government may extend the period for which a valuation roll remains valid to five years maximum, however. Such extension is permitted only if the provincial executive has intervened in the municipality or on request by the municipality, in exceptional circumstances which warrant such extension.<sup>487</sup> It must also be noted that a valuation roll remains valid for one year after the date on which the roll has lapsed if the provincial executive intervenes in terms of section 139 of the Constitution, which intervention could have been either before or after such a date. However, this position is subject to the fact that the intervention was caused by a municipality's failure to determine a date of valuation for its general valuation or its failure to designate a person as its municipal valuer.<sup>488</sup> It is therefore clear that unless exceptional circumstances exist, a municipality will have to conduct a general valuation of all property in its area every four years or on such intervals as it may have decided.

In order to compile a valuation roll, a municipality must designate a person as its municipal valuer before the date of valuation. This person may either be one of the financial officials of the municipality or a person in private practice. If a private practitioner is appointed, the municipality must follow an open, competitive and transparent process and must designate the successful bidder as its municipal valuer by way

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<sup>484</sup> See the MPRA s 30(2)-(3).

<sup>485</sup> Read the MPRA s 31(1)-(2).

<sup>486</sup> See the MPRA s 32(1)(a)-(b). This position reflect to some degree the similar position as was applicable under the previous legal dispensation.

<sup>487</sup> Read the MPRA s 32(2)(a)-(b) together with the Constitution s 139.

<sup>488</sup> Refer to the MPRA s 32(3)(a)-(b) read with ss 31 and 33.

of a written contract.<sup>489</sup> The designation/appointment of a municipal valuer may be withdrawn/cancelled only on the grounds of misconduct, incapacity, incompetence, non-compliance with the MPRA, under-performance or breach of contract, if applicable.<sup>490</sup>

A municipal valuer has a vast number of functions to perform. Such a person is obligated, *inter alia*, to

- value all properties
- prepare a valuation roll
- sign and certify the valuation roll
- submit the valuation roll to the municipal manager
- consider and decide objections to the roll
- attend every meeting of an appeal board hearing appeals or reviews of his/her decisions
- prepare supplementary rolls
- assist the municipality in collection/obtaining postal addresses of property owners
- generally provide appropriate administrative support incidental to the valuation roll.<sup>491</sup>

In order to assist a municipal valuer, a municipal manager may designate officials/persons in private practice as assistant municipal valuers. Similar requirements applicable to the municipal valuer are prescribed in relation to assistant municipal valuer.<sup>492</sup> A municipal manager may also designate officials or even non-officials of the municipality as data-collectors in order to assist the municipal valuer with the collection of data and other related work. Data-collectors appointed from outside the municipal staff component are remunerated from municipal funds, but only in terms of the contracts concluded with them.<sup>493</sup>

In an effort to help a municipal valuer to fulfil his/her functions and obligations, the MPRA determines that the valuer may delegate any powers or duties reasonably

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<sup>489</sup> See the MPRA s 33(1)-(2), read with the MFMA ch 11. The written contract should set out the terms and conditions of the designation and the person must be issued with an identity card with personal photograph for identification purposes. Read the MPRA s 33(3).

<sup>490</sup> The MPRA s 33(4)(a)-(d).

<sup>491</sup> See the MPRA s 34(a)-(i).

<sup>492</sup> Refer to the MPRA s 35(1)-(5).

<sup>493</sup> All data-collectors are also issued with ID cards and may be removed from such a designation. Normal contractual laws should be applicable in such instances. See the MPRA s 36(1)-(5). A data-collector is a person designated as such. Refer to s 1 definitions.

necessary to an assistant municipal valuer to assist the valuer. Powers and duties in the collection and processing of data may also be delegated to a data-collector. The valuer must regularly review such delegations and, if necessary, amend or withdraw such delegations. Delegations must be in writing, subject to the limitations and conditions determined in the delegation and not divest the valuer of the responsibility of the delegated powers. The valuer may also confirm, vary or revoke any decision taken in terms of the delegation, but any such action may not detract from any rights that may have accrued as a result of the decision.<sup>494</sup> In order to save costs and obtain expertise, a municipality may enter into an agreement with another municipality(s) to designate a single municipal valuer and to share the costs of preparing the different municipal valuation rolls. This sharing possibility is not permitted if the municipality concerned agrees to appoint an official of one of the partaking municipalities as the municipal valuer.<sup>495</sup>

Specific qualifications of municipal valuers are prescribed. The new legislative system determines that a municipal valuer:

- must be registered as a professional valuer or associated valuer in terms of the Property Valuers Profession Act<sup>496</sup> and
- may not be a councillor of the designating municipality or other involved municipalities.<sup>497</sup>

An assistant valuer must also have the same qualifications of a municipal valuer, except that a candidate valuer registered under the Property Valuers Profession Act may also be designated.<sup>498</sup> Before assuming office, a valuer or assistant valuer must make a prescribed declaration before a Commissioner of Oaths regarding the performance of the office and must lodge a copy of such a declaration with the municipal manager.<sup>499</sup>

It is common cause that all rateable property must be valued in order to determine the applicable rate payable. In order to value property and to establish the municipal valuation roll, access to all rateable property is required. To facilitate such access,

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<sup>494</sup> The MPRA s 37(1)-(3).

<sup>495</sup> Refer to the MPRA s 38(1)-(2). Sharing of a municipal valuer is thus permitted only if the designated person is a private practitioner.

<sup>496</sup> 47 of 2000.

<sup>497</sup> See the MPRA s 39(1)(a)-(b).

<sup>498</sup> The MPRA s 39(2)(a)-(b). No councillor may be an assistant municipal valuer.

<sup>499</sup> The MPRA s 40(a)-(b).



the MPRA states that subject to any legislation that restricts or prohibits entry to any specific property, the municipal valuer, assistant valuer, data-collector or other authorised person may enter any property that must be valued and inspect that property for purposes of the valuation, between 07:30 and 19:00 on any day, except a Sunday or public holiday. When entering a property, the person must, on demand by a person on that property, produce his/her identification card. The valuer or other official may also be accompanied by an interpreter or other functionaries.<sup>500</sup> A municipal valuer/other functionary may further require the owner/tenant/occupier of a property to give the valuer access to any document or information in his/her possession, which document or information is reasonably required for purposes of valuing the property. The valuer may make extracts from such documents or information and may also in writing require the owner/tenant/occupier or agent of owner, to provide the valuer either in writing or orally with particulars regarding the property which the valuer reasonably requires for the valuation.<sup>501</sup> Owners/occupiers/tenants should be careful about refusing to supply the information/documentation, since the MPRA determines that where a document/information was not provided, but the owner later relies on such a document/information in an appeal against the valuation, the appeal board hearing such an appeal may make an order as to costs if the board is of the view that the failure has placed an unnecessary burden on the functions of the valuer or appeal board.<sup>502</sup>

Valuers and assistant valuers are obligated to conduct the functions within a certain code of conduct. Every municipal valuer/assistant valuer must disclose any personal or private business interest to the municipality regarding any property in the municipality. The position/office as valuer may also not be used for private gain or improperly benefit another person. Furthermore each valuer/assistant valuer must comply with the code of conduct for municipal officials, as set out in Schedule 2 of the Systems Act.<sup>503</sup> A valuer/assistant valuer who contravenes/fails to comply with

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<sup>500</sup> See the MPRA s 41(1)-(3). In certain circumstances a valuer or other inspecting person may also be accompanied by security personnel, should such assistance be required by the circumstances. It is also submitted that any access to property must at least comply with any constitutional requirements. Examples of such rights are the right to privacy and property, to name but two.

<sup>501</sup> Read the MPRA s 42(1)(a)-(c).

<sup>502</sup> The MPRA s 42(2).

<sup>503</sup> Read the MPRA s 43(1)(a)-(c) together with the Municipal Systems Act Sch 2. According to s 43(2), a municipal valuer/assistant valuer who is not an official of a municipality must comply with the code of conduct as if that person is such an official.

the requirements is guilty of misconduct and subject to dismissal. A decision to dismiss a valuer/assistant who is an employee of the municipality must be based on a finding of an enquiry conducted in terms of the terms and conditions of employment of the person.<sup>504</sup> If a municipal valuer/assistant has an interest in property or his/her spouse, parent, child, partner or business associate, the municipal manager must designate a special valuer to perform such valuation.<sup>505</sup> Owners of the property should note that a municipal valuer or other functionary may not disclose to any person any information obtained except

- if allowed to in terms of the MPRA
- for the purpose of legal proceedings or
- in terms of court orders.<sup>506</sup>

#### **18.5.6.8 Aspects concerning property valuation criteria**

The new uniform Property Rates Act determines that all property must be valued in accordance with generally recognised valuation practices, methods and standards. Physical inspection, all often very useful, is optional. Comparative, analytical or even other systems or techniques may be used, including aerial photography and computer-assisted mass appraised systems/techniques. In cases where the available market-related data of any category of rateable property is not sufficient, such property may be valued in terms of mass-valuation systems. Such mass-evaluation systems/techniques should be approved by the municipality concerned after having considered any recommendations of its municipal valuer and as may be appropriate in the circumstances. Mass-valuation systems/techniques may include a system based on predetermined bands of property values and the designation of properties to one of those bands on the basis of minimal market-related data.<sup>507</sup> Subject to the provisions of the MPRA, the market value of a property is the amount that the property would have realised had it been sold on the date of valuation in the open market by a willing seller to a willing buyer. In order to determine the market value of a prop-

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<sup>504</sup> The section thus requires an inquiry in accordance with applicable labour relations practices and requirements. The municipality's normal disciplinary procedures would thus come into play. See the MPRA s 43(3)-(4).

<sup>505</sup> See the MPRA s 43(5). A special valuer must be qualified similarly to the normal municipal valuer. Refer to s 39 qualifications.

<sup>506</sup> See the MPRA s 44(1)(a)-(d). The protection of information clause is also applicable to any person accompanying a municipal valuer or other functionary, when performing his/her functions under the MPRA s 41(1).

<sup>507</sup> See the MPRA s 45(1)-(3).

erty, the following aspects must be considered for purposes of valuating a property:<sup>508</sup>

- (a) the value of any license, permission or other privilege legally granted to the property;
- (b) the value of any immovable improvement on the property that was erected or is being used for a purpose which is inconsistent with or in contravention of the permitted use of the property;
- (c) the value of the use of the property for a purpose which is inconsistent with the permitted use.<sup>509</sup>

The following issues must be disregarded for purposes of valuation:<sup>510</sup>

- the value of any building or other immovable structure under the surface of the property which is the subject of any mining authorisation or mining right as defined in the Minerals Act<sup>511</sup>
- the value of any equipment or machinery which is regarded as immovable property, excluding a lift, an escalator, an air-conditioning plant, fire extinguishing apparatus, a water pump installation for a swimming pool/irrigation or domestic purposes and any other equipment/machinery that may be prescribed<sup>512</sup>
- any unregistered lease in respect of the property.

When determining the market value of a property used for agricultural purposes, the value of any annual crops or growing timber that have not yet been harvested at the date of the valuation must be disregarded.<sup>513</sup> Where available, the market value of public service infrastructure may be valued in accordance with any other prescribed method of valuation.<sup>514</sup> In respect of sectional-title schemes, the valuer must determine the market value of each sectional title unit in accordance with the provisions of section 46 of the MPRA.<sup>515</sup>

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<sup>508</sup> See the MPRA s 46(a) and (c).

<sup>509</sup> Any unlawful use/improvement is regarded for valuation purposes as if the use/improvement was lawful.

<sup>510</sup> See the MPRA s 46(3)(a).

<sup>511</sup> 50 of 1991.

<sup>512</sup> Prescribed in this sense refer to prescribe by regulation in terms of the MPRA s 83.

<sup>513</sup> Refer to the MPRA s 46(4).

<sup>514</sup> The MPRA s 46(5).

<sup>515</sup> See the MPRA s 47.

### 18.5.6.9 Aspects regarding municipal valuation rolls

All valuation rolls must list all rateable properties in their respective municipal areas. Specific particulars that must be reflected on the roll, if such information is reasonably determinable, are:

- the registered or other description of the property
- the category in which the property falls
- the physical address
- the extent of the property
- the market value, if valued
- the name of the owner and
- any other prescribed particulars.<sup>516</sup>

The municipal valuer must submit the certified valuation roll to the municipal manager, who must within 21 days of receipt of the roll publish in the *Provincial Gazette*, once a week for two consecutive weeks, a notice stating:

- that the roll is open for public inspection for a specified period and
- which invites every person who wishes to lodge an objection against the roll in the prescribed manner and period.<sup>517</sup>

The municipal manager must further disseminate the substance of the notice to the local community and serve by ordinary mail, if appropriate, on every owner a copy of the notice, together with an extract of the valuation roll pertaining to the relevant property.<sup>518</sup> Both the notice and the valuation roll must also be published on the municipality's website, if applicable. Any person may, after publication of the notice, inspect the roll during office hours, and on payment of a reasonable fee, request extracts from the roll and may also lodge an objection with the municipal manager against any matter reflected/omitted from the roll. An objection must be in relation to a specific individual property and not against the valuation roll as such.<sup>519</sup> Objectors

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<sup>516</sup> Read the MPRA s 48(1)-(2)(a)-(g). The minister may prescribe further particulars.

<sup>517</sup> See the MPRA s 49(1)(a)(i)-(ii). The inspection period may not be less than 30 days from the date of the publication of the last/second notice in the *Provincial Gazette*.

<sup>518</sup> Refer to the MPRA s 49(1)(b)-(c). These requirements must be read with the requirements set out in the Municipal Systems Act ch 4 and s 115.

<sup>519</sup> It seems that since the Act allows *any person* (own emphasis added) to lodge an objection, it is therefore not necessarily the owner of a particular property that has such a right. It would thus seem possible that a person could lodge an objection to the valuation of other property owners. See the MPRA s 50(1).

who are unable to read or write must be assisted by the municipal manager.<sup>520</sup> It is not only private persons that may lodge an objection; a municipal council itself may lodge an objection with the municipal manager against the valuation roll that affects the interests of the municipality. The municipal manager must within 14 days of the end of the objection period submit all objections to the municipal valuer, who is again obligated to decide and dispose of the objections promptly. It is important to note that the lodging of an objection does not defer liability of payment of rates beyond the payment date.<sup>521</sup> When considering and processing objections, the municipal valuer must promptly consider the objections, decide them on facts and adjust or add to the valuation roll, depending the decision taken.<sup>522</sup>

The new legislative framework also provides for the compulsory review of decisions of the municipal valuer. In this regard it is provided that if a municipal valuer adjusts the valuation of a property by more than 10% upwards or downwards, then the valuer must give written reasons for such a decision to the municipal manager, who must, in turn, promptly submit the relevant valuation decision, together with reasons and documentation, to the relevant valuation appeal board, for review.<sup>523</sup> The relevant appeal board is then obligated to review the decision and either to confirm, amend or revoke the decision.<sup>524</sup>

It is further required that a municipal valuer must in writing notify every objector and also the owner of a property if not the same, of the valuer's decision, any adjustments made to the roll and whether a section 52 automatic appeal is applicable.<sup>525</sup> An objector or owner may in writing, and within 30 days after such notification, apply to the municipal manager for reasons for the decision. A prescribed fee must accompany the application. Within 30 days after receipt of such application through the

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<sup>520</sup> It seems obvious that the Act does not require the municipal manager to act in his/her personal capacity, but rather that personnel from his/her office provide such assistance. The municipal manager stays finally responsible for such assistance, however. The MPRA s 50(3).

<sup>521</sup> See the MPRA s 50(4)-(6). Payment of rates by property owners whilst an objection is still undecided, is somewhat controversial. It seems that the Act requires payment first and possible settlement/adjustments later. Such a situation could put legitimate objectors in a negative position vis-à-vis their relevant municipalities. The constitutionality of such a position is somewhat doubtful.

<sup>522</sup> Note that the minister may prescribe the objection procedure and also that the objections should be evaluated with due regard to the submissions of an objector, which can be the owner of the property concerned or any other person. See the MPRA s 51(a)-(c).

<sup>523</sup> Read the MPRA s 52(1)(a)-(b).

<sup>524</sup> If an appeal board amends or revokes a decision, the chairperson of such a board and the valuer must ensure that the valuation roll is adjusted according to the decision of the board. the MPRA S 52(3).

<sup>525</sup> See the MPRA s 53(1)(a)-(c).

municipal manager, the relevant valuer must then provide the applicant the reasons for the decision in writing.<sup>526</sup> After receipt of the written reasons for a decision, an appeal to an appeal board against the decision may be lodged in the prescribed manner with the office of the municipal manager. Such an appeal may be lodged by either an objector, an owner of a property who is affected by the decision and the municipal council concerned, if the municipality's interests are affected. An appeal by an objector must be lodged within 30 days after the date on which the written notice was sent to the objector or after 21 days after the day on which the reasons for a decision were sent to an objector who has requested such reasons. An owner of a property must lodge an appeal within 30 days after the date on which the written notice was sent, or within 21 days after the date on which the decision was taken.<sup>527</sup> A municipal manager must then forward any appeal to the chairperson of the appeal board within 14 days after the end of any applicable appeal period. The chairperson of the appeal board must then, for purposes of considering any appeal, convene a meeting of the board within 60 days after an appeal has been forwarded. A copy of the appeal must also be submitted to the municipal valuer concerned. Again the MPRA determines that an appeal lodged does not defer liability for payment.<sup>528</sup> Finally, it is determined in the Act that any adjustments or additions made to a valuation roll will take effect on the effective date of the valuation roll.<sup>529</sup> If an adjustment in the valuation of a property affects the amount due for rates, then the municipal manager must calculate the amount actually paid and the amount payable in terms of the adjustment calculated since the effective date. The municipal manager must then recover or repay the rates to the liable person: the difference together with interest at a prescribed rate.<sup>530</sup>

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<sup>526</sup> The MPRA s 53(2)-(3).

<sup>527</sup> See the MPRA s 54(1)-(2).

<sup>528</sup> Refer to the MPRA s 54(3)-(4).

<sup>529</sup> According to the definitions set out in the MPRA s 1, the term "effective date" means the date on which a valuation roll has taken effect in terms of the Act s 32(1) or the date on which a supplementary valuation roll has taken effect in terms of the Act s 78(2)(b).

<sup>530</sup> See the MPRA s 55(1)-(3). Where additions to a valuation roll were made, the municipal manager must also recover from the liable person, payment of the rate because of the addition, plus interest as prescribed.

#### 18.5.6.10 Requirements and determinations pertaining to valuation appeal boards

The MEC for local government in a province is authorised to establish as many appeal boards in the province as may be necessary. There must be no fewer than one such an appeal board in each district municipality and each metropolitan municipality, however.<sup>531</sup> If more than one appeal board is established in a district municipality, each board must be established for one or more local municipalities or even district management areas.<sup>532</sup> The main function of an appeal board is twofold:

- It should hear and decide appeals under the Act.
- It should review decisions of a municipal valuer submitted under section 52 of the Act.<sup>533</sup>

With reference to the composition of an appeal board, the PRA determines that each appeal board should consist of a chairperson, who must be a person with legal qualifications and sufficient experience in the administration of justice, and not fewer than two and not more than four other members with sufficient knowledge of or experience in the valuation of property. Of such persons, at least one must be a professional valuer registered in terms of the Property Valuers Profession Act. All members of an appeal board must be appointed by the MEC, taking into account the need for including representivity as well as gender representivity. When making appointments, the MEC must follow a transparent process.<sup>534</sup> The following persons are legally disqualified from being a member of an appeal board, however:

- an unrehabilitated insolvent
- a person under curatorship
- a person declared to be of unsound mind by a court of the Republic of South Africa
- a person who, after 24 April 1994, was convicted of an offence and sentenced to imprisonment without an option of a fine for a period of not less than 12 months
- a person who has been disqualified in terms of applicable legislation from practising as a valuer or a lawyer<sup>535</sup>

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<sup>531</sup> Notice of the appeal boards must be given in the *Provincial Gazette* of the province.

<sup>532</sup> See the MPRA s 56(1)-(2).

<sup>533</sup> Read the MPRA s 57(a)-(b).

<sup>534</sup> See the MPRA s 58(1)-(3).

<sup>535</sup> Refer to the Property Valuers Profession Act 47 of 2000 and the Attorney's Act 53 of 1979.



- a person who is in arrears to a municipality for rates or services charges for a period longer than three months.<sup>536</sup>

A member of an appeal board who is a councilor, employee or valuer of a municipality must withdraw from the proceedings of the board if a matter concerning that municipality's valuation roll is being considered by the board.<sup>537</sup> The normal term of office of members of an appeal board is four years, but members are eligible to be reappointed.<sup>538</sup> After consultation with the MEC, the minister of Local Government must determine the conditions of appointment of members of an appeal board. Conditions of appointment may differ between the chairperson and other members. The municipality or municipalities for which an appeal board was established must remunerate the members of the board according to the conditions of appointment and the directions of the MEC.<sup>539</sup> All members of appeal boards must perform their duties in good faith and without fear, favour or prejudice. Any personal or private business interest of a member in a matter on appeal must be disclosed, and such a member must withdraw from the proceedings, unless the board decides that the interest is trivial or not relevant. Such a decision should be announced in public at the first available sitting of the board. No member may use his/her position or privileges for private gain or to improperly benefit another person. Members may also not act in any way that compromises the credibility, impartiality, independence or integrity of an appeal board. If a member contravenes the code of conduct mentioned above, he/she will be guilty of misconduct.<sup>540</sup>

It is also provided that a member of an appeal board ceases to be a member when that person resigns, is no longer eligible or is removed from office. Only the MEC may remove a member from office and only on the grounds of misconduct, incapacity or incompetence. A decision to remove a member must be based on a finding of misconduct or incompetence by an investigating tribunal appointed by the MEC. Members under investigation may be suspended from office by the MEC.<sup>541</sup> The

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<sup>536</sup> The MPRA s 59(1)(a)-(f). The disqualification because of an offence ends five years after the imprisonment has been completed.

<sup>537</sup> The MPRA s 59(3).

<sup>538</sup> No specific terms are laid down in the MPRA. A member can thus be reappointed several times. Refer to the MPRA s 60.

<sup>539</sup> The MPRA s 61(1)-(3).

<sup>540</sup> Refer to the MPRA s 62(1)-(2).

<sup>541</sup> See the MPRA s 63(1)-(4).

MEC may further appoint alternative members of an appeal board. An alternative member acts as a member when a member is absent, has recused him/herself or when the filling of a vacancy on the board is pending.<sup>542</sup>

The chairperson on an appeal board decides where and when a board meets, but he/she must promptly convene a meeting if a majority of members of the board so request in writing, at a time and place set out in the request. When a board is hearing an appeal, it must sit in a municipality whose valuation roll is the subject of the appeal or being reviewed.<sup>543</sup> If a chairperson is absent or not available, or if there is a vacancy in the office of the chairperson, then the other members of the board must elect a member with experience in the administration of justice or elect the alternative as chairperson to preside at the meeting. Meetings are open to the public, but a board may adjourn in closed session when deliberating an issue.<sup>544</sup> An appeal board may further request a municipality whose valuation roll is under consideration to provide it with the necessary office accommodation and other administrative assistance, inclusive of staff for the board. All reasonable requests in this regard must be complied with by the municipality, which is subsequently also liable for the costs of the appeal board.<sup>545</sup> The internal procedure of a board may be determined by the board, subject to any procedures that may be prescribed.<sup>546</sup> A majority of members of an appeal board serving at any relevant time constitutes a quorum for a meeting, and a matter before the board is decided by a supporting vote of a majority of the members. If on any matter there is an equality of votes, then the member presiding must exercise a casting vote in addition to that person's normal vote as a member.<sup>547</sup> It is the responsibility of the chairperson of an appeal board and of the valuer

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<sup>542</sup> See the MPRA s 64(1)-(3).

<sup>543</sup> It seems that the intention of the legislator is for the board to sit and convene within the municipal offices of the municipality concerned. See the MPRA s 65(2).

<sup>544</sup> Read the MPRA s 55(1)-(4).

<sup>545</sup> Refer to the MPRA s 66(1)-(2).

<sup>546</sup> The MPRA s 67.

<sup>547</sup> The MPRA is somewhat unclear on the aspect of decision making. There seem to be two possibilities. Since a majority (50% + 1) of members of a board forms a quorum, such a quorum must normally be present before a meeting and subsequent decision is taken. The Act s 68 determines that any matter before the board is decided by a supporting vote of a majority of the members of the board, however, and not a majority of the members present that formed a quorum. To illustrate the position, let us imagine an appeal board that consists of five members. Refer again to the Act s 58. A quorum would be three members. If the legislator intended that a majority (absolute majority) of the members of a board must support a matter before the board, then all three members must support a decision. If the intention was to refer to a supporting vote of a majority of members present that form a quorum, then only 2 (50% + 1 of the members present) would allow a

*continued on next page*

of a municipality to ensure that that valuation roll is adjusted or added to in accordance with the decisions taken by the board.<sup>548</sup> When an appeal board gives a decision, it may issue an order with regard to costs, as it sees just and equitable. Persons whose appeals or opposition to an appeal were in bad faith or frivolous may be ordered to compensate the municipality concerned in full or in part for costs incurred by the municipality in the appeal.<sup>549</sup> It is also determined that the MEC may on request by an appeal board authorise the board to establish one or more committees to assist it in the performance of its duties. When appointing members of a committee, the board is not restricted to members of the appeal board. Furthermore, the board

- must determine the duties of a committee
- must appoint a chairperson and other members
- must authorise the committee to co-opt advisory members within the limits determined by the board
- may remove members
- may also determine a committee's procedure.

The board can also dissolve a committee at any time.<sup>550</sup>

Similarly to a municipal valuer, an appeal board may enter any property that is subject of an appeal and inspect the property. When entering a property, a member or assistant of the board must identify himself or herself and may be accompanied by an interpreter or other functionaries.<sup>551</sup> Members of appeal boards may require access to documents or information relevant to the appeal/review and may make extracts thereof. They can also require written or oral particulars regarding the property relevant to the appeal/review.<sup>552</sup> Information obtained may not be disclosed, except as authorised under the MPRA.<sup>553</sup>

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decision. The latter would seem the more likely interpretation, since the contrary would make the provision of s 68(1) rather meaningless.

<sup>548</sup> Refer to the MPRA s 69(1)-(3). Where an adjustment affects the amount due for rates, then s 55 must be applied.

<sup>549</sup> The MPRA s 70(1)-(2).

<sup>550</sup> See the MPRA s 71(1)-(5). Note also that ss 61-66(2)(b), read with the necessary changes, apply to the conditions of appointment of members of a committee who are not members of an appeal board.

<sup>551</sup> For the full details read the MPRA s 71(1)-(3). The MEC must issue all members of an appeal board an identity card with the photographs of that person for identification purposes.

<sup>552</sup> Refer to the MPRA s 73(a)-(c).

<sup>553</sup> Read the MPRA s 74(1)(a)-(d).

In order for an appeal board to function properly, the MPRA determines that an appeal board may by notice summon a person to appear before it in order to give evidence or to produce documents specified in the summons/notice. The board may also call a person present at a meeting, whether summoned or not, to give evidence or to produce a document in that person's custody. For evidential purposes, the board may administer an oath or solemn affirmation to a person and question or have a person questioned. Documents obtained may be retained by the board for a reasonable period.<sup>554</sup> It is further also provided that a person who is appearing before an appeal board, whether summoned or not, may at his/her own expense be assisted by a legal representative. When a person is summoned before a board, he/she is entitled to witness fees paid to state witnesses in criminal proceedings in a criminal court. Such fees are payable by the relevant municipality. It should be noted that the law regarding privilege to a witness in a criminal case applies before an appeal board.<sup>555</sup> In the last instance, it is provided that legal proceedings by or against an appeal board may be instituted in the name of the board, and any costs awarded in any legal proceedings against such a board must be borne by the municipality concerned.<sup>556</sup>

#### **18.5.6.11 Aspects regarding the updating of municipal valuation rolls**

All applicable municipalities must regularly, but at least once a year, update its valuation roll by preparing either a supplementary valuation roll or amending its current valuation roll.<sup>557</sup> In respect of supplementary valuations, a municipality must, whenever necessary, cause a supplementary valuation to be made in respect of all rateable property that

- was incorrectly omitted from the roll
- was included in a municipality after the last general valuation
- was subdivided or consolidated after the last general valuation of which the market value has substantially increased or decreased
- was substantially incorrectly valued during the last general valuation

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<sup>554</sup> See the MPRA s 75(1)(a)-(e).

<sup>555</sup> For more details refer to the MPRA s 75(2)-(4).

<sup>556</sup> It seems therefore that an appeal board is afforded legal personality, which can take legal action itself or against which legal action can be instituted. The MPRA is somewhat vague about this particular aspect. See the MPRA s 76(1)-(2).

<sup>557</sup> The MPRA s 77(a)-(b).

- must be revealed because of other exceptional reasons.<sup>558</sup>

A municipal valuer who prepared the valuation roll may be designated for the preparation and completion of the supplementary roll. A supplementary roll takes effect on the first day of the month following the completion of the public inspection period, and it remains valid for the duration of the municipality's current valuation roll.<sup>559</sup>

Supplementary valuations must reflect the market value of properties as determined in accordance with market conditions that prevailed at the date of the valuation determined for the purposes of the municipality's last general valuation and other provisions of the MPRA. Rates applicable to a supplementary valuation roll become payable with effect from:

- the effective date of the supplementary roll
- the date on which the property was included in the municipality
- the date on which the subdivision or consolidation of the property was registered in the deeds office or
- the date on which the market value has substantially increased or decreased.<sup>560</sup>

All municipalities must regularly amend their valuation roll to reflect any changes to the particular roll. Changes to the roll in circumstances under section 78 of the MPRA may be effected only through a supplementary roll, however.<sup>561</sup>

#### **18.5.6.12 Miscellaneous matters pertaining to the new property rates legislation**

The MPRA determines that, on good cause shown and on such conditions as the MEC may impose, the MEC for Local Government in a province may condone any non-compliance with a provision of the Act which requires any Act to be done within a specified period or pertaining to any Act to be done within a specified period. Any

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<sup>558</sup> See the MPRA s 78(1)(a)-(f). Note that the provisions of ch 4 Part 2 and also chs 5, 6 and 7 are applicable to the updating of valuation rolls.

<sup>559</sup> Read the MPRA s 78(2)(a)-(b) together with s 49.

<sup>560</sup> Refer to the MPRA s 78(3)-(4). It seems clear from the Act that not only increases in the value of property are provided for, but also decreases. When the valuation of a property is negatively impacted, eg, through fire or other natural disaster, then a property owner would be well advised to notify the relevant municipal manager of such an occurrence and request the municipal valuer to investigate the matter and to make an adjustment accordingly. It is submitted in this regard that unless an adjustment to the valuation roll by means of a supplementary roll has been made, a property owner will have to pay the rates due on that property as was valued in terms of the previous valuation. A possible refund could be applicable later when the supplementary valuation roll is in effect.

<sup>561</sup> The MPRA s 79.

non-compliance with sections 21, 31 or 32 of the Act may not be condoned.<sup>562</sup> The MEC must further monitor whether municipalities comply with the provisions of the Act. If municipalities fail to comply with the Act, the MEC may take any appropriate steps to ensure compliance, which steps could include a proposal to intervene in accordance with section 139 of the Constitution.<sup>563</sup> Even the minister may monitor or investigate and even issue a public report on the effectiveness, consistency, uniformity and application of municipal valuations. Such an investigation may include studies of the ratio of valuations to sale prices and also other appropriate statistical measures in order to determine the accuracy of valuations.<sup>564</sup> The minister is furthermore authorised to make regulations which are not inconsistent with the Act, and which concern:<sup>565</sup>

- (a) any matter that may be prescribed in the act;
- (b) matters that refer to the preparation, contents, adoption and enforcement of a municipal rates policy;
- (c) the manner in which rates referred to in section 21 of the MPRA must be phased in together with the criteria that municipalities must take into account;
- (d) the property register;
- (e) the form and content of any document referred to in the act, including a declaration, authorization, valuation roll, objection, appeal and notice;
- (f) the valuation and rating of public service infrastructure;
- (g) procedures to be followed in connection with appeals and reviews of decisions of municipal valuers;
- (h) aspects of condonement of non-compliance;
- (i) the giving of reasons by an appeal board;
- (j) the funding of appeal boards;
- (k) inquiries by investigating tribunals for appeal boards;
- (l) inquiries of alleged misconduct of valuers;
- (m) fees payable for information or issuing of documents;

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<sup>562</sup> The MPRA s 80(1)-(3). The power to condone may also only be exercised within a framework, as may be prescribed by regulation by the minister.

<sup>563</sup> Read the MPRA s 81(1)-(2).

<sup>564</sup> Investigations may be undertaken in respect of one, more or all municipalities. See the MPRA s 82(1)-(3).

<sup>565</sup> See the MPRA s 83(1)(a)-(n).

(n) any other matter in the opinion of the minister that is necessary for the effective carrying out or furtherance of the objects of the act.

Furthermore, the minister may declare by regulation a contravention of or failure to comply with any specific regulation to be an offence.<sup>566</sup> Before regulations are promulgated, the minister must consult with OLG on the substance of those regulations and must also publish the draft regulations in the *Government Gazette* for public comment.<sup>567</sup> It is also provided that the copyright of valuation rolls and other documents produced by municipal functionaries under the Act vests in the relevant municipality concerned.<sup>568</sup>

The MPRA determines that a person is guilty of an offence if that person:<sup>569</sup>

- (a) contravenes section 43(1)(a) or (b), 44, 62(1)(b) or (c) or section 74 of the act;
- (b) willfully obstructs, hinders or threatens a valuer or other authorized person when performing a duty or exercising a power in terms of the act;
- (c) willfully gives information in an objection in terms of section 50(1)(c) of the act or in an appeal which is false in any material aspect;
- (d) after having been summoned, fails to be present at a meeting, fails to remain present until excused or fails to produce a document specified in the summons;
- (e) after having been called under section 75 of the act, refuses to appear, answer any question, except where the answer might incriminate the person or to produce a document in the person's custody;
- (f) fails to comply with a request under section 29, 42 or 73 of the act or willfully supplies false or incorrect information in any material respect.

A valuer is guilty of an offence even if he/she is grossly negligent in the exercise of the functions of the office. For someone convicted of an offence, the penalty under the Act is the liability of imprisonment, which may not exceed two years, or a fine as may be prescribed in relevant national legislation. A person convicted of an offence in terms of section 83(2) of the Act is liable only for a fine or imprisonment not exceeding six months, however.<sup>570</sup> Finally, it is determined that the MPRA prevails in

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<sup>566</sup> See the MPRA s 83(2). It should be noted that regulations may treat different categories of property or different categories of owner of property differently.

<sup>567</sup> Reer to the MPRA s 84(a)-(b).

<sup>568</sup> The MPRA s 85.

<sup>569</sup> See the MPRA s 86(1)(a)-(f).

<sup>570</sup> Read the MPRA s 86(1)-(4).



the event of any inconsistency between it and any other legislation regulating the levying of municipal rates.<sup>571</sup>

#### **18.5.6.13 Aspects concerning transitional arrangements and the amendment and repeal of legislation**

According to the MPRA, municipal valuations and property rating conducted by a municipality in an area in terms of legislation which is repealed by the MPRA before the commencement of the Act may, despite such repeal, continue to be conducted in terms of that legislation until the date on which the valuation roll covering that particular area prepared in terms of the Act takes effect in terms of section 32(1).<sup>572</sup> Until a municipality prepares a valuation roll in terms of the MPRA, a municipality may continue to use a valuation roll and supplementary roll that was in force and may levy rates against property values as shown on that roll. Where valuation rolls were prepared by different predecessor municipalities, the current/new municipality may impose different rates based on the different rolls. The amounts payable on similarly situated properties should be more or less similar. The transitional requirements lapse within four years from the date of commencement of the MPRA, however.<sup>573</sup> Similar to valuation rolls, a rates policy adopted before the commencement of the Act continues to be of force until the date on which the first valuation roll prepared under the Act takes effect.<sup>574</sup> Transitional arrangements regarding section 21 applications, the liability of bodies corporate of sectional title schemes and special rating areas are also determined by the MPRA.<sup>575</sup> Finally, the MPRA amends and repeals various pieces of national and provincial legislation. For details on such legislation, refer to the schedule annexed to the Act.<sup>576</sup> In contrast with the levying of property taxes on privately owned land, the state is sometimes exempted from having to pay taxes to local authorities. According to the Rating of State Property Act,<sup>577</sup>

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<sup>571</sup> The enforcement of so-called "old-order" legislation, which is still in existence in the various provinces, is thus subjected to the MPRA. See the MPRA s 87.

<sup>572</sup> See the MPRA s 88(1)-(2).

<sup>573</sup> Read the MPRA s 89(2)-(3). When the old order laws lapse, then the old valuation rolls/supplementary rolls may not be used anymore.

<sup>574</sup> See the MPRA s 90(1)-(2). Any review of such an old rates policy after the commencement of the Act must take the aims of the MPRA s 3(3) into account.

<sup>575</sup> Refer to the MPRA ss 91, 92 and 93 respectively.

<sup>576</sup> See the Act s 95 together with the Sch. The Act comes into operation only on a date to be determined by the president by proclamation. The MPRA s 96. It should specifically be noted that the MPRA repeals the whole of the Rating of State Property Act 79 of 1984.

<sup>577</sup> 79 of 1984.

state property is also rateable. Exemptions are possible, however.<sup>578</sup> This Act was repealed by the MPRA, however.

### **18.5.7 Fees, service charges and tariffs**

Municipalities have always been very dependent on financial income derived from fees, service or user charges and various tariff obligations. All former provincial ordinances provided for such revenue arrangements. Section 10G(7) of the LGTA empowered municipalities to levy and recover levies, taxes, fees and tariffs and also prescribed the procedures for doing so. Unless repealed or contrary to the Constitution, such requirements are still applicable and enforceable. According to the new constitutional scheme, that is, section 229, municipalities are empowered to impose taxes, levies and duties apart from property rates and surcharges on fees if authorised by national legislation. Income tax, general sales tax, and value added tax are excluded, however.<sup>579</sup>

Generally speaking, a “charge” is regarded as a payment for something to be done, for example an electricity or water connection. The fee or charge is then a once-off payment. A “tariff”, on the other hand, refers to a continuing fee or charge for a service that is being rendered or for a function that is to be performed on a continuing basis. Examples of tariffs included tariffs for the supply of water or electricity, refuse removal or even public transport. In essence the purpose of fees, charges and tariffs is to recover the cost of providing such a service or to perform such a function.<sup>580</sup> Fees, tariffs and service charges are often divided into different categories. A distinction is made between *trading services*, *necessary services* and *social services*. Trading/utility services include water and electricity services. Normally it is expected that municipalities do not make a profit on such services, as it could be oppressive to poor households. In many instances in the past profits were indeed achieved on electricity and sometimes on water services. Necessary charges or fees relate mostly to sewerage, refuse removal and associated services. *Social services* refers to services such as clinics, building control, markets, halls, libraries,

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<sup>578</sup> See the Act s 3(3).

<sup>579</sup> The Constitution does not define what is meant by levies or taxes. Taxes must be levied and recovered according to the law, however.

<sup>580</sup> See Craythorne (1997) 360-361. The writer mentions that sometimes the amount charged will cover the entire cost of the service or function, and sometimes the cost will amount to only a contribution of the costs. The balance will then often be subsidised from other sources such as rate

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parks and other recreational facilities. Such services are regarded as important for the growth and development of a community. They are often very expensive and are subsidised from other sources.

It is evident that user charges form an important source of municipal own revenue and that the cost recovery of such charges is essential. Many municipalities under the new legal system contain several backlogs in respect of payment for these services. In an effort to assist municipalities in meeting the capital costs of bulk connector infrastructure, national government has provided for the Consolidated Municipal Infrastructure Programme (CMIP). There is a general obligation on municipalities to develop clear tariff policies and also to ensure that poor/indigent households have access to basic services. It is also important that tariff enforcement and credit control mechanisms should be improved. In an effort to guide tariff policies, government and other stakeholders have agreed on the following guidelines:<sup>581</sup>

- *Payment in proportion to the amount consumed* As far as is practically possible, consumers should pay in proportion to the number of services consumed.
- *Full payment of service costs* All households, with the exception of the indigent, should pay the full costs of the services consumed.
- *Ability to pay* Municipalities should develop a system of targeted subsidies to ensure that poor households have access to at least a minimum level of basic services.
- *Fairness* Tariff policies should be fair, in that all people should be treated equitably.
- *Transparency* Tariff policy should be transparent to all consumers and any subsidies and concessions which exist must be visible and understood by all consumers.
- *Local determination of tariff levels* Municipalities should have the flexibility to develop their own tariffs in keeping with the above principles.
- *Consistent tariff enforcement* A consistent policy for dealing with non-payment of tariffs needs to be developed. This must be targeted and enforced with sensitivity to local conditions.

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charges. If full cost were to be charged, ie for public swimming pool amenities, such facilities would be beyond the financial reach of many local residents.

<sup>581</sup> See the White Paper on Local Government (1998) at 137.

- *Ensure local economies are competitive* Local tariffs must not unduly burden local business through higher tariffs, as these costs affect the sustainability and competitiveness of such businesses and firms.

#### **18.5.8 Trading enterprises and subsidies**

It has always been customary for local governments to participate in trading enterprises. Trading enterprises are associated with activities such as the provision of water, electricity, transport and fresh produce. Trading enterprises should be balanced within the overall tariffs policy to enhance income, on one hand, but not to overburden consumers/residents on the other. In the past it was expected of local authorities to generate sufficient income to carry out their activities. Little financial or other assistance was received from the other spheres of government. Municipalities were exempted from revenue sources such as income tax, stamp duties and the taxation on gifts, however. Subsidies were also received from the central and provincial authorities. The provisions of section 214 of the Constitution, which requires the equitable division of revenue raised nationally, should significantly enhance the financial support from the two higher spheres of government to the lowest spheres. Both national and provincial governments are legally obligated to support municipalities from *inter alia* a financial point of view.

#### **18.5.9 RSC levies and intergovernmental transfers**

In the recent past, Regional Service Council levies have developed into an important source of revenue for especially metropolitan and district councils. Although often controversial, these taxes are important for municipal revenue and should be retained until a suitable alternative is found. Some of the general criticism levelled against RSC levies is the costs of collection and the fact that the tax is directed on staff or labour. This is often perceived to reinforce a bias against labour-intensive enterprises and could therefore negatively impact on development. It is submitted, however, that as long as such levies are restricted to low levels and are effectively controlled, the potentially negative effects should be minimised.<sup>582</sup>

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<sup>582</sup> See the Regional Services Act 109 of 1985, which provides for the payment to councils of a regional services levy by every employer and a so-called "regional establishment levy" payable by every person carrying on an enterprise in the area of a particular council. Refer also to the case of *Greater Johannesburg TMC v Eskom* 2000 (1) SA 866 (SCA). The dispute concerned the liability for regional establishment levies on the part of Eskom to the particular municipal council. According to the RSC Act s 12, every person carrying on an enterprise within a region/jurisdiction is subject to such a levy. Eskom Act 40 of 1987 s 24 exempted Eskom from payment of levies that would other-

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In light of the constitutional obligation that municipalities are entitled to an equitable share of national revenue as well as the obligation on national and provincial governments to support municipalities financially, the principle of intergovernmental transfers (IGT) has become very important. According to the White Paper on local government, three basic types of transfer were identified:<sup>583</sup>

- There are agency payments paid by provincial governments to municipalities for services rendered by the municipalities on behalf of the provinces.
- There are direct grants from higher spheres to municipalities to subsidise the capital costs of investment in municipal infrastructure.
- There are grants to support the operating budget of municipalities.

Municipalities must ensure that the agency payments they receive are sufficient to cover the full cost of the services which they deliver. The possibility of unfunded mandates should be guarded against. It is important that the new system of IGT should address not only the vertical division of revenue but also the horizontal division of revenue between municipalities *inter se*. The vertical division is decided via the national budgeting process. It is also important to note that the equitable share from national revenue covers only funds transferred to cover operating costs of municipalities. Capital grants are classified under so-called “additional grants”. From the horizontal divisional point of view, all municipalities must be able to provide a basic level of services and have at least an administrative infrastructure sufficient to govern its area effectively.

#### **18.5.10      *Municipal loans and capital funds***

It was mentioned above that the Constitution allows municipalities to raise loans for capital or current expenditure.<sup>584</sup> Such loan capacity refers to external loans such as bank overdrafts. Municipalities must be very cautious not to over-exceed their borrowing possibilities and end up having a negative credit rating, however. In order to ensure that a municipality does not fall into a trap of debts, strict requirements are set out before a loan can lawfully be obtained.<sup>585</sup> Loans for bridging finance may be raised only during a financial year and also only to finance current expenditure in

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wise have been payable to the state. Court held that the reference to “state” in the Act was to the state in all its manifestations, including local authorities such as RSC or TMC. Eskom was accordingly exempted from paying regional establishment levies.

<sup>583</sup> See White Paper on Local Government (1998) at 139.

<sup>584</sup> See the Constitution s 230.

<sup>585</sup> See the LGTA s 10G(8) and the various provisions under the LGMFMA discussed above.

anticipation of the receipt of revenue to be collected. Apart from raising loans, municipalities can also utilise internal capital funds as a resource for funding less expensive capital purchases such as equipment and minor building works.

#### **18.5.11      *Municipal stocks***

Another method used in the past in raising capital by municipalities was through the issuing of municipal stock. Stock refers to a fixed amount of money invested by an individual or institution. It is a form of loan. In return for the investment, a certificate is issued as evidence of ownership of a fixed amount of stock. Normally a stock certificate is transferable at a price determined by the prevailing money market. Craythorne identifies three types of stock.<sup>586</sup> These are *bearer stock*, *inscribed stock* and *registered stock*. Transfer of stock takes place through the transfer or surrender of the stock certificates. In South Africa this method of raising money is preferred because of security offered by the stocks and also easy accounting control. Finally, there are two methods of issuing stock: one is through the so-called “fixed price” system and the other is through the “tender” system. Under the tender system municipal stock is put up for public tender, and an issue is made to the highest bidder.<sup>587</sup>

#### **18.6 Conclusion**

It is obvious to conclude that the restructuring process of local government and the various constitutional demands placed on municipalities have introduced many financial challenges. These challenges include a dramatic increase in services responsibilities, escalation in municipal salaries, higher administrative costs and often a significant reduction in experienced personnel.<sup>588</sup> Most of these challenges have placed severe pressure on the cash flows and financial control mechanisms of all newly amalgamated municipalities.

There seems to be a strong need and indeed constitutional obligation for municipalities to restore and implement strict financial discipline and to take effective steps to recover outstanding debts and to fully utilise all local methods to generate the necessary revenue. Without sufficient revenue at their disposal, municipalities will not be able to fulfil and complete their constitutional obligations. It is further also

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<sup>586</sup> See Craythorne (1997) 364.

<sup>587</sup> Craythorne (1997) 364-365.

<sup>588</sup> Refer to the White Paper on Local Government (1998) at 147.

essential that municipalities are properly assisted and supported by both the national government and the provincial authorities. The success of municipal fiscal management lies in strict control and oversight, however. In this regard the higher spheres of government have important control functions to fulfil.

It is submitted that the new legislative provisions, within the basic framework of the Constitution, indeed create a legal dispensation that should allow all municipalities to enhance and secure sufficient financial revenue and thereby provide and sustain essential municipal services. Such support and financial entitlements are not unrestricted, and various measures of control and accountability over fiscal matters have been provided for. Clear and decisive provisions are also made to ensure higher-sphere involvement in municipal financial affairs and to provide for oversight and even national and provincial intervention in cases where municipal finances are inappropriately managed. The new legal framework also allows for much stronger public participation in financial affairs, which in turn should foster stronger relationships of trust and support between local residents and their respective municipal governments. However, the ultimate success of the new system lies in the way in which the new system is implemented and in the manner in which all roleplayers exercise and fulfil their distinctive legal obligations.



## **The principles of municipal public administration and the requirements of performance management, capacity building, accountability and public participation**

### **19.1 Introduction**

The importance of the relationship between municipalities and residents as well as between municipalities and the two higher spheres of government have been emphasised in many previous chapters of this work. These relationships have been given constitutional importance and significance under the new overall constitutional scheme. Especially since the Constitution is the supreme law of the state, all constitutional requirements dealing with the public administration and the relations between the public and government institutions must be strictly complied with. Under the previous local government system, many of these issues were not legally enforceable or were largely downplayed in mostly provincial ordinances. This position has now changed fundamentally under the new constitutional dispensation.

As a basic point of departure, the meaning of administration (ie municipal administration) refers to the overall management of the public affairs of a certain organisation.<sup>1</sup> On a municipal level, public administration encapsulates a special relationship between politics and administrative organs. The politicians are concerned with the uses of power, whilst the administration is concerned with translating the political decisions into practical implementation. Furthermore, the political dimension is subject to change, whereas the administration is characterised by stability and routine.

In terms of public administration, it must be remembered that the concept includes aspects such as policy, decisions, staffing matters, organising, planning and also resource allocations. The concept also differs widely from one administration to an-

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<sup>1</sup> Craythorne (1997) 65.

other. Municipal administration is undoubtedly part of public administration in general, but it also has a more distinctive importance; for example:<sup>2</sup>

- It operates in a political field.
- It operates within the context of democratic notions of an open, responsive and accountable government institution.
- It is decentralised and, to a certain degree, self-financing.
- It is the part of government which is closest to the citizens of a particular state.

### **19.2 Basic aspects concerning municipal public relations**

All forms of government accept in general that their actions have to be acceptable by their subjects. This realisation provides the basis for the development of a relationship of trust and support between the state and its people. In modern day governments this relationship is very important because a government is generally accountable to the people who have elected it to power. This position is particularly true for local governments. Because local authorities provide essential goods and services which affect people directly, it is acceptable that the public at large should be sensitive about the performance of both political office-bearers and administrative staff components.

In contrast to the public relations activities of private enterprises which are directed at sales and profits, public relations programmes of public institutions are usually approached from the point of view of promoting general welfare. Public institutions are mostly monopolistic enterprises with no real competitors. This position has changed somewhat under the new South African constitutional scheme as competitiveness, accountability and responsiveness in providing services and attracting investment have become familiar catch-phrases. Because of their prominent caretaker roles in society, public institutions such as municipalities are subjected to various legal requirements in respect of the exercise and fulfilment of their functions.<sup>3</sup> It is further also an established requirement that public functionaries maintain high ethical standards. This position is so because of the important public responsibilities which municipalities must perform.

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<sup>2</sup> See Craythorne (1997) 71.

<sup>3</sup> See Cloete (1997) 152. The writer mentions that the public does not always understand the reasons for administrative red tape. There are often very good reasons for such requirements, however. The introduction of Public/Private Partnerships (PPP) has also boosted municipal competitiveness and profit targeting.

Municipal public relations are affected by every action of a political or staff representative. The activities of municipalities will always be evaluated carefully by local residents and other stakeholders. If respect is to be achieved, officials and political representatives should foster an attitude of commitment to the general public. It is thus safe to say that the state of public relations is largely dependent upon the conduct and performance of every functionary involved in public administration. Because of its importance, every municipality should appoint officials that are charged exclusively with the handling of its public relations.<sup>4</sup> One of the many difficult tasks of a public relations officer is to determine public opinion and attitudes and to accommodate such opinions and attitudes. Quick and reliable information is very important here.

### **19.3 The constitutional requirements affecting municipal public administration**

In light of the importance and responsibilities of public administration at large, the new constitutional scheme specifically entrenches certain basic values and principles that govern it. These basic values and principles are important to not only the public administration *per se*, but also the public services throughout all three spheres of government. Unless the Constitution is amended, the basic values and principles have been afforded supreme legal status and must be complied with.

#### **19.3.1 *The basic values and principles governing public administration***

In section 195 of the Constitution, the following values and principles relevant to the overall public administration are mentioned as follows:<sup>5</sup>

- A high standard of professional ethics must be promoted and maintained.
- Efficient, economic and effective use of resources must be promoted.
- Public administration must be development-orientated.
- Services must be provided impartially, fairly, equitably and without bias.
- People's needs must be responded to and the public must be encouraged to participate in policy-making.
- Public administration must be accountable.
- Transparency must be fostered by providing the public with timely, accessible and accurate information.

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<sup>4</sup> Such personnel are usually known as "public relations officers" (PROs) and "publicity officers" (media liaison officers).

<sup>5</sup> See the Constitution s 195(1)(a)-(i).

- Good human-resource management and career-development practices must be cultivated to maximise human potential.
- Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress imbalances of the past to achieve broad representation.

All of the abovementioned values and principles are obligatory and must be complied with. The Constitution is clear on the fact that public administration must be governed by the democratic values and principles enshrined in the Constitution and not only those mentioned in section 195(1).<sup>6</sup> Apart from the values and principles mentioned, the Constitution confirms that the principles apply to the public administration in every sphere of government, organ of state and public enterprise. Without a doubt such principles are therefore relevant to all municipalities.<sup>7</sup> The Constitution further requires the enactment of national legislation which must ensure the promotion of the mentioned values and principles.<sup>8</sup> It is also permitted that the national legislation envisaged above may allow for differentiation between aspects regulating public administration between different sectors, administrations or institutions. In this regard the particular nature and functions of different sectors, institutions or administration should be taken into account when the legislation regulating the public administration is enacted. Furthermore, it seems clear from the Constitution that not all aspects concerning the public administration of all administrations or sectors should be precisely the same.<sup>9</sup> The national legislation envisaged in section 195 has been enacted as the Public Service Act.<sup>10</sup> *Inter alia*, the Act provides for the broad principles on the functioning of the public service in general, thereby also including various aspects important to municipal public administration. The Act must also be read in conjunction with section 197 of the Constitution, which in essence creates a public service for the entire Republic of South Africa. According to the Constitution, there is a public service within the overall public administration. Such public service must function

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<sup>6</sup> See the Constitution s 195(1).

<sup>7</sup> See the Constitution s 195(2)(a)-(c).

<sup>8</sup> See the Constitution s 195(3).

<sup>9</sup> See the Constitution s 195(4)-(6).

<sup>10</sup> 103 of 1994 as amended by Act 86 of 1998. Note that the Act is applicable to only the national and provincial spheres of government. Municipalities currently still determine their own conditions of service and determine their own salary scales.

and be structured in terms of national legislation, and the public service must execute the lawful policies of the government of the day loyally.<sup>11</sup> The terms and conditions in the public service must also be regulated by national legislation, and public service employees are entitled to a fair pension. No employee may be favoured or prejudiced because that person supports a particular political party or cause. Finally it is the responsibility of provincial governments to manage the public service in their administrations. They may do so only within a framework of uniform norms and standards applying to the public service.<sup>12</sup>

It was mentioned above that municipal administrations are clearly part of the public administration at large and that the principles and requirements mentioned in the Constitution and national legislation are equally applicable to them. Apart from the national legislative requirements for all administrations, certain specific aspects have also been included in selective laws dealing specifically with local government matters. Such legislative provisions will be discussed below. Finally, it must be pointed out that the Constitution also establishes a single Public Service Commission for the Republic of South Africa. The commission must be independent and impartial and must exercise and perform its functions in the interests of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The commission is regulated by national legislation and therefore it also plays an important role in overseeing and controlling aspects of public service and administration within the municipal public administrative domain.<sup>13</sup> The commission has various constitutionally entrenched powers and functions and also certain additional powers and functions prescribed by national legislation.<sup>14</sup>

### **19.3.2 Issues concerning municipal administration**

In follow-up of the constitutional requirements mentioned above, the new local government legislative framework also provides for aspects relevant to local public administration. According to the Local Government: Municipal Systems Act,<sup>15</sup> the local public administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution. It is further provided that in the administering of

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<sup>11</sup> See the Constitution s 197(1).

<sup>12</sup> Refer to the Constitution s 197(2)-(4).

<sup>13</sup> See the Constitution s 196(1)-(2).

<sup>14</sup> See the Constitution s 196(4)(a)-(g).

<sup>15</sup> 32 of 2000.

its affairs, municipalities must strive to achieve the objects of local government as set out in section 152 of the Constitution and also comply with the duties of local governments.<sup>16</sup> In furtherance of the developmental duties of municipalities, the Systems Act determines that, within their administrative and financial capacity, all municipalities must establish and organise their administration in a manner that would enable municipalities to comply with various administrative and financial requirements. These requirements are the following:<sup>17</sup>

- to be responsive to the needs of the local community
- to facilitate a culture of public service and accountability amongst its staff
- to be performance orientated and focused on the objects and developmental duties of local government
- to ensure that its political structures, political office bearers and managers and other staff members align their roles and responsibilities with the priorities and objectives of the municipality's integrated developmental plan
- to establish clear relationships and to facilitate co-operation, co-ordination and communication between its political structures and political office bearers and its administration; and between its political structures, political office bearers and administration and the local community
- to organise its political structures, political office bearers and administration in a flexible way in order to respond to the changing priorities and circumstances of the municipality
- to perform its functions through operationally effective and appropriate administrative units and mechanisms, including departments and other functional or business units and also, when necessary, to perform such functions on a decentralised basis
- to assign clear responsibilities for the management and co-ordination of the administrative units and mechanisms
- to hold the municipal manager accountable for the overall performance of the administration
- to maximise efficiency of communication and decision-making within the administration

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<sup>16</sup> See the Systems Act s 50(1)-(2).

<sup>17</sup> See the Systems Act s 51(a)-(m).

- to delegate responsibility to the most effective level within the administration
- to involve staff in management decisions as far as is practicable
- to provide an equitable, fair, open and non-discriminatory working environment.

The requirements mentioned above are subject to any applicable labour legislation, however. Applicable labour legislation will prevail if any inconsistencies arise.<sup>18</sup> It seems that the intention of the legislature was to allow municipalities considerable leeway in order to create an effective municipal administration, but not to do so at the expense of established and recognised labour interests.

#### **19.4 Principles of municipal accountability and public participation**

It is an historical fact that to a large extent community participation and municipal accountability were neglected under the former local government dispensation. One of the core elements of change was allowing people to have a say in the decisions that affected their lives. Participation and accountability of representatives are therefore not new concepts in South African public life. Under the new dispensation these concepts have been afforded significant recognition. The supreme law of the state now recognises that participation and accountability are core and crucial principles for ensuring sustainable, democratic and developmental local government. According to the founding provisions and the objectives of local government, the aim of the new constitutional dispensation is to establish a democratic government founded *inter alia* on the values of accountability, responsiveness and openness. These sentiments are echoed in the objectives of local government, which affirms the aim of providing democratic and accountable local governments for local communities and encouraging their involvement in local government matters.<sup>19</sup> With this new constitutional mandate, the principles of participation and accountability are central to the new local government dispensation and the final transformation of the previous system.

The process of ensuring participation and accountability in local government represents major challenges for all municipalities. The transition to the new system was long and difficult, and many adaptations were required in order to accommodate new structures and processes. Central to the success of establishing a new system has been the participation by citizens and the accountability of those in positions of

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<sup>18</sup> See the Systems Act s 52.

<sup>19</sup> See the Constitution ss 1 and 152.



power. There are many shortcomings in the new system, however, and constant development of participation and accountability is required.

#### **19.4.1 Participation, communication and partnerships**

The essence of the concept of participation is giving people, and more specifically local residents, a real say in decisions that affect their lives. In order to take part in such decision-making processes, people must have access to decision-making structures in order to make their voices heard. Real participation strengthens the legitimacy of municipal decision making. South African local governments face various challenges to ensure participation, however. Many members of society do not have the opportunities that others do to express themselves. The lack of resources and education often excludes people from participatory processes. There are two key ways in which participation can be facilitated. They are

- to improve and maintain existing channels of communication
- to form new and strong partnerships between municipalities and local stakeholders.

#### **19.4.2 Channels of communication**

It is a fact that in systems where there are open channels of communication meaningful participation usually occurs. The following different channels of communication should enhance participation between citizens and municipalities.<sup>20</sup>

- *As voters* One of the commonly known and important ways through which citizens can voice their opinions in terms of governmental decision making is through the process of voting. Every adult South African citizen has the right to vote and to take part in elections for any legislative body established in terms of the Constitution.<sup>21</sup> This constitutionally protected right is important not only to ensure a democratic society but also to allow the voters to have a direct say in the choice of their political leaders and their policies. As with all government structures, municipalities have an obligation to make voters aware of their right to vote and to motivate them to exercise such right.
- *As consumers of services* Most people have direct contact with their municipalities through the use of and payment for municipal services. Through this channel

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<sup>20</sup> See LGIS no 2 "Participation and Accountability" (1999) at 3-8.

<sup>21</sup> Read the Constitution s 19(3)(a).

of regular contact, many aspects of municipal decision making can be communicated.

- *As an organised interest group* People often organise themselves in different interest groups. Such groups include political parties, NGOs and a range of Community Based Organisations (CBOs) such as ratepayers associations, church groups etc. Business people also organise themselves into groups that look after their interests and the interests of the region. A local chamber of commerce is a good example of a business organisation that could have an important influence with the local authority and which could serve as an acknowledged and influential communication instrument.
- *Through specialised structures* Communication can also be significantly enhanced through specialised local structures. A ward committee is such a structure and could play a very important intermediary between local residents and their local municipality. Ward committees are best suited to detecting local problems and to communicating such problems quickly and effectively. Apart from ward committees, which interact with the specific ward representative, residents can also communicate and participate with their local municipality through their traditional leaders or other community organisations. The existence of traditional leadership in many regions in South Africa and its role and involvement with local municipalities should also provide a powerful mechanism for participating and communicating with their municipal structures.<sup>22</sup> It is essential that municipalities should ensure that the channels mentioned above are kept open and effective. To this end the new local government legislative framework provides specifically for a chapter on community participation.<sup>23</sup> A further example of a specialised structure is the existence of organised labour. Organised labour should also be consulted by municipalities when issues are considered that could have an impact on them. In the case of *SAMWU v City of Cape Town and Others*<sup>24</sup> the Supreme Court of Appeal stated that the provisions of sections 16-21 of the Systems Act foster

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<sup>22</sup> Municipalities can also ensure participation through the establishment of internal municipal committees, eg, an advisory committee. Such a committee is specifically formed to address the need for effective communication with the public and can act as a vital link between the municipality and its local community.

<sup>23</sup> See the Systems Act ch 4, which is discussed later in this ch.

<sup>24</sup> 2004 (1) SA 548 (SCA).

community participation in municipal decision-making processes. Such participation could include organised labour.<sup>25</sup>

#### **19.4.3 Participation through partnerships**

When channels of communication are open and effective, conditions are conducive for partnerships to be formed. Examples of these are partnerships between the municipality and the police in combating crime, and between local business enterprises to alleviate social upliftment. The new legal framework provides specifically for such programmes and partnerships.<sup>26</sup>

#### **19.4.4 The new legislative provisions regarding community participation**

Under the new local government legislative framework, specific provision has been made for ensuring and protecting the participation of local communities. Chapter 4 of the Municipal Systems Act features various legal obligations to which municipalities must comply. From the start the Act determines that municipalities develop a culture of municipal governance that complements formal representative government with a system of participatory governance. In an effort to achieve and develop such a culture, municipalities must encourage and create conditions for the local community to participate in the affairs of the municipality. Participation should include participation in:

- the preparation, implementation and review of the municipal integrated development plan
- the establishment, implementation and review of the performance management system
- the monitoring and review of performance in general, including outcomes and impact of performance
- the preparation of the municipal budget
- strategic decisions relating to the provision of municipal services.<sup>27</sup>

Municipalities must further contribute to building the capacity of the local community in order to enable it to participate, and to enable councillors and staff members to foster community participation. Municipal resources and funds that are allocated

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<sup>25</sup> Refer to the *SAMVU* case *supra* fn 24 at 551-555.

<sup>26</sup> See the Systems Act ch 4.

<sup>27</sup> Refer to the Systems Act s 16(1)(a)(i)-(v).

annually from the municipal budget should be provided in order to achieve the mentioned participatory objectives.<sup>28</sup>

Specific mechanisms, processes and procedures for community participation have also been provided for. The Systems Act determines that participation by the local community in the affairs of the municipality must take place through various mechanisms.<sup>29</sup> All municipalities must establish appropriate mechanisms, processes or procedures to enable the local community to participate in the affairs of the municipality. In this respect, municipalities must provide for

- the receipt, processing and consideration of petitions and complaints lodged by members of the local community
- notification and public comment procedures
- public meetings and hearings by the municipal council, other political structures and political office bearers, when appropriate
- consultative sessions with locally recognised community organisations and where appropriate, traditional authorities
- report-back mechanisms to the local community.<sup>30</sup>

When a municipality establishes mechanisms or processes of participation, it must take into account the special needs of people who cannot read or write, people who have disabilities, women and various disadvantaged groups. A municipal council may also establish one or more advisory committees to advise the council on any matter within the council's competence.<sup>31</sup>

A further important provision is that municipalities must communicate to their relevant communities information concerning *inter alia* the available mechanisms to encourage and facilitate community participation, the matters on which participation is encouraged and also the rights and duties of members of the local community.

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<sup>28</sup> See the Systems Act s 16(1)(b)-(c). It should be pointed out that the mechanisms to encourage participation must not be interpreted as permitting interference with a municipal council's rights to govern and to exercise executive and legislative authority. In instances where participatory schemes would interfere with municipal administration or the effective provision of services, such schemes must be overruled in favour of a municipality's right to govern and to exercise its functions and obligations. See the Act s 16(2).

<sup>29</sup> See the Systems Act s 17(1)(a)-(e). It is envisaged that participation must take place through (a) political structures; (b) other mechanisms, processes and procedures provided for in terms of the Systems Act; (c) other appropriate mechanisms, processes and procedures established by the municipality; (d) councillors; and (e) generally applying the provisions for participation as provided for in the Systems Act.

<sup>30</sup> See the Systems Act s 17(2)(a)-(e).

<sup>31</sup> See the Systems Act s 17(3)(a)-(d) and s 17(4).

When such information is being communicated by a municipality to its local community, it is obligatory for the municipality to take into account the language preferences and usage in the municipality and the special needs of people who cannot read or write.<sup>32</sup> Participation is also enhanced through giving notice to the public of municipal council meetings and giving them admission to these. It is now required by law that the municipal manager of a municipality give notice to the public of the time, date and venue of every ordinary meeting of the council and also special or urgent meetings, except when time constraints make such notice impossible.<sup>33</sup> As was stated elsewhere in this work, a municipal council must conduct its business in an open manner and may close its sittings only when it is reasonable to do so.<sup>34</sup> The constitutional requirement is reiterated in the new legislative framework. Meetings of a municipal council and of its committees are open to the public, including the media, and neither the public nor the media may be excluded from council or committee meetings except when:

- it is reasonable to do so because of the nature of the business being transacted *and*
- a by-law or resolution of the council specifying the circumstances in which the council/committee may close a meeting, authorises the council or committee to close the meeting to the public.<sup>35</sup> The public or media, may not be excluded, from a council or committee meeting when any of the following matters are being considered or being voted on:<sup>36</sup>
  - (a) a draft by-law tabled in council
  - (b) a budget tabled in council
  - (c) the municipality's draft IDP or amendments thereto, tabled in council
  - (d) the municipality's draft performance management system or amendments, tabled in council
  - (e) the decision to enter into a service delivery agreement in terms of section 76

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<sup>32</sup> Refer to the Systems Act s 18(1)-(2).

<sup>33</sup> See the Systems Act s 19(a)-(b). The manner in which the notice is to be given must be determined by the municipal council.

<sup>34</sup> See the Constitution s 160(7).

<sup>35</sup> See the Systems Act s 20(1)(a)-(b). Note that decisions by local governments are taken via specific resolutions or via the adoption of a by-law. Resolutions can however be *more easily amended* or changed than by-laws.

<sup>36</sup> See the Systems Act s 20(2)(a)-(f).

- (f) any other matter prescribed by regulation.

However, it is interesting to note that, subject to reasonability and the nature of the business being transacted, an executive committee and a mayoral committee may close any or all of its meetings to the public and media.<sup>37</sup> Finally, a municipal council, within its financial and administrative capacity, must provide space for the public in the chambers where the council or committees meet, and it may also take reasonable steps to regulate public access to and public conduct at such meetings.<sup>38</sup>

The new local government legislative framework also determines specific requirements in respect of communications to the local community. When a municipality needs to notify the community of anything through the media, it must do so in the local newspaper(s) of the area, in newspapers circulating in the area and in newspapers determined by the council to be newspapers of record; alternatively, notices can be sent by radio broadcasts covering the area of the municipality.<sup>39</sup> Any notification must be in the official language(s) determined by the council, with consideration of the language preference and usage within its area. Notices must also be displayed at the municipal offices. When a local community is invited to submit comments to the council, the invitation notice must state that municipal staff members will assist persons who cannot write. Similar provisions are set when members of the public are required to fill in forms. Persons who cannot read or write must be assisted.<sup>40</sup>

Specific provisions regarding the publicity of documents have also been included. According to the Systems Act, all documents that must be made public by a municipality in terms of a requirement of the Act, the Municipal Finance Management Act or any other applicable legislation must be conveyed to the local community by displaying the documents at the municipality's head and satellite offices and libraries, on the municipality's official website if available and by notifying the local community of the place and address where detailed particulars concerning the documents can be obtained.<sup>41</sup> Each municipality is also obligated to establish its own official website if it decides that it is affordable, and place on such website all information required under

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<sup>37</sup> The Systems Act s 20(3).

<sup>38</sup> The Systems Act s 20(4)(a)-(b).

<sup>39</sup> See the Systems Act s 21(1)(a)-(c).

<sup>40</sup> See the Systems Act s 21(2)-(5).

<sup>41</sup> See s 21A of the Systems Act as inserted by Act 44 of 2003 s 5. If appropriate, a notification mentioned above must invite the local community to submit written comments or representations to the municipality in respect of the relevant documents.

the Systems Act and the Municipal Finance Management Act. If no website is established, all relevant information should be displayed on an organised local government website sponsored or facilitated by the National Treasury. It is the overall responsibility of the municipal manager to ensure maintenance and regular updating of the electronic information of a municipality.<sup>42</sup>

Under the new legislative framework, the minister of local government is also authorised to make regulations or issue guidelines on various aspects concerning public participation in local municipal affairs. The minister should take into account whether municipalities have the capacity to fulfil extra regulatory or guiding requirements, however.<sup>43</sup>

#### **19.4.5 Local municipal accountability**

It was explained above that accountability is one of the founding values of the new South African constitutional state and is applicable to all spheres of government including the local government sphere. In essence, accountability refers to the need to explain or to defend certain actions or conduct. Accountability is needed to ensure that people in positions of power can be held accountable and responsible for their actions and conduct. Accountability therefore plays an important role in ensuring stability and acceptance of a particular democratic system. It ensures appropriate checks and balances for local residents with regard to their elective representatives. Accountability means not only taking responsibility, but also ensuring liability in certain instances. See, for example, the case of *Umzinto North Town Board v Moodley*.<sup>44</sup> In this case a duly appointed town treasurer, purporting to act under delegated authority, invested municipal funds contrary to the Local Authorities Ordinance<sup>45</sup>. The town treasurer/defendant argued that he was exempt from liability under the Ordinance. However, the court held *inter alia* that the defendant bore the onus of proving that he was entitled to an exemption, that he acted wilfully and knowingly that his investment decision was not covered by the ordinance and that his conduct

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<sup>42</sup> Read s 21B of the Systems Act as inserted by Act 44 of 2003 s 5.

<sup>43</sup> For more details refer to the Systems Act s 22(1)-(4). Note the difference between the words "responsible" and "accountable". Responsibility refers to the fulfilling of a duty, whilst accountability also includes the obligation to provide answers for specific actions/conduct. See also the LG: Municipal Planning and Performance Management Regulations published under GNR 796 in GG 22605 of 24 August 2001. Item 15 of the regulations deals with community participation in respect of IDP and performance management.

<sup>44</sup> 1996 (1) SA 539 (D).

<sup>45</sup> Ordinance 25 of 1974 (N).



was not excused by the ordinance. He was thus liable for the damage caused by his actions.<sup>46</sup> All three components of a municipality must be accountable in municipal matters.<sup>47</sup> There seems to be a stronger awareness of the importance of accountability and our courts should take bold action if accountability is not assured.<sup>48</sup> A system which encourages participation also deepens local democracy, as citizens feel more confident about participating when they know that their inputs count and that those responsible can be held accountable. Accountability in local government further ensures that the actions of the council also reflect the aspirations of the relevant community.

#### **19.4.6 Establishing paths of accountability**

In view of the importance of local accountability, it is essential for all local governments to establish all possible paths/methods to enhance and assure a truly accountable government. There are therefore various paths of accountability, some within the municipality itself and others between the municipality and the particular local community. The following diagram provides an overview of the various paths.<sup>49</sup>

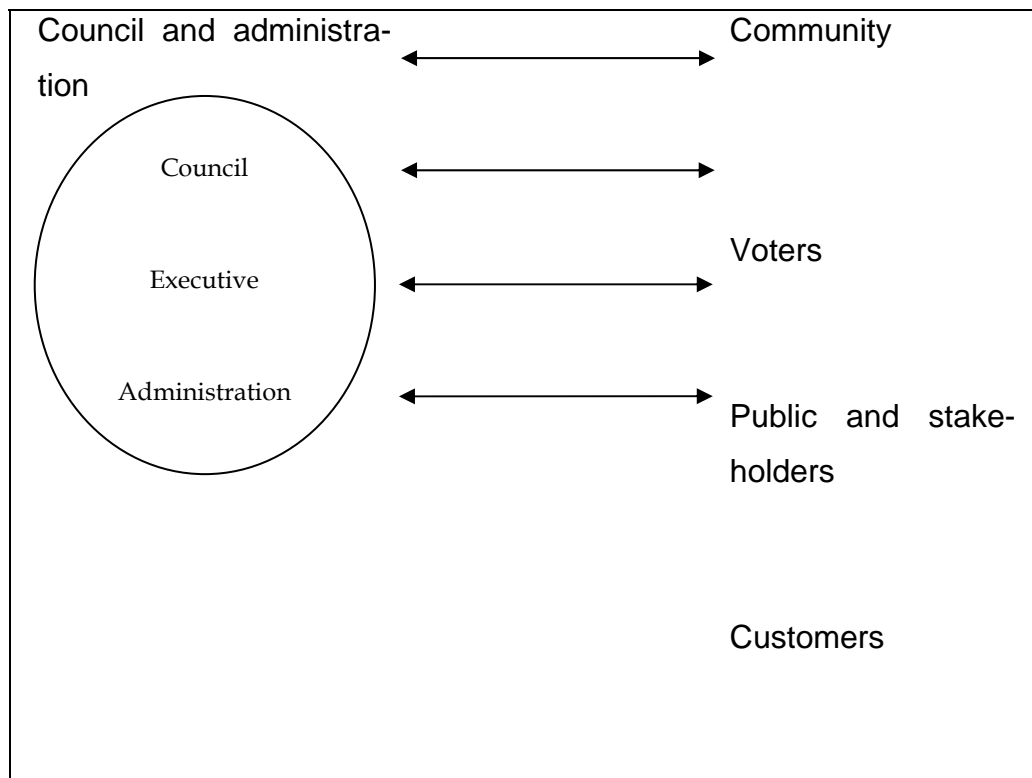
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<sup>46</sup> See the *Umzinto* case *supra* fn 44 at 543-545.

<sup>47</sup> The three components are the political office bearers, the municipal staff members and, to a lesser extent, the local community members.

<sup>48</sup> See in this regard the unreported case of *LR Brink and G Nieuwoudt v Die Speaker van die Munisipale Raad van Nala Plaaslike Munisipaliteit en een ander*, Free State High Court, December 10 2001 under case no 2125/2001. The case concerned mainly the suspension of two councillors from the municipal council. The court found on the facts that the grounds for suspension were frivolous and devoid of the rules of natural justice. The court held that the actions of certain councillors were so unreasonable and tainted by racism and maliciousness that it would be unfair to apply ratepayers' money to funding the action and that the costs of the matters should be paid by the relevant councillors out of their own pockets. The Constitution demands rational decision making, openness and fairness. Such features are essential to legitimacy, public confidence and acceptance of any administration. According to the Constitution, and more particularly s 152, municipal governments must be accountable governments. It is submitted by some legal experts that accountability can now be seen to extend further than the administrative organ itself and, in some extreme cases, can even mean personal accountability of those individuals who collectively make up the particular organ. See also Barrie G "Caveat town councillors" *Without Prejudice* (2001) 8. For a similar example of collective accountability, also refer to the Constitution ss 80(4) and 122(4), which allows the Constitutional Court to order unsuccessful applicants of the National Assembly or a provincial legislature to pay the legal costs of an application under the sections.

<sup>49</sup> Diagram taken from LGIS no 2 "Participation and Accountability" (1999) at 10.



As was mentioned above, a municipality is accountable to both institutions inside the municipality and to the public and other stakeholders outside the municipality. On the external level, municipalities are accountable to the public which they serve. External accountability manifests in different ways. There is, for example, the accountability of a ward councillor to the ward inhabitants. If the population of a ward is not satisfied with such a councillor, they should vote the person out of office in the next election. Non-ward councillors are also held accountable through pressure on the relevant political party that they represent. According to the new local government system, all councils must put an integrated development plan in place, which plan is linked with the five-year term of office of councillors. Councillors can thus be held accountable in respect of their performance relative to such an IDP. It is not only the political office-bearers that are accountable to the public, however; the municipal administration is also accountable. It must be emphasised that the relationship between the administration of a municipality and its local public is very important. Quality and professional service fosters public support and participation.<sup>50</sup> It is ultimately the

<sup>50</sup> Public accountability of municipal administrative staff has always been somewhat problematic, but in many municipalities it seems to have taken a turn for the worse. Both national and provincial governments have recognised the need for improvement in such regard. The *Batho Pele* (people first) programme is but one new initiative, which aims to ensure accountability through im-

*continued on next page*

responsibility of each municipality to ensure that it has implemented effective mechanisms and procedures to ensure that accountability is achieved. It should further be pointed out that organised labour is also accountable to the broader community. Unions have a duty to encourage their members to serve their communities. Ultimately what is needed is a balance between the needs and aspirations of workers and the needs of the community towards affordable and accessible services.<sup>51</sup>

Accountability must also be provided for within a municipal administration. In such instances various forms of accountability can be distinguished. Firstly, there should be strong accountability between the executive authority and the municipal council. Under new policy directives and emerging legislation, the role of executive structures within the council has been enhanced. The introduction of a speaker particularly enhanced executive accountability to the council and public.<sup>52</sup> Apart from being accountable to the executive authority, the council and the administration are accountable to one another. The administration has to answer to the council's political leaders, but the leader must support the administration in doing its work. On this point it should be noted that the new developmental nature of local government, with its greater emphasis on participation and accountability, has resulted in many changes in the way in which municipalities function.<sup>53</sup> Accountability is also required between the municipality as employer and organised labour. Various strategies should be developed to ensure that workers have a say in the way in which a municipality is to function. Finally, municipalities are also accountable to the other spheres of government, which are reciprocally accountable to them. For example, municipalities are required to implement national and provincial development programmes, but both national and provincial governments have a supporting, co-ordinating and monitoring role with regard to municipalities. All in all, the three

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proved customer management and service provision. See LGIS no 2 "Participation and Accountability" (1999) at 11.

<sup>51</sup> According to the White Paper on Local Government, labourer' interests should not stand in the way of transformation or delivery objectives. It is envisaged that the new South African Local Government Bargaining Council must play a critical role in enhancing positive partnerships between labour, management, the council and, finally, the relevant local community.

<sup>52</sup> Refer to all the special functions that the speaker must perform and oversee. The speaker functions as a person who is charged with ensuring that the council and its structures are accountable for the way in which they function.

<sup>53</sup> The enforcement of party political idealism within a particular administration often does not encourage co-operation and can be very destructive. See LGIS no 2 "Participation and Accountability" (1999) at 14.

spheres of government have an overarching constitutional accountability to the new constitutional model and to the nation at large. Such accountability is founded on the Constitution itself, as it requires a system of democratic government founded on *inter alia* the values of accountability, responsiveness and openness.<sup>54</sup>

In an effort to ensure that accountability is achieved, many new initiatives have been implemented. It is submitted that these initiatives should go a long way towards enhancing and achieving accountability. Some of the new initiatives are summarised briefly as follows:<sup>55</sup>

- *Codes of conduct* Codes of conduct have been introduced for councillors, traditional leaders and officials. Such codes should ensure that those individuals act in the interest of the communities that they serve and that they are accountable for their actions.
- *Full-time appointed councillors* Full-time councillors will have more time to fulfil their functions, which should improve effectiveness and accountability.
- *New structures and functionaries* Under the new legislative system, new and enhanced structures and functionaries such as the office of the executive mayor and the new municipal manager have been created. These structures and functionaries have specifically allocated powers, responsibilities and functions and should also play an important role in ensuring municipal compliance to all its duties and objectives.
- *Performance management* Under the new system, municipal performance is measured against key performance indicators (KPI). The KPI should be set up in consultation with the public and other stakeholders and should encourage participation and accountability through regular monitoring.
- *Public rights and responsibilities* Residents in particular municipal jurisdictions have both rights and obligations. Such a system, which requires a balanced approach, should also enhance municipal accountability and effectiveness.

#### **19.4.7 Developing programmes for participation**

It was mentioned above, that all municipalities are now legally obliged to develop systems of public participation. Such development requires different phases. In the first phase, municipalities should build up a relationship with all the relevant stake-

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<sup>54</sup> Refer to the Constitution the Preamble and s 1(d).

<sup>55</sup> Refer to LGIS no 2 "Participation and Accountability" (1999) at 12.

holders in their communities and develop a shared vision for the area as a whole. All interest groups should be involved. This process can be initiated through various strategies such as publicity days and local media coverage. Care should be taken not to marginalise groups within communities. People must also see that the municipal initiative is genuine and that serious consideration is given to their involvement. The second phase should involve the internal restructuring of municipal administrations. Existing staff members and councillors should change their attitudes toward public participation and their own accountability. Once a new relationship has been established the new system of interaction and participation should be maintained.

From the discussion above it is clear that the new local government system is significantly different from the one that existed prior to the new constitutional dispensation. Municipalities are now constitutionally obliged to provide democratic and accountable governance for all local communities. New laws provide the basis for making the new system a reality. The key to the success lies in the capacity and willingness of all stakeholders to take the processes forward, however.

### **19.5 Aspects concerning municipal performance management and capacity building**

The new legislative framework for local government has also established new demands on the performance of municipal staff members to ensure that the objectives of local government are met. After the transformation process had been initiated, municipal administrations were faced with various new challenges and demands: municipal jurisdictions were enlarged, many service backlogs became evident, a new constitutional vision and place for local governments was created, new boundaries were drawn and finally a new legal framework for local governments was initiated. Special directives and assistance to municipal administrations are therefore essential in order to ensure a more efficient, customer-orientated and developmentally creative local government dispensation. In order to create such a system, proper performance management within all municipal administrations is generally regarded as a prerequisite; performance management is seen as a strategic tool that can encourage new attitudes, skills and competencies within the new local government dispensation.

In essence, performance management can be summarised as a process whereby municipalities seek to improve and monitor their functioning and accountability on an ongoing basis. Performance is then regularly assessed to determine whether plans

have been implemented, resources are being used effectively and whether the municipality is fulfilling its duties and responsibilities. If municipal performance management is implemented correctly, it should enable municipalities to deliver quality services in a cost-effective, efficient and accountable manner. In light of the fact that performance management is a new concept for local administrations, there is no uniform or general model available which municipalities can implement with guaranteed success. An effective and efficient performance management system must be developed to meet the unique circumstances that exist in modern local governments in South Africa.<sup>56</sup>

The previous local government dispensation never provided properly for a comprehensive performance management system. Consumers or the public at large never had the opportunity to measure the effectiveness of municipal service delivery and quality of services. Under the new constitutional requirements local governments are obliged to meet the basic needs of citizens, and especially provincial governments are tasked with monitoring the performance, capacity and effectiveness of municipalities within their respective jurisdictions. In follow-up on the constitutional provisions, the new legislative framework for local governments provides specifically for the enhancing of municipal performance management.<sup>57</sup> The need for a general performance management system for all municipal governments was already envisaged in the White Paper on Local Government. The White Paper confirmed that the aim of a new national performance management system is to:<sup>58</sup>

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<sup>56</sup> Under the new constitutional system, various systems have been proposed to establish an effective performance management system. One such proposal was the *Batho Pele* (people first) vision for managing performance in the broader public sector. The *Batho Pele* proposal is aimed at delivering the best service to the public. The proposal consisted of eight service delivery principles (ie consultation, service standards, access, courtesy, information, openness and transparency, redress and value for money). *Batho Pele* also aims at constantly improving the quality of services through the implementation of an eight-step process. Such steps, which could serve as an important guide for municipalities that embark on performance improvement programmes, are: identification of the customer; establishing customer needs and priorities; determining the current service baseline; identifying the improvement gap; setting service standards; gearing up for delivery; announcing service standards and finally monitoring delivery against standards and publishing the results. These principles should form the basis for any new local government performance management system. The overall aim is to make municipalities efficient, customer-orientated, developmentally creative institutions that enable citizens to obtain better service delivery. See LGIS no 2 "Performance Management" (1999) at 4-5.

<sup>57</sup> See the Local Government: Municipal Systems Act ch 6. The aim of the new legal framework is to: define goals and priorities; establish objectives, set indicators for performance, measure performance; review and adjust service delivery mechanism and finally to report on the progress made.

<sup>58</sup> Refer to the White Paper on Local Government (1998) at 51-52.

- assess the overall state of local government
- monitor the effectiveness of development and delivery strategies of municipalities and ensure that scarce resources are utilised efficiently
- provide early warning signals
- allow for performance comparison between municipalities across the country
- identify successful approaches or best practises
- provide a national set of performance indicators.

The envisaged system is not aimed at imposing additional burdens on municipalities but rather at seeking a change in the way in which municipalities perform and fulfil their duties and responsibilities.

#### ***19.5.1 The new legislative requirements regarding municipal performance management***

As was envisaged in the White Paper on Local Government, national legislation under the new local government dispensation specifically determines various aspects regarding municipal performance management. All municipalities are now legally obligated to establish and develop performance management systems (PMS) and to review such systems. The new legal requirements relevant to municipal performance management are briefly as follows:

- *The establishment and development of performance management systems* Each municipality established under the new local government dispensation must establish a performance management system that is commensurate with its resources, that is best suited to its circumstances and is in line with the priorities, objectives, indicators and targets contained in its integrated development plan. Municipalities must further promote a culture of performance management among their political structures, office bearers, councillors and municipal administrations. They must also ensure that their affairs are administered in an economical, effective, efficient and accountable manner.<sup>59</sup> Specific responsibility has been placed on the executive committee or executive mayor, whichever is applicable, or a committee of councillors appointed by the municipal council in the absence of an executive committee or executive mayor,

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<sup>59</sup> See the Systems Act s 38(a)-(c).



- (a) to manage the development of a municipality's performance management system
- (b) to assign certain responsibilities of the system to the municipal manager
- (c) to submit the proposed system to the municipal council for adoption.<sup>60</sup>

All municipalities must further establish mechanisms to monitor and review their performance management system.<sup>61</sup>

- *The core components and community involvement in municipal performance management systems* Every performance management system is required to include various core components. Accordingly, in terms of its performance management system and any other regulations and guidelines that may be prescribed, every municipality must incorporate and provide for the following.<sup>62</sup>

- (a) setting appropriate key performance indicators (KPIs) as a yardstick for measuring municipal performance, including outcomes and impact, with regard to the municipality's development priorities and objectives set out in its IDP
- (b) setting measurable performance targets for each of the development priorities and objectives
- (c) monitoring performance and measuring and reviewing performance at least once a year against the development priorities and KPIs
- (d) taking steps to improve performance where targets have not been met
- (e) establishing a process of regular reporting to the council, political structures, office bearers, staff, the public and appropriate organs of state.<sup>63</sup>

It is further also obligatory for a municipality to involve the local community in the development, implementation and review of the municipality's PMS and also to allow the community to participate in the setting of appropriate key performance indicators and performance targets.<sup>64</sup>

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<sup>60</sup> Refer to the Systems Act s 39(a)-(c).

<sup>61</sup> The new legal framework does not provide guidelines on what mechanisms should be employed. It seems that if it is left to each municipal council to decide on what mechanisms to employ to monitor and review performance. See the Systems Act s 40.

<sup>62</sup> See the Systems Act s 41(1)(a)-(e).

<sup>63</sup> In this regard, appropriate organs of state should include provincial governments which are tasked to oversee and monitor municipal performance. Ss 41(2) requires the PMS applied by a municipality to be so devised that it could serve as an early warning indicator of under-performance.

<sup>64</sup> See the Systems Act s 42. This section entrenches for the first time real and constructive public participation in respect of municipal performance control and oversight. It is submitted that

*continued on next page*

- *The setting of key performance indicators and the audit of performance measurements* Under the new legal framework for local government, after consultation with the MEC for local government and organised local government nationally, the minister for local government may prescribe by regulation general key performance indicators that are appropriate and that can be applied to local government generally. The minister may also review and adjust those KPIs when necessary.<sup>65</sup> All municipalities are further required, in a manner determined by their council, to make known to the general public, both internally and externally, which KPI and performance targets are set by the municipality for purposes of its PMS. The results of such a PMS and performance measurements must be audited as part of the municipality's internal auditing processes and also annually by the auditor-general.<sup>66</sup>
- *Requirements regarding reports on the PMS and the making of regulations and guidelines* Apart from the establishment of a municipal performance management system, each municipality must prepare for each financial year an annual report consisting of *inter alia* a performance report. Such a performance report should reflect:
  - (a) the performance of the municipality and each external service provider during that financial year
  - (b) a comparison of the performances with the targets set for them and also the performances in the previous financial year
  - (c) measures taken to improve performance.<sup>67</sup>

It should be noted that an annual performance report must form part of a municipality's annual report as is determined in chapter 12 of the Municipal Finance Management Act.<sup>68</sup>

Apart from the reporting responsibility on the municipal manager, the newly enacted legislative requirements also place a similar responsibility on the MEC and the minister concerned. In this regard, the MEC for local government in a province is obliged

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this enhancement of public participation would significantly contribute to more active public involvement in municipal affairs.

<sup>65</sup> See the Systems Act s 43(1)(a)-(b). General KPIs must be included in a municipal PMS where applicable. See s 43(2).

<sup>66</sup> Refer to the Systems Act ss 44 and 45 respectively.

<sup>67</sup> Read s 46(1)(a)-(c) of the Systems Act as substituted by Act 44 of 2003 s 6.

<sup>68</sup> See s 46(2) of the Systems Act as amended.

annually to compile and submit to the provincial legislature and the national minister responsible for local government a consolidated report on the performance of municipalities in that province. The consolidated report must identify all municipalities that have underperformed during the year, as well as the proposed remedial action to be taken. The report must then be published in the *Provincial Gazette*.<sup>69</sup> Finally, the minister responsible for local government must annually compile and submit to parliament and the nine MECs for local government in the provinces a consolidated report of local government performance in general, in terms of general key performance indicators. Such a report must be published in the *National Gazette*.<sup>70</sup>

In confirmation of the fact that the new legislative requirements are not a complete legal system and in order to cater for the effectiveness of the system, the national minister is permitted to make regulations or to issue guidelines to provide or regulate certain issues. These are:<sup>71</sup>

- incentives to ensure municipalities establish PMSs within a prescribed period and comply to the Act
- the setting of KPIs by a municipality with regard to its development objectives
- the identification of appropriate general KPIs that can be applied to municipalities generally
- the regular review by a municipality of its KPIs
- the setting of a framework for performance targets by municipalities consistent with their development priorities, objectives and strategies set out in their IDPs
- mechanisms, systems and processes for the monitoring and measurement of performance by a municipality with regard to its development objectives
- the internal auditing of performance measurements
- the assessment of those performance measurements by a municipality;
- the assessment of progress by a municipality with the implementation of its IDP
- the improvement of performance
- any other matter that may facilitate the implementation by municipalities of an effective and efficient PMS or the application of chapter 6 of the Systems Act.

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<sup>69</sup> See the Systems Act s 47(1)-(2). The MEC is also tasked to submit a copy of the report to the NCoP S 47(3) of the Act.

<sup>70</sup> See the Systems Act s 48.

<sup>71</sup> See the Systems Act s 49(1)(a)-(k).

It is clear that the legislator's intention was to give the minister a wide authority to make regulations or to issue guidelines. When the minister makes regulations or issues guidelines he/she must take the capacity of municipalities into account and he/she must differentiate between different kinds of municipality.<sup>72</sup>

### **19.5.2 *Creating and maintaining an effective system of municipal performance management***

With reference to the abovementioned legislative requirements in relation to municipal performance management, two key elements seem to be significant. At first, each municipality will have to identify and prioritise those areas where performance improvement is most required. Such areas will include both external developmental priorities and internal transformation necessities. National government should assist municipalities by identifying common performance areas that are applicable to all municipalities, such as access to basic services such as water, sanitation, electricity and housing. Through national minimum standards, municipalities will be guided when defining their own goals within their unique circumstances and will consolidate existing fragmented approaches to services. The second key element is performance assessment. An objective performance assessment is crucial for the creation and maintenance of an economic, efficient and effective local government performance management system.<sup>73</sup>

Apart from the two key elements of an effective and efficient PMS, all performance management systems should contain six core elements. Each element is important to make the system work, and are discussed briefly as follows:

- *Performance measurement* Performance measurement requires a relatively objective framework for assessing performance. Measurement is achieved by setting

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<sup>72</sup> Refer to the Systems Act s 49(2)-(4). The minister is also permitted to phase in some or all of the applications of the provisions of the chapter on performance management, which provisions place a financial or administrative burden on municipalities.

<sup>73</sup> To illustrate the functioning of such an objective performance assessment system, imagine the following example: Two municipalities, A and B, with similar budgets, responsibilities and staff both decide to undertake similar-sized housing development projects. How would their respective performance with reference to the project be assessed? It is submitted that the first step would be to assess the economic factors of the project. Such measures look at the cost of resources. If one municipality spent more on materials, such a position would be one indication of performance. Cost measures alone can be misleading, as poorer quality material are cheaper. Quality is thus also important. The second phase of assessment should evaluate quantity and quality in relation to resources used. Finally the effectiveness should be evaluated. It is important to assess what effective contribution to the overall developmental objectives of a municipality has been achieved through the project. See also LGIS no 2 "Performance Management" (1999) at 11.

performance indicators and linking them to performance targets. Performance indicators indicate how performance will be measured; that is, the number of households to receive water connections. Performance targets again refer to the result to be achieved within a given timeframe (eg 5000 connections by yearend 2005). Performance indicators can be determined only once a municipality has identified the key objectives for development in its area and with the municipality's overall developmental goals and priorities in mind. Many municipalities have set various performance indicators through their development-planning processes. A distinction should be made between general performance indicators and local performance indicators. General performance indicators refer to such indicators that are applicable to all municipalities, while local indicators reflect particular local developmental priorities and objectives. Any KPI should ensure that the right area of performance is measured and that the quality of performance is also assessed. Part of any process of performance measurement involves the establishment of targets for each performance indicator. Performance is then measured within a given timeframe, according to whether targets for each indicator have been achieved. The setting of performance targets can be a somewhat complicated exercise and should ultimately result in realistic and achievable objectives. In determining proper targets it is suggested that certain guidelines be used and that a checklist be developed when targets are set for particular indicators.<sup>74</sup>

- *Performance monitoring and evaluation* The monitoring and assessment of the performance of municipalities is a crucial aspect of any successful PMS. Monitoring and evaluation are processes aimed at assessing the performance of municipalities and the people that work for them. It is important to note that the assessment of people refers not only to municipal staff members but also to external contractors that do work or provide services on behalf of a municipality. Generally speaking, performance monitoring is an ongoing process to determine whether targets are being met and whether development objectives are being

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<sup>74</sup> According to LGIS no 2 "Performance Management" (1999) at 14 the following guidelines and checklist questions should be useful in determining performance targets: Guidelines are preciseness and measurability, relevance to user, being demanding but realistic, approved by politicians and providing communication to the public. Checklist questions could include the number of each service provided, how many new services were provided in a year, what trends are impacting on the service, what customers expect, the municipality's realistic capacity and what other similar municipalities are achieving.

achieved. Performance management must be conducted very carefully, and information should not be manipulated to produce results that appear better than they really are. Uncompromising integrity of performance management is therefore essential. In contrast with the monitoring process, performance evaluation is a deeper and more detailed process of performance analysis. Such an evaluation process looks not only at whether a municipality is performing adequately but also at the areas of underperformance. All municipalities should make special arrangements to evaluate performance regularly. A further key element of the monitoring and evaluation process is so-called “performance auditing”. This process involves verifying that the measurement mechanisms and results are accurate and that proper procedures have been followed to evaluate and improve performance. The checks built into the new legislative framework should ensure objective verification of performance results and should ultimately enhance municipal service provision and compliance with the new constitutional demands.<sup>75</sup>

- *Performance reporting* Under the new legal framework, all municipalities are obliged to submit annual performance reports to the public and higher spheres of government. It is submitted that the reporting requirement should significantly enhance public participation and municipal accountability and should therefore be strictly enforced.
- *Capacity building* Without the necessary capacity, municipalities will not be able to perform and fulfil their duties and responsibilities. Municipal capacity building must therefore be a core element of a broader performance management strategy. Capacity building is a process of developing the ability for improved performance within municipalities and will be discussed in more detail elsewhere in this chapter.
- *Intervention* It was mentioned earlier that the Constitution allows and demands intervention into the affairs of local government when necessary. Especially the provinces are tasked with oversight and intervention powers into the affairs of municipalities when cases of non-performance are reported. Such interventions should be based on accurate diagnostic results, however, and should be undertaken on an objective basis. When intervention is allowed on subjective grounds

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<sup>75</sup> See LGIS no 2 “Performance Management” (1999) at 16-17. A further check on performance monitoring and evaluation is public participation. Public involvement and pressure for improved performance  
*continued on next page*

or without proper justification, the new constitutionally entrenched status of local government as an independent sphere of government would be unnecessarily jeopardised. In this regard it should be emphasised that the ultimate aim of intervention is not to create a hierarchy of one sphere of government over another but to ensure that citizens receive the essential services that are promised under the new constitutional scheme.

- *Performance incentives* Ultimately the performance of any particular municipality and its staff depends on certain incentives within the PMS. Good performance should be rewarded whilst poor performance should be penalised. Various means of incentive are possible, such as fiscal and political motivators, rewards, competitions and individual motivational schemes.

### **19.5.3 Implementing performance management**

The implementation and maintenance of an effective PMS is in essence founded on the new constitutional foundation. All spheres of government are constitutionally obliged to fulfil their duties and responsibilities according to the constitutional prescriptions and to ensure a general system of democratic government that is accountable, responsive and open. Local governments are further tasked with specific developmental duties and the achievement of specified municipal objectives.<sup>76</sup> In order to determine whether such objects and duties are being met, a proper system of accountability and performance management is necessitated. Under the provisions of the Systems Act, a new legal framework for national performance management has been enacted. In essence, the new system will function as follows:

- *Step 1:* All municipalities must identify the areas that require performance measuring and improvement. This will be an integral part of the IDP process and the setting of development objectives.
- *Step 2:* Once the areas have been identified, a municipality will monitor and measure its performance by developing indicators and targets for each of the development priorities.
- *Step 3:* A municipality will then have to evaluate its performance and take steps to improve performance when targets are not being met.

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formance should be protected as an important part of the overall PMS of a municipal government.  
<sup>76</sup> See the Constitution ss 1, 152 and 153.



- *Step 4:* In addition to those areas identified by a municipality, some areas fundamental to the overall reconstruction and development of South Africa will be identified by national government, through consultation with key stakeholders such as SALGA and provincial governments.
- *Step 5:* Each municipality will be expected to report on these areas through the prescribed national indicators and targets.
- *Step 6:* A municipality will be able to exceed the targets set by national government, but it will not be able to perform below those targets.

To illustrate the practical application of the new PMS, the example is given of a municipality where 50% of the residents do not have access to clean drinking water. Water is arguably the single most essential municipal service, as it is needed for drinking, cooking, washing and cleaning. Without water, communities suffer severe discomfort and disease. As a first step, the particular municipality will identify water provision as an area that requires performance measuring and improvement. Water provision to all residents will be set as a priority with a correlating objective of giving all residents access to at least a certain number of litres of drinkable water per day. The objective will then translate into development strategies which could include major investment programmes in water schemes. Strategies could also include cross-subsidising between consumers if necessary.

As a second step, and once the area of performance have been identified, then a municipality will have to monitor and measure its performance. This is achieved through the development of KPIs and targets for each of the identified priorities. The following KPIs and targets could be relevant to the example mentioned above:

KPIs:

- the percentage of households that do not have access to water (measure growth)
- the bacterial count in water (measure quality of water)
- average time spent by community members (measure impact of scheme on community to bring water to their houses)
- percentage of residents paying for services (measure sustainability and financial impact).

Targets:

- to reduce households without water from 50% - 30% in two years
- to ensure quality of water is up to standard
- to reduce travel time for community to fetch water

- to ensure measures are taken to service payment collections better.

Under the third step, the municipality will have to evaluate its performance and will have to take steps to improve performance when targets are not met. Measurement mechanisms can include:

- keeping data of households with water
- testing water quality regularly
- surveying residents' activities and the implementation of a proper billing and credit control system.

Finally, the municipality must report on its performance management in each area as is required by law.

Although the many benefits of a proper PMS are very clear, the implementation of such a system does present various challenges. Challenges that are most common are limited financial resources, inadequate administrative capacity, poor public participation and a slow ability to adapt to the new legal order. In order for effective and efficient performance management to occur, it is suggested that all municipalities will have to commit themselves to this end and dedicate their energy to overcoming the different challenges and finding new ways to fulfil their duties and obligations. Other spheres of government must assist municipalities in this endeavour, but ultimately the responsibility lies with municipalities all over the country to start focusing on the new outcomes of municipal services and programmes.<sup>77</sup>

## **19.6 Aspects regarding municipal capacity building**

### **19.6.1 Introduction**

It is a general phenomenon all over the world that local governments are pushing for autonomy and decentralised decision making. More autonomy and decentralised powers often leave municipalities with many new performance demands, however. The position in South Africa under the new local government legislative framework is no different. The new local government dispensation has created strict legal demands on municipalities to comply and fulfil certain duties and responsibilities. Without a sufficient capacity, municipalities will not be able to fulfil such duties and

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<sup>77</sup> In order to enhance the new legislative requirements dealing with performance management the LG: Municipal Planning and Performance Management Regulations were promulgated. See GNR 796 in GG 22605 of 24 August 2001. The regulations provide for *inter alia* the nature of a performance management system, the adoption of a PMS, the setting of key performance indicators, general key performance indicators, the setting of performance targets and the monitoring review and internal auditing of performance measurements.

responsibilities, however. It is of paramount importance therefore that municipalities themselves, as well as the two higher spheres of government, ensure that municipal capacity is adequate to ensure compliance with their new constitutional and other legislative obligations. Municipal capacity building is thus regarded as one of the more important tools available to municipalities to ensure service delivery and the overall fulfilment of their duties and responsibilities. Capacity building should therefore form one of the strategic programmes that municipalities must put in place.

During the former local government dispensation, capacity building was often racially determined and did not support democratic municipal development. Under the new system municipalities have been afforded distinctive autonomy and powers and are supported to handle their own affairs in accordance with their own priorities. Capacity building should be a very important objective for all municipalities, as it will ensure various advantages. The following advantages will be secured through a solid municipal capacity:

- services are delivered as is legally required
- more powers can be delegated down to a municipal level
- better investment opportunities can be created.

Capacity building is therefore very important and should be done on the political, financial management and administrative levels. It speaks for itself that capacity building cannot be done without proper training.<sup>78</sup> With the restructuring of local government, the overall local government capacity building scheme had to be revisited and changed. It was especially envisaged that the new system should ensure the following results:<sup>79</sup>

- to respond to municipal needs
- to be acceptable and aimed at all people
- to offer capacity building that qualifies officials and frontline workers for promotion and further development

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<sup>78</sup> Under the former system two training bodies made up local government training. There was the Local Government Training Board (LGTB), established under the Local Government Training Act, and the Apprenticeship Training Board for Local Authorities (ATBLA), established under the Manpower Act. The two structures operated separately and addressed different fields in the training sector. Coordination was poor, and the absence of a common national vision on capacity building led to a lack of objectives, fragmentation of training programmes and poor staff development results. The two bodies later merged into the Local Government Education and Training Board (LGETB).

<sup>79</sup> See LGIS no 2 "Capacity building" (1999) at 5.

- to address the capacity building needs of rural municipalities
- to ensure the involvement of all role players to find solutions for municipal challenges.

### **19.6.2 Establishing a new local government training system**

In the White Paper on Local Government, a vision and framework was provided within which local government capacity building was to be developed. The previous system had to be changed to become a more flexible, decentralised and demand-driven system with continuous improvement of municipal staff members and political office bearers.<sup>80</sup> In response to the new changes and challenges of the new system, a new set of skills and competences had to be created to ensure an overall developmental local government. Various initiatives have thus been piloted in a variety of newly created capacity building programmes and schemes.<sup>81</sup>

In follow-up on the vision in the White Paper on Local Government, various laws have been passed or amended to give more meaning and substance to the new local government capacity-building system. See, for example, the Skills Development Act,<sup>82</sup> which Act requires a Sector Education Training Authority (SETA) to be established in every sector of the South African workforce in order to develop skills.

This LGSETA will be made up of representatives of both organised labour such as SAMWU and IMATU and organised employer's organisations, which are represented under SALGA. Specific functions have been envisaged for the new LGSETA to fulfil. Such functions include:<sup>83</sup>

- Preparing a Local Government Skills Plan.
- Implementing the Local Government Skills Plan by
  - (a) establishing learnerships
  - (b) approving workplace skills plans
  - (c) allocating grants to employers, education and training providers and workers

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<sup>80</sup> See the White Paper on Local Government (1998) at 115.

<sup>81</sup> Examples of some of the new competencies and capacity-building programmes are: councilors' code of conduct, falling under SALGA training; performance management, falling under the department of Constitutional Development; integrated development planning, falling under the department of Constitutional Development; local economic development, falling under the department of Constitutional Development and NGO's financial management; voter education, falling under the IEC and senior management development, falling under university-based training programmes. See LGIS no 2 "Capacity building" (1999) at 7.

<sup>82</sup> 97 of 1998.

<sup>83</sup> See LGIS no 2 "Capacity building" (1999) at 9.

- (d) monitoring local government education and training in the sector.
- Promoting learnerships by
  - (a) identifying work places for practical work experience
  - (b) supporting the development of learning materials
  - (c) improving the facilitation of learning
  - (d) assisting in the conclusion of learnership agreements.
- Registration of learnership agreements.
- Applying to SAQA for accreditation as an Education and Training Quality Authority (ETQA).
- Collecting Skills Development Levies and disbursing these to municipalities.
- Reporting on income and expenditure and the implementation of its sector skills plan to the Director-General of Labour.
- Appointing staff for the performance of its functions.

The Skills Development Act also introduces a new learnership approach to skills development. This approach requires a combination of institutional learning and workplace learning/experience. Skills development, which will require substantial financial resources, is financed largely through the Skills Development Levies Act.<sup>84</sup> The levies are not sufficient to meet the existing training needs, and it is clear that other funding sources such as private donors, business or even other spheres of government should be explored.

It was mentioned above that it is not only municipal staff members that are in need of new training, but also political office bearers. The new constitutional and other legislative requirements have placed important responsibilities on political representatives. In this regard SALGA has developed a so-called "councillor-training programme" for all councillors. In order to ensure quality in the new training programmes, the South African Qualifications Authority Act,<sup>85</sup> has established the South African Qualifications Authority (SAQA), which must oversee the implementation of a national qualifications framework (NQF). The NQF is seen as a new way of "grading" learning achievements by using eight NQF levels.<sup>86</sup> The new NQF ap-

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<sup>84</sup> 9 of 1999.

<sup>85</sup> 58 of 1995.

<sup>86</sup> The lowest NQF level is level 1, which is the equivalent of grades 7-9 of the traditional high school education grading system. Level 4 corresponds to grade 12. In future, most officials will be trained against the eight NQF levels.

proach towards learning is different from the past, as it is based on learning outcomes, which are measured by the ability of a learner after training to convert his/her learning into work performance. SAQA and the NQF also promote a system for the recognition of prior learning and so-called “life-long learning”. These initiatives should allow people gradually to qualify themselves and to help to develop the careers of staff members and ensure that local government becomes an attractive place of work.

### **19.6.3 Mechanisms to enhance municipal capacity building**

In light of the new legal requirements, it is obvious that all local governments will have to establish various training and development programmes. Such programmes and initiatives will necessarily be different for each of the different categories and types of municipality because of their diverse circumstances and responsibilities. In many instances, the new local government dispensation is characterised by various performance gaps, some of which can be filled only through the training of councillors, officials and other frontline workers. What municipalities need is a good training programme. In order to establish such a training programme municipalities need to determine which of the problems they encounter can be solved through building the capacity of staff and which cannot. In instances where internal capacity building cannot solve the problems, alternative approaches exist such as outsourcing or the conclusion of partnerships with other private or public institutions. It is also very important for municipalities to prioritise their capacity-building strategy as part of their integrated development plan. In this regard it is suggested that every IDP should incorporate a skills-development plan as a key component, which should facilitate capacity-building solutions within the municipality.<sup>87</sup> Under the new constitutional dispensation, all provinces are obliged to build the capacity of local governments. Various interactions and cooperation strategies must still be developed between municipalities and their respective provincial governments in order to fulfil the constitutional vision and obligations.

## **19.7 Conclusion**

In conclusion, it is submitted that the principles of public administration, performance management and municipal capacity building are currently in need of major trans

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<sup>87</sup> See LGIS no 2 “Capacity building” (1999) at 16.

formation. According to the new legal framework, an entirely new approach towards capacity building, performance management and public participation has been mandated. All municipalities will have to take and implement new initiatives to ensure compliance with the newly established legislative requirements. All in all one can conclude that the new vision for local government is to create an essentially customer-orientated public service. The codes of conduct for both councillors and staff members set out basic requirements for accountability and control. It is further submitted that the new legal framework indeed lays a sound foundation for a more people-orientated local government system, which should be able to meet the demands of all South African people and should ensure a better and brighter future for all.



## Municipal development planning

### 20.1 Introduction

According to the new legal framework for local governments, a significant measure of responsibility relating to municipal planning has been decentralised to local government structures. Although municipal planning is incorporated as a functional area of concurrent national and provincial legislative competence,<sup>1</sup> all municipalities are constitutionally obligated to structure and manage their administrations and budgeting and planning process in such a way as to give priority to the basic needs of their communities. All municipalities must also promote the social and economic development of their communities.<sup>2</sup> The new constitutional dispensation furthermore determines that one of the objects of local government in general is to promote social and economic development and to promote a safe and healthy environment.<sup>3</sup> Because of this new constitutional mandate, the new local government system is often referred to as a developmentally orientated local government system. It is obvious from the abovementioned requirements that local government planning processes must be structured and organised so as to achieve the objects of the new local government dispensation and also to give priority to the basic needs of their respective communities. If local governments are to achieve such a developmental system, they are to be thoroughly supported by the two higher spheres of government. Both national and provincial laws are therefore needed to ensure municipalities fulfil their developmental duties. Whereas provincial laws will often differ in content and approach, national legislation should provide an overarching set of regulatory provisions so as to enable municipalities to create a basic planning framework. In compliance with its responsibility in this regard, parliament has enacted the Local

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<sup>1</sup> See the Constitution Part B Sch 4.

<sup>2</sup> Refer to the Constitution s 153(a).

<sup>3</sup> See the Constitution s 152(c)-(d).

Government Municipal Systems Act.<sup>4</sup> The provisions of the Act relating to planning and environmental issues will be discussed below.

## **20.2 National principles concerning local government developmental planning**

### **20.2.1 General requirements relating to municipal development planning**

According to the Local Government: Municipal Systems Act, local government planning is to be developmentally orientated. In order to achieve this objective, all municipalities must undertake developmentally orientated planning so as to ensure three purposes:<sup>5</sup>

- that municipalities strive to achieve the objects of local government set out in the Constitution
- that municipalities give effect to their developmental duties set out in the Constitution and
- that municipalities with other organs of state contribute to the progressive realisation of the (socio-economic) fundamental rights contained in the Constitution.<sup>6</sup>

In order to achieve and undertake planning processes that are developmentally oriented, the Systems Act determines that its provisions in this regard must also be read in conjunction with chapter I of the Development Facilitation Act.<sup>7</sup>

A second important feature of the new local government planning framework is that the planning processes undertaken by a municipality must be aligned with and must complement the development plans and strategies of other affected municipalities and other organs of state. The purpose of such alignment and complementation of different development plans and strategies is aimed at giving effect to the principles of co-operative government as is contained in the Constitution.<sup>8</sup>

Apart from the requirements of co-operation in municipal planning processes, municipalities are also obligated to participate in national and provincial developmental programmes. Such participation is directly required by the Constitution and is also a

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<sup>4</sup> 32 of 2000 as amended. The Act aims *inter alia* to establish a simple and enabling framework for the core processes of planning, which process *should* underpin the notion of developmental local government. Refer also to the long title of the Act.

<sup>5</sup> See the Systems Act s 23(1)(a)-(c).

<sup>6</sup> Refer to the Constitution ch 2s 24, 25, 26, 27 and 29.

<sup>7</sup> See the Systems Act s 23(2) as well as the Development Facilitation Act 67 of 1995.

<sup>8</sup> Refer to the Systems Act s 24(1) read together with the Constitution ss 40 and 41. According to s 41, all three spheres of government and all organs of state within each sphere must adhere to the principles of co-operative government as are set out in the Constitution. The main objective of co-operative government is to ensure co-operation and co-ordination between the various role players.

national consequence of the fact that both national and provincial governments have concurrent legislative competence over municipal planning activities.<sup>9</sup> The new legal framework also determines that if municipalities are required to comply with planning requirements in terms of national or provincial legislation, then the responsible organ of state must

- align the implementation of that legislation with the provisions of chapter 5 of the Systems Act and
- consult with the affected municipality in such implementation and take reasonable steps to assist the municipality in meeting the legal requirements relevant to its IDP.<sup>10</sup>

Before either national or provincial legislation affecting municipal planning issues is introduced in parliament or a provincial legislator, the organ initiating the legislation must consult with OLG. Similar consultation is required in respect of subordinate legislation before such legislation is enacted.<sup>11</sup> Again the underlining principle of co-operation and co-ordination as part of a system of co-operative government is emphasised.

The new legal framework directed at municipal planning also requires specific requirements regulating the adoption of IDPs. According to the Systems Act, each municipal council must adopt a single, inclusive and strategic plan for the development of the municipality within a prescribed period after the start of its elected term. Such plan should have the following aims:<sup>12</sup>

- (a) to link, integrate and co-ordinate plans and to take into account proposals for the development of the municipality;
- (b) to align the resources and capacity of the municipality with the implementation of the plan;
- (c) to form the policy framework and general basis on which annual budgets must be based;
- (d) to comply with other provisions of the Systems Act;
- (e) to ensure compatibility with national and provincial development plans and planning requirements binding on the municipality in terms of legislation.

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<sup>9</sup> Refer to the Constitution s 153(b), which specifically requires this participation.

<sup>10</sup> See the Systems Act s 24(3)(a)-(b).

<sup>11</sup> See the Systems Act s 24(4).

<sup>12</sup> See the Systems Act s 25(1)(a)-(e).

An IDP adopted by a municipal council as mentioned above may be amended, but it remains in force until a new IDP is adopted by the next elected council.<sup>13</sup> A newly elected municipal council may adopt the IDP of its predecessor, but must comply with certain requirements.<sup>14</sup> Finally, it is required for all municipalities to give notice to the public of such adoption within 14 days of the adoption of its IDP and also to make copies or extracts from the plan available for public inspection. A summary of the plan must also be published.<sup>15</sup>

### **20.2.2 The contents and core components of Integrated Development Plans**

The new national regulatory legislation furthermore sets specific core components that IDP must incorporate. According to the Systems Act, an IDP must reflect the following:<sup>16</sup>

- (a) the municipal council's vision for the long term development of the municipality with special emphasis on the municipality's most critical development and internal transformation needs;
- (b) an assessment of the existing level of development in the municipality, which must include an identification of communities which do not have access to basic municipal services;
- (c) the council's development priorities and objectives for its elected term, including its local economic development aims and its internal transformation needs;
- (d) the council's development strategies which must be aligned with any national or provincial sectoral plans and planning requirements binding on the municipality in terms of legislation;
- (e) a spatial development framework which must include the provision of basic guidelines for a land use management system for the municipality;
- (f) the council's operational strategies;
- (g) applicable disaster management plans;
- (h) a financial plan, which must include a budget projection for at least the next three years; and
- (i) the key performance indicators and performance targets determined in terms of section 41.

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<sup>13</sup> See the Systems Act ss 34 and 25(2).

<sup>14</sup> Read the Systems Act ss 25(3)(a) and 29(1)(b)(i), (c) and (d) in conjunction with one another.

<sup>15</sup> See the Systems Act s 25(4)(a)-(b).

<sup>16</sup> See the Systems Act s 26(a)-(i).

It is quite clear that the IDP has a central and very important function within the new local government system. The IDP serves basically as a guiding document for the short term developmental needs and initiatives of every municipal government in South Africa. For this reason, special provision regarding the status of an IDP has been made and will be discussed later.<sup>17</sup>

### **20.2.3 Requirements regarding the process for planning, drafting, adopting and reviewing Integrated Development Plans**

The Systems Act also determines specific procedures regarding the framework for integrated development planning, for adoption and review procedures of IDP(s) and for the role players involved during the various processes.

In order to establish a framework for integrated development planning, each district municipality must adopt a framework for integrated development planning in its area as a whole. The adoption of this framework is to be effected within a prescribed period after the start of the elected term of the council and also after a consultative process with the other local municipalities in the area has been followed. After adoption, the IDP framework binds both the district municipality and local municipalities in the relevant area jurisdiction of the particular district.<sup>18</sup> At the very least, the framework must

- identify the plans and planning requirements binding in terms of national or provincial legislation on the district municipality, the local municipalities or even any specific municipality on its own within the area
- identify the matters to be included in the IDPs of the district and local municipalities that require alignment
- specify the principles to be applied and co-ordinate the approach to be adopted in respect of the alignment of IDP matters
- determine procedures for consultation between the district and local municipalities during the process of drafting their respective IDPs and also the procedures to be implemented in order to effect essential amendments to the framework.<sup>19</sup>

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<sup>17</sup> See the Systems Act s 35. Refer also to item 2 of the local government: Municipal planning and performance management regulations as published under GNR 796 in GG 22605 of 24 August 2001. Item 2 deals with the details of an IDP.

<sup>18</sup> See the Systems Act s 27(1)-(2).

<sup>19</sup> Refer to the Systems Act s 27(2)(a)-(d). It should be noted that these provisions are applicable only between a district municipality and its various local municipalities. In a metropolitan area,

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Through their municipal councils and within a prescribed period after the start of their elected term, all municipalities are obliged to adopt a process set out in writing to guide the planning, drafting, adoption and review of their IDPs, however.<sup>20</sup> Through the various mechanisms of public participation, a municipality must consult with its local community before adopting the process mentioned above and must give notice to the local community regarding the particulars of the process it intends to follow.<sup>21</sup>

With reference to the process to be followed by a municipality to draft its IDP, the municipality must ensure the following requirements:<sup>22</sup>

- that the process is in accordance with a predetermined programme which must specify timeframes for different steps
- that mechanisms of public participation allow for
  - (a) the local community to be consulted on its development needs and priorities
  - (b) local community participation in the drafting of the IDP
  - (c) organs of state, traditional authorities and other role players to be identified and consulted on the drafting of the IDP
- that the identification of all plans and planning requirements that are binding on the municipality in terms of national and provincial legislation are provide for
- that the IDP is consistent with any other matters that may be prescribed by regulation.

In areas outside metropolitan areas, all district municipalities must plan integrated development for the area as a whole but in close consultation with the local municipalities and must draft its IDP after having taken into account the integrated development processes of and proposals submitted to it by the local municipalities in its area. Simultaneously, all local municipalities must align their IDPs with the framework adopted by the district municipality and must draft their IDPs, after taking into account the IDP process and proposals from the district municipality.<sup>23</sup>

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no such co-operation and alignment is necessary, as the metro municipality is the only local government operating in the particular area of jurisdiction.

<sup>20</sup> The new requirements make it clear that each and every local government is legally required to draft and adopt an IDP for its area. See the Systems Act s 28(1).

<sup>21</sup> See the Systems Act s 28(2)-(3).

<sup>22</sup> See the Systems Act s 29(1)(a)-(d).

<sup>23</sup> See the Systems Act s 29(2)-(3). It is clear that in the new legal system a district council's responsibility for a district IDP is a statutory requirement. All district councils must formulate district wide IDPs, which must include a framework for the IDPs of local councils in their areas of jurisdiction.

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The management of the IDP drafting processes falls under the responsibility of the executive committee or executive mayor of a municipality or under a committee of councillors appointed by the municipal council if it is a municipality without an executive committee or an executive mayor. The responsible committee or person must manage the drafting of the IDP, must assign responsibilities to the municipal manager in the IDP process and must submit the draft plan to the municipal council for adoption by the council.<sup>24</sup> Further monitoring and support to the process of integrated development planning is provided for in that the MEC for local government in the province may:

- monitor the process followed by a municipality
- assist a municipality with the planning, drafting, adoption and review of its IDP
- facilitate co-ordination and alignment of the IDPs of different municipalities and the strategies and programmes of national and provincial organs of state.

The MEC may take any appropriate steps to resolve disputes or differences in connection with the IDP processes between a municipality and its local community or between municipalities.<sup>25</sup>

After an IDP has been adopted or amended, the municipal manager of a municipality must submit a copy of the IDP to the MEC for local government in the province within ten (10) days after such adoption/amendment. The copy of the IDP must further be accompanied by a summary of the pre-adoption process, a statement that the process has been complied with, together with explanations where necessary, and finally in the case of a district and local municipality, a copy of the framework adopted for integrated development planning between the municipalities.<sup>26</sup> The MEC may within 30 days of receiving a copy of an IDP or amendment thereto, or within such reasonable longer period as may be approved by the minister of local government, request the relevant municipal council to adjust the plan or the amendment, in

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tion. District IDPs should thus determine a strategy for promoting economic development in the entire district and ensure upliftment of all communities. Such IDPs should guide revenue-raising and service-delivery activities and promote interaction between citizens, councillors, officials and higher spheres of government. It is important that District and Local IDPs be drawn up parallel to each other and inform and reinforce one another. District councils are thus responsible for aligning and co-ordinating potentially contradictory municipal IDPs. District IDPs are an important tool for integrating service-delivery activities and municipal goals.

<sup>24</sup> See s 30(a)-(c) of the Systems Act.

<sup>25</sup> See s 31(a)-(d) of the Systems Act. The monitoring and provincial supervision is subject to any other law(s) enacted to regulate such supervision in local government spheres, however.

<sup>26</sup> Refer to the Systems Act s 32(1)(a)-(b)(i)-(iii).



accordance with the MEC's proposals, if the plan/amendment does not comply with a requirement of the Systems Act or is in conflict or not aligned with the development plans and strategies of other affected municipalities or organs of state. The MEC may then request a municipal council to comply with the provisions of the Systems Act.<sup>27</sup> A municipal council must consider the MEC's proposals and, within 30 days of receipt of such proposals, adjust its IDP accordingly, if it agrees with the proposals. If a municipality disagrees with the proposals, it must object thereto and must furnish the MEC with written reasons for disagreeing. On receipt of such an objection, the MEC may refer the objection to an *ad hoc* committee for a decision. If the MEC decides to refer the objection, it must be referred within 21 days of receipt of the objection.<sup>28</sup>

The *ad hoc* committee mentioned above must be appointed by the MEC, whenever necessary. The committee must consist of members representing local government, the provincial government and national government. The MEC appoints the members of an *ad hoc* committee with the concurrence of the municipality concerned, the provincial organ or organs involved and with the concurrence of the national organ or organs of state involved in the dispute or in whose functional area the disputed is located.<sup>29</sup> The procedure of the *ad hoc* committee must be dealt with in accordance with procedures prescribed by regulation.<sup>30</sup> A matter before an *ad hoc* committee is decided if at least two spheres of government agree on the matter. If the committee rejects the objection(s) of the municipality, the municipality must comply with the initial request by the MEC within 30 days of the decision and after having been informed of the decision.<sup>31</sup>

All municipalities are also obligated to review their IDPs annually in accordance with an assessment of their performance measurements under section 41 of the Systems Act and also to the extent that changing circumstances so demand. The amendment procedure should be in accordance with a prescribed process.<sup>32</sup>

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<sup>27</sup> See the Systems Act s 32(2)(a)-(b).

<sup>28</sup> It seems clear from the Act that the MEC has a discretion either to refer such a dispute to an *ad hoc* committee or not to. Should he decide not to refer it, it seems that his decision would be final. See the Systems Act s 32(3)-(4).

<sup>29</sup> See s 33(2)(a)-(c) for more details.

<sup>30</sup> See the Systems Act ss 33(3) and 37.

<sup>31</sup> See the Systems Act s 33(4)-(5).

<sup>32</sup> Refer to the Systems Act s 34(a)-(b).

#### **20.2.4 Miscellaneous aspects concerning municipal integrated development planning**

The new legislative framework also affords specific status to a particular IDP. The Systems Act determines that an IDP adopted by a municipal council has the following importance:

- It serves as the principal strategic planning instrument which guides and informs all planning and development and decisions relating thereto in a municipal area.
- It binds the municipality in the exercise of its executive authority, except to the extent of any inconsistency between a municipality's IDP and national or provincial legislation, in which case such legislation is to prevail.
- It binds all other persons to the extent that those parts of the IDP that impose duties or affect the rights of those persons have been passed as a by-law.<sup>33</sup> It should be noted that a spatial development framework contained in an IDP prevails over a plan as is defined in section 1 of the Physical Planning Act of 1991.<sup>34</sup>

Finally, the Systems Act determines that all municipalities must give effect to their IDPs and conduct their affairs in a manner which is consistent with their IDPs. The national minister is further authorised, for the purposes of municipal integrated development planning, to make regulations or to issue guidelines in terms of section 120 of the Act and to provide or to regulate certain matters. Such matters are the following.<sup>35</sup>

- (a) incentives to ensure that municipalities adopt their integrated development plans within the applicable prescribed period, and comply with the provisions of the Act concerning the planning, drafting, adoption and review of those plans;
- (b) the detail of integrated development plans taking into account the requirements of other applicable national legislation;
- (c) criteria municipalities must take into account when planning, drafting, adopting or reviewing their integrated development plans;

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<sup>33</sup> See the Systems Act s 35(a)-(c). Although an IDP has been given statutory recognition and status, if certain parts of an IDP impose duties or affect the rights of other persons, such as the local community, eg, then such aspects should have been incorporated in a by-law and should have been passed as such to have binding force over such persons. See s 35(1)(c).

<sup>34</sup> 125 of 1991 and the Systems Act s 35(2).

<sup>35</sup> See the Systems Act s 37(1)(a)-(i).

- (d) the detail of the process for the planning, drafting, adoption and review of integrated development plans;
- (e) a process for the amendment of integrated development plans;
- (f) the manner in which an objection must be referred to an *ad hoc* committee envisaged in section 33;
- (g) the manner in which written evidence or documents must be submitted to an *ad hoc* committee;
- (h) the proceedings of an *ad hoc* committee; and
- (i) any other matter that may facilitate –
  - (i) integrated development planning and the drafting of integrated development plans; or
  - (ii) the application of this chapter.

When the minister makes regulations or issues guidelines to regulate matters under subsection 37(1)(b)-(e), he/she must take into account the capacity of municipalities to comply with those matters and must differentiate between different kinds of municipality according to their respective capacities. Furthermore, the minister is authorised to phase in the application of the provisions of the chapter on integrated development planning where such provisions place a financial or administrative burden on such municipalities.<sup>36</sup>

### 20.3 Conclusion

It was demonstrated above that municipal development planning is not only a legal obligation for all municipalities but that without such planning municipalities will not be in a position to fulfil their obligations and responsibilities. The new local government dispensation is developmentally orientated, which in essence requires progress in the real realisation of developmental goals. Municipalities must therefore move forward and should enhance and create a better living environment for all South African citizens. Development planning is not something that can be done in isolation by individual municipalities. It requires constructive involvement of all three spheres of government on a vertical axis and also all relevant municipalities *inter se*, on a horizontal axis. The constitutional obligations and principles of co-operative govern-

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<sup>36</sup> See the Systems Act s 37(3)-(4). Refer again to the LG: Municipal Planning and Performance Management Regulations as published under GNR 796 of GG 22605 of 24 August 2001. Apart from the details of an IDP, the regulations also address the process for amending IDPs, referring of objections to IDPs to an *ad hoc* committee, as well as requirements giving effect to an IDP.

ment are therefore of significant importance in relation to developmental strategies and interaction between the various organs of state. Such co-operation will benefit not only municipalities but also both national and provincial policies and programmes.

Municipal development planning is incorporated mainly in a Municipal Integrated Development Plan (MIDP), which serves as a single, inclusive and strategic plan for the development of the municipal area. All MIDP must incorporate certain minimum core components as they guide the short-term development of local governments in South Africa. Because of its importance, an MIDP is strongly protected, and strict requirements for its adoption and amendment are determined by law. Such plans are flexible, living documents, however, and should be reviewed annually to keep up with the changing demands and circumstances in municipal jurisdictions. All in all, the new requirements and status of MIDP should go a long way towards helping the new local government structures to manage and achieve their important constitutional obligations.

## **Basic legal matters relevant to local government structures**

### **21.1 Introduction**

In light of the various aims and responsibilities of local governments, it is generally accepted that such governments are confronted with almost all aspects of the law. It was explained in chapter 10 that municipalities have been established throughout the whole territory of South Africa, and therefore there is no area that does not fall under the direct authority of a particular municipal council. The importance of legal knowledge regarding not only the composition and functioning of municipalities, but also other fields of law is of significant importance. No legal practitioner can practise law in a particular area in our country without a sound knowledge of the legal rules that are applicable to local governments. Every now and then a practitioner will be confronted with legal disputes that concern the particular local authority either directly or indirectly. In many areas, the local municipality is often the largest employer organisation and also the largest economically active entity. In short, one can say that a legal adviser for a local government or a practitioner advising clients on local government matters should have a sound legal knowledge of almost all the different fields of the South African law.

In order to be able to handle and address legal problems, it is important to know the law and where to find the law. As the law is constantly changing and developing, it is obvious that all role players in local government should be able to access and then apply the relevant legal rules that encompass the new local government dispensation. All role players must have a sound knowledge of the different sources of local government law. These sources are mentioned briefly below.

### **21.2 Sources of local government law**

In principle, there are three main sources of local government law. They are :

- legislation
- a combination of common law and customary law

- legal precedents.

It is only legislation and case law that are of importance to local government practitioners and legal scholars, however. Since local government law is part of the broader constitutional system of South Africa, customary and common law rules have very little or no influence or impact as a source of local government law.<sup>1</sup>

### **21.2.1 Legislation as a source of local government law**

Legislation is without a doubt the most important and influential source of local government law. It was discussed and explained above that the new local government dispensation was not only created in terms of legislation but that it also functions and operates according to various pieces of legislation. Such legislative requirements can be from either the national or a provincial government.<sup>2</sup> It should be pointed out that the term “legislation “ as referred to here, is a wide term and includes both national and provincial laws, as well as proclamations and regulations made by ministers or MECs.<sup>3</sup>

Within the ambit of legislation, it should be obvious and self-explanatory that the Constitution of the Republic of South Africa, which is a very unique and important legislative source of the country’s legal system, forms the basic legal framework on which the new local government system has been founded. The Constitution defines mainly the powers and functions of all three spheres of government and, in particular, the powers and functions of all local governments.<sup>4</sup>

Apart from the constitutional text itself, the Constitution further mandates the enactment of various other national and provincial laws, with the purpose of giving body to the basic legal framework of local governments. Such Acts, as was mentioned and discussed in the previous chapters of this work, then complete the legal framework within which local governments are operating.<sup>5</sup>

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<sup>1</sup> For more on this point see the cases of *In re: Certification of the Constitution of the RSA 1998*, 1996 (4) SA 744 (CC) and also *President of the RSA v Hugo* 1997 (4) SA 1 (CC).

<sup>2</sup> Because of the ever-changing needs of society, local government law is contained and regulated mainly by legislation.

<sup>3</sup> See the Constitution s 239 for a more exact definition of the term “legislation”.

<sup>4</sup> As the supreme law of the state, the provisions and requirements of the Constitution are non-negotiable. Non-compliance with the Constitution would result in invalidation. See the Constitution s 2.

<sup>5</sup> It was mentioned above that local government *per se* is not a concurrent legislative competence or exclusive legislative competence in terms of the Constitution Sch 4 and 5. This position seems to indicate that it is left for mostly the national government to legislate on local government matters, if so allowed by the Constitution. See the Constitution s 163. Only when the Constitution allows provincial laws over certain matters will it be possible for provincial governments to legislate

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### **21.2.2 The importance of customary and common law principles**

Basically there are two main reasons for both the common law and customary law not featuring as important sources of local government law. In the first instance, the new local government system is a totally new legal system which had its origins within the new constitutional legal foundation. The new system was totally overhauled to such an extent that common law rules are no longer of any importance. Secondly, the Constitution also does not contain a provision to the extent that the former common law or customary law principles still continue.<sup>6</sup> Apart from this position, the former local government system was regulated mainly by legislation under the then government of South Africa. The influence of common law or customary law under the former system was largely non-existent. Finally, it was held by the highest judicial authority in South Africa that even from a constitutional viewpoint there are no common law powers left that were derived from the former royal prerogatives. All such powers have now been enumerated within the text of the Constitution or other legislation.<sup>7</sup>

### **21.2.3 Judicial precedent as a source of local government law**

Apart from legislation, judicial precedents, or what are commonly referred to as “case law”, are the second most important source of local government law. The importance of legal jurisprudence is founded on two issues in particular. Firstly, South Africa follows the legal doctrine of *stare decisis*, which means that the lower courts in the hierarchy of judicial bodies are compelled to follow the decisions, in similar cases, handed down by the higher courts. Secondly, the Constitution clearly spells out the importance and role of the judicial authority in our legal system. According to the Constitution, the judicial authority of the Republic of South Africa is vested in the courts and the courts are subject to the Constitution and the law only. Any order or decision by a court binds all persons to whom it applies, including the state.<sup>8</sup> The importance of judicial precedents is therefore self-evident, and local government

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over such matters. See, eg, the Constitution s 139. Provincial laws relevant to local governments are therefore much less important than their national counterparts.

<sup>6</sup> Under the 1983 Constitution s 88 such conventions still continued to be in force. The 1996 Constitution does not provide for such continuation.

<sup>7</sup> See the *First Certification Judgment* 1996 1996 (1) SA 1 (CC); *President of the RSA v Hugo* 1997 (4) SA 1 (CC) and *President of the RSA v SARFU* 2000 (1) SA 1 (CC).

<sup>8</sup> See the Constitution s 165(1)-(5).



practitioners and scholars must ensure that they keep up to date with decisions of our courts regarding local government legal matters.

Apart from the sources mentioned above, there are no other real sources of local government law. Although the works and writings of legal scholars, the discussion and deliberations of politicians and the submissions of the concerned public at large are of importance to legal development, such aspects are not sources of local government law and should be regarded only as primary information sources from which the content of the law can sometimes be determined.

### **21.3 Important fields of law relevant to local government law**

It was mentioned above that local government administrations often face a large variety of legal issues. In order to cope with such issues, most municipal councils that can afford to do so have a specific legal section that advises and handles legal problems for both the political and administrative branches of the local authority. Municipal legal advisors are therefore responsible for both internal and external legal matters. Such a situation often demands broad legal and paralegal expertise. Local government matters are important not only to the political office bearers and administrative personnel, however. Such matters are also regularly of importance to the relevant local community. Of the three spheres of government, citizens of a state are most likely, at some stage, to be involved in a legal dispute with their local authority. Against this background it is obvious that local community members are in need of professional and expert legal advice and assistance regarding local government legal matters.

It falls way beyond the scope of this work to discuss or even try to explain the various legal fields that are of importance in municipal matters. What is of interest, however, is to highlight briefly some of the most common areas of legal dispute that involve local governments. While it is the task of lawyers and legal advisors to keep knowledgeable about the law in general, some of the specialised legal issues are also of value for both the political and administrative components of a municipality in order for them successfully to fulfil and maintain their duties and responsibilities.

#### **21.3.1 Common legal issues relevant to local governments**

- *The law of contract* The law of contract is particularly important to local government legal advisors. All municipalities are involved in various legal contractual re-

relationships on a regular basis. As a sphere of government and a legal entity, municipalities are legally empowered to enter and conclude contracts.<sup>9</sup>

- *Property law* The law concerning property and other related issues is also of regular importance to local governments. Property is regarded as of such importance in our modern democracy that it has been afforded direct protection under the Constitution.<sup>10</sup> Property law also includes issues regarding
  - (a) expropriation
  - (b) property leasing
  - (c) purchase, sale and acquisition
  - (d) transfer of property ownership
  - (e) other related land use rights such as the restitution of land rights, land reform measures, communal property associations, informal land rights issues and eviction requirements and procedures.<sup>11</sup>

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<sup>9</sup> See also *Keyser v Orkney Town Council* 2003 (4) SA 131 (T) with reference to lease agreements. In *Gordon v Pietermaritzburg-Msunduzi: TLC and Another* 2001 (4) SA 972 (N) it was mentioned that with the advent of SA's new constitutional dispensation, momentous changes were brought about to local government. The court held that the contract concluded between the parties was impossible to perform and, although it was true that the state was bound by ordinary commercial contracts concluded by it, in cases of impossible performance, the law of contract allows for the cancellation of the agreement. In the case certain regulations, which formed the basis of the contractual relationship between the parties, were repealed in the context of an entirely new constitutional dispensation, which included local government. See paras B-D at 978.

<sup>10</sup> According to the Constitution s 25, no *person* may be deprived of property except in terms of a law of general application. Arbitrary deprivation of property is specifically outlawed. Although property may be expropriated, there are specified requirements under which such expropriation must be done. Refer also to the case of *Modderfontein Squatters, Greater Benoni City Council v Modderklip boerdery (Pty) Ltd (Agri SA and Legal Resources Centre as amici curiae)*, also referred to as *President of the RSA v Modderklip boerdery* 2004 (6) SA 40 (SCA).

<sup>11</sup> Most of these issues are regulated in terms of specific Acts of parliament. For more on municipal property-related issues, refer to Nonyana MR "Communal Property Associations for convenience v townships for services and maintenance" *Property Law Digest* August 2000 Butterworths at 3. The writer refers to the Communal Property Association Act 28 of 1996 which has improved communal land ownership. See also the following cases: *De Villiers en 'n Ander v Stadsraad van Mamelodi en 'n Ander* 1995 (4) SA 347 (T) dealing with expropriation under the Expropriation Act 63 of 1975. See also *Cape Town Municipality v Table Mountain Aerial Cableway Co Ltd* 1996 (1) SA 909 (C). In *Southern Metropolitan Substructure v Thompson and Others* 1997 (2) SA 799 (W) it was held that a local authority's duty to provide and allocate housing cannot lawfully be fettered by contractual undertakings not to evict illegal occupiers of land. When land/property is sold, it must be described sufficiently in accordance with the Alienation of Land Act 68 of 1981. Faultless description is not required. See *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA). See also *M & J Morgan Investments (Pty) Ltd v Pinetown Municipality* 1997 (4) SA 427 (SCA), and *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) dealing with expropriation issues. Refer also to *Skinberg v South Peninsula Municipality* 2001 (4) SA 1144 (C). It was stated as a *semble* to the case that despite the clear distinction made in the Constitution s 25 between deprivation and expropriation of property, there may be room for the development of a doctrine akin to constructive expropriation in South Africa, particularly where a public body utilises a regulatory power in a manner which, taken in isolation, can be categorised as a deprivation of prop-

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An interesting aspect regarding land is the Subdivision of Agricultural Land Act,<sup>12</sup> which requires that agricultural land may not be subdivided unless the Minister of Agriculture has given his written consent thereto.<sup>13</sup> Section 12 of the Local Government: Municipal Structures Act<sup>14</sup> allowed for the establishment of new municipalities for the entire territory of South Africa, however.<sup>15</sup> Accordingly, it is argued by some that all land now falls within the jurisdiction of a municipality.<sup>16</sup> Since agricultural land also falls within the jurisdiction of a municipal council, it seems that section 3 of the Subdivision of Agricultural Land Act no longer has application.

- *The law of delict* The law of delict is an equally important field of law within the local government domain. All municipalities face delictual accountability on a daily basis. Delictual liability is confined not only to general delictual claims but also more specialised claims under the legal protection of vicarious liability, defamation and other unique forms of delictual accountability. The law of delict is a vast and often complex field of the law and should be studied carefully.<sup>17</sup>

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erty rights and not an expropriation, but which has the effect, albeit indirectly, of transferring those rights to the public body. Other issues dealing with property-related matters were decided in *Bailes v Town and Regional Planning Commission* 2002 (2) SA 589 (N), *Kotzé v Minister of Landbou en Andere* 2003 (1) SA 445 (T), *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn* 2003 (6) SA 140 (C) and *Baartman and Others v Port Elizabeth Municipality* 2003 (3) SA 560 (SCA). Refer also to Griffiths G "Not so fast – that's municipal land: A discourse on the acquisition of municipal property under the Cape Municipal Ordinance 20 of 1974" *Property Law Digest* (1999) Butterworths at 11.

<sup>12</sup> 70 of 1970.

<sup>13</sup> Refer to the Act s 3.

<sup>14</sup> 117 of 1998.

<sup>15</sup> Read also the Constitution s 151(1), which states that the local sphere of government consists of municipalities which must be established for the whole territory of the Republic.

<sup>16</sup> See the letter of MJ Meyer "Is Act 70 of 1970 still necessary?" *DR* December 2001 at 5.

<sup>17</sup> Judicial examples of recent delictual cases concerning local authorities are the following: *Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 (4) SA 745 (O), dealing with the responsibility of a municipal airstrip; *Gardner v Whitaker* 1995 (2) SA 672 (E), dealing with issues of defamation; *Cape Town Municipality v Butters* 1996 (1) SA 473 (C), dealing with public liability; *Cape Town Municipality v Bakkerud* 1997 (4) SA 356 (C), concerning municipal liability for damages resulting from an omission to repair streets and pavements; *Welkom Municipality v Masureik and Herman t/a Lotus Corp* 1997 (3) SA 363 (SCA); *Pretoria City Council v De Jager* 1997 (2) SA 46 (SCA), dealing with the liability when failing to take reasonable precautions to prevent foreseeable harm on municipal sidewalks; *Graham v Cape Metropolitan Council* 1999 (3) SA 356 (C); *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA); *Grootboom v Graaff-Reinet Municipality* 2001 (3) SA 373 (E); *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA); *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA), concerning liability for municipal council's water main bursting and *Minister of Safety and Security v Duivenboden* 2002 (6) SA 431 (SCA) relevant to municipal security/police services. See also the following academic research: Scott J "Grootboom v Graaff-Reinet Municipality" *De Jure* 2002 at 635; Scott J "Re-affirmation of the doctrine of immunity of municipalities against liability for wrongful omissions assessed and rejected – Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA) *THRHR* 2001 (64) at 502; Scott J "The Cape Metropolitan Council v Noel Raymond Graham case no 157/99 (C)" *De Jure* (2001) at 198; Scott J "Cape Town Municipality v Butters 1996 (1) SA 473 (C)" *De Jure* (1996) at 379 and Smith A "Mu-

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- *Constitutional law and administrative law* The importance of constitutional law, which includes not only formal constitutional law but also aspects of fundamental rights law, administrative law, environmental law, legal interpretation and even some aspects of public international law have been highlighted above. Apart from the obvious importance of the Constitution and its Bill of Rights, the legal rules regulating the field of administrative law are also of particular importance to all local government bodies. Many municipal actions form part of the executive authority of the state and therefore fall under the rules of administrative law. The importance of administrative law was specifically highlighted in the case of *Fed-sure Life Assurance v Greater Johannesburg TMC*.<sup>18</sup> In this case it was mentioned that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates or determines appropriations to be made out of public funds, such a power is peculiar to elected legislative bodies. Such powers are exercised by democratically elected representatives after due deliberation of the circumstances and cannot be classed as administrative action.<sup>19</sup> Not only the legal advisors of a municipality, but all municipal administrators, should have a basic understanding and knowledge of administrative law and its various related legal rules.<sup>20</sup>
- *Criminal law* Municipalities are also often involved within the ambit of criminal law. Such issues are confined not only to incidents where municipal personnel are implicated in criminal activity but can also relate to incidents where municipal employees or even councillors are held criminally liable for activities within a particular municipality. So, for example, is it possible for a municipal official, mostly the municipal manager, to be held liable for non-compliance with certain

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municipalities mend your ways" *The Quarterly Law Review* for people in business vol 8 part 2 (2000) at 40.

<sup>18</sup> 1999 (1) SA 374 (CC).

<sup>19</sup> Refer to para 45 at 396-397.

<sup>20</sup> For more on constitutional and administrative law see the cases of *Claude Neon Ltd v Germiston City Council and Another* 1995 (3) SA 710 (W), where the court held that an undertaking by a local authority official to notify a person is an administrative act that gives rise to a legitimate or reasonable expectation. See also *Tony Rahme Marketing Agencies SA (Pty) Ltd and another v Greater JHB TMC* 1997 (4) SA 213 (W); *Gencor SA Ltd v TC for Rustenburg and Environs and another* 1998 (2) SA 1052 (T); *Erf one six seven Orchards CC v Greater JHB Metro Council and Another* 1999 (1) SA 104 (SCA) and *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA). See *City of Cape Town v Rudolph and others* 2004 (5) SA 39 (CPD) regarding a housing dispute under s 26 of the Constitution.

legislative requirements.<sup>21</sup> The importance of criminal law within the new local government dispensation should not be underestimated, therefore.

- *Labour law* The importance of labour law for municipal governments is particularly highlighted by the fact that municipalities are often one of the larger employer organisations within a particular municipal area. Depending on the size of the municipality, municipal councils employ hundreds or even thousands of personnel. Labour law issues are thus part and parcel of a municipal administration, and a sound knowledge of labour law is essential. Apart from normal labour issues such as wage negotiations, promotions and disciplinary action against employees, local government administration also encounter more specialised labour issues such as disputes within essential services areas. Because of the importance of labour law in local government, most municipalities have established personnel and labour relations departments to handle such matters. There is even a specific bargaining council that was established to resolve and deal with municipal labour issues between municipalities as employers, and labour unions as representatives of municipal employees.<sup>22</sup>
- *Building regulations and town and regional planning law* All municipalities are required to be involved in local planning processes and developmental programmes. Each municipal government is therefore regularly involved in town planning activities, and municipalities must also ensure that minimum building standards are complied with.<sup>23</sup>

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<sup>21</sup> See the Occupational Health and Safety Act 85 of 1993 as an example.

<sup>22</sup> For typical examples of labour-related issues in local authorities see *Cape Local Authorities Employers Organisation v IMATU* 1997 (1) SA 656 (C) and *Mhlambi v Matjhabeng Municipality and another* 2003 (5) SA 89 (O). In the latter case the court held *inter alia* that a reasonable request for further particulars in a disciplinary action is an ingredient of the right to a fair hearing and that the principles of natural justice demanded that such information be furnished.

<sup>23</sup> For more on town planning and building requirements see the National Building Regulations and Building Standards Act 103 of 1977. Refer also to cases such as: *Sandton Town Council v Gourmet Property Investments CC* 1994 (4) SA 569 (A) dealing with national building regulations; *Diepsloot Residents and Landowners Association and Another v Administrator Tvl* 1994 (3) SA 336 (A); *Schapenrome Investments (Edms) Bpk v Sandtonse Stadsraad* 1994 (2) SA 34 (A); *Stands 5/1 Wierda Valley (Pty) Ltd and Another v Sandton Town Council* 1994 (1) SA 333 (A); *Knop v JHB City council* 1995 (2) SA 1 (A); *Huisman v Minister of Local Government, Housing and Works* 1996 (1) SA 836 (A); *East Zulu Motors v Empangeni/Ngwelezane TLC* 1998 (2) SA 61 (CC) and also *Paola v Jeeva and others* 2004 (1) SA 396 (SCA), concerning the value of a view of a property. Refer also to Van Wyk J and Van Wyk D "Planning law, administrative justice and the Constitution: *Van Juyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C)" *THRHR* 1996 (59) at 675 *et seq*; *Gildenhuys A "Omgewingsbewaring beperkings op grondgebruiksveranderingen" Butterworths Property Law Digest* (2000) at 13 and Van Wyk J "Planning Law – Will Cinderella emerge a princess?" *THRHR* 1996 (59) at 1. See also the case of *Humphrys NO v Barnes* 2004 (2) SA 577

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- *Environmental law* It was mentioned above that all three spheres of government must comply with the new constitutional requirements. One such requirement is the provision of a clean and healthy environment. Environmental laws are therefore of significant importance for all local authorities. It is essential for municipalities to determine their responsibilities under current legislative provisions and to ensure compliance with their obligations in that regard.<sup>24</sup>

#### **21.4 Special legal matters pertaining to local government**

Apart from the general legal fields that have an impact on local governments, the new local government legal framework also provides for specific legal matters that are of particular importance to local authorities.<sup>25</sup> These special provisions regarding municipal legal matters must be read in conjunction with the general provisions of the law.

##### **21.4.1 Legal proceedings**

According to the Systems Act, all municipalities are authorised to compromise or compound any action, claim or proceedings and may submit to arbitration any matter other than a matter involving a decision on its status, powers, duties or the validity of its actions or by-laws.<sup>26</sup> The particular subsection is somewhat dubious and unclear. As a legal person all municipalities have legal standing and may thus institute or defend any legal action in which they have a direct, or sometimes indirect, interest. However, this position is conditional to the extent that the particular legal action is indeed permissible under the law in general.

##### **21.4.2 Legal representation for employees or councillors of a municipality**

Under the new legal framework, it is permissible for a municipality, subject to such terms and conditions as it may determine, to provide an employee or a councillor of

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(CPD) regarding the collapsing of a boundary wall between two private property owners. Refer also to *Botha v White* 2004 (3) SA 184 (TPD) regarding the use of a property contrary to the applicable zoning. See also *Clark v Faraday and Another* 2004 (4) SA 564 (CPD) regarding the approval of building plans and a neighbour's view. The court held *inter alia* that an owner of land who uses his/her property in an ordinary and natural manner is not guilty of committing an *injuria* to other property owners.

<sup>24</sup> For more on environmental aspects see *Verstappen v Port Edward Town Board and Others* 1994 (3) SA 569 (D), the Environmental Conservation Act 73 of 1989 and Witbooi E "Obligations on property owners to control alien invasive vegetation on their land" *Butterworths Property Law Digest* March 2003 at 3.

<sup>25</sup> Refer to the Local Government: Municipal Systems Act 32 of 2000 ch 11 as amended by Act 40 of 2002 s 2(1).

<sup>26</sup> See the Systems Act s 109(2).

the municipality with legal representation where applicable. Such legal representation is limited to only two instances, however.<sup>27</sup>

- where legal proceedings have been instituted against the employee or councillor as a result of any act or omission by that person in the exercise of his or her powers or the performance of his or her duties or
- where the employee or councillor has been summoned to attend any inquest or inquiry arising from the exercise of his or her powers or the performance of his or her duties.

It should be noted that employees or councillors are not automatically entitled to the legal representation mentioned above. The decision to provide for such representation lies with the municipal council. All legal assistance not addressed in the two instances above should be for the employee's or councillor's own account and should not be funded from the municipal/public purse.

#### **21.4.3 Issues concerning evidence**

The Systems Act specifically provides that in legal proceedings against a municipality a certificate which purports to be signed by a staff member of the municipality and which claims that the municipality used the best known or only or most practicable and available methods in exercising any of its powers or performing its functions must, on its mere production by any person, be accepted by a court as evidence of that fact.<sup>28</sup> It is further provided that a copy of the *Provincial Gazette* in which a by-law was published may, on its mere production in a court by any person, be used as evidence that that by-law was passed by a municipality concerned.<sup>29</sup>

#### **21.4.4 Fines, bail and the prosecution of offences**

Under the new legal framework, a staff member of a municipality so authorised may institute criminal proceedings and conduct the prosecution in respect of a contravention of or failure to comply with a provision of

- a by-law or regulation of the municipality
- other legislation administered by the municipality or

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<sup>27</sup> See the Systems Act s 109A(a)-(b).

<sup>28</sup> The Systems Act s 110.

<sup>29</sup> Refer to the Systems Act s 111. It is submitted, however, that such a situation should prevail only in instances where no contrary evidence is presented to a particular court.



- other legislation as determined by the National Director of Public Prosecutions in terms of section 22(8)(b) of the National Prosecuting Act of 1998.<sup>30</sup>

It is also provided that fines and bails that were recovered in respect of offences or alleged offences referred to in item 2 of Schedule 4 to the Public Finance Management Act<sup>31</sup> must be paid into the revenue fund of the municipality concerned.<sup>32</sup>

#### **21.4.5 Time of notices, payments and the service of documents and process**

A payment may be made at a municipality only during the normal or extended office hours of a municipality, except when payment is made by electronic transfer or at an agency pay-point. These times also apply to when any notice or other document may be served on the municipality, including its council, other structures, functionaries or staff members in an official capacity. There are exceptions to this rule in urgent matters, however.<sup>33</sup> Any notice or other document that is served on a person in terms of the Systems Act or by a municipality in terms of any legislation is regarded as having been served when:

- it has been delivered to that person
- it has been left at that person's place of residence or business in the Republic of South Africa with a person apparently over the age of sixteen years
- it has been posted by registered or certified mail to that person's last known residential or business address in the Republic of South Africa and an acknowledgement of the posting thereof is obtained from the relevant postal service
- it has been served on a person's agent or representative in the Republic of South Africa in a manner provided for above if that person's address in the RSA is unknown
- it has been posted in a conspicuous place on the property or premises of the person to which it relates if that person's address or agent in the Republic of South Africa is unknown.<sup>34</sup>

It is also provided that when any notice or other document must be authorised or served on the owner, occupier or holder of any property or right in any property, that it is sufficient if that person is described in the notice or document as the owner,

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<sup>30</sup> A staff member may prosecute or conduct criminal proceedings only if so authorised in terms of the National Prosecuting Authority Act 32 of 1998 s 22(8)(f).

<sup>31</sup> 1 of 1999.

<sup>32</sup> See the Systems Act s 113.

<sup>33</sup> See the Systems Act s 114(a)-(b).

<sup>34</sup> See the Systems Act s 115(a)-(e) as amended by Act 6 of 2004 see 94.

occupier or holder of the property. In such cases it is not necessary to name the person specifically. Finally, any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a person in attendance at the municipal manager's office. Outside parties thus seeking to serve on a municipality documents of whatever nature should serve such documents on the office of the municipal manager.<sup>35</sup>

A further important practical aspect concerning the institution of legal proceedings against a municipal council is the provision of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act<sup>36</sup>. According to this Act a notice must be sent to a municipality informing it of a claim against the municipality. According to section 2 of the Act such a notice/letter of demand must be sent to the council within 90 days of the date of the cause of action. After such notice, no formal summons may be issued against the municipality concerned, unless the claim has been rejected or a further 90 day period has lapsed. It must also be noted that the Act also requires that a claim prescribes against a council unless summons has been issued within 24 months since the occurrence of liability. Several case law precedents have been developed over such matters. See for example *Ntanga v Butterworth Municipality and another*<sup>37</sup> and also *East London Municipality v Abrahamse*.<sup>38</sup> In many instances the requirements of the Act were strictly enforced. Refer to *De Klerk en 'n ander v Groter Kroonstad Plaaslike Oorgangsraad*.<sup>39</sup> In *Provinsie van die Vrystaat v Williams No*<sup>40</sup> the Appellate Division confirmed that the term/word "liability" in the context of the Act has a wide meaning. Finally, the Constitutional Court in 2001 held that the Limitation of Legal Proceedings Act, which requires the specific notice within a short period of time and with limited scope for condonation for non-compliance, constitutes a material limitation of an individual's right of access to a court under section 34 of the Constitution and that such limitation could not be justified under section 36 of the Constitution. Accordingly, the court held that section 2(1)(a) of the Act was unconstitutional and invalid. See *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre*

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<sup>35</sup> Refer to the Systems Act s 115(2)-(3).

<sup>36</sup> 94 of 1970.

<sup>37</sup> 1995 (4) SA 437 (Tks).

<sup>38</sup> 1997 (4) SA 613 (SCA).

<sup>39</sup> 1999 (2) SA 870 (O).

<sup>40</sup> 2000 (3) SA 65 (SCA).

as *Amicus Curiae*).<sup>41</sup> In a follow-up case, the Constitutional Court further held that the invalidation of section 2(1)(a) of the Act operated retrospectively to the moment the Constitution came into effect. Since the Constitution came into effect, the inconsistency of the Act has become evident and, as a matter of law, the provision of the Act has been a nullity since that date.<sup>42</sup>

#### **21.4.6 Public servitudes and the custody of documents**

Similar to the situation under some of the former ordinances that affected local governments, the Systems Act now confirms that all public servitudes in favour of a municipality are under the control of the municipality. A municipality must further protect and enforce the rights of the local community arising from those servitudes.<sup>43</sup> It is also the responsibility of the municipal manager to take custody and control of all of a municipality's records and documents, unless where otherwise provided.<sup>44</sup>

#### **21.4.7 Restraint on transfer of property**

All municipalities are directly involved in the process of transferring property (land) from one person or institution to another. Similarly to the South African Revenue Service, a municipality must provide a clearance certificate stating that all levies, duties or taxes payable to the municipality have been paid up to date before a particular property can be transferred. In order to protect a municipality, and thus also its public community, from losing valuable revenue for service already rendered, the Systems Act determines that a registrar of deeds may not register the transfer of property except on production to that Registrar of Deeds of a prescribed certificate which :

- was issued by the municipality or municipalities in which that property is situated and
- certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.<sup>45</sup>

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<sup>41</sup> 2001 (4) SA 491 (CC).

<sup>42</sup> Refer to *Ex parte Women's Legal Centre v Greater Germiston TLC* 2001 (4) SA 1288 (CC).

<sup>43</sup> See the Systems Act s 116.

<sup>44</sup> The Systems Act s 117.

<sup>45</sup> See the Systems Act s 118(1)(a)-(b). The certificate is valid for a period of 120 days from the date it was issued. The Act s 118(1A). This was also the position under some of the former provincial ordinance. Refer also to *Venter NO v Eastern Metro Substructure, Greater JHB TC* 1998 (3) SA

*continued on next page*

In the case of a transfer of property by a trustee of an insolvent estate, the transfer and recovery of monies are subject to section 89 of the Insolvency Act.<sup>46</sup> To help secure municipal funds even more efficiently, it is specifically provided that an amount due for

- municipal service fees
- surcharges on fees
- property rates and other municipal taxes
- levies or duties

is a charge upon the property in connection with which the amount is owing and that such a claim enjoys preference over any mortgage bond registered against the property.<sup>47</sup> The requirement of a clearance certificate does not apply to a transfer from the national government, a provincial government or a municipality of a residential property which was financed with funds or loans made available by any of the three spheres of government, and when the vesting of ownership as a result of a conversion of land tenure rights into ownership in terms of the Upgrading of Land Tenure Rights Act of 1991.<sup>48</sup> However, municipalities are not precluded from collecting any amounts owed to them in respect of such a property at the time of the transfer or conversion.<sup>49</sup> Finally, the preference that is enjoyed over any mortgage bond does not apply to any amount referred to which became due before a transfer of a residential property or a conversion of land tenure rights into ownership.<sup>50</sup>

Although the protection of municipal service fees, surcharges, property rates and other taxes or levies is not something new, its new statutory protection has been the

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1076 (W). For an example of a certificate under s 118 see GN 686 as published in GG 24886 of 23 May 2003.

<sup>46</sup> 24 of 1936. S 89(4) provides that notwithstanding the provisions of any law which prohibited the transfer of any immovable property, unless any tax as defined in ss (5) due thereon had been paid, that law would not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate if he had paid the tax which might have been due on that property in respect of the periods mentioned in ss (1) and that no other preference would be accorded to any claim for such tax in respect of any other period. S 89(5) provided that, for the purposes of subss (1) and (4), 'tax' in relation to immovable property meant any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established under the authority of any law in discharge of a liability to make such periodical payments if that liability was an incident of the ownership of that property.

<sup>47</sup> See the Systems Act s 118(3).

<sup>48</sup> See Act 112 of 1991.

<sup>49</sup> The Systems Act s 118(4)(a)-(b).

<sup>50</sup> The Systems Act s 118(5).

focus of legal debate and even strong judicial challenge. In the matter between *Greater Johannesburg TMC v Galloway No and Others*<sup>51</sup> the first respondent, a liquidator of a company, had sold immovable property belonging to the company to the second respondent. In order to proceed with the transfer of the property, the first respondent applied to the municipality/applicant for clearance figures in order to pay such and to obtain a clearance certificate in accordance with section 50 of the Local Government Ordinance.<sup>52</sup> Upon receipt of the figures, the first respondent disputed certain amounts claimed by the council. The respondent also took the view that he was not required to pay the disputed levies/taxes by reason of section 89 of the Insolvency Act.<sup>53</sup> The court held that section 89(4) overrode the provisions of any other law which prohibited the transfer of any immovable property unless any tax defined under section 89(5) due on the property in question had been paid. The liquidator thus had to pay certain taxes. Any items prescribed by section 50 of the Ordinance which fell outside the definition of a tax set out in section 89(5) were not payable by the liquidator in order to obtain the clearance certificate.<sup>54</sup> The court further held that section 89(4) did not extend to water, electricity and refuse removal charges. Such items were not in respect of the property but were in respect of the agreements which had been entered into for the provision of such services and therefore in respect of the services themselves. Charges in respect of electricity, water and refuse removal were not in respect of the property and could not be recovered as a prerequisite before the clearance certificate was issued. The application by the council was accordingly dismissed.<sup>55</sup> A similar issue was decided in *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council v Venter NO*.<sup>56</sup> The case concerned a liquidator of a close corporation who had paid to the local authority under protest certain amounts for basic water and sewerage charges. The respondent argued that such charges did not constitute taxes under section 89(1) and 89(5) of the Insolvency Act and that he was not obligated to pay such amounts in order to obtain a clearance certificate under section 50 of Ordi-

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<sup>51</sup> 1997 (1) SA 348 (W).

<sup>52</sup> O 17 of 1939 (T) which provided that the transfer of land was not to be effected unless certain amounts due to the council had been paid.

<sup>53</sup> 24 of 1936.

<sup>54</sup> At 355-356.

<sup>55</sup> Refer to paras C-D at 360.

<sup>56</sup> 2001 (1) SA 360 (SCA).

nance 17 of 1939 (T). Rezoning fees under sections 48 and 63 of the Town Planning and Townships Ordinance 15 of 1986 (T) were also in issue. Contrary to the decision in *Greater JHB TMC v Galloway NO* above, the Supreme Court of Appeal held that there was no basis on which it could be contended that amounts not constituting taxes listed in section 50(1) of the Ordinance did not have to be paid by the respondent in order to obtain a clearance certificate. Although the amounts were not taxes, the council was entitled to withhold the clearance certificate until they were paid.<sup>57</sup> The court further held that once it had been accepted that the amounts were due and owing in terms of section 50, there was no legal basis for the amounts to be repaid to the respondent. Since the respondent wished to transfer the properties, he had to pay the amounts due in respect of the rezoning fee, and the basic water and sewerage charges so as to have the embargo created by section 50 lifted.<sup>58</sup> Section 118 of the Systems Act was also subjected to constitutional challenge. In *Geyser and another v Msunduzi Municipality and others*<sup>59</sup> it was argued by the applicant/owner of a property who was held liable by the respondent municipality for municipal service fees due on the property which the applicant leased to a tenant, that the charges were unconstitutional since they resulted in arbitrary destruction and deprivation of the property owner's rights under section 25 of the Constitution. The court held that although section 118 of the Act clearly envisaged deprivation of the property, the purpose of the deprivation was to facilitate debt recovery, which was a legitimate and important purpose essential for the economic viability and sustainability of municipalities in South Africa. There was thus a rational connection between the means employed and the desired result. The limitation on property owners' rights was reasonable and reflected a fair balance between public interest and the property owner's interest. Section 118 is thus not arbitrary and not inconsistent with the Constitution.<sup>60</sup> The court also held that municipal service fees were based on consumption and thus could not refer to rates on property. Such fees included charges for electricity and water consumption supplied to the owner/occupier of the property. The section also applied to all municipalities in the Republic, thus excluding incapacity in application. Notwithstanding the court's decision, some commentators have

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<sup>57</sup> See paras D-F at 369.

<sup>58</sup> At paras B-C at 370.

<sup>59</sup> 2003 (5) SA 18 (N).

<sup>60</sup> Refer to paras A-D at 38-39.

argued that the obligation on owners to pay all outstanding arrears is contrary to the Constitution.<sup>61</sup>

#### **21.4.8 Miscellaneous provisions**

The Systems Act also provides for a few miscellaneous legal aspects.<sup>62</sup> In the first place it is provided that a councillor who attempts to influence the municipal manager or any other staff member or even agent of a municipality not to enforce an obligation in terms of the law or a decision of the council is guilty of an offence and is on conviction liable to a fine or to imprisonment for a period not exceeding two years.<sup>63</sup> A person acceding to such an attempt is also guilty of an offence punishable with the same sanction. If a person is convicted of an offence and is subsequently sentenced to more than 12 months' imprisonment without the option of a fine, he/she is disqualified from remaining a councillor and cannot become a councillor of any municipality during a period of five years from the date of the conviction.<sup>64</sup>

The minister concerned with local government is also authorised to make regulations on certain matters and to issue guidelines that are not inconsistent with the Act.<sup>65</sup>

Finally, the Systems Act provides for certain transitional arrangements and the phasing in of the provisions of the Act itself. Under transitional arrangements, it is provided that any written agreement on the exercise of executive authority in an area of another municipality, which agreement existed immediately before the Act took effect, must be regarded as having been concluded in terms of the relevant provisions of the Systems Act.<sup>66</sup> The minister must also initiate steps for the rationalisation of existing national and provincial planning legislation applicable to municipalities in order to facilitate local development planning as an integrated concept within the system of co-operative government as is envisaged in section 41 of the Constitution. Mechanisms for facilitating co-ordination between sectoral regulation of local government matters must also be established.<sup>67</sup> In order to facilitate a smooth transition,

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<sup>61</sup> Refer to Kidson J "Rights of local government to collect service arrears" March (2002) *DR* at 8-9. The writer submits various arguments to explain why outstanding arrears are not payable.

<sup>62</sup> See the Systems Act ch 12.

<sup>63</sup> The Systems Act s 119.

<sup>64</sup> The Systems Act s 119(4).

<sup>65</sup> See the Act s 120(1)-(7) as amended for more full particulars on the procedures and requirements relevant to the making of regulations and guidelines.

<sup>66</sup> See the Systems Act s 122(1) read with s 11(2).

<sup>67</sup> See the Systems Act s 122(2)(a)-(b).



the minister is authorised to phase in the various applications of the provisions of the Systems Act which place a financial or administrative burden on municipalities.<sup>68</sup>

### **21.5 Conclusion**

It seems obvious that the application of the law is of significant importance to all local government structures. The law in general and, more particularly, the law relating to municipal affairs form not only the basis on which all municipalities must function, but also set the scene within which municipalities are to fulfil and perform their new constitutional role and obligations. It is clear in this respect that a sound knowledge of all the relevant legal principles relating to local government matters is an essential requirement for legal advisors, private practitioners, local administrators and political office bearers alike.

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<sup>68</sup> The Systems Act s 123.

## Concluding remarks

### 22.1 Introduction

It is clear from the above that the third sphere of government has changed drastically from the order that was in place prior to 1994. The new supreme Constitution with its comprehensive Bill of Rights has set a new legal paradigm for municipal government. It is especially the founding values and specific municipal objects of the new constitutional dispensation that had an unprecedented impact.<sup>1</sup> Compliance with the new constitutional provisions is imperative whether that relates to legislative or executive actions or even the conduct of bodies or institutions within the state. The Constitution however only provides a basic constitutional framework. In many instances the basic framework had to be completed through the enactment of various national or provincial laws.<sup>2</sup>

In chapter one of this research it was stated that the aim of the research is two-fold. The first objective was to provide a systematic and comprehensive exposition of the new constitutional and other national legislative provisions relevant to the new system of local government. In this respect it is submitted that the preceding chapters do indeed achieve such an objective. Almost all legislative provisions relevant to local government have been systematically subdivided into the various chapters and have been grouped together according to their topics and relevance. It is submitted that the compilation and systemisation of the many legal requirements should indeed contribute to making the legal dispensation regarding local government law more accessible which in turn could enhance more research and debate in this often neglected albeit important field of law.

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<sup>1</sup> Read s 1 of the Constitution. According to s 2 the Constitution is entrenched as the supreme law of the SA state and any law or conduct inconsistent with the Constitution is invalid. All the obligations imposed by the Constitution must be fulfilled.

<sup>2</sup> See again the provisions set out in ss 151(3), 154(1), 155(2) and (3), 157(2), 160(5) and 164 of the Constitution which specifically require either national or both national or provincial laws on issues directly relevant to local government matters.

The second aim was to evaluate the extent of compliance with the new local government legal system, to the key normative principles set out in the Constitution and which underpins the new legal government system. Such a evaluation can only be conducted after due regard to all the constitutional and subsequent national legislative requirements. In an effort to link the various preceding chapters together and to tie-up the research as a whole, a brief summary of the extent of compliance with the key constitutional requirements and prerequisites is provided in this conclusion. The summary follows the same chronological sequence as was provided for in the introductory chapter of this work.

## **22.2 Evaluating compliance with the key normative principles of the new local government legal dispensation**

### **22.2.1 *Is the new local government legal dispensation non-racial and truly democratic?***

The new dispensation has undoubtedly overturned the segregation and apartheid policies of the past and has provided a platform for a uniform democratic local sphere of governance where municipal services are rendered for the benefit of all people. The confirmation within the supreme law of the South African state of *inter alia* the founding values of equality, democracy, freedom, non-racialism and non-sexism has created a strong foundation to ensure that all spheres of government are constitutionally obligated to ensure a non-racial and democratic government.

### **22.2.2 *Does the new nature, rights and duties of municipalities comply with the new constitutional vision?***

It was indicated above that the new local government system does not only provide local government with a distinctive legal nature, but also sets down clear and precise rights and duties for all local government structures.<sup>3</sup> This is necessary to ensure local governments are empowered to fulfil their duties. The new system not only provides local authorities with the required foundation to act, but also incorporates constitutional values of accountability and public participation. These values are particularly promoted through legislative provisions which confirm that local government consists out of political, administrative and local community components. As such, the new legal framework should enhance and promote the underlying values

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<sup>3</sup> Read ss 4, 5 and 6 of the Municipal Structures Act together with s 156 of the Constitution.

that the Constitution demands.

### **22.2.3 *Municipal government and the principles of co-operative government***

The Constitution obligates all three spheres of government to comply with specific principles aimed at ensuring a system of co-operative federalism. All spheres have been allocated with specific functional activities. Although significant protection of such powers is provided for, many overlaps between the specified functions do occur. Such overlaps in turn again require proper co-operation between the spheres in order to fulfil their functions and responsibilities. In an effort to ensure such co-operation the Constitution determines various principles with which all spheres must comply.<sup>4</sup> The new legal framework, *via* the Municipal Systems Act, specifically expands on the basic constitutional provisions and thus enhances the envisaged constitutional scheme.

### **22.2.4 *The establishment of a new system and structure for local government***

It is a specific constitutional obligation, that all former local governments had to be restructured and that new institutional models for local government structures had to be provided for. Furthermore, the whole territory of the Republic had to be included in the jurisdiction of a specific municipal authority.<sup>5</sup> The new legal dispensation indeed complies with these constitutional requirements. In the first instance, the entire territory of the South African state falls within the jurisdiction of a demarcated municipal government. Even areas that are not viable to have their own direct local government, ie district management areas, fall under the control of a district municipality within that area. Secondly, the Municipal Structures Act provides for various new institutional models of local government. Apart from the constitutionally defined categories of municipalities the act provides for the establishment of various models of municipal types by combining various municipal systems.<sup>6</sup>

In total five systems have been created. Three are so-called executive systems whilst two are participatory systems. Since the powers, functions and circumstances of municipalities differ it is submitted that the various combination possibilities indeed should be able to cater for the different needs and responsibilities of all municipalities. The new legal framework further aims not only to achieve more effective execu

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<sup>4</sup> Refer to ss 40 and 41 of the Constitution.

<sup>5</sup> See s 151 of the Constitution.

<sup>6</sup> See s 7 of the Structures Act.

tive functioning but also to ensure public involvement and participation, which again should enhance the underlying values of the Constitution. Although a clear division of the roles and responsibilities of the various types of municipalities has been determined, there seems to be some uncertainty in practise. Uncertainty especially exists relating to the division of powers and functions between local municipalities and their relevant district municipalities. Notwithstanding such difficulties, the new legislative provisions have ensured that all municipal institutions have been re-established and all former municipal authorities have been replaced by newly transformed local authorities. Municipal boundaries were re-determined and many municipalities were amalgamated into new enlarged and supposedly more effective institutions.

A significant number of municipalities however still face enormous challenges relating to their new structures and boundaries and the amalgamation of municipal administrations and personnel. Further legal directions are needed to address some of these challenges more effectively.

#### **22.2.5 Confirmation of new municipal boundaries**

It is clear from the new constitutional framework, that municipal boundaries had to be re-determined. This requirement was specifically fulfilled *via* the Municipal Demarcation Act which established an independent Municipal Demarcation Board.<sup>7</sup> This board has demarcated all municipal boundaries and has fulfilled the requirement of creating a system of wall to wall municipal government in South Africa. Under the Constitution, national legislation had to determine the criteria and procedures to determine municipal boundaries by an independent authority.<sup>8</sup> Two national acts, the Local Government: Municipal Structures Act and the Local Government: Municipal Demarcation Act were enacted.<sup>9</sup> Together these two acts, address the overall constitutional obligations towards municipal boundaries.

Boundaries are important to ensure local governments can provide municipal services in an equitable and sustainable manner. It would seem that the new laws indeed comply and fulfil the constitutional demands. It should be noted however that the determination and internal delimitation of municipal boundaries are not once off

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<sup>7</sup> Read ss 151(1) and 155(3)(b) of the Constitution together with the provisions of Act 27 of 1998.

<sup>8</sup> S 155(3)(b) of the Constitution.

<sup>9</sup> 117 of 1998 and 27 of 1998.

exercises but are continuous in nature. Regular evaluation of municipal boundaries is thus required. It is also notable that after the demarcation process, the number of official local authorities were reduced from over 800 to 284.<sup>10</sup> The demarcation process thus significantly rationalized local government structures. Such rationalization was needed under the Constitution to create a system of local governance that is effective and efficient and that would ensure the achievement of the objects of local government as set out under the Constitution.

#### **22.2.6 Adhering to the founding values and the Bill of Rights**

The Constitution specifically requires radical changes to the composition and election of municipal councils. In essence the new local government system had to be redesigned to ensure and achieve compliance to the Constitution's founding values and a truly democratic state. In order to complete such a system, many new changes had to be affected. On a closer evaluation, it seems acceptable to conclude that the new legal framework, indeed completes the basic framework of the Constitution regarding the composition and election of municipal councils. Local governments are now truly democratic spheres of government.

The new system is unique in some instances. For example, although the term of local governments is now similar to national or provincial governments, local governments are composed according to a electoral system that provides for a combination of proportional representation and constituency based electoral systems.<sup>11</sup> The unique features have been included to enhance the unique features of local governments and to ensure better representation and accountability. It seems as if the new legal system is well equipped to fulfil the broad constitutional requirements.

#### **22.2.7 Recognising the role of traditional leadership**

One area where the new local government legal dispensation still seems to lack clear direction is with regards to the role and involvement of traditional leaders in local government structures. Although the institution of traditional leaders is constitutionally recognised and protected,<sup>12</sup> the precise role of traditional leaders, specially in local government, has not been properly defined. This problem is confirmed by na-

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<sup>10</sup> The number of 284 is composed out of 6 Metropolitan municipalities, 47 District municipalities and 231 Local municipalities. For more detail refer to [www.info.gov.za/localgovernment](http://www.info.gov.za/localgovernment) visited on 18/07/2005.

<sup>11</sup> Read ss 157(1) and (2)(a)-(b) of the Constitution.

<sup>12</sup> See ss 211 and 212 of the Constitution.

tional government, which has embarked on new policy and legislative initiatives aimed at clarifying the current uncertainties.<sup>13</sup> Traditional leaders form an important part of traditional African cultures and structures and they should not only be included in municipal decision-making processes, but they can play a positive role in ensuring the ultimate success of especially rural municipalities.

The Constitution however only creates three spheres of government and allocates powers or authority only to such spheres and not to traditional leaders. One can thus argue, that unless a constitutional amendment is carried through, traditional leaders will be subjected to the authority of the local governments in which area such leaders fall. Since traditional leaders play an important role in maintaining traditional African customs, their roles should thus be more clearly defined. In view of the fact that the Constitution is the supreme law of the state, the role and functions of traditional leaders must comply with the Constitution. Traditional leaders are thus not autonomous institutions but function within the broad constitutional system. A strong need exists for co-operation and consultation between traditional leaders and local government structures. Clear national guidelines on such issues should ensure positive co-operation between the two institutions. Such legislative requirements are urgently needed.

#### ***22.2.8 The division of the powers and functions between the three spheres of government***

Under the Constitution, local government is not only recognised as distinctive and autonomous sphere of government but the Constitution also determines the specific powers and functions of municipal governments. Such powers and functions are thus constitutionally entrenched and cannot be taken away unless constitutional amendments are executed.<sup>14</sup> Local government powers are however not absolute, and are subject to national and provincial laws. In essence municipal powers and functions must be exercised to fulfil constitutional objectives and developmental duties. Under the constitutional framework, both the Structures Act and the Systems Act expand upon municipal powers and functions. It is of interest to note that within the new constitutional dispensation, local government powers are regarded as original pow-

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<sup>13</sup> See the Traditional Leadership and Governance Framework Act 41 of 2003.

<sup>14</sup> Read s 156 together with parts B of Sch 4 and 5 of the Constitution.



ers.<sup>15</sup> The Constitution does however not directly distinguish between the powers and functions of the different categories of municipalities *inter se*. Although it is constitutionally envisaged that a proper division of municipal powers should be made, such division had to be conducted in terms of national legislation.<sup>16</sup> Since category A or Metropolitan councils have exclusive executive and legislative powers, the division is only relevant between Local Council and their relevant District Councils. This division is specifically provided under the Local Government: Municipal Structures Act.<sup>17</sup> Powers not specifically allocated to a district will vest in the local municipality.

It is thus submitted that the new legal framework indeed complies to the broad constitutional requirements regarding the identification of municipal powers and functions and the division of such powers and functions between category B and C municipalities. Assignment of powers or functions are also permitted, and it is regulated through provisions set out in the Systems Act.<sup>18</sup> The new system also provides for municipal financial powers. The current system however still faces problems relating to old order laws that are still applicable and new proposals that have not yet materialized. Although the national legislative framework has been enacted, both provincial and even municipal laws are needed to complete the overall legal framework.

#### **22.2.9 Evaluating the new legal rules dealing with internal mechanisms and municipal leadership**

It is an obvious fact that municipal governments are becoming more and more complex in comparison with their predecessors from yester year. Such complexities and duties require an effective, committed and educated leadership. On evaluation of the new legal framework, it would seem as if the new legal rules indeed support and facilitate the creation of such internal procedures and functions. The new system provides for various leadership options depending on the circumstances relevant in each particular municipal jurisdiction. To enhance and regulate municipal leadership,

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<sup>15</sup> See *Fedsure Life Assurance v Greater JHB TMC* 1999 (1) SA 3741 (CC).

<sup>16</sup> According to s 155(3)(c) the Constitution determines the following: “[S]ubject to section 229, [National Legislation must] make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality”.

<sup>17</sup> See ss 83-84 of the Systems Act.

<sup>18</sup> See ss 8-9 of the Systems Act.

the Constitution directly regulates the internal procedures of municipal councils.<sup>19</sup> These requirements are indispensable for effective municipal decision-making and the achievement of municipal goals and duties.

Both the Systems and the Structures Acts specifically expand on the basic constitutional provisions and thereby support and enhance the constitutional vision. Since the functioning of a local government is largely dependant on the effective exercise of functions, the new legal dispensation provides for specific codes of conduct for both political office bearers and also municipal administrative personnel.<sup>20</sup> It is thus submitted that the new legal provisions indeed have a significant role in regulating and controlling internal municipal functioning. Although the framework is extensive, regular overview should be employed and swift legal changes could be enacted to rectify or expand on existing rules in order to enhance or comply with practical problems.

#### **22.2.10 Ensuring sustainable municipal service delivery**

The new legal dispensation for local government also addresses the important aspect of service delivery and identifies various basic municipal services and functional activities. It must be remembered that the main objective/reason for existence of local governments is to provide sustainable and effective municipal services to local residents. Without such service delivery, local settlements cannot be sustained and the overall governmental structure of the state will be placed in jeopardy. The new system demands a system for service delivery that is accessible, simple, affordable, of high quality with incorporation of the values of accountability, sustainability and value for money.<sup>21</sup>

In compliance with the constitutional prerequisites, the Systems Act determines specific duties and requirements for all local governments in respect of municipal service provision and related aspects.<sup>22</sup> The act is however silent on which mechanism municipal councils should use to achieve and comply with the abovementioned requirements. Municipal councils must put their own policies and programmes in place and should be monitored and controlled by the two higher spheres. Possible expansion on the current legal regulation could enhance better achievement of the

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<sup>19</sup> See s 160 of the Constitution.

<sup>20</sup> Refer to Sch's 1 and 2 of the Municipal Systems Act.

<sup>21</sup> Read again ss 1, 152 and 153 of the Constitution.

<sup>22</sup> See s 73 of the Systems Act.

mentioned goals. Municipal councils must also adopt tariff policies for the levying of fees for municipal services.<sup>23</sup> Services can be provided via internal mechanisms or external ones.<sup>24</sup> Although municipal services per se are not absolutely defined and other services can also be assigned to municipalities, the Constitution together with the new laws, determines what should be regarded as basic municipal services. The achievement and compliance with the constitutional demand on services, will largely depend on how local governments structure their policies and also to what extent effective oversight by national/provincial governments are provided.

#### **22.2.11 Establishing a new local government personnel corps**

In relation to municipal staff the Constitution determines that all municipal councils can employ personnel that are necessary for the effective performance of their functions.<sup>25</sup> Local governments are thus empowered to employ such staff members that are needed to fulfil their obligations and duties. The new requirements have specifically been incorporated to enhance the organisational efficiency of municipalities but vigorous training of personnel is required. Municipal personnel matters should not be seen in isolation but together with other labour related requirements that are set out in other laws.<sup>26</sup> The new dispensation determines that the municipal manager is the head of the municipal administration and as such has been given a wide range of duties and responsibilities. Such a person is also the highest accountable official.<sup>27</sup>

Employment, especially of senior staff is linked to new performance standards and evaluations. Senior staff are mostly employed for fix periods only<sup>28</sup> and a comprehensive code of conduct for staff members has been included.<sup>29</sup> Continuous training and support is however a prerequisite for effective local government administrations. It is submitted that old order bureaucracies should be avoided and regular evaluation of the organizational structures of municipalities must be undertaken. Municipal staff matters should further be linked to the requirements of the public administration and guidelines on financial management. All in all it appears as if the basic constitutional

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<sup>23</sup> S 74 of the Systems Act.

<sup>24</sup> Ss 26-81 of the Systems Act.

<sup>25</sup> S 160(1)(c) read with s 156(5) of the Constitution.

<sup>26</sup> Read for example acts such as the Labour Relations Act 66 of 1995 and also the Basic Conditions of Employment Act 75 of 1997.

<sup>27</sup> See s 55 of the Systems Act.

<sup>28</sup> See s 7 of the Systems Act.

<sup>29</sup> Refer to Sch 2 of the Systems Act.

demands are met and that local government administrations and personnel structures are adequately empowered to achieve and fulfil their important constitutional obligations.

#### **22.2.12 Regulation of municipal fiscal management and fiscal powers**

Mention was made above that municipal administrations and staff members are partly regulated in terms of a new and reformed legislative framework dealing with municipal finance and fiscal management. Without a proper financial system and effective control mechanisms, local governments will not be able to fulfil their obligations. Financial powers and proper fiscal management are essential in the new local government dispensation. From the chapter on municipal finance discussed above it becomes obvious that an entire new legal framework has been established. Not only does the Constitution determine basic fiscal requirements and obligations, but also that new national legislative provisions are authorized to create a uniform system for property tax assessments and recovery as well as a comprehensive system aimed at regulating municipal fiscal management.<sup>30</sup> It is suggested that the new dispensation indeed fulfils the constitutional demands but that the system should be constantly monitored to ensure effectiveness and efficiency. Swift amendments should be considered to better and regulate the new system should new financial challenges arise. Financial discipline is a key component for the success of local governments and careful and continuous oversight by national/provincial governments is essential. It is submitted that the new dispensation, if applied correctly, indeed should enhance and ensure effective municipal financial capacity and fiscal management.

#### **22.2.13 Compliance to new vision for public administration**

It was mentioned above that the Constitution sets various requirements dealing with the public administration and other related matters. The new legal system supports such requirements and seeks to adhere and advance to the supreme constitutional demands.<sup>31</sup> Apart from the provisions dealing with the public administration, various other requirements such as principles and provisions of performance management, capacity building, municipal accountability and public participation have been included in the new system. Such provisions are aimed at fulfilling the new constitu-

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<sup>30</sup> 56 of 2003.

<sup>31</sup> See ss 195, 196, 50 and 51 of the Systems Act.

tional values set out in the founding provisions of our supreme law.<sup>32</sup> The new dispensation aims at ensuring a more customer orientated public service with strict requirements of accountability and control. One can indeed argue that a sound foundation for a general people orientated local government system has been established, which system should not only ensure constitutional compliance but also a more brighter future for all South Africans.

**22.2.14 Adhering to the principles of municipal development, planning, performance management, capacity building and public participation**

The new legal dispensation also incorporates significant provisions relating to municipal development planning and the regulation of basic legal matters. Important aspects relating to municipal planning have been decentralized to municipal governments, and although municipal planning is a functional area of concurrent national and provincial legislative competence, all municipalities are constitutionally obligated to ensure proper and effective municipal development planning. Proper municipal planning is needed to structure and manage municipal administrations in such a way as to give priority to the basic needs of their communities. Municipalities are also obligated to promote the social and economic development of their communities and to ensure a safe and healthy environment. The Constitution specifically requires national laws to provide an overarching set of regulatory provisions to enable all municipalities to create and cater for basic planning needs. This requirement was partly met in the provisions of the Systems Act.<sup>33</sup> Integrated Development Planning is now a core component of the new legal framework and should significantly allow municipalities to fulfil their developmental responsibilities. Municipal Integrated Development Planning should however be continuously monitored and adjusted to keep abreast with local changes and circumstances.

Since municipalities are established throughout the territory of South Africa and since they have a large impact on local communities, many general legal rules are applicable to local government administrations. Apart from a general understanding and knowledge of the different legal fields relevant to the South African legal system, various unique legal provisions are also highlighted. Such unique legal matters pertaining to local government only have been identified in national legislation and is

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<sup>32</sup> See s 1 of the Constitution read together with ch 4 and 6 of the Systems Act.

<sup>33</sup> See ss 24-29 of the Systems Act.

directly regulated in terms of the Systems Act.<sup>34</sup> As a sphere of government, local governments are faced with general legal matters on a daily basis, and as such a complete understanding and compliance with the law of the state in general is a prerequisite for municipalities to be able to perform their functions and achieve their goals.

#### **22.2.15 *Evaluating the new status and autonomy of local government institutions***

One of the more distinct features of the new face of local government in South Africa is the fact that it now has a new enhanced and protected status and autonomy. All local government institutions have been confirmed as a distinct and interdependent sphere of government.<sup>35</sup> Notwithstanding the constitutional confirmation of the new status and subsequent autonomy of local governments, such autonomy is not absolute and is often subjected to the oversight and control of both the national and provincial spheres of government.<sup>36</sup> In light of the constitutional provisions, the autonomy of municipalities is regarded as a limited or restricted autonomy. The crux of the limitation lies in the confirmation within the Constitution itself in that municipalities are in some instances subjected to national and provincial legislation. Any encroachment on the autonomy of a local authority must be justified and permitted under the Constitution or else it would be unconstitutional and invalid. Since the Constitution itself entrenches only a limited autonomy for local government, any dispute relating to such an issue should be resolved with reference and interpretation of the overall constitutional scheme. Many aspects could have an impact in such cases, for example the Bill of Rights, the principles of co-operative government or even the requirements dealing with government finance. It is however submitted that the limited autonomy of local government should not detract from the new role local governments are to play in our new constitutional dispensation.

#### **22.2.16 *Achieving the five core objects of local government***

Arguably the most important function of a local authority, seen from a local community point view, is the provision of sustainable service delivery. This core function of all municipal governments has been at the forefront of municipal development, not

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<sup>34</sup> See ch 11 of the Act for more detail.

<sup>35</sup> Refer to s 40 of the Constitution.

<sup>36</sup> See s 151(3) and (4) of the Constitution.

only in the South African context, but all over the world. It was explained above that the main reason for the existence of local authorities was to ensure and secure sustainable provision of certain municipal services to local communities. The most common problem facing local governments today is the lack or insufficient provision of such services. Since the provision of services is such a fundamental function of a local government, the new constitutional dispensation has specifically incorporated such a function within the new legal framework.<sup>37</sup> The provision of municipal services however is not the only important municipal object and therefore the Constitution has identified and entrenched five core objects of the new local government dispensation.<sup>38</sup> All municipalities are obligated to strive, within their financial and administrative capacities, to achieve the five objects mentioned above. Although the new legal framework should facilitate and enhance the fulfilment of the core objects of local government, it is ultimately left to municipal governments themselves to ensure that they structure their finances and administrations in a manner that will achieve the objects. Many municipalities in South Africa are not complying with this important constitutional requirement and subsequently many are not providing sustainable services and are not achieving the lawful expectations of local communities. It is this writer's submission that the new legal framework indeed fosters and ensures a legal order within which municipalities should be able to achieve their goals and objects. One should however not lose sight of the important role both national and provincial governments must play to ensure through oversight and control measures, that municipalities are indeed making positive progress in the achievement of local government objectives.

#### ***22.2.17 The principle of creating a local government dispensation that is developmentally orientated***

Apart from the core objects of local government the new constitutional scheme also requires all municipalities to be developmentally orientated regarding their duties.<sup>39</sup> In essence, the developmental approach of local government entails the improvement of the quality of life of all municipal communities. In order to achieve the obliga-

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<sup>37</sup> S 152(1)(b) of the Constitution states that one of the objects of local government is to ensure the provision of services to *local* communities in a sustainable manner.

<sup>38</sup> Refer to s 152(1)(a)-(e) of the Constitution. The objects are: democratic and accountable governance, provision of services, promotion of social and economic development, promotion of a safe and healthy environment and lastly the encouragement of public participation in municipal matters.

<sup>39</sup> See s 153 of the Constitution.



tion of being developmental in nature, all municipalities are obligated to do two things: (a) they must structure and manage their administrations and budgeting/planning processes in such a way as to give priority to the basic needs of their respective communities and thereby help to promote the social and economic development of such communities; (b) they must participate in national and provincial development programmes.<sup>40</sup> In view of the new legal system for local government, which includes aspects such as co-operative government and the new internal municipal structures and procedures, it is again writers submission that the new legal dispensation indeed caters and fosters a local government system where developmental duties and objects can be realised. Success however will ultimately depend on the manner in which municipalities themselves structure and manage their institutions in order to achieve such duties at best.

### **22.3 Conclusion**

It is writer's overall conclusion that the new legal dispensation relevant to local government institutions of South Africa, as was created within the general constitutional framework, not only complies with the overall constitutional demands, but if correctly applied and if the envisaged support and oversight is provided, should indeed succeed in steering local government to be a more developmental and more people orientated sphere of local government. A broad and seemingly effective legal system has been created to allow and ensure that municipalities can achieve their specified constitutional duties and objects. The new dispensation not only seems to cover all necessary components of a successful legal dispensation but also provides for various mechanisms to ensure proper control and oversight. Many commentators have in the recent years suggested that both the two higher spheres of government were dragging their feet in completing the legal system for local government, and that especially national government has failed to timeously fulfil its constitutional obligations. In view of the extent and content of the new legal system and upon close evaluation of all the new laws that were enacted, one can however understand that the completion of the new system was not as elementary as many initially believed. It is this writers opinion that the new established legal system indeed signifies a monumental advancement in the creation of an effective and supported municipal government in the new South African constitutional state.

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<sup>40</sup> See s 153(a)-(b) of the Constitution.

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## **The new institutional models in local government and the formal establishment of municipalities**

### **10.1 Introduction**

It was indicated earlier that the Constitution of the Republic of South Africa, 1996 requires local governments to be established for the whole territory of the Republic of South Africa.<sup>1</sup> Every part of the territory of the state will therefore be included within the jurisdiction of a specific municipal government. However, depending on their location and the specific needs of their local communities, municipalities have different challenges and responsibilities. In this regard it is important to note that local communities in South Africa are often very diverse and thus pose different challenges to their local authorities. In general, all communities are in need of local governments that are people driven and are equipped and positioned to achieve optimal social and economic development. Rural municipalities are especially in need of assistance. In the past, most attention was given to metropolitan local governments, while rural municipalities were neglected. In the formation of a new institutional model for local governments specific attention has been afforded to municipal institutions outside of metropolitan areas. The new local government system is therefore based on two important requirements. These requirements are discussed briefly below.

- *To create a flexible and effective two-tier system of local governments across the whole country.* It is important for local democracy that all people's interests are represented in their local authority. The new system is therefore directed at ensuring that every person will be governed by a primary or local tier of government. Such local governments are known as Metropolitan Councils and Local Councils. Primary councils must be viable and capacitated to perform and fulfil basic municipal functions and

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<sup>1</sup> See the Constitution s 151(1).

responsibilities. Communities do not exist in total isolation of one another, however, and often need to share scarce resources and expertise with each other. To accommodate such needs, the new system is also committed to a strong secondary or regional tier of local government structures. Such structures are also referred to as "District Councils".<sup>2</sup> It is envisaged that District Councils will play a vital role in the integration of big regions and that they will be best positioned to ensure that services and resources are distributed equitably between all municipal districts.

- *To define clearly the roles and responsibilities of all three spheres of government.* Various spheres of government are often involved in the rendering or delivery of the services in one community. This can easily lead to confusion in respect of who is finally responsible for such services. In an effort to prevent such problems, the new local government system specifically requires local governments to co-ordinate all local activities in their respective areas.

In light of the above, it becomes clear that municipal institutional arrangements cannot and should not be assessed in the abstract. There are no universally ideal systems or institutional models for local governments, and every state must create its own unique and effective system. The choice of specific institutional arrangements is a key policy issue, and it impacts on all people and the well being of the nation in general. Various factors that have influenced the final choices of municipal institutions for the new local government system in South Africa have been identified. Some of these factors are:

- the legacy of separation of different people
- the uneven distribution of municipal capacity and resources between urban and rural municipalities
- the need for speedy intervention and supervision in municipal affairs and
- vast social divisions between people of various communities.

During the transitional process, and more specifically after the local government elections of 1995/1996, it was found that the system then in place was bureaucratic and slow. In many instances, important decisions within

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<sup>2</sup> See the Local Government Information Series (LGIS) no 2 "Local Government for the 21st Century" (1999) at 12.

local governments were taken by senior unelected officials, and the often uninterested politicians merely endorsed such decisions without meaningful debate and consideration. It became clear that the whole institutional structure of local governments also required change in order to provide for strong political leadership, effective decision-making procedures and an overall democratic and accountable government. In order to achieve such a system the Constitution provided for the establishment of different categories of municipality as well as various types of municipality that may be established within each category. National legislation was further obligated to define the different types of municipality.<sup>3</sup> In order to comply with the constitutional requirements, the Local Government: Municipal Structures Act<sup>4</sup> was enacted by parliament. The Structures Act specifically provides for five different systems of municipal government and allows for different combinations of these five systems in order to meet the wide range of needs and requirements of municipalities across South Africa. The objectives of the new systems are to allow powers and functions to be delegated and shared among councillors and officials in such a way as to ensure effective decision-making procedures with clear lines of responsibility. They also allow for committed community participation and support. Both the different categories and municipal types are discussed in detail below.

## **10.2 Important requirements regarding the functioning and roles of local governments**

In chapter 7 of this work, mention was made of the fact that a local government consists of a municipal council represented by politicians who are democratically elected by the local residents, a municipal administration that is composed of many different officials employed by the municipal council and which is headed by a Municipal Manager<sup>5</sup> and, finally, the local community. Because of community involvement, municipal councils play a central role in local democracy. Although there are often many different leaders and influential people in local communities, the municipal council is the only

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<sup>3</sup> See the Constitution s 155(1) and (2).

<sup>4</sup> 117 of 1998 as amended. Hereafter referred to as the Structures Act.

<sup>5</sup> Previously called the Chief Executive Officer/CEO or Town Clerk of a municipality.

institution that is elected by the entire local community.<sup>6</sup> Municipalities have further various wide-ranging functions and responsibilities, and the following should be specifically emphasised:<sup>7</sup>

- Municipalities must ensure the provision of essential services to communities in a sustainable manner. In order to deliver such services, municipalities must hire staff and pay for infrastructure. If a municipality does not have adequate income, it will not be able to afford the continuous provision of services. All local authorities thus need financial and administrative systems that are effective, accountable and efficient in order to secure service delivery in a sustainable manner.
- All municipalities must promote social and economic development combined with a safe and healthy environment and a local community that is involved and committed to the matters involving their local area.
- It is also essential for municipalities to provide for a democratic and accountable government acceptable to their local communities. Local governments take important decisions on behalf of their local communities, and they are responsible for determining priorities that are needed and should benefit their local area. In this regard municipalities must be accountable to local residents for their decisions and the manner in which public funds are spent.

In light of the abovementioned objectives and responsibilities, all local governments must be structured and institutionally arranged in such a manner that optimal compliance and fulfilment of such objectives and responsibilities are achieved. It is submitted that the new institutional models of local government as mandated by the Constitution and the Municipal Structures Act, if combined and managed correctly, will indeed allow for flexibility in special circumstances and overall constitutional compliance and consistency.

One must also remember that Municipal Councils have both legislative and executive authority in their areas.<sup>8</sup> Municipalities are therefore responsible both for formulating legislation<sup>9</sup> and for developing programmes to implement or execute such legislation. However, no municipal council can fulfil all its

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<sup>6</sup> See Local Government Information Series no 2 "Types of Municipalities" (1999) at 2.

<sup>7</sup> Refer to the objectives of local government set out in the Constitution s 152.

<sup>8</sup> This aspect has been confirmed in the Constitution s 151(2).

<sup>9</sup> Also called municipal by-laws.

powers and duties without delegating at least some of its powers and duties.<sup>10</sup> All local governments therefore need to develop municipal systems that are capable of ensuring that delegated powers and functions are properly performed. It must further be noted that not all powers can be delegated. The Constitution specifically disallows certain powers or functions to be delegated.<sup>11</sup> The new institutional model for local government specifically provides for different systems that should each provide different possibilities in the way in which powers and responsibilities are allocated or delegated to individual councillors or specifically designated committees. These different systems and institutional models are identified and explained below.

### **10.3 Categories of municipal government**

#### **10.3.1 *The different categories of municipality***

Within the new system of local government provision has been made for different categories of municipality. The Constitution specifically identifies three categories of municipality and further requires that national legislation define the different types of municipality that may be established within each category.<sup>12</sup> The Constitution is thus of paramount importance regarding not only the different categories of municipality but also the different types that may be established within each category. It is therefore significant to distinguish between categories and types of municipality. In this respect the Constitution determines the following:<sup>13</sup>

- (1) There are the following categories of municipality:
  - (a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area.

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<sup>10</sup> Through delegating a power or duty a municipality is giving authority to either a substructure of that council or even an individual the power to exercise or perform that function on the council's behalf. The municipal council, however, remains fully responsible for all its powers and functions.

<sup>11</sup> According to s 160(2) of the Constitution, the following functions may not be delegated by a municipal council: (a) the passing of by-laws; (b) the approval of budgets; (c) the imposition of rates and other taxes, levies and duties; and (d) the raising of loans.

<sup>12</sup> See the Constitution s 155. The division of the three categories of municipalities was required in terms of the interim Constitution, constitutional principle XXIV. See also *In re: Certification of the Constitution of the RSA 1996* 1996 (4) SA 744 (CC). The court held *inter alia* that the very least CP XXIV necessitated the setting out in the new text of the different categories of local government that could be established by the provinces and a framework for their structures. In the new text, the only type of local government and local government structure referred to was the municipality, which was insufficient to comply with the requirements of the CP.

<sup>13</sup> The Constitution s 155(1)-(7).

- (b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.
  - (c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.
- (2) National legislation must define the different types of municipality that may be established within each category.
- (3) National legislation must–
- (a) establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;
  - (b) establish criteria and procedures for the determination of municipal boundaries by an independent authority; and
  - (c) subject to section 229, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.
- (4) The legislation referred to in subsection (3) must take into account the need to provide municipal services in an equitable and sustainable manner.
- (5) Provincial legislation must determine the different types of municipality to be established in the province.
- (6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must–
- (a) provide for the monitoring and support of local government in the province; and
  - (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.



- (6A) If the criteria envisaged in subsection (3)(b) cannot be fulfilled without a municipal boundary extending across a provincial boundary–
- (a) that municipality boundary may be determined across the provincial boundary, but only–
    - (i) with the concurrence of the provinces concerned; and
    - (ii) after the respective provincial executive has been authorised by national legislation to establish a municipality within that municipal area; and
  - (b) national legislation may–
    - (i) subject to subsection (5), provide for the establishment in that municipal area of a municipality of a type agreed to between the provinces concerned;
    - (ii) provide a framework for the exercise of provincial executive authority in that municipal area and with regard to that municipality; and
    - (iii) provide for the re-determination of municipal boundaries where one of the provinces concerned withdraws its support of a municipal boundary determined in terms of paragraph (a).
- (7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).”

The wording of the Constitution clearly indicates that a category A municipality, which has exclusive municipal executive and legislative authority, is also the only municipal council in that area. Category A municipalities thus stand alone. The best term for a category A municipality is a Metropolitan Municipality/Council. Within a metropolitan area there is only one municipal council, namely the metropolitan council. As indicated, category B municipalities are municipalities that share municipal executive and legislative authority in a specific area with a category C municipality within whose area such category B municipalities fall. A category B municipality is also referred to as a Local Municipality/Council. Lastly, the Constitution determines that category C municipalities are municipalities which have

municipal executive and legislative authority in areas that include more than one municipality.<sup>14</sup> The general term for a category C municipality is a District Municipality/Council. Three distinct categories of municipality are therefore identified within the new local government system as: metropolitan councils, district councils and local councils. Metropolitan councils and local councils are often referred to as primary local governments, while district councils, on the other hand, are regarded as secondary local governments, because they comprise representatives from primary local governments. Within the new local government system, district councils are comparable to the former regional services councils, which were created in terms of the Regional Services Council Act of 1995.<sup>15</sup>

It is important to remember that municipal councils often differ from each other in many different ways. Because municipalities are different, they need to be organised differently so as to ensure that they operate effectively and efficiently. This requirement has resulted in the fact that municipal councils are of varying sizes and are also elected and composed in different ways.<sup>16</sup> The Municipal Structures Act specifically takes into account the fact that not all municipalities/municipal councils are the same. The purpose of the Structures Act is *inter alia* to provide for the establishment of municipalities in accordance with the requirements relating to the different categories and types of municipality.<sup>17</sup>

The Structures Act furthermore confirms the different categories of municipality that are required in terms of section 155(1) of the Constitution.<sup>18</sup>

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<sup>14</sup> Category C municipalities are distinguished from other categories because they *do not function alone* in an area and they *do not have exclusive executive and legislative authority* in that area (own emphasis added). The principal objectives of district councils are to render cost-effective services through co-operation between adjacent municipalities, to provide for IDP planning for the whole region and to ensure equitable distribution of resources. See the Structures Act s 83.

<sup>15</sup> 109 of 1995. See also Rautenbach and Malherbe (1999) 314.

<sup>16</sup> It must be emphasised at this point that notwithstanding the category or name of a municipality, it is the relevant municipal council in which the municipal executive and legislative authority is vested. This aspect is confirmed in the Constitution s 151(2).

<sup>17</sup> Other purposes are: to establish criteria for determining the category of municipality to be established in an area; to define the types of municipality that may be established within each category; to provide for an appropriate division of functions and powers between categories of municipality; to regulate the internal systems, structures and office-bearers of municipalities; to provide for appropriate electoral systems and to provide for matters in connection with such purposes. Refer to the long title of the Structures Act.

<sup>18</sup> The Act determines that a district council, a local council and a metro council refer to the municipal council of a district municipality, local municipality or metropolitan municipality

In compliance with the Constitution,<sup>19</sup> the Structures Act also establishes the criteria for determining when an area should have a single category A municipality or when it should have both category B and C municipalities.

#### **10.3.1.1 Areas which must have category A municipalities**

According to the Structures Act, an area must have a single category A municipality if that area can reasonably be regarded as:<sup>20</sup>

- a conurbation featuring<sup>21</sup>
  - (a) areas of high population density
  - (b) an intense movement of people, goods and services
  - (c) extensive development and
  - (d) multiple business districts and industrial areas
- a centre of economic activity with a complex and diverse economy
- a single area for which integrated development planning is desirable and
- having strong interdependent social and economic linkages between its constituent units.

A closer evaluation of the abovementioned criteria reveals strong similarities between these and the elements that comprise the definition of a “metropolitan area” as defined in the Local Government Transition Act of 1993.<sup>22</sup> Although the Structures Act is not entirely clear on this point, it is suggested that all four main features<sup>23</sup> should be distinguishable before a single category can be determined and a municipality decided upon.<sup>24</sup> When the criteria set out in section 2 of the Structures Act have been met, the Act specifically requires the establishment of a category A or metropolitan municipality.

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respectively. A *District Municipality* is defined as a municipality that has municipal executive and legislative authority in an area that includes more than one municipality and which is described in s 155(1) of the Constitution as a category C municipality. A *Local Municipality* is a municipality that shares municipal executive and legislative authority in its area with a district municipality within whose area it falls and which is described in the Constitution s 155(1) as a category B municipality. Lastly, a *Metropolitan Municipality* refers to a municipality that has exclusive executive and legislative authority in its area and which is described in the Constitution s 155(1) as a category A municipality.

<sup>19</sup> See the Constitution s 155(3)(a).

<sup>20</sup> See the Structures Act s 2.

<sup>21</sup> Conurbation also means a conglomeration of urban areas.

<sup>22</sup> See the definition of a metropolitan area as set out in Act 209 of 1993 as amended by s 1.

<sup>23</sup> The Structures Act s 2(a)–(d).

<sup>24</sup> This submission seems to be supported in terms of the Structures Act s 3, which refers to the overall criteria as set out in the Act s 2.

### 10.3.1.2 Explaining a category A/metropolitan municipality

#### (a) Introduction

Metropolitan areas are large urban settlements with high population densities, often complex and diversified economies, high levels of functional integration over a large geographic area and many economic and social activities that transcend certain municipal boundaries.<sup>25</sup> According to the Constitution, a metropolitan local government is a municipality with exclusive municipal, executive and legislative authority in a particular area.<sup>26</sup> In general, three main reasons have been put forward for metropolitan councils' being needed in modern local government systems:<sup>27</sup>

- Metropolitan governments are seen to create the basis for equitable and socially just municipal government. All residents are treated equally and fairly. Municipal funds are distributed across the municipal jurisdiction or where needed. A metropolitan government ensures that everyone that contributes to the municipality also benefits from it. It must also be pointed out that metropolitan areas are large urban areas with dense populations which are directly and indirectly connected to each other. These areas cannot be governed properly in isolation, and therefore should be integrated as a unit.
- Metropolitan governments promote strategic and integrated land-use planning and help to co-ordinate public investment in both physical and social infrastructure. Planning is done for the whole metro jurisdiction and not in isolation, and services are shared across the metropolis.
- Metropolitan governments are better equipped and positioned to develop city-wide economic and social development and to enhance economic competitiveness and overall prosperity for their areas of jurisdiction. A metro council is regarded as a single functional entity for purposes of investment attraction and does not compete with other local municipalities for scarce financial investment.

As was explained in the definition above, metropolitan areas have more than one business district and industrial area and their economies are complex and

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<sup>25</sup> Eg, some people may live in one locality of the Metropolitan area but work in a different one.

<sup>26</sup> The Constitution s 155(1)(a).

<sup>27</sup> See the White Paper on Local Government (1998) at 79-80.

diversified.<sup>28</sup> Because of their size, most metropolitan governments are important contributors to the national economy of the country. Metropolitan areas are therefore key centres in the global economy and should be governed accordingly. It is furthermore important for metro governments to accommodate the intense movement of people and goods in their areas, and they must function as integrated units.<sup>29</sup>

### **(b) Creating the new metropolitan government system**

The local government dispensation before 1994 was substantially distorted by the former government's policies of segregation. Cities were seen as existing for the benefit of white communities only. Planning laws ensured mostly that businesses and industries were located near white residential areas, which had good infrastructures and services. Poorly serviced townships for black people were located far from the city centres, thus forcing the residents to travel long distances and incur high transport costs. Although township residents contributed significantly to the building of former white municipal areas, the money raised by white municipalities was spent predominantly within their own area. Township residents thus did not benefit from the tax base which they helped to build.

With the introduction of the Local Government Transition Act,<sup>30</sup> metropolitan government appeared for the first time in South African local government history. This was an important step towards changing the inequitable pattern of urban development that had been inherited from the past. Six metropolitan areas were proclaimed,<sup>31</sup> and each metro area had a two-tier local government system which consisted of a Metropolitan Council (MC) and some Metropolitan Local Councils (MLC). Unfortunately the LGTA did not specify clearly which powers and functions were divided between the MC and MLC. The Act in fact allowed for a local negotiation process to determine which functions and powers would rest in MCs and in MLCs respectively.<sup>32</sup> A further

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<sup>28</sup> This means *inter alia* that a metropolitan economy does not depend for its survival on any single location or sector such as mining or a certain manufacturing sector.

<sup>29</sup> Eg, all transport networks must allow for people to travel from one part of the metropolis where they live to other parts where they work or use recreational facilities.

<sup>30</sup> 209 of 1993.

<sup>31</sup> They were the Greater Pretoria Metro, Greater Johannesburg Metro, Greater Lekoa/Vaal Metro, Khayalami Metro, Greater Durban Metro and Cape Metropolitan Area.

<sup>32</sup> This was one of the major deficiencies of the LGTA and necessitated later amendments.

problem that was experienced during the transitional period within metropolitan areas was the fact that the establishment of separate administrations for MCs and each MLC led to considerable duplication of functions, and such efforts were both wasteful and inefficient. A final issue that hampered effective and efficient service delivery in the interim system was the fact that each MC and MLC was an employer body in its own right. This caused many inequalities between personnel and led to poor administrative support.<sup>33</sup>

### **(c) Establishing new metropolitan governments**

During the interim phase as determined by the LGTA, the national government consulted widely on the design of the final local government system. Many workshops and conferences were held to discuss and debate the advantages and disadvantages of the interim system. On the basis of these discussions, consultations and research reports, national government was confronted with two main models for future metropolitan governments. The two possible models were:

- A strong two-tier model of metropolitan government, which required both a metropolitan council and certain metropolitan local councils to function together as the local governments for a particular area. All municipal powers and functions had to be divided between the Metro Council and its Local Councils.
- A single city model,<sup>34</sup> which suggested a single metropolitan council vested with all the municipal powers and functions alone.

Based on the various discussions and public hearings, the White Paper on Local Government which was published in March 1998 proposed that a single tier of metropolitan government system should be introduced for all metropolitan areas in the country. Certain trial projects were launched, which later confirmed that a single tier of metropolitan government seemed to be the most effective system for metropolitan areas.<sup>35</sup> Accordingly, national

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<sup>33</sup> Ideally all municipal workers in a metropolitan area should have the same conditions of service and work for the same employer. This would ensure fair labour practices and workers that are paid equally for the same job performed. Staff redeployment would also be easier to implement.

<sup>34</sup> So-called "unity city".

<sup>35</sup> See the LGIS no 2 "Metropolitan Government" (1999) at 7.

government enacted the Local Government: Municipal Structures Act<sup>36</sup> to provide for a single tier of municipal government in metropolitan areas.<sup>37</sup>

Apart from the single tier metropolitan government, and in compliance with the constitutional requirements,<sup>38</sup> the Structures Act also established the criteria to determine when an area should have a category A or metropolitan municipality.<sup>39</sup> The Act contains criteria that describe the specific characteristics of a metropolitan area and specifies how these criteria are to be applied.

As metropolitan councils can consist of up to 270 councillors and because of their size, it is often very difficult for them to conduct their business effectively if every issue has to be decided in a full meeting of the council. To overcome this practical difficulty, metropolitan councils must elect either an executive committee or an executive mayor and then delegate executive powers as appropriate.

During the transitional process, all transitional metro councils established executive committees, as the mayoral executive system was not known to South Africa. Only with the local government elections of December 2000 was the creation of a mayoral executive system legally possible. In the national and provincial executive systems the president or premier is vested with executive authority, which is exercised together with members of cabinet or a provincial executive council.<sup>40</sup> Although the mayoral executive system is very similar to these systems, there are certain differences that should be noted. Firstly, the Constitution confirms that municipal executive authority is vested in the municipal council and not in a mayor. Secondly, the executive mayor and his mayoral committee can exercise only such executive powers as are delegated to him/her by the municipal council.<sup>41</sup> Thirdly, the Structures Act does not proclaim the mayoral committee to be handled and treated differently from the other types of committee possible in local government. This viewpoint was not shared by the majority of justices in the Constitutional

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<sup>36</sup> 117 of 1998.

<sup>37</sup> Refer to the Act s 2.

<sup>38</sup> See the Constitution s 155(3)(a).

<sup>39</sup> Refer to the Structures Act s 2.

<sup>40</sup> For more on the national and provincial executive provisions, refer to the Constitution ss 85 and 125.

<sup>41</sup> See the Structures Act s 56.



Court. In the case of *DA v Masondo No*<sup>42</sup> the court held that the mayoral committee was not a committee of the Municipal Council as contemplated in section 160(8) of the Constitution and therefore did not require minority representation in such a committee.<sup>43</sup>

#### **(d) Administrative transformation in metropolitan areas**

Within the public sector in general, many government functions are increasingly being decentralised to local government level. Examples of such functions are: certain health services, municipal police forces, local housing programmes and transport authorities, to name but a view. Often these functions are decentralised to local governments, without the necessary funds for them to exercise and perform such functions effectively. These functions are then referred to as “unfunded mandates”. Unfunded mandates must be guarded against, as such mandates may be regarded as unconstitutional.<sup>44</sup> In certain instances unfunded mandates and ill-considered decentralisation of functions can be regarded as being against the constitutional requirements to help and assist local governments. Decentralisation has its advantages, however, and there is a general realisation in modern governments that functions should be decentralised to the level where they can best be exercised effectively and efficiently.<sup>45</sup>

There seems to be a worldwide technological move towards private sector service providers’ rendering traditional municipal services, especially in metropolitan service provision. This tendency is very positive, in the sense that it ensures market competition, use of modern technologies, better operational efficiency, lower unit costs, better overall quality and more customer-orientated services. Notwithstanding the fact that private service

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<sup>42</sup> 2003 (2) SA 413 (CC).

<sup>43</sup> See para 33 at 424C-E. See, however, the minority judgment of O’Regan J at 429-439, which supports this writer’s viewpoint.

<sup>44</sup> The Constitution requires that national or a provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions. See s 151(4) of the Constitution. By legislative or other measures provincial governments must *inter alia* promote the development of local government capacity to enable municipalities to perform their functions and to manage their affairs. See the Constitution s 155(6)(b).

<sup>45</sup> Decentralisation goes hand in hand with the principle of subsidiary. Subsidiary is a specific form of decentralisation based on the principle that decisions should be taken at the lowest possible level in a state. Higher levels/spheres of government should provide support only insofar as lower levels are unable to perform certain functions and they therefore perform a subsidiary function in such cases. Refer to Rautenbach and Malherbe (1999) 93.

providers are used, metropolitan councils still have the final responsibility for ensuring that such services are provided according to certain minimum standards. The outsourcing of services means that the core business of municipalities is less focused on managing trading services and more focus on contract and performance management and supervision. Such a position has both advantages and disadvantages, however, and must be managed with care.

Parallel with the changes in operational conduct, metropolitan governments must ensure a sound metropolitan-wide fiscal framework, a uniform property rating system and equitable sharing of resources. Such changes need a more flexible skilled municipal labour force that is organised across a metropolitan jurisdiction. In this regard, it is submitted that the new model of metropolitan government as set out in the Structures Act has enough built-in flexibility to allow for the effective accommodation of the changes mentioned above.

#### **10.3.1.3 Areas which must have municipalities of both category B and C**

When an area does not comply with the criteria set out in section 2 of the Structures Act, the Act requires such an area to have municipalities of both category B and C.<sup>46</sup> According to the Act, the determining requirements for the establishment of particular categories of municipality in different areas are those that are set out in section 2 of the Structures Act.

#### **10.3.1.4 Category B local municipalities and category C district municipalities**

The new system of local government in South Africa promotes a vision of a two-tier system of local councils and region-wide district councils throughout the entire territory of the state, excluding metropolitan areas. It is hoped that this two-tier system will address the many problems facing municipalities outside metropolitan areas. To a large extent the local government dispensation pre 1994 and even under the LGTA was silent on rural local government aspects, and this created a wide range of problems in rural

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<sup>46</sup> In principle this means that in areas outside of metropolitan areas both category C and B municipalities must be established. See the Structures Act s 3.

municipal areas.<sup>47</sup> Like all municipalities, the new district local government system had to build municipal institutions that are geared towards meeting the social and economic needs of citizens in an economically feasible, efficient and democratic manner. Together with the White Paper on Local Government, the Municipal Structures Act and the Municipal Demarcation Act provide the new tools whereby local government outside metropolitan areas are created to provide district governments that are strong, decentralised governments with enough powers to fulfil their constitutional obligations. It is submitted that without a combination of municipal institutions in district areas, it will not be possible for one single authority to address all the development challenges and at the same time be responsive to the needs and demands of local residents.

In the new dispensation there is a clear need for an institution that can address challenges that affect the entire region, such as bulk water supply and integrated development planning. For this reason district councils are very important. At the same time the levels of municipal governments that are closer to home require a more decentralised system that provide citizens with a full range of municipal services and enable them to exercise their basic civil, socio-economic and political rights. Local councils are more suitable in such instances.<sup>48</sup> In general the new district council model is a combination of big and small governments that operate in a single space. Generally speaking, all local councils that fall within the area of the district council have the normal municipal powers and functions, apart from the functions of the district council.<sup>49</sup>

Within the new system envisaged by the Constitution, it is foreseen that some parts of district areas, will not be viable and suitable for local councils to

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<sup>47</sup> An example of such a problem is that the institutional relationship between district and local councils was often characterised by conflict. Furthermore, the relationship between provincial administrations and district councils had not clearly been defined, and the financial base of rural councils was weak. See LGIS no 2 "District Government" (1999) at 5-7.

<sup>48</sup> See LGIS no 2 "District Government" (1999) at 10.

<sup>49</sup> Although bulk services are normally provided by the district council, it is possible for a local municipality to perform such functions on behalf of the district council which, eg, might lack the necessary capacity. It must also be emphasised at this point that the Structures Act specifically provides for the division of functions and powers between district and local municipalities. See the Act s 84. See also the ch on the powers and functions of municipalities.

be established. In such areas so-called District Management Areas (DMA) have and can be declared.<sup>50</sup> In a District Management Area, the relevant district council is responsible for all municipal powers and functions in that area. According to the new framework for local government in non-metropolitan areas, a unique opportunity is created to improve the relations between local and district councils. To a large extent, the new rationalisation of municipalities and the re-demarcation of boundaries, have made this interaction much stronger and easier.<sup>51</sup>

### **10.3.2 The application of the relevant criteria**

In the past it was often difficult to determine who was responsible for the application of the criteria and the subsequent determination of the categories of municipality. This uncertainty has led to a specific legal dispute between the national government and some provincial governments. In the case of *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and another* and *Executive Council Kwazulu-Natal v President of the RSA and others*<sup>52</sup> two provincial governments instituted proceedings in the Constitutional Court challenging the constitutional validity of certain sections of the Local Government: Municipal Structures Act 117 of 1998. The constitutional challenges fell into two categories: (a) that certain provisions of the Act encroached on the powers of the provinces, more specifically the power to establish municipalities in their provinces in terms of section 155(6) of the Constitution, and (b) that the Act encroached on the constitutional power of municipalities *inter alia* to elect executive committees or other committees in terms of section 160(1) of the Constitution and to regulate their own internal affairs in terms of section 160(6) of the Constitution. The national government contended that although the Constitution in chapter 7 allocates powers to the provinces and municipalities, it does not deprive parliament of the power to legislate on such matters and that parliament in terms of section 44(1)(a) of the Constitution

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<sup>50</sup> See the Structures Act ss 1 and 6 for the definition of a District Management Area.

<sup>51</sup> The rationalisation of the number of local councils, have created a more viable and effective local government structures. Many rural and urban areas, as well as areas surrounding such urban areas previously known as peri-urban areas – which have been separated by municipal boundaries but were linked economically – have now been amalgamated.

<sup>52</sup> 2000 (1) SA 661 (CC).

has concurrent powers over such matters. It was also contended by the applicants that the Act was inconsistent with the Constitution in that section 155(3)(b) of the Constitution required municipal boundaries to be determined by an independent authority and in that the empowerment of the national government to apply the criteria to determine which area should have a category A municipality was usurping a function of the Demarcation Board. The minister's discretion to decide whether to accept the recommendations of the Demarcation Board in terms of municipal boundaries was also impermissible. After weighing up all the circumstances of the case, the court held that:

- The submission that parliament has concurrent powers together with provincial legislatures in terms of chapter 7 of the Constitution was inconsistent with the language of chapter 7 and could not be reconciled with section 164 of the Constitution.<sup>53</sup>
- Section 155(6) of the Constitution conferred only executive powers on the provinces in relation to the establishment of municipalities; no legislative powers were conferred. Section 155 further contemplated that the Demarcation Board should determine the boundaries of municipalities in terms of the criteria and procedures prescribed by national legislation without being constrained by national or provincial governments.<sup>54</sup>
- Section 155(6) meant that the provincial governments had to establish municipalities in terms of the boundaries determined by the Demarcation Board. The establishing powers of the provinces entailed nothing more than the power to set up municipalities under existing legislation. It did not comprehend the power to apply the criteria for both national/provincial governments. By authorising the minister to apply the criteria, section 2 of the Structures Act was rendered invalid.<sup>55</sup>
- It was confirmed that a district management area was neither a category nor type

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<sup>53</sup> See the *Executive Council (WC)* case *supra* fn 52 para 28 at 682A-B.

<sup>54</sup> *Ibid* para 55 at 690-691.

<sup>55</sup> *Ibid* para 59 at 692A-B.

of municipality; it was, however, a geographical area governed by only one municipality. District management areas were thus not separate municipalities, but rather part of the district municipality by which they were governed. Such areas were not a fourth category of municipality. It was also confirmed that a district municipality was a category C municipality and that such a category had to include only more than one municipality in that area.<sup>56</sup>

- The Constitution conferred only executive powers on the provinces in terms of section 155(6) and stated that such powers had to be exercised within a framework of legislation. Because of the constitutional silence on such legislative regulation, national legislation could be prescribed in terms of section 164 of the Constitution. The court made it clear that the power to establish municipalities had to be distinguished from the power to determine the types of municipality. The power on municipal types vested in the provinces according to section 155(5) of the Constitution.<sup>57</sup> In relation to the establishment of municipalities<sup>58</sup> the provinces had only executive powers, but in relation to establishing the types of municipality<sup>59</sup> the provinces had both legislative and executive powers. National government could not legislate on matters which fell outside its competence.<sup>60</sup>

Because of this decision, the Structures Act was amended in 1999.<sup>61</sup> According to the amendment Act, section 5 of the Structures Act was repealed and section 4 was amended and now states the following:<sup>62</sup>

- The Demarcation Board must
  - (a) apply the criteria set out in section 2 of the Act and determine whether an area must have a single category A municipality or municipalities of both category C and B
  - (b) determine the boundaries of the area in terms of the Demarcation Act.<sup>63</sup>

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<sup>56</sup> The *Executive Council (WC) case supra* fn 52 at paras 59, 65 and 66.

<sup>57</sup> *Ibid* paras 72 and 73 at 694-695.

<sup>58</sup> The Constitution s 155(6).

<sup>59</sup> The Constitution s 155(5).

<sup>60</sup> *Ibid* paras 82 and 83 at 696-697.

<sup>61</sup> See the Local Government: Municipal Structures Amendment Act 58 of 1999.

<sup>62</sup> Refer to the Municipal Structures Amendment Act s 4(1) and (2).

- The Demarcation Board may determine that an area must have a category A municipality only after consultation with the minister responsible for local government, the MEC for local government in the province concerned and SALGA.<sup>64</sup> It must be pointed out that the Demarcation Board does not need the minister's or the MEC's or SALGA's concurrence with its decision. The Structures Act requires the board to make its determination only *after consultation*.<sup>65</sup> The Demarcation Board must therefore consult with the other parties, but it is not obliged to follow their advice.<sup>66</sup>

### **10.3.3 Parts of category C areas in which category B municipalities are not viable**

The Structures Act further determines that if a part of an area that must have both category C and B municipalities is declared a district management area, that part does not have a category B municipality.<sup>67</sup> A district management area is an area that is part of a district municipality, but which has no local municipality for that area and is subsequently governed by that relevant district municipality alone.<sup>68</sup> Although the Constitution requires that municipalities be established for the whole of the territory of the Republic,<sup>69</sup> some areas are not viable and not in need of a local municipal institution for various reasons. To accommodate such areas, the Structures Act provides for the establishment of district management areas which are to fall under the control of a district municipality. Strictly speaking the district management area is therefore not without a local government for that area and should not be inconsistent with the obligation set out in section 151 of the Constitution. However, district management areas may be declared by the Demarcation

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<sup>63</sup> According to the Constitution, national legislation must establish criteria and procedures for the determination of municipal boundaries by an independent authority. See the Constitution s 155(3)(b). In compliance with this constitutional obligation, the national legislature has enacted the Local Government: Municipal Demarcation Act 27 of 1998, in terms of which the Municipal Demarcation Board was established by the Act s 2 to function as the independent authority required by the Constitution.

<sup>64</sup> SALGA is the South African Local Government Association, an association that is recognised in terms of the Organised Local Government Act 52 of 1997 s 2(1)(a). See the definition of SALGA in the Structures Act as well as in ch 8 above.

<sup>65</sup> Own emphasis added.

<sup>66</sup> If the Act had referred to the term *in consultation with* it would have required the parties to concur with the final determination. See also Rautenbach and Malherbe (1999) 212-216.

<sup>67</sup> Refer to the Structures Act s 6(1).

<sup>68</sup> See the definition of district management area as set out in the Structures Act s 1.

<sup>69</sup> The Constitution s 151(1).



Board only after consultation with the minister and the MEC for local government in the province concerned. District management areas should be declared only if the establishment of a category B<sup>70</sup> municipality in a particular area will not be conducive to the fulfilment of the objects of such a municipality, as is required in section 24 of the Demarcation Act.<sup>71</sup>

After consulting with the minister and relevant MEC for local government in the province concerned, the Demarcation Board may also withdraw a declaration of an area as a district management area. If such a declaration of a district management area is withdrawn, the MEC for local government must either establish a new local municipality for that area in terms of section 12 of the Structures Act or include that area within the jurisdiction of another local municipality in terms of section 17 of the Structures Act, in accordance with any boundary determinations or re-determinations received from the Demarcation Board and with effect from the date of the next elections of municipal councils.<sup>72</sup>

#### **10.3.4 Special provisions for cross-boundary municipalities**

Apart from the three categories of municipality mentioned above, the Constitution also provides for the establishment of so-called “cross-boundary municipalities”.<sup>73</sup> Cross-boundary municipalities are municipalities that have been established across provincial boundaries. The Constitution states that if the criteria envisaged in subsection 155(3)(b), which is to be found in the Demarcation Act,<sup>74</sup> cannot be fulfilled without a municipal boundary’s extending across a provincial boundary, the particular municipal boundary may be determined across the provincial boundary, but only (i) with the concurrence of the provinces concerned and (ii) after the respective provincial executives have been authorised by national legislation to establish a municipality in that municipal area. In this regard and subject to subsection

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<sup>70</sup> Local Council.

<sup>71</sup> See the Structures Act s 6(2), read together with the Demarcation Act s 24. When the Demarcation Board determines a municipal boundary, its objective must be to establish an area that would enable the municipality to fulfil its constitutional and other legislative obligations.

<sup>72</sup> See the Structures Act s 6(3)(a)–(b).

<sup>73</sup> See the Constitution s 155(6A). Note that at the time of going to press Parliament was considering an amendment to the Constitution which could result in a deletion of s 155(6A). If the amendment is approved, all cross-boundary municipalities will fall away. Refer to the Constitution Twelfth Amendment Bill 2005.

<sup>74</sup> See the Demarcation Act s 24.

155(5), national legislation may provide for the establishment in that area of a municipality of a type agreed to between the provinces concerned. The mentioned national legislation may also provide a framework for the exercise of provincial executive authority in that area and for the re-determination of municipal boundaries where one of the provinces concerned withdraws its support of a municipal boundary as has been determined by the Demarcation Board.<sup>75</sup>

In compliance with the constitutional requirements, the Municipal Structures Act specifically addresses the further aspects regarding cross-boundary municipalities.<sup>76</sup> According to the Act and if the Demarcation Board has demarcated a municipal area across a provincial boundary with the concurrence of the legislatures of the provinces involved, the relevant MECs for local government in those provinces must, subject to the authorisation of an Act of parliament, do the following:<sup>77</sup>

- Establish in that area, in accordance with section 12 of the Structures Act, a municipality of a type mentioned in section 8, 9 or 10 as agreed to between the provincial legislatures concerned.
- Exercise their executive authority in terms of the Structures Act and any other legislation jointly with regard to that municipality, except when the provincial governments concerned have entered into an agreement which provides for an alternative arrangement envisaged in subsection 90(3) of the Structures Act. The subsection states that the governments of the provinces concerned may enter into an agreement providing for an arrangement which may include:
  - (a) The exercise of their executive authority with regard to that municipality or in that municipal area by functionaries of one of those provincial governments on a delegation or agency basis.
  - (b) The provision of financial and other assistance to the municipality.
  - (c) The suspension of all or any legislation of the one province and the application of all or any of the other province's legislation in that municipal area. It is important to note that an agreement that provides

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<sup>75</sup> See the Constitution s 155(6A)(b)(i)–(iii).

<sup>76</sup> Refer to the Structures Act s 90(1).

<sup>77</sup> Both the Demarcation Act and the Structures Act.

for the application of one province's legislation in a municipal area that falls in another province is enforceable only if the provincial legislature of that other province has passed legislation that provides or allows for such application.<sup>78</sup>

Lastly, it is also confirmed that if a provincial legislature no longer supports the continuation of a cross-boundary municipality and subsequently passes a resolution calling for the disestablishment of that municipality, the Demarcation Board must re-determine the boundaries of that municipal area in such a way that no boundary extends across a provincial boundary.<sup>79</sup>

In further compliance with, and to give effect to, section 155(6A) of the Constitution, national government passed the Local Government: Cross-Boundary Municipalities Act<sup>80</sup> in 2000, whereby affected provincial executives are authorised to establish cross-boundary municipalities and to provide for the re-determination of the boundaries of such municipalities under certain circumstances. The preamble of the Act states that this Act was enacted by parliament because the Demarcation Board indicated the desirability for certain municipal boundaries to extend across provincial boundaries and because national legislation must authorise the respective provincial executives to establish a municipality within a municipal area that extends across a provincial boundary. According to the Act, the MECs in the provinces indicated in the annexed schedule to the Act are authorised to establish cross-boundary municipalities as set out in the schedule.<sup>81</sup>

Provision is also made for the re-determination of boundaries of cross-border municipalities, which may be re-determined under circumstances other than those provided for in section 90(5) of the Structures Act only if the legislatures of the provinces involved so concur and if the re-determination is authorised by national legislation.<sup>82</sup> In light of the above it is submitted that any re-determination of the boundaries of a cross-boundary municipality must be done in terms of section 90(5) of the Structures Act, unless section 2 of the Cross-boundary Municipalities Act is complied with. In compliance with the

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<sup>78</sup> See the Structures Act s 90(4).

<sup>79</sup> See the Structures Act s 90(5).

<sup>80</sup> 29 of 2000.

<sup>81</sup> See the Cross-boundary Act s 1.

<sup>82</sup> See the Cross-boundary Act s 2.

requirement that national legislation must authorise the re-determination of the boundaries of cross-boundary municipalities, national government enacted the re-determination of the Boundaries of Cross-boundary Municipalities Act in 2000.<sup>83</sup>

#### **10.4 Systems and types of municipal government**

##### **10.4.1 *Why different types of municipality are created***

Apart from defining the different categories of municipality, the Structures Act also defines the different types of municipality that may be established within each category. This provision is in compliance with the constitutional obligations.<sup>84</sup> The provision of different types of municipality places emphasis on the fact that not all municipal councils are the same and that different ways should be open to municipal councils whereby they can organise themselves to perform their powers and duties effectively. Some flexibility is thus needed to establish the different types of municipality that should be the most effective and efficient in particular circumstances. There is no standard way to organise all municipal councils, and the provision of different municipal types should afford most municipalities the opportunity to establish the system that will be most effective for specific local needs.

##### **10.4.2 *The different systems of municipal government***

Many different types of municipality can be established within the new local government structure. Each municipal type is made up of a combination of five specific systems of municipal government. Before a municipal type is established, therefore, one must identify and examine the different systems of municipal government that have been created, in order to combine them into specific municipal types. In this regard, five different systems of municipal government must be distinguished.<sup>85</sup>

According to the Structures Act, the different types of municipality that may be established within each category of municipality are defined in accordance with five different systems of municipal government or combinations of such systems. It is not mandatory that the different systems be combined to form a

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<sup>83</sup> 69 of 2000.

<sup>84</sup> The Constitution s 155(2) requires national legislation to define the different types of municipality.

<sup>85</sup> The different systems of municipal government are explained in the Structures Act s 7.

particular type. In some instances an individual system can also be used to establish a specific type of municipality, as long as it is one of the five executive systems.<sup>86</sup> These systems are:

- *A collective executive system*, which allows for the exercise of executive authority through an executive committee. Executive leadership of the municipality is collectively vested in the executive committee.
- *A mayoral executive system*, which allows for the exercise of executive authority through an executive mayor. Executive leadership of the municipality is vested in the mayor, who is assisted by a mayoral committee.
- *A plenary executive system*, which limits the exercise of executive authority to the municipal council itself.
- *A sub-council participatory system*, which allows for delegated powers to be exercised by sub-councils that are established for/in parts of the municipality.
- *A ward participatory system*, which allows for matters of local concern within the different wards of a particular municipality to be dealt with by the specific committee that has been established for such wards.

A closer investigation of the different systems of municipal government as mentioned above reveals a clear and important distinction between the different systems. Some systems are called “executive systems”, while others are “participatory systems”. In this regard, it must be remembered firstly that every municipal council has certain executive powers and duties which also allow for the exercise of certain legislative powers.<sup>87</sup> The Constitution further specifically vests both executive and legislative authority of a municipality in its Municipal Council.<sup>88</sup> This vesting of powers in the Municipal Council has very important implications for the different systems and types of municipality. The executive system of government describes the structure through which

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<sup>86</sup> Such types are identified in the Structures Act ss 8, 9 and 10.

<sup>87</sup> According to the Constitution s 156(1) and (2), a municipality has executive authority in respect of, and the right to administer the local government matters listed in, Part B of Schs 4 and 5 of the Constitution, as well as in respect of any other matter assigned to it by national or provincial legislation. A municipality may make and administer by-laws for the effective administration of the matters, which it has the right to administer and thus exercise executive authority over.

<sup>88</sup> Refer to s 151(2) of the Constitution.

that government exercises its executive powers and performs its executive duties. Thus the municipal executive system describes the structure through which a particular municipal council must exercise its executive authority. As mentioned above, the Structures Act provides for three systems of executive local government, and it goes without saying that every municipal government must be based on one of the three systems.<sup>89</sup>

In addition to the three executive systems, the Structures Act also provides for two so-called “participatory systems” of municipal government. The provision of the two participatory systems aims to ensure and enhance public participation within the formal executive functioning of municipalities and also to provide for more accountable democratic local governance. The two participatory systems cannot function on their own, however, and must be combined with one of the three executive systems. Various combinations of the executive systems and participatory systems are possible. In some instances certain executive systems will function on their own, while in other cases they will be combined with one or even both the participatory systems.<sup>90</sup> The type of municipality that has been established can be determined according to the particular executive municipal system or combination of executive systems with one or both of the participatory systems. In order to determine the best executive system or combination of systems for a particular municipality, each of the systems should be explained briefly.

#### **10.4.2.1 The collective executive system**

In a collective executive system, the municipal council elects an Executive Committee from among the members of the council and then delegates some of the council’s executive responsibilities to that executive committee. The executive committee is then empowered to take decisions on matters that fall within its delegated powers and is thus vested with executive leadership responsibilities for that municipality. Most municipal councils existing before

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<sup>89</sup> If a council were not based on one of the three executive systems of local government, it could not exercise its executive powers and duties and could therefore not operate as a local government.

<sup>90</sup> See the Structures Act ss 8, 9 and 10.

the December 2000 local government elections<sup>91</sup> established executive committees to increase the efficiency of their decision-making processes. In essence, the establishment of a separate executive structure enables a small group of councillors who have been elected to the executive committee to deal with the day-to-day business of running the municipality. Without a smaller executive structure, the whole council would be required to meet every time a decision is to be taken. In instances where a municipal council is very large or has many decisions to contemplate, the taking of decisions in plenary would result in a slow decision-making process. A collective executive system with an executive committee should be much more effective and efficient to ensure a more speedy decision-reaching process. The Structures Act specifically provides for the internal structuring and functioning of executive committees, the features of which will be discussed in later chapters of this work.<sup>92</sup>

It is important to note that in the collective executive system the relevant council delegates certain powers to the whole executive committee and not to any individual member of that committee. This therefore means that the executive committee must exercise its powers collectively as a unit, and no individual person can take decisions on behalf of the committee. The collective or team approach is often regarded as one of the key strengths of the collective executive system. The committee has the benefit of being able to draw on the collective experiences and insights of all the members of the committee. The particular system also ensures that proper checks and balances occur in terms of executive decision making. Because no member can take decisions individually, there is a far smaller chance that decisions will be taken in a biased or self-interested manner. Lastly, the collective approach is also beneficial to facilitate problem solving, as it may generate innovative solutions which individual members may not have thought of on their own.<sup>93</sup> Suffice it to say that in instances where a municipal council is very large or has a wide range of responsibilities, such a council should consider the

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<sup>91</sup> The date on which the final phase of the restructuring process commenced and municipalities embarked on a new vision and system of democratic and developmental local government.

<sup>92</sup> See the Structures Act ch 4 Part 1.

<sup>93</sup> Refer to the LGIS no 2 "Types of Municipalities" (1999) at 10–11.



delegation of some of its executive powers to a smaller group of councillors in order to facilitate fast and effective decision making.

#### **10.4.2.2 The mayoral executive system**

In a mayoral executive system, the exercise of executive authority is provided for through an executive mayor.<sup>94</sup> The executive leadership of the municipality is thus vested in the executive mayor in his or her personal capacity and not in a collective committee, as is the case in a collective executive system. However, the executive mayor may be assisted by a so-called “mayoral committee”.

In a mayoral executive system, a municipal council elects one member of that council as the executive mayor and then delegates certain executive powers and duties to that person. If this is approved by the MEC for local government of the province concerned, the municipal council may also elect a deputy executive mayor. The specific details of the mayoral executive system is specifically explained in the Structures Act, and this will be discussed in full detail in some of the chapters that follow.<sup>95</sup>

As was mentioned above, the mayoral executive system differs from the collective executive system in two important ways:

- In the mayoral executive system the relevant municipal council delegates executive powers and duties to an individual councillor: the executive mayor.

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<sup>94</sup> See the Structures Act s 7(b).

<sup>95</sup> See the Structures Act ch 4 Part 2.

lective executive system the municipal council delegates executive powers to the whole executive committee. Although in certain instances an executive mayor must appoint a mayoral committee and may delegate responsibilities to the members of the mayoral committee, the executive mayor still remains accountable and responsible to the municipal council for all the powers and duties allocated to him or her.<sup>96</sup>

- In the mayoral executive system the mayoral committee is appointed by the executive mayor. In a collective executive system the executive committee is elected by the municipal council on a proportional basis.

A closer investigation of the two executive systems mentioned above reveals several advantages of having a mayoral executive system. Some of these advantages are:

- The election of an individual executive leader puts a “face” in local government. Many local residents do not know who is responsible for governing a specific municipal area. Local government is often experienced as a faceless bureaucratic institution. It is not always clear who is accountable for the final decisions and political leadership of a municipal council. In this regard, an executive mayor gives a human face to local government and thereby makes it easier for ordinary residents to relate to the particular leadership of their local area. More certainty is provided to residents as to where final accountability and responsibilities are vested.
- A mayoral executive system should also provide for decisive leadership and rapid decision-making processes. Such positive attributes are particularly useful in larger and more complex municipalities. On the international front, many “international” cities such as London and New York are moving to a mayoral executive system of municipal governance.<sup>97</sup> Many such large metropolitan cities are often home to a diversity of strong local, national and international interests. In dealing effectively with such issues, a charismatic and respected executive mayor can play an important role in inspiring business confidence, attracting foreign investment and

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<sup>96</sup> Refer to the Structures Act s 60(1)(a).

<sup>97</sup> See LGIS no 2 “Types of Municipalities” (1999) at 16.

building strong relationships between the local municipality and community interest groups.<sup>98</sup>

- The mayoral executive system can sometimes also have positive advantages in rural jurisdictions with large geographical areas. In cases where councillors have to travel long distances to attend committee or council meetings, the election of an executive mayor could minimise the need for the council or a committee to meet and provide for faster and more effective decision making.

#### **10.4.2.3 The plenary executive system**

The plenary executive system is often regarded as the simplest system of municipal government. In a plenary system, the executive powers are exercised by a full meeting of the municipal council.<sup>99</sup> The municipal council takes all executive decisions regarding the business of the municipality and is also responsible as a council in general for the political guidance and leadership. According to the provisions in the Structures Act, a plenary executive system limits the exercise of executive authority to the municipal council itself.<sup>100</sup> A municipal council that has established a plenary executive system may thus not delegate its executive responsibilities to any individual councillor or to any of its committees.<sup>101</sup> Similar to all other municipal councils, a municipal council with a plenary executive system must also elect one of its members as a chairperson of that council. Such a chairperson is also called a mayor.<sup>102</sup> Plenary executive systems are best suited to small municipal councils or to councils that have only a limited range of powers and responsibilities. A municipal council that has a small number of councillors should be able to reach decisions quickly and effectively by discussing and debating such issues in a plenary session of that council.

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<sup>98</sup> A good example in this regard is the significant role the mayor of New York, mayor Giuliani, played after the 11th of September 2001 terrorist attacks on the USA. His executive leadership not only mobilised the local community but also received national and international praise for the manner in which the situation was dealt with.

<sup>99</sup> The word plenary means "full" or "complete".

<sup>100</sup> See the Structures Act s 7(c).

<sup>101</sup> In this regard one should distinguish between the delegation of executive authority and the general authority to delegate powers or functions. It is submitted that the Structures Act in this regard does not prohibit the general authority to delegate powers or functions, but that the Act confirms that in a plenary executive system it is the council in full, and not a specific person or smaller committee, that bears the brunt of final executive responsibility.

<sup>102</sup> See LGIS no 2 "Types of Municipalities" (1999) at 9.

#### **10.4.2.4 The two participatory systems**

The three executive systems of municipal government described above should enable effective and efficient decision making in local government.

Each municipal council must have one of these executive systems to ensure

that it can exercise its

executive authority. It is also very important, however, for municipalities to ensure that residents and community interest groups are able and motivated to participate in the municipal decision-making processes. As institutions that are regarded as service providers from the cradle to the grave, local governments form the sphere of government which interacts directly with the ordinary residents, and community involvement must be encouraged.<sup>103</sup> In order to provide for structured community participation, the new local government structure provides that the different executive systems can be combined with either of the two participatory systems, namely the ward participatory system and the sub-council participatory system.<sup>104</sup> It is submitted that community participation in the matters of local government will be enhanced through these two participatory systems.

**(a) The ward participatory system**

The ward participatory system of municipal government allows for the establishment of ward committees within the municipal jurisdiction in order to facilitate community participation in local matters. Ward committees have no original powers, as their powers and functions are delegated to them by the metro or local councils. They act as advisory committees with the aim of insuring and facilitating community participation, and as such they provide for a structural channel of communication, a local point of access to the municipal government and a foundation of accountability of municipal councillors. Apart from their role of enhancing community participation, the ward committees should also improve communication between the local municipal council and the local community. Through this communication system a municipal council should be able to identify community needs quickly and accordingly fine-tune its municipal policies and programmes to accommodate local circumstances and needs.

Most municipal areas were divided into wards for the purposes of the local government elections that took place during December 2000 and the elections that are to be held in the future.<sup>105</sup> In a ward participatory system, matters of local concern are addressed by the various committees that are established in

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<sup>103</sup> See the objects of Local Government set out in the Constitution s 152(1)(a)-(e).

<sup>104</sup> The Structures Act S 7(d) and (e).

<sup>105</sup> It should be noted that where a municipal council has less than seven members, there will be no wards demarcated for that council.

the wards. These committees allow residents a direct voice in the governance of their neighbourhoods. Participatory democracy is enhanced through a system that provides a vehicle for local communities to make their views and needs known to the municipal council. Because wards have a wide range of needs and interests, the Structures Act makes specific provision for the diversities of different areas to be represented in the relevant ward committees.<sup>106</sup>

If a municipal council decides to have ward committees, it must establish a ward committee for each ward in that municipality. Each ward committee consists of the councillor who represents that ward and a maximum of 10 other people from within the ward area.<sup>107</sup> It should be noted that ward committee members participate in the ward committee on a voluntary basis and are not remunerated for their involvement. When ward committees are managed and controlled properly, they should play a significant role in the enhancement of community participation in local government affairs.

#### **(b) The sub-council participatory system**

In order to enhance democratic participation further and also to enable a decentralised form of municipal management in usually large metropolitan areas, the new local government system provides for the so-called “sub-council participatory system” through the provisions of the Structures Act.<sup>108</sup> Metropolitan municipalities cover a large urban area and often have to deliver services to a large local population. Because they are so extensive, some metropolitan governments cannot effectively and efficiently provide and sustain quality service provision, and more often than not such services and functions can be better managed through a system of decentralised structures within the relevant municipal area. The sub-council participatory system provides for exactly such a decentralised system: services and functions are managed through so-called “sub-councils”, established for parts of the municipal area.

Sub-councils are committees of the metropolitan council and have such powers and duties that have been delegated to them by the Metro Council.

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<sup>106</sup> Refer to the Structures Act ch 4 Part 4.

<sup>107</sup> See the Structures Act s 73.

<sup>108</sup> See the Structures Act s 7(d).

Depending on the extent of the powers and duties that have been delegated to sub-councils, they usually range from being merely consultative in nature to having extensive delegated powers and significance.<sup>109</sup>

If a metropolitan council wishes to establish sub-councils, it should first determine how such sub-councils would promote effective and efficient government in its area. Some aspects should be carefully considered in this regard. The metro council must consider the size of the sub-councils, the specific powers and duties that will be delegated to them and also the financial framework within which the sub-councils will be required to operate. Sub-councils can easily become financial burdens and ineffective structures if proper initial planning has not been done.<sup>110</sup>

The boundaries of sub-councils are further determined by a process of clustering wards together. When wards are clustered together to determine the boundaries of a sub-council, the metro council must consult the Demarcation Board and as far as possible apply the criteria set out in sections 24 and 25 of the Demarcation Act.<sup>111</sup> The number of sub-councils will vary from one metropolitan municipality to another and will depend mostly on how decentralised a municipality wants its administration to be. Because of its specific composition, metropolitan sub-councils or the sub-council participatory system should contribute significantly to the success of a Metropolitan Local Government in achieving the local government objectives required by the Constitution.<sup>112</sup>

## **10.5 Combining the different systems of municipal government to form municipal types**

### **10.5.1 Introduction**

As was explained above, the different systems of municipal government or combinations of such systems are used to define the various types of municipality that may be established within each category of municipality. It

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<sup>109</sup> It should be noted that sub-councils have no original powers and are allowed to perform only the functions delegated to them.

<sup>110</sup> The Structures Act states certain provisions and requirements with regard to metropolitan sub-councils. See the Structures Act ch 4 Part 3.

<sup>111</sup> See the Structures Act s 62(2)(a) and (b).

<sup>112</sup> Sub-councils consist of councillors representing each ward in that sub-council area as well as additional councillors as determined by the metropolitan council in order to ensure political proportionality. See the Structures Act s 63(1)(a) and (b).



was always the intention of the constitutional drafters not to prescribe the types of municipality in each category, but to leave such determination in part to the national government and provincial governments.<sup>113</sup> In all, five different systems were identified. At first, three executive systems which describe the structures through which municipal councils exercise their executive powers and perform their executive duties were mentioned. The last two systems are participatory systems which again describe the structures to which the relevant municipal council may delegate the powers and duties that are then to be exercised in part by the participatory system of the municipal area.

The five systems of municipal government form the building blocks for all possible municipal types. All municipal types are made up of either an executive system alone or a combination of an executive system and the participatory systems. In forming the different types of municipality, the following aspects must be taken into account:

- All municipalities must have one of the executive systems of municipal government. It is important to note that the executive systems may not be combined with one another. If a municipality has decided on one of the executive systems but has no participatory system, the municipal type will be the same as the executive system.<sup>114</sup>
- The various executive systems can be combined with one or both of the participatory systems to form new municipal types.<sup>115</sup>
- It is important to note that the participatory systems cannot function on their own; they can be used only in combination with one of the mentioned

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<sup>113</sup> See *In re: Certification of the amended text of the Constitution of the RSA, 1996* 1997 (2) SA 97 (CC). The court held that the CP V did not require a description of the types of municipality that could be established in each of the three categories described in s 155(1) of the Constitution. Such a requirement would import too great a specificity to a phrase of such general and imprecise import as a "framework for local government . . . structures". A structural framework should convey an overall design or scheme and should indicate how local government executives are to be appointed, how local governments are to take decisions and the formal legislative procedures demanded by CP X. The amended constitutional text identified three categories of local government (s 155(1)), identified how local government executives were to be appointed (s 160(1)(b), (c) and (d)), how local governments were to take decisions (s 160(2), (3) and (4)), and the formal legislative procedures to be followed (s 160(2), (3) and (4)). In the context of the overall scheme this was sufficient to meet the requirements of CP XXIV. See paras 80-82 at 129-130.

<sup>114</sup> Eg, if a municipality has a collective executive system and no participatory system, the municipality will be defined as a collective executive type.

<sup>115</sup> If a municipality has a collective executive system combined with a ward participatory system, the municipality is defined as a collective executive combined with ward participatory type.

executive systems. The main reason for this is that every municipality has certain executive powers and duties, which can be exercised or performed only through an executive structure. As is suggested by the name, participatory systems are established to facilitate and enhance participation within the new local government structure.

### **10.5.2 *The relationship between categories of municipality and types of municipality***

According to the Structures Act, different types of municipality may be established within each category of municipality.<sup>116</sup> It is important to note that the way in which executive systems can be combined with the participatory systems in order to form municipal types is different for each category of municipality. The Structures Act specifically identifies the different types of municipality within each category.<sup>117</sup> The types of municipality in each category are explained as follows:

#### **10.5.2.1 Types of category A (metropolitan) municipality**

The following types of category A municipality can be established:

- a municipality with a collective executive system
- a municipality with a collective executive system combined with a sub-council participatory system
- a municipality with a collective executive system combined with a ward participatory system
- a municipality with a collective executive system combined with both a sub-council and a ward participatory system
- a municipality with a mayoral executive system
- a municipality with a mayoral executive system combined with a sub-council participatory system
- a municipality with a mayoral executive system combined with a ward participatory system and
- a municipality with a mayoral executive system combined with both a sub-council and a ward participatory system.

It must be noted that the Structures Act does not allow for the plenary executive system either to stand alone or to be combined with one or both of

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<sup>116</sup> See the Structures Act s 7.

<sup>117</sup> See the Structures Act ss 8, 9 and 10.

the participatory systems of municipal government within category A (Metropolitan) municipalities. Because metropolitan councils are very large, the plenary executive system is not appropriate and is therefore not an option in metropolitan areas. Category A or Metropolitan municipalities may therefore have either the collective executive system or the mayoral executive system on its own or one of these combined with one or both of the participatory systems. It must be emphasised again that the sub-council participatory system has been specifically designed for metropolitan areas. It allows metropolitan councils with large areas of jurisdiction to delegate powers and duties to sub-councils established for certain parts of the metropolitan area. In circumstances where a metropolitan municipality has both a ward participatory system and sub-council participatory system, the council should consider ways in which the ward committees and sub-councils can interact and complement one another in order to achieve effective and efficient local democracy.

#### **10.5.2.2 Types of category B (local) municipality**

Category B municipalities must have any one of the three executive systems, either alone or combined with a ward participatory system.<sup>118</sup> The Structures Act specifically identifies the different types of category B municipality.<sup>119</sup> The following options are available:

- a municipality with a collective executive system
- a municipality with a collective executive system combined with a ward participatory system
- a municipality with a mayoral executive system
- a municipality with a mayoral executive system combined with a ward participatory system
- a municipality with a plenary executive system and
- a municipality with a plenary executive system combined with a ward participatory system.

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<sup>118</sup> It was mentioned earlier that the sub-council participatory system has been designed specifically for category A or Metropolitan municipalities and is thus not an option in non-metropolitan areas.

<sup>119</sup> See the Structures Act s 9.

### **10.5.2.3 Types of category C (district) municipality**

The Structures Act allows for the following types of category C municipality:<sup>120</sup>

- a municipality with a collective executive system
- a municipality with a mayoral executive system and
- a municipality with a plenary executive system.

Because of their specific composition and role, category C municipalities may not combine their executive system with either one or both of the participatory systems. Participatory system options in category C municipalities are excluded because such municipalities do not have any wards and local community input and representation is already ensured through the representation of councillors from the relevant local municipalities within the area of the district municipality. However, all category C municipalities should ensure that they have mechanisms in place to enable and provide for public participation in their affairs. This is particularly important because district councils govern vast rural areas where participation and consultation have often in the past been neglected or totally ignored.

### **10.6 Application of municipal types to individual municipalities**

In the new local government structure all three spheres of government play a role in the establishment of the new local government system and municipal types. National government has defined the different types of municipality that may be established within each category of municipal government and has also established the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and C.<sup>121</sup> Provincial governments are involved in introducing the new system of municipal types when they establish new municipalities.<sup>122</sup> Lastly, local governments themselves must be consulted before the MEC for local government of a province determines which municipal type will apply to each municipality. It must be noted that since the new system of types was introduced after the local government elections in December 2000, the MEC for local government in a specific province has had the power to change the

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<sup>120</sup> See the Structures Act s 10.

<sup>121</sup> This was in accordance with the Constitution s 155(2) and (3) and is fulfilled in the Municipal Structures Act ch 1.

<sup>122</sup> Again the Constitution s 155(5) and the Structures Act s 11 provide for each category of municipality that provincial legislation must determine the different types of municipality that may be established per province in that category.

type of a municipality at any time. Such a change can be affected only through an amendment to the relevant section 12 notice whereby the municipality was established.<sup>123</sup> If a MEC wants to change the type of a municipality, he or she must again consult with the affected municipalities and organised local government structure in the province.

It is submitted, therefore, that the new systems of municipal government and the types of municipality which they have formed should significantly strengthen political leadership, should establish clear systems for decision making and should encourage proper democratic participation of local communities. In the new approach, specific flexibility has been built in which allows for various combinations of the different systems and which should have the result that municipalities will have established structures which are best suited to their specific circumstances. With the new types of municipality established after the 2000 local government elections, South Africa completed its journey of local government transformation to a truly democratic local government. What remains to be done is for all local role players – councillors, politicians, officials and local residents – to participate positively within the new structures and to ensure that local government in the 21st century will bring about a prosperous and better society for all in the country.<sup>124</sup>

## **10.7 Establishing new municipalities – procedures and requirements**

### **10.7.1 Introduction**

The establishment of new municipalities throughout South Africa is a key factor in building a new viable and developmental local environment. Such a move was needed to welcome in the new transformed system of local government according to the new constitutional mandate. When an urban area is in need of a local authority, one of two approaches may be decided upon. The area may either be added to or included in the jurisdiction of an already existing municipality, or a totally new municipal institution can be established.<sup>125</sup> According to the establishment process, all existing

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<sup>123</sup> See the Structures Act s 12 as well as the discussion on the establishment of municipalities explained in this ch.

<sup>124</sup> See LGIS no 2 “Types of Municipalities” (1999) at 29.

<sup>125</sup> In *Fedsure Life Assurance v Greater JHB TMC* 1998 (2) SA 1115 (SCA) the court held that while the interim Constitution s 174 and the Constitution s 151 created the

municipalities have been replaced with newly established municipalities in terms of the provisions of the Municipal Structures Act. All municipal boundaries were re-determined and re-demarcated by the Demarcation Board in accordance with the requirements of the Demarcation Act.<sup>126</sup> From a practical point of view, it was not possible to facilitate the establishment procedure in a short period of time, and long preparations took place. In general, the establishment procedures had three primary aims:<sup>127</sup>

- The first aim was to create a stable legal environment for the third sphere of government. A new legal foundation for individual municipalities which could clearly define the powers, functions, structures and responsibilities of such municipalities had to be established.
- Through the establishment process, many legal and administrative uncertainties which had been created during the transitional process were reduced. Every new municipality had to be established in terms of a specific establishment notice, which had basic requirements in terms of general information and details of transfers of assets and staff.<sup>128</sup>
- A firm foundation was laid through the establishment process for building the capacities of municipalities to deliver services and to fulfil their constitutional obligations. The establishment process provided for new streamlined systems of delegation and decision making and new structures suitable for enhancing public participation and community support. A further advantage of the new establishment process was the fact that all municipal databases, staff numbers, assets and liabilities as well as municipal by-laws were in some instances re-evaluated and updated. The establishing procedures therefore provided new opportunities to municipalities to address technical and administrative deficiencies and to reassess current procedures, conditions of service and other administrative functions. Consequently, the information that was required for the establishment procedures has given

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machinery for the establishment of local authorities through legislation, the respondents had actually been created by the LGTA s 8 and not the Constitution.

<sup>126</sup> See the Municipal Demarcation Act 27 of 1998. According to the interim Constitution s 174(2), provision had to be made for metropolitan, urban and rural local governments, with differentiated powers, functions and structures.

<sup>127</sup> See LGIS no 2 "Establishing New Municipalities" (1999) at 2.

<sup>128</sup> See the Structures Act s 14.

all local governments a new updated database that should prove to be very useful in future years.

### **10.7.2 The establishment of new municipalities and the so-called "section 12 notices"**

The document that describes and establishes each new municipality is called the "establishment notice". The establishment notice is the founding document for each municipality. It is a detailed and complex document and must be read carefully by all local politicians, municipal administrators and local community members. Most of the provisions of the establishment notice are legally binding on all role players, and strict requirements are set before the notice can be altered or amended.

According to the Constitution, each provincial government must establish municipalities in its province in a manner consistent with the Structures Act.<sup>129</sup> In this regard the Structures Act states the following regarding the establishment of municipalities:<sup>130</sup>

- The MEC for local government in a province must establish a municipality in each municipal area by notice in the Provincial Gazette. All municipal areas were demarcated by the Demarcation Board according to the provisions of the Demarcation Act.<sup>131</sup>
- The establishment of a municipality must be consistent with the provisions of the Structures Act, and the notice of establishment took effect at the commencement of the first elections of that council, which was generally 5 December 2000. In order for the notice to be consistent with the provisions of the Structures Act, it may not contain powers or functions for that municipality in contrast to what the Structures Act allows for.<sup>132</sup>
- The establishing notice must set out specifically required information. The minimum aspects that must be contained in the notice according to the Structures Act and which form the founding legal provisions of the new municipality are the following:
  - (a) The category of the municipality.

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<sup>129</sup> Refer to the Constitution s 155(6).

<sup>130</sup> See the Structures Act s 12(1)–(4).

<sup>131</sup> 27 of 1998.

<sup>132</sup> This entails that no municipality could be established outside the new legal framework created by the Municipal Structures Act.



- (b) The type of municipality as determined in terms of provincial legislation.
  - (c) The name of the municipality. Deciding on a new name can sometimes be a difficult issue. This is especially the case in instances where a new municipality is an amalgamation of two or even more existing municipalities with different names. It should also be taken into account that a change in name will also have an impact on such things as the bank account details, debit accounts, consumer billing and payment procedures, as well as stationary changes, which can be very costly in some instances.
  - (d) In the case of metropolitan or local municipalities, the number of wards in that relevant municipality.
  - (e) The number of councillors that have been determined in terms of section 20 of the Structures Act.
  - (f) In the case of a district municipality, the number of councillors, as determined by section 23 of the Structures Act.
  - (g) An indication as to which councillors of the municipality (if any) may be designated as fulltime according to section 18 of the Act.
  - (h) Any provisions of the Structures Act from which the municipality has been exempted in terms of section 91.
  - (i) Any other relevant details, which could include aspects regarding the status of traditional leaders on the relevant council.
- At the commencement of the process to establish a municipality, the relevant MEC must give written notice of the proposed establishment to Organised Local Government in the province and also to any existing municipalities that may be affected by the establishment. Before a notice is published, the MEC must further consult with OLG and the existing municipalities that may be affected. After the consultations have been conducted, the MEC must publish the particulars of the proposed notice for public comment.

As was mentioned above, the establishment notice takes effect only on the day of the commencement of the first election of a particular council, and only then is the new municipality established. The new municipality becomes the legal successor of the disestablished municipality if there was one – within the specified municipal jurisdiction. The establishment notice in terms of section

12 of the Structures Act serves as a legal document and founding charter for each new municipality in South Africa. Many aspects of municipalities that existed before the establishment process were drastically affected by the process. Accordingly, the Structures Act also had to provide for the regulation of the effects of the establishment of municipalities on existing municipalities. In this regard the Municipal Structures Act provides for the following:<sup>133</sup>

- A municipality established in terms of section 12 in a particular area supersedes the existing municipality or municipalities to the extent that such existing municipality or municipalities fall within the area.<sup>134</sup> The superseding municipality becomes the successor in law of the existing municipality, subject to certain requirements. Where a district municipality and one or more local municipalities within the area of the district municipality supersedes the existing municipality(ies) in that area, the district and local municipalities become the successors in law to the existing municipality(ies) depending on the specific assets, liabilities, rights and obligations allocated to the district and local municipalities respectively in terms of the relevant section 12 notice or notices.<sup>135</sup>
- If a municipality established in terms of section 12 supersedes an existing municipality(ies), the relevant section 12 notice, or any amendment of that section 12 notice, must:

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<sup>133</sup> See the Structures Act s 14, as amended by the Municipal Structures Amendment Act 33 of 2000.

<sup>134</sup> The Local Government: Municipal Structures Amendment Act 33 of 2000 specifically distinguishes between the terms “existing municipality”, “new municipality” and “superseding municipality”. An *existing municipality* means a municipality established in terms of legislation other than the Structures Act before the date of the first elections of municipal councils in terms of the Act. A *new municipality* refers to a municipality established or to be established in terms of the Structures Act and a *superseding municipality* means a new municipality which wholly or partially supersedes an existing municipality in accordance with the Structures Act s 14. See also Act 33 of 2000 s 1 definitions.

<sup>135</sup> See the Structures Act s 14(1)(b) and (c). See also the case of *ABSA Bank Ltd v Boksburg TLC* 1997 (2) SA 415 (W). In this case the plaintiff had instituted action in a Local Division against a city council in respect of the amount due on an overdrawn cheque account. The city council was dissolved by Gauteng Proc 46 of 15 December 1994 issued by the Premier of the Gauteng province in terms of the LGTA s 10, and a transitional local council (the present defendant) was established in its place and all its assets, liabilities, rights and obligations were transferred to the present defendant. The defendant issued a third party notice against the national government claiming indemnity in terms of s 8(3) of Proc 46 of 1994, which provided that the devolvement of liabilities, debts and obligations in terms of the proclamation would be subject to the “right of the national government to assume such liabilities, debts or obligations in terms of assurances made by the national government”.

- (a) Provide for the disestablishment of the existing municipality or, if only part of the existing municipality's area is affected, the disestablishment of the existing municipality in that affected area.<sup>136</sup>
- (b) Regulate the legal, practical and other consequences of the total or partial disestablishment of the existing municipality. Such consequences will include:
- (i) The vacation of office by councillors of the existing municipality.
  - (ii) The transfer of staff from the existing municipality to the superseding municipality or, if there is more than one superseding municipality, to any of the superseding municipalities. Municipal staff must formally be transferred to a new municipality when their existing municipality is disestablished. In some cases staff are even divided among new succeeding municipalities. In short, the transfer of staff must be regulated by detailed legal provisions, and these must protect their conditions of employment and job security. It should also be noted that the responsibility for staff transfers and other related matters rests with the relevant municipal trade unions and the municipalities themselves and not with the MEC of the province. Staff and labour-related disputes are regulated by the Bargaining Council at both national and regional levels.
  - (iii) The transfer of assets, liabilities, rights and obligations and administrative records from the existing municipality to the superseding municipality or municipalities, as the case may be. When the transfer of assets, liabilities, rights, obligations and administrative records are considered, the interests of creditors of the existing municipality must be taken into account.
  - (iv) The continued application of any by-law(s) and resolutions of the existing municipality to or in that area, as well as the extent of such application.<sup>137</sup> All existing by-laws, regulations and resolutions are transferred to the superseding municipality(ies) or specifically rescinded by the establishing notice. Where existing municipalities are amalgamated, the geographical extent of their by-laws and

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<sup>136</sup> See the Structures Act s 14(2)(a).

<sup>137</sup> See the Structures Act s 14(2)(a) and (b).

resolutions have to be re-evaluated. In cases of conflict between by-laws or resolutions, specific provision is needed to confirm which by-laws would still be applicable and which would be rescinded. The determination of which by-laws and resolutions would apply and which not requires extensive evaluation and oversight and also provides a unique opportunity for all new municipalities to review and tidy up all existing legislative and executive decisions, many of which were inconsistent with the Constitution. The Structures Act specifically provides for the review and rationalisation of existing municipal by-laws. The Act states that if an existing municipality is wholly or partially superseded by another municipality, the by-laws, regulations and resolutions<sup>138</sup> of the existing municipality *must* be reviewed and where necessary rationalised by the superseding municipality, to the extent that such by-laws, regulations and resolutions continue to apply in the area or part of the area of the superseding municipality.<sup>139</sup> If the superseding municipality is a district or local municipality, any transfer referred to in (ii) or (iii) above must be effected in a way that would enable the superseding municipality to perform the functions and powers assigned to it in terms of section 84 of the Systems Act.<sup>140</sup>

- According to the Structures Act, the transfer of staff in terms of a section 12 notice must/have to be on conditions of service not less favourable than those under which that staff member served in the existing municipality and must also be in accordance with the provisions of the Labour Relations Act of 1995.<sup>141</sup> It is further provided that a section 12 notice that transfers staff of an existing municipality to a superseding municipality *may* determine that the staff transferred form an administrative unit that functions as such until the superseding municipality has established a staff structure and has appointed staff to positions on that staff structure. Such an administrative

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<sup>138</sup> Including standing delegations.

<sup>139</sup> See the Structures Act s 15.

<sup>140</sup> Refer to Act 33 of 2000 s 2(b) and (c).

<sup>141</sup> 66 of 1995.

unit will function under the control of the municipal manager or acting municipal manager of the superseding municipality.<sup>142</sup>

- On the production of a certificate by a municipality that any asset was transferred to it in terms of a section 12 notice, the relevant registrar of deeds must make such entries or endorsements in or on any relevant register, title deed or document in order to register that asset in the name of that municipality. No duty, fee or charges is payable for such a registration.<sup>143</sup>
- The MEC in a province, by notice in the Provincial Gazette, may also make provision for transitional measures to facilitate the disestablishment of an existing municipality and the establishment of a new municipality. The MEC must consult with the existing municipality before publishing such a notice.<sup>144</sup>

From the provisions discussed above, it becomes clear that the establishment notice is a very important document in the new local government system and that all new municipalities are based on their respective establishment notices. It is important to note, however, that not all areas in the country fall under the provisions of an establishment notice. Areas that have been declared District Management Areas do not require an establishment notice.

### **10.7.3 Aspects regarding the amendment, repeal or replacement of section 12 notices**

It is understandable that although the section 12 establishment notices are regarded as the new founding documents of all municipalities in South Africa, such a foundation should not be cast in stone and must be amendable in order to change with local circumstances and to enhance new initiatives. Should any provision of a particular establishment notice be in need of change,<sup>145</sup> a formal process of amendment of the notice is required. As was stated above, amendments may be necessary from time to time to accommodate changing conditions affecting municipalities or to insert further measures to regulate the new local government system. Again the Structures

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<sup>142</sup> Refer to the Structures Act s 14(3)(a) and (b).

<sup>143</sup> See the Structures Act s 14(4).

<sup>144</sup> See the Structures Act s 14(5).

<sup>145</sup> Eg, to change the name or executive structure of a municipality.

Act provides for the requirements that must be complied with in order to amend a section 12 notice. Section 16(1)–(3) of the Structures Act states the following:

- The MEC, by notice in the provincial gazette, *may* amend a section 12 notice to change the type of the existing municipality, to alter the name, to alter the number of councillors subject to section 20 and with effect from only the next election of that municipal council, to specify which councillors may be designated as fulltime, to specify any provisions of the Structures Act from which the municipality has been exempted, to give effect to any change in boundaries or to further regulate matters mentioned in section 14 of the Structures Act, after all affected municipalities have been consulted.
- Any amendment of a section 12 notice must be consistent with the provisions of the Structures Act.
- At the commencement of a process to amend a section 12 notice, the MEC *must* give written notice of the proposed amendment to OLG in the province and also to any existing municipalities that may be affected by the amendment. Before the amendment notice is published, the MEC must consult with both OLG in the province and all the existing municipalities that are affected by the amendment. After the consultations have been held, the MEC must publish the particulars of the proposed notice for public comment.<sup>146</sup>

As was indicated above, a section 12 notice can also be repealed, amended or replaced in instances when the existing municipal boundaries are altered or re-determined. When in terms of the Demarcation Act the Demarcation Board re-determines a municipal boundary which affects the area of an established municipality, the provisions of section 12 and 14 of the Structures Act are applicable to the extent necessary to give effect to the re-determination. In such cases the MEC concerned must repeal, amend or replace the relevant section 12 notice and he or she *must* consult with the affected municipalities. Any repeal, amendment or replacement of a section 12 notice takes effect on

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<sup>146</sup> See the Structures Act as amended by s 16 of Act 33 of 2000 s 16(3)(a)–(c). The mentioned requirements are again mandatory with regard to the MEC and must be complied with. Any non fulfilment would render the proposed amendment unlawful without any legal binding force.

a date mentioned in the notice, subject to section 16 of the Structures Act.<sup>147</sup> Only in one instance is a municipality allowed to perform powers and functions that are not specifically granted to it in terms of its establishment notice: where the MEC has determined that a municipality is likely to collapse or cannot fulfil its functions. The MEC may then reassign any power and function of that municipality to another category of municipality without amending the establishment notice. In such cases the MEC will simply inform the affected municipalities of his/her decision, in writing.<sup>148</sup>

#### **10.7.4 Transitional arrangements in respect of the new local government dispensation**

During 2000, national government enacted the Local Government: Municipal Structures Amendment Act.<sup>149</sup> The purpose of the Act was *inter alia* to provide for certain transitional arrangements to accommodate the new local government dispensation. As was indicated elsewhere, the new dispensation commenced on the date of the new local government elections that were held during early December 2000. The Structures Amendment Act specifically stated that the transition meant the process

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<sup>147</sup> Refer to the Structures Act s 17(1)–(3). According to s 16(1)(c) an amendment of the number of councillors takes effect only from the next election of the municipal council.

<sup>148</sup> It must be remembered that such an assignment of powers and functions is merely a temporary arrangement and that the MEC must re-allocate those powers and functions once the situation has normalised or formally allocate such powers or functions to the other municipality by a formal amendment of the establishment notice. For more details see the Structures Act s 87(1)–(4).

<sup>149</sup> 33 of 2000.



of putting into operation the new local government dispensation as set out in the Structures Act, read together with chapter 7 of the Constitution. It was further provided that the transition was to end two years from the date of the elections held in December 2000, unless the minister determined a shorter period by notice in the Government Gazette.<sup>150</sup> If aspects of the Structures Act were disputed during the transitional period, special attention to the provisions of the Structure Amendment Act were to be taken into account.<sup>151</sup>

#### ***10.7.5 The relevant role players during the establishment process or subsequent amendment of the establishment notices***

From the discussions above, it would seem that the establishment process required different role players to work together in order formally and lawfully to establish the new municipalities in South Africa. It is submitted that the role players would almost all be involved in instances where an establishment notice was to be amended, or even repealed. The relevant role players are summarised as follows:

- the MEC for local government of a province
- the municipal demarcation board
- the minister responsible for local government
- organised local government
- individual municipalities and
- so-called “other role players”, which include municipal trade unions, community organisations and even creditors of a municipality.

#### **10.8 Conclusion**

With the local government elections that were held during December 2000, local government moved into the final phase of the transitional process. On the day of the elections many new municipalities were formally established, these municipalities varying in type and falling within the three categories mentioned in the Constitution.<sup>152</sup> Without the re-establishment of all municipalities according to the legal foundation of the new local government system, it would not be possible for municipalities to achieve and fulfil their constitutional objectives and obligations. As was mentioned at the beginning

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<sup>150</sup> The transitional arrangements in respect of the new local government dispensation cannot extend beyond the 5th of December 2002.

<sup>151</sup> See the Structures Amendment Act 33 of 2000 ch 2.

<sup>152</sup> The Constitution s 155(1).

of this work, the Constitution contains very few detailed instructions with regard to the local sphere of government. The Constitution has left it mostly to national government to provide for a more detailed framework of the new local government system. Accordingly, the Structures Act<sup>153</sup> has facilitated the establishment of all new municipalities and further regulates various future aspects regarding municipalities. After all the municipalities were legally established in December 2000, the new legal requirements and establishment provisions were formally implemented. Such implementation will require, *inter alia* the introduction of new leadership and management structures for all municipalities; developing co-operative relations between municipalities, especially between district and local municipalities; transferring staff to the new municipal structures and assigning them to their new offices; and also reviewing and rationalising all by-laws, regulations and standing delegations inherited from the old municipalities. It is clear that the process of implementing the provisions of the new legal foundation and the establishment notice will take considerable time and will be an ongoing process.

The establishment of new municipalities has brought many advantages to the new local government dispensation,<sup>154</sup> and suffice it to say that it has laid a sound basis for the new constitutionally envisaged sphere of local governance in South Africa.

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<sup>153</sup> 117 of 1998 as amended.

<sup>154</sup> Some of these advantages can be summarised as follows: the restructuring of municipal administrations, the streamlining of personnel, the re-evaluation and review of municipal by-laws, the formal confirmation of the identity of municipal councils and the provision of information which should give provinces an understanding and insight into the capacity and possible needs of municipalities that they have established. There are, however, some writers who argue that the new structure of local government leaves very little room for structural manoeuvres of individual municipalities to meet specific local conditions. See Chaskalson *et al* (1999) 5A 37-38.

## Demarcation of new local government boundaries

### 11.1 Introduction

In accordance with the new constitutional foundation, local governments had to be established for the whole territory of the Republic.<sup>1</sup> Before municipalities could be established, however, it was necessary specifically to determine, or in some cases re-determine, existing municipal boundaries. The Constitution demands that national legislation *inter alia* establish criteria and procedures for the determination of municipal boundaries by an independent authority. The relevant national legislation must further take into account the need to provide municipal services in an equitable and sustainable manner.<sup>2</sup> In order to comply with the constitutional requirements, national government enacted the Local Government: Municipal Structures Act<sup>3</sup> which, together with the Local Government: Municipal Demarcation Act,<sup>4</sup> provided for the establishment of an independent municipal demarcation board and for the criteria and procedures for the determination of municipal boundaries.<sup>5</sup>

The determination of municipal boundaries was, and still is, an important process in the successful transformation of local government. Although the demarcation of new municipal boundaries would not suddenly solve the many problems municipalities were facing, it indeed set the structural conditions within which other processes necessary for the transformation and development of local government could occur. Such processes would include the fulfilling of the constitutional objectives set out in section 152 of the Constitution. The way in which municipal boundaries are drawn will be important to ensure that municipalities meet their respective obligations.

<sup>1</sup> See the Constitution s 151(1).

<sup>2</sup> See the Constitution s 155(3) and (4).

<sup>3</sup> 117 of 1998, hereafter referred to as the Structures Act.

<sup>4</sup> 27 of 1998, hereafter referred to as the Demarcation Act.

<sup>5</sup> For more details regarding the demarcation of local governments under the new constitutional dispensation refer to Bekink (1998) *De Jure* at 319-326.

## 11.2 The importance of local government boundaries

Municipal boundaries have important political, financial and social effects. This is so because municipal boundaries determine what each municipality is responsible for and the extent of such responsibility. Some of the important functions are as follows:

- A municipal boundary determines the size and character of a particular municipal voting population. Depending on the boundary, the electorate can be wealthy or poor, or the area can have good infrastructure or can be underdeveloped. Because political parties tend to appeal to different constituencies, this may also affect the political outcome of a specific local community.<sup>6</sup> It is therefore very important that the demarcation process should not be politically biased or manipulated. Politically motivated manipulation of municipal boundaries would compromise efforts to achieve the overall constitutional objectives.
- Often municipal boundaries determine if a municipal area is financially viable or sustainable. The extent of municipal boundaries therefore has an effect on both the potential income and expected expenditure of that municipality.<sup>7</sup>
- A further important aspect regarding municipal boundaries is the fact that boundaries also determined the size and extent of settlements that must be served. This in turn has important implications for municipal infrastructure and service provision.<sup>8</sup> In short, boundaries have an important influence on social and economic upliftment.
- Many local residents also identify themselves with a specifically demarcated area and its people. If boundaries are drawn in a way that disrupts the social and economic patterns of people's lives, many community members may find it difficult to feel part of a specific municipal entity, because they associate themselves or have interests in other municipal jurisdictions. Such community members may not participate in or commit themselves to the municipality and, by so doing, negatively impact on the effectiveness of that municipal government.<sup>9</sup>

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<sup>6</sup> It must be remembered that the Constitution requires that municipalities provide for democratic and accountable government.

<sup>7</sup> It is obvious that a municipality will have little potential income if most of the local residents are very poor and if the local economy is weak with almost no tax base to draw upon.

<sup>8</sup> Again the Constitution requires each municipality to provide equitable and sustainable services to local communities and also to promote economic development. See the Constitution s 152.

<sup>9</sup> One must remember that community participation is also a constitutional imperative. See the Constitution s 152(2).

- The demarcation of boundaries is also important with regard to the relationship between municipalities themselves. This is particularly true in a system of so-called “wall-to-wall” local government, which South Africa has introduced.<sup>10</sup> In a system of wall-to-wall local government, the way in which municipal boundaries have been demarcated can have very important consequences with regard to the effectiveness and efficiency of some municipalities.<sup>11</sup> Depending on how boundaries are demarcated, the positive and negative effects between neighbouring municipalities can be shared between them. It is therefore clear that the demarcation of boundaries can have a significant cross-boundary impact on neighbouring municipalities. It can play a decisive role in determining whether the relations between municipalities are competitive or co-operative.<sup>12</sup>

Although each municipality must have clearly demarcated boundaries, the incorrect determination of such boundaries may prevent some municipalities from performing their constitutional obligations effectively. In order to ensure that municipalities have a fair chance of achieving their constitutional obligations within the boundaries given to them, the demarcation process had to be carefully considered and many different factors had to be taken into account.<sup>13</sup> In this regard the Municipal Demarcation Act has played a pivotal role in ensuring that the demarcation process was efficient, fair and procedurally correct.<sup>14</sup>

### **11.3 Re-determination of the municipal boundaries of the transitional period**

During 1995, approximately 1260 local government bodies across South Africa were amalgamated into 843 municipalities. These municipalities spent a lot of time and money on adjusting to their new boundaries, organising staff transfers and integrating administrations. In spite of all these efforts, it soon became clear that because of

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<sup>10</sup> Wall-to-wall local government means that every part of the country is covered by a municipality, and every municipality thus shares a border with at least one other municipality. The Constitution s 151(1) confirms the establishment of wall-to-wall municipalities for the whole territory of the Republic of South Africa.

<sup>11</sup> Eg, the infrastructure of one municipality may be impacted by the residents of another municipality's enjoying its facilities. The way in which municipalities and their residents interact with one another can have either positive or negative effects on either or both of the municipalities. A municipality could experience higher traffic volumes and maintenance costs, for example, but benefit from more municipal revenue and local investment.

<sup>12</sup> See Bekink (1998) *De Jure* 319 at 320-321.

<sup>13</sup> Refer to LGIS no 2 “Demarcation” (1999) at 3.

<sup>14</sup> The purpose of the Act is to provide for the criteria and procedures for the determination of municipal boundaries by an independent authority, the Demarcation Board and to provide for other matters that are connected to the demarcation process.

boundary determinations many local governments could not meet their obligated objectives. Some of the problems that arose were the following:<sup>15</sup>

- Some district councils were too large and too removed from local councils to be able to understand and respond to their needs.
- Metropolitan governments were divided between metropolitan councils and metropolitan local councils. This led to the tax base of the metropolitan area being split across settlements rather than being budgeted for as a single integrated area.
- Many municipalities were not financially viable and effective. Often this was the result of municipal boundaries that were not drawn widely enough to include a tax base that could sustain and support a particular municipal authority.
- Many parts of the country have been demarcated under the authority of district councils. As district councils are not directly elected councils, such areas were denied their own democratic and accountable local governments.
- It was also established that many municipalities could not cope with their financial and administrative obligations and that there was an urgent need for further rationalisation within the broad system of local government in South Africa.

For the new structures of local government to be successful, more appropriate and efficient boundaries had to be established. District councils had to be strengthened and metropolitan councils had to be redefined as single local authorities. Outside the metropolitan areas and with the exception of District Management Areas, a two-tier combined system of district and local municipalities had to be introduced. There was also a strong need for the number of councils to be reduced, with an emphasis on some rural and urban municipalities being amalgamated to ensure effective planning and service delivery. In light of the abovementioned background, all municipal boundaries had to be re-evaluated and often re-demarcated before the local government elections in December 2000 could be held.

#### **11.4 The municipal demarcation board**

##### **11.4.1 *Establishment, functions and general powers of the Demarcation Board***

In compliance with the constitutional requirement that an independent authority had to be established by national legislation to determine municipal boundaries, the min-

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<sup>15</sup> See LGIS no 2 "Demarcation" (1999) at 4.

ister Demarcation Act established the Municipal Demarcation Board.<sup>16</sup> The Act affords the Demarcation Board statutory status as a juristic person which is independent and must be impartial. All functions of the board must be performed without fear, favour or prejudice.<sup>17</sup>

The main functions of the board are to determine municipal boundaries in accordance with the provisions of the Demarcation Act and any other appropriate legislation enacted in terms of chapter 7 of the Constitution and to render an advisory service in respect of matters provided for in legislation.<sup>18</sup>

According to the Demarcation Act, the board is given certain general powers. Such powers include all steps necessary or expedient for the board to perform its functions.<sup>19</sup> However, the board may not borrow money.<sup>20</sup> Municipalities should note that the board may require a municipality that may reasonably be affected by a boundary determination to provide the board or any of its committees with facilities for holding meetings.<sup>21</sup>

#### **11.4.2 Membership provisions of the Demarcation Board**

The Demarcation Board consists of no fewer than seven and no more than 10 members that are appointed by the President in accordance with specific requirements. The responsible for local government must determine the number of members of the board. The composition of the board must be broadly representative of South African society and must also represent a pool of knowledge concerning issues relevant to municipal demarcation in each province.<sup>22</sup>

A member of the board must be a South African citizen and must have a qualification or experience in, or knowledge appropriate to, local government matters in gen-

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<sup>16</sup> See the Demarcation Act s 2.

<sup>17</sup> See the Demarcation Act s 3. The independence of the board is a constitutional prerequisite and together with the confirmation of impartiality it should ensure that narrow political interests can be eradicated from the board's functioning. See the Constitution s 155(3)(b).

<sup>18</sup> Such other legislation will include the Structures Act as amended; the Local Government: Cross-boundary Municipalities Act 29 of 2000 as amended. See the Demarcation Act s 4 as substituted by Act 51 of 2002.

<sup>19</sup> See the Demarcation Act s 5(1). These powers of the board include *inter alia* the power to determine its own staff establishment, acquire or dispose of any right in or to property, open and operate its own bank account, insure itself, perform legal acts and also institute or defend any legal action.

<sup>20</sup> The Demarcation Act s 5(2).

<sup>21</sup> See the Demarcation Act s 5(3).

<sup>22</sup> See the Demarcation Act s 6(1)–(3) read with s 8 of the Act.



eral or aspects that are specifically relevant to almost all municipalities.<sup>23</sup> Persons disqualified by the Act from becoming or remaining members of the board are, for example,

- an unrehabilitated insolvent
- someone who is placed under curatorship
- someone who is declared by a court of law of the Republic to be of unsound mind
- a person who was convicted after 4 February 1997 of an offence and sentenced to imprisonment without the option of a fine for a period of not less than 12 months.<sup>24</sup>

Whenever it is necessary to appoint a person as a member of the Board, the minister must invite persons to apply, establish a selection panel to evaluate applications and finally appoint a person.<sup>25</sup> The term of office of a member of the Board is five years, and reappointment is possible.<sup>26</sup> Apart from appointing the members of the Board the President also appoints one member as chairperson and another as deputy chairperson.<sup>27</sup>

Conditions of appointment of members must be determined by the minister with the concurrence of the minister of finance, and members are appointed either as full-time members or part-time members.<sup>28</sup> All members are obliged to adhere to a code of conduct, and any contravention of the code of conduct is regarded as misconduct.<sup>29</sup> Membership of the Board ceases when a person is no longer eligible under section 7, resigns by giving three months' notice or is removed from office by the President.<sup>30</sup>

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<sup>23</sup> Such specialised areas of expertise are: economic development, integrated development planning, community development, traditional leadership, local government administration, municipal finance and services, town and regional planning, legal and constitutional matters affecting local governments; land surveying, public health and also transport planning. See the Demarcation Act s 7(1)(b)(i)–(xii).

<sup>24</sup> See the Demarcation Act s 7(2).

<sup>25</sup> See the Demarcation Act s 8(1)–(5) as amended by Act 51 of 2002.

<sup>26</sup> See the Demarcation Act s 9.

<sup>27</sup> Refer to the Demarcation Act ss 8(7) and 10.

<sup>28</sup> See the Demarcation Act s 11.

<sup>29</sup> See the Demarcation Act s 12.

<sup>30</sup> A member may be removed from the board on grounds of misconduct, incapacity or incompetence only. See the Demarcation Act s 13(4)(a). A decision to remove someone must be based on a finding to that effect by an investigating tribunal appointed by the President. See also s 13(4)(b).

### **11.4.3 Operating procedures of the Demarcation Board**

Meetings of the board are determined by the chairperson unless the majority of the members request the chairperson to convene a meeting. Normally the chairperson or deputy chairperson presides at meetings. The board is further also mandated to determine its own internal procedures.<sup>31</sup> A decision of the board is decided by a supporting vote of at least the majority of members.<sup>32</sup> If the board consists of, for example, ten members, then at least a supporting vote of six members<sup>33</sup> is needed to decide a particular question.<sup>34</sup> The board may further also establish one or more committees to assist it, and when the board is appointing members to a committee, the board is not restricted to board members.<sup>35</sup> In order to perform its functions properly, the board may delegate any of its powers to a board member, a committee or an employee of the board. However, the power to make a final decision on the determination of municipal boundaries may not be delegated.<sup>36</sup> When powers are delegated by the board, the board still retains final responsibility for such powers or performance of such duties.<sup>37</sup> Because of the board's restrictive means, it may conclude an agreement with the Department of Provincial Affairs and Local Government, a provincial department or even a municipality in order to provide administrative and secretarial assistance to the board or its committees.<sup>38</sup>

## **11.5 Requirements regarding municipal demarcation**

### **11.5.1 Specific boundary determinations**

According to the Demarcation Act, the Demarcation Board must determine municipal boundaries in the territory of the Republic and may also re-determine any municipal boundaries. The Board does not have absolute authority during a demarcation process. Any determination or re-determination of a municipal boundary must be consistent with the Demarcation Act and other appropriate legislation enacted in terms of

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<sup>31</sup> See the Demarcation Act ss 15 and 16.

<sup>32</sup> A majority of members in this regard refer to a so-called "absolute majority", which will be 50% + 1 of the total number of members of the board. See also Rautenbach and Malherbe (1999) 159.

<sup>33</sup> 50% of 10 + 1.

<sup>34</sup> See the Demarcation Act s 17.

<sup>35</sup> See the Demarcation Act s 18(1)–(5).

<sup>36</sup> See the Demarcation Act s 19(1)(a).

<sup>37</sup> Refer to the Demarcation Act s 19(2)(a)–(b).

<sup>38</sup> See the Demarcation Act s 20(1).

chapter 7 of the Constitution.<sup>39</sup> Any determination or re-determination of a municipal boundary must be published in the relevant *Provincial Gazette*. A very important aspect provided for in the Demarcation Act is that any person that is aggrieved by a determination or re-determination of a municipal boundary may submit objections in writing to the Board within 30 days of publication of that determination.<sup>40</sup> The Board is obligated to consider any objections and to confirm, vary or withdraw its determinations and publish its decision in the relevant *Provincial Gazette*.<sup>41</sup>

The functions of determining or re-determining municipal boundaries are performed by the board: on its own initiative, on request by the minister or an MEC of a province or on the request of a municipality, with the concurrence of any other affected municipality.<sup>42</sup> Once the Board has determined or redetermined a municipal boundary, it must without delay send such particulars to the Electoral Commission (EC).<sup>43</sup> If the EC is of the view that the boundary determination will affect the representation of voters in the council of any affected municipality, then the determination will take effect only from the date of the next election in that area concerned.<sup>44</sup> If the EC is of the view that a boundary determination will not materially affect the representation of voters in such a council, the determination takes effect from the date determined by the notice in the *Provincial Gazette*. Within 60 days after having received the particulars of the Demarcation Board, the EC must make known its view as set out in subsection 23(2) of the Demarcation Act, by notice in the *Provincial Gazette*.<sup>45</sup>

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<sup>39</sup> See the Demarcation Act s 21(2). Note that s 26 does not apply where the Board re-determines a municipal boundary in respect of which the MEC and all affected municipalities have indicated in writing that they have no objection to the redetermination. See s 8 of Act 51 of 2002.

<sup>40</sup> See the Demarcation Act s 21(4). The subsection does not mention re-determinations, but it is submitted that objections against any re-determinations of municipal boundaries are also included. Persons that may object include both natural and legal persons such as private residents, community groups, private companies and even municipalities themselves.

<sup>41</sup> See the Demarcation Act s 21(5)(a)–(c) as amended. Note that any person may, subject to the Promotion of Access to Information Act 2 of 2000, request the Board to provide reasons for its decisions. See s 21(6) as added by s 8 of Act 51 of 2002.

<sup>42</sup> Refer to the Demarcation Act s 22. The section confirms that municipal boundaries are determined or re-determined either on the initiative of the board self or on request by relevant role players. The instances when the board will act on its own initiative will be discussed below.

<sup>43</sup> The Electoral Commission is the commission established in terms of the Electoral Commission Act 51 of 1996 to oversee and monitor national provincial and local government elections in South Africa. See also s 23(1)–(2) of the Demarcation Act.

<sup>44</sup> See the Demarcation Act s 23(2)(a). This means that the *status quo* is maintained. It is submitted that the reference to the next election does not include any by-elections, as such elections impact on only a specific ward and not the council as a whole.

<sup>45</sup> See the Demarcation Act s 23(3). Note that the MEC in the province concerned must publish the notice within three months of the date of the notice published by the Electoral Commission (EC). See s 10(b) of Act 51 of 2002.

### 11.5.2 Demarcation criteria

When the Demarcation Board is considering whether to determine or re-determine a municipal boundary, it must have an overall objective in mind to establish an area that would adhere to certain requirements. These requirements are:

- to enable the municipality for that area to fulfil its constitutional obligations as set out in section 152 of the Constitution
- to enable effective local governance in that area
- to enable and provide for integrated development and
- to have a tax base as inclusive as possible of all users of municipal services in that municipal area.<sup>46</sup>

In order for the Board to attain the overall objective and to comply to the required criteria of section 24, the Board must take certain factors into account when it is determining a municipal boundary. These factors are the following:<sup>47</sup>

- (a) the interdependence of people, communities and economies as indicated by:
  - (i) existing and expected patterns of human settlement and migration;
  - (ii) employment;
  - (iii) commuting and dominant transport movements;
  - (iv) spending;
  - (v) the use of amenities, recreational facilities and infrastructure; and
  - (vi) commercial and industrial linkages;
- (b) the need for cohesive, integrated and unfragmented areas, including metropolitan areas;
- (c) the financial viability and administrative capacity of the municipality to perform municipal functions efficiently and effectively;
- (d) the need to share and redistribute financial and administrative resources;
- (e) provincial and municipal boundaries;
- (f) areas of traditional rural communities;
- (g) existing and proposed functional boundaries, including magisterial districts, voting districts, health, transport, police and census enumerator boundaries;
- (h) existing and expected land use, social, economic and transport planning;

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<sup>46</sup> See the Demarcation Act s 24(a)–(d). All the relevant requirements must be considered before the Board makes its determination.

<sup>47</sup> See the Demarcation Act s 25(a)–(e).

- (i) the need for co-ordinated municipal, provincial and national programmes and services, including the needs for the administration of justice and health care;
- (j) topographical, environmental and physical characteristics of the area;
- (k) the administrative consequences of its boundary determination on:
  - (i) municipal creditworthiness;
  - (ii) existing municipalities, their council members and staff; and
  - (iii) any other relevant matter; and
- (l) the need to rationalise the total number of municipalities within different categories and of different types to achieve the objectives of effective and sustainable service delivery, financial viability and macro-economic stability.

From the factors mentioned above one can see that the determination process of a municipal boundary is a very involved and often difficult process. In many instances specialised guidance, expert advice and thorough pre-conducted investigations are required. The Demarcation Act does not specify how the Board should go about ensuring that all of the factors have indeed been complied with. This is perhaps an unfortunate lacuna in the Act, which could enhance the chances of legal challenges to actions of the Board. Such challenges could be minimised if the Board took every possible precaution to ensure that all relevant criteria were taken into account before a decision was finalised.

### **11.5.3 Demarcation procedures**

The Demarcation Act determines specific demarcation procedures that must be followed by the Demarcation Board. The Act requires that before the Board considers any determination of a municipal boundary it must publish a notice in a relevant local newspaper stating the Board's intention and invite written representations and views from the public.<sup>48</sup> Written representations or views must be submitted within a specified period, which period may not be shorter than 21 days.<sup>49</sup> It is further required that when the Board publishes a notice referred to in subsection 1 it must convey the content of the notice by radio or another appropriate means of communi-

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<sup>48</sup> Note that only one notice in one newspaper is required. The Board should ensure that the language of the notice is in the official language that is most used in that area.

<sup>49</sup> See the Demarcation Act s 26(1)(a) and (b).

cation, in the area concerned.<sup>50</sup> The Board is further required to send a copy of the notice to

- the MEC in the province concerned
- each municipality affected by the matter
- the magistrate of the area if any magisterial district is affected
- the provincial house of Traditional Leaders.

This can be carried out by registered post, by electronic means or by hand, and all of these parties are then invited to submit written representations.<sup>51</sup>

As soon as the period for written representations has expired, the Board is obliged to consider all representations submitted to it and may take a decision on the determination. The Board is also permitted to hold a public meeting, to conduct formal investigations or to do both.<sup>52</sup> If the Board decides on holding a public meeting it must publish a notice in a newspaper circulating in the area stating the time, date and place of the meeting and invite the public to attend the meeting. During public meetings a Board's representative must explain the issues at hand, allow the public to air their views and answer relevant questions.<sup>53</sup> When the Board decides to conduct an investigation, however, it may conduct such an investigation itself or designate an investigating committee to conduct the investigation on its behalf. During formal investigations the Board or investigating committee has specific powers.<sup>54</sup> The Demarcation Act further specifically addresses the situation where a demarcation affects existing municipalities. In such cases the legal, practical or other consequences of a municipality's wholly or partially being incorporated into or combined with another municipality must be dealt with in terms of the Municipal Structures Act.<sup>55</sup>

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<sup>50</sup> It is important that the notice should be published as widely as possible to ensure that all interested parties have an opportunity to respond. In this regard it would be advisable for the Board to undertake not only radio publication of the notice but, eg, to send out flyers to all local residents via the relevant municipality concerned. See the Demarcation Act s 26(2).

<sup>51</sup> See the Demarcation Act s 26(3).

<sup>52</sup> Refer to the Demarcation Act s 27.

<sup>53</sup> These aspects are confirmed in the Demarcation Act s 28(1)–(3).

<sup>54</sup> See the Demarcation Act ss 29 and 30. Such powers include to (a) summon by written notice a person who in the Board of Committee's opinion has information which is material to the investigation to appear before the Board or committee and to give evidence or to produce specified documents; (b) call a person present at a Board or committee meeting to give evidence or produce documents; (c) administer the oath or solemn affirmation; (d) question that person or have such person questioned by a person designated by the Board or committee; and (e) retain for a reasonable period a document produced at a meeting.

<sup>55</sup> The Demarcation Act s 31.

## **11.6 General administrative and other matters regarding the Demarcation Board**

### **11.6.1 *Manager of the Board***

The Demarcation Board must appoint a person as the Manager of the Board. Apart from having certain responsibilities, the Manager is also the accounting officer of the Board.<sup>56</sup>

### **11.6.2 *Aspects regarding the finances of the Board***

The Demarcation Board is funded mainly by money appropriated annually by Parliament to enable it to perform its functions. Money from other sources may be received through the National Revenue Fund. During each financial year the Board must submit an estimation of the Board's income and expenditure for the next financial year to the minister of Provincial Affairs and Local Government, as well as to the Minister of Finance. Any money paid to the Board that has not been used at the end of a financial year must be refunded to the National Revenue Fund, unless otherwise agreed by the two Ministers mentioned above.<sup>57</sup> As accounting officer, the Manager of the Board must comply with certain accountability requirements, and the financial statements and records of the Board must be audited annually by the Auditor-General.<sup>58</sup> Lastly the Act confirms that the Board is accountable to Parliament and must annually submit to both houses of Parliament a written report on its activities during a financial year. A copy of the report must also be submitted to each provincial legislature.<sup>59</sup>

### **11.6.3 *Miscellaneous matters concerning the Demarcation Board***

The Demarcation Board is protected against civil liability, as the State Liability Act<sup>60</sup> applies in respect of the Board.<sup>61</sup> No member of the Board is further liable for anything done or omitted in good faith when performing a duty or exercising a power in terms of the Demarcation Act.<sup>62</sup> According to section 41 of the Act, the minister may make regulations under the Demarcation Act if such regulations are not inconsistent

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<sup>56</sup> The responsibilities of the Manager are set out in the Demarcation Act s 33.

<sup>57</sup> See the Demarcation Act s 36(1)–(4).

<sup>58</sup> The Demarcation Act ss 37 and 38.

<sup>59</sup> Refer to the Demarcation Act s 39.

<sup>60</sup> 20 of 1957.

<sup>61</sup> Any reference to minister in the State Liability Act must be construed as a reference to the chairperson of the Board.

<sup>62</sup> See the Demarcation Act s 40.



with the Act or any other Act of Parliament. The Act also makes it an offence if people disrupt, hinder or do not co-operate with the Board in instances where they are legally required to.<sup>63</sup> Lastly, the Act also provides for a transitional arrangement, in that the boundaries of municipalities which existed before the Act took effect would continue to exist until superseded by new boundaries determined under the Act.<sup>64</sup>

### 11.7 Conclusion

During the transitional process of local government in South Africa, the Local Government Transition Act<sup>65</sup> allowed for the establishment of separate Demarcation Boards for each province.<sup>66</sup> Within the new structure of local government there is only one national independent Demarcation Board, which makes independent determinations.<sup>67</sup> The Demarcation Board gets its powers from not only the Demarcation Act, but also from other national legislation.<sup>68</sup>

The demarcation process of the new municipal boundaries was by no means a simple task. Many of the previous boundaries were drawn in a way that divided settlements irrationally and thus prohibited municipalities from providing effective services. In order for municipalities to operate efficiently and effectively, the most appropriate geographical municipal area had to be determined. In general, municipal boundaries should surround a functional area and should not be fragmented.<sup>69</sup> The demarcation process was difficult in many regards, but the process and functions of the Board are far from over. It is submitted that the process of re-demarcation and re-evaluation of existing municipal boundaries is continuous. There can be no doubt that in the new local government system the process of re-determining municipal

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<sup>63</sup> For more on the offence and penalties, see the Demarcation Act s 42.

<sup>64</sup> See the Demarcation Act s 44. According to s 45, the Demarcation Act took effect on the date on which the Municipal Structures Act came into effect.

<sup>65</sup> 207 of 1993.

<sup>66</sup> See the LGTA ss 10E, 10I(3) and 10K. Note that these sections were repealed by a schedule to the Demarcation Act.

<sup>67</sup> During 1999 a total of 11 members were appointed to the Demarcation Board by the President. The Board consists of a chairperson, a deputy chairperson and nine other members, each representing a province. Only the chairperson and deputy chairperson have been appointed on a fulltime bases. See the Demarcation Act and also LGIS no 2 "Demarcation" (1999) at 8.

<sup>68</sup> See, eg, the Structures Act as well as the Cross-boundary Municipalities Act and the Local Government: Municipal Electoral Act 27 of 2000.

<sup>69</sup> See the White Paper on Local Government (1998) at 98–100.

boundaries is a dynamic and ongoing feature of the overall development of local government.<sup>70</sup>

It is also important to remember that it is extremely difficult for the Demarcation Board to determine municipal boundaries that will address all problems in municipal areas; constant monitoring and performance evaluation is needed. In this regard, boundaries are important to ensure financial and administrative prosperity. Often people argue that towns that function well and are financially strong should be left alone when the demarcation of boundaries is considered. It is argued that such towns should not be burdened with the debt or incapability of other nearby towns. Other commentators suggest that such exclusion is unfair and is detrimental to poor areas or towns. It is submitted that after the overall demarcation process has been completed, flourishing municipalities should not be penalised with the burden of struggling and poorly managed municipalities unless the problems are closely linked to the manner in which municipal boundaries have been drawn.

The demarcation process under the Demarcation Act also targeted the total number of municipalities that were to be established. The total number of municipalities had to be reduced. Reality has shown that local democracy is best served by local governments that are effective and sufficient in delivering services and not by the total number of municipalities. In order to achieve a more rationalised system of local government, national government has envisaged a smaller number of municipalities with larger areas to serve. It is hoped that such rationalisation should bring more savings and efficiency if managed properly. The amalgamation process had a considerable impact on municipal administrative structures, and in many cases there is a significant over-capacity of staff with regard to certain expertise while other skills are urgently needed.

It must be remembered that municipal boundaries are not the only important boundary determinations in South Africa. Many other boundary determinations such as provincial boundaries and magisterial jurisdictions are also of significant importance. According to the principle of co-operative government, the different bounda-

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<sup>70</sup> The three broad principles/objectives of the demarcation process are to ensure integration of all areas that belong together, to ensure all municipalities are financially viable and capable of performing their functions and to ensure effective local democracy and local governance.

ries should not be determined independently from each other, and all relevant role players should be included in such processes in the future.<sup>71</sup>

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<sup>71</sup> According to research done in 1998, a total of 777 traditional authorities, 48 health regions, 180 health districts and 4700 magisterial jurisdictions were considered in the demarcation process of local government boundaries. See LGIS no 2 "Demarcation" (1999) at 23.

## **The composition, election and term of municipal councils**

### **12.1 Introduction**

According to the new constitutional foundation, various requirements regarding the composition, election and terms of municipal councils have been laid down. In broad terms, the new system has to be designed to achieve overall compliance with the new founding ethos and values of a revamped constitutional framework and a truly democratic government.<sup>1</sup> Many new changes had to be introduced in the new system to ensure a truly non-racial democratic local government structure. In such a favourable local democracy, all residents should be permitted and encouraged to take part in municipal decision-making processes. However, direct participation of all community members in their relevant local authorities is unachievable and unpractical. To address this impracticality, a system of representative democracy has been established in instances where direct democracy cannot be achieved.<sup>2</sup>

It is commonly accepted that one of the main ideals of the new local government dispensation is to create and ensure democratic elections within all local government jurisdictions and to achieve truly representative and accountable governments. The electoral system and its functioning is therefore something that affects every person in the country either directly or indirectly, and its importance should not be underestimated. In this regard there seems to be general agreement that current and future representative and accountable governmental structures should be seen to form

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<sup>1</sup> Especially the founding values of universal adult suffrage, a national common voters roll, regular elections on all three spheres of government and a multi party system of democratic government should be emphasised. See the Constitution s 1(d).

<sup>2</sup> In basic terms the system of representative democracy is synonymous with the relevant electoral system of a particular legislature. This again emphasises the important need for all municipal councils to be headed by truly representative and elected local councils with the support and acceptance of their local communities.

some of the most important building blocks for a newly transformed local government dispensation in South Africa.<sup>3</sup>

Similar to other local government aspects, the final Constitution again provides only a basic framework regarding the composition, election and terms of municipal councils. The complete legal framework is to be found in a variety of national legislative provisions.<sup>4</sup> Before the new constitutional framework and other national legislative requirements are investigated and discussed, it is necessary briefly to evaluate the relevant transitional requirements that were applicable during the transitional phases and also to identify some of the problems that were experienced during such phases in particular.

## **12.2 The composition and election of municipal councils during the local government transitional phases**

As was stated earlier, the first truly democratic local government elections were held during 1995 and 1996 and were transitional in nature. Two distinct electoral systems were combined into one. The first of these, the previously well-established and so-called "first-past-the-post" electoral system, was specifically directed at municipal wards.<sup>5</sup> The second was directed at achieving proportionality and was thus referred to as a system of proportional representation combined with a party list system.<sup>6</sup>

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<sup>3</sup> South African history vividly reiterates the fact that our country has a short track record of true democratic government on all spheres of government. For many decades many people were excluded from voting and electing their own representatives, which should in turn have resulted in acceptance and accountability from political structures. One can thus conclude that the most important component of any electoral system should be the voters on the ground. Every eligible citizen has a responsibility to take part in election processes and to ensure an accountable government. In this sense, voters are the true guardians of any democratic system. See Local Government Information Series no 2 'Elections' (1999) at 1.

<sup>4</sup> It is important to note that with regard to municipal elections, only national legislation is envisaged by the Constitution and that provincial legislation does not play a role in the composition, election or terms of municipal councils. It is specifically left to parliament to complete and fulfil the basic constitutional structure. Again, reference must be made to the Constitution s 239, where national legislation is defined to include (a) subordinate legislation made in terms of an Act of parliament and (b) legislation that was in force when the Constitution took effect and that is administered by the national government.

<sup>5</sup> In the first-past-the-post system, different candidates run against one another and the voters vote for a candidate of their choice. The candidate who obtains the most votes wins the ward seat. This particular system has encouraged personal accountability of elected councillors and has also allowed for a mix of independence and party influences. The single important disadvantage of the system is its failure to account for proportional representation of non-elected political support. Eg, if three candidates contested a particular ward and candidate A received 40% of the votes, and candidates B and C each 30% of votes, then candidate A would win the seat, but 60% of voters' support is excluded from representation in the ward of that municipal council. The majority of voters are thus denied representation.

<sup>6</sup> The system functioned through political parties' arranging their own candidates in a preferential list order and a percentage of seats being allocated to the candidates of that party depending on

*continued on next page*

Both systems ran parallel with one another in urban areas, with both ward candidates and proportional representative candidates contesting seats in the election. Ward councillors made up 60% of seats in all local councils, while proportional representative councillors accounted for the other 40%. The position in metropolitan areas was very similar.<sup>7</sup> In those transitional local councils that were too small to have wards, citizens voted only for political parties, and thus only the proportional representation system applied. This was also the position in so-called Transitional Representative Councils. (TRep Cs) and Transitional Rural Councils (TRur Cs). District councillors were appointed by and from among the councillors of transitional local councils, Transitional Representation Councils or Transitional Rural Councils. In certain rural areas where a primary tier of local government was not possible – so-called “remaining areas” – voters had to vote for councillors on the basis of proportional representation, who then served directly on the relevant district council.<sup>8</sup>

During the transitional period under the LGTA problems were already encountered regarding the proportional list system of representation. Such problems were directed not at the particular system *per se*, but rather at technical aspects regarding the system. Where the Durban High Court held that the forfeiture provisions of section 75(4) of the Local Government Election Regulations 28 of 1996 as published in terms of section 9 of the LGTA resulted in a situation where the will of the electorate was totally disregarded and the proportional representation system was substantially distorted we have an example of such problems. Such forfeiture provisions were regarded as inconsistent with the right to vote and thus unconstitutional and invalid.<sup>9</sup>

### **12.3 The composition and election of municipal councils under the final Constitution**

With the follow-up local government elections in December 2000, the transitional process was completed and the final phase of the new local government dispensation in South Africa initiated. In this regard the final Constitution determines the fol-

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the support the party has received. In such a system all parties that received support were represented in the exact proportion to the support received within the relevant municipal jurisdiction.

<sup>7</sup> Voters in metro areas voted both for ward candidates – 60% of seats – and for political party representatives – 40% of seats. These elected councillors of metropolitan local councils then in turn elected representatives/councillors from among themselves to represent the relevant substructures (local councils) at metropolitan council level. Such councillors subsequently became known as metropolitan councillors.

<sup>8</sup> For more information refer to LGIS no 2 ‘Elections’ (1999) at 3 and also the LGTA parts I and IA.

<sup>9</sup> See *Democratic Party v Miller NO and Others* 1997 (1) SA 758 (D) at 762–763.

lowing aspects on the composition and elections of the various municipal councils in South Africa:<sup>10</sup>

- (1) Subject to Schedule 6B, a Municipal Council consists of -
  - (a) members elected in accordance with subsections (2) and (3); or
  - (b) if provided by national legislation
    - (i) members appointed by other Municipal Councils to represent those other Councils; or
    - (ii) both members elected in accordance with paragraph (a) and members appointed in accordance with subparagraph (i) of this paragraph.
- (2) The election of members to a Municipal Council as anticipated in subsection (1)(a) must be in accordance with national legislation, which must prescribe a system
  - (a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or
  - (b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll.
- (3) An electoral system in terms of subsection (2) must result in general, in proportional representation.
- (4) (a) If the electoral system includes ward representation, the delimitation of wards must be done by an independent authority appointed in terms of, and operating according to, procedures and criteria prescribed by national legislation.
  - (b) Where a municipal boundary has been determined in terms of section 155(6A), a ward delimited within that municipal boundary may not extend across the provincial boundary concerned.
- (5) A person may vote in a municipality only if that person is registered on that municipality's segment of the national common voters roll.
- (6) The national legislation referred to in subsection (1)(b) must establish a system that allows for parties and interests reflected within the Municipal Council

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<sup>10</sup> Refer to the Constitution s 157.



making the appointment, to be fairly represented in the Municipal Council to which the appointment is made.

From the wording of section 157, various comments and conclusions can be submitted. First, it is clear that a municipal council consists only of members that are elected.<sup>11</sup> Two election possibilities are identified. On one hand members or councillors can be elected in terms of the requirements of section 157 subsections (2), (3), (4) and (5). The second procedure allows for members that have been elected to be further appointed by a municipal council to represent that council in another council. However, this appointment of members is permissible only if national legislation provides for such a process.<sup>12</sup>

It is important to note that the South African electoral laws in general have been fundamentally changed during 2002 and 2003. Before the new constitutional amendments were implemented, South Africa followed the so-called “imperative mandate” of representation. The imperative mandate required that members of legislatures which were elected under a particular political party had to vacate their seats if they lost their membership to that party. After intense political debate and even legal action, new amendments to the Constitution were implemented which now allow for a free mandate or representation. However, the free mandate, which allows for floor crossing between parties, is not without limits. In the case of the *UDM v President of the RSA (No 2)*<sup>13</sup> such laws were challenged on constitutional grounds. It was argued on behalf of the applicant that the that the right to vote and proportional representation were part of the basic structure of the Constitution and, as such, were not subject to amendment at all. It was also submitted that the amendments were inconsistent with the founding values in section 1 of the Constitution, more particularly that they were inconsistent with the values of a multi-party system and the rule of law. The applicant further contended that the proportional representation system was an integral part of the Constitution and that the purpose of the anti-defection provision was to protect this system; that by changing the system during the term of the legislatures infringed the voters' rights in terms of section 19 of the

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<sup>11</sup> This can either be directly or indirectly elected members.

<sup>12</sup> The best example of such an appointment of members is with regard to District Councils, whose members are appointed by the various local councils in their area of jurisdiction. The Local Government: Municipal Structures Act 117 of 1998 specifically provides for the election and *appointment* (own emphasis added) of district councils. See the Act s 23. The constitutional requirement set out in s 157(b) is therefore complied with.

<sup>13</sup> 2003 (1) SA 495 (CC).

Constitution and that the purpose of the disputed legislation was to cater for a particular, immediate, political situation. Item 23A of Annexure A to Schedule 6 to the Constitution, which contained the anti-defection provision relevant to the national and provincial legislatures could be amended by ordinary legislation “within a reasonable period after the new Constitution took effect” to make it possible for a member of the legislature who ceased to be a member of the party which nominated that member to retain membership of such legislature.

The court held *inter alia* that the Constitution as amended contemplated that floor-crossing would be permissible, including on the local sphere of government. It was further held that section 157(1) provided that council members were to be elected in accordance with subsections 157(2) and (3), but subject to Schedule 6A. This did not subordinate the Constitution to the schedule. It simply required section 157(3) to be read consistently with section 157(1) and Schedule 6A. If this were done, then in the light of the reference to Schedule 6A, the reference in subsection (3) to the need for the electoral system to result in general in proportional representation had to be construed as a reference to the voting system and not to the conduct of elected members after the election. Accordingly, the Constitution of the Republic of South Africa Amendment Act<sup>14</sup> and the Local Government: Municipal Structures Amendment Act<sup>15</sup> were not unconstitutional.<sup>16</sup> Members of legislatures representing political parties can lawfully cross the floor to another party without forfeiting their seats. In 2002, when the ruling government of the day decided to provide for floor-crossing legislation, the Constitution already envisaged such legislation as a possibility in future.<sup>17</sup> At local government level, all that was needed to allow for floor-crossing were amendments to the Structures Act.<sup>18</sup> In the national and provincial spheres,

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<sup>14</sup> 18 of 2002.

<sup>15</sup> 20 of 2002.

<sup>16</sup> See at 523-524. See also *Caluza v IEC and Another* 2004 (1) SA 631 (Tk) where the court with reference to the Constitution Sch 6 and the LG: Municipal Structures Amendment Act 20 of 2002 stated that it is clear from the two statutes that only two window periods for floor-crossing exist and that a councillor may change membership of a party only once. Such change is effected by informing the IEC thereof. A councillor's decision to cross must be endorsed by the new party. The IEC is not a party to a floor-crossing move. It merely keeps record of such moves. The decision to cross the floor is thus a unilateral act, and once the new party has accepted such an act and the decision has been given through to the IEC, the act to cross is binding on the councillor in terms of the provisions of the Amendment Act.

<sup>17</sup> However, see the Constitution Sch 6. National legislation had to be enacted to allow for such a position. Refer in this regard to the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

<sup>18</sup> These amendments were implemented during 2002. See the LG: Municipal Structures Amendment Act 20 of 2002.

constitutional amendments and the enactment of national legislation were required. In an effort to ensure legal certainty, further changes to the overall constitutional scheme were introduced, with the result that floor-crossing over all three spheres of government is today constitutionally protected and regulated.<sup>19</sup>

Schedule 6A specifically regulated the position regarding the retention of membership of the national assembly or provincial legislatures after a change of party membership, mergers between parties, subdivision of parties and the subdivision and merger of parties. Schedule 6B in turn regulates the loss or retention of membership of municipal councils after a change of party membership, mergers or subdivision of parties and the filling of vacancies.

The impact and consequences of Schedule 6B for future composition of municipal councils can be summarised as follows:

- A councillor of a municipal council who is not representing a ward (thus a proportional representative councillor) ceases to be a member of that council if that councillor, other than in accordance with item 2, 3 and 7 of Schedule 6B of the Constitution, ceases to be a member of the political party which has nominated him/her as a member of that council. This is also the position for a ward councillor who ceases to be a member of the party which has nominated him/her as a candidate in the ward election or who was not nominated by any party as a candidate (thus an independent candidate) and who then became a member of a party.<sup>20</sup>
- A councillor who is not representing a ward and who is a member of a party represented in a municipal council (the so-called original party) and who becomes a member of another party (the new party), whether the new party participated in an election or not, remains a councillor of that council. Similarly, a ward councillor remains that ward councillor if he/she was nominated by a party in the ward election and ceases to be a member of that party and becomes a member of another party, whether such new party participated in an election or not, or ceases to be a member of his/her original party and does not become a member of any other party or if he/she was not nominated by a party as a candidate in the ward elec-

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<sup>19</sup> See the Constitution Schs 6A and 6B as provided for by the Constitution Tenth Amendment Act of 2003.

<sup>20</sup> See the Constitution Sch 6B Item 1. Changes in accordance with Item 2, 3 or 7 will not result in the loss of the particular seat or seats.

tion and now becomes a member of a party.<sup>21</sup> These provisions are subject to item 4 of this Schedule, however, and depend on whether the ward councillor on his or her own or together with one or more other councillors who ceased to be members of the original party during a specified period represent not less than ten percent of the total number of seats held by the original party in that council. If a councillor changes parties, the seat held by that councillor must be regarded as having been allocated to the new party of which he or she has become a member, or to the councillor in person if he/she becomes an independent councillor.<sup>22</sup>

- Subject to item 4, any political party which is represented in a municipal council may merge with another party, whether that party participated in an election or not, or may subdivide into more than one party or subdivide and merge with another party. This may be done only if the members of a subdivision leaving the original party represent not less than ten percent of the total number of seats held by the original party in that council. In cases of mergers or subdivisions, the seats of such councillors must be regarded as having been allocated to the new party.<sup>23</sup>
- The provisions of item 2 and 3 apply only during two so-called window periods. The first period extends for a period of 15 days, calculated from the *first to the fifteenth day of September* in the second year following the date of an election of all municipal councils, and the second period is calculated for a period of 15 days from the first to the fifteenth day of September in the fourth year following the date of an election of all municipal councils.<sup>24</sup> It is further also determined that during a window period, as was mentioned above, a councillor may only once change membership of a party, become a member of another party or cease to be a member of a party.<sup>25</sup> Emphasis should be placed on the provision that during the floor-crossing periods the Constitution requires that without the written consent of the councillor concerned no party represented in a municipal council may suspend

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<sup>21</sup> It is thus possible for a party representative to become an independent councillor or for an independent councillor to become a party representative.

<sup>22</sup> See the Constitution Sch 6B Item 2.

<sup>23</sup> See the Constitution Sch 6B Item 3.

<sup>24</sup> A year means a period of 365 days, and the application of the window period did not apply during the year ending on 31 December 2002.

<sup>25</sup> See the Constitution Sch 6B Item 4(2)(a)(i)-(iii). When a councillor changes party or a merger or subdivision of parties take place, then an officer designated by the Electoral Commission must be notified in writing thereof. Written confirmation is also needed from the party that has accepted the new members. Parties may merge, subdivide or subdivide and merge only once during the window periods. See Sch 6B Item 4(2)(b). Notice must be given of the names of all councillors involved in the merger and the fact that the merger has been accepted.

or terminate the party membership of a councillor representing that party in that council or perform any act which may cause such a councillor to be disqualified from holding office as such in that council.<sup>26</sup>

- After the expiry of a period mentioned in item 4, the composition of a municipal council which has been reconstituted is to be maintained until the next election of all municipal councils or until the composition is again reconstituted during the next window period, or until a by-election is held in the municipal council.<sup>27</sup>
- Lastly, within 15 days of the expiry of the relevant window period a municipal council that has been reconstituted and which appoints members of another municipal council must again apply the procedure provided for in national legislation for the appointment of such members to represent the appointing council. Furthermore, all structures and committees of a category A and B or C municipality must be reconstituted in accordance with applicable law within a period of 30 days calculated from the date of the expiry of a window period mentioned in item 4 of the Schedule.<sup>28</sup>

Apart from the two election procedures mentioned above, the Constitution further allows for a combination of the two election procedures.<sup>29</sup> With regard to the election of members, the Constitution requires such election processes to be in accordance with national legislation, which legislation must then prescribe a system of proportional representation based on the lists of party candidates or the combination of such a system with a system of ward representation which is based on that municipalities segment of the national common voters role.<sup>30</sup> This combination between direct elections/ward representation and indirect elections/proportional representation is unique to local government elections. In general, the overall electoral system prescribed by the Constitution is a system that should generally result in proportional representation.<sup>31</sup> In contrast, the combination between a ward system and a system

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<sup>26</sup> Refer to the Constitution Sch 6B Item 4(c)(i)-(ii).

<sup>27</sup> See the Constitution Sch 6B Item 5.

<sup>28</sup> See the Constitution Sch 6B Item 6 and s 157, as well as the relevant provisions in the Structures Act. It should be noted also that councillors or parties were allowed to cross the floor or merge or subdivide during the first 15 days immediately following the date of the commencement of this Sch, which was the 20th of March 2003. Refer to the Constitution Tenth Amendment Act of 2003.

<sup>29</sup> See the Constitution s 157(1)(b)(ii).

<sup>30</sup> See the Constitution s 157(2)(a)-(b).

<sup>31</sup> This is specifically confirmed on the national and provincial spheres of government. See the Constitution ss 46 and 105 respectively. The Constitution requires that the electoral system should be prescribed by national legislation. On national and provincial spheres, this is done in terms of the Electoral Act 73 of 1998 as amended, read together with the Electoral Commission Act 51 of 1996.

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of proportional representation has many advantages. While a ward system gives a face to local government and ensures democratic and accountable government through the elected representatives, proportional representation adds the factor of various political parties that are often committed to national policies and allows for all parties that have received support during an election to be represented in that municipal council.

In relation to the principle of proportional representation, it is of interest to note that neither the Constitution nor other legislation provide a clear definition of what a system of proportional representation means. For more on this point, refer to the case of *Louw v Matjila and Others*<sup>32</sup>. The case concerned the election of executive committees of TLC or TMC in accordance with a system of proportional representation, under section 16(6) of the LGTA. The court held that the underlying purpose of a system of proportional representation is to ensure the equitable representation of minorities in the organs of government.<sup>33</sup> According to some commentators, the particular system under the LGTA was a majority system. The rule was that the two lists (one statutory and the other non-statutory) which receive a (relative) majority of the votes cast are to be adopted. On their own, the results of a specific "election" cannot determine the classification of the electoral system. Even if the lists were compiled in such a manner that all parties were proportionately represented on the list(s) and accordingly in the executive committee, this would not make the system a "system of proportional representation". The degree of proportionality attained was affected only by means of the informal political agreement between the participating parties, not the electoral system.<sup>34</sup>

It is submitted that this inclusive approach should significantly contribute to the stability and acceptance of municipal structures. A further important feature of a di-

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On local government level the relevant national legislation is the Structures Act, read with both the other legislative enactments, where applicable. It should be noted at this point that the Constitution does not require that the same national legislation prescribe the electoral systems for all spheres of government.

<sup>32</sup> 1995 (11) BCLR 1476 (W).

<sup>33</sup> See para D-E at 1482.

<sup>34</sup> See De Ville and Chohan-Khota "What is a system of proportional representation?" (1998) SALJ 406. See also De Ville and Chohan-Khota "Local Government elections: an exercise in proportional representation" (1996) 11 *SAPL* 30 *et seq*. The writers mentioned that electoral systems are usually discussed in the context of the choice of legislature for the population of a country. Such systems serve the function of determining how votes cast in an election should be translated into seats in a particular legislature. They concluded that a 50:50 division between wards of different ethnic groups conflicts with notions of fairness and that its application in future elections should be reconsidered.



rect/ward system is that it also allows for individuals who do not belong to a specific political party but who are competent and resourceful to stand as independent candidates. This possibility allows for municipalities to utilise the skills and expertise of people who want to serve their communities and who have obtained support from their communities although they do not favour a specific political manifesto.<sup>35</sup> Although the combination of a ward system<sup>36</sup> and system of proportional representation has been included in the final electoral structure of local governments, the position has changed somewhat from the combined system that was used during the transitional period. Seats are now divided equally between ward seats and proportional representative seats.<sup>37</sup>

In the new electoral system for local governments both the ward and proportional representation components work together in a so-called “mixed” system, rather than the parallel system that was in use during the local government transition. Citizens that live in large metropolitan areas are directly responsible for the election of ward metropolitan councillors. The former two-tier system where elected councillors chose representatives among themselves to serve on the metro council have fallen away.<sup>38</sup>

Subsection 157(3) of the Constitution further requires that the electoral system that is finally decided upon ensure that the total number of members elected from each party reflects the total proportion of votes recorded for those parties. This requirement has the important impact that within a mixed system of elections all votes that have been cast for a political party be taken into account to determine the overall

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<sup>35</sup> According to studies by the South African government, it has been positively established that the inclusion of independent candidates has many advantages for local government. It brings in urgently needed expertise and also helps to balance out the negative effects of strong inter-party political thinking, to name but two. For more details see LGIS no 2 ‘Elections’ (1999) at 4.

<sup>36</sup> Also known as a constituency-based system.

<sup>37</sup> One very important reason to introduce a 50/50 split rather than a 60/40 split is to allow and encourage more women to become community representatives, and to become involved in local government. About 50% of the South Africa population consists of women. During the transitional period, only about 20% of municipal councillors were women. International research has shown that the electoral system of proportional representation is best suited to allowing for the increased participation and incorporation of women within municipal structures. Party lists can be compiled specifically to allow for more women to be elected/appointed to municipal councils. In the past it was proposed that gender inequities could in future be addressed through the introduction of a quota system within the proportional representative component of political parties. A certain minimum of women candidates could thus be prescribed to be included on a party’s list and thus enhance women’s representation. During the 1995/1996 elections, 29% of councillors elected to proportional seats were women, while only 11% of ward seats were filled by women. See the White Paper on Local Government (1998) at 108–109.

<sup>38</sup> According to some commentators, this mixed system is based on the German additional-number electoral system, in which each voter has two votes: one for the candidate of his/her choice and one for the political party of his/her choice. See Devenish (1998) 209-210.



proportional support and position a party has achieved, including those votes that were cast for a ward candidate who was affiliated to a political party.<sup>39</sup>

The Constitution also specifically requires that if ward representation is included in municipal elections, the delimitation of such wards must be done by an independent authority that is appointed and operated according to the requirements set out in national legislation.<sup>40</sup> In compliance with this constitutional prerequisite, the Municipal Demarcation Board was established in terms of the Local Government: Municipal Demarcation Act.<sup>41</sup> The main function of the Demarcation Board is to determine all municipal boundaries.<sup>42</sup> However, to comply with constitutional requirement 157(4)(a) the Municipal Structures Act also includes certain requirements regarding the delimitation of wards.<sup>43</sup> The Structures Act determines that after consultation with the Electoral Commission the Demarcation Board must delimit all metropolitan municipalities and all other local municipalities that must have wards, into wards. The number of wards in a metropolitan or local municipality must be equal to the number of ward councillors that have been determined for that municipality in terms of section 22(2) of the Structures Act. When the Demarcation Board is delimiting a municipality in wards it must do so in a manner that each ward has approximately the same number of voters. The Board must also take the following delimitation criteria into account when wards are delimited:<sup>44</sup>

- (a) The number of registered voters in each ward, may not vary by more than 15% from the norm, where the norm is determined by dividing the total number of registered voters on the municipality's segment of the national common voters roll by the number of wards in the relevant municipality.
- (b) The need to avoid as far as possible the fragmentation of communities.<sup>45</sup>

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<sup>39</sup> The effect thus created is that although a party may have lost a particular ward election by a few votes, the party will still benefit from the mixed system because all the votes it has received *must* be taken into account when the relevant proportional representation seats are determined. Only those votes that were casted for independent candidates without any political affiliation will be excluded from the equation when proportional seats are determined.

<sup>40</sup> See the Constitution s 157(4)(a).

<sup>41</sup> See Act 27 of 1998 and ch 10 of this work.

<sup>42</sup> See the Demarcation Act ss 4 and 21.

<sup>43</sup> On this point one should distinguish between the terms "demarcation" and "delimitation". Demarcation generally refers to the drawing of outer boundaries of a municipal area. Delimitation on the other hand refers to the internal drawing of ward boundaries. See the Structures Act Sch 1 Part 1.

<sup>44</sup> See the Structures Act Sch 1 Part 1 Item 4.

<sup>45</sup> This criterion further enhances the Constitution s 157(4)(b), which requires that in circumstances of a cross-boundary municipality, a ward may not extend across the provincial boundary of

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- (c) The object of a ward committee as set out in section 72(3) of the Structures Act, which is mainly to enhance participatory democracy in local government, must be considered.
- (d) The availability and location of a suitable place or places for voting and counting if appropriate, must be taken into account. In this regard the following aspects should be taken into consideration:
  - (i) communication and accessibility;
  - (ii) density of population;
  - (iii) topography and physical characteristics;
  - (iv) the number of voters that are entitled to vote within the required time-frame.
- (e) The safety and security of voters and election material.
- (f) The need that ward boundaries are identifiable.”

When the Board has delimited the wards of a municipality, the Board must publish its delimitation in the relevant *Provincial Gazette*. Any person that is aggrieved by a delimitation determination may submit objections in writing to the Board within 14 days of publication of the Board's delimitation. The Board is then obliged to consider such objections and to confirm, vary or withdraw its determination(s). It should also be pointed out that the overall size of a municipality is set out in its notice of establishment, which notice also indicates the total number of wards in the municipality.<sup>46</sup>

It goes without saying that the delimitation process is of extreme importance to the outcome of municipal elections and finally the success of the new structure. Any delimitation must therefore be done independently and after careful consideration of the mentioned criteria. From the criteria mentioned above one can conclude that in more densely populated areas there will be more wards in comparison with areas that are not so densely populated. The delimitation processes should guarantee that:

- the spread of votes is fairly and equitably distributed
- the voting process is not disrupted
- residents of a particular community are able to vote together and to participate together in municipal affairs.

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that relevant municipality. This aspect was included in the Constitution in terms of a constitutional amendment in 1998.

<sup>46</sup> Refer to the Structures Act as amended s 12(3)(dA). One must again remember that in the final structure of local government, seats on the municipal council are split 50/50 between ward councillors and proportional representative councillors.

Subsection 157(5) of the Constitution reiterates a similar position with regard to national and provincial spheres of government. A person may vote in a municipal election only if that person is registered on that municipality's segment of the national common voters roll.<sup>47</sup> This requirement must not be looked at in isolation but must be read together with other constitutional and national legislative requirements. Arguably the most important protection of people's right to vote is entrenched in section 19 of the Bill of Rights, which protects the following political rights:

- (1) Every citizen is free to make political choices, which includes the right
  - (a) to form a political party;
  - (b) to participate in the activities of, or recruit members for, a political party;
  - and
  - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right
  - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
  - (b) to stand for public office and, if elected, to hold office.

Subsection 19(3) of the Constitution thus affords every *adult citizen*<sup>48</sup> the right to vote in elections for *any* legislative body established in terms of the Constitution, and to do so in secret. This would obviously also include municipal elections. Furthermore every adult citizen has the right to stand for public office and, if elected, to hold such office.<sup>49</sup> As is the case with all the other fundamental rights that are guaranteed in the Bill of Rights, the right to franchise is not an absolute right and can be limited in certain circumstances. Many prescriptions regarding the right to franchise are recorded in the Constitution itself or other national legislation.<sup>50</sup> Apart from the requirements of adulthood and citizenship, the Constitution also provides for other electoral requirements in the national and provincial spheres of government. For

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<sup>47</sup> This requirement is applicable to regular municipal elections or a by-election.

<sup>48</sup> Own emphasis added.

<sup>49</sup> The term "citizenship" is prescribed and defined in the South African Citizenship Act 88 of 1995 as amended. It is also important to note that the Constitution itself defines an adult person as someone over the age of 18 years. See the Constitution s 28(3) and indirectly s 46.

<sup>50</sup> In respect of municipal elections, such other national legislation would be the Electoral Act 73 of 1998, the Electoral Commission Act 51 of 1996 and the Municipal Structures Act 117 of 1998.

example, it is required that the national or provincial legislatures are elected in terms of an electoral system that

- is prescribed by national legislation
- is based on the national common voters' roll
- provides for a minimum voting age of 18 years
- generally results in proportional representation.<sup>51</sup>

Although the right to franchise is not an absolute right, any limitation or voting qualifications may not derogate from the rights guaranteed in the Constitution, unless such deviation or limitation complies with the requirements of the general limitation clause.<sup>52</sup>

In order to understand fully the new local government electoral system, the relevant provisions of the applicable national legislation must be evaluated together with the provisions of the Constitution. In this regard, the requirements of the Municipal Structures Act that follow are of significant importance.

### **12.3.1 The composition and establishment of municipal councils**

The Structures Act requires that each municipality must have a municipal council, and that such a council meet at least quarterly, which translates into at least four meetings a year.<sup>53</sup> The specific number of councillors of a municipal council is determined by the MEC for local government in the province by notice in the *Provincial Gazette*.<sup>54</sup> All municipalities have the power to designate councillors that have been

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<sup>51</sup> See the Constitution ss 46 and 105. In provincial spheres, the only difference from the national sphere is that the provincial electoral system should be based on that province's segment of the national common voters' roll. The position of local government level is significantly different from the position on the two higher spheres. The Structures Act provides more details, however, but such requirements are not part of the Constitution and therefore not so strongly protected.

<sup>52</sup> Refer to the Constitution s 36. See also *New National Party of South Africa v Government of the RSA* 1999 (3) SA 191 (CC); *August v Electoral Commission* 1999 (3) SA (CC) and *DP v Minister of Home Affairs* 1999 (3) SA 254 (CC). In essence, the Constitutional Court confirmed that voting requirements such as voter registration with barcoded identity documents are not necessarily an unconstitutional limitation to the basic right to vote. Even though the Constitution itself does not require voter registration, such registration is prescribed in terms of the Electoral Act 73 of 1998, and it is an important requirement in many democratic countries. In the NNP case the Constitutional Court held that the right to vote could be prescribed in terms of a electoral system prescribed by national legislation under the Constitution. The requirement of a SA citizen to register and obtain a barcoded identity document was a constitutional requirement and thus not a limitation of the right to vote. At 202 E-G.

<sup>53</sup> See the Structures Act s 18(1)–(2). The establishment of a municipal council is a natural consequence of the Constitution's confirmation that the legislative and executive authority of a municipality be vested in its municipal council. Refer to the Constitution s 151(2). Without a municipal council, no local government sphere would be able to exercise its authorities.

<sup>54</sup> This requirement should be read together with the Structures Act s 20.

determined by the MEC as full-time councillors.<sup>55</sup> It is furthermore required that the MEC's determination of full-time councillors be done in accordance with a policy framework, as may be determined by the minister responsible for local government after consulting all the MECs for local governments in the nine provinces.<sup>56</sup>

When a municipality has established its municipal council, such council is obliged to strive within its capacity to achieve the local government objectives set out in section 152 of the Constitution. In order to further enhance the constitutional objectives, each municipal council must annually review certain aspects that are community orientated.<sup>57</sup> It is also mandatory for all municipal councils to develop mechanisms to consult with their communities and community organisations in performing their functions and exercising their powers.<sup>58</sup>

### **12.3.2 The determination of the number of councillors of a municipal council**

The Structures Act specifically requires that the number of councillors of a municipal council must be determined in accordance with a formula determined by the minister of Local Government by notice in the *Government Gazette*. The formula must be based on the number of voters registered on that municipality's segment of the national common voters roll on a date specified in the notice.<sup>59</sup> It is further required that the number of councillors may not be fewer than 3 or more than 90, if it is a local or district municipality, and not more than 270 if it is a metropolitan municipality. The Structures Act also allows the MEC for local government to deviate from the number of councillors by either: (a) increasing the number of councillors if extreme distances, lack of effective communication or other exceptional circumstances render it necessary or (b) decreasing the number if it is necessary to achieve the most effective size for active participation, good and timely executive and legislative decision-taking, responsiveness and accountability and lastly the optimum use of municipal funds for councillor allowances and administrative support facilities.<sup>60</sup> The deviation allowed in

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<sup>55</sup> Note that there is no obligation on a municipality, through its municipal council, to designate full-time councillors. See the Structures Act s 18(3)–(4).

<sup>56</sup> The Structures Act s 18(4).

<sup>57</sup> In this regard the Structures Act s 19 obligates an annual review of (a) the needs of the community, (b) its own priorities in order to meet such needs, (c) its own processes for involving the community, (d) its own organisational and delivery mechanisms for meeting the needs of their communities and (e) its overall performance in achieving the constitutional objectives.

<sup>58</sup> See the Structures Act s 19(3).

<sup>59</sup> The specific date determined for the 2000 local government elections was 31 March 2000. See the Structures Act as well as Amendment Act 33 of 2000.

<sup>60</sup> See the Structures Act s 20(1)–(4). It must also be noted that different formulae for different categories of municipality may be determined. See the Act s 20(2).

terms of section 20(3) of the Structures Act may be no more than 3 from the initial number of councillors, if 30 or fewer councillors have been determined. No council with fewer than 7 councillors may be decreased.<sup>61</sup> If a council has more than 30 councillors, a deviation may be no more than 10% of the number initially determined for that municipality.

### **12.3.3 The election procedures of metropolitan, local and district councils**

It was explained earlier in this work that the Constitution provides for three distinct categories of municipality.<sup>62</sup> Within the final structure of Local Government, categories of municipality are elected differently from one another. Accordingly, the Municipal Structures Act determines the different election requirements as follows.

#### **12.3.3.1 The election of metropolitan and local councils**

The municipal council of a metropolitan or local council consists of councillors that are elected in accordance with Schedule 1 of the Structures Act. The councillors are elected by voters registered on that municipality's segment of the national common voters' roll, to (a) proportionally represent the parties (political) that contested the election in that municipality and (b) to directly represent the voters in the respective wards in that municipality.<sup>63</sup>

According to Schedule 1, the electoral system for metro and local councils encompasses the following aspects:

#### **(a) The electoral system for metro and local councils with wards:**

Any metro council or local council that has wards must be elected by directly electing a number of councillors equal to the number of wards in that municipality. Such election must be in accordance with *Part 2* of this schedule.<sup>64</sup> The rest of the councillors of the municipal council must be elected from party lists in accordance with *Part 3* of Schedule 1, to represent such parties proportionally in the council. Item 6 of Schedule 1 of the Structures Act is in compliance with section 22(2) of the Act, which requires that the number of ward councillors in a metro or local council must be equal

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<sup>61</sup> The Structures Act does not prohibit an increase in the number of councillors of a council of fewer than 7 councillors, which should subsequently be increased by only an additional three councillors. See the Structures Act s 20(4)(a).

<sup>62</sup> The Constitution s 155 identifies category A, B and C municipalities, which are also referred to as Metropolitan, Local and District Municipalities respectively.

<sup>63</sup> As was explained earlier, the new structure introduces a so-called mixed electoral system in local government, where both wards and proportional systems are combined. Refer to the Structures Act s 22(a)–(b). The overall objective of the mixed system is designed to enhance local democracy and stability through ensuring party political and direct representation.

<sup>64</sup> See the Structures Act Sch 1 Item 6.



to 50% of the number of councillors determined for that municipality in terms of section 20 of the Act.<sup>65</sup> Part 2 of Schedule 1 of the Structures Act deals with only ward elections. It states that in an election of a councillor for a ward, each voter in that ward, has one vote only, and a voter may vote for one candidate only. The candidate in each ward who receives the most votes is the elected councillor for that ward. However, if two or more candidates receive an equal number of votes, the result will be determined by lot.<sup>66</sup>

It is further provided that if only one candidate is duly nominated in a ward, an election is not held in that ward and the uncontested ward candidate is deemed to have been elected.<sup>67</sup> A uncontested ward candidate mentioned above is deemed to have been elected with effect from the date set for the election if the election is called in terms of section 24(2) of the Act or from the date stated in the time table for the by-election as the final date on which nominations for the by-election may be submitted.<sup>68</sup> Part 3 of Schedule 1 of the Structures Act again deals with proportional representation elections. It states that in an election for a metro or local council that has wards each voter has two votes and may vote (a) for not more than one ward candidate and (b) for not more than one (political) party. In elections for local councils that have no wards, each voter has one vote for one party only.<sup>69</sup>

### **(b) The submission of lists of candidates and party lists**

According to Schedule 1 item 10, a list of candidates may be submitted by a party (political) only.<sup>70</sup> If a party has gained representation in a municipality as a result of the provisions of item 2, 3 or 7 of Schedule 6B to the Constitution, that party may

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<sup>65</sup> This is confirmation that according to the new structure, ward seats and proportional seats are divided equally 50/50 and not 60/40 as was the case under the LGTA. It should also be noted that if the number of councillors determined in terms of s 20 is an uneven number, the fraction must be rounded off upwards. Eg, if the number is 25.25 it should be rounded off to 26. Furthermore, the number of proportionally elected councillors in a metro or local municipality is determined by subtracting the number of ward councillors from the total seats of the council. See the Structures Act s 22(2) and (3).

<sup>66</sup> Eg, if there are three candidates and candidate A receives 520, candidate B 510 and candidate C 500 votes, candidate A will be the elected ward councillor.

<sup>67</sup> See the Structures Act as amended by Act 51 of 2002 s 22 Sch 1 Part 2 item 8A.

<sup>68</sup> See the Structures Act s 8A(a)–(b).

<sup>69</sup> See the Structures Act Sch 1 Part 3 Item 9. This item must be read in conjunction with the Act Sch 1 Item 7 and s 22(4). Both s 22(4) and Item 7 confirm that if a local municipality has no wards, all its councillors must be elected from party lists in a proportional representation manner. In this regard it must be pointed out that local municipalities with fewer than seven members have no wards. On the other hand, all metro councils must have wards.

<sup>70</sup> On this point Sch 1 also defines an independent ward councillor and a ward candidate representing a party. The former term refers to a councillor who was not nominated by a party as a can-

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submit a list of candidates within 7 days after the expiry of a period referred to in item 4(1)(a)(i) or (ii) of Schedule 6B to the Constitution.<sup>71</sup> Furthermore, the number of candidates on a list submitted by a party may not exceed double the number of seats in the metro or local council that are to be filled from party lists.<sup>72</sup> All candidates' names must appear on the party list in the order of the party's preference, commencing with the first in order of preference and ending with the last. Every party must further seek to ensure that 50% of candidates on the list are women and that women and men are evenly distributed through the list.<sup>73</sup>

**(c) The quota to determine a seat in metro or local council**

Schedule 1 of the Structures Act also determines the quota for a seat in a metro or local council and the procedure for allocating seats in such councils. The quota of votes for a seat in a metro or local council must be determined in accordance with a specific formula. Any fractions are to be disregarded. The formula is the following:<sup>74</sup>

$$\frac{A}{B + 1} \div C$$

If a ward candidate representing a party is elected unopposed, a vote cast by a voter registered in that ward for the party of which the candidate is a representative must for the purpose of factor A be counted as two votes.<sup>75</sup>

**(d) The allocation of seats**

In the determination of seats on a metro or local council the total number of valid votes cast for each party on the party vote and votes cast for the ward candidates

candidate in a ward election, while the later refers to a ward candidate who was indeed nominated by a party as a candidate in a ward election. See the definitions in the Structures Act Sch 1 Item 1.

<sup>71</sup> See the Structures Act Sch 1 Item 10(2).

<sup>72</sup> In actual fact, this means that party lists may not exceed the total number of councillors of a metro or local council. This is so because ward seats and proportional representation seats are divided equally 50/50 between the total number of seats in the council. If a council thus has 60 seats, 30 must be ward seats and 30 proportional seats. The number of candidates on lists of political parties may not exceed double the number of proportional seats, thus they may not be more than 60, which is the overall number of seats of the council.

<sup>73</sup> See the Structures Act Sch 1 Item 11(2)–(3). These provisions have been included particularly to enhance women's participation and incorporation into the new structure of local government.

<sup>74</sup> A = represents the total number of valid votes cast for all parties, consisting of those votes cast on the party vote and those votes cast for ward candidates representing parties. This requirement seems to be in compliance with the Constitution s 157(3), which requires that the electoral system ensure that the total number of members elected from each party reflects the total proportion of the votes recorded for those parties. Thus only votes casted for independent ward councillors are to be excluded. B = represents the number of seats in the relevant metro or local council and C = represents the number of independent ward councillors elected in the election.

<sup>75</sup> See the Structures Act Sch 1 Item 12(2).

representing the party must be divided by the quota of votes for a seat. The result would then be the total number of seats to which each party is entitled before any adjustments are made. The following fictitious example of a mixed electoral system should help to explain the manner in which seats are to be allocated. Imagine a municipality named M is divided into 10 wards. There are 20 seats on the council of M that must be split 50/50 between ward seats and proportional representation (PR) seats. There are thus 10 ward seats and 10 PR seats. First one should evaluate the manner in which ward elections are held. Let us take, for example, ward 10 of the municipality. Imagine that there were three ward candidates.

- Candidate A, who is affiliated to party A, has received 200 votes.
- Candidate B, affiliated to party B, has received 500 votes.
- Candidate C, affiliated to party C, has received 300 votes.

Candidate B has received the most votes in the ward and has thus been elected. This voting process is then repeated in all the other 9 wards of the municipality. Eventually 10 ward councillors must be elected. For the purposes of this example, imagine that

- party A won 3 ward seats
- party B won 4
- party C won 3 ward seats.

The second step is then to determine the total number of seats that each party has won. In order to determine or calculate a party's overall representation in the council,<sup>76</sup> each party's proportional (PR) votes and all their ward candidate votes are added together. Let us say that

- party A received 1000 PR votes and 1000 ward votes, equalling 2000 votes.
- Party B received 3000 PR votes and 2000 ward votes, a total of 5000 votes.
- Party C received 3000 PR votes and 3000 ward votes, a total of 6000 votes.

All in all, 13 000 votes were cast for all parties together. When the total votes of each party have been determined, the seats formula should then be applied to determine the seats that each party should have on the council. The seats formula is  $A$  (total of valid votes) divided by  $B$  (number of seats), minus  $C$  (number of independent wards councillors elected) plus 1. In this example it would equate to:

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<sup>76</sup> Thus the total number of seats that party has won.

$$\begin{aligned}
 & \frac{A}{B} = \frac{2000}{5000 - 6000} + 1 \\
 & = \frac{13}{20} + 1 \\
 & = 650 + 1 \\
 & = 651 = \text{thus the number of votes needed to win a seat.}
 \end{aligned}$$

The result is that

- party A obtained 2000 votes divided by 651 = 3.072
- party B obtained 5000 votes divided by 651 = 7.680
- party C obtained 6000 divided by 651 = 9.216.

The seat allocation would be as follows:

- Party A must have 3 seats
- Party B must have 7 seats
- Party C must have 9 seats.

This totals 19, but there should be 20 seats according to the determination. In order to determine the outstanding seats, the fractions of the calculations compete for the seat(s) left. The highest fraction is afforded the seat, thus party B receives another seat. In order to finally determine how many PR seats a party has won, the ward seats must be subtracted from the total number of seats each party is entitled to.

- Party A is entitled to 3 seats, but it has already won 3 ward seats. Thus 3 minus 3 equals zero, so no PR seats are afforded to party A.
- Party B is entitled to 8 seats (7 + 1 for highest fraction) minus the 4 ward seats it has won, which equals 4 PR seats.
- Party C is entitled to 9 seats minus 3 ward seats, equalling 6 PR seats.

All ward seats and PR seats of metro and local councils are to be determined in this way. The method of allocating seats explained above was specifically incorporated into the new structure for local government elections.<sup>77</sup>

If a ward candidate representing a party is elected unopposed, a vote cast by a voter registered in that ward for the party of which the candidate is a representative must be counted as two votes for that party for the purposes of determining the total number of valid votes cast for each party. In cases where the calculation of the total number of valid votes cast for a party yields a surplus not absorbed by the seats awarded to a party, that surplus must compete with similar surpluses accruing to any other party or parties, and any undistributed seat or seats must be awarded to the party or parties concerned in sequence of the highest surplus (or surpluses). If the surplus for two or more parties is equal, the seat must be awarded to the party that has obtained the highest number of valid votes.<sup>78</sup>

It is also further required that in an election for a metro council or local council that has wards, the chief electoral officer must deduct from the total number of seats to which each party is entitled the number of ward candidates representing that party who were declared elected. The remaining result is then the number of seats which each party is entitled to fill from its list of party candidates.<sup>79</sup> If no party is awarded a seat, the votes for each party must be treated as if they are surpluses. Such an occurrence would be very unusual. The chief electoral officer is further obligated to determine which party candidates are elected by selecting from the party's list, in order of preference, the number of candidates that is equal to the number of seats to which the party is entitled, beginning with the first candidate on the list and ending with the lowest-ranking candidate.<sup>80</sup>

#### **(e) Uncontested elections and no party applications**

In instances where only one party has submitted a list to contest the election, an election according to PR must not be held for the metro or local council. The number of seats to which the party is entitled is the total number of seats on the council that are to be filled by proportional representation. The chief electoral officer must select

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<sup>77</sup> See the Structures Act Sch 1 Item 13(1)–(5).

<sup>78</sup> See the Structures Act Sch 1 Item 13(2)(a)–(b).

<sup>79</sup> See the Structures Act Sch 1 Item 13(3)(a)–(b).

<sup>80</sup> See the Structures Act Sch 1 Item 13(5). According to the definitions set out in Sch 1 Item 1, the chief electoral officer is defined to mean the chief electoral officer appointed in terms of the Electoral Commission Act 51 of 1996 s 12(1), and it includes a person designated by the chief electoral officer for the purposes of the Structures Act Sch 1.

the number of candidates from the party's list, in order of preference.<sup>81</sup> If no party has submitted a list, a by-election must be held within 90 days of nomination day and the MEC must determine a date of the election after consultation with the IEC.<sup>82</sup>

**(f) Excessive seats and insufficient party lists**

If through the election of ward candidates a party has obtained a number of seats that is equal or greater than the total number of seats in the council to which it is entitled under item 13, that party must not be allocated any seats from its list. Thus no further PR seats are allocated to that party.<sup>83</sup> However, it is important to note that the seats of the elected ward candidates are not affected in such instances.

In circumstances where a party list contains fewer candidates than the party is entitled to, the chief electoral officer must immediately notify the party in writing of the exact shortfall and request the party to deliver a list supplemented by the name or names of eligible candidates. Immediately upon receipt of the supplemented list, the Electoral Commission must allocate the number of representatives, in the order of preference on the list, to which the party is entitled. If the party that has supplied an insufficient list has ceased to exist, the seat or seats must remain unfilled. Similarly, if a party does not deliver a supplemented list, the seat or seats remain unfilled until it delivers the requested list. If an inadequate supplemented list is provided which contains fewer names than the number of seats to be filled, the unallocated seat or seats remain unfilled to the extent of the shortfall until the party delivers a further list.<sup>84</sup>

In cases where seats are unfilled and such vacancies render a quorum for that municipal council impossible, the party concerned forfeits the unfilled seats, and the unfilled seats must be filled within 14 days in accordance with a new quota of votes for seats.<sup>85</sup> In the sub-items it is stated that if a party forfeits seats, a new quota of votes for a seat must be determined in accordance with the following formula:

$$\frac{A - B}{C - (D + 1)} + E$$

<sup>81</sup> See the Structures Act Sch 1 Item 14.

<sup>82</sup> See Sch 1 Item 15 as amended by Act 27 of 2000 s 93.

<sup>83</sup> Refer to the example discussed above. See also the Structures Act Sch 1 Item 16.

<sup>84</sup> See the Structures Act Sch 1 Item 17(1)–(3).

<sup>85</sup> See the Structures Act Sch 1 Item 17(4)–(10).

A represents the total number of valid votes cast for all parties, including PR votes and votes cast for ward candidates representing parties. B represents the total number of valid votes cast for the party that has forfeited seats, including also both PR and ward candidate votes for that party. C represents the number of seats in the council, D represents the number of seats awarded to the forfeiting party and E represents the number of independent ward councillors elected in the election.

By using the fictitious example discussed above, one can see more clearly how the new formula operates. In the example, party A has obtained 2000 votes, party B 5000 votes and party C 6000 votes of the total number of valid votes, namely 13 000 votes. If party A, for example, has forfeited certain unfilled seats, the new quota of votes for a seat will be as follows:

$$\begin{aligned}
 & \frac{A (13\ 000) - B (2\ 000)}{C (20) - (D (3) + E (0))} + 1 \\
 &= \frac{11\ 000}{17} + 1 \\
 &= \frac{648.05}{1} \text{ is thus the new quota of votes for seats.}^{86}
 \end{aligned}$$

After the new quota of votes has been determined, the total number of valid votes cast for each party<sup>87</sup> *excluding* the party that has forfeited seats, must be divided by the quota. The result is then the total number of seats to which each party is entitled.<sup>88</sup> Any surplus not absorbed by the seats awarded must compete with similar surpluses of other parties, and any undistributed seat or seats must be awarded to the party or parties in sequence of the highest surplus. If the surplus for two or more parties is equal, the seat must be awarded to the party receiving the highest number of valid votes. If a ward candidate representing a party is elected unopposed, for the purposes of factors A and B and sub-item (5) a vote cast by a voter for that candi-

<sup>86</sup> Note that fractions are to be disregarded at this stage.

<sup>87</sup> Both ward and PR votes.

<sup>88</sup> If no party is awarded a seat in terms of this procedure, the votes for each party must be treated as if they are surpluses. See the Structures Act Sch 1 Item 17(8).

date (party) must be counted as two votes. In elections for councils with wards, the chief electoral officer must deduct from the total number of seats to which each party is entitled the number of ward candidates representing such party who were declared elected. In the event that a party is entitled to an additional number of seats and its list of candidates does not contain a sufficient number of candidates, subject to sub-item 17(1) the party must forfeit the unfilled seats and the process must be repeated until all seats have been filled or until all listed candidates have been allocated to a vacant seat.<sup>89</sup>

### **(g) The filling of vacancies**

If a councillor elected from a party list ceases to hold office and a vacancy thus occurs, subject to item 20 of Schedule 1 the chief electoral officer must declare in writing the person whose name is at the top of the applicable party list to be elected in the vacancy. Whenever a councillor ceases to hold office, the municipal manager concerned must inform the chief electoral officer of such an occurrence within seven days after the councillor has ceased to hold office.<sup>90</sup> Where a party's list has become exhausted, item 17 applies to the supplementation of the list, and if the party fails to supplement its list, or if the party has ceased to exist, the vacancy must remain unfilled.<sup>91</sup> According to item 19 of Schedule 1, there are various ways in which a vacancy on party lists can be caused. Accordingly, a person who is a candidate on a party list ceases to be a candidate and a vacancy arises in the list when the party withdraws the person's name by written notice to the chief electoral officer. A candidate also ceases to be a candidate when that person:<sup>92</sup>

- assumes office as a councillor
- resigns from the list by written notice to the chief electoral officer
- becomes ineligible to be a candidate
- is disqualified or removed from the list in terms of any legislation
- ceases to be a member of the party for which that person was listed as a party candidate
- ceases to be an ordinarily resident in the municipality to which the list relates.

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<sup>89</sup> See the Structures Act Sch 1 Items 17(5)–(10).

<sup>90</sup> Originally the law determined that a candidate who crosses the floor from one party to another will lose his or her seat on the council. During 2002 national government enacted constitutional amendments in order to allow party representatives to cross the floor to another party without losing their seats. See the Constitution Sch 6B as amended.

<sup>91</sup> Refer to the Structures Act Sch 1 Item 18.

<sup>92</sup> See the Structures Act Sch 1 Item 19(a)–(f).



Lastly, a party may supplement, change or increase its list at any time, provided that if a councillor elected according to a party list ceases to hold office, the party may supplement, change or increase its list by not later than 21 days after the councillor has ceased to hold office. The vacancy must then be filled within 14 days after the expiry of the 21 day period. When a party has supplemented, changed or increased its list, it must provide the chief electoral officer with an amended list. Although the Act does not prescribe a timeframe for providing the new list, it is submitted that this must be done expeditiously.<sup>93</sup>

#### **12.3.3.2 The election and appointment of district councils**

Because of their nature, district councils are elected differently from metro and local councils. In this regard, the Municipal Structures Act provides for a special election procedure.<sup>94</sup> Section 23 determines that the council of a district municipality consists of:

- councillors elected in accordance with Part 1 of Schedule 2 of the Structures Act by voters registered on that municipality's segment of the national common voters' role to proportionally represent the parties that contested the election in that district municipality
- councillors appointed in accordance with Schedule 2 by the councils of the respective local municipalities within that district municipality to directly represent those local municipalities
- if the district municipality has a district management area, councillors elected in accordance with Part 1 of Schedule 2 by voters registered on that district municipality's segment of the national common voters roll in that area to proportionally represent the parties that contested the election in that area.<sup>95</sup>

The number of councillors representing local municipalities and district management areas in a district council must be (a) equal to 60% of the number of total councillors determined for that municipality in terms of section 20 of the Act before any increase in terms of section 20(5) plus the increase and (b) allocated to the respective local councils and district management areas in accordance with Part 2 of Schedule 2. The number of proportionally elected councillors referred to in section 23(1)(a) is then determined by subtracting the number determined in terms of subsection (2)(a)

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<sup>93</sup> See the Structures Act Sch 1 Item 20.

<sup>94</sup> See the Structures Act s 23 and Sch 2.

<sup>95</sup> See the Structures Act s 23(1)(a)–(c).

from the number of councillors determined for that municipality in terms of section 20 or any increase in terms of section 20(5) of the Act.<sup>96</sup> A local council is further obligated to appoint its representatives to the district council within 14 days after the result of the election of the local council has been declared.<sup>97</sup>

Within the new structure of local government, Schedule 2 of the Structures Act now specifically deals with the electoral system for district councils. The schedule is divided into two parts. Part 1 deals with proportional elections,<sup>98</sup> while Part 2 deals with the allocation and election of representatives of local councils and district management areas to district councils. Both parts are discussed briefly below.

### **(a) Proportional elections in district councils**

Councillors of a district council that must be elected in terms of section 23 must be elected as follows: (a) a number of councillors determined for the municipality in terms of section 23(3) must be elected from the party lists to proportionally represent parties in the council and (b) a number of councillors allocated in terms of section 23(2)(b) to any district management areas in the municipality must be elected from party lists to proportionally represent parties in those areas.<sup>99</sup> In an election for a district council each voter registered in the area of a local municipality within the district municipality has one vote and may vote for one party only. Each voter registered in a district management area within a district municipality has two votes and may vote for: (i) not more than one party that submitted a list for the district council and (ii) not more than one party that submitted a list for the district management area. Only parties may submit a list of candidates.<sup>100</sup> Similar to the election of metro and local councils, the number of candidates on a party's list may not exceed double the number of seats in the district council. Candidate's names must appear on the list in order of party preference, and all parties must seek to ensure that 50% of can-

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<sup>96</sup> See the Structures Act s 23(3).

<sup>97</sup> See the Act s 23(4) and Sch 2 Part 2.

<sup>98</sup> It should be noted that the reference to election in this regard means an election called in terms of s 24 and, where appropriate, also a by-election called in terms of the Structures Act s 25. Read also the Structures Act Sch 2 Item 1.

<sup>99</sup> See the Structures Act Sch 2 Item 2.

<sup>100</sup> See Sch 2 Items 3 and 4 as amended. A party that has gained representation in a municipality as a result of the provisions of the Constitution Sch 6B Item 2, 3 or 7 may submit a list of candidates within seven days after the expiry of the period referred to in the Constitution Sch 6B Item 4(1)(a)(i) or (ii). Item 4 was amended by the Constitution Tenth Amendment Act of 2003 s 9.

didates are women and that women and men are evenly distributed through the list.<sup>101</sup>

The quota of votes for a seat in a district council or for a seat in a district council as a representative of a district management area must be determined in accordance with the following formula. Fractions are initially to be disregarded.<sup>102</sup>

$$\frac{A}{B} + 1$$

A represents the total number of valid votes cast for all parties, B represents either (1) the number of seats in the district council allocated in terms of section 23(1)(a) or (2) the number of seats allocated to a district management area in the district council, as the case may be.<sup>103</sup> Seats are then allocated as follows: The total number of valid votes must be divided by the quota for a seat. The result is then the total number of seats to which each party is entitled. The process is similar to the allocation of PR seats in metro or local councils set out in Schedule 1 of the Act.<sup>104</sup>

If only one party has submitted a list, an election *must not* be held for the district council or district management area. The number of seats to which the party is entitled is the total number of seats on the council that are to be filled by the election concerned.<sup>105</sup> If no party has submitted a list, a by-election must be held within 90 days of nomination day and the MEC must determine the date of the election after consultation with the Independent Electoral Commission.<sup>106</sup> Items 10-13 deal with

<sup>101</sup> Read the Structures Act Sch 2 Item 5.

<sup>102</sup> See the Structures Act Sch 2 Item 6.

<sup>103</sup> *Ibid* Sch 2 Item 6.

<sup>104</sup> If the calculation of seats yields a surplus not absorbed by the seats awarded to a party, that surplus must then compete with similar surpluses, and any undistributed seat(s) must be awarded to the party(s) concerned in sequence of the highest surplus. In instances where the surplus for two or more parties is equal, the seat must be awarded to the party that obtained the highest number of valid votes. If no party is awarded a seat, the votes for each party must be treated as if they are surpluses. Finally, the chief electoral officer must determine which party candidates are elected. This is done by selecting from the party's list the number of candidates that is equal to the number of seats to which the party is entitled. According to the Structures Act Sch 2 Item 1, the chief electoral officer means the officer appointed in terms of the Electoral Commission Act 51 of 1996 s 12(1). This definition includes a person designated by the chief electoral officer.

<sup>105</sup> See the Structures Act Sch 2 Item 8. The chief electoral officer must again determine which party candidates are elected.

<sup>106</sup> See Act 27 of 2000 Item 9 and s 93. S 25 of the Act dealing with by-elections applies to this item, to the extent that s 25 can be applied. According to the definitions set out in Sch 2 Item 1, the term "nomination day" means the day determined in terms of the Electoral Act for the announcement of the nominated candidates and parties for an election.

insufficient party lists, the filling of vacancies, causes of vacancies on lists and the filling of vacancies and changing the order. The provisions in these items are again very similar to the position in metro and local council elections, as was discussed above.<sup>107</sup>

**(b) The allocation and election of representatives of local councils and district management areas to district councils**

According to section 23(2), members of a district council must be (a) appointed by the councils of the local municipalities in the area of the district council from among the members of such local councils and (b) if there is a district management area, must be elected in terms of Part 1 of Schedule 2 of the Structures Act to represent that area on the district council.<sup>108</sup> The quota of registered voters that a local council or district management area must have to be entitled to a seat on the district council must be determined in terms of the following formula:<sup>109</sup>

$$\frac{A}{B} + 1$$

A represents the total number of voters registered on the district council's segment of the national common voters' roll, and B represents the number of seats on district council determined in terms of section 23(2)(a) for representatives of local councils and district management, but disregarding any increase in terms of section 20(5). Each local municipality and each district management area is entitled to a number of seats on the district council determined by dividing the total number of voters registered on the segment of the national common voters role for the local municipality or district management area by the quota of votes for a seat on the district council determined in terms of subitem 15(1) of Schedule 2. If the calculation to determine a seat on the district council gives a figure that is a fraction of the figure 1, for example 0, 78, the local council or district management area must be awarded one seat and must not participate in any further calculation or award. If the mentioned calculation yields a surplus, for example 5.32, that surplus must compete with similar surpluses of other local councils or district management areas, and any seat or seats not

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<sup>107</sup> See the Structures Act Sch 2 Items 10–13.  
<sup>108</sup> See the Structures Act Sch 2 Item 14.  
<sup>109</sup> Again, fractions are disregarded at first.

awarded in terms of subitem 15(2) or (3) must be awarded in sequence of the highest surplus.<sup>110</sup>

It was mentioned above that some members of a district council must be appointed by the councils of local council in the area of the district council. Each local council must thus elect the allowed number of representatives to the district council. The chief electoral officer must manage the election of such representatives of a local council to the district council. If a local council has been awarded one seat, the process will be as follows: any councillor may nominate a candidate and each councillor has one vote for his/her candidate of choice. The candidate who receives the most votes is elected.<sup>111</sup> However, if a council has been awarded more than one seat, the council must elect that number of members according to a system of proportional representation.<sup>112</sup> The procedure to elect such members proportionally can be summarised as follows:

- Every party or independent ward councillor may submit a candidate's list containing the names of (nominated) councillors, accompanied by a written acceptance by each listed candidate. A party or independent ward councillor may not submit more than one list. The lists must show the candidate's names in order of preference. A councillor's name may appear on only one list. All parties or independent ward councillors must seek to ensure that 50% of the candidates are women and that men and women candidates are evenly distributed through the list.<sup>113</sup>
- Each member of the local council may cast one vote for one list only.
- In a local council, the quota of votes for a seat to the district council must be determined in terms of the following formula:<sup>114</sup>

$$\frac{A}{B} + 1$$

<sup>110</sup> See the Structures Act Sch 2 Item 15(1)–(4).

<sup>111</sup> In practice this means that although one party has an overwhelming majority in a local council, it is possible for a minority party's nominated councillor to be elected to represent the local council on the district council. Because there is only one seat available, there is no proportional representation possible. Refer to the Structures Act Item 16(2)(a)–(c).

<sup>112</sup> See the Structures Act Sch 2 Item 16(3).

<sup>113</sup> See the Structures Act Sch 2 Item 17(1)–(5). An independent ward councillor means a councillor who was not nominated by a party as a candidate in a ward election. See the Act Sch 2 Item 1.

<sup>114</sup> The Structures Act Sch 2 Item 19.

A represents the number of members of the local council and B the number of seats that the local council has been awarded on the district council in accordance with item 15.

- The number of votes cast in favour of each list must then be divided by the quota of votes for a seat, and the result is the number of seats allocated to that list. If the calculation gives a surplus, that surplus must compete with other surpluses of any other lists, and seats not allocated must be awarded in sequence of the highest surplus.<sup>115</sup>
- After seats have been allocated, the chief electoral officer, in terms of the order of preference on a list, must select the number of candidates from the list that is equal to the number of seats allocated to that list.<sup>116</sup>

It should be noted that the members that are representing a district management area are elected differently. The councillors that are representing a district management area must be elected in terms of the proportional electoral system set out in Part 1 of Schedule 2 of the Structures Act.<sup>117</sup>

In summary, the following important changes should be noted within the new local government electoral system. First, the new system distinguishes between municipalities that are big enough to have wards and those who don't.<sup>118</sup> In so-called "secondary" cities or towns, cities or towns with more than 7 councillors, each voter will have three votes. Two votes will be for their local council<sup>119</sup> and a third vote will be for the political party that is to represent them proportionally on the relevant district council.<sup>120</sup>

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<sup>115</sup> See the Structures Act Sch 2 Item 20. If the surplus on one list is equal to the surplus on any other list, then the seat or seats must be awarded in sequence of the highest number of votes cast for those lists. See Act 51 of 2002 s 32. Note that according to the election of Municipal office bearers and representatives to district council's regulations published under GN 84 in GG 22088 of 22 January 2001, if at the election of the representatives in terms of item 16 of Sch 2 or item 20(2) of Sch 2, two or more candidates each receive the most votes or the highest surplus for one remaining seat, then the MEC may direct that the result must be determined by lot.

<sup>116</sup> Insufficient lists or the filling of vacancies on lists are determined respectively by the Structures Act Sch 2 Part 1 Items 10 and 11, to the extent that such item can be applied. Refer also to the Act Sch 2 Part 2 Items 22 and 23.

<sup>117</sup> Refer to the Structures Act Sch 2 Item 24.

<sup>118</sup> According to the Structures Act, only those councils entitled to more than seven councillors/seats are entitled to have wards. This requirement will always include metro councils; councils must thus always have more than seven members.

<sup>119</sup> One vote for ward councillors and one vote for their political party of choice which represents the proportional representative system.

<sup>120</sup> Note again that in all areas outside metropolitan areas there must be both category B and C municipalities, thus a combination of both local councils and district councils. In essence, the new system entails two elections at the same time in areas outside metropolitan areas. Voters will cast

*continued on next page*

In those municipalities too small to have wards, each voter will have two votes. One vote is for the political party of their choice to represent them on the relevant local council and one vote is for the political party to represent them on the district council. This electoral system is similar in metro councils, although the voter is exercising only his/her vote for one municipal council. Each voter has two votes. One vote is for a ward councillor of choice and one vote is for the political party of choice to represent them proportionally on the metro council.<sup>121</sup> However, district councils are elected differently. 40% of the members of a district council must be elected directly in terms of a proportional system by all voters living in the district council area (thus within the local councils which fall within jurisdiction of district councils). The other 60% of seats are allocated to councillors appointed by local councils or district management areas, where applicable. Although the Constitution aims to ensure that every area falls under a primary local government structure,<sup>122</sup> some areas are not viable to sustain and justify a local municipality. Such areas are then designated as district management areas.<sup>123</sup> In district management areas voters have two votes. Both votes are for political parties of their choice. One vote is for the political party to represent the district management area on the relevant district council, while the other vote is for the political party to control or form the district council itself.<sup>124</sup>

#### **12.4 Membership of municipal councils and the qualifications of councillors**

The final Constitution specifically sets certain requirements regarding the membership of all municipal councils. Membership requirements are set to ensure accountability and responsiveness and to prevent councillors from having various conflicts of interests. In order to ensure the membership of municipal councils is controlled, the Constitution requires the following:<sup>125</sup>

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their votes for two municipalities in which they have a stake. See also LGIS no 2 'Elections' (1999) at 8.

<sup>121</sup> The new system requires such votes to be distributed 50/50 between ward representatives and proportional representatives.

<sup>122</sup> See the Constitution s 151(1), which requires that municipalities be established for the whole of the territory of the Republic of South Africa.

<sup>123</sup> Refer to the Structures Act ss 1 and 6.

<sup>124</sup> This second vote was included in the new electoral system for local government to protect those voters who don't have a primary local government structure in their area by affording them their own direct representative choices on the relevant district council rather than only one proportional vote which then goes into the pot with all other proportional votes from the other local councils and thus dilutes their interests severely.

<sup>125</sup> See the Constitution s 158(1)-(2).



- (1) Every citizen who is qualified to vote for a Municipal Council is eligible to be a member of that Council, except
  - (a) anyone who is appointed by, or is in the service of, the municipality and receives remuneration for that appointment or service, and who has not been exempted from this disqualification in terms of national legislation;
  - (b) anyone who is appointed by, or is in the service of, the state in another sphere, and receives remuneration for that appointment or service, and who has been disqualified from membership of a Municipal Council in terms of national legislation;
  - (c) anyone who is disqualified from voting for the National Assembly or is disqualified in terms of section 47(1)(c), (d) or (e) from being a member of the Assembly;
  - (d) a member of the National Assembly, a delegate to the National Council of Provinces or a member of a provincial legislature; but this disqualification does not apply to a member of a Municipal Council representing local government in the National Council; or
  - (e) a member of another Municipal Council; but this disqualification does not apply to a member of a Municipal Council representing that Council in another Municipal Council of a different category.
- (2) A person who is not eligible to be a member of a Municipal Council in terms of subsection (1)(a), (b),(d) or (e) may be a candidate for the Council, subject to any limits or conditions established by national legislation.

From the wording of section 158 it is clear that only a citizen who is qualified to vote for a municipal council can be a member of that council. Non-citizens and people not qualified to vote in municipal elections cannot be councillors of municipalities.<sup>126</sup>

Apart from the general requirements of citizenship and qualifications to vote, section 158 identifies 5 different categories of people who are disqualified from being members of a municipal council. People who fall into these categories of disqualification are described below:

- Anyone who is appointed by or in the service of a municipality and receives remuneration for that appointment or service may not be a member of that council. The

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<sup>126</sup> Citizenship and the general qualifications to be able to vote were explained earlier in this ch. Both the Constitution and other national legislation have specific requirements that must be met  
*continued on next page*

Constitution is unfortunately not very clear on the aspects of appointment or service. It is uncertain if appointment also includes part-time or sub-contractual appointments. It is submitted, however, that if there is a formal appointment or service agreement of whatever nature, together with the payment of remuneration, that person will be disqualified from being a member of that council. The main objective of this requirement is to prevent a conflict between people's official responsibilities and their private interests.<sup>127</sup> It is important to note that the Constitution allows for people to be exempted from this disqualification in terms of national legislation. In this regard, section 21 of the Structures Act states that:

- (a) Every citizen who is qualified to vote for a particular Municipal Council has the right:
    - (i) to stand as a candidate in an election for that council, except if disqualified in terms of section 158(1)(c) of the Constitution and
    - (ii) if elected, to become and remain a councillor, except a person disqualified in terms of section 158(1)(a), (c), (d) or (e) of the Constitution.
  - (b) The MEC for local government in the province may except a person from a disqualification mentioned in section 158(1)(a) by notice in the Provincial Gazette only when there is no substantial conflict of interest or any irreconcilable conflict between the duties of the person in his/her capacity as described in section 158(1)(a) and the person's mandate or duties as a member of the Municipal Council. If a person is designated as a full-time councillor in terms of section 18(4) of the Structures Act, however, then the exemption lapses.<sup>128</sup> It is clear that an objective determination of all the relevant circumstances is to be made. Each case will have to be considered according to its own set of facts.
- Anyone who meets the requirements of Section 158(1)(b) of the Constitution. This section contains two requirements that must exist before a person is disqualified from voting for a municipal council. Firstly, the person must be appointed to or in the service of the state in either the national sphere or provincial spheres of government and must receive remuneration for such appointment or services. Sec

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before a person is qualified to vote in municipal or other elections. See the Constitution ss 19 and 46 and the Electoral Act.

<sup>127</sup> The position is similar on national and provincial spheres. See the Constitution ss 96 and 136.

<sup>128</sup> See the Structures Act as amended by Act 51 of 2002 s 21(2).

only, such person must be disqualified from membership of a municipal council in terms of national legislation. A good example of such a disqualification was recorded in the case of *Van Dyk v Maithufi NO en Andere*.<sup>129</sup> The applicant in the case was a member of the South African Police Service (SAPS). In the municipal elections held in December 2000 the applicant was a candidate for a political party, participated in the usual campaign activities and was subsequently elected to the applicable municipal council. The SAPS however contended that the applicant had contravened section 46(1)(a) of the South African Police Services Act,<sup>130</sup> which stated that no member shall express support for or associate him/herself with a political party. The applicant was charged before a disciplinary proceeding, found guilty of contravening section 46(1)(a) and was dismissed. On review, the court held that the wording of the Police Services Act was unambiguous and that members of the SAPS could not openly show support for a political party. The SAPS could not condone conduct in contravention of such a legal provision and its subsequent action against the applicant did not amount to an unfair labour practice. The application was thus dismissed.<sup>131</sup>

- Anyone who is disqualified to vote for the National Assembly or who is disqualified in terms of section 47(1)(c), (d) or (e) and therefore may not be a member of a municipal council. In this regard the Constitution determines the following:<sup>132</sup>

- (1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except
  - (a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than
    - (i) the President, Deputy President, Ministers and Deputy Ministers; and
    - (ii) other office-bearers whose functions are compatible with the functions of a member of the Assembly, and have been declared compatible with those functions by national legislation;
  - (b) permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council;
  - (c) unrehabilitated insolvents;
  - (d) anyone declared to be of unsound mind by a court of the Republic; or

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<sup>129</sup> 2004 (1) SA 441 (T).

<sup>130</sup> 68 of 1995.

<sup>131</sup> See pages 448-450.

(e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

(2) A person who is not eligible to be a member of the National Assembly in terms of subsection (1)(a) or (b) may be a candidate for the Assembly, subject to any limits or conditions established by national legislation.

(3) A person loses membership of the National Assembly if that person

(a) ceases to be eligible; or

(b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership.

(4) Vacancies in the National Assembly must be filled in terms of national legislation.

- A member of the NA or a delegate to NCoP or a member of a provincial legislature.
- Lastly, a member of another municipal council. However, this disqualification obviously does not apply to a member of a municipal council that is representing that council in another council of a different category.<sup>133</sup>

In comparison with the old electoral requirements for local government representatives, one can conclude that the new system is stricter and more extensively regulated. Qualifications of public representatives are regarded as such an important element of an effective local governance that even the highest law of the state is involved in ensuring significant standards. The maintenance of these requirements should ultimately result in an effective and accountable local government dispensation.

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<sup>132</sup> Refer to the Constitution s 47.

<sup>133</sup> This refers specifically to members of local councils that are representing such councils on the district council of that area.

## 12.5 The terms of municipal councils and councillors

### 12.5.1 *Terms of municipal councils*

According to the Constitution, the term of a municipal council may not be more than five years. This aspect must be determined by national legislation.<sup>134</sup> In compliance with the constitutional directive that national legislation should determine the exact term of a municipal council, the Structures Act determines that the term of municipal councils is five years.<sup>135</sup> The Structures Act also determines that, whenever it is necessary and after consulting the EC, the minister responsible for local government must by notice in the *Government Gazette* call and set a date for an election of all municipal councils, which election must be held within 90 days of the date of the expiry of the current term of such municipal councils.<sup>136</sup>

The Constitution also confirms the fact that municipal councils can be dissolved even before their terms have been completed. If a municipal council is dissolved, which subsequently must be done in terms of national legislation, or when its term normally expires, an election must be held within 90 days of the date that council was dissolved or its term expired.<sup>137</sup> In furtherance of these provisions, the Struc-

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<sup>134</sup> See the Constitution s 159(1) as substituted by Act 65 of 1998 s 1. See also *Executive Council, Western Cape v Minister of Provincial Affairs* 2000 (1) SA 661 (CC), where the Constitutional Court held that the Constitution s 159(1) made it clear that all municipal councils would have a uniform term of office, subject to a maximum of five years. It required national legislation to determine such term of office by using the expression "as determined by legislation". The term so established was subject to the prescribed maximum of five years. S 159(2) required that a municipal election be held within 90 days of the date that the previous council was dissolved or its term expired. The term of office of an elected legislative body such as a municipal council was a crucial aspect of the functioning of that council. The court further concluded that s 159(1) did not permit the determination of the term of municipal councils to be delegated by parliament; parliament had to determine the term itself. All that was required was for parliament to fix a term which would apply to all councils. The delegation of such a determination was impermissible. See para 126 at 711. The Constitution states that: (1) The term of a Municipal Council may be no more than five years, as determined by national legislation. (2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired. (3) A Municipal Council other than a Council that has been dissolved following an intervention in terms of s 139 remains competent to function from the time it is dissolved or its term expires until the newly elected Council has been declared elected. S 159 substituted by Act 65 of 1998 s 1. The position regarding the term of municipal councils is somewhat different from the two higher legislative spheres of government. Both the terms of the national parliament and provincial legislatures are normally set at a specific term of five years. See ss 49(1) and 108(1) of the Constitution. The terms of municipal councils are not specifically set at five years and can be less than five years. All that the Constitution requires is that the term of municipal council be not more than five years. They may be five years or less.

<sup>135</sup> This term is calculated from the day following the date set for the previous election of all municipal councils. See the Structures Act s 24(1) as substituted by Act 58 of 1999 s 5.

<sup>136</sup> Note that such notice may be published either before or after the term of municipal council has expired. See the Structures Act s 24(2) as amended by the LG: Municipal Electoral Act 27 of 2000 s 93.

<sup>137</sup> See the Constitution s 159(2).

tures Act determines that a municipal council may dissolve itself at a meeting called by the council specifically for such purpose. A resolution to dissolve must be adopted by the council with a supporting vote of at least two thirds of the councillors.<sup>138</sup> It is also determined that a municipal council may dissolve itself only when two years have passed since the council was last elected.<sup>139</sup>

A municipal council may also be dissolved by the MEC for local government in a province by notice in the *Provincial Gazette* if: (a) the Electoral Commission in terms of section 23(2)(a) of the Demarcation Act is of the view that a boundary determination affects the representation of voters in that council and the remaining part of the existing term of the council is more than one year or (b) an intervention in terms of section 139 of the Constitution has not resulted in the council's being able to fulfil its obligations in terms of legislation. The MEC may dissolve a council mentioned above only with the concurrence of the minister of local government and after notice of that dissolution has been tabled in the National Council of Provinces (NCoP) which has subsequently approved such a dissolution.<sup>140</sup> When a municipal council is dissolved or does not have enough members to form a quorum for a meeting, the MEC for local government in the province *must* appoint one or more administrators to ensure the continued functioning of that municipality until a new council is elected or until there is sufficient members to form a quorum. When the MEC appoints one or more administrators, he/she must determine the functions and powers of the administrator(s) by notice in the *Provincial Gazette*.<sup>141</sup> When a municipal council other than a council that has been dissolved following an intervention in terms of section 139 has been dissolved, the council remains competent to function from the time it has dissolved or its term has expired until such time as a newly elected council has been declared elected.<sup>142</sup>

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<sup>138</sup> See the Structures Act s 34. The two-thirds majority mentioned above is called a special majority, and refers to two-thirds of all the councillors of a council. If a council has 150 councillors, for example, at least 100 + 1 councillors (two-thirds of 150) must vote in favour of the resolution.

<sup>139</sup> See the Structures Act s 34(2). The position is relatively the same regarding the national or provincial legislatures, although a three-year period is prescribed by the Constitution. See the Constitution ss 50(1)(b) and 109(1)(b).

<sup>140</sup> See the Structures Act s 34(3)-(4).

<sup>141</sup> Refer to the caretaker provisions set out in the Structures Act s 35.

<sup>142</sup> See the Constitution s 159(3). This provision has been included to ensure that a municipal area is not without a decision-making body after the expiry of its term or decision to dissolve. In instances where a dissolution followed a s 139 intervention, the appointed administrator(s) should have enough powers to take decisions for that municipal jurisdiction.

### **12.5.2 The term of office of councillors and the vacation of office by a councillor**

The Constitution does not directly address the term of office of councillors, and it is left to the Structures Act to regulate such issues.<sup>143</sup>

#### **12.5.2.1 The term of office of councillors**

Section 26 of the Structures Act states that a person is elected as a member of a municipal council for a period ending when the next council is declared elected or when a person is appointed as a representative of a local council to a district council for a period ending when the next local council is declared elected.<sup>144</sup> However, there is an exception to this position. Where a person is replaced as a result of the provisions of item 6(a) of Schedule 6B to the Constitution, the newly appointed representative is appointed for the remainder of the replaced representative's term.<sup>145</sup> It is further stated that a person assumes office or starts his or her term of office as a councillor of a municipal council when he or she has been declared elected or appointed as such.<sup>146</sup>

#### **12.5.2.2 Vacation of office by municipal councillors**

Similar to the position on the national or provincial spheres, members of municipal councils may also vacate their office as councillors through various means. In this regard the Structures Act determines the following:<sup>147</sup>

A councillor vacates his or her office during a term of office if that councillor:

- resigns in writing

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<sup>143</sup> It must be pointed out that although the Constitution in respect of reform issues does not directly require national or provincial legislation to be enacted in order to regulate certain local government matters, the Constitution still covers regulation in terms of national or provincial legislation. This over-arching authority is provided in the Constitution s 164, which states that any matter concerning local government not dealt with in the Constitution may be prescribed by national or by provincial legislation. If provincial legislation deals with such matters, it may only do so within the framework of national legislation.

<sup>144</sup> See the Structures Act s 26(1)(a)-(b). Because a municipal council can dissolve before its normal term has expired, it is not possible to determine an exact term of office of municipal councillors. One can safely say, however, that the term of office may not be more than 5 years and 90 days. This is so because the Constitution requires that the term of a municipal council may not be more than 5 years and that when its term has expired an election must be held within 90 days of the date that the council was dissolved or its term has expired. As soon as the new council is elected, the term of office of the councillors of the previous council would have come to an end. See the Constitution s 159. The term of a municipal council and the term of office of municipal councillors are thus closely related.

<sup>145</sup> Refer to the Structures Act s 26(1)(b) as amended.

<sup>146</sup> See the Structures Act s 26(2).

<sup>147</sup> See the Structures Act s 27.



- is no longer qualified to be a councillor<sup>148</sup>
- contravenes a provision of the Code of Conduct for councillors set out in Schedule 1 of the LG: Municipal Systems Act, 2000 and is removed from office in terms of such code<sup>149</sup>
- is a representative of a local council in a district council and ceases to be a member of that local council which appointed him/her to the district council or if he/she is replaced by the local council as its representative in the district council.

Originally the Structures Act also required a councillor to vacate his or her office during a term when the councillor was elected from a party list and then ceased to be a member of that party or when he/she was elected to represent a ward and was nominated by a party as a candidate but after the election ceased to be a member of that party. The position was similar in cases where an independent ward councillor was elected and thereafter became a member of a political party. This position was altered substantially by Schedules 6A and 6B of the Constitution, however, and was subsequently repealed. Councillors are now constitutionally permitted to cross the floor to another party or for an independent councillor to join a political party, but specific requirements exist that must be adhered to before a councillor can legally change party affiliations.<sup>150</sup>

## 12.6 Municipal by-elections

Many of the requirements mentioned above are applicable to not only regular municipal elections, but also to by-elections.<sup>151</sup> Under the new legislative framework, a by-election must be held in the following instances:

- if the Electoral Commission does not declare the result of the election of a municipal council or the results of an election in a district management area or a ward within the time period as is specified in terms of the Electoral Commission Act<sup>152</sup>

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<sup>148</sup> In this regard the various legislative requirements regarding the competency of people to be municipal councillors come into play. It must be pointed out that the requirements to be a municipal councillor apply not only when councillors are to stand for election as either ward or proportional representative councillors, but for their whole term in office. If a councillor thus does not qualify in terms of the qualification requirements to be a councillor, he/she should vacate his/her office. See the Structures Act ss 27(b) and 21 read together with the Constitution s 158.

<sup>149</sup> The referred Code of Conduct is discussed elsewhere. See also Act 32 of 2000 s 121.

<sup>150</sup> Although the Structures Act does not use the word "must" vacate office on the above grounds, it is submitted that the intention of the legislator was indeed obligatory and that a councillor that is failing on or not complying with one or more of the mentioned grounds must vacate his/her office and does not have a choice in this regard.

<sup>151</sup> According to the Structures Act, a by-election refers to an election that is held between the regular elections called in terms of the Act s 24. See s 1 definitions.

<sup>152</sup> 51 of 1996.

- if a court sets aside the election of a council or an election in a district management area or a ward
- if a council is dissolved or
- if a vacancy in a ward occurs.<sup>153</sup>

If the election in a specific ward is the reason for the Electoral Commission's not declaring the result of a metro or local council, then a by-election must be held in that ward. The municipal manager of the municipality concerned must call and set a date for the by-election. The specific date of the by-election is determined after the municipal manager has consulted the Electoral Commission. Notice of the date of the by-election must be published in a local newspaper that is widely read in that jurisdiction. It is also required that the by-election be held within a 90-day period calculated of the date of the voting day of the previous election or when the election was set aside by the court, or from the date on which the vacancy occurred.<sup>154</sup>

It is of importance to note that the term of a municipal council is not interrupted by a by-election. Even if a council dissolves and a new council is elected, such new council will serve only until the next scheduled elections for all municipal councils.<sup>155</sup> Furthermore, it is prohibited for a municipal manager to call a by-election if the next election of all municipal councils must be held within nine calendar months calculated from the applicable date which necessitated a by-election, or within six calendar months if it is a by-election in a ward. The MEC may also decide that a by-election must stand over until the next election of all municipal councils.<sup>156</sup> In the last instance, it is also determined that a by-election in a ward does not affect the representation of parties by councillors elected from party lists. It was discussed above that both votes for candidates of wards that represent a political party as well as direct party/proportional representative votes are taken into account to determine a

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<sup>153</sup> Vacancies can occur for many reasons. A councillor can, eg, resign, be removed from office or die. For more details on instances where vacancies can occur, see the Structures Act s 27.

<sup>154</sup> See the Structures Act s 25(2) and (3). If the municipal manager does not call and set a date for the by-election within 14 days of the applicable date, then the MEC, after consultation with the EC, must by notice in the *Provincial Gazette* call and set a date for the by-election. Again the by-election must be held within 90 days of the applicable date. See the Act s 25(4).

<sup>155</sup> See the Structures Act s 25(5).

<sup>156</sup> Refer to the Structures Act s 26(6)(a)-(b). It is not clear on what basis the MEC can decide that a by-election should stand over. Such a decision can cause various practical and political problems. It is thus submitted that the MEC should carefully consider all relevant circumstances and should base his/her decision on legitimate reasons. A decision based on political grounds should not be allowed. Eg, if the MEC is convinced that a particular party will or will not win a by-election, and therefore decides that a by-election should stand over, such a decision should not be permitted.

party's proportional representation on a particular municipal council. In instances of a by-election, the votes cast in such by-election do not affect the proportional representation on the municipal council.<sup>157</sup>

## **12.7 General legislative provisions relevant to the local government electoral process and procedures**

It was explained above that the new local government electoral processes are determined and regulated by various different legislative provisions. In the first instance, the Constitution sets the basic framework within which the election and composition of all municipalities must be conducted. The basic constitutional framework is then expanded upon by mainly the Local Government: Municipal Structures Act. Both the Constitution and the Structures Act establish the new basis for all local government elections. Apart from this new basis, there are, however, many other legislative requirements that have either a direct or indirect impact on local government elections and more specifically the electoral procedures.<sup>158</sup> No investigation of the new local government electoral dispensation can therefore be complete without a brief evaluation of such laws.

### **12.7.1 The provisions of the Electoral Commission Act**

The Electoral Commission Act (ECA) was enacted in 1996. The main purpose of the Act is to make provision for the establishment and composition of an Electoral Commission (EC) which in turn is mandated to manage elections for national, provincial and *local legislative* bodies and referenda.<sup>159</sup> The ECA is also aimed at making provision for the establishment, composition, powers, functions and duties of an Electoral Court. Within the new constitutional legislative framework of South Africa, special provision has been made for various state institutions which have the overall responsibility and task to strengthen constitutional democracy in the Republic. One such institution is the Electoral Commission,<sup>160</sup> which is thus constitutionally entrenched and protected. All the state institutions mentioned in chapter 9 of the Constitution, including the EC, must be independent and are subject only to the

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<sup>157</sup> See the Structures Act s 25(7).

<sup>158</sup> In this respect reference must be made to the Electoral Commission Act 51 of 1996, the Electoral Act 73 of 1998 and also the Local Government: Municipal Electoral Act 27 of 2000. These legislative enactments together with the Constitution and the Structures Act complete the overall legal system in respect of municipal elections and election procedures.

<sup>159</sup> Refer to the Electoral Commission Act long title and s 2. Own emphasis is added to highlight the EC role with regards to municipal elections.

<sup>160</sup> See the Constitution s 181(1)(f).

Constitution and the law. They must all be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

The IEC is established as a legal person with all the powers and privileges associated with such status. At this point the Constitutional Court has confirmed the following:<sup>161</sup>

- The IEC, established pursuant to section 190 in chapter 9 of the Constitution, exercises public powers and performs public functions in terms of the Constitution and is therefore an organ of state as defined in section 239 of the Constitution. It is not part of government, however, in that, as an organ of state, it does not fall within the national sphere of government contemplated by chapter 3 of the Constitution. In the first place, the Commission cannot be said to be a department or administration within the national sphere of government in respect of which the national executive has a duty of co-ordination in accordance with section 85(2) of the Constitution. Secondly, in effect the Constitution describes the Commission as a state institution that strengthens constitutional democracy, and nowhere in chapter 9 is there anything from which an inference may be drawn that it is a part of the national government. The term "state" is broader than "national government" and embraces all spheres of government. Thirdly, under section 181(2) the Commission is independent, subject only to the Constitution and the law. It is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government.
- Furthermore, independence cannot exist in isolation, and it is clear that the chapter intends to make a distinction between the state and government, and the independence of the Commission is intended to refer to independence from the government, whether local, provincial or national. The Commission cannot be independent of the national government yet be part of it, although the Commission must manage the elections of national, provincial and municipal legislative bodies in accordance with national legislation. This legislation cannot compromise the independence of the Commission, however; the Commission is clearly a state structure. The fact that a state structure has to perform its functions in accordance with

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<sup>161</sup> See *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC).

national legislation does not mean that it falls within the national sphere of government.

- The very reason the Constitution created the Commission – and the other chapter 9 bodies – was that they should be and manifestly be seen to be outside government. The Commission is not an organ of state within the national sphere of government. The dispute between a local authority and the Commission concerning voting stations cannot therefore be classified as an intergovernmental dispute. There might be good reason for organs of state not being able to litigate against the Commission except as a last resort. However, an organ of state suing the Commission does not have to comply with section 41(3) of the Constitution.<sup>162</sup>

Other organs of state must assist and protect the institutions so as to ensure their independence, impartiality, dignity and effectiveness. No person or organ of state may interfere with the functioning of such institutions.<sup>163</sup>

In more direct terms, the Constitution, apart from the establishment of the EC, requires that the EC has the following functions:<sup>164</sup>

- the EC must manage elections of national, provincial and *municipal* legislative bodies in accordance with national legislation
- it must ensure that those elections mentioned above are free and fair and
- it must declare the results of those elections within a period that must be prescribed by national legislation. Such a period must be as short as reasonably possible.<sup>165</sup>

In order to ensure that the EC is empowered to fulfil and achieve its powers and functions, the Constitution further confirms that the EC has the additional powers and functions prescribed by national legislation.<sup>166</sup> In compliance with the Constitution,

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<sup>162</sup> Paras 22-31 at 936-940.

<sup>163</sup> Although independent and impartial, the different institutions are accountable to the NA and must report on their activities and the performance of the functions to the NA at least once a year. See the Constitution s 181(2)-(5). The EC is thus finally under the supervision of the national legislative authority.

<sup>164</sup> See the Constitution s 190(1)(a)-(c).

<sup>165</sup> It should be self evident, that the EC has an important role to play in all electoral proceedings in our state, inclusive of electoral processes on the third sphere of government. One should also consider the founding values of the new democratic state of the RSA which *inter alia* protects the values of regular elections, a system of democratic government and accountability and openness. See the Constitution s 1(d). It is submitted that included in such values are the principles of free and fair elections, which indirectly are required by the Constitution s 190(1)(b) and which are very important in all modern democratic governments.

<sup>166</sup> See the Constitution s 190(2). Such additional powers are not as strongly protected, as are the powers and functions set out in the Constitution s 190(1), as they do not form part of the supreme law of the state, but are only normal national legislative enactments.

the ECA thus establishes the EC and further expands on the powers, duties and functions of the EC.<sup>167</sup>

Apart from the establishment/creation of the EC, the Constitution also determines other more general provisions that are also important to the EC. In this regard, it is required that the EC be composed of at least three persons. The exact number as well as the terms of office of the members of the EC must be prescribed by national legislation.<sup>168</sup>

The Constitution further requires the members of the EC to be South African citizens, to be fit and proper persons to hold the particular office and to comply with any other requirements prescribed by national legislation.<sup>169</sup> The composition of the EC should reflect broadly the race and gender composition of South Africa, and members of the EC must be appointed by the president on the recommendation of the National Assembly. The National Assembly must also recommend persons that are nominated by a committee of the Assembly to be appointed as members of the EC. The recommendation of persons to be members of the EC must be approved by the NA by a resolution adopted with a supporting vote of a majority of the members of the Assembly.<sup>170</sup> Members of the EC may also be removed from office. However, the Constitution determines only three grounds for such removal.<sup>171</sup> If a ground or grounds for removal exists, then it is further required that a committee of the NA find that such ground(s) indeed exist, and thereafter the NA needs to adopt a resolution that calls for the person(s) to be removed from office. Again, a majority of the NA must support the request for removal of a member of the EC.<sup>172</sup>

In light of the constitutional foundation, it is clear that the EC has a determining role to play in all elections inclusive of municipal elections. In order to strengthen constitutional democracy and to promote electoral processes, the EC has been estab-

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<sup>167</sup> See the Electoral Commission Act (ECA) ss 3 and 5 respectively.

<sup>168</sup> Again the ECA advances on the Constitution and determines that the EC shall consist of five members that are appointed by the president. See the Constitution s 191 and the ECA s 6 respectively.

<sup>169</sup> In this respect the ECA requires that members of the EC should not have a high party political profile. The ECA s 6(2)(b).

<sup>170</sup> Refer to the Constitution s 193(1)-(5). As the NA consists out of 400 members, an absolute majority of the members would be 200 + 1. At least 201 members must thus support the recommendation of nominees to the EC.

<sup>171</sup> See the Constitution s 194(1)(a)-(c). The grounds are: misconduct, incapacity or incompetence.

<sup>172</sup> Refer to the Constitution s 194(1) and (2). The removal is indeed done by the president and not the NA. However, the president is obligated to remove a person from the EC upon the adoption by the NA of the resolution calling for such removal. See the Constitution s 194(3)(b).



lished as an independent institution subject only to the Constitution and the law.<sup>173</sup> In order to fulfil its constitutional objectives, the EC has been given various additional powers and duties.<sup>174</sup> In order to fulfil its obligations and duties, the EC shall acquire the necessary staff and facilities. One of the five members of the EC must be a judge. In light of recent constitutional jurisprudence the constitutionality of this requirement is somewhat in doubt.<sup>175</sup> The term of office of members of the EC is seven years. Reappointments are allowed, but only for one further term of office.<sup>176</sup> Because the independence and impartiality of members of the EC are vital to the role and functions of the institution, strict requirements regarding the conduct of commissioners/members are laid down.<sup>177</sup> According to the ECA, the commission shall appoint a suitably qualified and experienced person as chief electoral officer. The CEO shall be not only the head of the administration but also the accounting officer of the commission.<sup>178</sup> Most importantly, the EC is funded by parliament, but it may receive additional funding from other sources. Such sources could be foreign countries or overseas donor institutions. At the end of each financial year, the commission is required to submit to the National Assembly an audited report of all income and expenditure, as well as a report with regard to the functions, activities and affairs of the commission.<sup>179</sup>

One of the most relevant aspects concerning elections in any sphere is the registration of political parties. In this respect the EC has several functions to fulfil. It is the responsibility of the chief electoral officer to register parties upon application by a party. Any application for party registration shall provide for the name, distinguishing mark, symbol, abbreviation and the constitution of the party. If a party is not represented in a legislature, then it should also submit its deed of foundation and pay a prescribed registration amount.<sup>180</sup> Once a party has been registered, the chief electoral officer shall issue a registration certificate to the party concerned. All parties not

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<sup>173</sup> See the ECA ss 3 and 4.

<sup>174</sup> In this regard see the ECA s 5. Some of these powers and duties include managing any election, ensuring all elections are free and fair, compiling and maintaining voters' rolls by means of a system of registering eligible voters, compiling and maintaining a register of parties, undertaking and promoting research into electoral matters and declaring the results of elections for national, provincial and municipal legislative bodies within 7 days after such elections.

<sup>175</sup> Refer to the ECA s 6(1) and the case of *SAAPIL v Heath* 2001 (1) SA 883 (CC).

<sup>176</sup> See the ECA s 7.

<sup>177</sup> For more detail see the ECA s 9.

<sup>178</sup> See the ECA s 12.

<sup>179</sup> Refer to the ECA ss 13 and 14.

<sup>180</sup> See the ECA s 15(1)-(4).



represented in a legislative body shall annually renew their registration. The ECA specifically provides for the registration of parties for municipal elections. The registration procedure is identical to the procedure mentioned above.<sup>181</sup> If a party has been registered for a particular municipality, it may participate only in the elections for such a municipal council. In special circumstances, the chief electoral officer is prohibited from registering a party.<sup>182</sup> A party aggrieved by a decision either not to register or to register a party may *appeal* against the decision to the EC within 30 days after the official notification of such aspect.<sup>183</sup> If certain circumstances exist, then a party can also be deregistered.<sup>184</sup>

In an effort to resolve electoral disputes, the ECA specifically establishes an Electoral Court for the Republic, which court has a similar status as a supreme court.<sup>185</sup> The court may review *any* decision of the EC relating to an electoral matter. Any review shall be conducted on an urgent basis. The Electoral Court may further hear and determine an appeal against any decision of the EC, but only insofar as such decision relates to the interpretation of any law or any other matter for which an appeal is provided for by law.<sup>186</sup>

Under the heading of general provisions, the ECA provides that certain non-compliance with the provisions of the Act is regarded as an offence and may be punishable with a fine or even imprisonment for a period not exceeding five years. Lastly, the EC is also authorised to make various regulations.<sup>187</sup>

### **12.7.2 The provisions of the Electoral Act**

All democratic states in the world have their own specific rules to regulate the elections of the various legislative bodies relevant to such a state. The modern South African state is no different in this regard. The Electoral Act<sup>188</sup> was enacted to regulate elections of the National Assembly, provincial legislatures and municipal coun-

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<sup>181</sup> See the ECA s 15A.

<sup>182</sup> Refer to the ECA s 16.

<sup>183</sup> Note that the appeal lies to the EC and not the Electoral Court. The court should thus not be approached before internal remedies have been exhausted.

<sup>184</sup> See the ECA s 17.

<sup>185</sup> The Constitution s 166 confirms the judicial system in South Africa. The Constitution no longer refers to the Supreme Courts. Such courts are now referred to as the High Courts. S 166(e) allows for any other court to be established or recognised in terms of an Act of parliament, including any court of a status similar to either the High Courts or the Magistrate Courts. It is submitted that the Electoral Court is an example of a court mentioned in the Constitution s 166(e).

<sup>186</sup> See the ECA s 20(1)-(8). The court may determine its own practice and procedures and have many related powers.

<sup>187</sup> Refer to the ECA s 23.

<sup>188</sup> 73 of 1998.

cils.<sup>189</sup> It is important to note that the Electoral Act must be interpreted in a manner that gives effect to the declarations, guarantees and responsibilities contained in the Constitution. In recent years parliament has been investigating the possibility of changing the electoral system in South Africa, which would consequently require changes to the Electoral Act. A new Electoral Act could be considered future general elections in South Africa. Currently the Electoral Act of 1998 provides for the following:

- The registration of voters and the voters roll.
- The proclamation and preparations for elections, which includes provisions regarding the parties that contest an election and also lists of candidates. The Act also provides for issues relevant to the elections of municipal councils.

Accordingly, when it may be necessary to regulate elections or by-elections for municipal councils further, the EC, subject to the provisions of chapter 7 of the Constitution and other applicable national or provincial legislation, may make regulations regarding various issues:<sup>190</sup>

- The election procedures, such as voting, the counting of votes and the declaration of the final results.
- The appointment and powers and duties of agents.
- The administration of elections, which includes voting districts, voting stations, voting materials and other related aspects.
- General provisions relevant to elections. Such provisions include prohibited conduct, offences and penalties and also additional powers and duties of the EC.
- Election timetable, code of conduct and formulae for the determination of the number of members of the NA and provincial legislatures.<sup>191</sup>

### **12.7.3 The Local Government: Municipal Electoral Act, 2000**

During 2000, the president signed and assented to the Local Government: Municipal Electoral Act (MEA). The main objective of the Act is to regulate municipal elections and to provide for matters that are connected therewith. The MEA is directed to regulate only municipal elections, contrary to the Electoral Act of 1998, which deals with the election of all legislative bodies. Although specifically aimed at local government

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<sup>189</sup> See the long title of the Electoral Act as well as s 1 definitions. An election also means an election of a municipal council or a by-election for a municipal council. Read s 3 of the Act.

<sup>190</sup> See the Electoral Act s 32. Such provision seems to be in line with the provisions set out in the ECA that were mentioned above.

<sup>191</sup> See the Electoral Act Chs 2-7 as well as Schs 1 and 2.

elections, the MEA must be read in conjunction with the Constitution, the ECA, the Electoral Act and also the Local Government: Municipal Structures Act. Apart from the Constitution, all other Acts are equal in status, and it is somewhat uncertain how inconsistencies between the Acts should be addressed.

The MEA addresses broadly the following:

- aspects concerning the voters' roll applicable to municipal elections and election dates
- aspects concerning the preparations for elections, which includes election timetables, parties, ward candidates, voting stations and materials and also elections of officers
- aspects on election observers and voter education providers
- voting procedures
- the counting of votes
- general provisions including prohibited conduct, offences and penalties as well as an electoral code of conduct.<sup>192</sup>

The requirements of both the Electoral Act and the Municipal Electoral Act are not new. Previously applicable electoral legislation and even the LGTA provided for similar aspects.<sup>193</sup>

## 12.8 Conclusion

It is clear that the provisions of the Constitution have a fundamental impact on the election and composition of all local government structures in the modern South African constitutional state. All legislative bodies, including municipal councils, must be elected and composed in such a manner as to fulfil our new constitutional ideals and values. Since local government bodies are the spheres of government closest to

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<sup>192</sup> See the MEA Chs 2-7.

<sup>193</sup> For more on such aspects see the LGTA and the following case law: In *NP v Jamie NO and Another* 1994 (3) SA 483 (E) the court ruled that electoral tribunals are bound by electoral regulations. Such tribunals are creatures of statute and have no inherent jurisdiction. It was further mentioned that a member or supporter of a political party is bound by the applicable electoral code of conduct, and a political party is not usually vicariously liable for the acts committed by members or supporters. Such liability will have to be proved under the existing common law rules. At 494C-E. In *Tumisi and Others v ANC* 1997 (2) SA 741 (O) which concerned alleged irregularities in respect of nomination forms, the court held that the returning officer had to serve a written notice of any defect on the other party; failing which, the returning officer should not be allowed to discard the applicable nomination. Finally in *Mketsu and others v ANC and Others* 2003 (2) SA 1 (SCA) the court held that the procedure in the Municipal Electoral Act s 65, which provides for the selection process by which candidates were chosen for inclusion on a party's list for election was mandatory and that only the Electoral Court has jurisdiction to hear such matters.

the ordinary inhabitants of our state, it is in such spheres where acceptance and support of the new electoral processes and procedures are to be nurtured.

Participation and support of municipal electoral processes and procedures are essential aspects of ensuring an overall prosperous local government dispensation. It is submitted that the new electoral and composition requirements for local governments have been so devised that public support and participation are encouraged and that the new system, as is protected by the supreme law of the state, should indeed facilitate and ensure a true democratic local governance.

## The role and importance of the institution of traditional leadership in local government affairs

### 13.1 Introduction

During the overall restructuring and transformation of the South African constitutional dispensation, strong arguments were forwarded to include and protect the institution of traditional leadership and traditional law (also known as customary law). Following various discussions and consultations, both the interim Constitution of 1993 and the final Constitution of 1996 have made provision for the recognition and the role of traditional leaders.<sup>1</sup>

Although constitutionally recognised and protected, the exact role and involvement of traditional leaders and their participation in the three spheres of government, especially in local government, are unclear and have already caused some conflicts between traditional leaders and government structures.<sup>2</sup> In order to address some of these disputes and to clarify the position, national government has embarked on a process of investigation and consultation, with a final objective being to rationalise legislation and implement new policies pertaining to the role and participation of traditional leaders in official governmental structures.<sup>3</sup> From an African, and more

<sup>1</sup> See the interim Constitution of 1993 ch 11 and the Constitution ss 211 and 212.

<sup>2</sup> Refer to *Contralesa v Minister of Local Government*, EC 1996 (2) SA 898 (TkS). In this case the applicant's essential complaint was that the application of the LGTA to rural areas in the Eastern Cape would deprive traditional leaders of their powers. The court disagreed with the argument and held that the applicant did not have *locus standi* to bring the particular application. See para E-G at 905. See also *ANC v Minister of Local Government and Housing KZN* 1998 (3) SA 1 (CC), where the court held that transition to democratic local government was to take place in terms of the LGTA, which recognised that in the interim phase of transition, areas over which traditional leaders had had authority could be included within the areas of jurisdiction of elected local authorities. This had given rise to a potential tension between democratic local government and traditional leaders in the interim Constitution had sought to resolve this tension in part through the mechanism of s 182. See para A-C at 12.

<sup>3</sup> See the draft discussions document: *Towards a White Paper on Traditional Leadership and institutions: a publication of the department of Provincial and Local Government* April 2000 Pretoria.

specifically a South African perspective, it would be irresponsible and unfortunate if the importance of traditional leadership and traditional law were to be overshadowed by political short-sightedness or the failure to provide for their proper recognition and inclusion. This importance is particularly relevant in the new local government structures, where traditional leaders could have significant influence over their local communities. In order to understand the role and importance of the institution of traditional leadership, it is necessary to examine briefly the historical background of such institutions, and thereafter to evaluate the current legislative protection given to such institutions in the new governmental structure.

### **13.2 A brief historical overview of traditional leadership in South Africa**

Traditional leadership is an institution that has developed over hundreds, if not thousands, of years in Africa. Prior to the introduction of colonialism, social organisation in South Africa was characterised by many tribal regimes that existed and operated within certain areas of jurisdiction. Such tribal regimes were primarily based on the principles of patriarchy and inscriptive norms. Each tribe was led by a particular traditional or tribal leader, who was the central figure in that tribe.<sup>4</sup> The tribal leader or traditional leader was further vested with the highest authority in a particular territory. He had various functions, which he did not exercise as an autonomous individual but rather in collaboration with a so-called “tribal council”, which was representative of the ordinary people of that tribe. The traditional leader played a very important role within tribal customs. He was seen not only as a link between the people of the tribe and their ancestors, but also as a spiritual, cultural and judicial leader and the custodian of the values of his community. The traditional leader was often regarded as the co-ordinator of many aspects of everyday life of his people, the curator of community dreams and aspirations and the protector of harmony between the members of his community in respect of their natural, spiritual, social, physical and economical environment. The traditional leader had the final authority to rule over his tribe, and he was considered by that tribe to be functioning in the role of both father and son.<sup>5</sup> Often his leadership and traditional authority served as a bonding factor for the community, as he was responsible for the common good of all.

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<sup>4</sup> This is still applicable today.

<sup>5</sup> He was father to his people and son of the ancestors of his people.

Traditional leaders ruled over their tribes in accordance with the principles of African democracy and accountability. Their reign was similar to that of a king in council.<sup>6</sup>

With the dawn of colonialism in Africa, the traditional African government was systematically weakened, and the strong and influential bond between traditional leaders and their tribe members was gradually eroded. Many African people were displaced and were evicted from their properties, which in turn caused severance between tribal members and tribal leadership. Another factor which also impacted severely on the tribal relationship, especially between members and leadership, was the rise of urbanisation. Many people, mostly men, left their tribal villages for bigger cities in a quest for work and ultimately a better life.<sup>7</sup> Under colonial rule in South Africa and later National Party domination, new legislation increasingly strengthened tribal divisions and provided traditional leaders with powers and roles they had not possessed before. The institution of traditional leadership was sidetracked to a form of indirect government. General governmental affairs vested in the ruling government of the day, while traditional authorities had control over only predefined traditional or customary affairs.<sup>8</sup> In essence, the laws mentioned above created a system of local self-government which placed traditional leaders in a bureaucratic role. Chieftainship became reduced to a public office which was a mere creature of statute and which made the appointment, suspension or removal of chiefs subject to political manipulation.<sup>9</sup>

### **13.3 Important considerations relating to traditional leadership from a South African perspective**

In order to understand the importance and special role traditional authorities can and should play within government structures, some important considerations should be noted, as outlined below.

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<sup>6</sup> See the draft discussion document on Traditional Leadership and Institutions (2000) at 10 hereafter referred to as the discussion document on Traditional Leadership. The principles of African democracy are of significant importance to the South African legal system. For more on this see *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

<sup>7</sup> It is submitted that not only the colonial policies but also modern urbanisation trends combined caused ancient Southern African societies to be disrupted.

<sup>8</sup> See, eg, the Black Administration Act 38 of 1927, the Black Authorities Act 68 of 1951 and various pieces of legislation of black independent states or self-governing territories.

<sup>9</sup> See the discussion document at 11 and 13. It is safe to say that the successive colonial and later NP governments eroded Traditional Leadership as an institution and compromised its traditional values within the African concept. Although modern South Africa cannot go back to pre-colonial times, there are still definite advantages for the institution of Traditional Leadership in the 21st century South Africa.



### **13.3.1 *The structure of traditional leadership***

Originally traditional leadership was rooted in the notion of a kingship or kingdom. During colonial rule a tendency developed to refer to African rulers as chiefs rather than kings. This tendency obscured the hierarchy of leadership that existed in pre-developed African communities and led to the demise of the formerly strong traditional practices and customs. History indicates that the king in the African context was in principle not an autocrat. He ruled by popular mandate and took decisions after consultation with his councillors.<sup>10</sup> The king's council comprised the headmen and elders, who were normally notable leaders in the respective communities.<sup>11</sup> With the introduction of various legislative reforms, most notably the Black Administration Act,<sup>12</sup> the African system of governance was changed and transformed, and new structures were put in place of old ones.<sup>13</sup> Under the Union of South Africa, the Governor-General became something of a supreme chief over all tribal entities, which position gave him the power to create and divide tribes and to appoint or dismiss any person he wished as a chief or headman. In 1961 this role of "supreme chief" was assumed by the president of the Republic of South Africa.<sup>14</sup>

### **13.3.2 *The appointment/recognition of traditional leaders***

According to customary law, the appointment or recognition of a traditional leader was done mostly through various laws of succession. In principle there were strong hereditary customs along only male lines.<sup>15</sup> In modern South Africa there are many sets of legislation and procedures that are still applicable and used by the different provincial authorities to appoint traditional leaders to different positions of power.<sup>16</sup> As was stated above, the original power to appoint traditional leaders, which was vested in the supreme chieftaincy, was later assigned to the Governor-General by the Black Administration Act and reassigned to the President of South Africa in 1961

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<sup>10</sup> However, there are certain kings that acted autocratically and ruled as dictators.

<sup>11</sup> Headmen were usually members of the extended royal family and were each assigned a section of the tribe to rule on behalf of and with the assistance of the king. The royal family thus extended its power vertically and horizontally. The concept of democratic elections was foreign to a system of traditional rule.

<sup>12</sup> 38 of 1927.

<sup>13</sup> See, eg, the tribal authorities in the former Qwaqwa.

<sup>14</sup> Under the 1993 and 1996 Constitutions, these powers were assigned to the premiers of the nine provinces. See the discussion document on Traditional Leadership at 14.

<sup>15</sup> Females were appointed as regents for their male sons until they have reached the age of maturity. These practices are still followed today. See the discussion document at 25.

and lastly to the homeland governments upon their attainment of self-governing status and to the TBVC states upon receiving independence. Outside self-governing territories and TBVC states, traditional leaders were still being appointed by the South African president. It is commonly accepted that a traditional leader begins his term of office upon official appointment, which is then followed by a customary inauguration.<sup>17</sup> During 1994, under the IC, the power to appoint traditional leaders was assigned to the relevant premiers of six provinces in South Africa, where the institution of traditional leadership was relevant.<sup>18</sup>

Three institutions play a role in the appointment of a traditional leader:

- the customary institutions, which are normally the various royal families
- administrative institutions, for example the provincial government concerned
- statutory institutions, which are responsible for the official appointment.

As indicated above, succession to traditional leadership was, and still is, gender specific. Succession is hereditary in the male lines only, with the exception of the so-called Modjadjis, where succession is hereditary in the female lines. Ordinarily, the identification of the successor is determined by the relevant customary laws of the tribe or the community concerned. If the identified successor is still a minor, an acting chief, who can be a male or female, is appointed to rule, until the minor has reached maturity and can take over the reign himself. With regard to retirement of traditional leaders, it is interesting to note that customary law does not make provision for voluntary retirement.<sup>19</sup>

It is clear from the abovementioned that there are no uniform procedures in the appointment and recognition of traditional leaders. This situation is attributed largely to different norms, values, customs and legislative requirements in different provinces. A much clearer and uniform policy is needed. Apart from a new policy, many com-

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<sup>16</sup> As was indicated above, most powers concerning traditional authorities were assigned in 1994 to the various premiers of the nine provinces in South Africa. For more details on the provisions in each province see the discussion document at 25-28.

<sup>17</sup> It should be pointed out that according to current legislation in South Africa traditional leadership is divided into three categories. There are kings or so-called "paramount chiefs", and then there are chiefs and lastly headmen. These titles sometimes have a different meaning in the different provinces.

<sup>18</sup> The six provinces are: The Eastern Cape, Free State, KwaZulu-Natal, Mpumalanga, Limpopo and the North West Province. See the discussion document on Traditional Leaders at 25-28.

<sup>19</sup> However, in some provinces, eg the Eastern Cape and North West, legislation makes provision for the retirement of traditional leaders.

munities have expressed a strong wish to retain their customary practices; since such practices have a very valuable role to play in modern South Africa.<sup>20</sup>

### **13.3.3 The role of women and children in traditional leadership**

Traditionally South African societies were defined along patriarchal lines, which means that the head of the household was a man, and that his family – wife/wives and children were subordinate to his authority.<sup>21</sup> In tribal relationships, the wives were responsible for the general welfare of the family, which included the upbringing of children. Furthermore, women were responsible for the co-ordination of family rituals and functions.<sup>22</sup>

The colonial and National Party regimes as well as the unprecedented challenges and demands of urbanisation in the 21st century significantly altered the role that women played in traditional communities. The creation of African reserves and, more particularly, migrant labour practices left many women on their own and with many of the responsibilities formerly carried by their husbands. This state of affairs has caused many women in traditional communities to challenge modern practices, which still hinge on discrimination between women and men.<sup>23</sup>

Apart from male domination, age and seniority also played an important part in African traditional culture. The youth were raised knowing that they must respect and honour their seniors. Apart from performing small household tasks, most children were left to fend for themselves. In traditional communities minors were seen to belong to their families firstly, but secondly also to the community as a whole. If parents were unable to care for their children, the community would take over such responsibilities.<sup>24</sup> Customary law also prohibited children from succeeding in posi-

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<sup>20</sup> See the discussion document on traditional leaders at 29.

<sup>21</sup> For many years the position in western countries was very similar to this position.

<sup>22</sup> Refer to the discussion paper on traditional leaders at 33.

<sup>23</sup> Probably the best-known example of such a challenge is directed at the traditional succession laws and customs which discriminates towards women. Accordingly, both the Constitution s 9 and the Promotion of Equality and Prevention of Unfair Discrimination Act prevent any discrimination based on sex or gender. The province of KwaZulu-Natal was the first province where women were acknowledged officially as leaders in predominantly patriarchal traditional communities. During 1990 the AmaKhosi and Iziphakanyiswa Act 9 of 1990 was passed, which provided for any person – including women – to be appointed as an inkosi or siiphakanyiswa.

<sup>24</sup> This practice prevented homeless and orphaned children in traditional communities. This has changed radically and is one of the most concerning issues in the social balance of the broad South African community.

tions of traditional leadership, and often regents were appointed to act on the minor's behalf until he reached maturity.<sup>25</sup>

#### **13.3.4 Party political affiliation and the remuneration of traditional leaders**

Prior to the Union of South Africa in 1910, the former colonial governments had tried to reconstruct the chieftainship and make it conform to colonial rule.<sup>26</sup> Military actions took place in some areas, while in others treaties with tribal authorities were concluded, which allowed for limited tribal autonomy in certain areas. In 1910 and according to the terms of the South African Act of 1909, the Governor-General was conferred as a supreme chief over all African tribes. This led to a gradual reduction of traditional leaders to merely one element in an overall bureaucratic hierarchy.<sup>27</sup> In response to the formation of the Union, black Africans began to express certain political demands, and the formation of the African National Congress (ANC) in 1912 represented the first political instrument by which these new demands were articulated. Although the ANC was organised across ethnic and tribal lines, it nonetheless maintained respect for traditional leadership as an institution.<sup>28</sup> Suffice it to say that in modern South Africa the participation and inclusion of traditional leadership is strongly rooted in South African political history, and the final Constitution affords every citizen the right to make free political choices, which includes the right to form a political party and to participate in political activities.<sup>29</sup>

Apart from their early political inclusion, traditional leaders also enjoyed a position of unique privilege and authority regarding their own remuneration. A traditional leader was regarded as a repository of wealth and a dispenser of gifts. The traditional leader and his family normally took precedence in tribal affairs such as rituals or feasts. The traditional leader also had first choice of land to build his house and graze his cattle. All things considered, the traditional leader was the richest man in

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<sup>25</sup> Today the Constitution prohibits unfair discrimination based on age, and customary law must ensure compliance to the supreme law of the state. See also the discussion document on Traditional Leaders at 35.

<sup>26</sup> Often this objective was pursued through military conquest. The so-called "frontier wars" were good examples of such military actions.

<sup>27</sup> See the discussion document on Traditional Leaders at 36.

<sup>28</sup> When the ANC adopted its first Constitution in 1919 it provided for a forum within its congress known as the Upper House of Chiefs. Through this forum, traditional leaders would have access or representation in the highest political decision-making structure. Apart from showing respect and honouring the status of traditional leaders, the Upper House of Chiefs also served as a mechanism to obtain political consent of all ethnic groupings represented in the political organisation. Refer to the discussion document on Traditional Leaders at 36.

<sup>29</sup> See the Constitution s 19(1)(a)-(c).

his tribe.<sup>30</sup> The most important source of wealth of a traditional leader was his cattle. Through the introduction of new political structures, traditional customs were reformed, and some of the traditional leaders' powers were taken away. To a large extent traditional leaders became instruments in the hands of the governing administrations, for which role they were also remunerated. Thus, with the new democratic developments, the manner of remuneration of traditional leaders has assumed new dimensions. Traditional leaders are now paid by government on a uniform basis without recognition of the size or respect of the tribe.<sup>31</sup>

#### **13.4 The new legislative framework and requirements regarding traditional leadership**

In light of its historical background, traditional leadership as a traditional institution has an important role to play in many rural communities in South Africa. With the complete restructuring of South Africa's constitutional system, traditional leaders insisted on inclusion and protection of not only customary law but also traditional leadership itself. Accordingly, the final Constitution specifically accords constitutional recognition to the institution, status and role of traditional leadership.<sup>32</sup> Although the institution, status and role of traditional leadership are recognised, such aspects are subject to the Constitution in general. However, the Constitution is not clear on exactly what role traditional leaders should play within the overall governmental structure. In debating the role of traditional leaders, two viewpoints have emerged. According to the so-called modernistic view, traditional leaders should play only a ceremonial and advisory role in governmental structures. Traditionalists, on the other hand, argue that traditional leaders should participate directly in all activities of government.<sup>33</sup> Closer investigation of the constitutional text reveals that the Constitution favours the modernistic view and that, although traditional leadership is recognised and protected, it is subject to the Constitution and plays only an advisory role in the new democratic structures.

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<sup>30</sup> Because of his privileged position, traditional leaders were also punished more severely than ordinary tribesmen, when they committed certain offences.

<sup>31</sup> See the Remuneration of Public Office Bearers Act 20 of 1998, which determines the remuneration of *inter alia* traditional leaders. It is important to note that generally only kings and chiefs are paid remuneration, and not headmen. See the discussion document on traditional leaders at 38.

<sup>32</sup> See the Constitution ss 211 and 212.

<sup>33</sup> Refer to Devenish (1998) 295.

### 13.4.1 *The basic constitutional foundation regarding traditional leadership*

As was stated above, the final Constitution specifically recognises aspects of traditional leadership. In this regard, section 211 of the Constitution provides for the following:

- The institution, status and role of traditional leadership according to customary law are recognised, subject to the Constitution.<sup>34</sup> Not all aspects regarding traditional leadership are included; only the aspects that are recorded or part of customary law are recognised. A full investigation or evaluation of customary law principles regarding traditional leadership is therefore needed. Furthermore, the Constitution is very clear that the recognition of the institution, status and role of traditional leadership is not *cart blanche*, but is subject to the Constitution itself.<sup>35</sup>
- The Constitution further determines that a traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which legislation and customs would also include amendments or repeal of such legislation or customs.<sup>36</sup> The Constitution in this instance thus allows for the functioning of a traditional authority which is subject to legislative and customary regulations.<sup>37</sup>
- When disputes arise with regard to traditional leadership, the Constitution obligates the courts to apply customary law when that law is applicable.<sup>38</sup> Traditions

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<sup>34</sup> See the Constitution s 211(1).

<sup>35</sup> This is of course a further outflow of the already accepted and confirmed supremacy principle of the Constitution. See the Constitution s 2. No principles or requirements regarding traditional leadership will be acceptable and enforceable if they are not included in customary law and in complete compliance with all relevant constitutional principles. This would be inclusive of all constitutional requirements, including the Bill of Rights. Any conduct or law that is inconsistent with the Constitution is invalid.

<sup>36</sup> See the Constitution s 211(2).

<sup>37</sup> As the Constitution is silent on what type of legislative regulation is supposed, it is assumed and submitted that both national and provincial legislation can be applicable in these instances. It must also be pointed out that indigenous law and customary law, cultural matters and traditional leadership, subject to the Constitution ch 12, are all matters of functional areas of concurrent national and provincial legislative competence. Thus, both national and provincial governments can legislate over such matters. See the Constitution Sch 4 Part A. See also the case of *Ex parte Speaker of the KZN Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa amendment bill, 1995 1996 (4) SA 653 (CC)*. The case concerned the re-enactment and amendment of the KwaZulu Amakhosi and Iziphakanyiswa Act of 1990. The Act made provision for *inter alia* the payment of a monthly salary, allowances and other privileges to the King of the Zulus. The court held that such payments and allowances to traditional leaders fell within the competence of the provincial legislature. At para 21 at 663F. Refer also to the case of *President of Bophuthatswana v Milsell Chrome Mines (Pty) Ltd 1996 (3) SA 831 (BS)* in which it was confirmed that under the interim Constitution areas such as indigenous law and traditional authorities fell under Sch 6 functional areas of provincial legislative competence. See paras D-F at 844.

<sup>38</sup> See the Constitution s 211(3).



and practices of customary law regarding traditional leadership are therefore specifically protected by the Constitution. However, such customary law must be relevant to the circumstances and must be in compliance with the Constitution as supreme law and any other legislation that specifically deals with customary law. The Constitution hereby allows for customary law to be less valued than new legislative prescriptions, be they constitutional or other legislative requirements.

Apart from recognising the role of traditional leadership, the Constitution also determines that national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.<sup>39</sup> It must be pointed out that the Constitution provides for the possible role for traditional leadership only at local level and on matters affecting local communities; such constitutional possibilities are not envisaged for national or provincial spheres of government. In compliance with this constitutional provision, the Local Government: Municipal Structures Act provides for the participation of traditional leaders in municipal councils.<sup>40</sup>

The Constitution further states that in order to deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities that still observe a system of customary law, national or provincial legislation may provide for the establishment of houses of traditional leaders, and only national legislation may establish a council of traditional leaders.<sup>41</sup> Within the authority given in the Constitution, a national house and various provincial houses of traditional leaders have been established.<sup>42</sup>

#### **13.4.2 The formal recognition and establishment of traditional leadership**

In furtherance of the constitutional mandate, national parliament enacted the Traditional Leadership and Governance Framework Act<sup>43</sup> during 2003. The purposes of the Act are to provide for the recognition of traditional communities, the establishment and recognition of traditional councils, the establishment of a statutory frame-

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<sup>39</sup> See the Constitution s 212(1). The Constitution does not allow provincial legislation to provide for the role of traditional leadership. Through national legislation, a uniform role for traditional leadership is to be established.

<sup>40</sup> See the Structures Act s 81.

<sup>41</sup> See the Constitution s 212(2)(a)-(b).

<sup>42</sup> For more detail see the Council of Traditional Leaders Act 10 of 1997, as well various provincial Acts such as The House of Traditional Leaders Act 1 of 1995 (Eastern Cape), The House of Traditional Leaders Act 6 of 1994 (Free State), The House of Traditional Leaders Act 4 of 1995 (Mpumalanga), The House of Traditional Leaders Act 12 of 1994 (North-West) and The House of Traditional Leaders Act 7 of 1994 (KwaZulu-Natal).

<sup>43</sup> 41 of 2003, hereafter referred to as the TLGFA.



work for leadership positions within the institution of traditional leadership and for aspects such as the general recognition, functions and roles, remuneration, dispute resolution and a code of conduct for traditional leaders.<sup>44</sup> In general, the Act seeks to fulfil and enhance the broad constitutional protection of the institution of traditional leadership. Apart from the confirmation that the institutions of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights, the Act also envisages that such institutions must:

- promote freedom, human dignity and the achievement of equality and non-sexism
- derive their mandates and primary authority from applicable customary law and practices
- strive to enhance tradition and culture
- promote nation building and harmony and peace amongst people
- promote the principles of co-operative governance in their interaction with all spheres of government and organs of state and
- promote an efficient, effective and fair dispute-resolution system, and a fair system of administration of justice, as envisaged in applicable legislation.

The Act specifically provides for aspects concerning traditional communities and traditional councils, leadership positions within the institution of traditional leadership, houses of traditional leaders, the roles and functions of traditional leadership and also aspects relating to dispute resolution and the commission on traditional leadership disputes and claims. Although the Act is of relevance to all three spheres of government, the following aspects are of particular importance for all local government institutions:

- *Partnerships between municipalities and traditional councils* The Act specifically determines that the national government and all provincial governments must promote partnerships between municipalities and traditional councils through legislative or other measures.<sup>45</sup> Any such partnership between a municipality and a traditional council must be based on the principles of mutual respect and the recognition of the status and roles of the respective parties. The partnership must also be guided by and based on the principles of co-operative governance. It is further permitted for a traditional council to enter into a service delivery agreement

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<sup>44</sup> See the long title of the TLGFA.

<sup>45</sup> Refer to s 5(1) of the TLGFA.

with a municipality in accordance with the Local Government Municipal Systems Act and any other applicable legislation.<sup>46</sup> The obligation that any partnership between a municipality and a traditional council should be guided and based on the principles of co-operative governance is somewhat confusing. According to the Constitution, the principles of co-operative government are applicable to all spheres of government and all organs of state within each sphere.<sup>47</sup> Municipalities have been confirmed as a distinctive sphere of government and undoubtedly fall under the obligations set out in section 41 of the Constitution. Although institutions of Traditional Leadership or a traditional council could be classified as an organ of state under the Constitution, they are arguably not organs of state within a sphere of government.<sup>48</sup> In light of the above, it is submitted that the extension of the principles of co-operative government to the partnership between a municipality and a traditional council could well be misguided and unconstitutional. It is also this writer's submission that the constitutional directive incorporated in section 41(2) of the Constitution, does not allow for the extension of the principles of co-operative government to partnerships between municipalities and traditional councils.<sup>49</sup>

- *Referral of Bills to the National House of Traditional Leaders* Under the Act, any parliamentary Bill pertaining to customary law or customs of traditional communities must, before it is passed by the house of parliament where it was introduced, be referred to the National House of Traditional Leaders for its comments. A provincial legislature or a municipal council may adopt the same procedure in respect of the referral of a provincial Bill or a draft by-law to a provincial house of traditional leaders or a local house of traditional leaders.<sup>50</sup>
- *Guiding principles for the allocation of roles and functions of traditional leadership* According to the new legislative provisions, the national government or a provincial government may through legislative or other measures provide a role for traditional councils or traditional leaders. A role may be provided in respect of

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<sup>46</sup> Read ss 5(2)-(3) of the TLGFA together with Act 32 of 2000 as amended.

<sup>47</sup> See s 41(1) of the Constitution.

<sup>48</sup> Read s 239 of the Constitution together with the case of *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC).

<sup>49</sup> S 41(2) of the Constitution determines that an Act of parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations and to provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. Traditional councils are not part of the hierarchy of governmental institutions.

the following issues: arts and culture; land administration; agriculture; health; welfare; administration of justice; safety and security; the registration of births, deaths and customary marriages; economic development; environment; tourism; disaster management; the management of natural resources and the dissemination of information relating to government policies and programmes.<sup>51</sup> The Act further requires that whenever an organ of state within the national government or a provincial government considers allocating a role for traditional councils or traditional leaders, that organ of state must:<sup>52</sup>

- seek the concurrence of either the minister responsible for traditional leadership matters or the MEC responsible for traditional affairs in the province concerned;
- consult with the relevant structures of traditional leadership and SALGA;
- ensure that the allocation of a role or function is consistent with the Constitution and applicable legislation;
- take the customary law and customs of the respective traditional communities into account;
- strive to ensure that the allocation of a role or function is accompanied by resources and that appropriate measures for accounting for such resources are put in place;
- ensure, to the extent that it is possible, that the allocation of roles or functions is implemented uniformly in areas where the institution of traditional leadership exists; and
- promote the ideals of co-operative governance, integrated development planning; sustainable development and service delivery through the allocation of roles and functions.

When an organ of state has allocated a role or function to a traditional council or traditional leaders, that organ of state is obligated to monitor the implementation of the function or role and must also ensure that the implementation of the function is consistent with the Constitution and is indeed performed.<sup>53</sup>

(d) *Code of conduct for traditional leaders and traditional councils* Every traditional leader and members of a traditional council must adhere to a specific code of

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<sup>50</sup> Read s 18 of the TLGFA.

<sup>51</sup> See s 20(1)(a)-(n) of the TLGFA.

<sup>52</sup> See s 20(2)(a)-(g) of the TLGFA.

<sup>53</sup> See s 20(3)-(4) of the TLGFA.

## The powers and functions of municipal governments

### 14.1 Introduction

Within the new constitutional dispensation, local governments are not only recognised as a distinctive and autonomous sphere of government, but are also accorded specific powers and functions that are unique and appropriate to the lowest sphere of government in the state. Similar to the position with regard to national and provincial spheres, local government powers and functions are constitutionally entrenched and protected and cannot unilaterally be taken away by a higher sphere of government without a constitutional amendment.<sup>1</sup> Notwithstanding the fact that LG is constitutionally protected, the powers and functions of municipalities are not absolute and are subject to both constitutional and national legislative requirements.<sup>2</sup> In essence, there are two broad requirements to which municipal powers and functions are subjected. The first is that municipalities can perform only such powers or functions that are legally permissible for them to perform or exercise. This requires a substantive evaluation of the law – constitutional or otherwise – to determine if a municipal council indeed has a certain power or may exercise a particular function. The second requirement stipulates that if it has been established that a local government indeed has a specific power or may perform a certain function, such power or function must be performed or exercised according to predetermined and procedurally correct legal requirements. This entails a procedural evaluation of the manner in which powers or functions are or were indeed exercised or performed.<sup>3</sup>

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<sup>1</sup> See the Constitution s 156 and Sch 4 and 5 Part B.

<sup>2</sup> Eg, the Constitution requires that municipal legislative actions must conform with national or provincial legislation. See the Constitution s 156(3). Both national and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions as listed in Sch 4 and 5. See also the Constitution s 155(7).

<sup>3</sup> Both the substantive and the procedural requirements are mandatory and must be complied with in order for a municipal council to exercise a power or perform a function lawfully.

Before one begins to investigate the various substantive and procedural requirements regarding the powers and functions of municipal councils, it is important to consider a few background principles. In general, all local governments in the new local government structure are obliged to perform their functions and to exercise their powers in such a manner as to achieve their objectives and fulfil their developmental duties.<sup>4</sup> In essence, the general objectives of local government and the mentioned developmental duties project the basic rationale of local government existence. These objects and duties provide for an overarching set of obligations or sweeping duties that must be achieved, depending on the capacity of municipal councils only. Upon a closer evaluation of the constitutional chapter on local government, one is confronted by other provisions in the Constitution that circumscribe the power and functions of municipalities and thus have a restrictive impact on the fulfilment of the sweeping duties and objectives.<sup>5</sup> A further and equally important fact is that although local governments have their own powers and functions, they ultimately exercise such powers under the watchful eyes of the national and provincial governments.<sup>6</sup>

Similar to all other aspects regarding local governments, the Constitution provides only a basic foundation regarding the power and functions of municipalities. Both the Municipal Structures Act and the Municipal Systems Act further elaborate on this constitutional foundation. Before the Constitution and other relevant national legislative requirements are evaluated it must be pointed out that municipal powers and functions are divided into two categories: executive and legislative. Simply put, legislative authority is the power to make, amend and repeal rules of law, while executive authority is the power to implement and enforce legislation, to manage the administration and to develop policy. Both legislative and executive authority is distributed between all three spheres of government. Contrary to the position on national and provincial spheres, where legislative and executive authorities are vested in different

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<sup>4</sup> According to the Constitution ss 152(2) and 153(a), all municipalities must strive, within their financial and administrative capacities, to achieve the objectives laid down for local governments in general, and must also structure and manage their administrations, budgeting and planning processes to give priority to the basic needs of their communities.

<sup>5</sup> Some commentators have argued that this constitutional curtailment of the duties of local governments is an 'unhappy' position, as it suggests a predominantly more administrative role for local governments in contrast with its newly protected and recognised original and distinctive character with accompanying powers and functions. See Chaskalson *et al* (1999) 5A-34.

<sup>6</sup> See the Constitution s 155(7).

governmental bodies, both executive and legislative authority on the local sphere of government are vested in a municipal council. Only one body is responsible for the proper exercise and performance of municipal legislative and executive authority.<sup>7</sup> The rationale for only one body to exercise both legislative and executive powers is based on greater effectiveness, quicker decision making and performance of functions, as well as money saving. The biggest negative impact of a municipal council's having both executive and legislative powers is the fact that the built-in checks and balances of one government body over the other is lost. For example, in both the national and provincial spheres the executive authority is responsible to the relevant legislatures for the proper performance of its powers and functions. This is not the case at local government level, where the body that exercises executive powers is also the same body responsible for legislative powers. It is suggested, however, that the negative impact of the loss of internal control over the powers and functions of municipalities could be sufficiently countered by other oversight mechanisms such as the control and supervision of both national and provincial governments over the exercise and performance of municipalities of their powers and functions.<sup>8</sup> Before one considers the new constitutional framework concerning the powers and functions of local government, one should note that the exercise of municipal powers and functions is not without challenges. Many local governments face certain key issues regarding the exercise and fulfilment of their powers and functions. Some of these key issues are *inter alia* the following:

- Municipalities are facing a rapid increase in their responsibilities as many issues are assigned or delegated to them.
- Functions are often vaguely defined, especially where services are vertically integrated or shared by other spheres.
- Municipalities are often ignored when decisions are taken by the higher spheres of government and mostly lack the required capacity to perform their functions.

Speedy solutions to the abovementioned issues are of critical importance in order to ensure an effective system of municipal performance and constitutional compliance.

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<sup>7</sup> According to the Constitution s 151(2), both the executive and legislative authority of a municipality are vested in the municipal council.

<sup>8</sup> Again refer to the Constitution s 155(7), which specifically entrenches such power of control and supervision.

## 14.2 The constitutional basis of municipal powers and functions

In light of the aspects mentioned above, the Constitution of the Republic of South Africa now specifically entrenches specific powers and functions applicable to all municipalities in the state. This position was confirmed in the Constitutional Court in the case of *Fedsure Life Assurance v Greater JHB TMC*.<sup>9</sup> The court stated that the constitutional status of local government is thus materially different from what it was when Parliament was supreme and when not only the powers but the very existence of local government depended entirely on superior legislatures. Although the detailed powers and functions of local governments have to be determined by laws of a competent authority, this does not mean that the powers they exercise are “delegated” powers and does not prevent the powers from being regarded as “original” and not “delegated”.<sup>10</sup> It should be pointed out that the Constitution addresses aspects of municipal powers and functions in two categories. On one hand the Constitution directly provides for the powers and functions of municipalities, while on the other the Constitution also indirectly incorporates and mandates certain aspects that are also of importance to municipal powers and functions. For clarification purposes, the various direct and indirect requirements will be discussed separately.

### 14.2.1 *Direct constitutional directives regarding municipal powers and functions*

According to section 156 of the Constitution, municipal powers and functions are now addressed and protected directly in the Constitution. The section states the following:

- (1) A municipality has executive authority in respect of, and has the right to administer
  - (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
  - (b) any other matter assigned to it by national or provincial legislation.
- (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.
- (3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or

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<sup>9</sup> 1999 (1) SA 374 (CC).

<sup>10</sup> See paras 35-39 at 393-394.



provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

- (4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if
  - (a) that matter would most effectively be administered locally; and
  - (b) the municipality has the capacity to administer it.
- (5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

On close evaluation of the text of section 156 one can make several comments. The Constitution starts off by confirming and referring to the executive authority of a municipal government without including legislative authority in the same instance. Some commentators see this confirmation of municipal executive authority as placing more emphasis on the executive authority than on municipal legislative authority. It is argued that the Constitution still echoes something of the previous dispensation, when local governments were mere administrative institutions under the control of predominantly the provincial authorities and when their executive and administrative functions were regarded as more important than their legislative authorities.<sup>11</sup> Apart from the constitutional confirmation of municipal executive authority, the Constitution also confirms that all municipalities have the right to administer such executive matters.<sup>12</sup> It is of importance to note that the Constitution distinguishes between executive authority on one hand and the administration of such matters on the other.<sup>13</sup> On this point, it is of interest to note that in national and provincial spheres of government, legislative authority is often perceived to be of more importance than executive authority. Legislative power is stronger and more important than executive powers because legislative powers entail the creation of new laws or the amendment or

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<sup>11</sup> See Chaskalson *et al* (1999) 5A-35, where the writer states that the legislative authority is subsidiary to its executive or administrative functions.

<sup>12</sup> The Constitution s 156(1).

<sup>13</sup> Executive authority has been explained as the power to implement and fulfil legislative requirements and to perform certain related executive functions.

repeal of existing legal rules. To a large extent executive authority is thus subjected to legislative authority unless such executive authority is protected against manipulation by the Constitution. This seems not to be the constitutional intention on local government level, however. It would seem that more emphasis is directed at executive and administrative functioning.

The Constitution also specifically clarifies the matters on which a municipality has executive and administrative authority. Two sources of such authority are identified. The first source is the various local government matters that are listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution. These sources indicate a pre-determined list that encapsulates executive and administrative powers and functions, which cannot be reduced or expanded upon without constitutional amendment. It thus provides an exact indication of such powers and functions. The functional areas of municipal executive and administrative authority as determined by the Constitution are the following:

**Schedule 4**

FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE

PART B

The following local government matters to the extent set out in section 155(6)(a) and (7):

Air pollution

Building regulations

Child care facilities

Electricity and gas reticulation

Fire fighting services

Local tourism

Municipal airports

Municipal planning

Municipal health services

Municipal public transport

Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law

Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto

Storm water management systems in built-up areas

Trading regulations

Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

### **Schedule 5**

#### FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE

##### PART B

The following local government matters to the extent set out for provinces in section 155(6)(a) and (7):

Beaches and amusement facilities

Billboards and the display of advertisements in public places

Cemeteries, funeral parlours and crematoria

Cleansing

Control of public nuisances

Control of undertakings that sell liquor to the public

Facilities for the accommodation, care and burial of animals

Fencing and fences

Licensing of dogs

Licensing and control of undertakings that sell food to the public

Local amenities

Local sport facilities

Markets

Municipal abattoirs

Municipal parks and recreation

Municipal roads

Noise pollution

Pounds

Public places

Refuse removal, refuse dumps and solid waste disposal

Street trading

Street lighting

### Traffic and parking

A striking difference between Part B of Schedule 4 and Part B of Schedule 5 of the Constitution is that the matters listed in Part B of Schedule 4 are areas falling under concurrent national and provincial legislative competence. As such, these matters require a degree of intergovernmental cooperation and coordination. All three spheres of government have certain powers relating to such matters. On the other hand, the matters listed in Part B of Schedule 5 are the functions typically associated with local governments. The provincial authorities have exclusive legislative competence over such matters, and national government may not exercise legislative authority over such matters unless constitutionally authorised to do so under its “emergency powers”.<sup>14</sup> One can thus conclude that the matters mentioned in Part B of Schedule 5 require mainly a strong cooperation and coordination between municipalities and their applicable provincial governments.

The second reference to municipal executive and administrative authority is found in section 156(1)(b) of the Constitution. According to this section, municipalities have authority over any matter that is not included in Part B of Schedule 4 or Part B of Schedule 5 of the Constitution and that has been *assigned* to them in terms of national or provincial legislation. The Constitution thus does not cast the powers and functions of municipalities in stone, but allows the two higher spheres of government to assign certain matters to them when appropriate. It is suggested that such assignment can be a general one, for example national legislation assigning a function to all municipalities, or a specific assignment where a function or matter is assigned to only one or a few municipalities either in a province or in the country as a whole. On this issue, the provisions of section 156(4) are specifically important. National and provincial governments are obligated to assign the administration of one or more matters listed in Part A of Schedule 4 or Part A of Schedule 5, which necessarily relates to local government to municipalities. There are two further requirements that must both be met before such an assignment can take place, however. Firstly, the relevant matter must be of a nature that could be most effectively administered locally and, secondly, the municipality concerned must have the capacity to administer

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<sup>14</sup> Refer to the Constitution s 44(2).

such matter or matters.<sup>15</sup> Emphasis should also be placed on the fact that any assignment in terms of subsection 156(4) must be done by agreement between the assignor and assignee and is subject to any conditions set out in such an agreement. It thus seems possible for a municipality to agree to such an assignment only if certain conditions, for example financial support, are provided for by the assigning higher sphere of government. The Constitution also protects municipalities against unilateral decisions of higher spheres to assign the administration of matters which municipalities cannot or do not want to perform.<sup>16</sup>

A somewhat uncertain aspect in the Constitution is whether subsection 156(4) also affords a municipality executive authority over matters listed in Part A of Schedules 4 and 5 and which have been assigned to it. On one hand the subsection refers only to the administration of such matters and not to the exercise of executive authority related to such matters.<sup>17</sup> A counter argument in this regard is the fact that, apart from matters listed in Part B of Schedules 4 and 5, the Constitution indeed allows for municipal executive authority over any other matter assigned to it by national or provincial legislation.<sup>18</sup> The Constitution further affords a municipality the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. Essentially, this gives municipalities a residual or implied power – either executive or legislative – in order to perform their functions effectively. If Part A matters have been assigned to a municipality, therefore, and the municipality has certain obligations to meet or functions to perform

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<sup>15</sup> It is submitted that an independent evaluation of not only the relevant matter but also the capacity of a municipality concerned should be undertaken. All relevant circumstances should be considered carefully before an assignment is concluded. The higher spheres of government must guard against so-called “unfunded mandates”, where the lowest sphere is burdened with the administration of matters for which they do not have the capacity or the financial support. The assignment of functions specifically relates to the principle of decentralisation, which requires that functions should be allocated to the lowest spheres of government, where such functions can be exercised most effectively. For more detail see Rautenbach and Malherbe (1999) 93 with reference to the principle of subsidiarity.

<sup>16</sup> In this instance it is submitted that if no agreement is reached no assignment can take place. National or provincial government should not be able to force municipalities unwillingly to accept such assignments. In this regard the importance of the principles of cooperative government, as set out in the Constitution ch 3, must not be overlooked.

<sup>17</sup> The distinction between executive authority and the right to administer, as referred to in s 156(1) was mentioned above. It would thus seem possible that if the constitutional drafters also intended to accord executive authority over Part A matters that have been assigned, they would have specifically provided for this in the text of the Constitution.

<sup>18</sup> Refer to the Constitution s 156(1)(b). It should thus be possible to argue that matters listed in Part A of the relevant schedules which have been lawfully assigned to a municipality or municipalities also permit such local authorities to exercise executive authority over such matters.

under such assignment, then such municipality should have the right to exercise *any*<sup>19</sup> power concerning such matters. One can thus conclude that municipalities have not only administrative powers on matters assigned to them but also executive authority, notwithstanding the fact that the matter assigned is a matter falling under either Part A of Schedule 4 or Part A of Schedule 5 of the Constitution. An aspect that is very clear from the Constitution, however, is the fact that if a matter falls outside the matters listed in Part B of Schedule 4 or 5 of the Constitution and has not been lawfully assigned to a municipality, then a municipality has no executive or administrative authority over such matter or matters.<sup>20</sup>

Apart from the executive authority mentioned above, subsection 156(2) specifically provides for constitutional confirmation of the legislative authority accorded to local governments. Municipalities are allowed to make and administer by-laws for the effective administration of the matters which they have the right to administer. In the first instance it should be evident that municipal legislative authority is not without restrictions and that the extent of such authority is in need of careful consideration. The making of a by-law is undoubtedly referring to legislative authority.<sup>21</sup> The Constitution seems to suggest that a municipality may make and administer by-laws in respect of only those matters which it has the right to administer.<sup>22</sup> Municipal legislative authority is further restricted in the sense that the Constitution allows such legislative authority only for the effective administration of the matters which are administered by such a municipality.<sup>23</sup>

The Constitution is also very clear on the fact that municipal by-laws are subordi

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<sup>19</sup> Own emphasis added.

<sup>20</sup> This is, of course, excluding matters that are reasonably necessary for, or incidental to, the effective performance of the functions already entrusted to local governments. The Constitution s 156(5).

<sup>21</sup> The term "by-law" was also used in the previous dispensation. Some writers argue that the term by-law is inappropriate and should rather be called a "local law" or "municipal law", similar to "national laws" or "provincial laws". The term by-law is often still perceived as being subordinate to national or provincial laws, as was the case under the previous dispensation. See Meyer (1997) 116.

<sup>22</sup> To determine which matters a municipality has the right to administer, one must again look at the Constitution s 156(1)(a)-(b). The conclusion is thus that only the matters listed in Sch 4 Part B and Sch 5 Part B or any other matter specifically assigned to a municipality by either national or provincial legislation would qualify as matters over which a municipality has legislative authority. This would also include matters reasonably necessary for, or incidental to, the effective performance of a municipality of its functions. The Constitution s 156(5).

<sup>23</sup> If a by-law is thus enacted for other reasons than to provide for the effective administration of the matter(s) falling under a municipality's jurisdiction, it would seem to fall foul of the constitutional mandate and thus be unconstitutional and invalid.

nate to national or provincial legislation. In this respect it is confirmed that if a by-law conflicts with national or provincial legislation it is invalid.<sup>24</sup> It should be noted that the Constitution defines national or provincial legislation to include subordinate legislation made in terms of an Act of parliament, or a provincial Act, and it also includes legislation that was in force when the Constitution took effect and is administered by either national government or provincial governments respectively.<sup>25</sup> The invalidation of a by-law that conflicts with national or provincial legislation is subjected to the constitutional obligation that neither national nor a provincial governments may compromise or impede a municipality's ability or right to exercise its powers or perform its functions, however.<sup>26</sup> *Prima facie* this situation seems to refer to a *contradictio in terminis*. On one hand, a by-law which represents the constitutionally permitted legislative power of a municipality that conflicts with legislation of the two higher spheres is invalid, but on the other, the Constitution restricts the two higher legislatures from compromising or impeding municipal abilities or the exercise of its functions, through either legislative or executive actions. Both national and provincial legislatures must thus guard against enacting legislation that would compromise or impede municipal powers that would result in a conflict between municipal by-laws and such national or provincial laws. It follows that although municipalities have original legislative authority, such authority cannot be exercised in contradiction with national or provincial legislation. Municipal by-laws are subsequently subordinate in comparison with national or provincial laws. The only protection given to municipalities regarding a total domination by national or provincial laws is that such laws may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. In light of this protection, it would seem that if national or provincial legislation is mainly directed at or has the effect of compromising or impeding a municipality's ability or right to exercise its powers or perform its functions, a municipal by-law should have preference over such national or provincial legislation.<sup>27</sup> Subsection

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<sup>24</sup> See the Constitution s 156(3).

<sup>25</sup> Refer to the Constitution s 239 definitions.

<sup>26</sup> See the Constitution s 156(3) read together with s 151(4).

<sup>27</sup> In this regard it would be of importance to look and evaluate the purpose of the national or provincial legislation. One must remember that the Constitution allows both national and the provincial legislatures to exercise legislative authority over the matters listed in the Constitution Schs 4 and 5 Parts A and B respectively. There is thus no prohibition on such legislatures to legislate on the matters that are also listed and over which municipalities can make by-laws. The purpose of the national or provincial law is a decisive factor, however.



156(3) further requires an investigation of section 149 of the Constitution. Section 149 states that a decision by a court that legislation (either national or provincial) prevails over other legislation, such a decision does not invalidate that other legislation, but such other legislation becomes inoperative for as long as the conflict remains. Because provincial legislatures have both exclusive legislative competencies and concurrent legislative competencies, conflict between a national law and a provincial law is a strong possibility. National legislation does not have automatic dominance over provincial legislation.<sup>28</sup> If such a conflict has occurred and a court has given a decision in favour of either the national law or the provincial law then the other law which is part of the conflict becomes inoperative for as long as the conflict remains. If a municipal by-law in turn conflicts with legislation that is inoperative, the by-law is not invalid and must be regarded as valid for as long as that legislation is inoperative.<sup>29</sup>

#### **14.2.2 Constitutional provisions that indirectly impact on municipal powers and functions**

The Constitution itself provides for various obligations and requirements that have an impact, albeit often indirectly, on the powers and functions of municipal governments. These aspects are briefly identified and discussed as follows:

- The Constitution confirms that both the executive authority and legislative authority of a municipality is vested in its municipal council. There can be no doubt therefore as to the ability of a municipality to exercise or perform executive or legislative authority. Such authority vests only in the municipal council, however.<sup>30</sup>
- Municipalities are also accorded a right to govern the local government affairs of their communities on their own initiative. Once it has been determined that a specific matter(s) is to be classified as part of local government affairs, a municipality has a constitutional right to govern that matter on its own initiative. However, this

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<sup>28</sup> See the Constitution s 146, which indicates how such a dispute is to be resolved.

<sup>29</sup> Take the following practical example: Imagine both a national law and a provincial law on the environment. The two laws are in conflict with one another and a court has decided that the provincial law is to prevail over the national law. The national law becomes inoperative insofar as the conflict remains. If such a national law is also in conflict with a municipal by-law, the by-law will not be invalid and must be regarded as valid for as long as the national legislation is inoperative. See s 156(3). Such circumstances, especially within the constitutional framework of cooperative government, should be very rare, however.

<sup>30</sup> See the Constitution s 151(2).

right is circumscribed by the Constitution to the extent that it is subject to national and provincial legislation, as provided for in the Constitution.<sup>31</sup>

- Municipal powers and functions are also protected through the provision that national or provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.<sup>32</sup> Any consideration of a dispute in this regard would call for an objective evaluation of all relevant facts and circumstances.<sup>33</sup>
- Apart from being subject to national and provincial legislation as mandated by the Constitution, municipal powers and functions are also largely influenced by mostly national legislation.<sup>34</sup> In this regard and subject to section 229, which deals with financial matters, national legislation is required to make provision for an appropriate division of powers and functions between municipalities in areas which have both category B and C municipalities. Such division of powers between category B and C municipalities need not be uniform across a province.<sup>35</sup>
- Mention has already been made of the fact that the Constitution mandates both national and provincial governments to have legislative and executive authority to

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<sup>31</sup> See the Constitution s 151(3). This subsection must be read together with s 156(3), which invalidates a municipal by-law that conflicts with national or provincial legislation. The wording "as provided for in the Constitution" used in s 151(3) is somewhat controversial, however, and in need of clarification. Two possible interpretations seem possible: one is that the Constitution refers only to those national or provincial laws which are specifically mentioned in the Constitution ch 7 and which deal with local government aspects. The other possibility, which suggests a broader interpretation, refers to any national or provincial legislation that is constitutionally legitimate or lawful, evaluated in the broad constitutional framework. The latter interpretation seems to be the one that should be favoured.

<sup>32</sup> Refer to the Constitution s 151(4).

<sup>33</sup> The principles and requirements of cooperative government set out in the Constitution ch 3 are also important in such cases. Such principles require all spheres of government to *inter alia* respect the constitutional status, institutions, powers and functions of governments in the other spheres; not to assume any power or function except those conferred in terms of the Constitution and to exercise their powers and perform their functions in a manner that do not encroach on the geographical, functional or institutional integrity of another sphere of government. See the Constitution s 41(e)-(g).

<sup>34</sup> Throughout the chapter on local government in the Constitution, many obligations are set whereby national legislation must establish criteria, define the types of municipality and determine various other aspects applicable to local governments. See, eg, the Constitution ss 155(3)(2) and (3)(a) and 160(5).

<sup>35</sup> According to s 155(3)(c) the Constitution determines that a division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B and C municipality. All that is constitutionally required is an appropriate division method whereby such powers and functions are divided. It should be noted that the national legislation referred to in this instance is obligated to take into account the need to provide municipal services in an equitable and sustainable manner. See the Constitution s 155(4). The division of powers and functions between category B and C municipalities must thus be carefully considered.

see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5. This national or provincial authority to oversee municipal performance is exercised through a process of regulating the exercise by municipalities of their executive authority referred to in section 156(1).<sup>36</sup>

- In respect of the internal procedures of a municipal council, the Constitution also determines that a municipal council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality. Municipal councils are also permitted to employ personnel that are necessary for the effective performance of municipal functions.<sup>37</sup> The fact that the municipal legislative authority is a function that may not be delegated by a municipal council and must be exercised by the council self is also constitutionally protected.<sup>38</sup> Furthermore, municipal councils are constitutionally authorised to make by-laws, thus exercising legislative authority, through rules and orders for its internal arrangements, its business and proceedings and the establishment, composition, procedures, powers and functions of its committees.<sup>39</sup> *Prima facie* these provisions refer to additional legislative authority of municipal councils apart from the ones mentioned earlier, closer evaluation suggests that such authority is a further elaboration of the so-called “implied powers” of municipalities permitted under section 156(5) of the Constitution.

In the discussion of the constitutional requirements regarding the powers and functions of municipalities, mention was made of the important role that mostly national legislation is obligated to play in the new local government system. Such national legislation is also important in relation to the powers and functions of municipal governments. Both the Local Government: Municipal Structures Act and the Municipal Systems Act contain important legislative requirements in this respect. These are discussed briefly below.

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<sup>36</sup> See the Constitution s 155(7). Through the regulation of municipal executive authority, municipal legislative authority is also regulated. Municipal legislative authority is thus dependent on the existence of municipal executive authority. See the Constitution s 156(2).

<sup>37</sup> See the Constitution s 160(1)(a) and (d) respectively.

<sup>38</sup> Refer to the Constitution s 160(2)(a).

<sup>39</sup> See the Constitution s 160(6)(a)-(c).

### **14.3 National legislation to enhance the constitutional foundation on the powers and functions of municipal councils**

The importance of both national and provincial legislation on the powers and functions of municipalities have been clearly indicated above. Apart from the most obvious influence, namely that national or provincial governments may, or sometimes must, assign other matters to municipalities through legislation,<sup>40</sup> the Constitution also requires national legislation to provide for an appropriate division of powers and functions between category B and C municipalities.<sup>41</sup> Such division is per definition relevant only between a category B municipality (local municipality) and a category C (district municipality). Category A or metropolitan municipalities have exclusive municipal executive and legislative authority within their areas of jurisdiction.<sup>42</sup> In compliance with the abovementioned constitutional requirements, the following national legislative provisions have been enacted.

#### **14.3.1 Functions and powers of municipalities under the Local Government: Municipal Structures Act<sup>43</sup>**

In general, the Municipal Structures Act provides that a municipality has the functions and powers assigned to it in terms of sections 156 and 229 of the Constitution. Such powers must be divided between a district municipality and local municipalities within the area of a district municipality.<sup>44</sup> The Act further obligates a district municipality to achieve the integrated, sustainable and equitable social and economic development of its area as a whole. Such development is to be achieved through exercising or providing the following powers or functions:<sup>45</sup>

- (a) Ensuring integrated development planning for the district as a whole;
- (b) By promoting bulk infrastructural development and services for the district as a whole;
- (c) By building the capacity of local municipalities in its area to perform their functions and to exercise their powers where such capacity is lacking; and

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<sup>40</sup> See the Constitution s 156(1)(b) and 156(4).

<sup>41</sup> This is confirmed in the Constitution s 155(3)(c).

<sup>42</sup> See the Constitution s 155(1)(a)-(c) for an explanation of the three categories of municipalities.

<sup>43</sup> 117 of 1998.

<sup>44</sup> See the Structures Act s 83(1) and (2).

<sup>45</sup> See s 83(3)(a)-(d). It is clear that the Act accords significantly more responsibility and authority to district councils over local councils in its area. This seems to be in line with the Constitution's definition and creation of the two different categories of municipality. The Constitution s 155(1).

- (d) To promote the equitable distribution of resources between the local municipalities in its area and to ensure appropriate levels of municipal services within the area.

Apart from the general emphasis on the responsibilities of district municipalities, the Act also specifically provides for the division of functions and powers between district and local municipalities. Accordingly, all district municipalities are accorded the following functions and powers:<sup>46</sup>

- (a) Integrated development planning for the district municipality as a whole, including a framework for integrated development plans of all municipalities in the area of the district municipality.
- (b) Potable water supply systems.
- (c) Bulk supply of electricity, which includes for the purposes of such supply, the transmission, distribution and, where applicable, the generation of electricity.
- (d) Domestic wastewater and sewage disposal systems.
- (e) Solid waste disposal sites, in so far as it relates to –
  - (i) the determination of a waste disposal strategy;
  - (ii) the regulation of waste disposal;
  - (iii) the establishment, operation and control of waste disposal sites, bulk waste transfer facilities and waste disposal facilities for more than one local municipality in the district.
- (f) Municipal roads which form an integral part of a road transport system for the area of the district municipality as a whole.
- (g) Regulation of passenger transport services.
- (h) Municipal airports serving the area of the district municipality as a whole.
- (i) Municipal health services.
- (j) Fire fighting services serving the area of the district municipality as a whole, which includes –
  - (i) planning, coordination and regulation of fire services;
  - (ii) specialised fire fighting services such as mountain, veld and chemical fire services;
  - (iii) coordination of the standardisation of infrastructure, vehicles, equipment

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<sup>46</sup> See the Structures Act s 84(1)(a)-(p).

and procedures;

- (iv) training of fire officers.
- (k) The establishment, conduct and control of fresh produce markets and abattoirs serving the area of a mayor proportion of the municipalities in the district.
- (l) The establishment, conduct and control of cemeteries and crematoria serving the area of a mayor proportion of municipalities in the district.
- (m) Promotion of local tourism for the area of the district municipality.
- (n) Municipal public works relating to any of the above functions or any other functions assigned to the district municipality.
- (o) The receipt, allocation and, if applicable, the distribution of grants made to the district municipality.
- (p) The imposition and collection of taxes, levies and duties as related to the above functions or as may be assigned to the district municipality in terms of national legislation.

All the remaining powers and functions afforded under section 83(1) which have not been vested in terms of section 84(1) in the district municipality of a relevant area will fall under the authority of the relevant local municipalities.<sup>47</sup>

Although section 84(1) of the Structures Act clearly distinguishes between the powers and functions of district and local municipalities, the Act does allow for a local municipality to perform certain powers and functions that have been allocated to district municipalities. In this regard, the Act requires that the minister (responsible for local government) may authorise a local municipality to perform a function or exercise a power mentioned in subsection 84(1)(b), (c), (d) or (i), or any aspect of such function or power, in the area of that local municipality

- by notice in the *Government Gazette*
- after consultation with the cabinet member responsible for the functional area in question
- after consulting the MEC for local government in the provinces and, if applicable,

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<sup>47</sup> The Structures Act s 84(2). A comparison between the Constitution ss 156 and 229 and the functions and powers allocated to district municipalities under s 84(1) shows that only a few powers and functions will remain under local municipalities. In this regard it should be obvious that the authority of local municipalities is severely restricted in favour of district municipalities, which are legally empowered with more powers and functions.

subject to national legislation.<sup>48</sup>

According to subsection 84(3)(a), only the powers and functions regarding potable water supply systems, bulk supply of electricity, domestic waste water and sewage disposal systems and municipal health services can be allocated to local municipalities.<sup>49</sup> It is also required of the Minister of Local Government that if he/she issues a notice in terms of section 84(3)(a), such notice must regulate the legal, practical and other consequences of his/her authorisation. Such consequences may include the transfer of staff, the transfer of assets, liabilities, rights and obligations and administrative and other records, and also the continued application of any by-laws and resolutions in the area of the municipalities concerned. The minister may amend a notice and then regulate the legal, practical and other consequences of such amendment.<sup>50</sup>

The Structures Act also provides for the adjustment of the division of functions and powers between district and local municipalities. The Act states that, subject to section 85 and within a prescribed policy framework, the MEC for local government may adjust the division of functions or powers between a district and local municipality as set out in section 84(1) and (2) by

- allocating any of those functions or powers vested in the local municipality to the district municipality
- allocating any of those functions or powers vested in the district municipality to the local municipality.<sup>51</sup>

An MEC may allocate a function or power mentioned above only if the municipality in which the function or power is vested lacks the capacity to perform that power or

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<sup>48</sup> The Structures Act s 84(3)(a). Strictly speaking, the Minister of Local Government does not have to follow the decision reached after consultation as long as the consultation was held, but from a political and cooperative point of view unilateral decisions should not be accepted.

<sup>49</sup> This would thus require the involvement of the Ministers of Water, Energy and Health respectively.

<sup>50</sup> See the Structures Act s 84(3)(b)-(e) as amended.

<sup>51</sup> Note that a function or power referred to in s 84(1)(a), (b), (c), (d), (i), (o) or (p) is excluded from such allocation from the district municipality to the local municipality. See the Structures Act s 85(1)(b). Note that the MEC may adjust the division of functions and powers between a district and a local municipality by allocating a function or power within a particular policy framework. According to the policy framework for the adjustment of division of functions and powers regulations published under GN 2592 in GG 21370 of 12 July 2000, the allocation of a function or a power must be aimed at specific objectives. Refer to s 2(b)(i)-(xi) of the regulations.



function and the MEC has consulted the Demarcation Board and has considered its assessment of the capacity of the municipality concerned.<sup>52</sup>

Apart from the general role of the Demarcation Board explained in chapter 10 of this work, the Demarcation Board must consider the capacity of a district or local municipality to perform the functions and exercise the powers vested in the municipality as set out in section 84(1) or (2). This consideration must be done in two distinct instances:

- where the Board is determining or re-determining the boundaries of such municipalities
- when requested to do so in terms of subsection 85(2)(b) of the Structures Act by the MEC for Local Government in the relevant province.

The Board must also convey its assessment in writing to the relevant MEC.<sup>53</sup> If an MEC disagrees with the assessment of the Board and still decides to adjust or refuses to adjust the division of powers and functions between the municipalities concerned, the MEC must furnish reasons to the relevant municipalities and the Minister before finalising such an adjustment.<sup>54</sup> An important aspect to note is that any adjustment of the division of powers or functions must be reflected in the section 12 notices whereby the concerned municipalities have been established.<sup>55</sup> The MEC's decision can be vetoed by the Minister because after consulting the MEC and municipalities concerned the Minister is given the power to vary or withdraw any allocation or to adjust the division of powers and functions between a district municipality and local municipality in instances where the MEC has refused to make an adjustment in accordance with the assessment of the Demarcation Board. It is the MEC's responsibility to amend the section 12 notices in order to give effect to any variation or withdrawal of any allocation or reallocation and also regularly to review the capacity of the relevant municipality(s) and to reallocate a function or power to a municipality when it acquires the capacity to perform or exercise that power or function.<sup>56</sup>

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<sup>52</sup> Note that the second requirement does not apply if the Demarcation Board omits to comply with a request from the MEC within a reasonable period. Disputes in this regard will depend on the circumstances of each case. See the Structures Act s 85(2) and (3).

<sup>53</sup> See the Structures Act s 85(4).

<sup>54</sup> The Structures Act s 85(5).

<sup>55</sup> See ch 9 of this work dealing with the establishment of municipalities. See also the Act s 85(6).

<sup>56</sup> See the Act s 85(7)-(9). Any reallocation must be made with the concurrence of the receiving municipality or, if such concurrence cannot be obtained, after consultation with the Demarcation

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According to the Structures Act, if a dispute arises between a district and local municipality concerning the performance of a function or exercise of a power, the MEC may resolve the dispute by defining their respective roles by notice in the *Provincial Gazette*. Such resolve by the MEC may be done after consultation with the municipalities concerned.<sup>57</sup> It is furthermore also provided that if the provision of basic services by a district or local municipality collapses or is likely to collapse because of a lack of capacity or *any other reason*,<sup>58</sup> the MEC, after written notice to the relevant municipality and with immediate effect, may allocate any power or function necessary to restore or maintain those basic services to a local or district municipality, depending on the circumstances of the case.<sup>59</sup> Either the district or local municipality concerned may lodge a written objection against such "emergency" allocation to the minister. In return, the minister has the power to confirm, vary or withdraw the allocation after he/she has consulted the Demarcation Board. A written objection such as that mentioned above must be lodged within 14 days of the date of the official notice of the MEC in the *Provincial Gazette*, and any failure to lodge an objection timeously will be regarded as consent to the allocation by the municipalities concerned. When a municipality has lost a power or function but is again in a position to resume the provision of those basic services, then the MEC must reallocate such power or function to the original municipality.<sup>60</sup>

Mention has been made of the importance of the principles of cooperative government, especially in respect of the powers and functions relating to municipalities. Not only cooperation between municipalities and the two higher spheres of government is important, but also co-operation between municipalities *inter se*. In order to enhance such cooperation, both a district municipality and local municipalities within the area of that district municipality must cooperate with one another by assisting and supporting each other. Cooperation also includes provision of financial, technical and administrative support services, if capacity allows. Support will be requested by

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Board regarding the capacity of that municipality. In this regard, municipalities are protected against being allocated powers or functions which they cannot or do not have the capacity to exercise or perform.

<sup>57</sup> See the Structures Act s 86 as substituted by Act 33 of 2000 s 8.

<sup>58</sup> Own emphasis.

<sup>59</sup> The Structures Act s 87.

<sup>60</sup> See the Structures Act s 87(2)-(4). During difficult times municipalities are thus protected against being deprived of the powers and functions on a permanent basis; they are deprived of

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mostly one municipality from another, and include support between a district municipality or local municipality or *vice versa* or between local municipalities *inter se*.<sup>61</sup>

Lastly, it should be noted that no division of powers and functions is applicable in a category A or metropolitan municipality. All municipal powers and functions assigned in terms of sections 156 and 229 of the Constitution are vested in the metropolitan council itself. The position is similar in district management areas, where all the municipal powers and functions are vested in the relevant district municipality within whose area the district management area falls.<sup>62</sup>

#### **14.3.2 Aspects regarding municipal functions and powers under the Local Government: Municipal Systems Act<sup>63</sup>**

In order to further regulate aspects regarding the powers and functions of municipalities and also to compliment and support the Constitution and Structures Act, the Municipal Systems Act provides that a municipality has all the functions and powers conferred by or assigned to it in terms of the Constitution and must exercise such powers and functions subject to chapter 5 of the Municipal Structures Act.<sup>64</sup> A municipality also has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers.<sup>65</sup>

The Systems Act originally dealt with two types of assignment of powers or functions. The first type was assignments initiated by the national or provincial executives to all municipalities generally. In this regard the Act provided that a cabinet member or depute minister that initiated the assignment of a function or a power by way of national legislation to municipalities in general had, before the draft legislation is introduced in parliament to:

- consult the Minister of Local Government, the National Minister of Finance and

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them only temporarily – until they resume a position of service delivery. Simultaneously the community is also assured of continuous service delivery.

<sup>61</sup> See the Structures Act s 88(1)-(3). When a district municipality is to provide support services to a local municipality, the MEC is obligated to assist that district municipality to provide the relevant support services.

<sup>62</sup> See the Structures Act s 89.

<sup>63</sup> 32 of 2000.

<sup>64</sup> The Municipal Structures Act ch 5 encompasses s 83 to 89 of the Act, which is discussed above.

<sup>65</sup> Refer to the Systems Act s 8(2). This subsection is in confirmation of the Constitution s 156(5).

### Organised Local Government<sup>66</sup>

- consider any assessment by the Financial and Fiscal Commission (FFC) and
- publish the draft legislation in terms of section 154(2) of the Constitution.<sup>67</sup>

The position was very similar when an MEC (thus a provincial executive) initiated the assignment of a function or power in terms of provincial legislation to municipalities in that province. The legislative position was changed, however, during 2003<sup>68</sup>. The Systems Act now allows for the assignment of functions or powers to municipalities generally by Acts of parliament or provincial Acts. According to the amended provisions, a cabinet member or deputy minister who seeks to initiate the assignment of a function or power by way of an Act of Parliament to municipalities in general, or to any category of municipality, must, within a reasonable time before the draft bill is introduced as the following:

- (a) He/she must request the Financial and Fiscal Commission (FFC) to assess the financial and fiscal implications of the proposed legislation. For purposes of the assessment, the FFC must be informed about the possible impact of the assignment on the future division of revenue between the spheres of government in terms of section 214 of the Constitution; the fiscal power, capacity and efficiency of municipalities or any category of municipalities and the transfer, if any, of employees, assets and liabilities.
- (b) He/she must consult with the minister of local government, the ministers of finance and organised local government who represent local government nationally. The consultation should have regard to the assessment by the FFC; the policy goals to be achieved by the assignment and the reasons for utilising assignment as the preferred option; the financial implications of the assignment projected over at least three years; any possible financial liabilities or risks after the three year period; the manner in which additional expenditure as a result of the assignment will be funded; the implications of the assignment for the capacity of municipalities; the assistance and support that will be provided to municipali-

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<sup>66</sup> OLG is represented by SALGA at national level.

<sup>67</sup> According to the Constitution s 154(2), draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in parliament or a provincial legislature. The publication must be done in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to such draft legislation.

<sup>68</sup> See Act 44 of 2003 sec 2.

ties and, finally, any other matter that may be prescribed by regulation under the Act.<sup>69</sup>

When draft legislation, as is mentioned above, is introduced in parliament or a provincial legislature, then the legislation must be accompanied by a memorandum which should give a projection of the financial and fiscal implications, disclose any possible financial liabilities or risks, indicate how any additional expenditure will be funded and indicate the implications of the assignment for the capacity of the municipalities involved. The official assessment of the FFC must also be annexed.<sup>70</sup>

The Systems Act also provides for the assignment of functions or powers to specific municipalities by acts of the executive or by agreement. In this regard it is provided that if a function or power is assigned to any specific municipality in terms of a power contained in an Act of parliament or a provincial Act, or by agreement in terms of section 99 or 126 of the Constitution, then the organ of state assigning the function or power must submit a memorandum to the Minister of Local Government and the National Treasury. The memorandum must give at least a three-year projection of the financial implications of the function or power for the municipality, disclose any possible financial liabilities or risks and indicate how additional expenditure will be funded.<sup>71</sup> It is further provided that the Cabinet member, MEC or other organ of state initiating an assignment of a power or function to a municipality in terms of sections 9 or 10 of the Systems Act must take appropriate steps to ensure sufficient funding and capacity building initiatives for the performance of the assigned power or function, if:

- the assignment imposes a duty on the municipality
- the power or function falls outside the functional areas listed in parts B of Schedules 4 and 5 to the Constitution or is not incidental to any of those functional areas
- the performance of the power or function (duty) has financial implications for the municipality.<sup>72</sup>

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<sup>69</sup> Refer to s 9(1)(a)-(b) of the Systems Act. The position is very similar when an MEC seeks to initiate the assignment of a function or power by way of a provincial Act to municipalities in the province or only certain category of municipalities in the province. Read s 9(2)(a)-(b) of the Act. What is regarded as a reasonable time for purposes of ss 9(1)(a) and 9(2)(a) is, however, unclear.

<sup>70</sup> See s 9(3)(a)-(b) of the Systems Act.

<sup>71</sup> See the Systems Act s 10 as substituted by Act 44 of 2003 s 3.

<sup>72</sup> Read s 10A of the Systems Act as inserted by Act 44 of 2003 s 4.

#### 14.4 Executive and legislative functioning

In support of and in compliance with the Constitution, the Systems Act confirms that both the legislative and executive authority of a municipality are exercised by the council of a municipality and that the council takes all decisions of the municipality subject only to section 59 of the Systems Act, which deals with the delegation of powers and functions to other functionaries within the municipality.<sup>73</sup>

Similar to other instances where executive or legislative authority is exercised or performed, there are various requirements and determinations that must be adhered to. In this regard, it is a common principle that a legislature or executive organ can lawfully exercise only such authority that has been given to it and can do so only within a specific area. In this respect, a municipality is authorised in general to exercise executive and legislative authority within its boundaries only.<sup>74</sup> However, it is possible for a municipality to exercise executive authority in the area of that other municipality by agreement with another municipality and subject to chapter 5 of the Municipal Structures Act and other applicable national legislation.<sup>75</sup>

In order for a municipality to exercise its executive and legislative authority, it must obviously comply with constitutional and other legislative requirements. Many of these requirements have been identified and discussed above. In respect of the exercise of executive authority, it is very important to look at the legislation dealing with the internal procedures and functioning of local governments. Again, the Constitution and other national legislation are prescriptive in this regard and will be discussed in a following chapter. Apart from those requirements, the Systems Act in general determines that a municipality exercises its legislative or executive authority in various ways, and more particularly by doing the following:<sup>76</sup>

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<sup>73</sup> Although the Constitution confirms that executive and legislative authority of a municipality is vested in the municipal council, the Systems Act also confirms that it is the responsibility of a council to take all the executive and legislative decisions and accordingly also the responsibility for such authority. See the Constitution s 151(2) and the Systems Act s 11. Delegated powers or functions are exercised or performed by the delegated functionary, but the municipal council still retains final responsibility. See the Systems Act s 59(2)(e).

<sup>74</sup> Again the boundary determinations and the role of the Demarcation Board should be emphasised in this regard.

<sup>75</sup> See the Systems Act s 11(2). Note that this exception refers only to the exercise of executive authority and is somewhat unclear about the exercise of legislative authority. According to the Constitution, the authority to exercise legislative authority follows from the authority to exercise executive authority. It could thus be argued that even legislative authority can be exercised by one municipality in the jurisdiction of the other.

<sup>76</sup> The Systems Act s 11(3)(a)-(n).

- (a) Developing and adopting policies, plans, strategies and programmes, including setting targets for delivery;
- (b) Promoting and undertaking development;
- (c) Establishing and maintaining an administration;
- (d) Administering and regulating its internal affairs and the local government affairs of the local community;
- (e) Implementing applicable national and provincial legislation and its by-laws;
- (f) Providing municipal services to the local community, or appointing appropriate service providers in accordance with the criteria and process set out in section 78;
- (g) Monitoring and, where appropriate, regulating municipal services where those services are provided by service providers other than the municipality;
- (h) Preparing, approving and implementing its budgets;
- (i) Imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees including setting and implementing tariff, rates and tax and debt collection policies;
- (j) Monitoring the impact and effectiveness of any services, policies, programmes or plans;
- (k) Establishing and implementing performance management systems;
- (l) Promoting a safe and healthy environment;
- (m) Passing by-laws and taking decisions on any of the above mentioned matters; and
- (n) Doing anything else within its legislative and executive competence.

Lastly, it is important to note that a decision taken by a municipal council or any other political structure of the municipality must be recorded in writing.<sup>77</sup>

#### **14.5 Legislative procedures and requirements**

In the preceding paragraphs of this chapter it was mentioned that municipalities have both executive and legislative powers and functions. Municipal legislative powers or functions are restricted to such matters that are necessary for municipalities to ensure an effective administration.<sup>78</sup>

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<sup>77</sup> This requirement is directed more at executive decisions than legislative decisions, as legislative decisions are always in writing.

<sup>78</sup> Refer to the Constitution s 156(1) and (2). It is argued that such legislative authority, ie to make and administer by-laws, depends on the extent of municipality's executive authority and also



Apart from determining the basis of a municipality's legislative authority, the Constitution also stipulates other procedural considerations that must be complied with when municipalities exercise their legislative powers or functions. The newly enacted national legislative framework gives further content to such requirements. The following constitutional requirements are of importance in this respect:

- Subject to section 151(4), a municipality should not enact by-laws that are in conflict with national or provincial legislation.<sup>79</sup>
- It is the responsibility of the municipal council to make decisions concerning the exercise of all the powers and the performance of all the functions including legislative powers and functions. This responsibility is so important that the Constitution specifically forbids such functioning to be delegated to any other organ or functionary in that council.<sup>80</sup> In *Fedsure Life Assurance v Greater JHB TMC*<sup>81</sup> the Constitutional Court held *inter alia* that [a] [municipal] council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate. Such decisions must, of course, be lawful, but the requirement of legality exists independently. The procedures according to which legislative decisions are to be taken are prescribed by the Constitution, the empowering legislation and the rules of the council. Whilst this legislative framework is subject to review for consistency with the Constitution, the making of by-laws and the imposition of taxes by a council in accordance with the prescribed legal framework cannot appropriately be made subject to challenge by "every person" affected by them. The court also stated that each member of a council is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on po-

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whether it is required for the effective administration of its executive powers or functions. It would seem that the basis of municipal legislative authority is indirect and not original. The Constitution confirms this submission by stating that a municipality has executive authority and the right to administer the local government matters listed in the Constitution Schs 4 and 5 Part B or assigned to it in terms of national or provincial legislation.

<sup>79</sup> The Constitution s 156(3).

<sup>80</sup> See the Constitution ss 160(1)(a) and (2)(a). The passing of by-laws is a function that may not be delegated by a municipal council. This requirement is seen to protect representative and accountable democratic government. Only the properly elected municipal council should have the authority to perform or exercise legislative competencies.

<sup>81</sup> 1999 (1) SA 374 (CC).

litical grounds. It is for the members and not the courts to judge what is relevant in such circumstances.<sup>82</sup>

- A majority of the members of a municipal council must be present before a vote may be taken on any matter. However, all questions concerning the passing of by-laws are determined by a decision taken by that council with the support of a majority of its members.<sup>83</sup>
- The Constitution requires that no by-law may be passed by a municipal council unless all the members of the council have been given reasonable notice of the by-law and the proposed by-law has been published for public comment. Both these requirements must be met before a by-law can lawfully be enacted by a municipal council. What is regarded as reasonable notice is not altogether certain and depends on the circumstances of each case. It is submitted that national legislation should provide for such uncertainties and should, for instance, prescribe a minimum notice period.<sup>84</sup>
- In order to enhance the notification of municipal by-laws, the Constitution requires that a municipal by-law may be enforced only after it has been published in the official gazette of the relevant province. Upon request by a municipality, an official *Provincial Gazette* must publish a municipal by-law. The Constitution also requires that municipal by-laws must be accessible to the public.<sup>85</sup>

In an effort to further enhance the basic constitutional framework regarding the legislative powers and functions of municipalities, a specific chapter on municipal functions and powers was included in the Local Government: Municipal Systems Act.<sup>86</sup> The Act specifically addresses aspects such as legislative procedures, the publication of by-laws, standard draft by-laws and the municipal code.<sup>87</sup> Each of these aspects is discussed briefly below:

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<sup>82</sup> See paras 41-42 at 394-395.

<sup>83</sup> In this regard one should distinguish between a relative majority and an absolute majority. A relative majority/simple majority is the majority of 50% + 1 of the members present who formed a quorum. A quorum is often less than 50% of the total number of members of a particular council. An absolute majority, on the other hand, is a majority of 50% + 1 of the total number of members of a council. If a council thus has 200 members, at least the support of 101 of the members is required to obtain an absolute majority. See the Constitution s 160(3)(a) and (b). See also Rautenach and Malherbe (1999) 159.

<sup>84</sup> Neither national nor provincial legislation seem to address such an important aspect. See the Constitution s 160(4)(a) and (b).

<sup>85</sup> See the Constitution s 162.

<sup>86</sup> See the Systems Act ch 3.

<sup>87</sup> Refer to the Systems Act ss 12-15.

- *Legislative procedures* In respect of legislative procedures, it is legally required that only a member or a committee of a municipal council may introduce a draft by-law in the council.<sup>88</sup>

Furthermore, a by-law must be enacted by a decision taken by a municipal council

(a) in accordance with the rules and orders of the council and

(b) with a supporting vote of a majority of its members.<sup>89</sup>

No by-law may be passed by a municipal council unless

(a) all members have been given reasonable notice and

(b) the proposed by-law has been published for public comment in a manner that allows the public an opportunity to make representations with regard to the proposed by-law.<sup>90</sup>

The legislative procedures mentioned above also apply when a municipal council incorporates by reference, as by-laws, provisions of either legislation passed by another legislative organ of state or standard draft by-laws made in terms of section 14 of the Systems Act.<sup>91</sup>

- *Publication by by-laws* According to the Systems Act, a by-law passed by a municipal council
  - (a) must be published promptly in the relevant *Provincial Gazette* and, when feasible, also in a local newspaper or in any other practical way in order to bring the contents of the by-law to the attention of the local community and
  - (b) takes effect when published or on a future date determined in the by-law.<sup>92</sup>

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<sup>88</sup> This position is similar to provincial legislatures, where only members of the executive council of a province or a committee of the legislature or a member of the provincial legislature may introduce a bill in the legislature. Only the MEC for finance may introduce a money bill. See the Constitution s 119. Because a municipal council is vested with both executive and legislative authority, the functionary that may introduce a by-law in the council is not comparable with the position in provincial legislatures. See also the Systems Act s 12(1).

<sup>89</sup> Thus referring to an absolute majority.

<sup>90</sup> These requirements are directed to ensure compliance with the Constitution ss 160(3) and (4) and 162 (1)-(3). It is also submitted that municipal rules and orders should address issues such as "reasonable notice" and "a manner to allow for public opportunity to make representations". The Constitution allows specifically for the making of by-laws which prescribe rules and orders for the internal arrangements, business and proceedings and aspects concerning committees of a municipal council. See the Constitution s 160(6)(a)-(c) and the Systems Act s 12(2) and (3).

<sup>91</sup> See the Systems Act s 12(4)(a)-(b).

<sup>92</sup> "Promptly" is generally regarded to mean "as soon as possible". Unfounded delays should not be acceptable. One should also take note that other practical ways to inform local residents or community members includes reports by local radio stations, advertisements in local newspapers, community newspapers and leaflets that are sent out by post with each resident's rates and taxes account.

Similar to national or provincial legislation, municipal by-laws take effect either when published or on a date as is determined by the by-law self.

- *Standard draft by-laws* According to section 14 of the Systems Act, at the request of OLG representing LG nationally or after consulting the MECs for local government and OLG and by notice in the national gazette:

(a) The minister of local government may make standard draft by-laws concerning any matter for which a municipal council may make by-laws. This includes aspects mentioned in section 160(6) of the Constitution.

(b) The minister of local government may amend any such standard draft by-laws. Before the minister is to make or amend a standard draft by-law he/she must publish the proposed by-law or amendment in the national gazette for public comment and consult the cabinet member concerned if the by-law or amendment is to affect a particular area of responsibility.<sup>93</sup> As with the national minister, an MEC for local government may make standard draft by-laws or amend such by-laws concerning any matter for which municipal councils in that province may make by-laws, on request by OLG in the province or after consulting the minister of local government and by notice in the *Provincial Gazette*.<sup>94</sup> Again proper publication of the by-laws or amendments and consultation with other MECs in the province is required.<sup>95</sup> In order to protect the constitutionally granted legislative authority, the Systems Act states that a standard draft by-law or an amendment is applicable in a municipality only if, to the extent that, and subject to any modifications and qualifications have been adopted by the council of that municipality.<sup>96</sup>

A somewhat uncertain aspect of the Act is whether a standard draft by-law which is repealed by the national government after it has been adopted by a municipality still applies in the relevant municipal jurisdiction. The intention of the drafters of the Act is uncertain in this regard, and it seems that they intended that it would not be possible to repeal a draft standard by-law once it had been adopted by a mu

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<sup>93</sup> See the Systems Act s 14(1)(b).

<sup>94</sup> This will normally refer to such matters that have been assigned to municipal councils in terms of a provincial legislation and over which that municipality can subsequently exercise legislative authority.

<sup>95</sup> See the Systems Act s 14(2)(a) and (b).

<sup>96</sup> The Act s 14(3)(a). The standard draft by-law can thus not be enforced on a municipal council and only serves as a concept on which a municipality can finalise its own more detailed by-laws, if it so wishes.

municipal council. This would mean that such a standard draft by-law cannot be amended by the council itself and may be amended by only the Minister or MEC as set out in section 14(1) and (2) of the Act. The constitutionality of this section of the Act is somewhat in doubt, as it seems that the Act limits the legislative authority of municipalities, which would also mean the amendment of municipal legislative actions. Nowhere does the Constitution allow for such a restriction; on the contrary, the Constitution specifically requires that neither the national or a provincial government may compromise or impede a municipality's ability or right to exercise its powers or perform its functions.<sup>97</sup> In the last instance, if a municipal council intends to adopt a standard draft by-law with or without modifications or qualifications, the council must follow the same procedure set out in section 12(3) of the Systems Act and also publish the by-law in accordance with section 13 of the Act.<sup>98</sup>

*Municipal code* According to the Systems Act, a municipality must compile and maintain in bound or loose-leaf form or, when feasible also in electronic format, a compilation of all its by-laws and the provisions incorporated by reference as by-laws. This compilation is known as the "municipal code" and must constantly be updated and annotated. Furthermore, the code must be kept at the municipality's head office as its official record of all applicable by-laws. At the request of a member of the public, the municipality must provide that person with a copy or extract from its municipal code against payment of a reasonable fee as determined by the council.<sup>99</sup>

#### **14.6 Municipal financial powers**

Apart from the powers and functions mentioned above, municipal governments also have some limited financial powers. Again, it is important in this regard to refer to the Constitution, which provides the following foundation regarding municipal fiscal powers and functions:<sup>100</sup>

- (1) Subject to subsections (2), (3) and (4), a municipality may impose

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<sup>97</sup> The restrictions set out in the Systems Act s 14(3)(b) thus seem to be contrary to the provisions of the Constitution, and more specifically the Constitution s 151(4).

<sup>98</sup> These requirements are confirmed in the Systems Act ss 14(4) and 12(4).

<sup>99</sup> Refer to s 15(1)-(3) of the Systems Act.

<sup>100</sup> See the Constitution s 229.

- (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
  - (b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.
- (2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties
- (a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and
  - (b) may be regulated by national legislation.
- (3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria:
- (a) The need to comply with sound principles of taxation.
  - (b) The powers and functions performed by each municipality.
  - (c) The fiscal capacity of each municipality.
  - (d) The effectiveness and efficiency of raising taxes, levies and duties.
  - (e) Equity.
- (4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.
- (5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.

From the text of the Constitution it is apparent that local governments have been vested with significant fiscal powers and functions and that national legislation may regulate such powers more extensively. Apart from quite a wide range of fiscal pow-

ers, the Constitution specifically excludes municipalities from imposing income tax, value-added tax, general sales tax or customs duty.<sup>101</sup> Only a constitutional amendment would allow for such powers to be extended to municipalities as well. Municipal financial powers such as the power to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality or other taxes, levies or duties as provided for in national legislation are constitutionally curtailed in two ways:

- Such powers may not be exercised in a way that materially and unreasonably prejudice national economic policies, economic activities across the municipal boundaries or the national mobility of goods, services, capital or labour<sup>102</sup>
- The powers or functions may be regulated by national legislation.<sup>103</sup>

The Constitution further allows for the division of fiscal powers and functions between two municipalities. Again regulation through national legislation is significant after the criteria set out in section 229(3)(a)-(e) of the Constitution has been taken into account. In order to facilitate cooperation and involvement, the national legislation that the Constitution envisages may be enacted only after OLG and the FFC have been consulted and any of the recommendations of the Commission have been considered. For more detail regarding matters concerning municipal finance, such as the raising of loans and the sharing of revenue, see the chapter on finance in this work.

#### **14.7 Municipal powers and functions regarding municipal law enforcement**

In the new local government dispensation municipalities have also been allocated stronger powers and functions regarding municipal law enforcement. Such powers already existed under the LGTA and have been included in the final municipal legal framework.<sup>104</sup> According to the final structure of local government, no direct reference is made to the power or functions regarding municipal law enforcement. Neither Part B of Schedule 4 nor Part B of Schedule 5 of the Constitution refers to the func-

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<sup>101</sup> See the Constitution s 229(1)(b).

<sup>102</sup> This provision is again directed at ensuring uniformity throughout the country and emphasises the importance of cooperation between all spheres of government. The criteria mentioned above are also similar to the provisions employed by the Constitution to determine if national legislation should prevail over provincial legislation in cases of disputes between such legislative enactments. See the Constitution s 146(2) and see also s 44(2).

<sup>103</sup> See the Constitution s 229(2)(a)-(b).

<sup>104</sup> In terms of the LGTA Schs 2 and 2A, certain powers were given to transitional metro councils and transitional local councils in order to establish and control municipal law enforcement agencies. However, such powers were subject to the South African Police Service Act 69 of 1995, as amended.



tional area of municipal law enforcement. The only reference to law enforcement is dealt with under Schedule 4 Part A dealing with police, to the extent that the provisions of chapter 11 of the Constitution confer any competence upon the provincial legislatures. One can conclude, therefore, that municipal law enforcement is not a direct executive, and thus legislative, competence of municipalities and can be exercised by municipalities only if assigned to them in terms of national or provincial legislation.<sup>105</sup>

In order to allow for municipal law enforcement, the South African Police Services Act was amended in 1998<sup>106</sup> and provided for the establishment of a municipal police service.<sup>107</sup> According to section 64A of the Act and in the prescribed manner, any municipality may apply to the MEC for safety and security of a province for the establishment of a municipal police service for its area of jurisdiction. Subject to certain conditions, the MEC may approve an application for the establishment of such a municipal police service if:

- the application complies with the prescribed requirements
- the municipality has the resources at its disposal to provide for a municipal police services which complies with national standards on a 24-hour basis
- traffic policing services by the municipality will not prejudicially be affected by the establishment of a municipal police service
- proper provision has been made by the municipality to ensure civilian supervision of the municipal police service and
- the establishment of the municipal police service will improve effective policing in that part of the province.

The MEC may approve an application only after consultation with the national police commissioner; after consultation with the metro council if the municipality falls in the area of a metropolitan council and with approval of the member or members of the executive council responsible for local government, finance, transport and traffic

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<sup>105</sup> Refer again to the Constitution s 156(1)(a)-(b). One can possibly also argue that limited municipal law enforcement is necessary for all municipalities to ensure the effective performance of their functions. Without a measure of law enforcement powers, municipalities will be toothless to enforce their own or other applicable legal rules and regulations and would thus be severely undermined in respect of their own functions and responsibilities. See also the Constitution s 156(5).

<sup>106</sup> See Act 83 of 1998.

<sup>107</sup> Reference to only a metropolitan police services was deleted by Act 83 of 1998 s 1(a). A "municipal police service" now refers to a municipal police service established under Act 83 of 1998 s 64A. See the Act s 1 definitions.

matters or the premier or member to whom such responsibilities have been assigned. Once an application has been approved, the MEC can establish the municipal police services by notice in the *Gazette*. All expenditure incurred by or in connection with the establishment, maintenance and functioning of a municipal police service shall be for the account of the municipality.<sup>108</sup>

The chief executive officer of a municipality is responsible to the municipal council for the functioning of the municipal police service (MPS). It is the council that incurs final responsibility, however. Once an MPS has been established, a municipal council appoints a member of the MPS as the executive head thereof. This person is required to be a fit and proper person.<sup>109</sup> Subject to the Act, the national standards and the directives of the CEO of the municipality, the executive head of the MPS exercises control over the municipal police service. More specifically, such control includes the following:

- being responsible for maintaining an impartial, accountable, transparent and efficient municipal police service
- being responsible for the recruitment, appointment, promotion and transfer of members of the municipal police service, subject to the applicable laws
- ensuring that traffic policing services by the municipality are not prejudicially affected by the establishment of the municipal police service
- being responsible for the discipline of the municipal police service
- representing the municipal police service on every local policing coordination committee established in terms of section 64k within the area of jurisdiction of the municipality, either personally or through a member or members of the municipal police service designated by him or her for that purpose
- representing the municipal police service on every community police forum or sub-forum established in terms of section 19 within the area of jurisdiction of the municipality, either personally or through a member or members of the municipal police service designated by him or her for that purpose
- developing before the end of each financial year a plan which sets out the priorities and objectives of the municipal police service for the following financial year,

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<sup>108</sup> See the Police Service Act s 64A(3)-(6), as amended.

<sup>109</sup> The Act s 64C and D. It is submitted that such a person should at least have expertise in law enforcement tasks and responsibilities.

provided that such plan, insofar as it relates to the prevention of crime, shall be developed in cooperation with the service

- performing such duties as may from time to time be imposed upon him or her by the chief executive officer of the municipality.

According to the Act, the functions of an MPS are threefold:

- traffic policing, subject to any legislation relating to road traffic
- policing of municipal by-laws and regulations which are the responsibility of the municipality
- prevention of crime.<sup>110</sup>

Furthermore, it is stated that, subject to the Constitution, a member of a municipal police service may exercise such powers and perform such duties as are by law conferred upon or assigned to that member. In this regard the minister of safety and security is empowered to prescribe that any power conferred upon a member of the Police Service may be exercised by a member of the MPS.<sup>111</sup> The Act also confirms that every member of an MPS is an officer of the peace and may exercise the powers conferred upon a peace officer in terms of the law within the area of jurisdiction of the municipality in question. In special circumstances a member may exercise such powers outside the area of jurisdiction if it is done:

- in pursuit of a person whom the member reasonably suspects of having committed an offence, and if the pursuit commenced within the area of jurisdiction of the municipality, and
- in terms of an agreement between municipalities.<sup>112</sup>

When a person is arrested, either with or without a warrant, by a member of an MPS, such person shall be brought as soon as possible to a South African Police station or to the place mentioned in the warrant of arrest, if applicable. Furthermore, any legal proceedings against an MPS or member of such service shall be instituted against the municipal council in question.<sup>113</sup>

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<sup>110</sup> See the Act s 64E.

<sup>111</sup> The Act s 64F(1)-(2).

<sup>112</sup> See the Act s 64F(3)(a)-(b). It appears that both requirements must be met before an extra territorial pursuit will be lawful.

<sup>113</sup> This again confirms the final responsibility of the municipal council. The Limitation of Legal Proceedings Act 94 of 1970 are applicable to disputes involving MPS actions, however. See the Act s 64I(2).

In order to ensure proper control over an MPS, it is required that a municipal council shall appoint a committee consisting of members of the council and such other civilian persons as determined by the council to oversee the MPS. The committee has various functions and shall do the following:

- advise the council on matters relating to the municipal police service, at the request of the municipal council in question
- advise the chief executive officer with regard to the performance of his or her functions in respect of the municipal police service
- perform such functions as the member of the executive council, the municipal council or the chief executive officer may consider necessary or expedient to ensure civilian oversight of the municipal police service
- promote accountability and transparency in the municipal police service
- monitor the implementation of policy and directives issued by the chief executive officer and report to the municipal council or chief executive officer thereon
- perform such functions as may from time to time be assigned to the committee by the municipal council or the chief executive officer and
- evaluate the functioning of the municipal police service and report to the municipal council or chief executive officer thereon.

Both the National Police Commissioner and the Minister of Safety and Security have various powers in respect of the MPS. For example, the National Commissioner may determine national standards of policing for the MPS and in addition to the training prescribed for traffic officers in terms of the Road Traffic Act<sup>114</sup>, may determine national standards with regard to the training of members of a MPS. Failure by an MPS to maintain national standards shall be reported by the commissioner to the minister.<sup>115</sup> Upon receipt of a failure report, the minister may request the MEC concerned to intervene in terms of section 139 of the Constitution and, upon failure of the MEC to intervene as requested, the minister may intervene in terms of section 100 of the Constitution. In such circumstances the national executive authority shall have the same powers as its provincial counterparts in this regard.<sup>116</sup> The MEC for safety and

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<sup>114</sup> 29 of 1989.

<sup>115</sup> Refer to the Act s 64L.

<sup>116</sup> The Act s 64M(1)-(2).

security also has important powers in respect of an MPS and should ensure compliance with national standards.<sup>117</sup>

The Act also provides that the minister may prescribe which other provisions of the Act shall apply to an MPS, and to what extent. The minister is also authorised to make regulations regarding the effective functioning of an MPS.

When the South African Police Service Amendment Act took effect,<sup>118</sup> only one previously established municipal police service had been established, namely the Durban City Police, established under section 83 of the Durban Extended Powers Consolidated Ordinance, 1976.<sup>119</sup> The amendment Act now provides that such a former MPS is deemed to have been established in terms of the Act and shall continue to exist subject to certain requirements.<sup>120</sup> The Act also provides that every person who, on the date of the establishment of an MPS, is registered as a traffic officer and who is employed by that municipality may be appointed as a member of that MPS even though the person may not comply with the training requirements for appointment.<sup>121</sup> However, the Act determines that a member appointed to an MPS shall cease to be a member of that MPS unless before 1 October 2003 he/she has successfully completed a training course which complies with the requirements determined by the National Commissioner.<sup>122</sup> Since the Act took effect, no municipal service has been permitted to include the word "police" in its name unless the service was established as an MPS under the Act.<sup>123</sup>

#### 14.8 Conclusion

From the legal principles and requirements mentioned above, it is evident that the new constitutional framework has a significant impact on the powers and functions of all local governments throughout South Africa. All municipalities have both executive and legislative authority, which authority may be lawfully exercised or performed only within the broader constitutional setting.<sup>124</sup> According to the new system, municipal

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<sup>117</sup> For more details on such powers see the Act s 64N(1)-(7).

<sup>118</sup> 83 of 1998.

<sup>119</sup> Natal Ordinance 18 of 1976.

<sup>120</sup> See the Act s 64Q(1)(a)-(e).

<sup>121</sup> This provision has been included to incorporate traffic officers of relevant municipalities into its MPS.

<sup>122</sup> See the Act s 64Q(2)(a)-(b).

<sup>123</sup> The Act s 64Q(3).

<sup>124</sup> See the case of *Aussenkehr Farms (Pty) Ltd v Walvis Bay Municipality* 1996 (1) SA 180 (C). In the case the applicant had erected a tent on a site in Walvis Bay in order to sell fresh fish and vegetables to the public. It did so with the apparent approval of an official of the respondent municipi-

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by-laws are no longer regarded as subordinate legislation, but as original and direct constitutionally entrenched legislative powers and functions. These newly entrenched legislative powers have important impact in cases where by-laws are part of a legal dispute.<sup>125</sup>

One of the most important and difficult dilemmas faced by local governments in the new dispensation is how to restructure so-called “old order” legislation and substitute such legislation with newly redrafted and constitutionally accepted municipal legislative enactments.<sup>126</sup> During the restructuring of the old local government system and even after the new system was established, many former by-laws and executive decisions were, and still are, applicable in certain areas and are in need of urgent clarification and transformation. It would have been impractical and severely disruptive if all old order legislation were revoked without new legislation’s being put in place simultaneously. In this regard the Constitution provides that all law that was in force when the Constitution took effect continues to be in force subject, however, to any amendments or repeals and consistency with the Constitution. Any old order legislation that continues to be in force does not have a wider application, territorially or otherwise, unless subsequently amended to have a wider application and continues to be administered by the authorities that administered it when the Constitution took effect, subject only to the Constitution.<sup>127</sup> Within this legal framework many old order laws are still applicable within local governments jurisdictions today.<sup>128</sup> Because of the restructuring of provincial boundaries under the interim Constitution of 1993, many difficulties regarding the application and authority of certain legislation

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pality. The applicant was then told to vacate the site. The court held that the applicant was entitled to an interdict against being deprived unlawfully of its *de facto* possession, even if his possession was itself unlawful. See paras B-D at 190.

<sup>125</sup> Eg, under the previous local government dispensation, magistrate courts had the authority to pronounce on the validity of a by-law. By-laws are now constitutionally authorised, however, and their validity must be determined with reference to the Constitution in general. In this regard it is important to note that not all courts have the jurisdiction to rule on constitutional issues. The Constitution itself proclaims that magistrates courts and all other courts may decide any matter determined by an Act of parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of *any legislation*, (including municipal legislation) or any conduct of the president. See the Constitution s 170. Disputes regarding by-laws, which are not of a constitutional nature or that are not based on a constitutional issue should be determined by a court which has been empowered to do so in terms of an Act of parliament. The relevant Acts of parliament are the Magistrates Court Act 32 of 1944 and the Supreme Court Act 59 of 1959.

<sup>126</sup> “Old order legislation” is defined by the Constitution as legislation that was enacted before the interim Constitution Act 200 of 1993 took effect, which was 27 April 1994.

<sup>127</sup> See the Constitution Sch 6(2)(1) and (2).

<sup>128</sup> See, eg, the Transvaal Ordinance on Municipal Administration Ordinance 17 of 1939.

have been experienced. It is proposed that especially provincial and local authorities should work proactively towards a complete overhaul of all legislative enactments applicable in each province and each municipal jurisdiction. Any law or conduct inconsistent with the Constitution, including of the Bill of Rights, will be invalid.<sup>129</sup>

Finally it is submitted that the new framework regarding the executive powers and functions of all municipalities and the overall constitutional protection of such powers and functions should be sufficient to ensure that municipalities can perform their functions effectively and comply with their constitutional obligations and duties. There are, however, significant challenges that must be overcome. For example, local government functions are expected to take responsibility for a set of functions that is growing in complexity and scope. An increasing number of new responsibilities are being added through the processes of assignments and delegations and also through new responsibilities identified in new legislation. Some examples and key issues relating to the way in which municipal functions are undertaken are:

- the establishment of sound relationships between councillors and senior officials
- the implementation of new land reform legislation;
- the integration of health services which are statutorily divided between the national and provincial spheres of government;
- the provision of housing, water and electricity services
- the provisions of functions such as roads and transport, environmental management, community and security services and municipal economic development.

Only a committed municipal corps and administration functioning within an environment of cooperative government would ensure proper fulfilment of the new powers and functions of South African municipalities.

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<sup>129</sup> The Constitution s 2.



## Political structures and internal procedures of municipal councils

### 15.1 Introduction

In modern day societies both urban and rural communities are becoming increasingly complex and often difficult to govern effectively. A wide range of different interests are involved in such communities, and each particular local area is becoming more part of an overall network of social, economical and political transactions, rather than staying a closed society unto itself. Many decisions of a local authority thus transcend its local boundaries and impact on a wide range of other civil and corporate role players. Within this context, the new system of developmental local government is in need of strong political leadership that is able to make difficult policy judgements and decisions and to guide the actions of the municipal administration in order successfully to promote the social and economic well-being of its local communities. Accordingly, the White Paper on Local Government has identified various principles whereby political leadership should be able to fulfil its diverse obligations. These principles can be summarised as follows:<sup>1</sup>

- *To provide community-wide leadership and vision* Many local communities are diverse, with multiple interests combined. New partnerships and coalitions of common interests can be built through a specified local vision which in turn should encourage and promote local government.
- *To constantly build capacity and implement policy initiatives:* Governing is about making choices. Such choices include the prioritisation of interests to the allocation of limited resources. Capacity and progress cannot be achieved if political representatives do not understand the dynamics of a local area and if they do not anticipate changes and learn from past mistakes.

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<sup>1</sup> See White Paper on Local Government (1998) at 101-102.

- *To be accountable and transparent* Apart from being basic constitutional principles, accountability and transparency require political leadership that should account to their community regularly, apart from during normal elections and should do so openly and without personal or political hidden agendas. Both accountability and transparency involve the community, increase legitimacy and deepen democracy.
- *To build partnerships and coalitions* Strong partnerships and coalitions, with local, national and even international actors must be developed in order to achieve positive development.
- *To represent the diversity of interests* First and foremost, municipal representatives should strive for the best interests of the municipality as a whole. Narrow political ideologies do not serve all interests and can be very detrimental to many. Marginalised sections of communities must also be identified and their interests protected.
- *To ensure and demonstrate value for money* Local taxes should be utilised to the maximum benefit of each local community. All local administrations must be efficient and effective and should constantly seek ways to enhance performance and quality services.

In order to achieve and facilitate the abovementioned principles, the Constitution allows and provides for special measures that are directed at supporting the internal procedures and functions of all municipalities. Various options are available to cater for different scenarios. For example, all municipalities must

- decide if powers should be delegated to other functionaries in the council and, if so, which ones
- decide whether to establish an individual or collective executive system
- determine which committees should be established to enhance decision making and ensure effective governance.<sup>2</sup>

Many of these issues have now been given direct constitutional protection or are constitutionally authorised to be prescribed in mostly national legislation. Both the

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<sup>2</sup> With regard to the delegation of executive powers, which is a common phenomenon in most governmental systems, each municipal council should make a careful assessment of its abilities and circumstances. In general, the delegation of powers, enhances both accountability and efficiency. Smaller executive bodies have more ability to act quickly and effectively than larger legislatures, but are not removed from accounting to the full council on executive or administrative obligations.

constitutional and other legislative provisions are subsequently investigated and discussed.

## **15.2 The basic constitutional framework regarding the internal procedures of municipal councils**

In respect of the internal procedures of municipal councils, the Constitution states the following:<sup>3</sup>

- (1) A Municipal Council
  - (a) makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;
  - (b) must elect its chairperson;
  - (c) may elect an executive committee and other committees, subject to national legislation; and
  - (d) may employ personnel that are necessary for the effective performance of its functions.
- (2) The following functions may not be delegated by a Municipal Council:
  - (a) The passing of by-laws;
  - (b) the approval of budgets;
  - (c) the imposition of rates and other taxes, levies and duties; and
  - (d) the raising of loans.
- (3)
  - (a) A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.
  - (b) All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.
  - (c) All other questions before a Municipal Council are decided by a majority of the votes cast.
- (4) No by-law may be passed by a Municipal Council unless
  - (a) all the members of the Council have been given reasonable notice; and
  - (b) the proposed by-law has been published for public comment.
- (5) National legislation may provide criteria for determining
  - (a) the size of a Municipal Council;

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<sup>3</sup> See the Constitution s 160.

- (b) whether Municipal Councils may elect an executive committee or any other committee; or
  - (c) the size of the executive committee or any other committee of a Municipal Council.
- (6) A Municipal Council may make by-laws which prescribe rules and orders for
- (a) its internal arrangements;
  - (b) its business and proceedings; and
  - (c) the establishment, composition, procedures, powers and functions of its committees.
- (7) A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.
- (8) Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that
- (a) allows parties and interests reflected within the Council to be fairly represented;
  - (b) is consistent with democracy; and
  - (c) may be regulated by national legislation.

Although the provisions of the Constitution seem simple and precise, it will become evident that there are many uncertainties and issues that are in need of a more complete and clearer interpretation. Some of these have already been the focus of legal disputes and judicial interpretation.<sup>4</sup> In order to understand the various constitutional provisions regarding the internal procedures of a municipal council, each of the provisions will be investigated and discussed individually. In each instance, the fuller legal framework as provided by national legislation will be highlighted.

### **15.2.1 *Internal procedure with regard to municipal councils***

#### **15.2.1.1 Decisions by municipal councils**

The Constitution makes it very clear that the municipal council is the body that makes the decisions in a municipal jurisdiction in respect of the exercise of all powers and the performance of all the functions of that relevant municipality.<sup>5</sup> As a general rule, it is thus the municipal council that takes responsibility for its powers and

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<sup>4</sup> Refer, eg, to s 160(6) below and the case law on such subsection.

<sup>5</sup> See the Constitution s 160(1)(a).

functions.<sup>6</sup> It is possible, however, for a municipal council to delegate many such powers or functions to other functionaries, such as an executive committee or an executive mayor. Despite such delegations, the relevant municipal council still retains the final responsibility and accountability.

#### **15.2.1.2 Electing a chairperson/speaker**

A municipal council is obligated to elect its own chairperson.<sup>7</sup> This mandatory requirement seems to point to the fact that each municipal council in the new local government systems must elect an internal chairperson and that such a person must be elected by the municipal council itself. This requirement is further expanded upon by the Municipal Structures Act. According to the Structures Act, each municipal council must have a chairperson who is subsequently called the “speaker”, and who is elected from amongst the councillors of the municipal council at the council’s first sitting after its election or when it is necessary for the council to fill a vacancy. The task to elect a speaker is a specific obligation of a municipal council.<sup>8</sup> When a speaker is to be elected, the municipal manager of the municipality or, if he/she is not available, a person designated by the MEC for local government in the province, is to preside over the election process. Schedule 3 of the Structures Act specifically sets out the procedure that is to be followed when a speaker or a mayor is elected.<sup>9</sup> A councillor may not hold office as speaker and mayor or executive mayor at the same time.<sup>10</sup>

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<sup>6</sup> Powers and functions in this respect would seem to include both legislative and executive powers and functions.

<sup>7</sup> See the Constitution s 160(1)(b).

<sup>8</sup> See the Structures Act s 36(1)-(2).

<sup>9</sup> See the Structures Act s 36(3)-(4) and Sch 3. According to Sch 3, the presiding person must first call for the nomination of candidates. A nomination must be carried out in a prescribed manner, signed by two members of the Municipal Council and must be accepted in writing by nominee. Names are then announced, but no debate over names is allowed. If only one candidate is nominated, he/she must be declared elected. If there is more than one candidate, an election procedure is prescribed together with an elimination procedure if no candidate receives a majority of votes. If no election can be achieved, a further meeting must be held within seven days, and the election procedure is applied again.

<sup>10</sup> This is not relevant in all instances. In municipalities with either a plenary executive system or a plenary executive system combined with a ward participatory system, the speaker must be called the mayor. In such municipalities, the mayor and speaker is the same person, although the position is called mayor and not speaker. See the Structures Act s 36(5).

The speaker of a municipal council has specific functions to perform. These functions include the following:<sup>11</sup>

- to preside at meetings of the municipal council
- to perform the duties and exercise the powers delegated to the speaker in terms of section 59 of the Local Government: Municipal Structures Act
- to ensure the council meets *at least* quarterly
- to maintain order during meetings
- to ensure compliance in the council and council committees with the code of conduct of councillors as set out in Schedule 1 of the Local Government: Municipal Systems Act
- to ensure council meetings are conducted in accordance with the rules and orders of the council.

In normal circumstances, the speaker of a municipal council is elected for a term ending when the next council is declared elected. The term thus normally corresponds with the term of the municipal council. However, a speaker will have to vacate office during a term if that person

- resigns as speaker
- is removed from office
- ceases to be a councillor of the relevant municipality.<sup>12</sup>

A speaker may be removed only by a municipal council itself, and only by resolution adopted by the council. Prior notice of an intention/motion to move for the removal of the speaker must be given. Although the Structures Act does not specify the notice period, a reasonable time would seem sufficient. What is to be regarded as a “reasonable time” is not entirely certain, but it is submitted that such time that would allow the different political parties represented in the council to discuss and consider the proposed removal would suffice. It should also be noted that the Structures Act does not require a special majority for the removal of the speaker. It therefore seems acceptable to assume that a normal quorum and a normal majority of votes in favour or against a removal will be lawful.<sup>13</sup> If a speaker is absent or not available to per-

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<sup>11</sup> Refer to the Structures Act s 37. According to this section, it is important for any newly elected speaker to obtain a copy of the rules and orders of the council and to ensure he/she is up to speed with any powers that might be delegated to the office of speaker.

<sup>12</sup> See the Structures Act ss 38 and 39.

<sup>13</sup> See the Structures Act s 40 read together with the Constitution s 160(3).

form the functions of speaker or if there is a vacancy in the office, the municipal council must elect another councillor to act as speaker.<sup>14</sup>

### 15.2.1.3 Executive and other committees or functionaries

Apart from the election of a chairperson, a municipal council may also elect an executive committee and other committees, subject to national legislation. On the point of the establishment of committees subject to national legislation, the Constitutional Court has already determined the following: In the case of *Executive Council, KZN v President of the RSA*,<sup>15</sup> two provincial governments instituted proceedings in the court which challenged the constitutional validity of certain provisions of the Local Government: Municipal Structures Act<sup>16</sup>. It was contended *inter alia*, that the Act encroached on the constitutional powers of municipalities, especially a municipal council's power to elect executive committees or other committees in violation of section 160(1)(c) of the Constitution. The court held that section 160(1)(c) conferred this power "subject to national legislation", which meant that the right of municipalities to elect committees would not prevail where there was national legislation to the contrary. The national legislation referred to in section 160(1)(c) had to include any other legislation passed by Parliament in terms of chapter 7 of the Constitution. If the legislation was within the scope of national legislation sanctioned by chapter 7, the municipal power to elect committees had to be exercised, subject to that legislation. The municipal power to elect executive or other committees was therefore subordinate to these provisions and to the provincial power to select types of municipality. If this had the effect of precluding particular municipalities from electing executive or other committees, that resulted from the provisions of the Constitution itself and could not be challenged as being a breach of section 160(5)(b).<sup>17</sup> It is important to note that a municipal council is not obliged to elect an executive committee, as was the position under the interim Constitution. Subject to the new legislative framework

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<sup>14</sup> The Act is unfortunately somewhat uncertain in this regard, as two different situations can occur. Eg, if a speaker is absent or unavailable, the newly elected speaker will act as only acting speaker, and will be replaced by the usual, elected speaker upon his/her return or availability. When there is a vacancy in the position of the speaker, the next-elected speaker should be the elected speaker of the municipal council until the end of the remaining term of the municipal council. Strictly speaking, the person is thus not acting temporarily as speaker for another person. See the Structures Act s 41.

<sup>15</sup> 2000 (1) SA 661 (CC).

<sup>16</sup> 117 of 1998.

<sup>17</sup> See paras 87-88 at 699-700.



and based on the specific type of municipality that has been established, a municipal council may decide to elect an executive committee.<sup>18</sup> The new legislative framework makes provision for various committees or internal functionaries. Apart from general criteria applicable for the establishment of committees, the Structures Act also contains specific requirements applicable to the various committees or functionaries. Each of the sets of requirements will be discussed below.

#### **15.2.1.4 Criteria for the establishment of committees**

According to the Structures Act, three general criteria are laid down for the establishment of a committee(s). A municipality may establish a committee as provided for in the Act if:

- the municipality is of a type that is empowered in terms of the Act to establish a committee of the desired kind<sup>19</sup>
- the establishment of the committee is necessary.<sup>20</sup> When the necessity of the establishment of a certain committee is evaluated, the following factors should also be taken into account:
  - (a) the extent of the functions and powers of the municipality
  - (b) the need for the delegation of those powers and functions in order to ensure efficiency and effectiveness in their performance
  - (c) the financial and administrative resources of the municipality available to support the proposed committee.<sup>21</sup>
- in the case of the establishment of an executive committee, the municipality has more than nine councillors.<sup>22</sup>

#### **15.2.1.5 Requirements regarding the composition, functions and procedures of executive committees**

Only certain municipalities may establish executive committees. These are municipalities that are defined or classified as municipalities with

- a collective executive system

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<sup>18</sup> See the Structures Act ss 7-11.

<sup>19</sup> In respect of the various types of municipalities, see the Structures Act ss 7-11. According to the Structures Act ss 42, 54, 61 and 72 only municipalities of specific type may establish certain committees or functionaries.

<sup>20</sup> The necessity of a committee will depend on the relevant circumstances of each municipality. Almost all larger municipalities will need certain committees in order to fulfil and execute their functions and duties.

<sup>21</sup> See the Structures Act s 33(b)(i)-(iii).

<sup>22</sup> The Structures Act s 33(c).

- a collective executive system combined with a sub-council participatory system
- a collective executive system combined with a ward participatory system
- a collective executive system that is combined with both a sub-council and a ward participatory system.<sup>23</sup>

If a municipal council establishes an executive committee, it must elect as members of the committee a number of councillors who will ensure effective and efficient municipal government. However, the Structures Act determines that no more members than 20% of the councillors of the council or 10 councillors, whichever is the least, may be elected. It is further also required that an executive committee may not have fewer than three members.<sup>24</sup> The Act further determines that an executive committee be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in substantially the same proportion that they are represented in the council. This section must be read together with section 160(8) of the Constitution, which requires that the members of a municipal council be entitled to participate in the proceedings of the council and of its committees, allows parties and interests reflected in the council to be fairly represented, is consistent with democracy and may be regulated by national legislation.<sup>25</sup> The Structures Act also provides that a municipal council may determine any alterna-

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<sup>23</sup> See the Structures Act s 42(1) read together with ss 8(a), (b), (c) and (d), 9(a) and (b) and 10(a). It is clear from the Act that any municipality that has a collective executive system or combination with such an executive system may establish an executive committee.

<sup>24</sup> See the Structures Act s 43. It thus seems clear that an executive committee can never have more than 10 members. Eg, if a municipal council consists of 30 councillors and decides to establish an executive committee, the committee will consist of 6 councillors.  $30 \times 20\% = 6$ . Six is fewer than 10, thus only 6 members. If a municipal council consists of 100 members, the executive committee will have 10 members.  $100 \times 20\% = 20$ , whichever is fewer than 10 = 10.

<sup>25</sup> This requirement has caused several legal disputes both under the interim Constitution and the Constitution. See also the Structures Act s 43. See, eg, the case of *Democratic Party and Others v Brakpan TLC and Others* 1999 (4) SA 339 (W), where it was mentioned that it is not the function of the court to prescribe to a council the number of members which must comprise its executive committee or what system of proportional representation it should adopt in electing such members; such a function has been entrusted to the legislature. The court is however obligated to intervene if the exercise of such powers negates the right[s] conferred on members in terms of the Constitution s 160(8)(a). It was further stated that the objective and purpose of s 160(8)(a) is to ensure, as far as is practically possible, that members that are representing political parties in the council participate fairly in the committees of the council. Such fairness is then determined according to the representation of the parties on the council and not according to political support amongst the electorate. It is the parties and interests within the council that must be fairly represented. The court finally held that the decision to appoint an executive committee of only ANC and NP members, notwithstanding the fact that the DP had equal representation to the NP within the council, was unconstitutional. See at 344-345.

tive mechanism for the election of an executive committee, provided that it complies with section 160(8) of the Constitution.<sup>26</sup>

Executive committees have specific powers and functions, and thus play an important role in the overall performance and exercise of municipal obligations and duties. In this regard the Structures Act determines the following:

- An executive committee is regarded as the *principal committee* of a municipal council. It is also the committee of a municipal council which receives reports from all other committees, which must then be forwarded by the executive committee, together with its recommendations to the municipal council itself. This requirement is applicable only when it (the executive committee) cannot dispose of such matters in terms of its delegated powers.<sup>27</sup>
- The executive committee is obligated to
  - (a) identify the needs of the municipality
  - (b) review and evaluated those needs in order of priority
  - (c) recommend to the municipal council strategies, programmes and services to address priority needs through the integrated development plan and estimates of revenue and expenditure. The executive committee should in such instances take any applicable national and provincial developmental plans into account.
  - (d) recommend or determine the best methods possible to deliver its strategies, programmes and services to the maximum benefit of the community.<sup>28</sup>
- An executive committee, when performing its duties, must comply with various legislative requirements. In this regard, the Structures Act determines that an executive committee must:<sup>29</sup>
  - (a) identify and develop criteria in terms of which progress in the implementation of the council's strategies, programmes and services can be evaluated. Such criteria can include Key Performance Indicators (KPI) relevant to the municipal council or that are common to local government in general

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<sup>26</sup> See the Structures Act s 43(3). It thus seems that while the composition of an executive committee is strictly determined, alternative procedures for the election of the members of such executive committee can be provided for.

<sup>27</sup> See the Structures Act s 44(1)(a)-(b).

<sup>28</sup> Such recommendations or determinations may include partnerships and other approaches. See the Structures Act s 44(2)(a)-(d).

<sup>29</sup> See the Structures Act s 44(3)(a)-(h).

- (b) evaluate progress against the KPI
- (c) review the performance of the municipality in order to improve the economy, efficiency, effectiveness, efficiency of credit control, revenue and debt collection services and also the implementation of the municipality's relevant by-laws
- (d) monitor the management of the municipality's administration in terms of the policy directions of the municipal council
- (e) oversee the provision of services to communities in a sustainable manner
- (f) perform such duties and exercise such powers as the municipal council may delegate to it
- (g) report annually on the involvement of communities and community organisations in the affairs of the municipality
- (h) ensure that regard is given to public views and report on the effect of consultation on the decisions of the council.

Apart from the reporting duties mentioned above, an executive committee is generally obligated to report to the municipal council on all decisions taken by the committee.<sup>30</sup>

Members of an executive committee must be elected from among the members of a municipal council and by the municipal council itself within 14 days of the council's election or, if it is a district council, within 14 days after the last of the local councils has appointed its representatives to that district council.<sup>31</sup> If the type of municipality has been changed to a type that may establish an executive committee, within 14 days the municipal council of the new type of municipality must also elect the members of the executive committee.<sup>32</sup> Subject to any vacancies, members of an executive committee are elected for a term ending when the next municipal council is declared elected.<sup>33</sup> Members of an executive committee are not always elected for

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<sup>30</sup> This relates to all aspects where an executive committee has the power or authority to take certain decisions itself and thus to bind the municipal council. One must remember that the municipal council is always ultimately responsible for all decisions taken within that municipality's structures. It speaks for itself therefore that a municipal council must be updated regularly and informed of all decisions that the municipal council itself has not taken directly. See the Structures Act s 44(4).

<sup>31</sup> See the Structures Act s 45(a)-(b).

<sup>32</sup> See the Structures Act s 45(c) as substituted by Act 1 of 2003 s 1.

<sup>33</sup> In essence, the term of members of an executive committee is similar to the term of a municipal council in normal circumstances. Refer to the Structures Act s 46. The term of office as an ex-

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the full term of office, as vacancies can occur. A member of an executive committee must vacate his/her office during a term if that member

- resigns as a member of the executive committee
- is removed from office as member of the executive committee in terms of section 53 of the Act
- ceases to be a councillor.

When a vacancy has occurred and needs to be filled, such filling is subject to section 43 of the Act.<sup>34</sup>

Although the new legislative framework for local government makes provision for the election of an executive mayor in certain circumstances, the election of a mayor is not restricted to such executive systems of municipality only. Accordingly, a municipal council must elect a member of its executive committee as the mayor, and if so approved by the MEC in the province, also a deputy mayor.<sup>35</sup> The election of a mayor or deputy mayor takes place according to the procedure set out in Schedule 3 of the Act. When a mayor or deputy mayor is elected, he/she is elected for the duration of that person's term of office as member of the executive committee.<sup>36</sup> Similar to membership of the executive committee, a mayor or deputy mayor must vacate his/her office during a term if that person

- resigns as mayor or deputy mayor
- is removed from office as a member of the executive committee;
- ceases to be a member of the executive committee.<sup>37</sup>

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ecutive committee member can also be shortened if the type of municipality has been changed to a type which does not allow for the establishment of an executive committee. See Act 1 of 2003 s 2.

<sup>34</sup> This again emphasises the fact that if vacancies do occur, the proportional representation systems must still apply. If, eg, a member of political party A resigns, a fellow member of that party should take up such membership. The reflection of parties and interests in the executive committee as a committee of the municipal council should be maintained, as was determined according to the election results. The filling of vacancies cannot be used by the majority party in the municipal council to strengthen its own representation in the executive committee. See the Structures Act s 47(2).

<sup>35</sup> It is important to note that a mayor or deputy mayor is not elected by the executive committee itself, but by the municipal council. The mayor or deputy mayor must be a member of the executive committee before he/she is elected, however. The facts thus speak for themselves that the election of a mayor or deputy can take place only once the executive committee has been elected or when it is necessary to fill a vacancy. See the Structures Act s 48(1)-(2).

<sup>36</sup> Although the new legislative framework does not directly make mention of the time when a mayor or deputy is to be elected, it is submitted that such election should take place simultaneously with the election of the members of the executive committee, or very shortly thereafter. Because of the important role that a mayor plays within the executive structures of a municipality, a quick and speedy election of such a person is essential. The election of mayor or deputy mayor is conducted in terms of the procedures set out in the Structures Act Sch 3. See also the Act s 48(2).

<sup>37</sup> See the Structures Act s 48(4)(a)-(c).

No person may hold office as mayor or deputy mayor in the same council for more than two consecutive terms.<sup>38</sup> If a person is elected to fill a vacancy in the office of mayor or deputy mayor, the period between that election and the next election of a mayor or deputy mayor *was originally regarded* as a term of office.<sup>39</sup> During 2003 the Structures Act was amended to determine that when a vacancy in the office of mayor or deputy mayor is to be filled, the period between such election and the next election of mayor or deputy mayor is not regarded as a term. Any time served by a person in order to fill a vacancy or when the type of municipality has been changed to one which requires a mayor or deputy mayor, such a term is also not regarded as a term of office as mayor or deputy mayor. A mayor whose two consecutive terms have expired may not immediately after the expiry be elected as deputy mayor.<sup>40</sup>

The person elected as mayor in an executive committee system has specific powers and functions. The mayor normally presides at meetings of the executive committee and performs the necessary duties, including any ceremonial functions, and he/she exercises the powers delegated to the office of mayor by the municipal council or executive committee. If a mayor is absent or not available, the deputy mayor will exercise the powers and perform the duties of the mayor. It should be noted that the mayor may also delegate duties to the deputy mayor.<sup>41</sup>

Generally speaking, it is the mayor that decides where and when the executive committee should meet. However, if a majority of the members of an executive committee requests the mayor in writing to convene an executive committee, the mayor is obligated to convene such a meeting at a time and place set out in the

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<sup>38</sup> The position is the same regarding a deputy mayor or deputy executive mayor. A person may hold office for only two consecutive terms.

<sup>39</sup> This position is now similar to the position or office of president or premier. When a person is elected to fill a vacancy in the office of the president on national level or the office of premier on a provincial level, the period between that election and the next election of either the president or the premier *is not regarded* as a term of office. See the Constitution ss 88(2) and 130(2). See the Structures Act s 48 as amended by Act 1 of 2003 s 3.

<sup>40</sup> See the Structures Act s 48(6). The time period that is required is not certain, however. It is submitted that a term should pass before a former mayor who has served two consecutive terms as such can be elected as a deputy mayor. Arguably, the position should not be the same with regard to a deputy mayor who has served consecutive terms as deputy and now stands to be elected as mayor. If the legislator intended such requirements, it would have been included in the legislation. The elevation from deputy mayor to mayor should not be restricted/delayed by a certain time period.

<sup>41</sup> If a mayor is absent or not available and there is no deputy mayor, or he/she is also absent or not available, then the members of the executive committee designated as such by the mayor in writing will act as mayor, or if the mayor has not designated anyone, the members of the Executive

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written request.<sup>42</sup> If both the mayor and deputy mayor are absent from a meeting and if there is a quorum of members present, the members present must elect another member to preside at the meeting.<sup>43</sup>

It is standard practice for an executive committee to determine its own internal procedures and functioning. Accordingly, an executive committee, by resolution taken with a supporting vote of a majority of its members, may determine its own procedures subject, however, to any directions and the rules and orders of the relevant municipal council.<sup>44</sup> The Structures Act determines not only the rules and orders of a municipal council, but also the fact that a majority of the members of an executive committee constitutes a quorum for a meeting. Decisions or questions before the executive committee are further decided if there is agreement/consensus among at least the majority of the members present that form a quorum. If there is an equality of votes on any question (an equal number of votes against and in favour of a matter), the person presiding must exercise a casting vote. Such a casting vote is in addition to that member's normal vote as a member of the executive committee.<sup>45</sup>

Lastly, it is important to note that members of an executive committee may be removed from office as members of the executive committee. A municipal council is authorised to remove one or more or all members of its executive committee by resolution. The municipal council must ensure that it acts within the ambit of the law, however. Before a member or members of an executive committee are removed, prior notice of the intention to move for a motion for removal must be given.<sup>46</sup> If all the members of an executive committee are removed, a new election of members and of the mayor or deputy mayor, if applicable, must be held in terms of sections 45

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Committee can elect someone from amongst its members to act as mayor. The Structures Act s 49(1)-(3).

<sup>42</sup> It is submitted that the majority in such instances refers to an absolute majority, which requires a 50% + 1 of all the members of the executive committee. See the Structures Act s 50(1).

<sup>43</sup> The Structures Act s 50(2).

<sup>44</sup> In this respect the Constitution s 160(6) determines that a municipal council may make by-laws which prescribe rules and orders for the council's internal arrangements, business and proceedings and the establishment, composition, procedures, powers and functions of its committees. See also the Structures Act s 51.

<sup>45</sup> To illustrate by way of an example: If an executive committee consists of 8 members, at least (4 + 1) 5 members will constitute a quorum, and at least 3 members should be in agreement in terms of a decision. See the Structures Act s 52(1)-(3).

<sup>46</sup> See the Structures Act s 53(1). Note also that according to the Constitution s 160(3) a majority of members of the municipal council must be present and that such a decision will be decided by majority votes of the members present. Refer also the Structures Act s 30.



and 48 respectively. Any new election will subsequently also be subject to the requirements of section 43 of the Structures Act.<sup>47</sup>

#### **15.2.1.6 Requirements regarding the composition, functioning and procedures of executive mayors**

In the new local government system, only municipalities with a mayoral executive system or such a system combined with a sub-council participatory system or ward participatory system are allowed to have or establish an executive mayor.<sup>48</sup> If a municipal council has decided to choose an executive mayor, it must elect an executive mayor from among its members. If the MEC for local government so approves, an executive deputy mayor may also be elected from among the members of the municipal council. Furthermore, an executive mayor must be elected within 14 days after the date from which the type of municipality has been changed to a type that allows for an executive mayor.<sup>49</sup> The election of an executive mayor must be held at a meeting of the municipal council within 14 days of the council's election or, in the case of a district council, within 14 days after the last one of the local councils has appointed its representatives to the district council. The election of an executive mayor or deputy mayor is prescribed in Schedule 3 of the Structures Act. Any vacancy in the office of executive mayor or deputy executive mayor must be filled when necessary.<sup>50</sup>

Similar to the position of an executive committee, an executive mayor has specific powers and functions. In this respect an executive mayor is entitled to receive reports from committees of the municipal council and forward such reports together with a recommendation to the municipal council in instances when the matter cannot be disposed of by the executive mayor himself/herself in terms of the powers delegated to his/her office. An executive mayor has the same obligations as an executive committee.<sup>51</sup> In municipalities that have established an executive mayor, such an executive mayor is obligated to perform ceremonial functions if the municipal council so determines, and he/she must report to the municipal council on all decisions

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<sup>47</sup> See the Structures Act s 53.

<sup>48</sup> See the Structures Act ss 54(1) and 8(e), (f), (g), (h), 9(c) and 10(b).

<sup>49</sup> See the Structures Act s 55(1)(c) as substituted by Act 1 of 2003 s 4.

<sup>50</sup> See the Structures Act s 55. According to Sch 3, certain formal requirements and procedures must be complied with.

<sup>51</sup> See s 56(2)(a)-(c) and (3)(a)-(h). The mayor must identify the needs of the municipality, prioritise needs and make recommendations to the municipal council.

taken by his/her office. If the executive mayor is absent, not available or if the office is vacant, the deputy mayor, if applicable, exercises all powers and performs the duties and functions of the executive mayor.<sup>52</sup>

An executive mayor and deputy executive mayor must be elected for a term ending when the next council is declared elected or when the type of municipality is changed to one not allowing for an executive mayoral system. No executive mayor or deputy mayor may serve as such for more than two consecutive terms. When filling a vacancy, such a vacancy period is not regarded as a term. This position is the same regarding the term of office as mayor or deputy mayor in both the executive committee system or the mayor executive system. The period served as mayor or deputy mayor in instances where the type of municipality has been changed is also not regarded as a term of office. As in the executive committee system, an executive mayor whose two consecutive terms have expired may not be elected as deputy executive mayor immediately after such expiry.<sup>53</sup> The term of an executive mayor is not always fixed until the next council is declared elected. By resolution, a municipal council may remove its executive mayor or deputy mayor from office. Prior notice of an intention to propose a motion for removal must be given.<sup>54</sup> Apart from removal, an executive mayor or deputy will also have to vacate his/her office during a term if he/she resigns, is removed or ceases to be a councillor of the municipal council.<sup>55</sup>

An important addition to an executive mayor system is the appointment of a mayoral committee. According to the Structures Act, if a municipal council has more than

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<sup>52</sup> See the Structures Act s 56(4)-(6). In a system with an executive mayor, the office of executive mayor is vested with both the executive authority and ceremonial duties. Note that if the executive mayor is absent or not available to perform his/her functions and there is no deputy mayor or such a deputy mayor is also absent or unavailable, then the council must designate a councillor to act as executive mayor. See the Act s 56(7) as amended by Act 51 of 2002 s 16(b).

<sup>53</sup> The reasoning for such provisions seems to be to allow other members of a municipal council an opportunity to obtain experience as mayor and deputy mayor, to allow for new leadership and to ensure that powers are not fixed in one or two individuals. An aspect that is unclear is if an executive mayor, after serving two consecutive terms, and after he/she has sat out a term, can be elected again as mayor or deputy mayor. In this regard it is submitted that should a person be allowed to serve as mayor or deputy again, this would be contrary to the intention of the legislator. In both national and provincial spheres, once a president or premier has served his/her consecutive terms, such a person cannot again be elected to that office or position. See the Constitution ss 88 and 130. This should also be the position on local government level. However, the position is different if a mayor is elected as deputy mayor or *vice versa*. Only the requirement of s 57(2) is relevant to such situations.

<sup>54</sup> Refer to the Structures Act s 58.

<sup>55</sup> See the Structures Act s 59.

nine members and has established an executive mayoral system, then its executive mayor.<sup>56</sup>

- must appoint a mayoral committee from among the councillors to assist the executive mayor
- may delegate specific responsibilities to each member of the mayoral committee
- may delegate any of the executive mayor's powers to the members of the committee and
- may dismiss a member of the mayoral committee.

The mayoral committee is comparable with the cabinet of the president on a national level or an executive council on a provincial level.<sup>57</sup> A mayoral committee must consist of the deputy executive mayor, if applicable, and as many councillors as may be necessary for effective and efficient government. However, no mayoral committee may have more members than 20% of the councillors of a municipal council or 10 councillors, whichever is the least.<sup>58</sup>

The powers and functions of an executive mayor as may be designated by the municipal council must be exercised and performed by the executive mayor *together* with the other members of the mayoral committee.<sup>59</sup> Generally speaking, the members of a mayoral committee will remain in office for the term of the executive mayor who has appointed them. However, if the executive mayor vacates office, the mayoral committee will also dissolve.<sup>60</sup>

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<sup>56</sup> See the Structures Act s 60(1)(a)-(d).

<sup>57</sup> In both the national and provincial spheres of government the members of cabinet or members of executive councils are appointed by the president or premier and are given tasks by them and can be dismissed by them respectively. See the Constitution ss 91 and 132. There seems to be uncertainty, however, if a mayoral committee must be appointed in a manner that allows parties and interests reflected in the municipal council to be fairly represented. In light of the Constitution s 160(8), it seems that such appointment should indeed be proportional.

<sup>58</sup> Eg, if a municipal council has 40 members, a mayoral committee can consist out of 8 members.  $40 \times 20\% = 8$ . A municipal council with 150 members can have a mayoral committee of only 10 members.  $150 \times 20\% = 30$ . The least between 30 and 10 is 10. See the Structures Act s 60(2). The mayor is also a member of the mayoral committee and must be calculated within the membership total.

<sup>59</sup> See the Structures Act s 60(3). The wording "together with the other members" indicates that the mayoral committee should act on consensus. The executive mayor should consult the other members and should act on their advice. He/she is not merely obligated to consult such members and then act on his/her own accord. The decision-making process of a mayoral committee seems to be left for such committee self to decide. Normally majority decision making or sufficient consensus would be employed.

<sup>60</sup> Read the Structures Act s 60(5) together with s 59.

### **15.2.1.7 The establishment, powers and internal arrangement of metropolitan sub-councils**

Apart from an executive committee and an executive mayor, the Structures Act also provides for the establishment of metropolitan sub-councils and ward committees. Only metropolitan municipalities with a collective executive system or mayoral executive system that is combined with a sub-council system may establish metropolitan sub-councils.<sup>61</sup>

If a metropolitan municipality decides to establish metropolitan sub-councils, it must do so by passing a by-law which should:

- determine the number of sub-councils to be established
- determine an area within the municipal area that will consist out of a cluster of adjoining wards for each sub-council
- establish a sub-council under a distinct name in each area
- determine a mechanism that complies with Part 2 of Schedule 4 for the appointment of councillors in terms of section 63 of the Structures Act
- provide for an equitable financial framework in terms of which the sub-councils must function and
- regulate any other relevant matters.<sup>62</sup>

When wards are clustered together to determine the area of a metropolitan sub-council, the municipal council must apply the criteria set out in sections 24 and 25 of the Demarcation Act, insofar as they can be applied, and must also consult the Demarcation Board regarding such exercise.

After metropolitan sub-councils have been established, each of such sub-councils shall consist of

- the councillors representing the wards in the sub-council area
- an additional number of councillors that are allocated in terms of Part 1 of Schedule 4 of the Structures Act.<sup>63</sup>

Schedule 4 determines that the component of seats in section 63(1)(b) of the Structures Act, which refers to the allocating of seats to parties, is allocated to each party

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<sup>61</sup> See the Structures Act s 61(1) read with s 8(b), (d), (f) and (h).

<sup>62</sup> Note that before the by-law is passed, a process of public consultation must have been undertaken. See the Structures Act s 62 as amended by Act 20 of 2002.

<sup>63</sup> See the Structures Act s 63(1)-(2).

in accordance with the following formula:<sup>64</sup>

$$\frac{A}{B} \times C$$

If the equation results in fractions, such fractions are to be disregarded. The seats allocated in terms of section 63(1)(b) must be allocated to parties represented in the metro council in a manner that will allow parties and interests reflected in the council to be fairly represented in the metro sub-council and that is consistent with the principle of democracy. In order to facilitate party representatives on the metro sub-council, each party represented in the metro council must designate their representatives to each metro sub-council from amongst their councillors not representing wards. No councillor may serve on more than one sub-council, and vacancies must be filled as they occur. Schedule 4 does not apply in cases where

- metropolitan sub-councils are established;
- the *areas* of existing metro sub-councils are changed; or
- the *number* of existing metro sub-councils are changed, after the composition of a metro council has changed as a result of the provisions of Schedule 6B of the Constitution.

In such cases, the additional number of councillors is determined by the metro council, so as far as possible the seats held by proportional representative councillors are equally distributed amongst all the metro sub-councils.<sup>65</sup>

The councillors referred to in section 63(1)(b) must consist of councillors elected to the metro council from party lists in terms of Part 3 of Schedule 1 and must be appointed in terms of Part 1 of Schedule 4 or section 62(1)(cA) of the Act. It must be emphasised that item 3 of the code of conduct for councillors as set out in Schedule 1 to the Systems Act, which deals with the attendance at meetings, does not apply to the speaker, executive mayor, a member of the mayor committee or a member of the

<sup>64</sup> A = total number of valid votes cast for each party on the party vote in the area of the metropolitan *sub-council*; B = the total number of valid votes cast for each party on the party vote in the total area of the metro council; and C = the total number of seats allocated to each party in the metro council in accordance with Sch 1 Part 3.

<sup>65</sup> See the Structures Act s 63(1)(b) as amended by Act 2 of 2003 s 9.

executive committee in respect of meetings of a metro sub-council of which such an office bearer is a member.<sup>66</sup>

In respect of powers and functions, a metro sub-council has such duties and powers as the metro council may delegate to it, and it may make recommendations to the metro council on any matter affecting its area. In respect of delegated powers, a metro sub-council may advise the metro council on what duties and powers should be delegated to it.<sup>67</sup>

A metro sub-council must further elect one of its members to be the chairperson of that sub-council. In normal circumstances the term of members of a metro sub-council will be until the next metro council is declared elected. However, where a section 63(1)(b) member of a metro sub-council is replaced as a result of the provisions of item 6(b) of Schedule 6B to the Constitution, the newly appointed member is appointed for the remainder of the replaced member's term, subject to section 67. Vacancies in sub-council membership can occur if a councillor resigns as a member of the sub-council or ceases to be a councillor in general, however.<sup>68</sup>

Subject to any directions of the metro council, the chairperson of a metro sub-council decides when and where the sub-council will meet. However, if a majority of members makes a request to the chairperson in writing, the chairperson must convene a meeting as requested. At meetings of the sub-council, the chairperson will preside. If the chairperson is absent but a quorum is present, then the members present must elect a member to preside at that meeting. With a supporting vote of a majority of its members, all metro sub-councils are allowed to determine their own internal procedures. Such procedures are subject to any directions of the metro council, however. Quorums in sub-councils are achieved when a majority of the members are present. Questions or decisions before the sub-council are then decided if there is agreement among at least the majority of the members present that form a quorum.<sup>69</sup> If there is an equality of votes on any question, the member presid-

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<sup>66</sup> See the Structures Act s 63(3).

<sup>67</sup> It is important that a proper evaluation of the capacity and capabilities of the metro sub-councils be undertaken before unrealistic and unachievable powers or duties are delegated. One must remember that the metro council will ultimately have the responsibility regarding the duties and provision of services. Refer to the Structures Act s 64.

<sup>68</sup> Refer to the Structures Act ss 65-67, as amended by Act 20 of 2002 and Act 2 of 2003.

<sup>69</sup> Again, this refers to a normal majority of 50% + 1. If a sub-council consists of 12 members, at least (6 + 1 =) 7 members must be present to form a quorum and at least 50% + 1 of the members present must agree or vote in favour of a question. See the Structures Act ss 68-70.

ing must exercise a casting vote in addition to that member's normal vote as a member. Lastly, all metro sub-councils are permitted to appoint internal committees, including a management committee. Members of the committees are appointed from among the members of the sub-council itself, and the main purpose of such committees is to assist the sub-council in the performance of its duties and the exercise of its powers.<sup>70</sup>

#### **15.2.1.8 The establishment, powers and functions of ward committees**

Similar to the position mentioned above, only metropolitan and local municipalities with a collective executive system or a mayoral executive system may establish ward committees. The main objective of a ward committee is to enhance participatory democracy in local government.<sup>71</sup>

If a metro or local council decides to have ward committees, it must establish a ward committee for each ward in the municipality. A ward committee consists of

- the ward councillor, who must also be the chairperson of the ward committee
- not more than 10 other members.

A metro or local council must further make rules regulating the election procedure of the ward committee members other than the chairperson. Such rules must take into account the need for women to be equitably represented in the ward committee and also the need to represent the diversity of interests in the ward. The rules must furthermore regulate the circumstances under which a ward committee member must vacate his/her office and the frequency of meetings of ward committees.<sup>72</sup>

In an effort to enhance participatory democracy, ward committees have been given specific powers and functions. A ward committee may make recommendations on any matter affecting its ward to either the ward councillor or through the ward councillor, to the relevant municipal council or its executive committee or executive mayor, or even the metro sub-council if applicable. All ward committees have such duties and powers as the municipal council may delegate to it.<sup>73</sup>

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<sup>70</sup> See the Structures Act s 71.

<sup>71</sup> See the Structures Act s 72(1)-(3) read together with ss 8(c), (d), (g) and (h) and 9(b), (d) and (f).

<sup>72</sup> See the Structures Act s 73(1)-(4). The Act also allows a metro or local council to make administrative arrangements to enable ward committees to perform their function and exercise their powers effectively. Such arrangements should include technical and administrative support through the provision of advice or infrastructure.

<sup>73</sup> Refer to the Structures Act s 74.



Generally speaking, the members of a ward committee are elected for a term as is determined in terms of the rules of the metro or local council.<sup>74</sup> Vacancies in membership of ward councillors, apart from a vacancy in the office of the elected ward councillor himself/herself, must be filled in terms of a procedure determined by the relevant municipal council. It is important to note that no remuneration is payable to members of a ward committee apart from the relevant ward councillor. Again, emphasis should be placed on the fact that ward committees are directed at achieving and enhancing participation by local residents in ward-related matters. Such committee members are not official office bearers of the relevant municipal council and are thus not remunerated for their services. It is lastly also possible for a metro or local council to dissolve a ward committee if that committee fails to fulfil its objectives.<sup>75</sup>

#### **15.2.1.9 Other committees of municipal councils**

Apart from the committees mentioned above, a municipal council may also establish one or more committees necessary for the effective and efficient performance of any of its powers or functions.<sup>76</sup> The members of such committees are appointed from among the members of the municipal council by the municipal council, and the municipal council is also permitted to dissolve a committee at any time.<sup>77</sup> When so-called section 79 committees are established, the municipal council must adhere to the various legislative requirements:

- It must determine the functions of the committee.
- It may delegate duties and powers to the committee.
- It must appoint the chairperson of the committee.
- It may authorise a committee to co-opt advisory members to the committee, who are not members of the council, within the limits determined by the municipal council.
- It may remove a member of a committee at any time.
- It may determine a committee's procedure.<sup>78</sup>

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<sup>74</sup> See the Structures Act ss 73(3)(b) and 75 read together.

<sup>75</sup> Refer to the Structures Act ss 77-78 respectively.

<sup>76</sup> Such committees are often referred to as "s 79 committees" or "portfolio committees".

<sup>77</sup> The establishment of such committees should comply with s 160(6)(c) regarding the establishment of *inter alia* committees and the Constitution s 160(8), which requires proportionality in such committees. See also the Structures Act s 79.

<sup>78</sup> See the Structures Act s 79(2)(a)-(f).

If a municipal council has an executive committee or an executive mayor, it may appoint, in terms of section 79, certain committees of councillors to assist the executive committee or the executive mayor respectively. The number comprising such committees may not exceed the number of members of the executive committee or the mayoral committee, as was discussed above.<sup>79</sup> Depending on the circumstances, either the executive committee or the executive mayor:

- appoints a chairperson for each committee
- may delegate any power and duties to such committees
- is not divested of responsibility of such powers or duties, however
- may vary or revoke any decision taken by a committee, subject to any vested rights.<sup>80</sup>

All section 80 committees must report to either the executive committee or the executive mayor in accordance with the directions given by the executive committee or executive mayor, whichever is applicable.<sup>81</sup>

#### **15.2.1.10 The employment of municipal personnel**

The Constitution specifically entrenches the authority of a municipal council to employ personnel that are necessary for the effective performance of its functions. Each municipal council must therefore decide which personnel should be appointed and if such personnel can be afforded by the municipality concerned. Although generally speaking it is open for a municipal council to employ personnel, every municipal council is obligated to appoint a municipal manager who is to head the administration and also the accounting officer for the municipality. When necessary, a municipal council must also appoint an acting municipal manager. A person that is appointed as a municipal manager must have the relevant skills and expertise to perform the duties and functions associated with such a post.<sup>82</sup>

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<sup>79</sup> Where a municipal council has established an executive mayor, the mayor must appoint a mayor committee if the council have more than 9 members. Such mayor committee may never have more than 10 members. See s 60 of the Structures Act. Therefore, a s 80 committee, appointed in terms of s 79, can never have more than 10 members as a maximum. See the Structures Act s 80(2).

<sup>80</sup> Refer to the Structures Act s 80(3)(a)-(d).

<sup>81</sup> In the former local government dispensation a distinction was made between committees with authority to bind the municipal council through its decisions and committees that performed only administrative functions without binding authority. See, eg, the Transvaal Ordinance on Municipal Administration, O17 of 1939 ss 59 and 60.

<sup>82</sup> Apart from sophisticated managerial skills, a municipal manager should also have wide knowledge of local government matters as well as experience in public administration. See the Structures Act s 82.

### **15.2.2 Aspects regarding the delegation of powers and functions in local government structures**

It is an accepted practice in many governmental systems and public departments to allow and provide for the delegation of powers by one functionary to another. Generally speaking, the power or authority to delegate a power or function entails the lawful transfer of such a power or function from a structure which has legally been vested with a power or performance of such a power or function to another structure. Such delegation of authority is directed mainly at ensuring more effective and sufficient decision making within governmental structures. Because of its importance, the Constitution specifically entrenches the principles of agency and delegation.<sup>83</sup> In this regard, section 238 of the Constitution states as follows:

An executive organ of state in any sphere of government may-

- (a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or
- (b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

In its position as an executive organ of state in the third sphere of government, a municipal council is therefore constitutionally authorised to delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state. Such delegation must be consistent with the legislation in terms of which the power is exercised or the function is performed. Consequently, any delegation of authority must be evaluated against either the Constitution or other legislation applicable to such delegation.

Apart from section 238, a further constitutional provision regarding the delegation of powers on local government sphere is found in section 160(2) of the Constitution. According to the subsection and notwithstanding the provisions of section 238, certain functions may not be delegated by a municipal council. Such functions include

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<sup>83</sup> In the case of *Executive Council, Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC) the Constitutional Court *inter alia* held that there was nothing in the interim Constitution prohibiting parliament from delegating subordinate regulatory authority to other bodies. The court stated that the power to delegate authority was necessary for effective law making. See para 51 at 899D-E.

- the passing of by-laws
- the approval of budgets
- the imposition of rates and other taxes, levies and duties and
- the raising of loans.

All such functions must be taken by the municipal council itself and may not be delegated to another functionary such as an executive committee or an executive mayor.<sup>84</sup> See the case of *Executive Council, Western Cape v Minister of Provincial Affairs*,<sup>85</sup> where the Constitutional Court per Ngcobo J held that section 160(2) of the Constitution simply prohibited municipalities from delegating certain matters. Section 160(2) did not give municipalities an unqualified right to delegate any other matter, however. Section 160(2) indeed provided how the power to delegate might be exercised and to which structures it might be delegated. The section did not in any way take away from municipalities the power to delegate matters except those excluded by the subsection. The court further confirmed that section 154(1) of the Constitution conferred wide legislative authority on the national government in respect of municipalities, and it authorised both national and provincial governments to enact legislation to empower municipalities to manage their affairs. According to the court, such legislative authority was wide enough to confer authority on the national government/parliament to enact section 32 of the Structures Act. The enactment of section 32, which required a municipal council to develop a system of delegation that would maximise administrative and operational efficiency was therefore not inconsistent with section 160(2) of the Constitution.<sup>86</sup>

#### **15.2.2.1 The new system for delegation in local government**

Apart from the constitutional requirements regarding the delegation of powers, the new legislative framework for local government established under the Constitution also contains several aspects regarding the delegation system that must be developed. In this regard the Local Government: Municipal Systems Act determines that a municipal council must develop a system of delegation that will maximise the admin-

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<sup>84</sup> Cf the case of *Kritzinger v Newcastle Local Transitional Council and Others* 2000 (1) SA 345 (N), where the court held that the Constitution s 160 did not mention the right to delegate to the executive committee the power to determine whether civil proceedings should be instituted or defended as one of those aspects which municipal councils were precluded from delegating. See at 350B-H.

<sup>85</sup> 2000 (1) SA 661 (CC).

<sup>86</sup> Refer to paras 126-129 at 711-712.

istrative and operational efficiency of the municipality. The system of delegation must also provide for adequate checks and balances.<sup>87</sup> The Systems Act furthermore determines that, according to the system of delegation, appropriate powers may be delegated to any of the municipality's other political structures, political office bearers, councillors or staff members. Certain powers may not be delegated to such functionaries, however. These powers are:

- a power mentioned in terms of section 160(2) of the Constitution
- the power to set tariffs
- the power to decide to enter into a service delivery agreement in terms of section 76(b) of the Systems Act
- the power to approve or amend the municipality integrated development plan (IDP).<sup>88</sup>

The system of delegation may also instruct any political structure, political office bearer, councillor or staff member to perform any of the municipality's duties.<sup>89</sup> Notwithstanding the fact that certain powers or duties have been delegated to other functionaries by a municipal council, such delegation authority is not absolute, and accordingly the system of delegation may also provide for the withdrawal of any delegation or instruction.

When a delegation or instruction is given, there are specific requirements that legally must be met. These requirements can be summarised as follows:<sup>90</sup>

- A delegation or instruction must not conflict with the Constitution, the Systems Act or Structures Act.
- It must be in writing.
- It is subject to any limitations, conditions and directions that the municipal council may impose.
- It may include the power to sub-delegate a already delegated power.

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<sup>87</sup> See the Systems Act s 59(1).

<sup>88</sup> See the Systems Act s 59(1)(a).

<sup>89</sup> Delegation therefore refers not only to the exercise of certain powers, but also to the performance of certain duties. See the Systems Act s 59(1)(b)-(c).

<sup>90</sup> See the Systems Act s 59(2)(a)-(f). Refer also to the case of *Nelson Mandela Metropolitan Municipality v Greyvenouw* CC 2004 (2) SA 81 SECLD, where the court held that the delegation of non-discretionary decisions, such as giving effect to a discretionary decision taken by a Municipal Manager to institute legal proceedings, did not offend against the purpose of the system of delegation of authority. If the Municipal Manager was authorised to exercise the decision, he/she could then legally authorise someone else to fulfil such authority. See para 49-51 and 98-99.

- It does not divest the municipal council of the responsibility concerning the exercise of the power or duty.
- It must be reviewed when a new council is elected or, in the case of a district council, when such council has been elected and appointed.

In order to strengthen and enhance accountability and to ensure a proper check on delegated powers or duties, a municipal council may, in accordance with its internal procedures, review any decision taken by a political structure, political office bearers, councillor or staff member in consequence of a delegation or instruction. Upon such review, the municipal council may either confirm, vary or revoke the decision taken by such functionary, subject to any rights that may have accrued to a person. Apart from a municipal council's authority to review *mero moto* the exercise of a delegated power or duty, a municipal council must review a decision taken in consequence of a delegation or instruction if at least one quarter of the councillors of the council request the municipal council to do so, in writing.<sup>91</sup> A municipal council may also require its executive committee or executive mayor to review any decision taken by a functionary in consequence of a delegation or instruction.<sup>92</sup>

However, according to the new legislative framework, certain delegations are restricted to executive committees or executive mayors only. In this regard, the powers to:

- take decisions to expropriate immovable property or rights in or to immovable property and
  - determine or alter the remuneration, benefits or other conditions of service of the municipal manager or managers directly responsible to the municipal manager
- may only be delegated to the executive committee or executive mayor, which ever is applicable within a policy framework determined by the municipal council.<sup>93</sup> It is also determined that a municipal council may delegate only to an executive committee or executive mayor or chief financial officer the authority to make investments on behalf

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<sup>91</sup> See the Systems Act s 59(3)(a).

<sup>92</sup> The Systems Act s 59(3)(b). It is important to note that any delegation or sub-delegation to a staff member of a power conferred on a municipal manager must be approved by the municipal council in accordance with the system of delegation that has been established in terms of the Act s 59(1). See s 59(4) as added by Act 51 of 2002 s 36.

<sup>93</sup> See the Systems Act s 60(1)(a)-(b).

of the municipality, within the policy framework determined by the national minister of finance.<sup>94</sup>

In order to ensure control over delegated matters, it is determined that a political structure, a political office bearer, a councillor or a staff member of a municipality to whom a delegating authority has been delegated or sub-delegated may or sometimes must refer the matter to the relevant delegating authority for a decision.<sup>95</sup> Furthermore, any person whose rights are affected by a decision taken by a functionary in terms of a power or duty delegated or sub-delegated may appeal against that decision by giving written notice of the appeal and reasons therefore to the municipal manager within 21 days of the date of the notification of the decision. Upon receipt of a notice of appeal, the municipal manager must promptly submit the appeal to the appropriate appeal authority, which must consider the appeal and confirm, vary or revoke the decision.<sup>96</sup> According to the Systems Act, various persons or a combination of persons will be regarded as an appropriate appeal authority, depending on the particular circumstances. For example, if the appeal is against a decision by a staff member other than the municipal manager, then the municipal manager is the appeal authority. If the appeal is against a decision by the municipal manager, then the executive committee or executive mayor is the relevant appeal authority. If a municipality does not have an executive committee or executive mayor, then the municipal council of the municipality is the appeal authority. Lastly, if an appeal is against a decision by a political structure such as an executive committee or executive mayor, or a political office bearer or a councillor, then the municipal council is the appeal authority. This will be the case only where the council comprises less than 15 councillors. Where the council comprises more than 15 councillors, a committee of councillors must be appointed and will be the appropriate appeal authority.<sup>97</sup> It is further required that an appeal authority commence with an appeal within six weeks from the date of referral of the appeal to it and decide the appeal within a reasonable

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<sup>94</sup> The Systems Act s 60(2).

<sup>95</sup> See the Systems Act s 61.

<sup>96</sup> In this respect it is of importance to note that no variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision. See the Systems Act s 62(3).

<sup>97</sup> A special appeal committee must be appointed by the municipal council for such a purpose and must involve councillors who were not involved in the original decision. See the Systems Act s 62(4)(a)-(c).



period. It should be noted that an internal appeal does not detract from any appropriate appeal procedure that is provided for in any other applicable law.<sup>98</sup>

In an effort to further ensure accountability and oversight in respect of delegated powers, it is determined that a political structure, office bearer, councillor or staff member to whom an authority has been delegated or sub-delegated must report to the delegating authority in such intervals as the delegating authority may require. A delegation or sub-delegation may also be withdrawn or amended, or can even lapse. It is, however, important to note that the withdrawal, amendment or lapsing of a delegation or sub-delegation does not invalidate anything done as a consequence of a decision taken in terms of that delegation or sub-delegation.<sup>99</sup>

Delegations or sub-delegations should also be reviewed at regular intervals.<sup>100</sup> In this regard, and whenever it becomes necessary to review a municipality's delegations, the municipal manager must submit to the municipal council the following:

- a report on the existing delegations issued in terms of section 59 of the Systems Act and all other delegating authorities and
- recommendations on any changes to the existing delegations which the municipal manager may consider necessary.

If the municipality has an executive committee or an executive mayor, then the municipal manager must submit his/her report and recommendations to the municipal council through such executive committee or executive mayor.<sup>101</sup>

### **15.2.3 Quorums and majorities necessary to take lawful municipal decisions**

Similarly to the two higher spheres of government, all municipal councils must comply with certain basic procedural requirements in order to take lawful decisions. In this regard the Constitution requires that a majority of the members of a municipal council be present before a vote may be taken on *any matter*.<sup>102</sup> A majority in this respect seems to refer to a normal or simple majority. Such a majority would equate to 50% + 1 of the members of a particular municipal council.<sup>103</sup> The Constitution thus

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<sup>98</sup> See the Systems Act s 62(6).

<sup>99</sup> See the Systems Act ss 63 and 64.

<sup>100</sup> According to s 59(2)(f), a delegation or instruction must be reviewed when a new council is elected.

<sup>101</sup> See the Systems Act s 65(1)-(2).

<sup>102</sup> Own emphasis added.

<sup>103</sup> Eg, if a municipal council consists of 100 members, then 50 + 1 members must be present to form a quorum and before a vote may be taken.

seems clear that a quorum of at least 50% + 1 of the members of a municipal council must be present before a decision is taken. This requirement is relevant for all matters before the council.<sup>104</sup>

If a majority of the members of a municipal council is present, then such council may take lawful decisions. There are exceptions to the general rule, however. If an aspect is considered that falls within the ambit of section 160(2) of the Constitution, then it is required that the matter can be determined only by a decision taken by the municipal council with a supporting vote of a majority of its members.<sup>105</sup> This subsection seems to indicate a so-called “absolute majority”, which in turn refers to a majority vote/supporting vote of the total number of members of a municipal council. All questions before the municipal council are decided by a majority of the votes cast.<sup>106</sup>

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<sup>104</sup> See the Constitution s 160(3)(a). During the restructuring of local government, similar provisions were applicable under the LGTA. See the case of *MEC, Development Planning and Local Government v DP* 1998 (4) SA 1157 (CC). In this case a dispute arose between members of the Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council (“the Council”) as to whether or not a simple majority or a two-thirds majority was required for the approval of its budget for the forthcoming financial year. The Council and the appellant brought an urgent application in a High Court for an order declaring a simple voting majority to be sufficient. The application was dismissed with costs. The appellant then applied for leave to appeal directly to the Constitutional Court or, in the event of such leave being refused, to the Supreme Court of Appeal or to a Full Bench of the High Court. The substance of the appeal was the constitutionality of the LGTA 209 of 1993 s 15(5), which provided that the budget of a municipal council had to be approved by a two-thirds majority of that council and that, if the budget for any financial year was not approved by 30 June of that year, the member of the executive council of a province responsible for local government could exercise the power to approve the budget. The basis of the challenge was that s 16(5) was inconsistent with the 1996 Constitution, in that it violated the Constitution s 160(3)(b) read with s 160(2)(b), which required the budget of a municipal council to be approved by a majority of the members of that council. The dispute turned on the meaning of the second sentence of Constitution Sch 6 Item 26(2), which provided that the LGTA s 16(5) and (6) may not be repealed before 30 April 1999. The court finally held that the LGTA s 16(5) could not be repealed and remained in force until 30 April 1999 despite the provisions of the Constitution s 160(3)(b), which would not apply during this limited period. S 16(5) was accordingly consistent with the Constitution s 160(3)(b). See para 53 at 1178 B-D.

<sup>105</sup> Refer to the Constitution s 160(3)(b).

<sup>106</sup> See the Constitution s 160(3)(c). The following example can be used to illustrate the practical effect of the abovementioned requirements. Imagine a municipal council that consists of 100 members. According to the Constitution s 160(3)(a), at least 50% + 1 (51 or more) members must be present before a vote may be taken. If a vote is to be taken on any matter which falls outside the functions mentioned in the Constitution s 160(2)(a)-(d), then such matters are to be decided by a majority of the votes cast of the members that are present. If we accept that 60 members out of the 100 members are present, then it would seem that the Constitution requires a majority of 50% + 1, thus equating to 30 + 1 = 31 or more votes to decide the matter. It is unclear, however, what the position would be if certain members, although present, abstained from voting. Let's say that four members of the 60 present do not vote. In this regard it is submitted that the decision is to be taken on the votes cast. If only 56 votes were cast, then the majority of such votes would determine the final outcome. If the matter before the council referred to a s 160(2) matter, then a supporting vote of [the] majority members of the municipal council would be mandated. This would mean that within a council with a total of 100 members, at least 51 (50% + 1) of the members would have to vote in

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An important principle to mention here is that municipal decisions such as those taken under the LGTA are not classified as administrative actions, and municipal councils are subsequently not required to provide reasons for their decisions. It seems that municipal decisions cannot legally be attacked on grounds of content; only on grounds of required procedures. This writer does not agree with such an hypothesis, however. Under the new constitutional dispensation, municipalities are required not only to comply with procedural requirements, but also to ensure that the result of certain actions or decisions comply with constitutional obligations.<sup>107</sup> This writer agrees that municipal decisions do not fall under the definition of administrative action, however.<sup>108</sup>

Apart from the mentioned constitutional requirements regarding internal quorums and majorities necessary to take lawful decisions, there is other national legislation which sets out certain requirements. According to the Local Government: Municipal Structures Act,<sup>109</sup> the speaker of a municipal council decides when and where the council should meet, subject to section 18(2) of the Act.<sup>110</sup> However, the speaker must convene a meeting if a majority of the councillors request in writing that the speaker convene a council meeting. The meeting must then be convened at a time

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support of the proposal. It should be clear from the abovementioned explanation that an absolute majority requires more votes than a normal majority.

<sup>107</sup> Refer again to the positive obligations set out in the Bill of Rights and also the Constitution ss 152 and 153. See also the constitutional case of the *Minister of Health v TAC (No 2)* 2002 (5) SA 721 (CC).

<sup>108</sup> See *Steele v South Peninsula Municipal Council* 2001 (3) SA 640 (C). In the case the respondent municipality decided by a majority vote to remove about half of the speed bumps which had been constructed in two "collector roads" in a suburb within its area of jurisdiction. The applicants, who were dissatisfied with the decision, applied in a Provincial Division for an order reviewing and setting aside the resolution so taken. The applicants contended that the resolution was an administrative act of the kind contemplated by the Constitution s 33 and was therefore subject to review. The court held that, although the council's resolution, apart from that portion of it which related to the allocation of expenditure, could not properly be regarded as legislation, it did not fit comfortably into the notion of administrative action either. The decision by the council rather constituted the exercise of its constitutional authority and "right to govern ... the local government affairs of its community" as intended in of the LGTA 209 of 1993 s 10C(3) read with the Act Sch 2A Items 6 and 7. The court further held that the resolution of the council could not be categorised as administrative action: the council passed a resolution pursuant to its statutory obligation to see to traffic control and road safety within its area of jurisdiction and it did not implement any particular law. The council resolution was carried by a majority. It was not a decision taken by a functionary who could be expected to furnish reasons but was a decision taken by a politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted. See at 643-644.

<sup>109</sup> The Act s 29.

<sup>110</sup> According to the Structures Act s 18(2), a municipal council must meet at least quarterly.

set out in the written request.<sup>111</sup> This position was affirmed by the Pretoria High Court in 2001 in the case of *Oelofse and others v Sutherland and others*.<sup>112</sup> The background to the case was the following: The second respondent, a municipal council established in terms of the Municipal Structures Act 117 of 1998, had 12 councillors, elected in the local government elections in November 2000. Six of the councillors (the applicants) formed a group or block in the second respondent council, while the other six formed another group or block. The first respondent, who had been elected the speaker of the second respondent council, was a member of the latter group or block. One of the members of the latter group resigned as a councillor in March 2001, leaving only 11 incumbent councillors. The first respondent then wrote to the other councillors informing them that as "all political parties and interest groups will need ... to prepare themselves for the by-election" he "will not be calling any council meeting before the by-election takes place". The six applicants thereupon signed a written notice calling upon the first respondent to convene a council meeting for 24 April 2001. The first respondent, claiming that the applicants lacked the requisite number of councillors to give a valid notice, declined to convene a council meeting. Relying on section 29(1) of the Act (which provided that "if the majority of the councillors requests the speaker in writing to convene a council meeting, the speaker must convene a meeting at a time set out in the request"), the six applicants applied in a Provincial Division for an urgent order compelling the first respondent to convene the council meeting. The first respondent, in opposing the application, contended that the phrase "a majority of councillors" in section 29(1) did not mean the majority of incumbents without counting any vacancies in the council and that the applicants therefore did not constitute a majority of councillors. The court, as per Bertelsmann J, held that although there was no definition of the word "quorum" in the Act, the legislature had provided in section 35 that a quorum of members was required before a valid meeting of a council could be held. None of the sections of the Act provided a number or formula for the calculation of the relevant quorum. Consequently, the quorum consisted of half the total number of members plus one. From this it followed that a municipal council had to have at least one half

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<sup>111</sup> See the Municipal Structures Act s 29(1). It is submitted that a majority of the councillors would seem to refer to an absolute majority, which would require a majority (50% + 1) of the total number of councillors of the particular municipal council.

<sup>112</sup> 2001 (4) SA 748 (T).

plus one of the number of potential council seats allocated to it by the MEC for local government to be filled by incumbents before the council could function.<sup>113</sup> The court further held in regard to section 160 of the Constitution that "members" referred to incumbents and that it was clear that a majority of incumbents could request a meeting of the municipal council. The Act clearly provided that, once a council was quorate, the majority of incumbents held sway. The court held accordingly that the application had to succeed. The applicants represented the majority of incumbents ('the majority of the councillors' referred to in section 29(1)) and were entitled to demand that a meeting be convened.<sup>114</sup>

Furthermore, the municipal manager of a municipality or, in the absence of the municipal manager, a person designated by the MEC for local government in the province, must call the first meeting of the council within 14 days after the council has been declared elected or after all the members of a district council have been appointed.<sup>115</sup> Where the composition of a municipal council has been changed as a result of the provisions of item 2, 3 or 7 of Schedule 6B of the Constitution, then, subject to item 6(b) of Schedule 6B of the Constitution, the speaker, must convene council meetings to deal with council matters. The first meeting must be held within 7 days.<sup>116</sup>

According to section 30 of the Structures Act, the basic constitutional requirements regarding municipal council quorums and decisions, as is set out in section 160(3) of the Constitution, are reiterated. However, the Act also provides that if there is an equality of votes on any question, the councillor presiding must exercise a casting vote in addition to his/her normal vote as a councillor.<sup>117</sup> It is further also legislated that before a municipal council is to take a decision on

- any matter mentioned in section 160(2) of the Constitution
- the approval of an integrated development plan for the municipality or any amendment to that plan
- the appointment and conditions of service of the municipal manager and a head of a department of the municipality

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<sup>113</sup> See pages 751-752.

<sup>114</sup> At 752-753.

<sup>115</sup> See the Structures Act s 29(2).

<sup>116</sup> See the Constitution Sch 6B read in conjunction with the Structures Act s 29(3)(a) and (b).

<sup>117</sup> See the Structures Act s 30(4).

the council must first require from its executive committee or executive mayor, whichever is applicable, to submit to it [the council] a report and a recommendation on the relevant matter.<sup>118</sup>

#### **15.2.4 Internal procedures regarding municipal by-laws**

With regard to the internal procedures of municipal councils, the Constitution further requires that no by-law may be passed by a municipal council unless

- all the members of the council have been given reasonable notice of such by-law
- the proposed by-law has been published for public comment.<sup>119</sup>

The enactment of by-laws forms part of a municipality's legislative powers and is discussed more fully in chapter 14 in this work.

#### **15.2.5 Procedures relating to the size of a municipal council and its committees**

The size of a municipal council or of its committees is a very important factor in determining the effectiveness and success of any municipal government. Very large municipal councils tend to be more ineffective than smaller, more compact, councils. The most effective municipal government would need a council that is ideally balanced and that is not too large but also not too small to be unrepresentative of community interests.

In relation to the size of a municipal council, the Constitution determines that national legislation may provide for criteria for determining the size of a municipal council, whether the council may elect an executive committee or other committees and also the size of the executive committee or other committees, if so permitted.<sup>120</sup> Again the Constitution seems to confirm a need for uniformity regarding the sizes of municipal councils and the committees operating within such councils. This uniformity is then achieved through national legislation, and it is not left to the provinces to determine differently in each province.<sup>121</sup>

#### **15.2.6 The making of by-laws to regulate internal procedures**

The Constitution specifically authorises a municipal council to enact or make a by-law which prescribes rules and orders for the internal arrangements of the council. The by-law also regulates the council's business and proceedings and should further

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<sup>118</sup> See the Structures Act s 30(5).

<sup>119</sup> See the Constitution s 160(4)(a)-(b).

<sup>120</sup> The Constitution s 160 (5)(a)-(c).

<sup>121</sup> See the Structures Act ch 3, as was discussed above.



deal with the establishment, composition, procedures, powers and functions of the committees within the relevant council.<sup>122</sup> In this regard it is important to note that the Constitution seems to enhance some sort of autonomy for municipalities regarding its internal procedures, as well as the functioning and operation of its committees. This position was confirmed in the case of *Executive Council's WC and KZN v Minister of Provincial Affairs*,<sup>123</sup> where the court held that the constitutional power of legislatures to regulate the internal proceedings of committees was a narrow power, not a broad one, and was related not to the executive committees of these legislatures, but rather to other committees entrusted with specific tasks or portfolios. Section 160(6) of the Constitution had to be interpreted in a similar fashion: although the section conferred an important power upon municipalities, its scope was relatively narrow and did not relate to the power to regulate the establishment or functioning of the executive of municipal councils, whatever form that executive might take, or any other committee of the municipality which was a key part of its democratic structure. It related only to task and working committees which might be established and disestablished from time to time. The court held further that the committees which fell within those contemplated in section 160(6)(c) were those regulated by sections 71, 79 and 80 of the Structures Act. The power of municipalities to appoint committees was subject to section 160(1)(c). Municipalities had the power to elect "an executive committee or other committees subject to national legislation". The effect of section 160(1)(c) was that the power of the municipalities to appoint committees contemplated in section 160(1)(c) was subject to national legislation. Therefore, there could be no objections to sections 71, 79 and 80. Apart from this, these provisions largely repeated the provisions of the Constitution, which afforded municipal councils the power to determine whether to establish committees or not.<sup>124</sup>

When one is dealing with a municipal council, one should have due regard to such by-laws as regulate the internal functioning. However, it is equally important to remember that municipal by-laws may not be in conflict with national or provincial legislation.<sup>125</sup> It is therefore safe to say that no by-laws that prescribe rules and orders

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<sup>122</sup> See the Constitution s 160(6)(a)-(c).

<sup>123</sup> 2000 (1) SA 661 (CC).

<sup>124</sup> See paras 100-104 at 703-705.

<sup>125</sup> See again the Constitution s 156(3). A by-law that conflicts with either national or provincial legislation is invalid.



for internal arrangements, business or proceedings or relating to municipal committees, may be different from the provisions regarding such aspects that have been determined in the legislation of the two higher spheres of government.

#### **15.2.7 Procedures regarding the manner of conducting the internal business of municipal councils**

All municipal councils are obligated by the Constitution to conduct their business in an open manner.<sup>126</sup> In essence this means that all activities of municipalities are open for public scrutiny and oversight. This obligation is applicable to not only the municipal council but to all of its committees. Only when it is reasonable to do so may a municipal council or a committee of a council close its sittings. Such closure would mean no publicity regarding the content or outcome of a particular issue or issues.<sup>127</sup> An interesting aspect is that neither the Structures Act nor the Systems Act deals further with the issue of closure of sittings. In the absence of any other such legislative provisions, it is up to each individual municipality to enact by-laws which prescribe rules and orders relating *inter alia* to its internal arrangements and its business and proceedings.<sup>128</sup>

#### **15.2.8 Internal procedures regarding the participation of members of municipal councils in council proceedings**

The final constitutional provision dealing with internal council proceedings relates to the participation of members in council or committee proceedings. In this respect the Constitution states that members of a municipal council are entitled to participate in the proceedings of the council or in the proceedings of the committees within the council.<sup>129</sup> The Constitution however circumscribes the entitlement to participate in three ways: firstly, members are entitled to participate in a manner that allows parties and interests reflected within the council to be fairly represented. What is or should constitute fair representation is somewhat uncertain and needs better clarification.

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<sup>126</sup> See the Constitution s 160(7).

<sup>127</sup> In order to determine the reasonability of closing a council or committee sitting, the council or committee must determine the circumstances objectively and after due regard to all relevant aspects has been given. The Constitution specifically requires due regard to be given to the nature of the business that is being transacted. See s 160(7). Eg, when a council is considering implementing a strategic law enforcement operation, it is obvious that the nature of such business requires secrecy and non-disclosure.

<sup>128</sup> See s 160(6)(a)-(b) above.

<sup>129</sup> It should be noted that the Constitution does not exclude certain members or certain committees. The Constitution therefore seems to suggest that all the members of a council should participate in all proceedings of the council, if they so wish.

As a starting point, one can argue that fair representation would equate to proportional representation. The *prima facie* wording of the Constitution seems to suggest that the requirement of proportional representation is applicable to all committees of a municipal council. The wording of section 160(8) of the Constitution does not distinguish directly between different municipal councils or any of its committees. When the issue regarding the requirement of fair representation in a council or a committee came before the courts, the highest court in our state held a different view. See the matter of the *DA v Masondo No and another*<sup>130</sup>. The main issue in the case was whether or not minority parties in the Johannesburg municipal council were entitled to representation on a mayoral committee established under the provisions of the Local Government: Municipal Structures Act. Section 60 of the Act provided that “if a municipal council has more than nine members, its executive mayor (a) must appoint a mayoral committee from among the councillors to assist the executive mayor”. Section 160(8) of the Constitution provided that “members of a municipal council are entitled to participate in its proceedings and those of its committees in a manner that (a) allows parties and interest reflected within the council to be fairly represented”. The appellants argued that on a proper construction of section 60(1)(a) of the Structures Act, read with section 160(8)(a) of the Constitution, the representation of minority parties is a requirement even if the subsection does not expressly say so. The respondents contended that neither the Constitution nor the Structures Act required a mayoral committee to have minority party representation. Chapter 7 of the Constitution, which contained the framework for local government, provided for three types of executive system in municipal government: a plenary executive system, an executive committee system and the executive mayoral system. The Johannesburg municipal council has the latter system.

The majority members of the Constitutional Court held that the primary function of the mayoral committee was the rendering of assistance to the mayor in the exercise of his authority. This view was supported by the provisions of section 160(6)(c) and (8) of the Constitution which, in context, referred only to committees elected by the municipal council.<sup>131</sup> It also held that, although the democratic principle and the requirement of minority party representation in the deliberative processes of local gov-

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<sup>130</sup> 2003 (2) SA 413 (CC).

<sup>131</sup> See paras 19-20 at 420-421.

ernment were important, so was the need for effective delivery of services. A mayoral committee, which was personally chosen by the mayor to assist in the discharge of his duties as mayor, was simply not the type of committee contemplated by section 160(8). The mayor was entitled to choose that committee because he or she was personally responsible for what it did. To force the mayor to choose a multiparty committee to discharge these responsibilities would be to blur the distinction between an executive mayoral system and an executive committee system.<sup>132</sup> The Structures Act did not describe the mayoral committee as a committee of the municipal council; nor did it expressly require that the mayoral committee should have minority party representation. There were a number of factors pointing to a deliberate distinction in the Act between committees of the municipal council and a mayoral committee. First, the powers granted in section 60(1) of the Act to appoint, dismiss and delegate were given to the mayor, not the municipal council; secondly, the Act expressly required that the composition of the executive committee be representative of parties and interests in the council (section 43(2) of the Act) when dealing with the executive committee system, but not so when dealing with mayoral committees; and, thirdly, there is a deliberate distinction between the mayoral committee and the municipal committees appointed under section 80 of the Act.<sup>133</sup>

The court continued that the power of the municipal council under section 60(3) of the Act to insist that the mayor exercise certain powers or perform certain functions in conjunction with the mayoral committee did not mean that the mayoral committee was a committee of the council. The mayoral committee was accountable to and controlled by the executive mayor only.<sup>134</sup> The mayoral committee was not a committee of the municipal council as contemplated in section 160(8) of the Constitution, and the provisions of the section were thus not applicable to the composition of the mayoral committee.<sup>135</sup> Finally the contention of the appellants that section 60(1)(a) fell foul of section 160(8) of the Constitution because it did not require minority representation on a mayoral committee had to be rejected: since it was clear that the provisions of section 160(8) had no relevance to the appointment of a mayoral committee, it followed that neither the Structures Act nor the Constitution required minor-

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<sup>132</sup> Paras 22-23 at 421D/E-422A.

<sup>133</sup> Paras 24-27 at 422A/B-I, paraphrased.

<sup>134</sup> Paras 28-30 at 422I/J-423H, paraphrased.

<sup>135</sup> Para 33 at 424D.

ity representation on a mayoral committee. Accordingly, section 60(1)(a) was not in conflict with the Constitution.<sup>136</sup>

This writer disagrees with the reasoning of the court, however. Although the conclusion of the court that a mayoral committee is different from other committees and should not allow for proportional representation should be accepted, the basis for the court's decision is wrong. It is clear that the wording of the Constitution, read together with the Structures Act, is vague and uncertain and that the position should have been corrected through legislative amendments and clarification.<sup>137</sup> It is submitted that it is very dangerous for our courts to decide and read things into the legislation where the legislature has failed to express its legislative intentions clearly. Such an assumption of legislative authority could in itself be contrary to the Constitution and could be unconstitutional when tested against the principle of separation of powers. Rather, the courts should demand clarification of an issue from the legislature. Secondly, participation should be allowed in a manner that is consistent with democracy and, thirdly, such participation may be regulated by national legislation.<sup>138</sup>

### **15.3 The privileges and immunities of municipal councils and their members**

The protection of members of legislative organs of the state is not new to South Africa's constitutional system. During the development of the parliamentary system in England, many privileges developed to protect members against interference or pressures from outside the legislature. Although the protection of privileges was originally directed at members of parliament, over the years such protection was also extended to members of other legislatures. Within the new constitutional dispensation in South Africa such privileges have been entrenched on all three spheres of government.<sup>139</sup> In respect of local government, the Constitution confirms that provincial legislation within the framework of national legislation may provide for privileges and immunities of municipal councils and their members.<sup>140</sup>

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<sup>136</sup> Para 34 at 424E-G.

<sup>137</sup> See the minority decision of the *Masondo* case *supra* fn 130 at 429 *et seq.*

<sup>138</sup> Refer to the Constitution s 160(8)(a)-(c). See also the Structures Act chs 3 and 4.

<sup>139</sup> According to the Constitution ss 58, 71 and 117, both members of parliament and of provincial legislatures have certain privileges such as freedom of speech in the legislature or its committees and are also exempted from civil or criminal proceedings in relation to anything they have said or produced before the legislature or any of its committees.

<sup>140</sup> See the Constitution s 161. It is conspicuous that the Constitution does not directly entrench the privileges of members of municipal councils in a similar fashion as the protection afforded to the

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A closer evaluation of section 161 of the Constitution indicates that the constitutional drafters intended to give more authority to the provincial legislatures in respect of municipal privileges, although not a *carte blanche* power. The provincial legislatures could each provide for privileges or immunities of municipal councils and their members in each province, but such legislative provisions have to fall within the framework of national legislation. The autonomy regarding privileges and immunities is thus circumscribed by national framework directions. In compliance with the Constitution, the Municipal Structures Act determines that provincial legislation enacted in terms of section 161 of the Constitution provide for at least the following:<sup>141</sup>

- that councillors have freedom of speech in a municipal council and in its committees, subject to the relevant council's rules and orders as is envisaged in section 160(6) of the Constitution and
- that councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything that they have said in, produced before or submitted to the council or any of its committees or for anything revealed as a result of anything that they have said in, produced before or submitted to the council or any committee of the council.

On the point of freedom of speech in municipal council meetings, two particular aspects are of importance. In the first instance, freedom of speech is a constitutionally recognised fundamental right and may only be limited in accordance with the Constitution.<sup>142</sup> Secondly, freedom of speech is important to allow for fair and free political criticism and is a core component of the principle of a democratic government. Confirmation of this position was given in various court decisions.<sup>143</sup>

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members of the two higher spheres of government. Such diminution in the protection of local government affairs is somewhat unfortunate. It is submitted, as is the case in respect of other issues, that the Constitution could indeed have provided equal protection to certain constitutional issues for all three spheres of government. The protection given by the Constitution in respect of local government matters merely confirms that national or provincial legislation may provide for certain aspects. Such legislative provisions are much easier to amend and thus provide less protection than the Constitution itself.

<sup>141</sup> See the Structures Act s 28(1)(a)-(b).

<sup>142</sup> See the Constitution ss 16 and 36 respectively.

<sup>143</sup> See, eg, *Waters v Khayalami Metropolitan Council* 1997 (3) SA 476 (W), where the court held that the censuring of applicant who criticised and requested information regarding other councillors stifled freedom of expression and restricted debate in the respondent's meetings. The action of the respondent militated against the fundamentals of democracy. The court held that in an open and accountable society those who held power and were responsible for public administration ought to be open to criticism. See at 491C-D. See also the case of *De Lille v The Speaker of the National Assembly* 1998 (3) SA 430 (C).

It should be noted that the enactment of provincial legislation in terms of section 161 of the Constitution is not compulsory. Provinces may enact such legislation if they so wish. It is thus quite possible that some provincial legislatures will not opt to enact such legislation. To address such situations, the Structures Act provides that until such provincial legislation has been enacted, the privileges referred to in section 28(1) of the Act will apply to all municipal councils in the province concerned.<sup>144</sup> Apart from the legislative provisions mentioned above, it is advisable for all municipal councils to make provision for the privileges and immunities of council members in their own internal rules and orders. This is particularly important since the protection given in the Structures Act is made subject to a council's rules and orders.<sup>145</sup>

It seems that the Act wants to protect a certain measure of autonomy for municipalities in respect of the privileges and immunities of their members. However, one must emphasise the constitutional provision that any municipal by-law that is in conflict with a national or provincial law is invalid. The autonomy is therefore relatively restricted. Only a limited measure of autonomy regarding privileges is given to municipalities within a national regulatory framework.

#### **15.4 Internal municipal functionaries and procedures**

In accordance with the new legal framework, all municipalities are obligated to define the specific role and area of responsibility of each political structure and each political office bearer of the municipality. This also includes the role and responsibilities of the municipal manager.<sup>146</sup> The respective roles and areas of responsibility must be

- defined in precise terms by way of separate terms of reference and must be in writing
- acknowledged and given effect to in the rules, procedures, instructions, policy statements and other written instruments of the specific municipality.<sup>147</sup>

The terms of reference mentioned above may also include the delegation of powers and duties to the relevant functionary(ies).

When the respective roles and areas of responsibility of each political structure, political office bearer or the municipal manager are being defined by the relevant

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<sup>144</sup> See the Structures Act s 28(2).

<sup>145</sup> Cf the case of *Herselman No v Botha* 1994 (1) SA 28 (A).

<sup>146</sup> See the Systems Act s 53(1).

<sup>147</sup> Refer to the Systems Act s 53(2)(a)-(b).

municipality, the municipality must determine five aspects:<sup>148</sup>

- the relationship among those political structures, office bearers and the municipal manager and also the manner in which they must interact
- the appropriate lines of accountability and reporting procedures for the functionaries
- the mechanisms, processes and procedures for minimising cross-referrals and prevention of unnecessary overlapping of responsibilities between the functionaries
- the mechanisms, processes and procedures for resolving disputes between the functionaries *inter se*
- the mechanisms, processes and procedures to ensure interaction between the functionaries and other staff members of the municipality and between the councillors and the municipal manager and other staff members of the municipality.

It is further important to note that if a specific municipality has a decentralised regional administration in any part of its area, the municipality must determine mechanisms, processes and procedures for interaction between the regional management structures and

- the ward councillor or other councillors responsible for that part of the municipal area
- any sub-council or ward committee where applicable
- the local community in that area.<sup>149</sup>

### **15.5 Code of conduct for councillors**

Within the new legal system for local government, specific provision has been made for a code of conduct for political office bearers/councillors. The main aim of this code of conduct is to enhance the overall principles of accountability and responsiveness that are entrenched in the Constitution.<sup>150</sup> The inclusion of a specific code of conduct for councillors is not a new aspect, but has always been included in the legal structure of the third sphere of government.<sup>151</sup> A code of conduct for political

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<sup>148</sup> See the Systems Act s 53(5)(a)-(e).

<sup>149</sup> The Systems Act s 53(6)(a)-(c).

<sup>150</sup> The Constitution s 1 provides the basic values on which the new democratic state is founded.

<sup>151</sup> See, eg, the LGTA of 1993 Sch 7.



members of a legislature is not only required on the lowest level of government in a state but is also prescribed for the higher spheres of government.<sup>152</sup>

On local government level, the Systems Act determines that the code of conduct that is contained in Schedule 1 of the Act applies to every member of a municipal council. This code of conduct thus applies only to the political component of a municipality, as a municipal council comprises elected representatives only.<sup>153</sup> According to the preamble of the code of conduct, councillors are elected to represent local communities on municipal councils, to ensure that municipalities have structured mechanisms of accountability to local communities and to meet the priority needs of communities by providing effective, equitable and sustainable services. In the fulfilment of their roles, councillors must be accountable to local communities and must report back at least quarterly to constituencies on council matters, including the performance of the municipality. In an effort to ensure that councillors fulfil their obligations and to support the achievement by a municipality of its objectives as set out in the Constitution and section 19 of the Municipal Structures Act, a detailed code of conduct has been established.<sup>154</sup>

#### **15.5.1 General conduct of municipal councillors**

According to the code of conduct for councillors, every councillor must:

- perform the functions of his/her office in good faith, honestly and in a transparent manner
- act in the best interests of the municipality at all times and in such a way that the credibility and integrity of the municipality are not compromised.

Conduct relating to aspects of good faith, honesty, transparency and best interests are not defined, and it is submitted that an objective determination of all relevant circumstances will be required in order to determine whether or not a councillor has breached these requirements in specific circumstances.<sup>155</sup>

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<sup>152</sup> See, eg, the Constitution ss 96 and 136. Both the members of cabinet and deputy ministers as well as the members of the executive council of a province must act in accordance with a code of ethics that is prescribed by national legislation. According to internal house rules, both national and provincial executive members act in a prescribed manner. See also the Executive Members Ethics Act 82 of 1998.

<sup>153</sup> Officials and the public are excluded from such code of conduct, and the code applies only to municipal councillors.

<sup>154</sup> Refer to the preamble of the code of conduct for councillors set out in the Systems Act Sch 1.

<sup>155</sup> See the Systems Act Sch 1 Item 2.

### **15.5.2 Attendance at meetings**

Every councillor must attend each meeting of the municipal council and of a committee of which that councillor is a member. Exceptions to this obligation will be accepted only when

- leave of absence is granted in terms of an applicable law or as may be determined by the rules and orders of the council or
- if the councillor is required in terms of this code to withdraw from the meeting.<sup>156</sup>

Provision is further made that a municipal council may impose on a councillor a fine as is determined by its standing rules and orders for

- not attending a meeting as is required or
- failing to remain in attendance at such a meeting.

If a councillor is absent from three or more consecutive meetings of the council or a committee meeting which he/she is required to attend, then he/she must be removed from office as a councillor.<sup>157</sup> Any proceeding for the imposition of a fine or the removal of a councillor must be conducted in accordance with a uniform standing procedure, which procedure each municipal council must have in place for the purposes of this item. Such procedure must naturally comply with the rules of natural justice, which in turn form part of the constitutional right to just administrative action.<sup>158</sup>

### **15.5.3 Disclosure of interests and personal gain**

According to item 5 of the code of conduct, a councillor must

- disclose to the municipal council, or to any committee of which the councillor is a member, any direct or indirect personal or private business interest that that councillor, his or her spouse, partner or business associate may have in any matter before the council or the committee
- withdraw from the proceedings of the council or committee when that matter is considered, unless the council or the committee decides that the councillor's direct or indirect interest is trivial or irrelevant.<sup>159</sup>

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<sup>156</sup> Refer to the Systems Act Sch 1 Item 3.

<sup>157</sup> It is evident that the Act is very strict and severe on this point. Councillors should be well advised to note that the Act is mandatory in this regard.

<sup>158</sup> See the Systems Act Sch 1 Item 4 as well as the Constitution s 33.

<sup>159</sup> It is important to note that the Act Item 1 of the code of conduct defines a "partner" as a person who permanently lives with another person in a manner as if married. This inclusion is to be welcomed, as a much wider disclosure of interests is required. In a country where corruption is the order of the day, strict and extensive measures of anti-corruption prevention are indeed needed.

It is furthermore legislated that a councillor who or whose spouse, partner, business associate or close family member acquired or stands to acquire any direct benefit from a contract concluded with the municipality must disclose full particulars of the benefit of which the councillors is aware.<sup>160</sup> Such disclosure is to be done at the first meeting of the municipal council at which it is possible for the councillor to make such disclosure. Such disclosure is not required in instances where an interest or benefit has been acquired in common with other residents of the municipality, however.<sup>161</sup>

A councillor is further prohibited from using his/her position or privileges as a councillor or from using confidential information obtained as a councillor for private gain or to improperly benefit another person. Furthermore, no councillor, except with the prior consent of the municipal council, may

- be a party to or beneficiary under a contract for the provision of goods or services to the municipality or for the performance of any work other than the work as a councillor for the municipality
- obtain a financial interest in any business of the municipality and
- appear on behalf of any other person before the council or a committee for a fee or other consideration.

Prior consent of the municipal council can be vetoed by more than a quarter of the councillors of a particular council.<sup>162</sup>

The code of conduct for councillors also requires that when a councillor is elected or appointed, he/she must declare to the municipal manager in writing and within 60 days of the date of such election or appointment the following financial interests which he/she holds:

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<sup>160</sup> See the case of *Mpakathi v Kghotso Development CC and Others* 2003 (3) SA 429 (W). The essential question in the case was whether or not a councillor of a local authority may purchase property at a sale in execution where the local authority was the judgment creditor. According to the Local Government Ordinance 17 of 1939 (T) s 40, a councillor could not enter into a contract with the council in which he had any direct or indirect pecuniary interest unless prior approval had been obtained from the administrator. The court held that, in selling the property, a contract came into existence between the sheriff and the purchaser. The judgment creditor was not a party to the contract. The argument of the plaintiff that the contract should be declared void had to be dismissed. See paras E-F at 438.

<sup>161</sup> See the Systems Act Sch 1 Item 5(3).

<sup>162</sup> If more than one quarter of the councillors of a municipal council object to consent's being given to a councillor that has requested consent pertaining to an aspect where personal gain is involved, then such consent may be given to the councillor only with the approval of the MEC for local government in the specific province. See the Systems Act Sch 1 Item 6.

- shares and securities in any company
- membership of any close corporation
- interests in any trust
- directorships
- partnerships
- other financial interest in any business undertaking
- his/her employment and remuneration
- interest in property
- pension
- subsidies, grants and sponsorships by any organisation.

Apart from declaring the abovementioned interests, a councillor is also obligated to declare to the municipal manager any change in the nature or detail of his/her financial interests, in writing and on an annual basis.<sup>163</sup> Furthermore, a councillor must also declare all gifts received that are above a prescribed amount.<sup>164</sup>

#### **15.5.4 Undertaking of other paid work and the acceptance of rewards, gifts and favours**

The code of conduct further determines that a full-time councillor may not undertake any other paid work except with the consent of the relevant municipal council. Such consent should not be withheld unreasonably.<sup>165</sup>

No councillor may request, solicit or accept any reward, gift or favour for

- voting or not voting in a particular manner on any matter before the council or a

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<sup>163</sup> See the Systems Act Sch 1 Item 7(1) and (2). On close consideration of the various interests that must be declared, one can justifiably question whether such declaration is too extensive and whether it is indeed unnecessary. Keeping in mind the purpose of such declaration, it seems inevitable that after having been elected or appointed some councillors will be legally obligated to declare to the municipal manager certain personal or private interests that do not relate to his or her position as a councillor. To what extent these provisions may limit a councillor's other rights, such as a right to personal privacy, is not absolutely certain and may well cause legal disputes in future. In an attempt to obviate some of these problems, the Systems Act determines that the municipal council must determine which of the financial interests mentioned above should be made public. Such determination must take into account the need for confidentiality of certain matters, as well as the importance of the public interest for disclosures.

<sup>164</sup> The amount is not fixed by the Act but is prescribed by regulations. According to the Local Government: Municipal Systems Regulations as published under GNR 459 in GG 22328 of 25 May 2001, gifts received by a councillor must be declared where:

- the value of the gift exceeds R1 000, and
- the value of gifts received from a single source in any calendar year exceeds R1 000.

A declaration of gifts received by a councillor must also contain a description of such gift/gifts and must indicate the value and source of such gift/gifts.

<sup>165</sup> See the Systems Act Sch 1 Item 8.

committee of the council

- persuading the council or any committee to exercise any power, function or duty in a certain regard
- making a representation to the council or any committee of the council
- disclosing privileged or confidential information.<sup>166</sup>

**15.5.5 *The unauthorised disclosure of information, intervention in the administration of the municipality and aspects concerning council property***

Without the permission of the municipal council or a committee, a councillor may not disclose any privileged or confidential information of the council or committee to any unauthorised person. For the purposes of this item, privileged or confidential information includes any information:

- determined by the municipal council or committee to be privileged or confidential
- discussed in closed session by the council or committee
- whose disclosure would violate a person's right to privacy
- that is declared to be privileged, confidential or secret in terms of the law.<sup>167</sup>

It is further also provided that, except if provided by law, no councillor may:<sup>168</sup>

- interfere in the management or administration of any department of the council unless mandated by the council to do so
- give or purport to give any instruction to any employee of the council, except when authorised to do so
- obstruct or attempt to obstruct the implementation of any decision of the council or a committee by an employee of the municipality
- encourage or participate in any conduct which would cause or contribute to the mal-administration in the relevant council.

A councillor may also not use, take, acquire or benefit from any property or asset owned, controlled or managed by the municipality to which that councillor has no

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<sup>166</sup> See the Systems Act Sch 1 Item 9(a)-(d).

<sup>167</sup> See the Systems Act Sch 1 Item 10(2)(a)-(d). It should be noted that according to Item 10(3) the prohibition of privileged or confidential information does not derogate from the right of any person to access to information in terms of national legislation. This item is really unnecessary, as it is obvious that such prohibitions must comply with the law of the state in general. Reference in this instance to national legislation is also incorrect and should rather refer to the protection given in terms of the provisions of the Constitution.

<sup>168</sup> See the Systems Act Sch 1 Item 11.

right. Furthermore, no councillor may be in arrears to the municipality for rates and service charges for a period longer than three months.<sup>169</sup>

#### **15.5.6 Breaches of the code of conduct**

According to item 13 of the code of conduct of councillors, if the chairperson of a municipal council, on reasonable suspicion, is of the opinion that a provision of the code has been breached, the chairperson must:

- authorise an investigation of the facts and circumstances of the alleged breach
- give the councillor concerned a reasonable opportunity to reply in writing regarding the alleged breach
- report back to a meeting of the municipal council after the requirements of the investigation and reply from the councillor have been complied with. Such report to the municipal council is open to the public, and the chairperson must report the outcome of the investigation to the MEC for local government in the province concerned.<sup>170</sup>

Because of the serious consequences that can follow when the code has been breached, not only for the councillors of a municipal council but ultimately also for the principle of democracy, the chairperson of each municipal council must ensure that, when each councillor is taking office, he/she is given a copy of the code of conduct and also that a copy of the code is available in every room or place where the council meets.<sup>171</sup>

It is further permitted for a municipal council to investigate and make a finding on any alleged breach of a provision of the code of conduct or to establish a special committee to investigate and make a finding on any alleged breach, and also to make appropriate recommendations to the relevant municipal council.<sup>172</sup> If the council or special committee has found that a councillor has breached the code, the council may do any of the following:

- issue a formal warning to the councillor
- reprimand the councillor

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<sup>169</sup> Refer to the Systems Act Sch 1 Items 12 and 12A. Item 12A was inserted by Act 51 of 2002 s 45. In light of a councillor's sufficient remuneration packages, there should be no acceptable reason why such a councillor is not up to date with his/her own municipal rates and taxes. Councillors have a duty to set an example in terms of punctual payment for services received.

<sup>170</sup> See the Systems Act Item 13(1), (2) and (3).

<sup>171</sup> See the Systems Act Item 13(4).

<sup>172</sup> See the Systems Act Sch 1 Item 14(1)(a)-(b).

- request the MEC for local government in the province to suspend the councillor for a period
- fine the councillor or
- request the MEC to remove the councillor from office.<sup>173</sup>

Any councillor who has been warned, reprimanded or fined may appeal to the MEC in writing within 14 days of having been notified of the decision of the municipal council. The appeal should set out the reasons on which the appeal is based. If an appeal is lodged, a copy thereof must be provided to the council, which may in turn within 14 days of receipt of the appeal make any representation thereto to the MEC in writing.<sup>174</sup>

After having considered the appeal, the MEC may then confirm, vary or set aside the decision of the council and inform both parties of the outcome. The MEC may also appoint a person or a committee to investigate any alleged breach of the code and to make a recommendation on whether the councillor should be suspended or removed from office.<sup>175</sup> Lastly, it is also provided that if the MEC is of the opinion that a councillor has breached a provision of the code and that such contravention warrants a suspension or removal, the MEC may

- suspend the councillor for a period and on conditions determined by the MEC or
- remove the councillor from office.

Any investigation or decision must be in accordance with the rules of natural justice and obviously also any other applicable laws.<sup>176</sup> According to case law, nothing in item 13 or 14 permits an MEC to act *mero motu*, particularly in a case where the

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<sup>173</sup> Two aspects should be noted in this regard. First is that the municipal council must decide on an appropriate action against a councillor who has breached the code of conduct. The Act does not allow for the special committee to decide on an appropriate punishment. Secondly, it is only the MEC that can remove a councillor from office. The municipal council may only request such removal. See the Systems Act Sch 1 Item 14(2).

<sup>174</sup> It should be of interest to note the decision in *Van der Merwe and others v Slabbert NO and Others* 1998 (3) SA 613 (N). In the case, which concerned allegations of breaches of the code of conduct for councillors promulgated under the LGTA, the court held that investigating bodies in code breach investigations do not necessarily need to apply the rules of natural justice during their investigations, depending on the circumstances. However, whenever a statute empowered a public official or body to do something or to give a decision which would affect an individual's liberty, property or other existing rights, then the rules of natural justice come into play and the investigating body does not have an unfettered discretion to determine the procedure that should be followed. See at 624D-H.

<sup>175</sup> The Systems Act Sch 1 Item 14(3) and (4). If the MEC appoints a one man or other committee to investigate a breach of the code of conduct, then the Commissions Act 8 of 1947 as amended, or where appropriate, applicable provincial legislation may be applied.

<sup>176</sup> See the Systems Act Item 14(6)-(7).



municipal council has taken definite steps to investigate an alleged breach of the code of conduct. The MEC is obliged to await the outcome of the council's own investigation and recommendation before he/she acts in terms of item 14(1) and (6).<sup>177</sup>

#### **15.5.7 Application of the code of conduct to traditional leaders**

An important addition to the code of conduct is that most of the items also apply to a traditional leader who participates in or who has participated in the proceedings of a municipal council in terms of section 81 of the Municipal Structures Act. The code of conduct applies to traditional leaders in the same way as it applies to councillors. If a traditional leader has breached the code, the council may either issue a formal warning to him or request the MEC to suspend or cancel his right to participate in the proceedings of the council. It should be noted, however, that the suspension or cancellation of a traditional leader's right to participate in the proceedings of a council does not affect that traditional leader's right to address the council in terms of section 81(3) of the Municipal Structures Act.<sup>178</sup>

#### **15.6 The procedures regarding the election of municipal office-bearers**

A specific procedure has been determined in Schedule 3 of Municipal Structures Act, which should be applied whenever a municipal council meets to elect a speaker, an executive mayor, a deputy executive mayor, a mayor or a deputy mayor.<sup>179</sup> In short, the procedure requires the presiding person at a meeting of the municipal council to call for the nomination of candidates. A nomination must be made on the form determined by the municipal manager and it must be signed by two members of the municipal council. All nominees must also indicate their acceptance of the relevant nomination by signing either the nomination form or any other form of written confirmation.<sup>180</sup>

After the nominations have been called for, the person presiding at the meeting must announce the names of the persons who have been nominated as candidates. No debate on such nominations is permitted. If only one candidate is nominated, then the presiding person must declare that candidate elected. If there is more than one candidate, then a vote by secret ballot must be taken at the meeting. During

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<sup>177</sup> See *Van Wyk v Uys No 2002 (5) SA 92 (C)* at 99-100.

<sup>178</sup> See the Structures Act Sch 1 Item 15(1)-(8).

<sup>179</sup> See the Structures Act Sch 3 Item 1 as amended.

<sup>180</sup> See the Structures Act Sch 3 Item 3. A nominee can thus accept his/her nomination through any form of written confirmation. Oral acceptance is not permitted, however.

such a vote each councillor present at the meeting may cast one vote, and the presiding person must declare the candidate who has received a majority of the votes to be elected.<sup>181</sup>

A specific elimination procedure is provided for if no candidate has received a majority of the votes. In such a case the candidate who has received the lowest number of votes must be eliminated from the procedure and a further vote taken on the remaining candidates in accordance with item 6 of the schedule. Such an elimination procedure must be repeated until a candidate receives a majority of votes for the position nominated.<sup>182</sup>

If only two candidates are nominated or remain after an elimination procedure and those two candidates receive the same number of votes during an election to decide between them, then a further meeting must be held within seven days, at a time determined by the presiding person. The same procedure mentioned above is to be applied during the follow-up meeting as if it were the first meeting for the election of a specific position. If at this further meeting only two candidates are nominated or remain after an elimination procedure and the two candidates receive the same number of votes, then the presiding person must determine by lot who of the two candidates will hold the office for which the election has taken place.<sup>183</sup>

## 15.7 Conclusion

It is submitted that the new legal framework that has been enacted to regulate and control the internal functioning and procedures of all municipal councils has established a firm foundation for municipalities to conduct their affairs and fulfil their obligations and functions properly. Similar to the position in a private company or business, no municipality will be in a position to fulfil its overall constitutional duties effectively and sufficiently without strict internal control and management. Local

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<sup>181</sup> See the Structures Act Sch 3 Items 4-6. Again, the Act seems to refer to a normal majority of votes that is needed to elect a nominee for a certain position. A normal majority does not refer to 50% + 1 of the total number of councillors represented in the relevant municipal council.

<sup>182</sup> If two or more candidates have each received the lowest number of votes during the taking of a vote, then a separate vote must be taken on those candidates alone, and should be repeated as often as may be necessary to determine which candidate is to be eliminated. See the Structures Act Sch 3 Item 7(2).

<sup>183</sup> The purpose of the first postponement is to give the councillors a chance to re-think their votes and to determine the issue afresh. If the same result is obtained, the presiding person must determine the outcome by lot. A determination by lot is generally understood to mean the two names will be put in a hat and the presiding person will at random select one name from the hat, which person will then be elected to hold office in the specific position. Determination by lot can also be conducted by flipping a coin.

governments are not private companies or business institutions *per se*, however, and their functioning is often complicated with policy considerations and political objectives. In this regard it is important for all municipalities that a balanced approach between political idealism and private realism is achieved. Again, strong emphasis should be placed on the main reasons for local government's existence and their constitutional objectives. All internal structures and procedures must be directed at ensuring compliance with the predetermined constitutional duties and obligations. This writer is of the opinion that the new legal framework regarding the internal structures and functioning of municipal councils can indeed succeed in ensuring that municipal duties and obligations are met. Such success is dependant on the proper and unbiased enforcement of all the newly enacted legal rules, however.

## **Municipal services and service delivery and the basic functional activities of municipal governments**

### **16.1 Introduction**

In their capacity as the third and lowest sphere of government and the one that functions closest to local communities, municipal governments have often been described as comprising the sphere of government that is tasked mainly with the development and provision of services to communities. Some writers have even commented that if a municipality cannot or does not perform its service provision obligations, it should forfeit its right to exist.<sup>1</sup> This idealism is strongly entrenched in the new constitutional framework that has been devised for local government.<sup>2</sup>

Although all municipalities have been constitutionally tasked with providing sustainable and effective services, such a realisation is not as easy as it may seem. There are many different aspects that must integrate with one another before a municipality will be able to succeed in this mammoth task. One should therefore look not only at the different services that should be provided by local governments but also to the various obstacles and problems to their fulfilling their mandate. Factors that influence services and service delivery change drastically from one municipal term to the next, and continuous and long term planning is of the order of the day.<sup>3</sup>

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<sup>1</sup> See Craythorne (1997) 391.

<sup>2</sup> According to the Constitution s 152(b), one of the main objectives of local government is to ensure the provision of services to communities in a sustainable manner. The provision of services is thus a cardinal function, if not the most important function, of every municipal government.

<sup>3</sup> New demands on services and service provisions are especially relevant in many formerly underdeveloped areas and also in areas where drastic urbanisation is taking place. Without proper planning, future service delivery objectives will most definitely be jeopardised.

## **16.2 The new vision of local government service delivery**

### **16.2.1 Assessing basic needs**

It has been mentioned above that local government administrations have been undergoing radical changes under the new constitutional dispensation of South Africa. Unfortunately many of such changes have not been driven by clear and precise visions of the role and responsibilities that all municipalities should play. A practice that was introduced during the process of amalgamating and restructuring municipal administrations and which was subsequently proceeded with in the new local government system was to adopt and extent the structures and functioning of the former established municipal administrations without significant changes.<sup>4</sup>

On the contrary, it must be said that many municipalities indeed used the amalgamation process to initiate processes of review of their administrative organisation. This is how many innovative approaches to especially strategic management procedures were introduced, for example. Such approaches focussed mainly on technical problems, however, and little attention was given to rethinking the basic principles on which the administrations were organised. For the transformation and new local government system to be successful, a process of administrative reorganisation is required. This is particularly essential if all municipalities are to achieve the new constitutional obligations.<sup>5</sup> In order to enhance service delivery, almost all municipalities have wide-ranging options. Most prominent, however, is the need to assess and plan strategically for the most appropriate and effective forms of service delivery mechanisms within each particular municipal area. Municipal administrations must choose those delivery options that would ensure maximum benefit and efficiency.

### **16.2.2 Basic principles and approaches on service delivery**

In order to achieve optimal service delivery, each municipal government should choose a delivery system that is best suited to the type of municipality concerned and after taking into account all the special needs of the local communities. When municipalities are deciding on the particular delivery options for their areas, they

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<sup>4</sup> In order to minimise administrative disruption, minimal changes were made to many municipality's organisational structures. This aspect was, and still is, not absolutely favoured by the ruling government, as it perceives the old structures as ineffective and disruptive to the new local government vision. See the White Paper on Local Government (1998) at 111.

<sup>5</sup> Again, emphasis should be placed on the fact that the central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all South African commu-

*continued on next page*

should be guided by certain basic principles.<sup>6</sup> The principles can be summarised as follows:

- *Accessibility* All communities should have access to at least a minimum level of services. This is not a goal, but a constitutional obligation. The many imbalances that still exist regarding equal access to services should be addressed through the development of new infrastructure and the rehabilitation and upgrading of existing infrastructure.
- *Simplicity* Municipal services should not only be accessible, they should also be easy and convenient to use. In this regard it is of special importance that municipalities should aim to ensure that people with disabilities or that are illiterate should be able to access and use municipal services with ease.
- *Affordability* It is a given that many services remain unaffordable for many South African residents. In order to enhance quality of life, municipalities should strive to make services as affordable as possible. This is not an easy task, as many factors have an impact on the pricing of services.<sup>7</sup>
- *Quality* Services should not be rendered below a certain determined quality. In this regard, services should be suitable for their purpose, should be timeously provided, should be safe and should be accessible on a continuous basis. Service users will not pay and support their municipal service providers promptly if services are sub-standard and of a poor quality. Not only the services themselves but also back up maintenance and support should comply with the minimum quality standard.
- *Accountability* The new South African state, which includes local governments, is founded on, *inter alia*, the values of a democratic government, which includes principles of accountability and responsiveness.<sup>8</sup> Whenever a delivery system is adopted by a particular municipal government, therefore, it remains the responsi-

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nities. The provision of basic services enhances the quality of life of all citizens, and it increases many new economic opportunities and productive initiatives.

<sup>6</sup> See the White Paper on Local Government (1998) at 113-114. The principles mentioned in the White Paper should not be regarded as a *numerus clausus*, but should serve as a basic point of departure.

<sup>7</sup> Again one must remember that municipalities have a constitutional obligation to provide at least certain minimum services to people, even though they cannot pay for such services. See, eg, the socio-economic rights set out in the Constitution ch 2, as well as ch 7 ss 152 and 153. In compliance with these requirements, many municipalities have introduced so-called "sliding scale payment schemes", where all residents are provided with a predetermined quantity of water and electricity free of charge.

bility of that municipality to be accountable for all its activities, which includes the assurance of service provision of an acceptable quality.

- *Integration* All municipalities should adopt an integrated approach to planning and ensuring municipal service provision. The integration of municipal services requires specifically that each municipality take into account the economic and social impact of service provision in relation to overall municipal policy objectives such as poverty eradication and job creation.
- *Sustainability* The provision of services to local communities in a sustainable manner is also a constitutional imperative for all municipal governments.<sup>9</sup> In light of this constitutional requirement, service provision is an ongoing process. However, ongoing service provision depends on municipal institutions that are properly managed both financially and administratively.
- *Value for money* Municipal services should account for value for money. Municipalities should strive to provide not only sustainable services but services that provide value for money for all services users. In this respect, value for money and affordability goes hand in hand.
- *Promotion of competitiveness* All municipalities should take cognisance of the fact that job generation and the competitive nature of local commerce and industry could be adversely affected by imposing higher rates and service charges on such industries in order to subsidise domestic users. Such practices could have a negative impact on local economic development, as many potential investors or businesses could be scared or lured away to other jurisdictions. In this regard, sufficient transparency is needed to ensure that all investors are aware of the costs of doing business in a particular local area.
- *Promotion of the new constitutional values* Lastly, it is not only a legal prerequisite for all municipalities to comply and adhere to the new constitutional values and requirements, it is also an essential recipe for all local governments to achieve optimal sufficiency and support. Municipal administrations must therefore fulfil and promote the democratic and other administrative values and principles that are enshrined in the Constitution.

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<sup>8</sup> See the Constitution s 1(d).

<sup>9</sup> Refer to the Constitution s 152(1)(b).



After the abovementioned criteria have been taken into account, a municipality should be in a good position to determine which service delivery options would be best for its particular area of jurisdiction. In appropriate circumstances, a special mixture of different delivery options can be implemented. Apart from the delivery option or options, most municipalities can further enhance service delivery through the implementation of specific delivery mechanisms. Such mechanisms include the following:<sup>10</sup>

- *Building on existing capacity* It is a known fact that municipal governments throughout South Africa have different levels of administrative capacity. Many municipalities have however a sound existing infrastructure and established municipal capacity. Without ignoring new initiatives, it is very important for all municipal governments to build on their already existing capacity and potential. Reinvention of the wheel so to speak will only result in poor service delivery and unnecessary expenditure. Not all existing capacities are however suitable for expansion. In many instances drastic reform measures should be introduced as a matter of urgency. Such measures could include the introduction of performance-based contracts for senior staff members, the development of new codes of conduct, the implementation of reform policies such as affirmative action programmes, training and empowering the skills of frontline workers to interact with the communities, the decentralisation of operational management responsibilities and, lastly, the development of new strategies through consultation and communication.
- *Corporatisation* In essence the term corporatisation refers to the separation of service delivery units from the specific municipal council. This in turn should enable a council to determine specific policy goals and to set service standards to which corporate units can be held responsible. Corporatisation also offers greater autonomy and flexibility to the management of the different service units which could allow for commercial management practices to be introduced.<sup>11</sup>
- *Establishment of public-public partnerships* The establishment of public-public partnerships or so-called public joint ventures can allow for horizontal co-operation between municipalities. Such partnerships are often common in other countries

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<sup>10</sup> See the White Paper on Local Government (1998) at 115-121.

<sup>11</sup> Corporatisation can take a number of forms, from public institutions such as Water Boards or Town Planning Boards to joint ventures between municipalities. Corporatisation is of particular value in large municipal jurisdictions.

especially in areas such as joint purchasing, training initiatives and technical support.<sup>12</sup> Within the new local government scheme of South Africa, municipalities should begin to explore these innovative partnership agreements with other state institutions or parastatals such as the Post Office for the collection of municipal revenue. Obvious benefits can be derived from such partnerships, not only for the municipalities concerned, but also for the benefit of local residents.

- *Establishment of partnerships with community-based organisations and non-governmental organisations* Partnerships with community-based organisations (CBOs) and non-governmental organisations (NGOs) can be very effective in involving local communities and also to stimulate local economic development. Often such organisations have particular skills that could enhance and facilitate new development initiatives and serve as an effective intermediary in local initiatives. In the new area of local government development, municipalities should consider involving CBOs and NGOs in partnerships with other public or private institutions. Even so-called three-way-partnerships between a public, a private and a CBO/NGO can be very effective.<sup>13</sup>
- *Public-private partnerships* Municipalities should also explore the possibilities of entering into partnerships with local businesses. Apart from stimulating the local economy, such partnerships should also ensure effective services and less financial expenditure for the local authority.
- *Out sourcing/out contracting* For many years already, many municipalities have benefited from the practice to contract certain services out to specialist private companies. Such specialist companies can often provide such services more effectively than in-house municipal departments can. It is however important for municipalities that when services are contracted out the municipality should protect and ensure minimum standards, contract specifications and an overall control and monitoring capacity. The modern trend in local government seems to be that services are outsourced by way of tender procedures and not by subjective unilateral decision making, or even auction procedures. During a tender process, the lowest

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<sup>12</sup> Refer to the White Paper on Local Government (1998) at 117.

<sup>13</sup> In such a partnership a municipality can, eg, provide funding for a project, a private contractor can provide skills and equipment, whilst a CBO can facilitate the recruitment and management of local labour and community support. The advantage of such a partnership is that skills are effectively transferred, employment is created and effective services are provided without exhausting municipal capacity.

bidder is not always the best contractor. Various factors such as the financial standing of the contractor, the inclusion of local labour and technical capacity and quality control should be taken into account. Municipalities must ensure that all legal requirements are adhered to in this regard. Contracting out should be most effective when municipalities are clear about the services they are seeking from a private contractor, and when they have the capacity to manage the tender process and monitor the rendering of the services to ensure that municipal objectives are met.

- *Leases and concessions* A further approach to service delivery is the conclusion of either lease or concession agreements. Such agreements are forms of public-private partnerships that are most common for services where large-scale capital investment is required. The agreements are characterised by an often long contractual period extending over many years, a contractor that is required to take charge of the assets and infrastructure associated with the service for the duration of the contract, which requires substantial investment from the contractor's side. Because the contractor is taking on more risk, it normally demands the transfer of the responsibility for revenue collection in order to minimise financial losses. The long contract period is usually long enough to allow the contractor to recover its initial investment through the revenue that is generated from the provision of the services. In almost all instances the contractor will require ownership of the assets for the duration of the contract period. When the contract lapses, ownership and infrastructure is then transferred to the municipality.<sup>14</sup> Lease and concession agreements can be concluded in various formats. There are so-called build-operate-transfer (BOT) agreements, where a contractor builds an asset, operates it for a period of time and then transfers it to a municipality. Then there is the build-own-operate-transfer (BOOT) agreement, which further gives ownership of

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<sup>14</sup> Although this form of service provision is not entirely new to government institutions, it has only recently started to take effect. A good example of such a partnership is the partnership between the department of correctional services and private institutions to build and manage new correctional facilities. The private companies have agreed and contracted with government to build new prisons, which they will then manage for a certain period in lieu of payment for such services. After the contract period has lapsed, the prison and other assets will fall back on the government. There are many areas in local government service provision, where such partnerships can be very effective. One such example is the possible upgrading and management of old power stations in municipal areas. Private companies can reinvest in such stations and then sell the electricity to the local municipality. After a certain period, the power station and new infrastructure will again be owned by the municipality, to utilise to the benefit of its local communities.

the assets or infrastructure to the contractor for the length of the contract period. Lastly, there is also a build-operate-train-transfer (BOTT) variation which specifically provides for training for municipal employees during the contract period, which will then operate and manage the facilities and services, after the contract period has come to an end. Apart from the obvious benefits of such partnerships, there are high financial risks if such partnerships are managed or structured poorly. To avoid such negative possibilities, national government has put forward certain regulatory requirements to ensure public accountability and consumer protection. Some of these requirements will be discussed elsewhere in this chapter.

- *Privatisation/transfer of ownership* The last procedure to enhance service delivery refers to the transfer of ownership from municipalities to private or community-based entities. The transfer of ownership in this respect particularly refers to the sale of municipal assets, together with the transfer of responsibilities for the management of such services. Such a process is more generally referred to as privatisation. Although privatisation should not easily be considered with reference to primary/core municipal services such as water, electricity and solid waste disposal, it certainly could have positive outcomes in respect of secondary services such as municipal maintenance, parks and recreation and even refuse removal services.<sup>15</sup> All in all, the privatisation of non-core assets can boost municipal capacity and revenue in order for municipalities to focus on the delivery of strategic and core municipal services. Although there seems to be no clear consensus on which municipal services should be regarded as core or non-core services, national guidelines provide more clarity in this respect. It is, however, the final responsibility of each municipal council to make its own assessments in relation to what services are core services and what are not. In this regard, municipalities should be guided by the strategic policies put forward in each municipally integrated development plan.

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<sup>15</sup> With special emphasis on the central role that municipalities are constitutionally obligated to play in meeting the material, social and economic needs of communities, it is undesirable that ownership of core infrastructure and assets is removed from the municipal/public sphere.

### **16.2.3 Some basic administrative capacities that will enhance municipal development**

In order to play and ensure a developmental role effectively and to improve performance in respect of service delivery, all municipalities will need to develop at least the following capacities:

- Municipalities will have to become more strategic in their orientation. They should be open and flexible to new or unforeseen demands.
- They will have to maximise integrated capacity, both inside and outside the municipal jurisdiction.<sup>16</sup>
- They will have to become much more community orientated.

Municipal councils need to develop mechanisms to interact with community groups and to identify service needs and priorities. Without the capacity to strategise, integrate and interface with non-municipal groups, many local governments are unlikely to be sustainable in the future. The implementation of new strategies and policies requires a strong municipal leadership, with the necessary support and belief of the municipal council. Continuous communication between all role players and regular oversight and training should be provided.<sup>17</sup>

Suffice it to say that the approaches to improving service delivery efficiency and quality, which build on existing capacity, are more likely to succeed if they are structured as a partnership between council, management, labour and the community. Although labour protects particular interests, such interests should not prevent effective service delivery to communities. In this respect the South African Local Government Bargaining Council (SALGBC) will play a critical role in achieving new service delivery standards and development objectives. The SALGBC will have to look specifically at new measures to ensure more flexibility in the retraining and redeployment of municipal staff, the introduction of a more customer- and performance-orientated service system and the improvement of accountability and commitment to delivery within municipal administrations. Finally, one should remember that it is

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<sup>16</sup> The vertical integration of national and provincial programmes with municipal administrative systems may be a particularly effective way for rural municipalities to build their administrative capacity.

<sup>17</sup> It should be noted that the training of municipal councillors falls under SALGA, which in turn should ensure that an intensive councillor training programme is provided for after every election of new municipal councillors. See the White Paper on Local Government (1998) at 125.

ultimately the responsibility of national and provincial governments to monitor and oversee the effective performance by municipalities of their functions.<sup>18</sup>

### **16.3 The new legislative requirements regarding municipal services and service provision**

#### **16.3.1 *The constitutional legal basis***

According to the new constitutional framework, all municipalities are obligated to provide certain services and to achieve certain objectives. In this regard there is a strong relationship between the functions that municipalities should fulfil and the services and objectives that they should achieve and provide. It is interesting to note that the Constitution itself does not go into much detail regarding all the services that a modern municipal government should provide. The Constitution merely states that all municipalities must strive, within their financial and administrative capacities, to achieve the objectives of:

- a democratic and accountable government
- the provision of services in a sustainable manner
- social and economic development
- safe and healthy environments
- community involvement in local government matters.<sup>19</sup>

The Constitution also mandates all municipalities to structure and manage their administrations, budgets and planning processes to give priority to the basic needs of their communities and to promote social and economic development.<sup>20</sup> What the basic needs of communities are is not altogether certain. Some core/basic needs are universal, however, and should take centre stage in any municipal service provision planning. Such basic services would normally include water and electricity provision, as well as solid waste disposal and general municipal infrastructure. These services must be provided in an equitable and sustainable manner.<sup>21</sup> The Constitution again does not provide more guidance regarding specific services that should be rendered.

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<sup>18</sup> See again the Constitution ss 154(1) and 155(6).

<sup>19</sup> Refer again to the Constitution s 152(1)(a)-(e). It is self evident that without the necessary financial and administrative capacity the mentioned objectives will not be achieved. Various strategic programmes and initiatives should be implemented in order to enhance both financial and administrative capacities.

<sup>20</sup> See the Constitution s 153(a)-(b).

<sup>21</sup> In terms of s 155(4) of the Constitution, national legislation must take into account the need of municipalities to provide municipal services in an equitable and sustainable manner.

Apart from the fact that municipalities are obligated to provide certain core services to their residents, a municipality must be legally authorised to provide such a service or to impose fees or tariffs for such services. Without legal authorisation, a municipal government will not be entitled to render particular services or to impose fees for such services.<sup>22</sup>

In an effort to further enhance the achievement and fulfilment of their obligations towards service provision, the Constitution requires provincial governments to establish municipalities in a manner that will promote the development of local government capacity in each province so as to enable municipalities to perform their functions and manage their own affairs.<sup>23</sup> Only time will tell if the different types of municipality that have been established under provincial authorisation will indeed promote the development capacities as is required. On this point, it is also important to mention that both national and provincial governments, through their legislative and executive powers, should see to the effective performance by a municipality of its functions in relation to the matters listed in Schedules 4 and 5 of the Constitution.<sup>24</sup> Furthermore, a municipality, in the effective performance of its functions, has the right to exercise any power concerning a matter that is reasonably necessary for or incidental to the performance of its normal functions.<sup>25</sup> In this respect one should remember that it is the municipal council itself that makes decisions concerning the exercise of powers

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<sup>22</sup> See, eg, the case of *Kajee v Stanger Borough Town Council* 1994 (3) SA 9 (A). In this case the appellant's property was situated outside the municipal area and not connected to the respondent's electricity system. The respondent's main electricity cable, however, passed within 23 metres of appellant's property; accordingly, the respondent alleged, the appellant was liable in terms of the Local Authorities Ordinance 25 of 1974 (N) s 266(1)(f), which provides that the town council can make by-laws prescribing, *inter alia*, "an availability electricity charge in respect of properties ... which are not connected to the council's electricity scheme if such properties can reasonably be so connected". These charges were purportedly fixed and levied in terms of two municipal notices promulgated by a resolution of the council. However, on appeal the respondent was unable to produce a by-law authorising the council to impose such charges, but referred instead to s 268 of the ordinance (as it existed prior to its amendment in 1985), which, after dealing with the procedure to be followed for the making of valid by-laws, provided in ss (4) that "notwithstanding anything in s 266 contained, the council shall impose fees and frame tariffs of charges only by resolution". The court held that before the council could impose fees or frame tariffs it had to be properly empowered to do so. Because no valid by-law had been passed, the municipality had no power to prescribe or recover the particular tariff. See paras C-D at 14.

<sup>23</sup> See the Constitution s 155(6)(b). This establishment took place during the 2000 local government elections and with the beginning of the final phase of the restructuring process.

<sup>24</sup> See the Constitution s 155(7).

<sup>25</sup> This aspect is confirmed in the Constitution s 156(5).



and the performance of all functions of a municipality and also employing the necessary personnel to perform its functions effectively.<sup>26</sup>

In light of the abovementioned, it seems acceptable to argue that the constitutional drafters did not want to address extensively all the various legal aspects and specific services that municipalities in the new legal scheme have to comply with. Basically they left it open for parliament to address these issues in more detail and with more certainty, and created only a broad framework wherein such services had to be identified and sufficiently provided for. In this respect the Municipal Systems Act contains numerous legal requirements relating to municipal service provision and fulfilment.

### **16.3.2 General provisions regarding municipal services according to national legislation**

#### **16.3.2.1 The general duty on municipalities in respect of municipal services and basic aspects concerning service tariffs**

In compliance with the basic constitutional provisions and requirements in respect of municipal service provision, the Local Government: Municipal Systems Act<sup>27</sup> determines specific duties and requirements for all municipalities, which must be complied with. As a general duty, a (or all) municipality must give effect to the provisions of the Constitution and must:

- give priority to the basic needs of the local community
- promote the development of the local community
- ensure that all members of the local community have access to at least the minimum level of basic municipal services.<sup>28</sup>

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<sup>26</sup> The Constitution S 160(1)(a) and (d).

<sup>27</sup> 32 of 2000 as amended.

<sup>28</sup> See the Systems Act s 73. According to s 1 of the Act, the term "basic municipal services" is defined to mean a municipal service that is necessary to ensure an acceptable and reasonable quality of life and that, if not provided, would endanger public health or safety or the environment. Although the definition provides some guidance, an exact determination of what should be regarded as a basic municipal service is very open ended and will have to be determined on a case-to-case basis and after consideration of all relevant circumstances. See the case of *Manqele v Durban TMC* 2002 (6) SA 423 (D). The Water Services Act 108 of 1997 s 2(a) sets out that one of the main objectives of the Act is to provide for "the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being". In terms of the Act s 3 everyone has "a right of access to basic water supply and basic sanitation", and every water service institution must take reasonable measures to realise these rights. In terms of the definitions in the Act s 1, "basic water supply" means the "prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene", whilst "prescribe" itself means "prescribe by regulation". In the absence of regulations defining the extent of the right of access to a basic water supply, the court has no guidance from the legislature

*continued on next page*

The Systems Act furthermore identifies five specific requirements that municipal services must adhere to. These requirements are:<sup>29</sup>

Municipal services must be:

- equitable and accessible
- provided in a manner that is conducive to prudent, economic, efficient and effective use of available resources and the improvement of standards of quality over time
- financially sustainable
- environmentally sustainable
- regularly reviewed with a view to upgrading, extension and improvement.<sup>30</sup>

The Act is unfortunately silent on ways or mechanisms whereby municipalities are to achieve and adhere to the mentioned requirements. It seems that the main initiatives in this regard should come from individual municipalities themselves. All municipal councils should therefore take full cognisance of the listed requirements and put policies and programmes in place in order that they do not fall foul of the broad and more specific legal obligations. It is also submitted, however, that national and provincial governments should do more to assist and support municipalities in comply-

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or the executive to enable it to interpret the content of the right to basic water supply embodied in the Act s 3. The applicant approached a Local Division after the discontinuation by the respondent of the water supply to the premises she occupied together with four of her own children and three other children, as a result of non-payment of the applicant's water account. The relief sought was predicated on the existence of the applicant's "right" to a basic water supply as referred to in the Act s 3. The court held that, in the absence of prescription of the minimum standard of water supply services necessary to constitute a basic water supply, the interpretation that the applicant wanted the court to place on the Act s 3 required it to pronounce upon and enforce upon the respondent, a local authority, the quantity of water that the applicant was entitled to have access to, the quality of such water and acceptable parameters for "access" to such basic water supply. Those were policy matters which fell outside the purview of the court's role and function and were inextricably linked to the availability of resources. See also *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T), where the court held *inter alia* that the attitude adopted by the respondents in their answering affidavits reflected a certain contempt for the plight of the people whose water supply had been cut off; a degree of unwillingness to co-operate that was unacceptable on the part of an organ of state.

<sup>29</sup> See the Systems Act s 73(2)(a)-(e).

<sup>30</sup> It is interesting to note that according to recent case law it was stated that there is no language anywhere in the Act which expressly requires one to confine the ordinary meaning of the wide expression "municipal services", where it appears in the Act, to municipal services which are charged for or which are notionally capable of being charged for and which have identifiable users. It cannot be accepted that throughout the whole of the Act any reference to municipal services must be taken to be confined to services which are chargeable to individual users. See *SAMWU v City of Cape Town* 2004 (1) SA 548 (SCA) para 8 at 550.

ing with their general service delivery duties. This can be achieved through the enactment of more detailed legislative or even executive guidelines.<sup>31</sup>

Apart from the basic duties and requirements on local governments in respect of municipal services, the Systems Act further determines that all municipal councils must adopt and implement a tariff policy on the levying of fees for municipal services that are provided by the municipality itself or by way of service delivery agreements. Such a tariff policy must then comply with the provisions of the Systems Act, the MFMA, as well as with any other applicable legislation.<sup>32</sup> The Act then determines that the mentioned tariff policy must reflect at least a certain minimum principles. These minimum requirements are the following:<sup>33</sup>

- (a) users of municipal services should be treated equitably in the application of tariffs;
- (b) the amount individual users pay for services should generally be in proportion to their use of that service;
- (c) poor households must have access to at least basic services. This can be achieved through tariffs that cover only operating and maintenance costs, by introducing special tariffs or life line tariffs for low levels of use or consumption or for basic levels of service, or by any other direct or indirect method of subsidisation of tariffs;
- (d) the tariff policy must reflect the costs reasonably associate with rendering the service, including capital, operating, maintenance, administration and replacement costs, and also interest charges;
- (e) tariffs must be set at levels that facilitate the financial sustainability of the service, taking into account the subsidisation from sources other than the particular service concerned;
- (f) provision may be made in appropriate circumstances for a surcharge on the tariff for a particular service;

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<sup>31</sup> In this regard, emphasis should again be placed on the constitutional obligations placed on national or provincial governments as set out in the Constitution ss 151(3) and (4), 154(1), 155(4), (6)(b) and (7). Even if such provisions are viewed to be inadequate, then s 164 should be helpful, which determines that any matter concerning local government that has not been dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.

<sup>32</sup> See the Systems Act s 74(1) as substituted by Act 44 of 2003 s 10.

<sup>33</sup> See the Systems Act s 74(2)(a)-(i).

- (g) provision may be made for the promotion of local economic development through special tariffs for certain categories of commercial and industrial users;
- (h) the policy must also encourage the economical, efficient and effective use of resources, the recycling of waste and other appropriate environmental objectives to be achieved;
- (i) the policy should also fully disclose the extent of subsidisation of tariffs for poor households and other categories of users.<sup>34</sup>

Apart from the basic tariff policy principles mentioned above, special cognisance should be taken of the fact that a tariff policy may lawfully differentiate between various categories of service user, debtor, service provider, service, service standard, geographical area and other matter, as long as such differentiation does not amount to unfair discrimination.<sup>35</sup>

When the tariff policy has been finalised, a municipal council must adopt by-laws to give effect to the implementation and enforcement of such a tariff policy. Again, such by-laws may differentiate between different categories of user, debtor, service provider, service, service standard and geographical area as long as such differentiation does not amount to unfair discrimination.<sup>36</sup>

Apart from the tariff policy, municipalities are afforded a general power to levy and recover fees, charges and tariffs. Accordingly, the Systems Act determines that a municipality may

- levy and recover fees, charges or tariffs in respect of any function or service of the municipality

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<sup>34</sup> It is submitted that this provision should have the positive support of the tariff policy in general. Many South African citizens do accept that there are enormous gaps between average households and very poor households, which in turn requires special measures in order to provide basic life-supporting services to such households. However, when municipalities are not clear and transparent about their policies and reasons for special measures to support such poor households, many other service users can feel that they are not being treated equally and fairly, and thus they object and do not support such initiatives.

<sup>35</sup> See the Systems Act s 74(3). This reasoning seems in line with the general principle of the rule of law which requires a legitimate governmental purpose to exist if people are treated differently as well as direct provisions set out in the Constitution. The Bill of Rights s 9 allows for the unequal treatment of people in certain circumstances. Such treatment would be constitutionally sanctioned and would not be unjustifiable and unreasonable in terms of the Constitution s 36. However, care must be taken not to exceed the constitutional provisions and thus allow for unconstitutional policies or conduct. When the provisions of the Constitution are breached, such conduct or actions would be invalid. Refer to the Constitution s 2.

<sup>36</sup> See the Systems Act s 75.

- recover collection charges and interest on any outstanding amount.

The mentioned fees, charges and tariffs are levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members.<sup>37</sup> After such a resolution has been passed, the municipal manager must do the following without delay:

- Conspicuously display a copy of the resolution for a period of at least 30 days at the main administrative office of the municipality and at such other places within the municipality to which the public has access. Such other places may be determined by the municipal manager.
- Publish in a newspaper of general circulation in the municipal jurisdiction a notice stating that a resolution in respect of fees, charges or tariffs has been passed by the municipal council and that a copy thereof is available for public inspection during office hours at the main administrative office of the municipality and at other places specified in the notice. The notice must also indicate the date on which the determination will come into operation.
- Seek to convey the information of the notice to the local community by means of radio broadcasts covering the area of municipal jurisdiction.<sup>38</sup> As soon as the notice of any fees, charges or tariffs has been published in a newspaper, the municipal manager must forthwith send a copy of the notice to the MEC for local government in the province concerned.<sup>39</sup>

#### **16.3.2.2 National legislative requirements regarding the provisions of municipal services**

According to the new national legislative framework for local government, a municipality may provide a municipal service in its area or a part of its area. Such a service or services may be provided through an internal mechanism or external mechanism.

*Internal mechanisms* include

- a department or other administrative unit within the municipal administration
- any business unit devised by the municipality, provided that such a unit operates within the municipality's administration and under the control of the municipal council in accordance with its operational and performance criteria

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<sup>37</sup> See the Systems Act s 75A(1) and (2). It is submitted that the section refers to an absolute majority of 50% + 1 of the total number of members of the relevant municipal council.

<sup>38</sup> Refer to the Systems Act s 75A(3)(c).

<sup>39</sup> The Systems Act s 75A(4).

- any other component of the municipal administration.<sup>40</sup>

On the other hand, an *external mechanism* refers to a service delivery agreement that has been entered into between a municipality and any of the following institutions:

- a municipal entity
- another municipality
- an organ of state, including a water services committee established in terms of the Water Services Act of 1997, a traditional authority or any other registered service provider registered or recognised in terms of national legislation
- a CBO or NGO that are legally competent to enter into such an agreement
- any other institution, entity or person legally competent to operate a business activity.

It is striking and rather unfortunate that the Act does not require the partners in an external service delivery agreement to be competent and able to provide the municipal service relevant to the contract. It is therefore left to a municipality itself to determine if a party to a service delivery agreement is indeed competent to provide a specific municipal service in the municipal area or a part thereof. Municipalities are therefore obligated to review or decide on an appropriate mechanism to provide a municipal service. In cases of a service provision which is provided through an internal mechanism, municipalities must review or decide on an appropriate service provision mechanism when:

- an existing municipal service is to be significantly upgraded, extended or improved
- a performance evaluation requires a review of the existing mechanism
- the municipality is restructured or re-organised in terms of the Municipal Structures Act.<sup>41</sup>

When a municipal service is provided through an external mechanism, a municipality must review or decide on an appropriate mechanism to provide a particular service when:

- a performance evaluation requires a review of the particular service delivery agreement<sup>42</sup>

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<sup>40</sup> See the Systems Act s 76(a)(i)-(iii).

<sup>41</sup> See the Systems Act s 77(a)(i)-(iii).

<sup>42</sup> In order to determine if such a performance evaluation is required, refer to the Systems Act ch 6.

- the service delivery agreement is anticipated to expire or be terminated within the next 12 months or
- an existing municipal service or part thereof is to be significantly upgraded, extended or improved and such an event is not addressed in the relevant service delivery agreement.<sup>43</sup>

A municipality must also review and decide on an appropriate mechanism in order to provide a municipal service when a review of such a service is required by an intervention in terms of section 139 of the Constitution. The same obligation is required when a new municipal service is to be provided or when the local community has requested such review or when a review of the municipalities IDP also requires a review of the delivery mechanisms regarding a service or services.<sup>44</sup>

Apart from the obligation placed on municipalities to review and decide on mechanisms to provide municipal services, certain criteria and processes for deciding on such mechanisms have been statutorily provided for. Accordingly, when a municipality has decided on a particular mechanism to provide a municipal service or to review any existing mechanism, it must first assess five particular criteria. These criteria are the following:<sup>45</sup>

- The direct and indirect costs and benefits associated with the project if the service is provided by the municipality through an internal mechanism. Part of this assessment must also include the expected effect the mechanism could have on the environment, on human health and well-being, as well as safety.
- The municipality's capacity and potential future capacity to furnish the skills, expertise and resources that are necessary or will become necessary for the provision of the service through an internal mechanism.
- The extent to which the re-organisation of the municipality's administration and the development of the human resource capacity within that administration could be utilised to provide a service through an internal mechanism.
- The likely impact the decision could have on aspects such as development, job creation and employment patterns in the municipality.
- The views of organised labour.

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<sup>43</sup> See the Systems Act s 77(b)(i)-(iii).

<sup>44</sup> See the Systems Act s 77(c)-(f). The procedure for review on request by the local community is determined in terms of the Act ch 14.

<sup>45</sup> See the Systems Act s 78(1)(a)(i)-(v).



It is important to note that all of the abovementioned aspects must be assessed. After thorough assessment has taken place a municipality may also take into account any developing trends that are generally applicable to the sustainable provision of municipal services.<sup>46</sup> After the abovementioned criteria have been applied, a municipality may decide on an appropriate internal mechanism to provide the service or, before it takes a decision on an appropriate mechanism, explore the possibility of providing such a service through an external mechanism. If it decides to explore an external mechanism, the municipality must give notice to the local community of its intention to explore the provision of the service through an external mechanism and must also assess the various delivery options as are mentioned in section 76(b) of the Systems Act. When assessing such options, the municipality must take into account similar criteria, as would be the case under section 78(1)(a) of the Systems Act.<sup>47</sup> The municipality must also conduct or commission a feasibility study which must be taken into account before a final decision is taken. The feasibility study must include the following:<sup>48</sup>

- a clear identification of the municipal service for which the municipality intends to consider an external mechanism
- an indication of the number of years for which the provision of the service through an external mechanism might be considered
- the projected outputs which the provision of the service might be expected to produce
- an assessment as to the extent to which the provision of the service will provide value for money, address the needs of the poor, be affordable for the municipality and residents and impact of the transfer of appropriate technical, operational and financial risk
- the projected impact on the municipality's staff, assets and liabilities
- the projected impact on the municipality's integrated development plan

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<sup>46</sup> Refer to the Systems Act s 78(1)(b).

<sup>47</sup> See the Systems Act s 78(2) and (3). The mentioned criteria are: (i) the direct and indirect costs and benefits associated with the project, including the expected effect of any service delivery mechanism on the environment and on human health, well-being and safety; (ii) the capacity and potential future capacity of prospective service providers to furnish the skills, expertise and resources necessary for the provision of the service; (iii) the views of the local community; (iv) the likely impact on development and employment patterns in the municipality; and (v) the view of organised labour.

<sup>48</sup> See s 78(3)(c)(i)-(viii) of the Systems Act.

- the projected impact on the municipality's budget including impacts on revenue, expenditure, borrowing, debt and tariffs
- any other matter that may be prescribed.

After having applied and assessed the mentioned criteria, a municipality must decide on an appropriate internal or external mechanism that would ultimately result in or achieve the best outcome.<sup>49</sup>

On the question of whether a municipality is obligated to assess or take into account the views of organised labour before making a decision to establish a (municipal police) service, the Supreme Court of Appeal stated that while provisions 16-21 of the Systems Act, which foster participation by the community in municipal decision-making processes, are expressed in relatively wide and general terms, the provisions of section 78 of the Act are not. Section 78 provisions are applicable only when a municipality has decided on a mechanism to provide or review a municipal service in terms of section 77. Section 78 provisions are not applicable to the anterior decision to provide or extend a municipal service. Sections 77 and 78 of the Act are concerned with the question of how things (services) are to be done and not whether they should be done. The purpose of sections 77 and 78 of the Act is to compel a municipality to consider how a particular service can be done and through which appropriate internal mechanism it can be done. Only after that has been done may the provision of a service through an external mechanism be considered. It is in considering these questions that section 78(1)(a)(v) and (3)(b)(v) oblige the municipality to assess and take into account the views of *inter alia* organised labour. Section 78 also postulates that a decision has already been made to provide or review a municipal service.<sup>50</sup>

Apart from the determining criteria discussed above, a further important obligation on municipalities is that, if a municipality has decided to provide a municipal service through an internal mechanism, it must allocate sufficient human, financial and other resources to the particular unit that might be necessary for the proper provision of

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<sup>49</sup> It is important to note that when a municipality is following the abovementioned requirements, it must comply with any applicable legislation that is relating to the appointment of a service provider other than the municipality itself and also any other additional requirements that may be prescribed by regulations. See the Systems Act ss 78(4)-(5).

<sup>50</sup> Refer to *SAMWU v City of Cape Town* 2004 (1) SA 548 (SCA). The court held that the provisions of ss 77 and 78 do not have to be complied with before a decision to provide a new service or to upgrade or review an existing service is reached. Paras 11-14 at 551-552 and also at 555.

such service and must also transform the actual provision of that service in accordance with, and thus in compliance with, the provisions of the Systems Act.<sup>51</sup> If a municipality decides to provide a service through a service delivery agreement in terms of section 76(b) of the Systems Act with:

- a municipal entity or another municipality, it may, subject to subsection (3) of the Act, negotiate and enter into such an agreement with the relevant municipal entity or municipality without applying part 3 of chapter 8 of the Systems Act which refers to service delivery agreements involving competitive bidding
- a national or provincial organ of state, it may enter into such an agreement with the relevant organ of state without applying the principles of competitive bidding
- any institution or entity, or any person, either juristic or natural, which was not mentioned above in either paragraphs (a) or (b), then it must apply part 3 referring to competitive bidding before entering into an agreement with such institution, entity or person.<sup>52</sup>

It is further provided that before a municipality enters into a service delivery agreement with an external service provider it must establish a programme for community consultation and information dissemination regarding the appointment of the external service provider and the contents of the service delivery agreement. The contents of a service delivery agreement must be communicated to the local community through the media. In instances where a municipality decides to enter into a service delivery agreement with another municipality, that other municipality must conduct or commission a feasibility study and take it into account before the agreement is entered into.<sup>53</sup>

The new legislative framework also establishes specific responsibilities of municipalities when they provide services through service delivery agreements with other

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<sup>51</sup> See the Systems Act s 79(a)-(b). In determining what would be sufficient resources, all relevant circumstances should be taken into account. Various factors can have an impact on such a determination. It is suggested that if a municipality makes an objective and informed determination, such a determination would hardly fall foul of the requirements of the Act.

<sup>52</sup> See s 80(1)(a)-(b) of the Systems Act as substituted by Act 44 of 2003 s 12. Note that a 'municipal entity' means a private company, a service utility or a multi-jurisdictional service utility. A 'multi-jurisdictional service utility' again means a body established in terms of s 87 of the Systems Act. Refer to the definitions of the Act, s 1 as amended by Act 44 of 2003.

<sup>53</sup> Read ss 80(3)(a)-(b) of the Systems Act. Note that the feasibility study must include an assessment on the impact on the budget and other assets, liabilities and staff expenditure, an assessment whether staff should be increased, an assessment on the ability of the other municipality to absorb any commitments, liabilities or employees involved, when the appointment ends and finally any other relevant information as may be prescribed.

external mechanisms. In such instances it is required that if a municipal service is provided through a service delivery agreement with an external mechanism the municipality remains responsible for ensuring that such service is provided to the local community in accordance with new legal standards.<sup>54</sup> In order to oversee and ensure its obligations of final service provision, all municipalities must do the following:<sup>55</sup>

- regulate the provision of the service in accordance with section 41 of the Systems Act, which sets certain core components for performance management
- monitor and assess the implementation of the service agreement and performance management of the particular service provider<sup>56</sup>
- perform its functions and exercise its powers according to the Systems Act if the municipal service falls within a development priority or objective of the municipality's IDP
- control the setting and adjustment of tariffs by the service provider for the service, within the council's tariff policy
- general exercise its service authority to ensure uninterrupted delivery of service in the best interests of the local community.

Through its conclusion of a service delivery agreement, a municipality is legally authorised to do the following<sup>57</sup> in order to ensure effective, sustainable and uninterrupted municipal services:

- It may assign to a service provider the responsibility for
  - (a) developing and implementing detailed service delivery plans (SDP) within the framework of the municipality's IDP
  - (b) the operational planning, management and provision of the municipal service
  - (c) the undertaking of social and economic development that is directly related to the provision of the service
  - (d) customer management
  - (e) managing its own accounting, financial management, budgeting, investment and borrowing activities within the framework of transparency, accountability,

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<sup>54</sup> Such provisions confirm the new constitutional obligations in terms of accountability and sustainable service provisions. Municipalities cannot contract their responsibilities away regarding service provision.

<sup>55</sup> See the Systems Act s 81(1)(a)-(e).

<sup>56</sup> Such evaluation of performance by a service provider must be done in terms of s 41 provisions.

<sup>57</sup> See the Systems Act s 81(2)(a)-(e).

reporting and financial control determined by the municipality, all of which are subject to the MFMA.<sup>58</sup>

- (f) the collection of service fees for its own account from users of services, in accordance with the municipality's tariff policy and credit control measures.<sup>59</sup>
- It may pass on funds for the subsidisation of services to the poor to the service provider through a transparent system, which must be subject to performance monitoring and audit.
  - It must ensure that the agreement provides for a dispute-resolution mechanism to settle disputes between the municipality and the service provider.
  - It may transfer or second any staff members to the service provider, with the concurrence of the staff member concerned and in accordance with applicable labour legislation.
  - It must ensure continuity of the service if the service provider is placed under judicial management, becomes insolvent, is liquidated or for any other reason is unable to continue performing its functions and obligations in terms of the particular service delivery agreement.
  - It must, where applicable, take over the service, including all assets, when the service delivery agreement expires or is terminated.

The municipal council is also permitted to set, review or adjust the tariffs within its tariff policy. The service delivery agreement may further provide for the adjustment of tariffs by the service provider, within certain limits set by the municipal council<sup>60</sup> It is further possible for a service delivery agreement to be amended by agreement between the parties, except where an agreement has been concluded, following a competitive bidding process. Where a service agreement has been concluded following a competitive bidding process, an amendment can be made only after the local community has been given:

- reasonable notice of the intention to amend the agreement, including the reasons for the proposed amendment
- sufficient opportunity to make representations to the municipality.<sup>61</sup>

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<sup>58</sup> See the Local Government: Municipal Finance Management Act 56 of 2003.

<sup>59</sup> See also the Act ch 9 which deals with aspects concerning credit control and debt collection.

<sup>60</sup> See the Systems Act s 81(3).

<sup>61</sup> See the Systems Act s 81(4)(a)-(b).

It is important to note that no councillor or staff member may share in any profits or improperly receive any benefits from a service provider providing or proposing to provide any municipal service in terms of a service delivery agreement.<sup>62</sup>

### **16.3.2.3 Service delivery agreements that involve competitive bidding**

The Systems Act further provides that if a municipality decides to provide a municipal service through a service delivery agreement with a person referred to in section 80(1)(b) of the Act, it is obliged to select such a service provider through a selection process which

- complies with chapter 11 of the MFMA
- allows all prospective service providers to have equal and simultaneous access to information relevant to the bidding process
- minimises the possibility of fraud and corruption
- makes the municipality accountable to the local community with regard to the progress of selecting a service provider and the reasons for any decision in this regard
- takes into account the need to promote the empowerment of small and emerging enterprises.<sup>63</sup>

It is also provided for, but subject to the provisions of the Preferential Procurement Policy Framework Act,<sup>64</sup> that a municipality may determine a preference for categories of service providers in order to advance the interests of persons disadvantaged by unfair discrimination, as long as such preference is exercised in a manner that does not compromise or limit the quality, coverage cost and developmental impact of the services.<sup>65</sup> The selection of preferential service provider contenders must be fair, equitable, transparent, cost-effective and competitive.<sup>66</sup> Such requirements may be

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<sup>62</sup> Such prohibition on receiving any profits or benefits is in line with new procedures to eradicate corruption and bribery. Apart from possible criminal prosecution, councillors and staff members that receive such profits or benefits will also contravene their respective codes of conduct and can also be held punishable under such codes.

<sup>63</sup> See the Systems Act s 83(1)(a)-(e).

<sup>64</sup> Act 5 of 2000, which aims at giving effect to the Constitution s 217(3) by providing a framework for the implementation of a procurement policy.

<sup>65</sup> In other words, preferential service providers such as affirmative action appointments or black empowerment groups may be preferred, as long as certain minimum standards and obligations are not compromised.

<sup>66</sup> See *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) where it was submitted that the Preferential Procurement Policy Framework Act requires organs of state to establish a procurement policy, and also makes it obligatory for organs of state to follow a tender procedure for the procurement of goods and services. If such requirements are not met, then the tender process, if any, was unlawful.

provided for in other applicable national legislation. Even in cases of the consideration of a municipality to select a service provider, the selection process must also apply with the criteria listed in section 78 of the Systems Act in addition to the preferences for certain categories referred to in this subsection.<sup>67</sup>

It is also required that on the basis of the bidding documents, any addenda, amendments or variations that were provided to all bidders after a prospective service provider has been selected, the municipality must negotiate the final terms and conditions of the service delivery agreement with the preferred service provider. If the negotiations are successful, the municipality must then enter into the agreement on such terms and conditions that were specified in the bidding documents, together with additions thereto. It should be noted that modifications to the bidding process must not materially affect the bid in any manner that would compromise the integrity of the bidding process. If the terms and conditions of an agreement cannot be agreed upon within a reasonable time, the municipality may negotiate a possible agreement with the next-ranked prospective service provider.<sup>68</sup> When a municipality has entered into a service delivery agreement it must

- make copies of the agreement available at its offices for public inspection
- give notice in the media of the particulars of the service that will be provided in terms of the agreement, the name of the selected service provider and the place and period where copies of the agreement will be available for public inspection.<sup>69</sup>

#### **16.3.2.4 The legal requirements relating to internal municipal service districts**

It is generally understood that the provision of municipal services, according to the new constitutional and other legal requirements, is not an easy task. Even more difficult is the provision of services in large metropolitan or district municipal jurisdictions. In an effort to lighten the burden on service delivery and in order to ensure effective and sustainable service provision, the new legislative framework on local

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<sup>67</sup> See the Systems Act s 83(2) and (3).

<sup>68</sup> The bidding process is therefore not to be repeated because the first preferred service provider did not accept the conditions of the agreement. The reference to a reasonable time for the negotiations will depend on the circumstances of each case. The more urgent the service that should be provided, the less time would be regarded as reasonable. It is, however, advisable for municipalities to communicate in writing the circumstances and urgency of each case and to put the preferred bidder on terms to either accept or withdraw from the bidding process.

<sup>69</sup> Refer to the Systems Act s 84(1)-(3).



government allows for the establishment of so-called “internal municipal service districts”. In this regard and in accordance with its policy framework, a municipality is allowed to establish part of the municipality as an Internal Municipal Service District (IMSD) to facilitate the provision of a municipal service in that part of the municipality. Before an IMSD is established, the municipality must:

- consult the local community on the following matters:
  - (a) the proposed boundaries of the service district
  - (b) the proposed nature of the municipal service
  - (c) the proposed method of financing the service
  - (d) the proposed mechanism for provision of the service and
- obtain the consent of the majority of the members of the local community in the proposed IMSD that will be required to contribute to the provision of the municipal service.<sup>70</sup>

Following on subsection 85(2), when a municipality establishes an IMSD, the municipality must determine the boundaries of the district, the mechanism to provide the service and establish a separate accounting system and other record-keeping systems in respect of the service. The municipality may also set a tariff or levy for the service, impose a special surcharge in the district for the service or increase the tariff in the district for the service. The municipality may further establish a committee comprising persons representing the community of the IMSD to act as a consultative or advisory forum regarding the management and other matters of the service.<sup>71</sup> In areas where IMSDs are considered, a municipality must develop and adopt a policy framework for the establishment, regulation and management of such an IMSD. Such a policy framework must reflect at least the following aspects:

- the development needs and priorities of designated parts of the municipality which must be balanced against the needs and priorities of the municipality as a whole and
- the extent to which the establishment of one or more IMSDs will promote the local economic development of the municipality as a whole, will contribute to enhancing the social, economic and spatial integration of the municipality and which may not

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<sup>70</sup> See the Systems Act s 85(1) and (2).

<sup>71</sup> See the Systems Act s 85(3)(a)-(e). Note that the committee proposed in s 3(e) should be established on the basis of gender representivity.

entrench or contribute to further disparities in service provision in the municipal jurisdiction.<sup>72</sup>

According to wide-ranging amendments to the Systems Act during 2003, various new issues have been incorporated under section 86 of the Act. Section 86A provides now for the following:

The Minister may for purposes of municipal services, make regulations or issue guidelines in accordance with section 120 of the Act, in order to provide for or regulate the following matters:

- The preparation, adoption and implementation of a municipal tariff policy
- the subsidisation of tariffs for poor households through cross-subsidisation within and between services, equitable share allocations to municipalities and national and provincial grants to municipalities
- limits on tariff increases
- criteria to be taken into account by municipalities when imposing surcharges on tariffs for services and determining the duration thereof
- incentives and penalties to encourage the economical, efficient and effective use of resources when providing services; the recycling of waste and other environmental objectives
- criteria to be taken into account by municipalities when assessing options for the provision of a municipal service
- measures against malpractice in selecting and appointing service providers, including measures against the stripping of municipal assets
- mechanisms and procedures for the co-ordination and integration of sectoral requirements in terms of legislation and the manner in which municipalities must comply with these
- standard draft service delivery agreements
- the minimum content and management of service delivery agreements
- additional matters that must be included in a feasibility study in terms of section 78(3)(c) of the Act, which may include the strategic and operational costs and benefits of an external mechanism in terms of the municipality's strategic objectives, an assessment of the municipality's capacity to effectively monitor the provi-

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<sup>72</sup> Refer to the Systems Act s 86(1) and (2).

sion of the municipal service through an external mechanism and to enforce the service delivery agreement

- performance guarantees by service providers and
- any other matter that would facilitate the effective and efficient provision of municipal services or the application of the provisions of the Act.<sup>73</sup>

The Minister may make regulations and issue guidelines relating to fiscal matter only after consulting with the Minister of Finance and any other Cabinet member whose portfolio is affected by such regulations and guidelines. When making regulations or issuing guidelines, the Minister must take into account the capacity of municipalities to comply with such regulations and guidelines and differentiate between different kinds of municipality according to their respective capacities.<sup>74</sup>

The Act specifically determines that there are the following kinds of municipal entity:

- a private company established by one or more municipalities in terms of Part 2 of the Act or in which one or more municipalities have acquired or hold an interest according to Part 2 of the Act
- a service utility established by a municipality in terms of Part 3 of the Act and
- a multi-jurisdictional service utility established by two or more municipalities in terms of Part 4.<sup>75</sup>

It is specifically provided that no municipality may establish, or participate in the establishment of, or acquire or hold an interest in, a corporate body, including a trust, except where such corporate body is a private company, service utility or multi-jurisdictional service utility referred to above or a fund for the benefit of its employees in terms of a law regulating pensions or medical aid schemes. However, such requirements do not apply to the acquisition by a municipality for investment purposes of securities in a company listed on the Johannesburg Securities Exchange in accordance with the investment framework envisaged in section 13 of the Municipal Finance Management Act.<sup>76</sup>

It is further provided that a municipality may, subject to subsection 86C (2), establish or participate in the establishment of a private company in accordance with the

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<sup>73</sup> See s 86A(1)(a)-(m) of the Systems Act.

<sup>74</sup> Refer to ss 86A(2)-(3) of the Systems Act.

<sup>75</sup> Read s 86B(a)-(c) of the Systems Act.

<sup>76</sup> See ss 86B(2)-(3) of the Systems Act.

Companies Act,<sup>77</sup> or acquire or hold an interest in a private company in accordance with the Companies Act. In this regard it is further permitted that:

- A municipality may in terms of subsection 86C(1)(a) or (b) either acquire or hold full ownership of a private company or acquire or hold a lesser interest in a private company.
- A municipality may acquire or hold such a lesser interest in a private company only if all the other interests are held by (i) another municipality or municipalities, (ii) a national or provincial organ of state or organs of state or (iii) any combination of institutions referred to in (i) and (ii).
- A municipality may, despite paragraph (b), acquire or hold an interest in a private company in which an investor other than another municipality or a national or provincial organ of state has an interest, but only if effective control in the private company vests in that municipality, another municipality, or that municipality and another municipality collectively.<sup>78</sup>

It is also important to note that a private company referred to in section 86C(1) is a municipal entity if a municipality, or two or more municipalities collectively, have effective control of that private company or is a public entity to which the Public Finance Management Act applies, if ownership control in the company is held by a national or provincial organ of state.<sup>79</sup> A private company which is a municipal entity must further restrict its activities to the purpose for which it is used by its parent municipality in terms of section 86E(1)(a) of the Systems Act and it has no competence to perform any activity which falls outside the functions and powers of its parent municipality contemplated by section 8 of the Act.<sup>80</sup>

Municipalities may further establish a private company or acquire an interest in such a company only for the purpose of utilising the company as a mechanism to assist it in the performance of any of its functions or powers or if the municipality can demonstrate that there is a need to perform that function or power in accordance with business practices in order to achieve the strategic objectives of the municipality

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<sup>77</sup> 61 of 1973.

<sup>78</sup> Refer to ss 86C(1)-(3) of the Systems Act. Note that if a municipality establishes a private company or acquires or holds an interest in such a company, it must comply with the Companies Act and any other law regulating companies. If any conflict however arises between the Companies Act or other law and a provision of the Systems Act, then the Systems Act prevails.

<sup>79</sup> See Act 1 of 1999 read together with s 86D(1) of the Systems Act.

<sup>80</sup> Read ss 86D(1)-(2) of the Systems Act.

more effectively and that the company would benefit the local community. It is also imperative that all other conditions that may be prescribed have been complied with. It should be noted however that if a municipality establishes a private company or acquires an interest in such a company for the purpose of using that company as a mechanism to provide a municipal service, then the provisions of Chapter 8 of the Systems Act are applicable.<sup>81</sup>

According to the new amendments, if two or more municipalities intend to establish a private company or to acquire interests in the same private company, each of those municipalities must:

- comply with section 86E of the Systems Act
- consider and reach agreement on proposals for shared control of the company and
- consider cash flow projections of the company's proposed operations for at least three financial years.<sup>82</sup>

A municipality may further transfer ownership or otherwise dispose of a wholly owned private company, subject to the Municipal Finance Management Act, or an interest in a private company subject to section 14 of the Municipal Finance Management Act and only if that transfer or disposal would not result in an infringement of section 86C (2) of the Systems Act by another municipality which holds an interest in the company.<sup>83</sup>

In respect of the establishment of a service utility, it is now statutorily permitted for a municipality to pass a by-law establishing such a service utility. A by-law establishing a service utility must: state the purpose for which the service utility is established, confer the powers and impose the duties on the service utility which are necessary for the attainment of such purpose and provide for the following aspects:

- a board of directors to manage the service utility
- the number of directors to be appointed
- the appointment of directors, the filling of vacancies and the replacement and recall of directors by the parent municipality
- the terms and conditions of appointment of directors

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<sup>81</sup> Ss 86E(1)-(2) of the Systems Act.

<sup>82</sup> See s 86F of the Systems Act.

<sup>83</sup> Read s 86G of the Systems Act.

- the appointment of a chairperson
- the operating procedures of the board of directors
- the delegation of powers and duties to the board of directors
- any other matter necessary for the proper functioning of the board of directors
- the acquisition of infrastructure, goods, services, supplies or equipment by the service utility, or the transfer of infrastructure, goods, services, supplies or equipment to the service utility
- the appointment of staff by the service utility or the transfer or secondment of staff to the service utility in accordance with applicable labour legislation
- the terms and conditions on which any acquisition, transfer, appointment or secondment is made
- the governance of the service utility and
- any other matter necessary for the proper functioning of the service utility.

The by-law may also determine budgetary and funding arrangements for its implementation. No by-law may confer on a service utility any functions or powers falling outside the competence of the parent municipality contemplated by section 8 of the Systems Act.<sup>84</sup> It should also be noted that a service utility is a juristic person and a municipal entity under the sole control of the municipality which established it. All service utilities must restrict their activities to the purpose for which they were established and have no competence to perform any activity which falls outside their functions or powers as are determined in terms of the by-law of the municipality.<sup>85</sup>

Apart from establishing IMSDs, municipalities may also establish so-called Multi-jurisdictional Municipal Service Utilities (MMSUs).<sup>86</sup> In this regard it is provided that two or more municipalities, by written agreement, may establish a multi-jurisdictional service utility to perform any function or power envisaged by section 8 of the Systems Act, in their municipal areas or in any designated parts of their municipal areas. The Minister may, in the national interest and in consultation with the Cabinet member responsible for the functional area in question, request two or more municipalities to establish a multi-jurisdictional service utility to conform to the requirements of national legislation applicable to the provision of a specific municipal service. The

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<sup>84</sup> Read ss 86H(1)-(4) of the Systems Act.

<sup>85</sup> See s 86I(1)-(2) of the Systems Act.

<sup>86</sup> See s 87 of the Systems Act as substituted by s 19 of Act 4 of 2003.

municipalities that receive such a request must within two months decide whether to accede to the request, and convey their decision to the Minister.<sup>87</sup> An agreement establishing a multi-jurisdictional service utility must describe the rights, obligations and responsibilities of the parent municipalities, and must :

- determine the boundaries of the area for which the multi-jurisdictional service utility is established
- identify the municipal service or other function to be provided in terms of the agreement
- determine budgetary and funding arrangements for implementation of the agreement
- provide for a board of directors for the multi-jurisdictional service utility, the appointment of directors by the respective parent municipalities, the filling of vacancies and the replacement and recall of directors, the number of directors appointed by each parent municipality, the terms and conditions of appointment of directors, the appointment of a chairperson, the operating procedures of the board of directors, the delegation of powers and duties to the board of directors and any other matter relating to the proper functioning of the board of directors
- provide for the acquisition of infrastructure, goods, services, supplies or equipment by the multi-jurisdictional service utility or the transfer of infrastructure, goods, services, supplies or equipment to the multi-jurisdictional service utility; the appointment of staff by the multi-jurisdictional service utility or the transfer or secondment of staff to the multi-jurisdictional service utility in accordance with applicable labour legislation and the terms and conditions on which any acquisition, transfer, appointment or secondment is made
- determine the conditions for, and consequences of, the withdrawal from the agreement of a parent municipality
- determine the conditions for, and consequences of, the termination of the agreement, including the method and schedule for winding-up the operations of the multi-jurisdictional service utility; the distribution of the proceeds and the allocation among the parent municipalities of any assets and liabilities
- provide for the governing of the multi-jurisdictional service utility, compulsory written reports regarding the activities and performance of the multi-jurisdictional ser-

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<sup>87</sup> See s 88 as amended by s 20 of Act 44 of 2003.



vice utility to a parent municipality, information that may be requested from the multi-jurisdictional service utility by a parent municipality, the amendment of the agreement and any other matter necessary for the proper functioning of the multi-jurisdictional service utility.<sup>88</sup>

A multi-jurisdictional service utility is further accountable to the parent municipality(ies) and must comply with the Municipal Finance Management Act. Parent municipalities are again entitled to receive such regular written reports from the multi-jurisdictional service utility with respect to its activities and performance, as may be set out in the agreement establishing the multi-jurisdictional service utility. They may also request the multi-jurisdictional service utility to furnish them with such information regarding its activities as the parent municipality(ies) may reasonably require. Parent municipalities may also appoint a nominee to inspect, at any time during normal business hours, the books, records, operations and facilities of the multi-jurisdictional service utility and those of its contractors relating to the performance of the function or power for which the multi-jurisdictional service utility is established.<sup>89</sup>

Multi-jurisdictional service utilities terminate automatically, when there is only one remaining parent municipality or by written agreement among all of the parent municipalities or upon the termination date or the fulfilment of any condition for termination contained in the agreement establishing the multi-jurisdictional service utility.<sup>90</sup>

The parent municipality(ies) of a municipal entity have specific duties towards such a municipal entity and must:

- exercise any shareholder, statutory, contractual or other rights and powers it may have in respect of the municipal entity to ensure that both the municipality and the municipal entity comply with this Act, the Municipal Finance Management Act and any other applicable legislation and that the municipal entity is managed responsibly and transparently and meets its statutory, contractual and other obligations
- allow the board of directors and chief executive officer of the municipal entity to fulfil their responsibilities and

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<sup>88</sup> See s 90 of the Systems Act as substituted by s 22 of Act 44 of 2003. A (MMSU) is a juristic person and falls under the control/shared control of the parent municipalities. All (MMSU) must restrict their actions to the object of their establishment and they have no other competencies outside the functions set out in their establishment agreement.

<sup>89</sup> Read s 92 as substituted by s 24 of Act 44 of 2003.

<sup>90</sup> S 92 as substituted.

- establish and maintain clear channels of communication between the municipality and the municipal entity.<sup>91</sup>

In instances where a parent municipality, which has sole control of a municipal entity, or effective control in the case of a municipal entity which is a private company, the parent municipality must ensure that annual performance objectives and indicators for the municipal entity are established by agreement with the municipal entity and included in the municipal entity's multi-year business plan in accordance with section 87 (5) (d) of the Municipal Finance Management Act. The parent municipality is further obligated to monitor and annually review, as part of the municipal entity's annual budget process, the performance of the municipal entity against the agreed performance objectives and indicators and may liquidate and disestablish the municipal entity if the performance of the municipal entity is unsatisfactory, if the municipality does not impose a financial recovery plan in terms of the Municipal Finance Management Act and the municipal entity continues to experience serious or persistent financial problems or if the municipality has terminated the service delivery agreement or other agreement it had with the municipal entity.<sup>92</sup> Parent municipalities that have shared control of a municipal entity must enter into a mutual agreement determining and regulating the following:

- their mutual relationships in relation to the municipal entity
- the exercise of any shareholder, contractual or other rights and powers they may have in respect of the municipal entity
- the exercise of their powers and functions in terms of the Systems Act and the Municipal Finance Management Act with respect to the municipal entity
- measures to ensure that annual performance objectives and indicators for the municipal entity are established by agreement with the municipal entity and included in the municipal entity's multi-year business plan in accordance with section 87 (5) (d) of the Municipal Finance Management Act
- the monitoring and annual review, as part of the municipal entity's annual budget process as set out in section 87 of the Municipal Finance Management Act, of the performance of the municipal entity against the established performance objectives and indicators

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<sup>91</sup> Refer to s 93A as inserted by s 26 of Act 44 of 2003.

<sup>92</sup> See s 93B of the Systems Act.

- the payment of any monies by the municipalities to the municipal entity or by the municipal entity to the municipalities
- procedures for the resolution of disputes between those municipalities
- procedures governing conditions for and consequences of withdrawal from the municipal entity by a municipality
- procedures for terminating the appointment and utilisation of the municipal entity as a mechanism for the performance of a municipal function
- the disestablishment of the municipal entity, the division, transfer or liquidation of its assets and the determination of the responsibility for its liabilities and
- any other matter that may be prescribed.

Parent municipalities may further liquidate and disestablish the municipal entity if the performance of the municipal entity is unsatisfactory, if the municipality does not impose a financial recovery plan in terms of the Municipal Finance Management Act and the municipal entity continues to experience serious or persistent financial problems, or if the municipality has terminated the service delivery agreement or other agreement it had with the municipal entity.<sup>93</sup>

In respect of municipal representatives, it is now determined that the council of a parent municipality must designate a councillor or an official of the parent municipality, or both, as the representative or representatives of the parent municipality. The functions of such representative(s) are to represent the parent municipality as a non-participating observer at meetings of the board of directors of the municipal entity concerned and to attend shareholder meetings and exercise the parent municipality's rights and responsibilities as a shareholder, together with such other councillors or officials that the council may designate as representatives. It is further important to note that the official lines of communication between a municipal entity and the parent municipality exist between the chairperson of the board of directors of the municipal entity and the mayor or executive mayor, as the case may be, of the parent municipality. The mayor or executive mayor, as the case may be, of a parent municipality may at any time call or convene any meeting of shareholders or other general meeting comprising the board of directors of the municipal entity concerned and the representatives of the parent municipality, in order for the board of directors to give

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<sup>93</sup> Read s 93C as inserted by s 26 of Act 44 of 2003.

account for actions taken by it. The council of a parent municipality may also determine the reporting responsibilities of a municipal representative. A municipal representative is strictly obligated to represent the parent municipality faithfully at shareholder meetings, without consideration of personal interest or gain, and must keep the council informed of how voting rights were exercised and of all relevant actions taken on behalf of the municipality by the representative. A municipal representative must further act in accordance with the instructions of the council and may be reimbursed for expenses in connection with his or her duties as a municipal representative. The municipal representative may not receive any additional compensation or salary for such duties, however.<sup>94</sup>

It is also provided that the board of directors of a municipal entity must have the requisite range of expertise to effectively manage and guide the activities of the municipal entity. The board must consist also of at least a third non-executive directors and must have a non-executive chairperson. Before nominating or appointing a director, it is the responsibility of the parent municipality of a municipal entity to establish a process through which applications for nomination or appointment are widely solicited, to compile a list of all applicants and any prescribed particulars concerning applicants and to ensure that the municipal council makes the appointment or nomination from such list.<sup>95</sup> A person is not eligible to be a director of a municipal entity if he or she:

- holds office as a councillor of any municipality
- is a member of the National Assembly or a provincial legislature
- is a permanent delegate to the National Council of Provinces
- is an official of the parent municipality of that municipal entity
- was convicted of any offence and sentenced to imprisonment without the option of a fine, and a period of five years since completion of the sentence has not lapsed
- has been declared by a court to be of unsound mind or
- is an unrehabilitated insolvent.

If a director of a municipal entity during that person's term of office becomes disqualified on a ground mentioned above, then such a person ceases to be a director from

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<sup>94</sup> See s 93D of the Systems Act as amended.

<sup>95</sup> See s 93E of the Systems Act.

the date of becoming disqualified.<sup>96</sup> The parent municipality of a municipal entity is further authorised to remove or recall a director appointed or nominated by that municipality. Such removal or recall is permitted only when the performance of the director is unsatisfactory; when the director, either through illness or for any other reason is unable to perform the functions of office effectively or if the director, whilst holding office, is convicted of fraud or theft or any offence involving fraudulent conduct or has failed to comply with or breached any legislation regulating the conduct of directors, including any applicable code of conduct.<sup>97</sup>

The board of directors of a municipal entity has also been afforded specific duties and responsibilities. As such, the board must provide effective, transparent, accountable and coherent corporate governance and conduct effective oversight of the affairs of the municipal entity. It must also ensure that it and the municipal entity comply with all applicable legislation and agreements and communicate openly and promptly with the parent municipality of the municipal entity. In general, the board must deal in good faith with the parent municipality of the municipal entity. A director of a municipal entity is further obligated to disclose to the board of directors and to the representative of the parent municipality any direct or indirect personal or business interest that the director or his or her spouse or partner may have in any matter before the board, and must withdraw from the proceedings of the board when that matter is considered, unless the board decides that the director's direct or indirect interest in the matter is trivial or irrelevant. Directors must at all times act in accordance with the Code of Conduct for directors referred to in section 93L of the Systems Act, which is referred below.<sup>98</sup> In respect of meetings of the board of directors it is provided that such meetings must be open to the municipal representatives referred to in section 93D of the Systems Act. Municipal representatives have non-participating observer status in a meeting of the board of directors of a municipal entity.<sup>99</sup> It is also determined that the board of directors of a municipal entity must appoint a chief executive officer of the municipal entity. Such a chief executive officer

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<sup>96</sup> Refer to s 93F of the Systems Act.

<sup>97</sup> Read s 93G of the Systems Act as inserted by s 26 of Act 44 of 2003.

<sup>98</sup> See s 93H of the Systems Act.

<sup>99</sup> Refer to s 93I of the Systems Act.

is accountable to the board of directors for the management of the municipal entity.<sup>100</sup>

Municipal entities may not establish or participate in the establishment of a company or any other corporate body, including a trust, or acquire or hold an interest in a company or any other corporate body, including a trust. This prohibition does not apply, however, to the acquisition by a municipal entity of securities in a company listed on the Johannesburg Securities Exchange for investment purposes, subject to any applicable provisions of the Municipal Finance Management Act or a fund for the benefit of employees of a municipal entity in terms of a law regulating pensions or medical aid schemes.<sup>101</sup>

Mention was made earlier in this chapter that the Systems Act now provides for a specific Code of Conduct for directors and members of staff of a municipal entity. In this regard, it is provided that the Code of Conduct for councillors contained in Schedule 1 of the Act also applies, with the necessary changes, to directors of a municipal entity. In the application of item 14 of Schedule 1 of the Act to directors of a municipal entity, that item must be regarded as providing that:

- the board of directors of a municipal entity may investigate and make a finding on any alleged breach of a provision of this Code by a director or establish a special committee to investigate and make a finding on any alleged breach of a provision of this Code by a director or make appropriate recommendations to the board of directors
- if the board of directors or special committee finds that a director has breached a provision of this Code, the board of directors may issue a formal warning to the director, reprimand the director, fine the director or recommend to the parent municipality that the director be removed or recalled
- the board of directors of a municipal entity must inform a parent municipality of that entity of any action taken against a director in terms of the Code of Conduct.

The Code of Conduct for municipal staff members contained in Schedule 2 of the Systems Act applies, with the necessary changes, to the members of staff of a municipal entity. For purposes of this provision, any reference in Schedule 1 or 2 of the Act to a 'councillor', 'MEC for local government in the province', 'municipal council',

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<sup>100</sup> S 93J of the Systems Act.

<sup>101</sup> Read s 93K of the Systems Act.

'municipality' and 'rules and orders' must, unless inconsistent with the context or otherwise clearly inappropriate, be construed as a reference to a director of a municipal entity, parent municipality, board of directors, municipal entity and procedural rules, respectively.<sup>102</sup>

## **16.4 An overview of services that are generally provided by local governments**

### **16.4.1 General factors that impact on municipal services**

It has been explained in the introductory chapters of this work that the provision of municipal services is arguably the most important reason for the existence and creation of local government structures. So important and fundamental is the provision of municipal services to local communities that it has been incorporated and entrenched within the new constitutional framework of South Africa. Before one investigates the basic services that municipalities should provide, it is important to look briefly at specific factors that have an impact on service provision and service levels, however. To a large extent these factors are determining factors in achieving a system of effective and sustainable service provision. The factors can be summarised as follows:

- *Financial resources* Finance is often regarded as the oil that keeps the engine of government running smoothly.<sup>103</sup> Without financial resources there can be no effective and sustainable provision of municipal services. All municipalities should maximise their potential financial income and should utilise such resources sparsely and diligently. Municipal finances are generated mainly via two sources:
  - (a) the sharing in revenue that is raised nationally
  - (b) revenue that is generated locally through the collection of rates, taxes and surcharges on services.
- *Training and municipal planning* The restructuring of municipal governments since 1993 has had a somewhat negative impact on skilled municipal employees. Many municipalities have lost the services of highly skilled and experienced municipal personnel. Coupled with the reality of a new legal and administrative framework, all municipalities are in need of extensive training and education programmes to ensure services are provided in compliance with the new legal foundation. Local governments should not be short sighted in respect of the

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<sup>102</sup> Refer to s 93L of the Systems Act as inserted by s 26 of Act 44 of 2003.

<sup>103</sup> See Craythorne (1997) 391.



importance of new training initiatives. The new local government systems must be supported by a comprehensive and continuous programme of training and skills development. Without proper attention to such aspects, sustainable service provision might be an unattainable ideal. Equally important to training is the principle of municipal planning. Planning in general is an inseparable part of the processes of public administration and accordingly requires specific consideration.<sup>104</sup> In basic terms, municipal planning means looking ahead by anticipating and making arrangements for dealing with future problems by projecting trends. One such trend is, for example, the migration of people. Migration of people from mostly rural areas to more developed areas such as towns or cities is a universal phenomenon. People migrate from one place to another in the hope of obtaining work and achieving a better quality of life. The most important consideration in municipal planning in terms of accommodating migration trends is to anticipate future demand for basic municipal services such as water, sanitation, refuse removal and primary health care facilities and means. Often migration patterns are difficult to anticipate, because many informal settlements are established almost anywhere. In light of such sudden municipal demands, municipal planning is a *sine qua non* for a successful local government system. Planning thus has its roots in the past, but with a view to deciding the future in the present.<sup>105</sup>

- *Accountability, effective decision making and local democratic governance* The new constitutional dispensation of South Africa, which includes local governments, is founded *inter alia* on the values of a democratic, accountable, responsive and open government.<sup>106</sup> All municipal governments must therefore structure and manage their affairs in compliance with such values. Municipalities must take decisive steps to eradicate all forms of maladministration and corruption and must align themselves with the new supreme values in the state. Without a concerted effort to establish a new, clean and accountable local governance, there is little

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<sup>104</sup> See Craythorne (1997) 400-402. The writer refers to certain definitions of the term "planning", which in essence means that objectives need to be clarified, whereafter specific actions should be implemented to achieve the desired goals. Planning involves not only the financial inputs necessary but also who the various role players should be.

<sup>105</sup> See Craythorne (1997) 402.

<sup>106</sup> See the Constitution s 1(d).

chance that the newly established local government structures will secure and fulfil their obligations towards effective and sustainable service delivery.<sup>107</sup>

- *Public participation and social and economic development* Public participation within all spheres of government is a constitutional prerequisite. This is of particular importance since the former local government dispensation excluded many people from its processes and decision-making procedures. Without proper participation of all the role players in local communities, the new local government dispensation is stillborn from the outset. In general, participation leads to information, which in turn ensures support. It is further a well-known fact that people generally support and participate in processes in which they have a direct or even an indirect stake. Communities need to realise that local governments are there mainly to provide services and to manage and control the local area to the benefit of all that are living or working there. As a counterweight, municipalities must assure and provide their services so as to ensure social and economic development which in turn will ensure a better future for all residents. The importance of this objective has been given constitutional protection.<sup>108</sup>

#### **16.4.2 Municipal services to be provided under the Constitution**

##### **16.4.2.1 Distinguish between functions and services**

Before one looks at the different services a municipality is required to provide, it is of value to distinguish between the terms functions and services. As defined by Craythorne,<sup>109</sup> a municipal function is something that is linked to the nature of governance. A government must govern, and in order to govern it must perform certain functions, such as making laws, levying taxes, employing personnel and allocating resources. On the other hand, a service is something that is provided by one person or institution to another person or groups of persons. In this regard, a service is something that is to be rendered to others.<sup>110</sup>

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<sup>107</sup> The more money is lost or wasted because of maladministration and corruption, the fewer resources are available to provide much-needed services and infrastructure to service hungry local communities.

<sup>108</sup> See the Constitution s 152.

<sup>109</sup> See Craythorne (1997) 409.

<sup>110</sup> The main objective of municipalities, not only historically, but also according to the Constitution, is to provide effective and sustainable services to their respective communities. In order to provide such services, a municipality must also perform certain functions. The provision of services is therefore dependent on the ability to perform certain functions.

### 16.4.2.2 Specific municipal services

It is interesting to note that within the new constitutional dispensation no direct or specific mention is made with regard to the specific services that municipalities should ordinarily render to their communities. On the contrary, the new legal framework refers to the powers, functions, objects and duties of municipalities. A closer evaluation of such powers, functions, objects and duties the terms seem to indicate reveals, albeit indirectly, certain services that should be rendered. However, it is submitted that it is not altogether certain whether certain powers, functions or duties also require municipalities specifically to render services regarding such matters.<sup>111</sup> In summary, municipalities have executive and legislative powers with regard to the matters listed in Part B of Schedule 4 and 5 of the Constitution, as well as with regard to those matters that have been assigned to them in terms of national or provincial legislation.<sup>112</sup> Apart from the functional areas mentioned above, all municipalities have to strive, within their financial and administrative capacities, to achieve the objects set out in section 152(1)(a)-(e) of the Constitution.<sup>113</sup> Seen in context, the areas or matters mentioned in Part B of Schedules 4 and 5 indicate the type of service that local government should provide for. These seem to be areas that neither the national nor the provincial government would be able to provide without unnecessary bureaucratic growth. Before the different services are discussed briefly, it must be remembered that, according to item 2 of Schedule 6 of the Constitution, much old order legislation, for example old provincial ordinances, are still in force, and many of them require extra services or functions to be rendered.<sup>114</sup>

Upon a close evaluation of the different municipal services that should be rendered, two broad categories of such service are recognisable. Some services are

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<sup>111</sup> The Constitution Sch 4 Part B and Sch 5 Part B identify the functional areas of municipal executive authority and also indirectly municipal legislative authority. Only a few of these functional areas refer to a service or services that are to be rendered. Sch 4 Part B refers only to fire fighting services, municipal health services and water and sanitation services. Sch 5 Part B does not refer to any services that should be provided. In this regard it is somewhat uncertain if the other functional areas also refer to a service that should be rendered regarding such areas or if they are only to be regulated through executive and legislative actions.

<sup>112</sup> See the Constitution s 156(1)(a)-(b). Again reference should be made to the obligation on the two higher spheres of government to assign to municipalities those matters listed in Schs 4 and 5 Part A, which necessarily relates to local government. See the Constitution s 156(4)(a)-(b).

<sup>113</sup> See the Constitution s 152(2).

<sup>114</sup> Only if such old-order laws are contrary to the Constitution or have been repealed would they be of no further force. See, eg, also the matters listed in the LGTA Schs 2 and 2A. The LGTA has been revoked, however, and is no longer applicable.

regarded as *support services*, while others are classified as *operational services*. Support services refer broadly to those services that are vital for the efficient and effective operation of the overall municipal machine and differ from one municipality to another, according to size and capacity. Operational services again refer to those services that are generally considered to be services that a municipality should render to its local community. The different services in each category can be summarised briefly as follows:

**(a) General municipal support services**

- *Legal services* All municipalities need legal advice and support in order to ensure that they operate within the Constitution and the law in general. Basically all the different branches of the law are applicable and relevant to municipal operations and activities. There are hardly any legal aspects, apart from aspects such as international relations, that are not applicable within some municipal situation. In order to deal with the many legal aspects, municipalities appoint either their own legal staff or make use of various private legal advisors.
- *Financial services* Internal financial advice services are indispensable for all municipalities. Without such advice, municipalities will not be able to plan and realise their other responsibilities according to the new constitutional requirements.<sup>115</sup> The importance of financial services therefore speaks for itself.
- *Personnel services* As a legal person, no municipality can act without natural persons that act on behalf of the municipality. This municipal corps or administration is thus vital to any local government. All in all personnel services refers to the recruitment, selection, appointment, placement, promotion and disciplinary procedures relating to the members of staff of a particular municipal government.
- *Secretarial services* These services refer mainly to the overall administration of a municipality. All internal procedural aspects are handled mostly through such services which include internal correspondence and also the finalisation of council agendas and the keeping of council minutes.
- *Repair and maintenance services* Municipalities need a very large infrastructure to operate effectively. This infrastructure requires various movable assets, which assets should be maintained and repaired from time to time. Basically all municipi

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<sup>115</sup> See again the Constitution ss 152(2) and 153.

palties therefore provide for internal repair and maintenance services.

- *Information and technology services* In the 21st century, no government can operate effectively and sufficiently without the modern world's new technological development. It is especially the computerised information services that have revolutionised all institutions. No local government can afford to be without such services.
- *Supply services* All municipalities must provide for a certain number of supplies that should be available for effective and smooth operations. Such services are a vital support service to municipal operations. Supplies include aspects such as stationery, furniture, and other supplies, to name but a few.

**(b) Municipal operational services:**<sup>116</sup>

- *Air pollution* Municipalities similar to the two higher spheres of government are also responsible for environmental protection. Air pollution from car exhaust fumes or industrial smoke is an important environmental concern and should be addressed and controlled on a local level.<sup>117</sup>
- *Building regulations* The control and oversight of building activities is generally regarded as one of the so-called "inspection services". All municipalities should control and inspect compliance to building regulations and standards. This is a very important service to the public in general, as substandard building or dwellings can have life-threatening consequences. Although building regulations and standards are set nationally, it is their enforcement and control on a municipal level that ensures a safe and acceptable system.<sup>118</sup>
- *Childcare facilities* The provision and control of childcare facilities is also a municipal matter. Neither national government nor the provincial governments are in an ideal position to address and control such a functional area. It is for municipalities themselves to determine local needs and expectations and to provide for them as may be required. Although childcare facilities and services have also been allocated to local governments, the specific role of such governments is not

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<sup>116</sup> See the Constitution Schs 4 and 5 Parts B.

<sup>117</sup> Municipalities are constitutionally obliged to promote a safe and healthy environment. The Constitution s 152(d).

<sup>118</sup> See the National Building Regulations and Building Standards Act 103 of 1977. Many municipalities also provide for their own town-planning schemes, which also require certain standards regarding building activities. Some municipal by-laws are also important in this regard.

clearly explained. Some commentators have already suggested that new legislative guidance is needed to rectify such a position.<sup>119</sup>

- *Electricity and gas reticulation* Arguably one of the most common and important services that are provided for by municipalities is electricity and/or gas reticulation. This is an example of a traditional service that has become indispensable within a modern society. The service does not necessarily relate to the generation of electricity or exploitation of gas, but rather to providing such commodities to local premises for utilisation.

In a similar way to water provision, electricity is normally rendered to local residents after such residents have concluded a service-provision agreement with their local municipality. When such services are received, residents are normally responsible for paying for such services.<sup>120</sup> Most municipalities are mere suppliers of electricity to local residents. In order to become a supplier, a municipality must become a licensee, as is intended in national legislation.<sup>121</sup> Once a municipality has started to supply electricity to consumers, it is prohibited from disconnecting such supply if such a consumer has paid the full amount due in respect of the supply of electricity. This is the position regardless of whether the consumer owes any other amount to the municipality for other services or other causes of action.<sup>122</sup> Generally a municipality is required to supply electricity to consumers. To supply means to make available rather than to actually deliver. Electricity is nor-

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<sup>119</sup> See Zaal and Matthais "Local Government and the Provision of Childcare Services: An Essential area for legislative reform" *SALJ* 119 (1) 138 *et seq.* The writers mention that the potential importance of the role of local authorities was recognised by the drafters of the 1996 Constitution: therefore its inclusion in Sch 4B. They finally reiterate that local government authorities have a constitutional obligation to provide services for children but that such an obligation has largely gone unrecognised, and needs urgent attention. They conclude by suggesting that the best way to redress this serious inadequacy is for the national legislature to promulgate additional legislation. At 153-154.

<sup>120</sup> See *Wellington Court Shareblock v Johannesburg City Council* 1995 (3) SA 827 (A). In the case the appellants, each of whom owned immovable property within the respondent's municipal jurisdiction, concluded agreements with the respondent in terms of which the respondent was to supply the properties in question with electricity and water. In its particulars of claim in an action in a local division the respondent alleged that the appellants were liable to it for the payment of certain amounts in respect of such services. The appellants excepted to these particulars on the ground that the agreements were *ultra vires* the relevant by-laws and could accordingly not support a claim for payment. The local division assumed, for the sake of argument, that the agreements were indeed *ultra vires*, but held, on the authority of a long line of cases, that the appellant, having received benefits under the contract, was estopped from raising the *ultra vires* defence.

<sup>121</sup> See the Electricity Act 41 of 1987.

<sup>122</sup> See *Senekal Inwonersvereniging v Plaaslike Oorgangsraad* 1998 (3) SA 719 (O). The court held that the disconnection of the electricity supply of residents who had not paid all accounts in respect of services or rates in full could not be valid. At 727 paras H-I.



mally also supplied to consumers and not a property. There can thus be more than one consumer on a particular erf.<sup>123</sup> Generation or exploitation is normally done nationally, although it is not entirely uncommon for certain municipalities to generate electricity for themselves.<sup>124</sup> Generally municipalities are responsible for the establishment and maintenance of the electricity provision network and for providing support services thereto. Local authorities must note that they are not generally allowed to discontinue one service because of arrear rates for another. In the case of *Hartzenberg v Nelson Mandela Metropolitan Municipality (Despatch admin unit)*,<sup>125</sup> the court held that although the applicants were in unlawful occupation of houses and were in arrears with payments for water supplies, the respondent municipality could not disconnect the electricity supply to the properties. The court held that neither the relevant Electricity Supply by-law nor the Local Government: Municipal Systems Act gave the respondent such authority. The respondent was thus not entitled to discontinue the electricity supply because of the arrears on the water accounts.<sup>126</sup>

- *Fire fighting services* The provision of fire fighting services is the first service that is specifically referred to in Part B of Schedule 4 of the Constitution. It is self-explanatory that this service is of cardinal importance to all residents of municipal areas. Every day local residents are at risk in respect of fires. In this respect, such services are often lifesaving. Municipalities should ensure that fire stations are ideally located within each particular municipal jurisdiction, in order to provide a rapid and effective service. The nature of the service at hand requires the quickest response possible. The personnel that provide the service must be properly trained and should be effectively equipped to handle any foreseeable situation. Emphasis should be placed not only on corrective fire-fighting services, but also on preventative initiatives. Such initiatives and responsibilities are especially important in high-risk areas such as informal settlements. Fire-fighting services are controlled mainly through national legislation.<sup>127</sup> It should be noted that fire-

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<sup>123</sup> See *Omtter (Edms) Bpk v Welkom Stadsraad* 1999 (3) SA 787 (SCA).

<sup>124</sup> See the Electricity Act 41 of 1987 and the Gas Act 48 of 2001 for more details.  
<sup>125</sup> 2003 (3) SA 633 (SE).

<sup>126</sup> See at 638E-F.

<sup>127</sup> See the Fire Brigade Services Act 99 of 1987.



fighting services are not free of charge and that fees could be recovered by the service provider.<sup>128</sup>

- *Local tourism* In an effort to attract national or even international investment, all municipalities should explore local investment opportunities. Tourism is one such opportunity that could be a significant enhancement in municipal financial income and one which should be explored thoroughly. Local tourism is something that cannot be done locally on an isolated basis, however; it needs to tie in with an overall national programme for the country as a whole.
- *Municipal airports* In some municipal areas there might be a need to provide and or maintain a municipal airport. To this extent, such a service should be provided to fulfil local needs, depending on financial resources and overall strategic programmes. When such a service is indeed provided for, municipal governments should take note of the various responsibilities and possible liabilities that accompany the provision of such a service.
- *Municipal planning* It has been stated several times in this work that all municipalities are obligated to provide and ensure proper municipal planning services. Such services refer mainly to various aspects of the management and control of land use or land use rights. There are many laws applicable in relation to municipal planning services, ranging from national laws such as the Physical Planning Act<sup>129</sup> and the Development Facilitation Act<sup>130</sup>, provincial laws and ordinances and also relevant local by-laws and town planning schemes.<sup>131</sup>
- *Municipal health services* All municipalities are involved in ensuring and providing certain minimum health services to their local communities. Such service provision is essential to everyday life, and municipalities are best suited to provide and en-

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<sup>128</sup> See, eg, *Tuinroete Klein Karoo Distriksmunisipaliteit v Lategan* 2003 (2) SA 683 (C). The Fire Brigade Services Act 99 of 1987 (the Act) s 10 creates a statutory obligation to pay for fire brigade services, coupled with an effective debt-recovery mechanism. The Act s 10(1) authorises a controlling authority (which is a local authority in terms of the Act s 1) to determine the fees payable by a person on whose behalf fire-fighting services were rendered. The subsection creates a *sui generis* cause of action. It does not exclude the recovery of compensation for the rendering of services on common-law grounds. The chief fire officer who wishes to recover compensation from a person on whose behalf fire-fighting services were rendered has a choice to institute action for compensation on a common-law cause of action or to recover the moneys as determined by the controlling authority.

<sup>129</sup> 88 of 1967 and also the Physical Planning Act 125 of 1991.

<sup>130</sup> 67 of 1995.

<sup>131</sup> See, eg, the old Transvaal ordinance on town planning and towns, ordinance 15 of 1986 and the former Pretoria town-planning scheme 1974, which was enacted in accordance and on the authority of s 19 of the ordinance.

sure such services. Again, one should remember that such services interact with national and provincial programmes on health services.

- *Municipal public transport* Public transport is an indispensable service to the public at large. Depending on the size and density of a local area, municipalities should plan and make provision for public transport facilities. These services are very expensive and need to be justified according to local needs.
- *Municipal public works* Municipalities should also provide for certain municipal public works. Such works refer only to facilities or services that are required in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under the Constitution or any other law. Most other public works services are to be provided by the higher spheres of government.
- *Municipal services relating to pontoons, ferries, jetties, piers and harbours* Depending on location and geographical features, some municipalities are required to provide, maintain and control certain services where water is applicable. Often such services are also regulated in terms of higher legislative provisions. In some instances municipal involvement is entirely excluded. The regulation of, for example, international and national shipping and matters related thereto are exempt from local government control.
- *Storm water management systems in built-up areas* As municipal jurisdictions are becoming more and more developed, the management, provision and maintenance of storm-water systems are becoming ever so troublesome. Urbanisation with complaisant modern infra-structure such as tarred roads and roofed buildings increasingly causes severe flooding in residential areas. Municipalities therefore need to plan and provide for sufficient infrastructure to handle and control such higher volumes of storm water.
- *Trading regulations* The modern 21st century city has undergone significant changes from its humble beginnings a few hundred years ago. Many changes in society, especially in some third world countries and economies, have led to new approaches regarding trading patterns in especially highly populated areas. In many towns and cities, residents have become accustomed to informal trading practices that are permitted throughout the municipal area. However, such trading habits can sometimes have a negative impact on long-established and more tradi-

tional business establishments, which in turn could negatively affect new job creation and sustainable enterprises.<sup>132</sup>

- *Water and sanitation services* The provision of water, and more specifically drinking water, to local residents is generally accepted as one of the most basic of services that municipalities must render.<sup>133</sup> Without water and basic sanitation infrastructure and services, it is difficult to imagine how such settlements can sustain and survive. Accordingly, water and sanitation services are seen to tie in strongly with the developmental duties and objectives of municipalities that have been entrenched in the Constitution.<sup>134</sup>
- *Beaches and amusement facilities* Coastal municipalities have an additional service to their communities, in that they must control and manage local beaches in their areas. Apart from beachfront management, all municipalities are to a greater or lesser degree responsible for the control and management of amusement facilities.
- *Billboards and the display of advertisements in public places* The advertising industry has become a very competitive and fast-growing business. Every municipal administration is therefore regularly confronted with new developments regarding advertisement initiatives. Because of factors such as traffic safety, environmental considerations and an overall aesthetic presentation of a particular area, proper management and control over billboards and the display of advertisements in public is necessary. Under the Constitution, special attention should be given to the regulation of billboards and the display of advertisements in public places. In light of the fact that the Bill of Rights protects the right to freedom of expression, which right also includes commercial free speech, municipalities must ensure that their policies and by-laws do not limit such a right unreasonably. For more on such aspects see *African Billboard Advertising v NSS Central Local*

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<sup>132</sup> Most informal or so-called "street trader" do not pay levies for being able to trade in certain areas and it is the responsibility of formal business owners to cross-subsidise for loss in municipal revenue. These practices not only create unequal trading standards but they often also pose environmental and safety hazards. The trading of goods and services within municipal areas should therefore be regulated and controlled, to the benefit of all parties concerned.

<sup>133</sup> See the Water Services Act 108 of 1997. See also *Manqele v Durban TMC* 2002 (6) SA 423 (D).

<sup>134</sup> Refer to the Constitution ss 152(d) and 153. Water is an essential life-sustaining commodity and is also indispensable to ensure a healthy environment. Municipal water and sanitation services are, however, limited to portable water supply systems and domestic wastewater and sewage dis-

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*Councils.*<sup>135</sup> In this case the applicant erected certain advertising signs on property in the Durban area which was owned by Spoornet. Acting in terms of its local building by-laws, the respondent objected to the presence of the signs on the basis that they had been erected either in contravention of its by-laws or without the requisite permission to do so, and it placed the applicant on terms to remove them. When the applicant failed to oblige, the respondent engaged the services of a contractor to remove them. The applicant demanded its property back. The court held that the removal of the billboards was unlawful and that the by-law in question had not intended that such signs be removed without a court order. The respondent was subsequently ordered to re-erect the signs.<sup>136</sup>

- *Cemeteries, funeral parlours and crematoria* Providing for cemeteries, crematoria and funeral parlours has always been a function of local governments. Such services are important in the day-to-day living experiences of all communities and should thus be provided on a continuous basis.
- *Cleansing services* According to the Constitution, the provision of cleansing services is also regarded as a local government matter that falls within the functional areas of exclusive provincial legislative competence. What is included under such services is not clear. It is submitted that cleansing services are closely related to municipal health services, however, and that a strong link between the two types of services is self-evident.
- *Control of public nuisances* Municipalities are also responsible for controlling public places within their relevant municipal jurisdiction, and they must therefore also provide for control measures to ensure that public nuisances are addressed. Typical examples of public nuisances that should be controlled are matters that relate to noise control, zoning-scheme contraventions and aspects that have their origin in bad neighbour relations. Municipalities should ensure that community members live as far as possible in harmony with one another and that clear and effective mechanisms exist in order to address any negative or nuisance-like actions or activities that do arise.

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positional systems. As is the case with many other services, water and sanitation services should link up with national and provincial programmes and initiatives.

<sup>135</sup> 2004 (3) SA 223 (N).

<sup>136</sup> See pages 228-229.

- *Control of undertakings that sell liquor to the public* The selling of liquor to the public has always been a contentious and often difficult issue, as there are many negative consequences attached to such activities. Because of the enormous extent of the liquor industry and liquor consumption in our country, control over the liquor trade is something that must be exercised in all three spheres of government. Various national and provincial laws are directed at the liquor trade, and municipalities must also do their bit in order to complete and enhance the overall regulatory framework.<sup>137</sup>
- *Facilities for the accommodation, care and burial of animals* The keeping of animals for farming or as pets is part of human life all over the world. To accommodate aspects relating to animals, especially within modern urbanised areas, certain services should be provided to address issues such as the accommodation, care and disposal of animals. Often the neglect of such services could lead to health risks or could even cause the outbreak of infectious diseases, which in turn could have enormous consequences, not only within a particular municipal area but even for the country as a whole.<sup>138</sup>
- *Fencing and fences* Depending on local circumstances, issues relating to fencing and fences within a municipal area could also have important implications. Not only are fences and issues relating to fencing important for private and public safety reasons, they often also assist in preventing damage to property or even disputes relating to ownership of goods or animals. The control and services relating to fences are therefore often more important in rural or farming communities than in some urban developments.
- *Licensing of dogs* Mention was made of the fact that many people keep so-called “domestic animals” as pets on their properties. The control over such animals is much less of a problem in rural communities, as they are within modernised towns or cities. Arguably the most common domesticated pet and security measure is a dog. In light of the nature of such animals, certain minimum controls should be exercised, and thus municipalities are empowered to insist that dogs within their areas of jurisdiction be licensed.

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<sup>137</sup> Eg, see the Liquor Act 27 of 1989 as amended.

<sup>138</sup> One should recall the attention that was given to the outbreak of mad cow disease and foot and mouth disease in Britain, eg, to see what devastation such diseases can create within a country.

- *Licensing and control of undertakings that sell food to the public* In an effort to ensure and enhance public health standards, municipalities should provide for measures that regulate the licensing and the control over undertakings that sell food to the public. There are various standards and requirements that must be enforced to ensure and promote a safe and healthy environment.<sup>139</sup> Municipalities are often best suited to ensuring and enforcing such standards and requirements.
- *Local amenities* Municipalities should make a determination with regard to local needs in respect of possible amenities and should then provide, manage and control such amenities. The availability of resources and budget priorities would impact considerably on the variety and extent of local amenities provided. General amenities are municipal pools, picnic areas, caravan parks and even resorts.
- *Local sport facilities* South Africa is generally recognised as a sporting nation. Our climate and weather patterns allow for favourable outdoor sporting activities. Sport forms an important part of many people's private lives and social interactions. Most people do not have the financial capacity to build and maintain their own private sporting facilities. Local governments are therefore tasked and best suited to provide, manage and maintain such facilities.
- *Markets* In large metropolitan areas, some municipalities also provide and manage market facilities. A market is a place where people trade in various items, but mostly in foodstuff. The existence of fresh produce markets or wholesale flower markets is well known in this respect.
- *Municipal abattoirs* In some instances, and depending on local circumstances, some municipalities are also required to provide and control municipal abattoirs. An abattoir is a place where animals are slaughtered and meat is prepared for public consumption. Strict hygiene and health requirements must be adhered to at all times.
- *Municipal parks and recreation* All municipalities should provide so-called "open spaces" or municipal parks where members of local communities can relax and

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<sup>139</sup> Note the case of *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City council* 1994 (3) SA 170 (A). The appellant, a bottler and distributor of soft drinks, was convicted in a magistrate's court of contravening by-law 18(c) of the City of Durban Food By-Laws, which had been promulgated in terms of the Local Government Ordinance 21 of 1942 (N) s 197(1)(f). The conviction was based on an admission at the appellant's trial that it had sold a bottle of carbonated mineral water which contained a bee to a supermarket in Durban. The magistrate found that by-law 18(c)

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where children can meet and play. In modern urbanised areas, many residents in high-rise compartment blocks do not have gardens or play areas of their own. It is thus a responsibility of municipal governments to create and maintain such public recreational areas.

- *Municipal roads* Municipal infrastructure plays an important role in achieving social and economic development and ensuring that other essential services can also be rendered. In this regard, the proper control and maintenance of municipal roads are of paramount importance. The control and maintenance of municipal roads cannot be done on an isolated basis and must interact with national and provincial initiatives and schemes. Maintenance of municipal roads also includes the provision and maintenance of storm-water systems citywide.
- *Noise pollution* Within the new constitutional scheme, environmental issues are the responsibility of all three spheres of government. Various national and provincial laws are applicable in order to enhance the protection of environmental demands and requirements. Noise pollution, especially in urban areas, is an aspect that ties in with other environmental interests, and municipalities are best suited within their local jurisdictions to address and control such a matter.
- *Pounds* It is advisable for municipalities to provide for so-called “municipal pounds” where stray animals, illegally parked vehicles or other unauthorised goods can be stored and secured. Pounds vary accordingly to what is to be secured. Proper measures should be introduced to ensure that municipal councils do not incur civil liability for goods or property that have been impounded.
- *Public places* The provision and maintenance of public places is also an important local service that should be provided to local communities. The availability of finances will determine to what extent such places can be afforded.
- *Refuse removal, refuse dumps and solid waste disposal* It is an essential service for municipalities to provide for both domestic and industrial refuse or solid waste removal and dumping facilities. Such services are needed in every community and must be rendered and controlled effectively in order to prevent possible health risks. Because of environmental importance, services relevant to refuse removal,

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imposed a strict liability. The court held that the contamination was foreseeable and that the appellant had been negligent in preventing foreign objects from passing into the consumable products.



dumps and solid waste disposal mechanisms must comply with legislative requirements from the higher spheres of government.

- *Street trading* Many municipal functions and services are interrelated with other services. The control and management of street trading is a good example. Street trading also ties in with general trading regulations and is directed at controlling and managing trading activities that are conducted next to municipal streets. Other functions such as traffic, parking and municipal roads are also relevant to trading services.
- *Street lighting* Apart from addressing the services relating to municipal roads and public transport, municipalities should also provide street lighting in certain areas. The provision of street lighting is particularly important for road safety and personal security. Not all municipal roads can be provided with lighting facilities, and municipalities should conduct investigations to determine which streets require lighting.
- *Traffic and parking* Traffic control and parking facilities are among the most common municipal services that have been rendered over the years. Such services must interrelate with other similar services such as municipal transport and municipal roads. Various national and provincial laws also exist regarding such matters and must be complied with in the fulfilment or rendering of such services. Traffic control is regarded as an area-bound service and should be managed through strict command and control procedures.

The abovementioned areas of municipal service provision have been entrenched within the new constitutional dispensation of South Africa and cannot be taken away unless the Constitution so permits.<sup>140</sup> Apart from the areas mentioned in the Constitution, some older laws that are still in place and in effect also identify and confirm certain services or functions to be fulfilled by local governments. Some such services or functions are the following:

- *Civil protection services* All municipalities should plan and provide for emergency protection or even disaster management services. In this regard, all possible scenarios should be investigated and potential crisis areas or hazards should be identified. Common aspects that should be provided for are, for example, floods or

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<sup>140</sup> See the Constitution Sch 4 and 5 Part B.

other natural disasters, outbreaks of infectious diseases and possible human-made emergency situations such as terrorist attacks or arson incidents. The prevention and management of such incidents is very important and should not be neglected.<sup>141</sup>

- *Housing* All spheres of government are involved in providing housing services in South Africa. Therefore, housing is one of the most needed commodities in our new state. Many people are living in extreme poverty and with no roof over their heads. Because of the special need of new houses, the national government has introduced various housing schemes.<sup>142</sup> Broadly speaking, the provision of housing services includes aspects such as low-cost housing, modern township developments, retirement homes and facilities, as well as rental properties. Municipalities must interact with the programs of the two higher spheres of government and must also assess and evaluate local housing needs. It is submitted that without the provision of proper housing services there can be no real social and economic development. Housing is thus a high priority service in the new governmental systems in South Africa.
- *Licensing services* In many instances municipalities are tasked with certain licensing services that are to be performed within their areas of jurisdiction. Such services are often required by either national and provincial laws, which in turn mandate local authorities to act as a so-called “controlling” or “inspection” authorities. Examples of these services include business- and vehicle-licensing services, inspection of the premises of liquor-selling businesses and also building regulation fulfilments.
- *Civic centres, city halls and public libraries* Over the years, it has been customary for local authorities to provide and maintain civic centres and city halls. Such centres play an important role in building a local symbolic identity. City halls or civic centres provide a place for public gatherings, official and ceremonial functions and also cultural activities. It is obvious that such centres fulfil an important role in local community activities. Such services are very expensive, however, and careful pri-

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<sup>141</sup> In South Africa special attention must be given to frequent fires that occur within rural areas and also within informal settlements. As prevention is better than cure, local governments should not be unaware of the devastating effect such incidents could have on local communities.

<sup>142</sup> See, eg, the Redistribution and Development Program, which specifically provides for the provision of housing developments.

orisation should be done locally. Building town halls or city halls is very costly, but most towns or cities in South Africa already possess one, and these should be maintained and controlled.<sup>143</sup> Providing a library service is not a specific function of municipalities, but many municipalities often provided such a service. A library service is directed at serving the local population through the provision of educational and recreational information. In light of modern electronic development, such centres should also provide internet and even e-mail facilities.

- *Law enforcement and municipal police services* It was explained above that municipalities have various law-enforcement obligations and services that must be rendered. Such services differ from building inspections, town planning scheme control, various health and safety measures and also road traffic law enforcement. Apart from providing such services, municipalities are also permitted to establish and maintain a municipal police service.<sup>144</sup> It should be pointed out that local governments do not have an automatic right to establish a municipal police service.<sup>145</sup> Specific requirements must be met before permission can be granted for the establishment of a municipal police service.

## 16.5 Conclusion

As is the case with many other aspects of the new local government dispensation, it is imperative that municipal services and service provision should comply and conform to the new constitutional vision and requirements. Municipal services must be equitable and accessible for all local residents and must enable all municipalities to achieve and fulfil their objectives and duties.

The basic municipal services are set out in Part B of Schedules 4 and 5 of the Constitution. Apart from such services, national or provincial governments may as-

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<sup>143</sup> City halls are often rich with local heritage and traditions.

<sup>144</sup> According to the Constitution s 205(1), the national police services must be structured to function in the national, provincial and, where appropriate, local spheres of government. S 206(7) further states that national legislation must provide a framework for the establishment, powers, functions and control of municipal police services. For more detail, see the South African Police Service Act 68 of 1995.

<sup>145</sup> *In re Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) the Constitutional Court held that whereas the interim Constitution required provision to be made for the establishment by a local government of a municipal or metropolitan police service whose functions would be restricted to crime prevention and the enforcement of municipal and metropolitan by-laws, there was no comparable provision in the new text. Local policing was a matter to be dealt with by an Act of parliament. See paras 395-401 at 888-890.

sign other matters to municipalities via legislation.<sup>146</sup> One can thus conclude that municipal services are not absolutely defined or identified and can differ from one municipality to another as circumstances may require. Within the new local government legislative framework there seems to be rediscovery of the basic essential services that a municipality is supposed to render. This development has caused almost all local governments to focus mainly on the core services and to deregulate or even privatise many other secondary services.

The Constitution compels all municipalities to strive within their financial and administrative capacities to achieve the objectives and therefore the services that were identified above. Services should be provided and rendered to uplift and enhance the quality of life of all local people without a sacrifice in quality or sustainability. In many cases services should be decentralised or even privatised in order to allow local governments all over South Africa to focus and achieve their main constitutional service objectives.

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<sup>146</sup> See the Constitution s 156(1)(b). Subs (4) further enhances such assignment as national and provincial governments must assign to a municipality the administration of a matter listed in the Constitution Sch 4 or 5 Part A, which matter necessarily relates to local government.

## Municipal personnel, labour relations and staffing matters

### 17.1 Introduction

It is an obvious observation that no municipality would be able to fulfil its obligations and duties without basic personnel administration and management. Not only are employees necessary, they have to be motivated, dedicated and properly trained. In light of their vast and diverse functions, municipalities need a mix of personnel that vary from general administrative officials, such as administrative clerks and office personnel, to highly qualified experts such as engineers, town planners, lawyers, accountants and personnel managers. Without the abovementioned personnel corps in place, no municipal government will be able to perform and fulfil its constitutional duties and obligations, and the Constitution specifically states that a municipal council may employ personnel that are necessary for the effective performance of its functions.<sup>1</sup> All municipalities therefore have to evaluate and determine their specific personnel needs in order to perform their functions. It goes without saying that it is not only the appointment of personnel that is important in this regard; so is the management, control and performance measurement of such personnel.

According to the Constitution, municipalities have significant powers regarding personnel matters.<sup>2</sup> One must be aware of the fact that other national or provincial legislation also impacts on personnel matters or even labour relations, however, and that municipalities may not act contrary to such laws.<sup>3</sup> When municipal personnel, also often referred to as the municipal administration, is discussed, it is again important to remember the three components that together complete a local government. All

<sup>1</sup> See the Constitution s 160(1)(c).

<sup>2</sup> The Constitution s 156(5) states that a municipality has the right to exercise *any power* concerning a matter that is reasonable necessary for, or incidental to, the *effective performance of its functions* (own emphasis added). Since the appointment of personnel is essential for the effective performance of municipal functions, municipalities should be able to exercise strong powers in this respect.

<sup>3</sup> See the Constitution s 156(3).

municipal governments consist of a combination of political functionaries, administrative personnel and a specific local community.<sup>4</sup> Together the three components comprise a municipal government. The importance of a municipal personnel corps is thus self-evident. However, one should guard against possible confusion between municipal administrative personnel and office bearers representing political structures. Municipal personnel are not elected political representatives; they are employees in the normal sense of a municipal council.<sup>5</sup>

## **17.2 The broad organisational structure and overall personnel administration of local governments**

### **17.2.1 *Basic organisational systems***

In the past the organisational structure of a municipal government could be compared with a human body:

- A particular structure (the skeleton) exists to ensure effectiveness.
- Staff (the muscles) are needed to perform functions and ensure movement
- A decision-making body (the brain) is required, through which communication is achieved between the decision-making body and the staffing component, which must then perform the instruction given.<sup>6</sup>

Broadly speaking, two types of organisational structure have been identified. There is the *mechanistic/closed type* of structure, in which duties are precisely defined and where a high value is placed on precision, specified job descriptions and strong loyalty to the organisation. Functional tasks are differentiated, and there is a hierarchical structure of command. The manager or head of the organisation is often deemed to be omniscient, as he or she possesses all important knowledge. Factors such as authority, coordination and efficiency are strongly emphasised. Job responsibilities are mainly routine, with most decisions and knowledge coming from the top. Contrary to the closed organisational structure, one finds the *organic or open type* of organisational structure. Such a structure was developed and adopted to handle

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<sup>4</sup> See ch 7 of the work and also the Systems Act s 2(b)(i) and (ii).

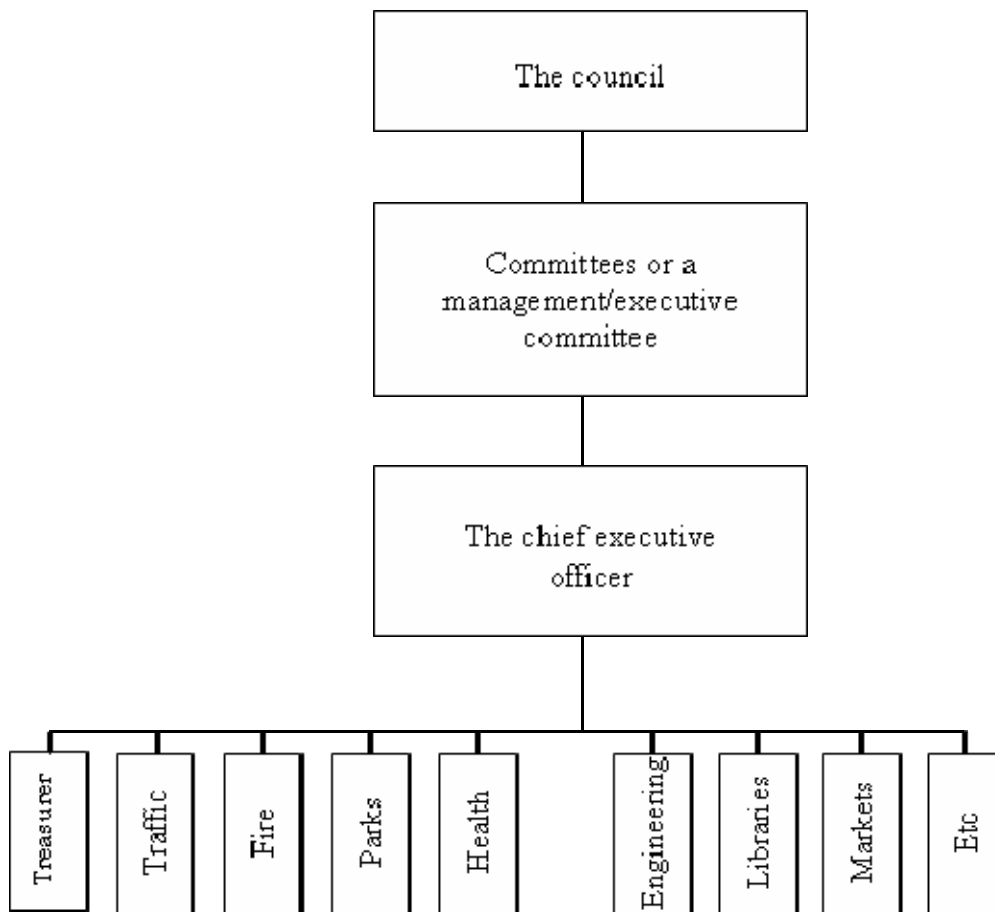
<sup>5</sup> Again notice should be taken of the fact that it is a municipal council, as a legal entity that acts as an employer and that appoints or concludes services/employment contracts with potential employees. The position regarding political office bearers, as was discussed elsewhere, is quite different. Anyone who is appointed by or in the service of a municipality is normally not eligible to be a member of the political component of that municipal council. Refer to the Constitution s 58(1)(a) and (b).

<sup>6</sup> See Craythorne (1997) 279.

unstable and continuously changing conditions. Many internal jobs have little formal definition, and functions are not precisely demarcated. Responsibilities and tasks are constantly redefined. In an organic structure the emphasis is on getting the job done, and thus individual responsibilities are not precisely defined.<sup>7</sup> It is also possible to find institutions that incorporate a combination of the two types of organisational structure.

From a municipal government point of view, municipalities exist to provide services to their inhabitants. They must therefore have a structure within which staff can be deployed and organised to ensure that the required services are indeed provided. Craythorne mentions that in the South African local government of the past it was usual to encounter two forms of organisational structure. One was identified as a long, flat organisation with many departments. The other form was more of a pyramidal type, with fewer departments.<sup>8</sup>

(A)



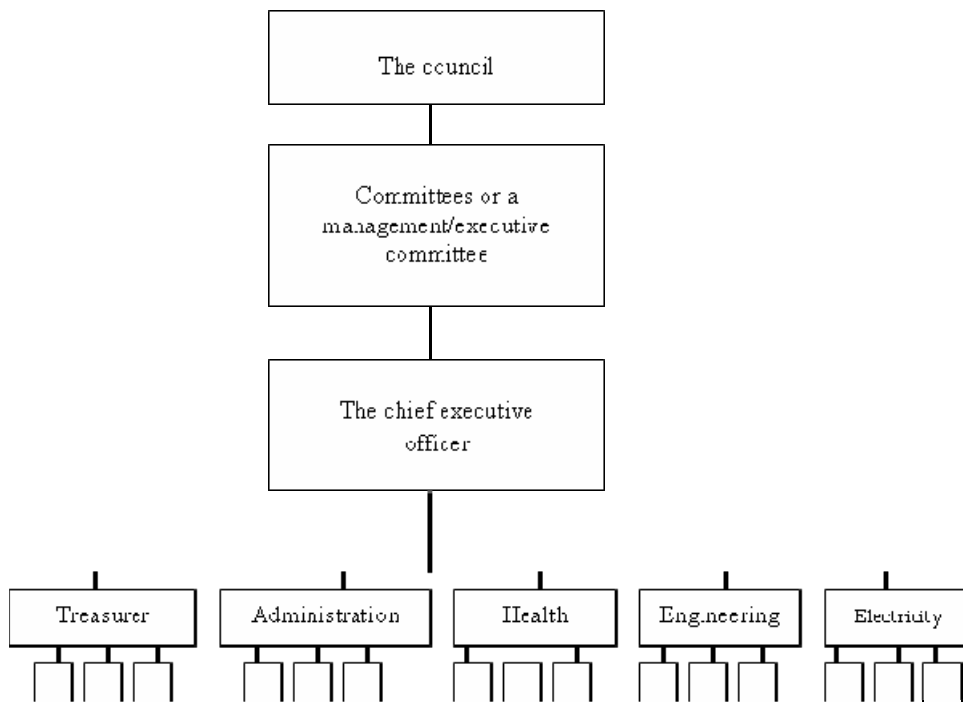
<sup>7</sup> See Craythorne (1997) 282-283.

<sup>8</sup> See Craythorne (1997) 283-285.



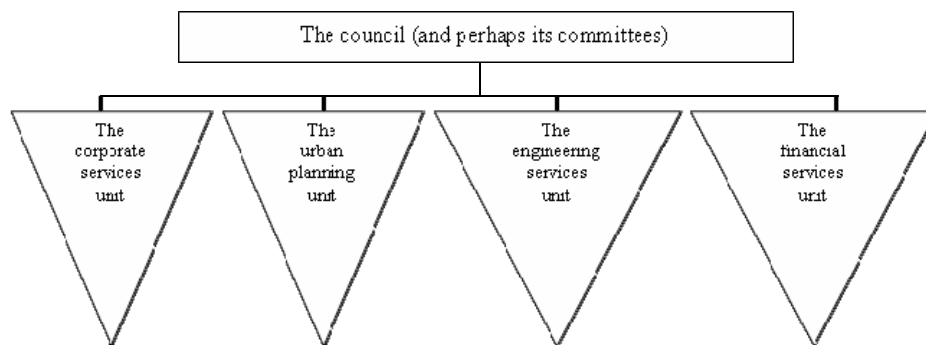
In more recent years, a new local government organisational structure, generally termed the business unit model, was developed. In such a model, the municipal organisation is divided into semi-autonomous business units. Especially from a concentration of skills and expertise point of view, the business unit model has definite advantages.

(B)



Specialised branches within departments

(C)



It is important to remember, however, that in a public-sector body, where control over policy and decision making is necessarily political, it is not possible to have a truly decentralised structure. Although many decisions should be delegated to strategic officials, ultimately the overall policy and political decisions must be made at municipal council level.

In the new local government dispensation, municipalities have been established and are constitutionally required to render effective, efficient and sustainable services. Depending on the services, this obligation often requires professional experts and technicians and a careful preplanning and evaluation of the organisational structure is thus essential. It is also generally accepted that the personnel of specialised services such as engineering, town planning, accounting and also legal services should not be lumped together, but should rather be placed within separate specialised units, which are then tasked with only that specialised service.<sup>9</sup>

### **17.2.2 Internal mechanisms to enhance organisational efficiency**

No organisation can be efficient and effective without certain control measures' being put in place. It is a fact of any organisational structure that not all members or staff can be expected to meet standards voluntarily. Measures of control in local governments arise from various sources, such as from the political leadership, internal leadership structures and even through public complaints and requests. The main objective of control within the public sector is to ensure accountability for everything the public authority does.<sup>10</sup> Another form of external control over the public sector is via the law and judicial structures. Many legal rules have been developed to ensure that the public service is regulated within certain minimum standards. The judicial structures are also properly empowered to oversee public sector compliance with the law.<sup>11</sup>

Local governments should further also guard against the familiar concept of empire building in public structures. Empire building arises mostly from personal motivations such as ambition, a desire for status, a lust for power and also professional jealousy. Status-driven and power-orientated personnel see the organisation in which they work merely as a tool for achieving personal goals. Ineffective and unnecessary empires are commonly developed through a process of lengthening work outputs

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<sup>9</sup> See Craythorne (1997) 290. In many instances, professional personnel are controlled and supervised by their professional body (eg the South African Law Society for attorneys, and a minimum standard of professionalism is required which may not be reduced or limited by political intervention. A municipality can therefore not prescribe to a professional employee such as a civil engineer to design structures that would not comply with minimum safety requirements but would save the municipality lots of money. Minimum professional standards may never be compromised.

<sup>10</sup> For more on this point see Cloete (1997) 184, and also Craythorne (1997) 297.

<sup>11</sup> Within the new constitutional dispensation of South Africa, the importance of control and minimum standard setting within the public sector is strongly echoed in the Constitution ch 10, which sets basic values and principles to which the public administration must adhere. See the Constitution s 195 in particular.

and by creating the impression that a certain post has more responsibilities than it really has. This is then followed by requests for additional posts and the upgrading of the original post to a unit supervisor or leader.

One should not mistake genuine personnel enlargements with the concept of empire building, however. Many municipalities in South Africa are facing severe shortages of qualified and properly trained personnel. There are many internal departments that are functioning with only 50% or even less of the minimum staff that are required to perform the particular workload. This situation has become critical since the commencement of the final phase of the new local government restructuring. Many newly established municipalities have lost vast numbers of highly trained and experienced municipal personnel and do not have appropriate replacements on hand. This situation has resulted in many inexperienced personnel being appointed to often strategic positions or municipal councils being indecisive in appointing and filling urgently needed vacant posts.

Since the beginning of the restructuring of local governments, it has always been envisaged that the overall internal organisational structures of all municipalities should be reviewed and reorganised. This is a difficult and ongoing process, however, and many local governments are in need of professional assistance to achieve a genuinely effective and streamlined municipal corps. Most jobs will have to be re-analysed to ensure that they are suitably defined.

Another important aspect of a municipal organisation is municipal leadership. Every municipal structure must have a leader that is not only knowledgeable in terms of local government affairs but who is also followed and respected by the general personnel corps. Municipalities differ from many other organisations in that they have a number of leaders, such as the councillors, the municipal manager, heads of department and sub-units. Each official in charge of a unit is a leader, but at a different level.<sup>12</sup>

No organisation can establish and maintain a successful organisational structure without a proper personnel administration in place. Personnel administration is a key activity in local government administrations and, if handled effectively, it will contribute significantly to the existence and maintenance of a healthy municipal organisa

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<sup>12</sup> See Craythorne (1997) 302-303.

tion. Even the smallest local authority must devote some of the time allocated to administrative duties to employment-related matters such as conditions of service and remuneration and recruitment/appointment procedures. Municipal councils should provide for at least the following regarding personnel management:

- a written service contract which explains the general conditions of service
- an employee file setting out the date of appointment, the position and basic remuneration package
- basic job description lists
- grievance and disciplinary procedures.

Every council should have a data base containing a record of all the posts and jobs in that council's service. In planning and improving on the structure of a municipal organisation, posts should be ranked and grouped together in appropriate departments or sectors. It is also a good policy to review the staff establishment periodically in order to ensure that the administrative structure is still streamlined and effective.<sup>13</sup> In recent years, many questions have been asked about the overall remuneration packages that are paid to municipal personnel. According to media reports, some municipal managers have even bigger remuneration packages than the president of the country. It follows, therefore, that an urgent investigation of how such remuneration rates are determined should be undertaken. Craythorne identifies methods that can be used to determine an acceptable remuneration rate for a particular post.<sup>14</sup> The methods are:

- to compare a post with a similar post in the private sector
- to compare posts between different municipal councils
- to use a cost of living index
- to look at customary or trade rates in a particular area.

Apart from establishing an effective administrative personnel corps, municipalities should also ensure that proper manpower planning initiatives are put in place. According to Craythorne, personnel planning is concerned with identifying the personnel needs of a particular organisation. Proper planning is required to replace those staff mem-

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<sup>13</sup> It is of interest to note that the staff component of a municipality constitutes a large proportion of the costs of that council's operating budget and that there has to be proper control over the number of posts permitted. Employee remuneration comprises a large part of a municipal budget, and it includes not only the basic salary packages but also issues such as housing subsidies, pension or provident scheme contributions, medical aid, life insurance, bonuses and long-service awards.

<sup>14</sup> See Craythorne (1997) 310-312.

bers who leave the organisation by resigning, retiring, or for other reasons. Personnel planning is essential if municipalities are to fulfil their objectives and duties.<sup>15</sup> Apart from personnel planning, municipal councils as employers should also spend considerable time on the motivation and development of their human resources. Often municipal employees work in unpleasant and highly stressful circumstances, and it is important for the managerial structures to ensure that employees are motivated. Without a motivated personnel corps the desired, and indeed required, results are not likely to be achieved. Various practical steps have been developed to motivate employees.<sup>16</sup>

One of the most important challenges facing the new local government dispensation is ensuring and building properly trained local government administrations. South Africa requires trained municipal employers in order to meet the needs of local populations. Without adequately trained personnel, many service standards will decline, and some municipal governments will not be able to fulfil and adhere to their new constitutional obligations. In an effort to enhance the training of municipal personnel, various initiatives have been introduced which, through proper application, could significantly boost training targets.<sup>17</sup>

### **17.3 New legislative provisions regarding municipal staff matters**

#### **17.3.1 *The appointment and employment conditions of municipal managers***

Under the new local government legislative framework, the head of the municipal administration is called the “municipal manager”.<sup>18</sup> In his/her capacity as the head of the administration of a municipality, the municipal manager is tasked with a wide range of responsibilities and is also the final accountable official for many municipal affairs. Both the responsibilities and accountable duties are subject to the policy directions of the particular municipal council, however.<sup>19</sup> It is generally accepted that

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<sup>15</sup> See Craythorne (1997) 317. In essence, personnel planning ensures that an organisation will have and continue to have a certain required number and quality of personnel that are able to perform the tasks of the organisation in order for it to be successful.

<sup>16</sup> Some of these steps are: to ensure that the organisation has a shared objective or mission statement; to enhance aspects of team spirit or esprit de corps; by sharing responsibility and authority; by rewarding excellence; by allowing inputs from employees in relation to work procedures; through proper training initiatives; by clearly identifying expectations and tasks; by introducing regular performance appraisals and by treating employees as human beings. See Craythorne (1997) 322-323.

<sup>17</sup> See Craythorne (1997) 323 *et seq.*

<sup>18</sup> This office was formerly known as the Chief Executive Officer (CEO) during the transitional phases, and the Town or City Clerk under the old dispensation.

<sup>19</sup> See the Systems Act s 55(1).

the municipal manager is the chief of a municipal administration and that he/she is also the chief agent of that municipality. This position has already been confirmed in a number of judicial decisions. In *Gcali NO v MEC for Housing & Local Government, EC*<sup>20</sup> the court held that in authorising the institution of legal proceedings, a town clerk acted as an agent for the municipality. Furthermore, when the interests of the municipality so demanded, the town clerk had to act as a *negotiorum gestor* on behalf of the municipality and had no authority to institute legal action on behalf of the municipality without instructions to do so.<sup>21</sup> In the case of *King William's Town TLC v Border Alliance Taxi Association (Bata)*<sup>22</sup> it was mentioned that the town clerk as chief executive officer was not merely the recipient of instructions, he/she was

- privy to the council's deliberations, debates and decisions
- in as good a position as any other to give evidence of the collective mind of the council over years
- the proper person/functionary to testify to the reasons for council decisions.

Such evidence is admissible and relevant to show that the council applied its corporate mind to a particular issue.<sup>23</sup> According to the new legal order, a municipal manager is responsible and accountable for the following:<sup>24</sup>

- the formation and development of an economical, effective, efficient and accountable administration that is equipped to carry out the task of implementing the municipality's IDP, to operate in accordance with the municipality's performance management system and to be responsive to the needs of the local community in order to participate in the affairs of the municipality<sup>25</sup>
- the management of the municipal administration in general
- the implementation of the municipality's IDP as well as the monitoring of progress with the implementation of the plan
- the management of the provision of services to the local community in a sustainable and equitable manner

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<sup>20</sup> 1996 (4) SA 456 (TkS).

<sup>21</sup> See paras E-H at 463.

<sup>22</sup> 2002 (4) SA 152 (E).

<sup>23</sup> See paras B-E at 156.

<sup>24</sup> See the Systems Act s 55(1)(a)-(q).

<sup>25</sup> It is therefore the municipal manager's responsibility to ensure that a proper municipal administration is established and maintained in order for that municipality to fulfil its obligations and duties.

- the appointment of staff other than the staff that are appointed by the municipal council itself<sup>26</sup>
- the management, effective utilisation and training of staff
- the maintenance of discipline of staff
- the promotion of sound labour relations and compliance by the municipality with applicable labour legislation
- advising the political structures and political office bearers of the municipality
- managing the communications between the administration and political structures
- carrying out the decisions of the political structures
- overseeing the administration and implementation of the municipal by-laws and other legislation
- the exercise of any power or performance of any duties delegated by the municipal council or other body under a sub-delegation to the (office of the) municipal manager
- facilitating the participation by the local community in the affairs of the municipality
- developing and maintaining a system whereby community satisfaction with municipal services is assessed
- ensuring or overseeing the implementation of national and provincial legislation applicable to the municipality
- performing any other function that may be assigned by the municipal council to the municipal manager.

A further important responsibility of the municipal manager is to ensure and oversee the municipality's financial and fiscal matters. The municipal manager is *ex officio* and *ex lege* the accounting officer of a municipality and as accounting officer he/she is responsible and accountable for

- all income and expenditure of the municipality
- all assets and the discharge of all liabilities of the municipality
- the proper and diligent compliance with the Municipal Finance Management Act.<sup>27</sup>

In light of the aforementioned, it is clear that from an administrative point of view the municipal manager is the final responsible and accountable person in relation to the

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<sup>26</sup> See the Systems Act s 55(1)(e) read with s 56(a). Note that the appointment of staff is subject to various legislative requirements, including the Employment Equity Act 55 of 1998.

<sup>27</sup> See the Systems Act s 55(2)(a)-(c) as amended by Act 44 of 2003. Refer also to ch 17 of this work.



general obligations and duties of a municipality. It goes without saying that the tasks and responsibilities of the municipal manager are enormous and that, unless he/she is assisted by a dedicated and effective municipal administration, it is difficult to imagine how all the responsibilities falling under such a post can properly be fulfilled.

In an effort to assist a municipal manager in the fulfilment of his/her responsibilities, the new legislative system developed for local government specifically envisages the appointment of managers that are directly accountable to the municipal manager. In this regard it is required that after consultation with the municipal manager a municipal council should appoint a manager (or managers) that are directly accountable to the municipal manager. The appointment of managers should enable a municipal manager to fulfil the diverse responsibilities vested in the position.<sup>28</sup> A person that is appointed as a manager must have the relevant skills and expertise to perform the duties that are associated with the post in question. For example, if a manager is appointed to manage municipal finance, that person must have the necessary skills and expertise to perform such duties. These are usually acquired through academic studies and practical experience.<sup>29</sup>

The appointment of municipal managers and other managers accountable to the municipal managers is further regulated through various legislative provisions. In this respect, it is required that a municipal manager or other managers be appointed to such posts only in terms of written employment contracts with the municipality and subject to separate performance agreements that are concluded annually between the council and the incumbents.<sup>30</sup> The performance agreement must be concluded within a reasonable time after a person is appointed and thereafter within one month after the beginning of the municipality's next financial year. When a performance agreement is concluded with a municipal manager, the agreement must be entered into with the municipality as represented by the mayor or executive mayor, and when

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<sup>28</sup> Note that it is the responsibility of the municipal council to appoint the managers under the municipal manager. Although prior consultation between the council and the municipal manager should take place, it is still the council's decision whom to appoint as managers. Only consultation is required; not consensus or agreement. It would be unwise to appoint managers with whom the municipal manager is not satisfied or comfortable, however. A strong and united managerial team should be pursued. Although the Systems Act refers only to the appointment of a manager, it is submitted that the intention of the legislator was the appointment of one or more such managers. See the Systems Act s 56(a).

<sup>29</sup> When managers or other personnel are appointed, the requirements of any applicable affirmative action policy should be considered. See the Systems Act s 56(b).

<sup>30</sup> See the Systems Act s 57(1)(a)-(b).

entered into with other managers, as represented by the municipal manager.<sup>31</sup> With regard to the performance agreement, it is required that such an agreement include:

- the performance objectives and targets that must be met, as well as the time frames within which targets must be met
- the standards and procedures for evaluating performance and intervals for evaluation
- the consequences of substandard performance.<sup>32</sup>

Finally, it is required that the employment contract for a municipal manager be concluded for a fixed term of employment, which term may not exceed a period ending two years after the election of the next council of the municipality. The term may thus be no longer than seven years.<sup>33</sup> The contract must also provide for a cancellation clause should there be non-compliance with the employment conditions.<sup>34</sup> Although the term of the contract must be fixed, it is possible for the renewal of the employment relationship. The only statutory requirements in this regard are that although the renewal of the employment contract is permitted it can be done only by agreement between the relevant parties. In the last instance, the municipal manager's employment contract must reflect the values and principles referred to in section 50 of the Systems Act, the code of conduct for municipal staff members as well as the management standards and practices that are contained in section 51 of the Systems Act. On this point it should be noted that the requirements relating to the em-

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<sup>31</sup> See the Systems Act s 57(2) and (3). The employment contract mentioned above must include details of duties, remuneration, benefits and other terms and conditions of the employment. All related employment particulars are subject to applicable labour legislation. It should be noted that under old-order laws, many of which are still applicable, issues such as medical aid schemes, pension schemes etc. were also addressed. Such aspects should be closely considered. See, eg, the case of *Munimed v Premier, Gauteng and Others* 1999 (4) SA 351 (T), where the court held that by establishing a medical aid scheme contrary to the provisions of s 79bis(1) of the Local Government Ordinance 17 of 1939 (T), the administrator had acted beyond the scope of his powers.

<sup>32</sup> The performance objectives and targets must be practical, measurable and based on the key performance indicators set out in the municipality's IDP. The provisions of the MFMA conferring responsibilities on the accounting officer of a municipality must be regarded as forming part of the performance agreement of a municipal manager. It should also be noted that bonuses based on performance may be awarded to a municipal manager or a manager directly accountable to the municipal manager after the end of the financial year and only after an evaluation of performance and approval of such evaluation by the municipal council. See ss 4A and 4B as inserted by Act 44 of 2003 s 8. Refer also to s 57(5) of the Systems Act.

<sup>33</sup> The normal term of a municipal council is 5 years plus the maximum 2 years mentioned above.

<sup>34</sup> Such conditions may also include the fulfilment or compliance with the relevant performance agreement conditions as were agreed upon. See the Systems Act s 57(6)(b).

ployment contract of a municipal manager may also be extended to the contract of any other manager that is directly accountable to the municipal manager.<sup>35</sup>

An aspect that has become very controversial in recent times is the remuneration packages that are paid to municipal managers and other managers. It is reported that in some instances, particularly where metropolitan councils are involved, the municipal managers earn very high remuneration packages; in some cases these are even more than members of the national government. This situation seems somewhat distorted and is currently under investigation. One must remember, however, that a municipal manager is not a political functionary in a municipal government, but is part of the administrative component. A comparison between the salary of such a person and a political functionary is therefore not necessary. Salaries of municipal staff members, including a municipal manager, form part of the public administration and should be regulated under such principles. In principle, it is advisable for government to structure the remuneration of the public service in a uniform manner within all spheres of government and after all relevant considerations have been taken into account. With regard to the remuneration of municipal managers or other managers, the Systems Act required that on or before 31 October of each year a municipality had to publish in the media the salary scales and benefits of the municipal manager and other managers directly accountable to the municipal manager.<sup>36</sup>

### ***17.3.2 Basic principles relating to local public administration and internal municipal organisation***

It was mentioned above that issues concerning the local public administration and internal municipal organisational structures are also regulated within the framework of national legislation and that compliance to such requirements must also form part of the conditions of employment of a municipal manager. With reference to the values and principles of local public administration, the new legislative framework states that the local public administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution. Furthermore, in the administra-

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<sup>35</sup> See the Systems Act s 57(7). Note that the Act ss 50 and 51 deals with the basic values and principles relevant to local public administration and organisational requirements of municipal administrations respectively. Such requirements are discussed below.

<sup>36</sup> There seems to be no legislative regulation in relation to what such salaries or benefits should be. It is thus up to especially national government to regulate such issues via uniform legislative provisions. Note that s 58 was repealed by Act 44 of 2003 s 9.

tion of its affairs a municipality must strive to achieve the objectives of local government and the general duties of municipalities.<sup>37</sup>

Apart from the general principles that regulate public administration, all municipalities must establish and organise their administration, within their administrative and financial capacity, in a manner that would enable a municipality to achieve and comply with certain objectives/requirements. These objectives are the following:<sup>38</sup>

- to be responsive to the needs of the local community
- to facilitate a culture of public service and accountability amongst municipal staff
- to be performance orientated and focused on the objectives and duties of local government in general
- to ensure that political structures, political office bearers and managers and other staff members align their roles and responsibilities with the priorities and objectives set out in the municipality's IDP
- to establish clear relationships and to facilitate co-operation, co-ordination and communication between political structures, office bearers and the administration and the local community
- to organise the political structures, office bearers and the administration in a flexible way in order to respond to changing priorities and circumstances
- to perform municipal functions through operationally effective and appropriate administrative units and mechanisms, including through departments and other functional or business units; such functions, when necessary, may also be performed on a decentralised basis
- to assign clear responsibilities for the management and co-ordination of the administrative units and mechanisms
- to hold the municipal manager accountable for the overall performance of the administration
- to maximise efficiency of communication and decision making within the administration
- to delegate responsibility to the most effective level within the administration
- to involve staff in management decisions as far as is practicable

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<sup>37</sup> See the Systems Act s 50(1) and (2). The values set out in s 195 will be discussed in a separate chapter dealing with the basic principles concerning the public administration.

<sup>38</sup> See the Systems Act s 51(a)-(m).

- to provide an equitable, fair, open and non-discriminatory working environment.

Suffice it to say that the structuring and management of a municipal administration is quite a complex and extensive exercise. The internal arrangements are therefore likely to differ from one municipality to another as circumstances may require or depending on the category of municipality in question. There seem to be no uniform models of how a municipal administration should be established. What is certain, however, is that municipalities must establish and organise their administrations to ensure compliance with the set criteria, and the way in which the administration is structured and organised may vary from one municipality to another, as long as the minimum objectives are attained. Because of a possible conflict between municipal staff affairs and labour legislation in general, it is determined that in the event of any inconsistency between a provision in the Systems Act relating to municipal organisational matters, including the code of conduct for municipal staff members and any applicable labour legislation, such labour legislation should prevail.<sup>39</sup> In this regard it should be obvious that all municipalities under the new local government dispensation must familiarise themselves with applicable labour laws and developments and must ensure compliance with such laws.<sup>40</sup>

### **17.3.3 Municipal staff matters**

According to the Systems Act, it is the responsibility of the municipal manager to

- approve a staff structure for the municipality
- provide a job description for each post
- attach to the posts the remuneration and service conditions as may be determined
- establish a process or mechanism to evaluate the staff establishment regularly and, if necessary, to review such establishment and the remuneration or conditions of service.<sup>41</sup>

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<sup>39</sup> See the Systems Act s 52. In situations of conflict, provisions of the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997 or other labour legislation will prevail over the aspects directed at the structuring and management of internal municipal administrations set out in the Systems Act or regulations made under the Act.

<sup>40</sup> For examples of such labour disputes see the cases of *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) and also *Ntshotsho v Umtata Municipality* 1998 (3) SA 102 (Tk). Even part-time employees of municipalities are protected under labour laws, and they cannot be dismissed contrary to their employment contracts and without proper cause.

<sup>41</sup> These obligations do not apply to the employment contracts of managers directly accountable to the municipal manager. See the Systems Act s 66(1)-(2). The obligations on the municipal manager are subject to any applicable legislation and the policy framework that has been determined by the relevant municipal council. The protection given under any applicable legislation is to ensure

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All municipalities are obligated to develop and adopt appropriate systems and procedures that are directed at achieving fair, efficient, effective and transparent personnel administrations. Such systems and procedures must comply with applicable laws and are also subject to any applicable collective agreements that are in effect. The systems and procedures should provide for the following aspects:<sup>42</sup>

- the recruitment, selection and appointment of persons as staff members
- service conditions of staff
- supervision and management of staff
- monitoring, measuring and evaluating the performance of staff
- the promotion and demotion of staff
- the transfer of staff
- grievance and disciplinary procedures
- investigations of allegations of misconduct or complaints against staff
- the dismissal and retrenchment of staff
- any other matter prescribed by regulation.

It is the responsibility of the municipal manager to ensure that every staff member or relevant trade union has easy access to a copy of the staff systems and procedures. On the written request of a staff member, a copy or part of the relevant staff systems and procedures must be made available to that staff member. It is also the responsibility of the municipal manager to ensure that all staff members have been informed about the systems and procedures.<sup>43</sup>

Municipalities should also develop various capacity-building initiatives. All municipalities are obligated to develop their human resources capacities in order to perform their functions and to exercise their powers as is required by the Constitution and other applicable legislation. In this respect, the provisions of the Skills Development Act,<sup>44</sup> as well as the Skills Development Levies Act,<sup>45</sup> are of particular importance and must be complied with. Apart from any training levies required by law, a municipality may in addition provide in its budget for the development and training pro-

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that a municipal manager cannot unilaterally change or amend conditions of employment of members of staff. Strict requirements are set in this regard by mainly the Labour Relations Act.

<sup>42</sup> See the Systems Act s 67(1)(a)-(k).

<sup>43</sup> Refer to the Systems Act s 67(4)(a)-(c). Special attention must be given to informing staff members who cannot read.

<sup>44</sup> 97 of 1998.

<sup>45</sup> 9 of 1999.

grammes of municipal personnel. If a municipality does not have the financial means to provide additional funds for training, it may apply to the Sector Education and Training Authority (SETA) for local government for such funds. The SETA was established in terms of the Skills Development Act to assist municipalities in training programmes.<sup>46</sup>

#### **17.3.4 The code of conduct for municipal staff members**

Similar to the position regarding political office bearers of municipalities, all municipal staff members must adhere to a particular code of conduct that is very similar to the code of conduct applicable to municipal councillors. The code of conduct is set out in Schedule 2 of the Systems Act, and it states the following:

- *General conduct* All staff members of municipalities must at all times:
  - (a) execute loyally the lawful policies of the municipal council
  - (b) perform the functions of office in good faith, diligently, honestly and in a transparent manner
  - (c) act in such a way that the spirit, purport and objects of a municipal administration are promoted<sup>47</sup>
  - (d) act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised
  - (e) act impartially and treat all people, including other staff members, equally without favour or prejudice.<sup>48</sup>
- *Commitment to serving the public interest* In light of the fact that every municipal staff member is recognised as a public servant in a developmental local system, all staff members must:
  - (a) implement the provisions of organisational systems as is set out in section 50(2), (b)
  - (b) foster a culture of commitment to serving the public, together with a sense of responsibility for performance in terms of standards and targets
  - (c) promote and implement the basic values and principles of the public administration

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<sup>46</sup> For more details see both the Skills Development Act and Skills Development Levies Act mentioned above. Refer also to the Systems Act s 68(1)-(3).

<sup>47</sup> See the Systems Act s 50 for such objects.

<sup>48</sup> Refer to the Systems Act Sch 2 Item 2.



- (d) seek to implement the objectives of the municipal IDP and to achieve the performance targets set for each performance indicator
- (e) participate in the overall performance management system as well as the individual performance appraisal and reward system.<sup>49</sup>
- *Personal gain* A staff member of a municipality may not use his/her position or privileges or confidential information for private gain or to improperly benefit another person. Personnel may also not take a decision on behalf of the municipality concerning a matter in which that staff member, his/her spouse, partner or business associate has a direct or indirect personal or private business interest.<sup>50</sup> Furthermore, and unless a staff member has obtained prior consent from the council, no staff member may be a party to a contract for the provision of goods or services to the municipality or may not perform any other work for the municipality apart from the duties associated with his/her employment contract. Staff may also not obtain a financial interest in any business of the municipality or be engaged in any business, trade or profession, other than his/her work for the municipality.<sup>51</sup>
  - *Disclosure of benefits* Any direct benefit from a contract concluded between the municipality and a staff member or spouse, partner or business associate of such a staff member must be disclosed in writing and with full particulars. This disclosure does not apply to a benefit which a member of staff has acquired in common with all other residents of the municipality, however.<sup>52</sup>
  - *Unauthorised disclosure of information* Without permission, members of a municipal staff may not disclose to an unauthorised person any privileged or confidential information obtained. On this point, privileged or confidential information includes any information that
    - (a) is determined as such by the municipal council or any of its structures or functionaries
    - (b) is discussed in closed session by the council or a committee
    - (c) would violate a person's right to privacy

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<sup>49</sup> See the Systems Act Sch 2 Item 3.

<sup>50</sup> According to the Act, a "partner" refers to a person who permanently lives with another person in a manner as if they are married.

<sup>51</sup> See the Systems Act Sch 2 Item 4.

<sup>52</sup> See the Systems Act Sch 2 Item 5.

(d) is declared to be privileged, confidential or secret in terms of the law.<sup>53</sup>

- *Unduly influence* A staff member of a municipality may not unduly influence or attempt to influence the council, a structure, functionary, or councillor with a view to obtaining any appointment, promotion, privilege, advantage or benefit, or for such a benefit or advantage for a friend, associate or family member. Furthermore, members of staff may not mislead or attempt to mislead the council, municipal structures or functionaries in their consideration of any matter. No member of staff may be involved in a business venture with a councillor unless prior written consent of the council has been obtained.<sup>54</sup>
- *Receiving gifts, favours or rewards* Municipal staff may not request, solicit or accept any reward, gift or favour in return for
  - (a) persuading the council or any structure or functionary to exercise any power or perform any duty
  - (b) making a representation to the council or any structure
  - (c) disclosing any privileged or confidential information
  - (d) doing or not doing anything within that staff member's powers or duties.<sup>55</sup>

It seems from the wording of the item that an innocent gift received by a staff member for having done his/her work well or because he/she has "gone the extra mile" would not be in contravention of the code of conduct. Personnel should be very careful, however, and should not accept gifts from the public or immediately report such a gift or favour to their superiors or the speaker of the council. It is common practice for municipal staff to receive flowers, a box of chocolates, a bottle of wine or free tickets for a meal or sports happening as a gesture of appreciation from a member of the local community. The acceptance of such gifts should not be seen as a contravention of the code, but staff should be careful not to create a wrong impression. It is advisable for municipalities to establish a clear policy on such matters.

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<sup>53</sup> See the Systems Act Sch 2 Item 6. It should be noted that the prohibition to disclose information does not derogate from a person's right to access to information, which is provided for in terms of national legislation. For more, see the Promotion of Access to Information Act 2 of 2000.

<sup>54</sup> See the Systems Act Sch 2 Item 7.

<sup>55</sup> All staff must report to either a superior official or to the speaker of the council without delay any offer which, if accepted, would constitute a breach of this subitem. Municipal staff are thus obligated to report any attempts from other persons or institutions to solicit a bribe or to try and buy favours. Refer to the Systems Act Sch 2 Item 8.

- *Council property, payment in arrears and staff participation in elections* No member of a municipal staff may use, take, acquire or benefit from any property or asset owned, controlled or managed by that municipality. Again it is submitted that the circumstances of each case will be indicative of whether or not there is a real contravention of this prohibition. Innocent usage, without real benefit to the staff member, should not be regarded as a breach of this item.<sup>56</sup>

Similar to municipal councillors, no member of staff may be in arrears to the municipality for rates and services charges, for a period longer than three months. After this period, municipalities are permitted to deduct any outstanding amounts from staff members' salaries. This stipulation is somewhat controversial, however. Although it is acceptable that staff members and councillors should set an example regarding payment for municipal rates and service charges, it is not clear why outstanding amounts may be deducted from staff members' salaries but not from the salaries of councillors.<sup>57</sup> Furthermore, it seems unlawful to recover outstanding debts without an investigation regarding the merits of each case.<sup>58</sup> It is submitted that such automatic recovery of outstanding amounts should not be permitted, as it raises several legal and even constitutional issues. Municipalities should be obligated to follow the normal procedure applicable for the recovery of outstanding rates and services charges under the law in general.

A further and somewhat unclear provision in the code of conduct is that municipal staff are prohibited from participating in an election of the council of the municipality, other than in an official capacity or pursuant to any constitutional right. Staff members also have constitutional rights regarding the participation in municipal elections, and the purpose of this item is not clear.<sup>59</sup>

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<sup>56</sup> Eg, if a staff member uses the internet and prints a report for a personal use, or if member uses stationery that belongs to the council, such events should not constitute a breach of the code. The well-known maxim of South African law, namely *de minimus non curat lex*, should be applicable in such instances. See the Act Sch 2 Item 9.

<sup>57</sup> Cf Sch 2 Item 10 and Sch 1 Item 12A as inserted by Act 51 of 2002.

<sup>58</sup> It is quite possible for a municipal staff member to be in a dispute with his/her local municipality and subsequent employer regarding the correctness of a municipal account. To allow a council to deduct any amounts it deems outstanding from the salary of the staff member would not only negatively prejudice such a staff member, but would probably also not pass the test under the Bill of Rights s 36. A staff member should be able to argue that he/she is being treated unequally and that normal recourse under the law has been restricted.

<sup>59</sup> See the Systems Act Sch 2 Item 11. See also the Constitution s 19, which refers to the political rights of every adult citizen.

- *Sexual harassment* Following on other legislative prohibitions, no staff member of a municipality may embark on any action amounting to sexual harassment. The purpose of this item is self-evident, and breaches will depend on the circumstances of each case.<sup>60</sup>

Finally, the code of conduct obligates all staff members to report such possible breach without delay to a superior officer or to the speaker of the council whenever staff members have reasonable grounds to believe that there has been a breach of this code. Any breach or breaches of the code must be dealt with in terms of the relevant disciplinary procedures that are in force within the relevant municipality.<sup>61</sup> It is the responsibility of the municipal manager to ensure that a copy of the code of conduct or any amendments thereof have been provided to every member of the staff, if applicable. The municipal manager must also ensure that the purpose, content and consequences of the code have been explained to staff members who cannot read and furthermore to communicate to the local community the sections of the code that affect the public.<sup>62</sup>

#### **17.3.5 Miscellaneous aspects relevant to municipal staff members and the organisational structure of a municipal administration**

In order to address any shortcomings in the new legislative framework enacted to regulate the internal organisational structures of municipalities as well as related staff matters, the Systems Act allows the minister responsible for local government to make regulations or to issue guidelines covering a vast array of matters. In relation to the making of regulations, the Systems Act confirms that the following matters may be extended by regulations:<sup>63</sup>

- the procedure to be followed in appealing against decisions taken in terms of delegated powers and the disposal of such appeals
- the suspension of decision on appeal

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<sup>60</sup> See the Systems Act Sch 2 Item 12.

<sup>61</sup> It is thus safe to conclude that a *prima facie* breach of the code does not (allow or) permit a municipality to act against such a staff member other than according to the normal disciplinary processes. A breach of the code thus creates a ground or grounds for further disciplinary action and does not allow immediate termination of the employment relationship between the parties. See the Systems Act Sch 2 Items 13 and 14 as amended. Note that a breach of the code is not only a ground for dismissal or other disciplinary steps, but that such steps may include a suspension without pay for no longer than three months; a demotion; a transfer to another post; a reduction in salary, allowances or benefits or an appropriate fine. See item 14A as added by Act 44 of 2003 s 29.

<sup>62</sup> See the Systems Act s 70(1) and (2).

<sup>63</sup> See the Act s 72(1)(a)(i)-(vi).

- the setting of uniform standards for municipal staff establishments, municipal staff systems and any other matters concerning municipal personnel administration
- capacity building within municipal administrations
- training of staff, including in-house-training subject to national legislation<sup>64</sup>
- any other matter that may facilitate the application of the chapter and requirements regarding local public administration and human resources.

On the other hand, it is also provided that the minister may issue guidelines to provide for the following matters:<sup>65</sup>

- the establishment of job evaluation systems
- the regulation of remuneration and other conditions of service of staff members of municipalities
- the measuring and evaluation of staff performance
- the development of remuneration grading and incentive frameworks for staff members
- corrective steps in cases of substandard performance by staff members
- any other matter that may facilitate the implementation by a municipality of an efficient and effective system of personnel administration.

When making regulations or issuing guidelines, the minister must take into account the capacity of municipalities to comply with such matters and differentiate between the different kinds of municipality, according to their capacities. Issues regarding local public administration and human resources which place a financial or administrative burden on municipalities may be phased in by the minister. Such phasing in is done by notice in the *Government Gazette*.<sup>66</sup> Finally, it is also important to note that apart from relevant labour legislation that must be adhered to, municipalities are also obliged to comply with any collective agreements that have been concluded by organised local government within its mandate on behalf of local government in the specific bargaining council that has been established for municipalities.<sup>67</sup>

#### **17.4 Conclusion**

It can be concluded that municipalities, in similar fashion to all other private or public entities, need an effective and efficient personnel corps in order to fulfil their vast array

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<sup>64</sup> See again the Skills Development Act and Skills Development Levies Act.

<sup>65</sup> See the Systems Act s 72(1)(b)(i)-(vi).

<sup>66</sup> See the Systems Act s 72(2)-(4).

<sup>67</sup> See the Systems Act s 71.

of municipal services and obligations. There is no doubt therefore that municipalities must make every possible effort to maintain, control, educate, train and motivate their respective administrative functionaries. In the past, local governments too often neglected their personnel obligations and political ambitions overshadowed people-related interests.

Under the new local government dispensation a rejuvenated effort has been launched to protect and enhance municipal labour- and staff-related matters. Local government does not operate in an exclusive environment, however, and therefore must adhere to standard labour laws and practices. In light of the specific tasks and obligations of all local governments, it is very important for all municipal administrations to organise and structure their respective administrations in such a manner that optimal efficiency is obtained. Bureaucratic institutions should be avoided and regular evaluation of the organisational structure must be undertaken.

Various new initiatives have been incorporated into the new legal framework to ensure more professional and skilled local government administrations. Such initiatives include *inter alia* the introduction of key performance indicators to measure overall performance, fixed term service contracts for senior personnel and a comprehensive code of conduct for all administrative staff. A municipal manager as head and chief of the municipal administration has been legally entrenched and is finally tasked with overall personnel accountability. All municipal managers should have strong leadership and human relations qualities, and municipal councils must ensure that properly trained and suitably experienced candidates are appointed to such positions. The influence of the municipal manager is of fundamental importance to the overall success of a particular local government.

With due regard to the various constitutional requirements, such as the principles of the public administration and financial management, read together with the new criteria on municipal administrative management, it is submitted that local governments should be able to perform and fulfil their legal functions and obligations. There seems to be a stronger realisation that without effective and efficient municipal administrations most, if not all, local governments will not be able to succeed in their roles as the third branch of the overall governmental structure of a new and truly democratic state.

## Issues relating to municipal finance and municipal fiscal management

### 18.1 Introduction

The overall reform and transformation of the new local government dispensation has not only affected the composition and internal functioning of all local governments in South Africa, it has also significantly impacted on municipal financial affairs. It is clear that municipalities need adequate financial resources to achieve their new constitutional objectives. From the outset it is important to note not only that municipal income sources should be protected, but also sound expenditure policies and financial control mechanisms must be implemented.<sup>1</sup> In light of the new constitutional dispensation, all governmental expenditure and financial management practices must adhere to the basic values of accountability and transparency.<sup>2</sup> Strict control over municipal financial matters is thus a *sine quo non* for a successful and effective local government sphere.

Against this background, a new legal framework has been developed to manage and control the financial affairs of all municipalities. At the centre of the new framework is the Constitution, which specifically requires that all local governments must be developmentally orientated and that they aim at meeting the basic needs of their respective communities in their budgeting and administrations.<sup>3</sup> Furthermore, municipalities must also strive to achieve various constitutional objectives, which spe-

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<sup>1</sup> No local government will be able to fulfil its overall constitutional objectives and duties without effective and strict monetary control. See also Cloete (1997) 108.

<sup>2</sup> These values are the basic foundations upon which the new governmental structure, including the new local government dispensation, is based. Refer also to the Constitution s 1.

<sup>3</sup> See the Constitution ss 152 and 153 respectively.



cifically include the provision of basic services to local residents in a sustainable manner.<sup>4</sup>

In order for the new framework of municipal finance to be effective, the White Paper on local government has identified three aspects which the new financial framework had to incorporate:

- The new system had to be developmentally orientated and had to address the root causes of current financial problems.
- A balance had to be achieved between programmes for poverty eradication combined with strategies of growth and job creation.
- All local governments had to be empowered to fulfil their overall constitutional mandates.<sup>5</sup>

It is further imperative that the new framework recognises and accommodates the difference between the three categories of municipality. In this respect it is important to take cognisance of the fact that urban and rural municipalities have very different financial circumstances and capacities.<sup>6</sup> In light of the abovementioned factors, the Department of Constitutional Development and Local Government has embarked on a programme to establish and enact various legislative provisions in order to establish a broad financial framework for local governments. Although it is hoped that the new legal framework will be effective in order to secure the responsibilities that local governments must meet, the department has encountered many delays in finalising the proposed legal framework.<sup>7</sup>

## **18.2 The new legislative framework for municipal financial management**

Within the new constitutional dispensation of South Africa, all local governments are specifically entrenched as being part of the government of the Republic, and their existence and functioning are thus constitutionally controlled and regulated. This is also the position regarding the principles of municipal finance. The Constitution pro-

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<sup>4</sup> In this regard it is submitted that sustainable services refer to services that can be continued on a day-to-day basis. Apart from sustainability, services should also be affordable to all members of local communities which in turn often require some form of local cross-subsidisation within a matrix of affordability, efficiency and constitutional effectiveness. See Craythorne (1997) 342.

<sup>5</sup> See the White Paper on Local Government (1998) at 129.

<sup>6</sup> See the three categories of municipality set out in the Constitution s 155. Against the backdrop of a combination of various factors, such as the system of segregation, poor administration and inadequate control measures, many local governments, especially in rural areas, do not have adequate tax bases to fund and sustain basic service delivery.

<sup>7</sup> It took nearly five years to finalise the new Local Government: Municipal Property Rates Act, and the Local Government: Municipal Finance Management Act.

vides the basic foundation and directives which have to be observed and complied with by all spheres of government, including municipalities. In relation to municipal finance, the Constitution incorporates various directives, and accordingly the new restructured system of municipal finance needs to be founded on the supreme constitutional foundation. Apart from such constitutional provisions, both national and provincial legislatures are authorised to enact further legal rules in order to complete the new envisaged system. Each of the new legislative sources is discussed below.

### **18.2.1 The broad constitutional foundation relevant to municipal finance**

According to the Constitution, all municipalities are obligated to structure and manage their administrations, budgeting and planning processes in such a way as to give priority to the basic needs of their respective communities and also to promote the social and economic development of such communities. In order to achieve these constitutional duties, all municipalities are obligated to participating in national and provincial development programmes.<sup>8</sup> A further important constitutional requirement that impacts on municipal financial affairs is the fact that neither national government nor provincial governments may compromise or impede a municipality's ability or right to exercise its powers or perform its functions. Both higher spheres of government must support and strengthen the capacity of municipalities to manage their own affairs and to exercise and perform their powers and functions.<sup>9</sup> It is clear from the constitutional text that the two higher spheres of government have a significant responsibility to ensure that municipalities are capacitated and able to perform their powers and functions. Apart from the provisions mentioned above, the chapter on local government in the Constitution contains no requirements regarding the system of municipal finance. However, the broad requirements relating to municipal finance are set out in chapter 13 of the Constitution, which deals with the financial affairs of all three spheres of government. In this regard, the Constitution deals with the following:

- *National revenue fund* The Constitution determines that a national revenue fund be established and that all money which is received by the national government

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<sup>8</sup> Refer to the Constitution s 153. This section must be read together with s 152, which confirms the various objects that municipalities must strive to achieve, depending on their financial and administrative capacities.

<sup>9</sup> See the Constitution s 151(4) read with s 154(1).

be paid into such national revenue fund. Only money that is reasonably excluded by an Act of parliament may be deposited in another fund(s).<sup>10</sup>

- *Equitable shares and allocations of revenue* According to the Constitution, an Act of parliament must provide for *inter alia*, the equitable division of revenue that has been raised nationally among the national, provincial and local spheres of government and also for any other allocations of revenue to provinces. The Act must also provide for any other allocations to the provinces or *local government or municipalities* from the national government's share of that revenue and any conditions on which those allocations may be made.<sup>11</sup> The Act of parliament that regulates the equitable share and allocation of revenue raised nationally may be enacted only be after the provincial governments, Organised Local Government (OLG) and the Financial and Fiscal Commission (FFC) have been consulted, and after any recommendations of the commission have been considered. Furthermore, the Act must take various factors into account, such as *inter alia*:
  - (a) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them
  - (b) the fiscal capacity and efficiency of the provinces and municipalities
  - (c) the developmental and other needs of provinces and municipalities
  - (d) the various obligations of the provinces and municipalities that have been allocated to them in terms of national legislation.<sup>12</sup>

In essence, the Constitution addresses intergovernmental fiscal relations in two broad respects. On one hand the Constitution entitles the local sphere of government to an equitable share of revenue raised nationally. Such sharing of national revenue is generally referred to as "intergovernmental transfers" (IGTs). Apart from the entitlement to share in revenue, the Constitution specifically entrenches oversight and regulation of the financial affairs of municipalities in the national government.<sup>13</sup>

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<sup>10</sup> See the Constitution s 213(1)-(3).

<sup>11</sup> Refer to the Constitution s 214(1)(a)-(b). In compliance with s 214(1)(a) national parliament has enacted the Division of Revenue Act 7 of 2003. The Act specifically provides for the equitable division of revenue between the three spheres of government.

<sup>12</sup> For more details see the Constitution s 214(2)(a)-(j). The use of the terms "local governments" and "municipalities" in s 214 is somewhat unclear and unnecessary, as both terms are synonymous with one another.

<sup>13</sup> This oversight and control is protected in various sections of the Constitution. For more details, refer to the Constitution ss 100, 139, 155(7), 229 and 230A. Many other sections regarding

- *National, provincial and municipal budgets* The new constitutional dispensation envisages an overall financial system for all spheres of government that is transparent, effective and accountable and regards it as obligatory. All national, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.<sup>14</sup> Again, the Constitution itself requires national legislation to further complete and regulate such financial processes. The national legislation must prescribe the form of the budgets in all three spheres of government, and all budgets must show the sources of revenue and the way in which proposed expenditure will comply with national legislative requirements.<sup>15</sup> The Constitution further determines that each budget in each sphere of government, including all municipal budgets, must contain specific information. For example, each budget must contain estimates of revenue and expenditure, proposals for financing any anticipated deficit and an indication of intentions regarding borrowing and also other forms of public liability that will increase public debt.<sup>16</sup>
- *Treasury control and procurement* The Constitution also requires national legislation to establish a national treasury and to prescribe measures to ensure both transparency and expenditure control in each sphere of government. Such measures are to be achieved by introducing generally recognised accounting practices, by uniform expenditure classifications and through uniform treasury norms and standards. It is the responsibility of the national treasury to enforce compliance with the measures that have been mentioned above. If an organ of state commits a serious or persistent material breach of the mentioned measures, then the national treasury may stop the transfer of funds to that organ or organs.<sup>17</sup> It is evident that the Constitution, as with other issues, vests the final oversight and control with the national sphere of government, within which sphere the national treasury operates. This is also the case concerning municipal treasury control.

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finance such as ss 215 and 216 grant further powers to the national treasury to regulate municipal financial affairs. The Act will therefore set financial controls for all spheres of government and will impose responsibilities and penalties on not only accounting officers, but also on the municipal manager and political heads. Refer also to the White Paper on Local Government (1998) at 130-131.

<sup>14</sup> See the Constitution s 215(1).

<sup>15</sup> Refer to the Constitution s 215(2)(a)-(c).

<sup>16</sup> See the Constitution s 215(3)(a)-(c).

<sup>17</sup> See the Constitution s 216(1) and (2).

*Requirements regarding aspects of procurement* These are also constitutionally entrenched. When an organ of state in any sphere or any other institution so identified in national legislation contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and also cost effective. Procurement procedures or policies may further provide for categories of preference in the allocation of contracts and also for the protection or advancement of persons or categories of persons that have been disadvantaged by unfair discrimination.<sup>18</sup> National legislation must again prescribe a framework within which the procurement policy is to be implemented.<sup>19</sup>

In accordance with the abovementioned constitutional imperative set out in section 217 of the Constitution, national parliament has enacted the Preferential Procurement Policy Framework Act (PPPFA).<sup>20</sup> The main aim of the Act is to give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2). The PPPFA determines that organs of state, including municipalities, must determine their preferential procurement policies and also implement them within the following framework:<sup>21</sup>

- (a) A preference points system must be followed.
- (b) For contracts with a rand value above a prescribed amount, a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d), provided that the lowest acceptable tender scores 90 points for price. For contracts with a rand value equal to or below a prescribed amount, a maximum of 20 points may be allocated for specific goals, provided that the lowest acceptable tender scores 80 points for price.<sup>22</sup>

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<sup>18</sup> This preferential treatment is a good example of so-called "affirmative action" initiatives. It is submitted that although such initiatives are constitutionally permitted, the relevant institutions do not have a carte blanche freedom over the contract requirements with outside institutions. Such appointments or awarding of contracts must also comply with other constitutional requirements. See, eg, the provisions of s 9 (equality) and s 33 (fair administration action) set out in the Bill of Rights.

<sup>19</sup> See the Constitution s 217(1)-(3).

<sup>20</sup> 5 of 2000.

<sup>21</sup> See the PPPFA s 2(1)(a)-(g).

<sup>22</sup> "Prescribed" in this sense means prescribed by regulation by the Minister of Finance. See the PPPFA ss 1 and 5 respectively. Read also with the Act s 2(1)(d). Note also that an "acceptable tender" means any tender which in all respects complies with the specifications and conditions of tender set out in the tender document.

- (c) Any other acceptable tenders which are higher in price must score fewer points, on a *pro rata* basis. Points are calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula.
- (d) The specific goals may include the contracting with persons or categories of persons that have been historically disadvantaged by unfair discrimination on the basis of race, gender or disability and the implementing of the programmes of the Reconstruction and Development Programme.<sup>23</sup>
- (e) Any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender.<sup>24</sup>
- (f) The contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer.
- (g) Any contract awarded on account of false information by a tenderer to secure preference may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have in terms of the law.

On request, however, the Minister of Finance may exempt an organ of state from any or all of the provisions of the Act. Such exemption is permitted only if it is in the interests of national security, if the likely tenderers are international suppliers or if it is in the public interest to grant exemption.<sup>25</sup> Any procurement processes implemented under a preferential procurement policy, where the invitation to tender was advertised before the commencement of the PPPFA, must be finalised as if the Act had not come into operation. Furthermore, the minister may make regulations regarding any matter that may be necessary or expedient in order to achieve the objectives of the Act.<sup>26</sup> With reference to the tender processes of municipalities, the supreme court of appeal in *Metro Projects CC and Another v Klerksdorp Local Municipality and Others*<sup>27</sup> held that any tender process must be fair, equitable and cost effective. As an organ of state in the local government sphere, a municipality, in awarding a tender, is obliged to comply with section

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<sup>23</sup> See *Government Gazette* 16085 of 23/11/1994.

<sup>24</sup> Such goals must be measurable, quantifiable and monitored for compliance. See the Act s (2).

<sup>25</sup> Read the PPPFA s 3(a)-(e).

<sup>26</sup> Refer to the PPPFA ss 4 and 5.

<sup>27</sup> 2004 (1) SA 16 (SCA).

10G(5)(a) of the Local Government Transition Act,<sup>28</sup> read with section 217(1) of the Constitution. These provisions mandate it to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The PPPFA requires organs of State to establish a procurement policy, and also makes it obligatory for the first respondent, as an organ of state in the local sphere, to follow a tender procedure for the procurement of goods and services.

There is also another reason why the tender procedure of a local authority must be fair. Invitations by organs of state to tender and the awarding of tenders where it is done in the exercise of public power is an administrative process. Section 3(2)(a) of the Promotion of Administrative Justice Act<sup>29</sup> requires the process to be lawful, procedurally fair and justifiable. Fairness must be decided on the circumstances of each case. In given circumstances it may be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake and, particularly in a complex tender, it may be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.<sup>30</sup>

- *Government guarantees* Governments, including municipalities, may guarantee a loan or loans only if the guarantee complies with the conditions set out in national legislation.<sup>31</sup> In order to ensure accountability and transparency, the Constitution demands that every government publish a report each year on the guarantees it has granted. This is an important requirement, since a government guarantee is a legally binding instrument whereby such government has financially bound itself to the extent of that guarantee.
- *The remuneration of persons that are holding public office* In the former system for local government in South Africa, the remuneration of municipal office bearers had a significant impact on municipal finance. According to the Act on the remuneration of town clerks,<sup>32</sup> the town clerk was the highest paid official of a municipality, and his or her salary scale was the sealing of all salaries for a particular

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<sup>28</sup> 209 of 1993.

<sup>29</sup> 3 of 2000.

<sup>30</sup> See pages 20-21.

<sup>31</sup> See the Constitution s 218. The national legislation referred to in this section may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

<sup>32</sup> 115 of 1984.



municipality. Municipalities were further divided into categories, rated from 1 to 14, 1 being the smallest municipality and 14 the biggest. The top salary, that of the town clerk, was determined according to the specific category. Town clerks of category 14 municipalities earned much more than their counterparts in smaller local government structures. Under the new dispensation, the Constitution requires that an Act of parliament establish a framework for determining the upper limits of salaries, allowances or benefits of *inter alia* municipal councils of the different categories of municipality.<sup>33</sup> In order to make recommendations concerning the salaries, allowances and benefits mentioned above, the Constitution obligates national parliament to enact national legislation, which must then establish an independent commission to undertake such tasks. The provisions of such a national law may be implemented only by government institutions, including municipalities, after the consideration of any recommendations of the independent commission.<sup>34</sup>

- *The establishment of the Financial and Fiscal Commission* Under the new financial framework, the Constitution confirms that there is a Financial and Fiscal Commission (FFC) for the Republic of South Africa which makes recommendations on government fiscal matters to parliament, provincial legislatures or other authorities. The commission is independent and subject only to the Constitution and the law. It must also be impartial and must perform its functions in terms of an Act of parliament.<sup>35</sup> The commission consists out of a chairperson and a deputy chairperson, one person nominated by the executive councils of each of the nine provinces, two persons nominated by organised local government and nine other

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<sup>33</sup> See the Constitution s 219(1)(b). It is interesting to note that only the *upper limit of salaries, allowances or benefits* of members of provincial legislatures, MECs and members of municipal councils must be established in terms of national legislation. See the Constitution s 219(1)(a). The Constitution does not require the national Act to prescribe only the upper limits of salaries or benefits of members of the NA or NCoP, cabinet, deputy ministers, traditional leaders or members of councils of traditional leaders. The Act must establish the specific salaries or benefits that are applicable. This position seems to indicate that a similar system as was used under the Act for the remuneration of town clerks is proposed for local government.

<sup>34</sup> Refer to the Constitution s 219(2) and (4). In compliance with this requirement, parliament has enacted the Independent Commission for the Remuneration of Public Office-bearers Act 92 of 1997.

<sup>35</sup> See the Constitution s 220. Furthermore, the Financial and Fiscal Commission Act 99 of 1997 has been enacted to give effect to the constitutional requirements that relates to the FFC.

persons.<sup>36</sup> Finally the FFC is obligated to report regularly, both to parliament and to the provincial legislatures.<sup>37</sup>

- *Provincial revenue funds and national sources of provincial and local government funding* Apart from the national revenue fund, the Constitution also determines that there should be a provincial revenue fund for each of the provinces into which all money received by a provincial government must be paid.<sup>38</sup> Money may be withdrawn from a provincial revenue fund only in terms of an appropriation allowed by a provincial Act. More importantly is the provision that revenue allocated through a province to local governments in terms of section 214(1) of the Constitution is a direct charge against that province's revenue fund.<sup>39</sup> It is furthermore determined that local government and each province is entitled to:
  - (a) an equitable share of revenue raised nationally to enable it to provide basic services and to perform the functions allocated to it
  - (b) receive other allocations from national government revenue, either conditionally or unconditionally.<sup>40</sup>

An important provision in this regard is that the Constitution protects additional revenue raised by provinces or municipalities. Such additional revenue may not be deducted from their share of revenue raised nationally or from any other allocations made to them. If a municipality is thus entitled to a specific share of revenue, but it has also earned additional revenue, by whatever means, such revenue may not be deducted from its original share amount. The intention of the constitutional

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<sup>36</sup> There should thus be in total 22 members of the commission. Members must also have appropriate expertise, which would include financial and public affairs expertise. See the Constitution s 221.

<sup>37</sup> Refer to the Constitution s 222.

<sup>38</sup> Exceptions may be provided for through an Act of parliament.

<sup>39</sup> Refer to the Constitution s 226. The Constitution further states that national legislation may determine a framework within which revenue allocated through a province to local government in that province, must be paid to municipalities in the province. In this regard the Intergovernmental Fiscal Relations Act 97 of 1997 has been enacted. The purposes of the act are to promote co-operation between the spheres of government relating to fiscal and budgetary matters, and to ensure equitable sharing and the allocation of revenue.

<sup>40</sup> See the Constitution s 227(1)(a)-(b). It is of interest to note that in the case of *In re: Certification of the Constitution of the RSA 1996*, 1996 (4) SA 744 (CC) the Constitutional Court held that the absence in the new text of the Constitution of a provision equivalent to the interim Constitution s 158(b), which provided that [the] financial allocations by the national government to local government shall ordinarily be made through the provincial government of the province in which the local government is situated was not a material diminution in the powers of provincial governments. S 158(b) established [only] the possibility, not the certainty, that provincial government could be utilised as a conduit through which funds raised nationally could be allocated to local government.

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drafters seems to be to promote and encourage provinces and municipalities to implement initiatives, so as to earn additional income. If such income were to be deducted from a municipality's share in income then there would be no motivation or purpose for it to secure additional revenue. By protecting additional revenue, municipalities are encouraged to devise new initiatives in order to raise more money for themselves and to thus be more able to fulfil and perform their functions and duties. As a counter protection, the Constitution also determines that there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.<sup>41</sup> It is submitted that although national government is under no obligation to compensate the two lower spheres of government for their own ineffectiveness to raise revenue which they should have raised, national government, being the highest sphere of government, is still constitutionally obligated to intervene and oversee the fulfilment of the duties and functions of the lower spheres.<sup>42</sup>

- *Municipal fiscal powers and functions* The chapter on finance in the Constitution specifically determines certain fiscal powers and functions for municipalities. In this regard municipalities may impose:
  - (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality
  - (b) other taxes, levies and duties appropriate to local government or the specific category concerned if so authorised by national legislation.<sup>43</sup>

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Such a section did not purport to create provincial powers in respect of such revenue. See para 430 at 897.

<sup>41</sup> See the Constitution s 227(2).

<sup>42</sup> See the Constitution ss 100, 139 and 154 respectively. Refer also to the case of *Member of the Executive Council for Local Government, Mpumalanga v IMATU and Others* 2002 (1) SA 76 (SCA). The court stated that the Constitution ss 139 and 154 do not impose on a provincial government the constitutional duty towards a local authority to provide it with funds to enable it to pay its debts. See paras 8-10 at 79.

<sup>43</sup> Refer to the Constitution s 229(a)-(b). National legislation must therefore determine such other taxes or levies before local governments may impose them. See also *Gerber and others v Member of the Executive Council for Development, Planning and Local Government, Gauteng and Another* 2003 (2) SA 344 (SCA). The case concerned an appeal regarding the legality of land rates imposed on owners of agricultural land. The local authority argued that it was entitled to impose a flat rate under the provisions of the Ordinance for the Transvaal Board for the Development of Peri-Urban Areas 20 of 1943 (T). The court held that the original powers granted to municipalities in terms of the Constitution s 229(1)(a) were to impose a property rate. "Rate" referred to rate on property in relation to size or value of property. S 229 did not depart from such a meaning. The LGTA s 10G(6) stated in pre-emptory terms that if not feasible to value or measure a property, rates could be determined as prescribed. Data of the properties was provided. The court held that there was no correlation between the size of the property and the rate imposed, thus the rate imposed

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It is, however, specifically determined that no municipality may impose income tax, value-added tax, general sales tax or customs duty. Such taxes may be imposed only by the national government; not even by provincial governments.<sup>44</sup> Municipalities clearly have the authority to impose rates on property and surcharges on fees for services and other taxes, levies or duties. However, such power or authority may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries or the national mobility of goods, services, capital or labour. National legislation is again envisaged to regulate such powers of municipalities.<sup>45</sup> When two municipalities have the same fiscal powers and functions in an area, an appropriate division of such powers and functions must be made in terms of national legislation. The division may be made only after at least the following criteria have been taken into account:<sup>46</sup>

- (a) the need to comply with sound principles of taxation
- (b) the powers and functions performed by each municipality
- (c) the fiscal capacity of each municipality
- (d) the effectiveness and efficiency of raising taxes, levies and duties
- (e) equity.

There is no prohibition on the sharing of revenue raised between municipalities that have fiscal powers in the same area. It is important that division of powers and the sharing of revenue between municipalities in the same area should be carefully considered and monitored. National legislation as well as the involve-

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treated landowners unequally. Owners of smaller pieces of land paid as much as owners of larger tracts of land within same area. Since the council relied on the Constitution s 229(1)(a) and not s 229(1)(b), which allowed a levy on property, its basis for calculation of the levy/rate was irrational, unfair and discriminatory. The rates were thus set aside. See para 25-28 at 354 and para 36 at 357. Refer also to *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (CPD). The case concerned the validity of a municipality levying service charges comprising part property rates and part service fees. The court held that there was nothing in the Constitution or other legislation that precluded a municipality from levying service charges that comprise both property rates and user fees. The court concluded that such authority is permitted under the LGTA, s 229 of the Constitution and ss 74-75 of the LG: Municipal Systems Act. See pages 560-561.

<sup>44</sup> See the Constitution s 228(1), which determines that provincial legislatures may impose taxes, levies and duties *other than* income tax, value-added tax, general sales tax, rates on property or customs duties. See the Constitution s 228(1)(a) read with s 229(1)(a).

<sup>45</sup> See the Constitution s 229(2).

<sup>46</sup> Refer to the Constitution s 229(3)(a)-(e).

ment of the FFC should play a vital role in creating an effective and equitable system of sharing revenue.<sup>47</sup>

- *Municipal loans* The Constitution determines that a municipal council may, in accordance with national legislation:
  - (a) raise loans for capital or current expenditure for the municipality
  - (b) bind itself and a future council in the exercise of its legislative and executive authority in order to secure loans or investments for the municipality.

It must be noted, however, that loans for current expenditure may be raised only when it is necessary for bridging purposes during a fiscal year.<sup>48</sup> The national legislation that authorises municipal loans may be enacted only after recommendations of the FFC have been considered.

It is clear from sections 229 and 230A of the Constitution that the Constitution grants municipalities considerable taxation and borrowing powers, but subject such powers to national legislative control and regulation. Municipal taxation powers are further also limited, in that they may not unreasonably prejudice national economic policies and activities. Finally, the prohibition that borrowings may not fund budget deficits effectively outlaws deficit budgeting on local government level. It is quite evident that the new constitutional framework specifically demands that local authorities adhere to specific constitutional directives when dealing with financial matters. These basic directives may be expanded upon by parliament through the enactment of new national legislation.

### **18.2.2 The new basic policy objectives**

In order to meet the new supreme objectives as set out in the Constitution, a new system of municipal finance had to be created. Such reconstruction had to conform

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<sup>47</sup> The sharing of revenue between municipalities in the same area is applicable only between category B and C municipalities, and national legislation must regulate the position. Such national legislation may be enacted only after organised local government and the FFC have been consulted and any of their recommendations have been considered, however. See the Constitution s 229(5). See also *Robertson & Another v City of Cape Town and Another* 2004 (5) SA 412 (CPD), where the court held that bilateral consultation had to take place between the FFC and the Minister or Parliament regarding the provisions of the Structures Act as amended, before such provisions could be enacted. Refer to para 109-110 at 446-448.

<sup>48</sup> The importance of municipal loans should not be underestimated, and such loans could have a significant impact on the fulfilment of the powers and functions of future councils. Because of this important impact, only the municipal council may conclude loans and may not delegate such authority. See the Constitution s 160(2)(d) read together with s 230A.

to a number of basic policy principles. According to the White Paper on local government, the principles for the new system can *inter alia* be summarised as follows:<sup>49</sup>

- *Revenue adequacy and certainty* All municipalities need to have access to adequate revenue sources to fulfil their powers and functions. Such sources should then be fully exploited in order for municipalities to meet their developmental objectives. In order to ensure compliance with their objectives, municipalities will need certainty regarding their revenue so as to allow them to plan realistically for the future.
- *Sustainability* Financial sustainability requires municipalities to ensure that their budgets are balanced. Income should cover expenditure adequately. In order to achieve sustainability, services should be provided at affordable levels, and municipalities must recover the costs of service delivery. Bail-outs for overspending on budgets or improper financial management will not be provided by higher spheres. In this regard, it is the responsibility of the political leadership to ensure that realistic budgets are set.
- *Effective and efficient use of resources*: Generally speaking, municipal resources are scarce and should be used in the best possible way to ensure maximum benefit for local communities. All communities should ensure through participation that their elected municipal council adheres to this important principle.
- *Accountability, transparency and good governance* Municipalities should be held responsible and accountable to local taxpayers for the use of public funds. Expenditure decisions must be explained in detail. The overall fiscal system should be designed to encourage accountability and should be open to public scrutiny. Community participation in the budgeting processes should be encouraged, and people should understand why decisions or priorities were taken. In general, the accounting procedures should allow for minimal opportunities for corruption and malpractice.
- *Equity and redistribution* Citizens must be treated equitably and within the ambit of the law. This treatment is also relevant to the provision of services. Municipalities themselves should also be treated equitably by the higher spheres of government regarding intergovernmental transfers. In order to ensure equity, municipalities are allowed to cross-subsidise between high and low-income con-

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<sup>49</sup> See the White Paper on Local Government (1998) at 131-132.



sumers. The extent of cross-subsidisation is a local choice and needs to be exercised very carefully within the overall framework of a municipality's integrated development plan.

- *Adhering to national policies* Municipalities form an important part of the public sector in South Africa. Many actions or decisions of local governments can substantially affect national policy. Municipalities thus need to operate and fulfil the obligations within the national macro-economic framework of the state.

### **18.2.3 Financial matters under the Local Government Transition Act**

Under the provisions of the LGTA, every municipality had to adhere to certain principles in respect of the management of its financial affairs. In this regard municipalities had to:<sup>50</sup>

- conduct their affairs in an effective, economical and efficient manner with a view to optimising the use of their resources in addressing the needs of the community
- conduct their financial affairs in an accountable and transparent manner
- prepare a financial plan in accordance with the IDP
- structure and manage their administration, budgeting and planning processes to give priority to the basic needs of their communities, to promote social and economic development and to support the implementation of national and provincial development programmes
- manage their financial resources so as to meet and sustain their objectives
- regularly monitor and assess their performance against their IDP
- annually report to and receive comments from their community regarding the objectives set out in their IDPs.

According to the LGTA, the chief executive officer (CEO) was responsible for keeping accounting records that reflected the transactions and financial state of affairs of a municipality. All money received had to be deposited in a banking account in the name of the municipality. Every municipality was also obligated to establish and maintain a system of internal financial control. Furthermore, all municipal financial years were to end on 30 June of each year, and all accounts had to be audited by the Auditor-General.<sup>51</sup> The report of the Auditor-General had to be submitted to the council, and notice of such referral to the council had to be given in a newspaper

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<sup>50</sup> See LGTA s 10G(1)(a)-(g).

<sup>51</sup> See the LGTA s 10G(2)(c)-(d).



circulating in the area. The council meeting on the report had to be open to the public, and the CEO had to be present to answer possible questions in his/her capacity as accounting officer.<sup>52</sup>

On the point of accountability, the LGTA stated that if a person who is or was in the employ of a municipality caused a loss or damage for the municipality because he/she:

- failed to collect money owing to the municipality for which collection he/she was responsible
- was responsible for an irregular payment of money or payment not supported by a proper voucher
- was responsible for fruitless expenditure due to an omission
- was responsible for the destruction or damage to council property or
- was responsible, due to an omission, for a claim against the municipality, the CEO or the council, who had to determine the amount of such loss or damage, had to take disciplinary action where possible and had to recover the loss or damage in appropriate cases.

Any fraudulent and corrupt actions by employees had to be reported to the SANPS.<sup>53</sup> According to the Act, an expenditure was unauthorised if payment was made:

- by the CEO without provision having been made therefore by any budget or if payment resulted in the total amount of the approved annual operating or capital expenditure budget was exceeded
- if the CEO was unable to produce to the Auditor General (AG) or MEC or council authority for the payment as was required by law or where the CEO made a payment inconsistent with a provision by any law.

Any unauthorised expenditure had to be disallowed until approved by the responsible authority. Any unauthorised expenditure had to be recovered from the CEO if he/she was unwilling to recover such from either the beneficiary or person responsible for the expenditure. An interesting provision on this point was that in instances where unauthorised expenditure has been effected on a written instruction of a councillor or as a result of a council resolution in favour of which a councillor voted,

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<sup>52</sup> Refer to the LGTA s 10G(e)(i)-(iii).

<sup>53</sup> See the LGTA s 10G(2)(f)-(i).

unless it was recorded that the councillor voted against such resolution, the expenditure had to be recovered from the councillor(s) concerned.<sup>54</sup>

The LGTA also provided for strong oversight procedures regarding the financial management of municipalities. If the MEC was of the opinion that the finances of a municipality were or became unsound, he/she could instruct the council to take certain steps specified in writing.<sup>55</sup>

In respect of municipal budgets, the LGTA stated that a municipality had to compile and approve annually a budget with a two-thirds majority of all members of its council. The budget had to provide for operating income and expenditure and for capital expenditure which had to reflect the sources of finance, future capital charges, operating and maintenance costs as well as the consequential influence thereof on levies, rates and services charges. All municipalities had to ensure that they did not budget for a year-end deficit on their operating accounts and that their budgets were in accordance with their IDPs. Expenditure could be incurred only in accordance with the approved budget. Any decision to incur expenditure had to be taken by a majority of votes cast in council. It was also possible for the Minister of Finance to determine maximum expenditure limits for municipal budgets.<sup>56</sup> If a budget did not comply with the maximum expenditure limits, it had to be referred back to the council for reconsideration and amendment. In some cases, certain exceptions were allowed.

A further important provision in the LGTA was that municipalities had to award contracts for goods and services in accordance with a system which had to be fair, equitable, transparent, competitive and cost-effective. Preference could be given to persons previously disadvantaged by unfair discrimination. In cases of emergency, municipalities could dispense with the calling of tenders or if such option was allowed by law. Properties had to be valued and a single valuation roll for all properties had to be compiled, which had to be open to the public. Councils could levy and recover property rates, and metropolitan councils had to determine a common rating system.

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<sup>54</sup> Refer to the LGTA s 10G(2)(k)-(l).

<sup>55</sup> See the LGTA s 10G(2)(m)(i)-(iii). The term "unsound" also included any failure to claim or collect income, to control expenditure or to compile and approve an operating budget. If a municipality did not comply to the instructions of the MEC, the MEC could take such steps as he/she deemed necessary to restore the finances to a sound footing.

<sup>56</sup> See the LGTA s 10G(3)-(4). A municipal budget had to be submitted to the minister of Finance within 14 days of its adoption. The minister could delegate this monitoring power to the MEC.

Municipalities could also levy and recover levies, fees, taxes and tariffs, also known as charges. A municipality could also

- differentiate between different categories of user or property on such grounds as it deemed reasonable
- in respect of charges, amend or withdraw previous determinations
- recover any charges, including interest on any outstanding amount.<sup>57</sup>

Municipalities could also obtain money and raise loans for capital expenditure. The Minister of Finance could determine reasonable conditions and criteria regarding loans, however. Loans for bridging finance, which included bank overdrafts, could be raised by a municipality during a financial year only in order to finance current expenditure in anticipation of the receipt of revenue in that year. Municipalities could not raise loans denominated in a foreign currency and were not permitted to incur any other liability or risk payable in a foreign currency without approval by the minister of Finance. Any money borrowed by a municipality was a financial obligation of the municipality and was chargeable and payable from the revenues and assets of that municipality.<sup>58</sup>

In respect of investment policies, a municipality could make investment in various instruments with the concurrence of the minister of Finance. Such instruments included *inter alia*

- deposits with registered banks
- securities issued by the national government
- municipal stock
- long-term securities offered by insurance companies.<sup>59</sup>

With the concurrence of the Minister of Finance, the minister of Local Government could determine other investment instruments. Full details of any investments had to be published. Finally, municipalities had to ensure that the acquisition, disposal, utilisation, control and maintenance of its assets were carried out in an economic, efficient and effective manner.<sup>60</sup>

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<sup>57</sup> See the LGTA s 10G(7)(a)-(b). Decisions regarding charges had to be passed on to the MEC and to the public, who could lodge objections.

<sup>58</sup> See the LGTAs 10G(8).

<sup>59</sup> See the LGTA s 10G(9)(a)(i)-(ix).

<sup>60</sup> Refer to the LGTA s 10G(10)-(12). No claim of any creditor of any municipality could attach or be paid out of the national revenue fund or be paid by the national or any provincial government, unless this was specifically authorised by such government.

### **18.3 Legislative control mechanisms over municipal finance matters**

#### **18.3.1 Parliamentary control**

In compliance with the new constitutional demands and in order to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government and furthermore to establish treasury norms and standards for the local sphere of government, the national parliament has enacted the Local Government: Municipal Finance Management Act (MFMA).<sup>61</sup> The object of the MFMA is to be achieved by establishing norms and standards and other requirements for the following issues:<sup>62</sup>

- (a) ensuring transparency, accountability and appropriate lines of responsibility in the financial and fiscal affairs of municipalities and municipal entities;
- (b) the management of revenues, expenditures, assets, liabilities and the handling of municipal financial dealings;
- (c) budgetary and financial processes and the co-ordination of those processes with the processes of organs of state in other spheres of government;
- (d) borrowing;
- (e) the handling of financial problems in municipalities;
- (f) supply chain management; and
- (g) other financial matters.

##### **18.3.1.1 The broad requirements of the Local Government: Municipal Finance Management Act**

###### **(a) Application and aspects of supervision over local government financial management**

The MFMA applies to

- all municipalities
- all municipal entities<sup>63</sup>
- national and provincial organs of state to the extent of their financial dealings with municipalities.<sup>64</sup>

In the event of any inconsistency between a provision of the MFMA and any other legislation in force when the MFMA took effect and which regulates any aspect of the

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<sup>61</sup> 56 of 2003, hereafter referred to as the MFMA. See also the long title of the MFMA.

<sup>62</sup> See the MFMA s 2(a)-(g).

<sup>63</sup> A municipal entity is defined in terms of the Municipal Systems Act s 1.

<sup>64</sup> The MFMA s 3(1)(a)-(c).

fiscal and financial affairs of municipalities or municipal entities, the provision of the MFMA prevails.<sup>65</sup> Draft national legislation directly or indirectly amending the MFMA or providing for the enactment of subordinate legislation that may conflict with the Act may be introduced in Parliament only after the Minister of Finance and the Financial and Fiscal Commission have been consulted in writing on the contents of the draft legislation, and after they have responded in writing.<sup>66</sup>

The MFMA further determines general functions of the National Treasury and provincial treasuries. The National Treasury must:

- fulfil its responsibilities in terms of Chapter 13 of the Constitution and the Act
- promote the object of the Act as stated in section 2
  - (a) within the framework of co-operative government set out in chapter 3 of the Constitution and
  - (b) when coordinating intergovernmental financial and fiscal relations in terms of the Intergovernmental Fiscal Relations Act, the annual Division of Revenue Act and the Public Finance Management Act<sup>67</sup> and
- enforce compliance with the measures established in terms of section 216(1) of the Constitution, including those established in terms of the MFMA.<sup>68</sup>

To the extent necessary to comply with the general functions mentioned above, the National Treasury may:

- (a) monitor the budgets of municipalities to establish whether they:
  - (i) are consistent with the national government's fiscal and macro-economic policy; and
  - (ii) comply with chapter 4;
- (b) promote good budget and fiscal management by municipalities, and for this purpose monitor the implementation of municipal budgets, including their expenditure, revenue collection and borrowing;
- (c) monitor and assess compliance by municipalities and municipal entities with—
  - (i) the act; and
  - (ii) any applicable standards of generally recognised accounting practice and uniform expenditure and revenue classification systems;

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<sup>65</sup> The MFMA s 3(2).

<sup>66</sup> See the MFMA s 4.

<sup>67</sup> The Act provided for under the Constitution s 214(1) and also Act 97 of 1997 respectively.

<sup>68</sup> See the MFMA s 5(1)(a)-(c).

- (d) investigate any system of financial management and internal control in any municipality or municipal entity and recommend improvements;
- (e) take appropriate steps if a municipality or municipal entity commits a breach of the act, including the stopping of funds to a municipality in terms of section 216(2) of the Constitution if the municipality, or a municipal entity under the sole or shared control of that municipality, commits a serious or persistent material breach of any measures referred to in that section; and
- (f) take any other appropriate steps necessary to perform its functions effectively.<sup>69</sup>

In turn, a provincial treasury must in accordance with a prescribed framework

- fulfil its responsibilities in terms of the Act
- promote the object of the Act as stated in section 2 within the framework of co-operative government set out in chapter 3 of the Constitution and
- assist the National Treasury in enforcing compliance with the measures established in terms of section 216(1) of the Constitution, including those established in terms of the Act.<sup>70</sup>

To the extent necessary to comply with the abovementioned requirements, a provincial treasury:

- (a) must monitor –
  - (i) compliance with the act by municipalities and municipal entities in the province;
  - (ii) the preparation by municipalities in the province of their budgets;
  - (iii) the monthly outcome of those budgets; and
  - (iv) the submission of reports by municipalities in the province as required in terms of the act;
- (b) may assist municipalities in the province in the preparation of their budgets;
- (c) may exercise any powers and must perform any duties delegated to it by the National Treasury in terms of the act; and
- (d) may take appropriate steps if a municipality or municipal entity in the province commits a breach of the act.<sup>71</sup>

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<sup>69</sup> See the MFMA s 5(2)(a)-(f).

<sup>70</sup> See the MFMA s 5(3)(a)-(c).

<sup>71</sup> The MFMA s 5(4)(a)-(d).

It should be noted that the functions assigned to the National Treasury or a Provincial Treasury in terms of the MFMA are additional to those assigned to the National Treasury or a Provincial Treasury in terms of the Public Finance Management Act.<sup>72</sup> The Minister of Finance, as the head of the National Treasury, takes all decisions of the National Treasury in terms of the Act, except those decisions taken as a result of a delegation in terms of section 6(1). Similarly, the MEC for finance in a province, as the head of the provincial treasury, takes all decisions of the provincial treasury in terms of the Act, except those decisions taken as a result of a delegation in terms of section 6(4). A provincial treasury must submit all information submitted to it in terms of the MFMA to the National Treasury on a quarterly basis, or when so requested.<sup>73</sup>

According to the MFMA, both the National Treasury and provincial treasuries are authorised to delegate their powers. On a national level the minister may delegate any of the powers or duties assigned to the National Treasury in terms of the MFMA to

- the Director-General of the National Treasury or
- the MEC responsible for a provincial department, as the minister and the MEC may agree.<sup>74</sup>

It should be noted, however, that the minister may not delegate the National Treasury's power to stop funds to a municipality in terms of section 5(2)(e).<sup>75</sup> A delegation authorised under section 6(1) is restricted as follows:

- (a) must be in writing;
- (b) is subject to any limitations or conditions which the minister may impose;
- (c) may, subject to any such limitations or conditions, authorise –
  - (i) the Director-General of the National Treasury to sub-delegate a delegated power or duty to a staff member of the National Treasury; and
  - (ii) the MEC responsible for the relevant provincial department to sub-delegate a delegated power or duty to a staff member of that department; and
- (d) does not divest the National Treasury of the responsibility concerning the

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<sup>72</sup> 1 of 1999.

<sup>73</sup> See the MFMA s 5(5)-(8).

<sup>74</sup> Refer to the MFMA s 6(1)(a)-(b).

<sup>75</sup> The MFMA s 6(2).



exercise of the delegated power or the performance of the delegated duty.<sup>76</sup>

The MEC for finance in a province may also delegate any of the powers or duties assigned to a provincial treasury in terms of the Act to the head of the relevant provincial department of which the provincial treasury forms part. Such delegation is subjected to the same conditions as are required on national level.<sup>77</sup> Both the minister or MEC for finance in a province may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.<sup>78</sup>

### **(b) Aspects relating to municipal revenue**

Under the new legislative framework, every municipality must open and maintain at least one bank account in the name of the municipality. All money received by a municipality must be paid into its bank account or accounts, and this must be done promptly and in accordance with the MFMA and any requirements that may be prescribed. A municipality may not open a bank account:

- abroad
- with an institution not registered as a bank in terms of the Banks Act<sup>79</sup> or
- otherwise than in the name of the municipality.<sup>80</sup>

Money may be withdrawn from a municipal bank account only in terms of the procedure set out in section 11(1) of the MFMA.

It is further required for each municipality to have a primary bank account. If a municipality has only one bank account, that account is its primary bank account. If it has more than one bank account, it must designate one of those bank accounts as its primary bank account.<sup>81</sup> Specific moneys must be paid into a municipality's primary bank account. Such moneys include:

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<sup>76</sup> See the MFMA s 6(3)(a)-(d).

<sup>77</sup> Read the MFMA ss 6(3) and 6(5) together.

<sup>78</sup> The MFMA s 6(6).

<sup>79</sup> 94 of 1990.

<sup>80</sup> See the MFMA s 7(1)-(2).

<sup>81</sup> The MFMA s 8(1)(a)-(b).

- all allocations to the municipality, including those made to the municipality for transmission to a municipal entity or other external mechanism assisting the municipality in the performance of its functions<sup>82</sup>
- all income received by the municipality on its investments
- all income received by the municipality in connection with its interest in any municipal entity, including dividends
- all money collected by a municipal entity or other external mechanism on behalf of the municipality and
- any other moneys as may be prescribed.<sup>83</sup>

The accounting officer of a municipality must submit to the National Treasury, the relevant provincial treasury and the Auditor-General, in writing, the name of the bank where the primary bank account of the municipality is held and the type and number of the account. If a municipality wants to change its primary bank account, it may do so only after the accounting officer has informed the National Treasury and the Auditor-General, in writing, at least 30 days before effecting the change.<sup>84</sup>

Each accounting officer of a municipality must submit to the relevant provincial treasury and the Auditor-General, in writing, the following information:

- within 90 days after the municipality has opened a new bank account, the name of the bank where the account has been opened, and the type and number of the account and
- annually before the start of a financial year, the name of each bank where the municipality holds a bank account, and the type and number of each account.<sup>85</sup>

It is the responsibility of the accounting officer of a municipality to

- administer all the municipality's bank accounts

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<sup>82</sup> "Allocation" in relation to a municipality means: (a) a municipality's share of the local government's equitable share referred to in the Constitution s 214(a); (b) an allocation of money to a municipality in terms of the Constitution s 214(1)(c); (c) an allocation of money to a municipality in terms of a provincial budget; or (d) any other allocation of money to a municipality by an organ of state, including by another municipality, otherwise than in compliance with a commercial or other business transaction. See the MFMA s 1 definitions.

<sup>83</sup> Refer to the MFMA s 8(2)(a)-(e). A municipality must take all reasonable steps to ensure that all moneys referred to above are paid into its primary bank account. Furthermore, no organ of state in the national, provincial or local sphere of government may transfer an allocation of money referred to above to a municipality, except through the municipality's primary bank account. All allocations due by an organ of state to a municipal entity must be made through the parent municipality, or if there is more than one parent municipality, any of those parent municipalities as may be agreed between the parent municipalities.

<sup>84</sup> Refer to the MFMA s 8(5).

<sup>85</sup> See the MFMA s 9(a)-(b).

- account to the municipal council for the municipality's bank accounts
- enforce compliance with the requirements of the MFMA.

The accounting officer may delegate the duties referred to above to the municipality's chief financial officer only.<sup>86</sup>

Only the accounting officer or the chief financial officer of a municipality or any other senior financial official acting on the written authority of the accounting officer may withdraw money or authorise the withdrawal of money from any of the municipality's bank accounts, and may do so only:

- (a) to defray expenditure appropriated in terms of an approved budget;<sup>87</sup>
- (b) to defray expenditure authorised in terms of section 26(4) of the MFMA;
- (c) to defray unforeseeable and unavoidable expenditure authorised in terms of section 29(1) of the MFMA;
- (d) in the case of a bank account opened in terms of section 12 of the MFMA, to make payments from the account in accordance with subsection (4) of that section;
- (e) to pay over to a person or organ of state money received by the municipality on behalf of that person or organ of state, including –
  - (i) money collected by the municipality on behalf of that person or organ of state by agreement; or
  - (ii) any insurance or other payments received by the municipality for that person or organ of state;
- (f) to refund money incorrectly paid into a bank account;
- (g) to refund guarantees, sureties and security deposits;
- (h) for cash management and investment purposes in accordance with section 13 of the MFMA;
- (i) to defray increased expenditure in terms of section 31 of the act; or
- (j) for such other purposes as may be prescribed.<sup>88</sup>

Any authorisation to a senior financial official to withdraw money or to authorise the withdrawal of money from a bank account must be in accordance with a framework

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<sup>86</sup> See the MFMA s 10(1)-(2).

<sup>87</sup> An "approved budget" means an annual budget (a) approved by a municipal council or (b) approved by a provincial or the national executive following an intervention in terms of the Constitution s 139 and includes such an annual budget as revised by an adjustments budget in terms of the MFMA s 28. See s 1 definitions.

<sup>88</sup> See the MFMA s 11(a)-(j).

as may be prescribed. The accounting officer may not authorise any official other than the chief financial officer to withdraw money or to authorise the withdrawal of money from the municipality's primary bank account if the municipality has a primary bank account which is separate from its other bank accounts.<sup>89</sup>

Within 30 days after the end of each quarter, it is the responsibility of the accounting officer to table in the municipal council a consolidated report of all withdrawals made in terms of subsection 11(1)(b) to (j) of the Act during that quarter and to submit a copy of the report to the relevant provincial treasury and the Auditor-General.<sup>90</sup>

No political structure or office-bearer of a municipality may set up a relief fund, charitable fund, trust or other fund of whatever description, except in the name of the municipality. Only the municipal manager may be the accounting officer of any such fund. A municipality may open a separate bank account in the name of the municipality for the purpose of a relief fund, charitable fund, trust or other fund, however. All money received by the municipality for the purpose of such a fund must be paid into a bank account of the municipality or into a separate bank account if one has been opened. Money in a separate account may be withdrawn from the account without appropriation in terms of an approved budget, but only by or on the written authority of the accounting officer acting in accordance with decisions of the municipal council and also only for the purposes for which the fund was established or the money in the fund was donated.<sup>91</sup>

The MFMA further provides that the minister, acting in concurrence with the Cabinet member responsible for local government, may prescribe a framework within which municipalities must conduct their cash management and investments and invest money not immediately required. Each municipality must establish *an appropriate and effective cash management and investment policy* in accordance with any framework that may be prescribed.<sup>92</sup> A bank where a municipality holds a bank account at the end of a financial year, or held a bank account at any time during a financial year, must:

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<sup>89</sup> Note that money may be withdrawn from a bank account in terms of s 11(1)(b) to (j) without appropriation in terms of an approved budget. See the MFMA s 11(3).

<sup>90</sup> Refer to the MFMA ss 11(4)(a)-(b). A "quarter" is defined under the MFMA as any of the following periods in a financial year: (a) 1 July to 30 September, (b) 1 October to 31 December, (c) 1 January to 31 March, or (d) 1 April to 30 June. See s 1 definitions.

<sup>91</sup> See the MFMA s 12(1)-(4).

<sup>92</sup> See the MFMA s 13(1)-(2).

- within 30 days after the end of that financial year notify the Auditor-General, in writing, of such bank account, including
  - (a) the type and number of the account and
  - (b) the opening and closing balances of that bank account in that financial year and
- promptly disclose information regarding the account when so requested by the National Treasury or the Auditor-General.

A bank, insurance company or other financial institution which at the end of a financial year holds, or at any time during a financial year held, an investment for a municipality, must also

- within 30 days after the end of that financial year, notify the Auditor-General, in writing, of that investment, including the opening and closing balances of that investment in that financial year and
- promptly disclose information regarding the investment when so requested by the National Treasury or the Auditor-General.<sup>93</sup>

Under the new legislative dispensation a municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.<sup>94</sup> A municipality may transfer ownership or otherwise dispose of a capital asset other than one mentioned above, but only after the municipal council in a meeting open to the public:

- has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services and
- has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.<sup>95</sup>

After a decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services, such decision may not be reversed by the municipality after that asset has been sold, transferred or otherwise disposed of. A municipal council may delegate to the accounting officer of the mu-

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<sup>93</sup> Refer to the MFMA s 13(3)-(4).

<sup>94</sup> A "basic municipal service" means a municipal service that is necessary to ensure an acceptable and reasonable quality of life and which, if not provided, would endanger public health or safety or the environment. See the MFMA s 1 definitions.

<sup>95</sup> See the MFMA s 14(1)-(2).

municipality its power to make the determinations referred to in subsection (2) (a) and (b) of the MFMA in respect of movable capital assets below a value determined by the council. Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent, competitive and consistent with the *supply chain management policy* which the municipality must have and maintain in terms of section 111 of the MFMA.<sup>96</sup>

### **(c) Aspects relating to municipal budgets**

A municipality may, except where otherwise provided in the MFMA, incur expenditure or appropriate funds only:

- in terms of an approved budget and
- within the limits of the amounts appropriated for the different votes in an approved budget.<sup>97</sup>

For each financial year, the council of a municipality must approve an annual budget for the municipality before the start of that financial year.<sup>98</sup> In order for a municipality to approve an annual budget, the mayor of the municipality must table the annual budget at a council meeting at least 90 days before the start of the budget year.<sup>99</sup>

According to the MFMA, an annual budget of a municipality must be a schedule in the prescribed format and must incorporate the following:

- (a) setting out realistically anticipated revenue for the budget year from each revenue source;
- (b) appropriating expenditure for the budget year under the different votes of the municipality;
- (c) setting out indicative revenue per revenue source and projected expenditure by vote for the two financial years following the budget year;
- (d) setting out –
  - (i) estimated revenue and expenditure by vote for the current year; and

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<sup>96</sup> These requirements do not apply to the transfer of a capital asset to another municipality or to a municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework. See the MFMA s 14(4)-(6).

<sup>97</sup> See the MFMA s 15(a)-(b).

<sup>98</sup> "Financial year" means a year ending on 30 June of a particular year. See the MFMA s 1 definitions.

<sup>99</sup> Refer to the MFMA s 16(1)-(2). It should be noted that the approval of an annual budget does not preclude the appropriation of money for capital expenditure for a period exceeding three financial years, provided that a separate appropriation is made for each of those financial years. The

*continued on next page*

- (ii) actual revenue and expenditure by vote for the financial year preceding the current year; and
- (e) a statement containing any other information required by section 215(3) of the Constitution or as may be prescribed.<sup>100</sup>

An annual budget must generally be divided into a *capital and an operating budget* in accordance with international best practice, as may be prescribed. When an annual budget is tabled, it must be accompanied by the following documents:

- (a) Draft resolutions –
  - (i) approving the budget of the municipality;
  - (ii) imposing any municipal tax and setting any municipal tariffs as may be required for the budget year; and
  - (iii) approving any other matter that may be prescribed;
- (b) measurable performance objectives for revenue from each source and for each vote in the budget, taking into account the municipality's integrated development plan;
- (c) a projection of cash flow for the budget year by revenue source, broken down per month;
- (d) any proposed amendments to the municipality's integrated development plan following the annual review of the integrated development plan in terms of section 34 of the Municipal Systems Act;
- (e) any proposed amendments to the budget-related policies of the municipality;
- (f) particulars of the municipality's investments;
- (g) any prescribed budget information on municipal entities under the sole or shared control of the municipality;
- (h) particulars of all proposed new municipal entities which the municipality intends to establish or in which the municipality intends to participate;
- (i) particulars of any proposed service delivery agreements, including material amendments to existing service delivery agreements;
- (j) particulars of any proposed allocations or grants by the municipality to –
  - (i) other municipalities;

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MFMA s 16(3). A budget year seems to be the year from 1 July of a year until 30 June of the next year.

<sup>100</sup> See the MFMA s 17(1)(a)-(e).



- (ii) any municipal entities and other external mechanisms assisting the municipality in the exercise of its functions or powers;
- (iii) any other organs of state;
- (iv) any organisations or bodies referred to in section 67 (1);
- (k) the proposed cost to the municipality for the budget year of the salary, allowances and benefits of –
  - (i) each political office-bearer of the municipality;<sup>101</sup>
  - (ii) councillors of the municipality; and
  - (iii) the municipal manager, the chief financial officer, each senior manager of the municipality and any other official of the municipality having a remuneration package greater than or equal to that of a senior manager;
- (l) the proposed cost for the budget year to a municipal entity under the sole or shared control of the municipality of the salary, allowances and benefits of –
  - (i) each member of the entity's board of directors; and
  - (ii) the chief executive officer and each senior manager of the entity; and
- (m) any other supporting documentation as may be prescribed.<sup>102</sup>

It is further required that an annual budget may be funded only from

- realistically anticipated revenues to be collected
- cash-backed accumulated funds from previous years' surpluses not committed for other purposes
- borrowed funds, but only for the capital budget referred to in section 17(2).

All revenue projections in the budget must be realistic, taking into account the projected revenue for the current year based on collection levels to date and also the actual revenue collected in previous financial years.<sup>103</sup> Under the new financial dispensation a municipality may spend money on a capital project only if:

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<sup>101</sup> Note that a political office-bearer in relation to a municipality means (a) the speaker, executive mayor, deputy executive mayor, mayor, deputy mayor or a member of the executive or mayoral committee of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act or (b) a councillor referred to in the MFMA s 57(1). See s 1.

<sup>102</sup> See the MFMA s 17(3)(a)-(m). Note that according to the definitions set out in the MFMA, "shared control" means the rights and powers a municipality has over a municipally entity which is (a) a private company in which effective control as defined in the Municipal Systems Act s 1 is vested in that municipality and one or more other municipalities collectively or (b) a multi-jurisdictional service utility in which that municipality participates, and "sole control" means the rights and powers a municipality has over a municipal entity which is (a) a private company in which effective control as defined in the Municipal Systems Act s 1 is vested in that municipality alone or (b) a service utility established by the municipality.

<sup>103</sup> Refer to the MFMA s 18(1)-(2).

- (a) the money for the project, excluding the cost of feasibility studies conducted by or on behalf of the municipality, has been appropriated in the capital budget referred to in section 17(2);
- (b) the project, including the total cost, has been approved by the council;
- (c) section 33 has been complied with, to the extent that that section may be applicable to the project; and
- (d) the sources of funding have been considered, are available and have not been committed for other purposes.<sup>104</sup>

Before approving a capital project the council of a municipality must consider various issues. Such issues include:

- (a) the projected cost covering all financial years until the project is operational; and
- (b) the future operational costs and revenue on the project, including municipal tax and tariff implications.<sup>105</sup>

The MFMA specifically provides that the minister, acting with the concurrence of the Cabinet member responsible for local government, must prescribe the form of the annual budget of municipalities and may prescribe matters such as:

- the form of resolutions and supporting documentation relating to the annual budget
- the number of years preceding and following the budget year for which revenue and expenditure history or projections must be shown in the supporting documentation
- inflation projections to be used with regard to the budget
- uniform norms and standards concerning the setting of municipal tariffs, financial risks and other matters where a municipality uses a municipal entity or other external mechanism for the performance of a municipal service or other function
- uniform norms and standards concerning the budgets of municipal entities or
- any other uniform norms and standards aimed at promoting transparency and expenditure control.<sup>106</sup>

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<sup>104</sup> Read the MFMA s 19(1)(a)-(d).

<sup>105</sup> See the MFMA s 19(2)(a)-(b). A municipal council may approve capital projects below a prescribed value, however. Such approval may be done either individually or as part of a consolidated capital programme. S 19(3).

<sup>106</sup> See the MFMA s 20(1)(b)(i)-(vi). See also the Municipal Investment Regulations and the Municipal Public-Private Partnership Regulations published under the MFMA.

The minister may further take appropriate steps to ensure that a municipality in the exercise of its fiscal powers as is set out in section 229 of the Constitution does not materially and unreasonably prejudice:

- national economic policies, particularly those on inflation, administered pricing and equity
- economic activities across municipal boundaries and
- the national mobility of goods, services, capital or labour.<sup>107</sup>

With regard to the budget preparation processes, the MFMA determines that the mayor of a municipality must:

- (a) co-ordinate the processes for preparing the annual budget and for reviewing the municipality's integrated development plan and budget-related policies to ensure that the tabled budget and any revisions of the integrated development plan and budget-related policies are mutually consistent and credible;<sup>108</sup>
- (b) at least 10 months before the start of the budget year, table in the municipal council a time schedule outlining key deadlines for –
  - (i) the preparation, tabling and approval of the annual budget;
  - (ii) the annual review of –
    - (aa) the integrated development plan in terms of section 34 of the Municipal Systems Act; and
    - (bb) the budget-related policies;
  - (iii) the tabling and adoption of any amendments to the integrated development plan and the budget-related policies; and
  - (iv) any consultative processes forming part of the processes referred to in subparagraphs (i), (ii) and (iii).<sup>109</sup>

When preparing the annual budget, the mayor of a municipality must also:

- (a) take into account the municipality's integrated development plan;

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<sup>107</sup> The MFMA s 20(2)(a)-(c).

<sup>108</sup> A budget-related policy means a municipal policy affecting or affected by the annual budget of the municipality, including (a) the tariffs policy which the municipality must adopt in terms of section 74 of the Municipal Systems Act, (b) the rates policy which the municipality must adopt in terms of legislation regulating municipal property rates or (c) the credit control and debt collection policy which the municipality must adopt in terms of s 96 of the Municipal Systems Act. Refer to the MFMA s 1.

<sup>109</sup> Read the MFMA s 21(1)(a)-(b).

- (b) take all reasonable steps to ensure that the municipality revises the integrated development plan in terms of section 34 of the Municipal Systems Act, taking into account realistic revenue and expenditure projections for future years;
- (c) take into account the national budget, the relevant provincial budget, the national government's fiscal and macro-economic policy, the annual Division of Revenue Act and any agreements reached in the Budget Forum;
- (d) consult –
  - (i) the relevant district municipality and all other local municipalities within the area of the district municipality, if the municipality is a local municipality;
  - (ii) all local municipalities within its area, if the municipality is a district municipality;
  - (iii) the relevant provincial treasury, and when requested, the National Treasury; and
  - (iv) any national or provincial organs of state, as may be prescribed; and
- (e) provide, on request, any information relating to the budget –
  - (i) to the National Treasury;<sup>110</sup> and
  - (ii) subject to any limitations that may be prescribed, to –
    - (aa) the national departments responsible for water, sanitation, electricity and any other service as may be prescribed;
    - (bb) any other national and provincial organ of states, as may be prescribed; and
    - (cc) another municipality affected by the budget.<sup>111</sup>

Immediately after an annual budget is tabled in a municipal council, the accounting officer of the municipality must:

- (a) in accordance with chapter 4 of the Municipal Systems Act –
  - (i) make public the annual budget and the documents referred to in section 17(3); and
  - (ii) invite the local community to submit representations in connection with the budget; and
- (b) submit the annual budget –

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<sup>110</sup> Note that reference to the National Treasury means the National Treasury established by the Public Finance Management Act s 5. See the MFMA s 1.

<sup>111</sup> See the MFMA s 21(2)(a)-(e).

- (i) in both printed and electronic formats to the National Treasury and the relevant provincial treasury; and
- (ii) in either format to any prescribed national or provincial organs of state and to other municipalities affected by the budget.<sup>112</sup>

In an effort to further accountability and public participation, the MFMA requires that when the annual budget has been tabled, the municipal council must consider any views of:

- the local community and
- the National Treasury, the relevant provincial treasury and any provincial or national organs of state or municipalities which made submissions on the budget.

After considering all budget submissions, the council must give the mayor an opportunity:

- to respond to the submissions and
- if necessary, to revise the budget and table amendments for consideration by the council.<sup>113</sup>

The National Treasury may issue guidelines on the manner in which municipal councils should process their annual budgets, including guidelines on the formation of a committee of the council to consider the budget and to hold public hearings. No guidelines issued in terms the MFMA are binding on a municipal council unless adopted by the council.<sup>114</sup>

At least 30 days before the start of their budget years, all municipal councils must consider approval of the annual budget. An annual budget:

- (a) must be approved before the start of the budget year;
- (b) is approved by the adoption by the council of a resolution; and
- (c) must be approved together with the adoption of resolutions as may be necessary –
  - (i) imposing any municipal tax for the budget year;
  - (ii) setting any municipal tariffs for the budget year;
  - (iii) approving measurable performance objectives for revenue from each source and for each vote in the budget;

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<sup>112</sup> The MFMA s 22(a)-(b).

<sup>113</sup> The MFMA s 23(2)(a)-(b).

<sup>114</sup> Read the MFMA s 23(3)-(4).

(iv) approving any changes to the municipality's integrated development plan;  
and

(v) approving any changes to the municipality's budget-related policies.<sup>115</sup>

The accounting officer of a municipality must submit the approved annual budget to the National Treasury and the relevant provincial treasury. If a municipal council fails to approve an annual budget, including revenue-raising measures necessary to give effect to the budget, the council must reconsider the budget and again vote on the budget or on an amended version thereof. This must be done within seven days of the council meeting that failed to approve the budget. The process provided for must be repeated until a budget is approved, including revenue-raising measures necessary to give effect to the budget. If a municipality has not approved an annual budget, including revenue-raising measures necessary to give effect to the budget, by the first day of the budget year, the mayor must immediately comply with section 55 of the MFMA.<sup>116</sup>

If by the start of the budget year a municipal council has not approved an annual budget or any revenue-raising measures necessary to give effect to the budget, the provincial executive of the relevant province must intervene in the municipality in terms of section 139(4) of the Constitution by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the council and

- appointing an administrator until a newly elected council has been declared elected
- continued functioning of the municipality.<sup>117</sup>

When approving a temporary budget for a municipality, the provincial executive is not bound by any provision relating to the budget process applicable to a municipality in terms of the MFMA or other legislation. Such a budget must, after the intervention has ended, be replaced by a budget approved by the newly elected council, provided that the provisions of the Chapter relating to annual budgets in the MFMA are substantially complied with and are in line with any revised time frames approved by the MEC for finance in the province. Until a new budget for the municipality is

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<sup>115</sup> Read the MFMA s 24(1)-(3).

<sup>116</sup> Read the MFMA s 25(1)-(3). According to s 55, the mayor must send a report to the MEC.

<sup>117</sup> See the Municipal Structures Act s 26(1)(a)-(b), read together with ss 34(3) and (4) and 35. The Structures Act applies when a provincial executive dissolves a municipal council.

approved, with the approval of the MEC for finance in the province, funds for the requirements of the municipality may be withdrawn from the municipality's bank accounts in accordance with certain provisions. Such funds may:

- be used only to defray current and capital expenditure in connection with votes for which funds were appropriated in the approved budget for the previous financial year
- may not:
  - (a) during any month, exceed eight per cent of the total amount appropriated in that approved budget for current expenditure, which percentage must be scaled down proportionately if revenue flows are not at least at the same level as the previous financial year
  - (b) exceed the amount actually available.<sup>118</sup>

Upon becoming aware of any impending non-compliance by the municipality of any provisions of the MFMA or any other legislation pertaining to the tabling or approval of an annual budget or compulsory consultation processes, the mayor of a municipality must inform the MEC for finance in the province, in writing, of such impending non-compliance in an effort to ensure effective control and accountability. If the impending non-compliance pertains to a time provision, except section 16(1), the MEC for finance may, on application by the mayor and on good cause shown, extend any time limit or deadline contained in that provision, provided that no such extension may compromise compliance with section 16(1). An MEC for finance must

- exercise the power contained in the MFMA in accordance with a prescribed framework
- promptly notify the National Treasury, in writing, of any extensions given, together with the name of the municipality concerned and the reasons for the extensions.<sup>119</sup>

Upon becoming aware of any actual non-compliance by the municipality of any required provisions, the mayor of a municipality must also inform the council, the MEC for finance and the National Treasury, in writing, of

- such non-compliance

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<sup>118</sup> The funds provided for above are not additional to funds appropriated for the budget year, and any funds so withdrawn must be regarded as forming part of the funds appropriated in a subsequently approved annual budget for the budget year. See the MFMA s 26(3)-(6).

<sup>119</sup> See the MFMA s 27(1)-(2).



- any remedial or corrective measures the municipality intends to implement to avoid a recurrence.<sup>120</sup>

It should again be noted that the provincial executive may intervene in terms of section 139 of the Constitution if a municipality cannot or does not comply with the provisions of this chapter, including a provision relating to process.

A municipality may revise an approved annual budget through an adjustments budget. In this regard an adjustments budget:

- (a) must adjust the revenue and expenditure estimates downwards if there is material under-collection of revenue during the current year;<sup>121</sup>
- (b) may appropriate additional revenues that have become available over and above those anticipated in the annual budget, but only to revise or accelerate spending programmes already budgeted for;
- (c) may, within a prescribed framework, authorise unforeseeable and unavoidable expenditure recommended by the mayor of the municipality;
- (d) may authorise the utilisation of projected savings in one vote towards spending under another vote;
- (e) may authorise the spending of funds that were unspent at the end of the past financial year where the under-spending could not reasonably have been foreseen at the time to include projected roll-overs when the annual budget for the current year was approved by the council;
- (f) may correct any errors in the annual budget; and
- (g) may provide for any other expenditure within a prescribed framework.<sup>122</sup>

Only the mayor may table an adjustments budget in the municipal council. When an adjustments budget is tabled, it must be accompanied by:

- (a) an explanation how the adjustments budget affects the annual budget;
- (b) a motivation of any material changes to the annual budget;
- (c) an explanation of the impact of any increased spending on the annual budget and the annual budgets for the next two financial years; and

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<sup>120</sup> The MFMA s 27(3)-(4). It should be noted that the non-compliance by a municipality with a provision of the chapter relating to the budget process or a provision in any legislation relating to the approval of a budget-related policy does not affect the validity of an annual or adjustments budget.

<sup>121</sup> A current year refers to the financial year which has already commenced, but not yet ended. See the MFMA s 1.

<sup>122</sup> The MFMA s 28(1)-(3). An adjustments budget must be in a prescribed form.

(d) any other supporting documentation that may be prescribed.<sup>123</sup>

It is important to note that municipal tax and tariffs may not be increased during a financial year, except when required in terms of a financial recovery plan.<sup>124</sup> The mayor of a municipality may in emergency or other exceptional circumstances authorise unforeseeable and unavoidable expenditure for which no provision was made in an approved budget. Any such expenditure:

- (a) must be in accordance with any framework that may be prescribed;
- (b) may not exceed a prescribed percentage of the approved annual budget;
- (c) must be reported by the mayor to the municipal council at its next meeting;
- and
- (d) must be appropriated in an adjustments budget.<sup>125</sup>

The appropriation of funds in an annual or adjustments budget lapses to the extent that those funds are unspent at the end of the financial year to which the budget relates, except in the case of an appropriation for expenditure made for a period longer than that financial year in terms of section 16(3).<sup>126</sup> It is further also determined that when funds for a capital programme are appropriated in terms of section 16(3) for more than one financial year, expenditure for that programme during a financial year may exceed the amount of that year's appropriation for that programme, provided that:

- (a) the increase does not exceed 20 per cent of that year's appropriation for the programme;
- (b) the increase is funded within the following year's appropriation for that programme;
- (c) the municipal manager certifies that –
  - (i) actual revenue for the financial year is expected to exceed budgeted revenue; and
  - (ii) sufficient funds are available for the increase without incurring further

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<sup>123</sup> Read the MFMA s 28(5)(a)-(d).

<sup>124</sup> See the MFMA s 28(6)-(7). Ss 22(b), 23(3) and 24(3) apply in respect of an adjustments budget. "Municipal tax" means property rates or other taxes, levies or duties that a municipality may impose. "Municipal tariff" refers to a tariff for services which a municipality may set for the provision of a service to the local community and includes a surcharge on such tariff. See the MFMA s 1.

<sup>125</sup> Read the MFMA s 29(1)-(3). If such adjustments budget is not passed within 60 days after the expenditure was incurred, the expenditure is unauthorised and s 32 applies.

<sup>126</sup> See the MFMA s 30.

- borrowing beyond the annual budget limit;
- (d) prior written approval is obtained from the mayor for the increase; and
- (e) the documents referred to in paragraphs (c) and (d) are submitted to the relevant provincial treasury and the Auditor-General.<sup>127</sup>

Without limiting liability in terms of the common law or other legislation, the MFMA specifically provides for personal accountability and liability over both political office bearers and officials of a municipality that work with financial matters. The MFMA states that:

- a political office-bearer of a municipality is liable for unauthorised expenditure if that office-bearer knowingly or after having been advised by the accounting officer of the municipality that the expenditure is likely to result in unauthorised expenditure, instructed an official of the municipality to incur the expenditure<sup>128</sup>
- the accounting officer is liable for unauthorised expenditure deliberately or negligently incurred by the accounting officer, subject to subsection (3) of the MFMA
- any political office-bearer or official of a municipality who deliberately or negligently committed, made or authorised an irregular expenditure<sup>129</sup> is liable for that expenditure or

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<sup>127</sup> The MFMA s 31(a)-(e).

<sup>128</sup> Note that “unauthorised expenditure” means any expenditure incurred by a municipality otherwise than in accordance with s 15 or 11(3) and includes (a) overspending of the total amount appropriated in the municipality’s approved budget, (b) overspending of the total amount appropriated for a vote in the approved budget, (c) expenditure from a vote unrelated to the department or functional area covered by the vote, (d) expenditure of money appropriated for a specific purpose, otherwise than for the specific purpose, (e) spending of an allocation referred to in para (b), (c) or (d) of the definition of “allocation” otherwise than in accordance with any conditions of the allocation, or (f) a grant by the municipality otherwise than in accordance with this Act. “Overspending” is further defined thus: (a) in relation to the budget of a municipality, it means causing the operational or capital expenditure incurred by the municipality during a financial year to exceed the total amount appropriated in that year’s budget for its operational or capital expenditure, as the case may be, (b) in relation to a vote, it means causing expenditure under the vote to exceed the amount appropriated for that vote or (c) in relation to expenditure under s 26, it means causing expenditure under the section to exceed the limits allowed in ss (5) of that section. See the MFMA s 1.

<sup>129</sup> “Irregular expenditure” means (a) expenditure incurred by a municipality or municipal entity in contravention of, or not in accordance with, a requirement of this Act, and which has not been condoned in terms of s 170, (b) expenditure incurred by a municipality or municipal entity in contravention of, or not in accordance with, a requirement of the Municipal Systems Act and which has not been condoned in terms of that Act, (c) expenditure incurred by a municipality in contravention of, or not in accordance with, a requirement of the Public Office-Bearers Act 20 of 1998 or (d) expenditure incurred by a municipality or municipal entity in contravention of, or not in accordance with, a requirement of the supply chain management policy of the municipality or entity or any of the municipality’s by-laws giving effect to such policy and not condoned in terms of such policy or by-law. Irregular expenditure excludes expenditure by a municipality which falls within the definition of “unauthorised expenditure”. See the MFMA s 1.

- any political office-bearer or official of a municipality who deliberately or negligently made or authorised a fruitless and wasteful expenditure is liable for that expenditure.<sup>130</sup>

A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure unless the expenditure

(a) in the case of unauthorised expenditure, is –

- (i) authorised in an adjustments budget; or
- (ii) certified by the municipal council, after investigation by a council committee, as irrecoverable and written off by the council; and

(b) in the case of irregular or fruitless and wasteful expenditure, is, after investigation by a council committee, certified by the council as irrecoverable and written off by the council.

If the accounting officer becomes aware that the council, the mayor or the executive committee of the municipality, as the case may be, has taken a decision which, if implemented, is likely to result in unauthorised, irregular or fruitless and wasteful expenditure, the accounting officer is not liable for any ensuing unauthorised, irregular or fruitless and wasteful expenditure provided that the accounting officer has informed the council, the mayor or the executive committee, in writing, that the expenditure is likely to be unauthorised, irregular or fruitless and a wasteful expenditure.<sup>131</sup> The accounting officer must further promptly inform the mayor, the MEC for local government in the province and the Auditor-General, in writing, of:

- (a) any unauthorised, irregular or fruitless and wasteful expenditure incurred by the municipality;
- (b) whether any person is responsible or under investigation for such unauthorised, irregular or fruitless and wasteful expenditure; and
- (c) the steps that have been taken –
  - (i) to recover or rectify such expenditure; and
  - (ii) to prevent a recurrence of such expenditure.<sup>132</sup>

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<sup>130</sup> The MFMA s 32(1)(a)-(d). “Fruitless and wasteful expenditure” means expenditure that was made in vain and would have been avoided had reasonable care been exercised. See the MFMA s 1.

<sup>131</sup> See the MFMA s 32(2)-(3).

<sup>132</sup> The MFMA s 32(4)(a)-(c).

It should be noted that the writing off of any unauthorised, irregular or fruitless and wasteful expenditure as irrecoverable is no excuse in criminal or disciplinary proceedings against a person charged with the commission of an offence or a breach of the MFMA relating to such unauthorised, irregular or fruitless and wasteful expenditure. The accounting officer is further obligated to report to the South African Police Service all cases of alleged

- irregular expenditure that constitutes a criminal offence
- theft and fraud that occurred in the municipality.

The council of a municipality must take all *reasonable steps* to ensure that all cases of irregular expenditure, theft or fraud are reported to the South African Police Service if

- the charge is against the accounting officer or
- the accounting officer fails to report such matters.<sup>133</sup>

Under the new financial requirements, a municipality may enter into a contract which will impose financial obligations on the municipality beyond a financial year, but if the contract will impose financial obligations on the municipality beyond the three years covered in the annual budget for that financial year, it may do so only if:

- (a) the municipal manager, at least 60 days before the meeting of the municipal council at which the contract is to be approved –
  - (i) has, in accordance with section 21A of the Municipal Systems Act:
    - (aa) made public the draft contract and an information statement summarising the municipality's obligations in terms of the proposed contract; and
    - (bb) invited the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed contract; and
  - (ii) has solicited the views and recommendations of:
    - (aa) the National Treasury and the relevant provincial treasury;
    - (bb) the national department responsible for local government; and
    - (cc) if the contract involves the provision of water, sanitation, electricity, or any other service as may be prescribed, the responsible national de

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<sup>133</sup> The MFMA s 32(5)-(8). The minister, acting with the concurrence of the cabinet member responsible for local government, may regulate the application of these provisions by regulation. Read also the MFMA s 168.

partment;

(b) the municipal council has taken into account:

- (i) the municipality's projected financial obligations in terms of the proposed contract for each financial year covered by the contract;
- (ii) the impact of those financial obligations on the municipality's future municipal tariffs and revenue;
- (iii) any comments or representations on the proposed contract received from the local community and other interested persons; and
- (iv) any written views and recommendations on the proposed contract by the National Treasury, the relevant provincial treasury, the national department responsible for local government and any national department referred to in paragraph (a) (ii) (cc); and

(c) the municipal council has adopted a resolution in which:

- (i) it determines that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the contract;
- (ii) it approves the entire contract exactly as it is to be executed; and
- (iii) it authorises the municipal manager to sign the contract on behalf of the municipality.<sup>134</sup>

The process set out in subsection 33(1) of the MFMA does not apply to:

- (a) contracts for long-term debt regulated in terms of section 46(3) of the MFMA;
- (b) employment contracts; or
- (c) contracts:
  - (i) for categories of goods as may be prescribed; or
  - (ii) in terms of which the financial obligation on the municipality is below:
    - (aa) a prescribed value; or
    - (bb) a prescribed percentage of the municipality's approved budget for the year in which the contract is concluded.<sup>135</sup>

All contracts referred to above and all other contracts that impose a financial obligation on a municipality:

- must be made available in their entirety to the municipal council and

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<sup>134</sup> Refer to the MFMA s 33(1)(a)-(c).

<sup>135</sup> See the MFMA s 33(2).

- may not be withheld from public scrutiny, except as provided for in terms of the Promotion of Access to Information Act.<sup>136</sup>

**(d) Aspects concerning municipal financial co-operative government**

It is a constitutional prerequisite that the national and provincial governments must by agreement assist municipalities in building their capacities for efficient, effective and transparent financial management. The national and provincial governments must support the efforts of municipalities to identify and resolve their financial problems. When performing its monitoring function in terms of section 155(6) of the Constitution, a provincial government:

- (a) must share with a municipality the results of its monitoring to the extent that those results may assist the municipality in improving its financial management;
- (b) must, upon detecting any emerging or impending financial problems in a municipality, alert the municipality to those problems; and
- (c) may assist the municipality to avert or resolve financial problems.<sup>137</sup>

In an effort to promote co-operative government on a local government level, both national and provincial departments and public entities must:

- (a) in their fiscal and financial relations with the local sphere of government, promote co-operative government in accordance with chapter 3 of the Constitution;
- (b) promptly meet their financial commitments towards municipalities;
- (c) provide timely information and assistance to municipalities to enable municipalities:
  - (i) to plan properly, including in developing and revising their integrated development plans; and
  - (ii) to prepare their budgets in accordance with the processes set out in chapter 4 of this Act; and
- (d) comply with the Public Finance Management Act, the annual Division of Revenue Act and the Intergovernmental Fiscal Relations Act,<sup>138</sup> to the extent

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<sup>136</sup> See Act 2 of 2000 read together with the MFMA s 33(3)-(4).

<sup>137</sup> See the MFMA s 34(1)-(4). Non-compliance with this section or any other provision of this Act by the national or a provincial government does not affect the responsibility of a municipality, its political structures, political office-bearers and officials to comply with this Act.

<sup>138</sup> 97 of 1997.



that those acts regulate intergovernmental relations with the local sphere of government.<sup>139</sup>

In order to provide predictability and certainty about the sources and levels of intergovernmental funding for municipalities, the accounting officer of a national or provincial department and the accounting authority of a national or provincial public entity responsible for the transfer of any proposed allocations to a municipality must, by no later than 20 January of each year notify the National Treasury or the relevant provincial treasury, as may be appropriate, of all proposed allocations, and the projected amounts of those allocations, to be transferred to each municipality during each of the next three financial years. The minister or the MEC responsible for finance in a province must, to the extent possible when tabling the national annual budget in the National Assembly or the provincial annual budget in the provincial legislature, make public particulars of any allocations due to each municipality in terms of that budget, including the amount to be transferred to the municipality during each of the next three financial years.<sup>140</sup>

Municipalities are themselves also required to promote co-operative government. In doing so, municipalities are obligated to:

- promote co-operative government in accordance with chapter 3 of the Constitution and the Intergovernmental Fiscal Relations Act in their fiscal and financial relations with the national and provincial spheres of government and other municipalities
- provide budgetary and other financial information to relevant municipalities and national and provincial organs of state
- promptly meet all financial commitments towards other municipalities or national and provincial organs of state.

In order to enable municipalities to include allocations from other municipalities in their budgets and to plan effectively for the spending of such allocations, the accounting officer of a municipality responsible for the transfer of any allocation to another municipality must notify the receiving municipality of the projected amount of any allocation proposed to be transferred to that municipality during each of the next

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<sup>139</sup> Read the MFMA s 35(a)-(d).

<sup>140</sup> Refer to the MFMA s 36(1)-(2).

three financial years, by no later than 120 days before the start of its budget year.<sup>141</sup> In certain instances the transfer of funds to municipalities may be stopped. In this regard the MFMA determines that the National Treasury may stop:

- the transfer of funds due to a municipality as its share of the local government's equitable share referred to in section 214(1)(a) of the Constitution, but only if the municipality commits a serious or persistent breach of the measures established in terms of section 216(1) of the Constitution or
- the transfer of funds due to a municipality as an allocation referred to in section 214(1)(c) of the Constitution, but only if the municipality or the municipal entity for which the funds are destined
  - (a) commits a serious or persistent breach of the measures established in terms of section 216(1) of the Constitution or
  - (b) breaches or fails to comply with any conditions subject to which the allocation is made.

Before the National Treasury stops the transfer of funds to a municipality, it must:

- (a) give the municipality an opportunity to submit written representations with regard to the proposed stopping of the funds;
- (b) inform the MEC for local government in the province; and
- (c) consult the Cabinet member responsible for the national department making the transfer.<sup>142</sup>

If the stopping of funds affects the provision of basic municipal services in the municipality, the provincial executive must monitor the continuation of those services. Section 139 of the Constitution applies if the municipality cannot or does not fulfil its obligations with regard to the provision of those services. When considering whether to stop the transfer of funds to a municipality, the National Treasury must take into account all relevant facts, including:

- (a) the municipality's compliance with the requirements of this act, in particular those relating to:
  - (i) annual financial statements, including the submission to the Auditor-General of its annual financial statements; and

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<sup>141</sup> See the MFMA s 37(1)-(2).

<sup>142</sup> See the MFMA s 38(1)-(2).

(ii) budgets, including the submission of information on the budget and implementation of the budget to the National Treasury and the relevant provincial treasury; and

(b) the municipality's co-operation with other municipalities on fiscal and financial matters, in the case of district and local municipalities.<sup>143</sup>

A decision by the National Treasury to stop the transfer to a municipality of funds

- lapses after the expiry of 120 days
- may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 75 of the Constitution.

Such a procedure should be prescribed by the joint rules and orders of Parliament. This process must be completed within 30 days of the decision by the National Treasury to stop the transfer of the funds.<sup>144</sup>

Parliament may further renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection 39(1)(b) of the MFMA. Before Parliament approves or renews a decision to stop the transfer of funds to a municipality, the Auditor-General must report to Parliament, if requested to do so by Parliament, and the municipality must be given an opportunity to answer the allegations against it and to state its case before a committee.<sup>145</sup> If the transfer of funds to a municipality has been stopped in terms of section 38(1)(b) for the rest of the relevant financial year, then the accounting officer of the national or provincial department responsible for the transfer must reflect such stopping of funds, together with reasons, in the annual financial statements of the department.<sup>146</sup>

The National Treasury is further obligated to monitor:

- the pricing structure of organs of state for the supply of electricity, water or any other bulk resources that may be prescribed, to municipalities and municipal entities for the provision of municipal services and
- payments made by municipalities and municipal entities for such bulk resources.<sup>147</sup>

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<sup>143</sup> Read the MFMA s 38(3)-(4).

<sup>144</sup> The MFMA s 39(1)(a)-(b).

<sup>145</sup> Read the MFMA s 39(2)-(3).

<sup>146</sup> The MFMA s 40.

<sup>147</sup> Refer to the MFMA s 41(1).

Each organ of state providing such bulk resources to a municipality must within 15 days after the end of each month furnish the National Treasury with a written statement setting out, for each municipality or for each municipal entity providing municipal services on behalf of such municipalities, the following information:

- the amount to be paid by the municipality or municipal entity for such bulk resources for that month, and for the financial year up to the end of that month
- the arrears owing and the age profile of such arrears and
- any actions taken by that organ of state to recover arrears.<sup>148</sup>

In relation to price increases of bulk resources for the provision of municipal services, it is stated that if a national or provincial organ of state which supplies water, electricity or any other bulk resource as may be prescribed to a municipality or municipal entity for the provision of a municipal service intends to increase the price of such resource for the municipality or municipal entity, it must first submit the proposed amendment to its pricing structure to its executive authority within the meaning of the Public Finance Management Act and secondly to any regulatory agency for approval, if national legislation requires such approval.<sup>149</sup> At least 40 days before making a submission, the organ of state referred to above must request the National Treasury and organised local government to provide written comments on the proposed amendment. Any submission must also be accompanied by:

- a motivation of the reasons for the proposed amendment
- an explanation of how the amendment takes account of
  - (a) the national government's inflation targets and other macroeconomic policy objectives
  - (b) steps taken by the organ of state to improve its competitiveness or efficiency in order to reduce costs
  - (c) any objectives or targets as outlined in any corporate or other governance plan applicable to that organ of state
- any written comments received from the National Treasury, organised local government or any municipalities and
- an explanation of how such comments have been taken into account.<sup>150</sup>

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<sup>148</sup> See the MFMA s 41(1)-(2).

<sup>149</sup> See the MFMA s 42(1)(a)-(b).

<sup>150</sup> Read the MFMA s 42(3)(a)-(d).

The executive authority of the organ of state must table the amendment and the documents referred to above either in Parliament or the relevant provincial legislature, as may be appropriate. Unless approved otherwise by the Minister, an amendment to a pricing structure which is tabled in Parliament or the relevant provincial legislature on or before 15 March in any year does not take effect for the affected municipalities or municipal entities before 1 July in that year or after 15 March in any year, does not take effect for the affected municipalities or municipal entities before 1 July the next year.<sup>151</sup>

If a national or provincial organ of state in terms of a power contained in any national or provincial legislation determines the upper limits of a municipal tax or tariff, such determination takes effect for municipalities on a date specified in the determination. Unless the minister approves otherwise on good grounds, the date specified in a determination referred to above may:

- (a) if the determination was promulgated on or before 15 March in a year, not be a date before 1 July in that year; or
- (b) if the determination was promulgated after 15 March in a year, not be a date before 1 July in the next year.<sup>152</sup>

If a municipality has in accordance with section 33 or 46(3) of the MFMA entered into a contract which provides for an annual or other periodic escalation of payments to be made by the municipality under the contract, no determination in terms of a power referred to in subsection 43(1) of the MFMA regarding the upper limits of a municipal tax or tariff applies to that municipality insofar as such upper limits would impair the municipality's ability to meet the escalation of its payments under the contract.

Whenever a dispute of a financial nature arises between organs of state, the parties concerned must as promptly as possible take all reasonable steps that may be necessary to resolve the matter out of court. If the National Treasury is not a party to the dispute, the parties must report the matter to the National Treasury and may request the National Treasury to mediate between the parties or to designate a per-

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<sup>151</sup> See the MFMA s 42(5)(a)-(b).

<sup>152</sup> See the MFMA s 43(1)-(2).

son to mediate between them. If the National Treasury accedes to a request, it may determine the mediation process.<sup>153</sup>

**(e) Aspects concerning municipal debt**

A municipality may incur short-term debt only in accordance with and subject to the provisions of the MFMA and only when necessary to bridge shortfalls within a financial year during which the debt is incurred. Such debt may be incurred only in expectation of specific and realistic anticipated income to be received within that financial year or capital needs within a financial year, to be repaid from specific funds to be received from enforceable allocations or long-term debt commitments.<sup>154</sup> Furthermore, a municipality may incur short-term debt only if a resolution of the municipal council, signed by the mayor, has approved the debt agreement and the accounting officer has signed the agreement or other document which creates or acknowledges the debt. For the purpose of obtaining a resolution to incur short term debt, a municipal council may:

- (a) approve a short-term debt transaction individually; or
- (b) approve an agreement with a lender for a short-term credit facility to be accessed as and when required, including a line of credit or bank overdraft facility, provided that—
  - (i) the credit limit must be specified in the resolution of the council;
  - (ii) the terms of the agreement, including the credit limit, may be changed only by a resolution of the council; and
  - (iii) if the council approves a credit facility that is limited to emergency use, the accounting officer must notify the council in writing as soon as practical of the amount, duration and cost of any debt incurred in terms of such a credit facility, as well as options for repaying such debt.<sup>155</sup>

A municipality must pay off short-term debt within the financial year and may not renew or refinance short-term debt, whether its own debt or that of any other entity, where such renewal or refinancing will have the effect of extending the short-term debt into a new financial year. No lender may wilfully extend credit to a municipality

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<sup>153</sup> See the MFMA s 44(1)-(4). These provisions apply only if at least one of the organs of state is a municipality or municipal entity. Refer again to the principles of co-operative government set out in the Constitution s 41.

<sup>154</sup> Read the MFMA s 45(1)(a)-(b). "Short-term debt" means debt payable over a period not exceeding one year. See the MFMA s 1.

<sup>155</sup> See the MFMA s 45(2)-(3).

for the purpose of renewing or refinancing short-term debt that must be paid off. If a lender wilfully extends credit to a municipality in contravention of the abovementioned provision, then the municipality is not bound to repay the loan or interest on the loan.<sup>156</sup>

With reference to long-term debt,<sup>157</sup> a municipality may incur such debt only in accordance with and subject to any applicable provisions of the MFMA, including section 19. Such debt may be incurred only for the purpose of:

- (a) capital expenditure on property, plant or equipment to be used for the purpose of achieving the objects of local government as set out in section 152 of the Constitution, including costs referred to in subsection 46(4); or
- (b) re-financing existing long-term debt subject to subsection 46(5). A municipality may incur long-term debt only if a resolution of the municipal council, signed by the mayor, has approved the debt agreement and the accounting officer has signed the agreement or other document which creates or acknowledges the debt.<sup>158</sup>

Furthermore, a municipality may incur long-term debt only if the accounting officer of the municipality:

- (a) has, in accordance with section 21A of the Municipal Systems Act:
  - (i) at least 21 days prior to the meeting of the council at which approval for the debt is to be considered, made public an information statement setting out particulars of the proposed debt, including the amount of the proposed debt, the purposes for which the debt is to be incurred and particulars of any security to be provided; and
  - (ii) invited the public, the National Treasury and the relevant provincial treasury to submit written comments or representations to the council in respect of the proposed debt; and

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<sup>156</sup> See the MFMA s 45(4)-(6). It should be noted that the non-repayment of a loan to a lender does not apply if the lender (a) relied in good faith on written representations of the municipality regarding purpose of the borrowing, and (b) did not know and had no reason to believe that the borrowing was for the purpose of renewing or refinancing short-term debt. A "lender" in relation to a municipality, means a person who provides debt finance to a municipality. Refer to s 1 definitions.

<sup>157</sup> "Long-term debt" means debt repayable over a period exceeding one year. See the MFMA s 1.

<sup>158</sup> See the MFMA s 46(1)-(2). Note that debt means (a) a monetary liability or obligation created by a financing agreement, note, debenture, bond or overdraft, or by the issuance of municipal debt instruments or (b) a contingent liability such as that created by guaranteeing a monetary liability or obligation of another. See the MFMA s 1.



- (b) has submitted a copy of the information statement to the municipal council at least 21 days prior to the meeting of the council, together with particulars of-
- (i) the essential repayment terms, including the anticipated debt repayment schedule; and
  - (ii) the anticipated total cost in connection with such debt over the repayment period.<sup>159</sup>

Capital expenditure contemplated in subsection 46(1)(a) may include:

- financing costs, including
  - (a) capitalised interest for a reasonable initial period
  - (b) costs associated with security arrangements in accordance with section 48 of the MFMA
  - (c) discounts and fees in connection with the financing
  - (d) fees for legal, financial, advisory, trustee, credit rating and other services directly connected to the financing and
  - (e) costs connected to the sale or placement of debt, and costs for printing and publication directly connected to the financing
- costs of professional services directly related to the capital expenditure and
- such other costs as may be prescribed.<sup>160</sup>

Municipalities are further allowed to borrow money for the purpose of re-financing existing long-term debt, provided that:

- the existing long-term debt was lawfully incurred
- the re-financing does not extend the term of the debt beyond the useful life of the property, plant or equipment for which the money was originally borrowed
- the net present value of projected future payments (including principal and interest payments) after re-financing is less than the net present value of projected future payments before re-financing and
- the discount rate used in projecting net present value referred to above, and any assumptions in connection with the calculations, must be reasonable and in accordance with criteria set out in a framework that may be prescribed.<sup>161</sup>

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<sup>159</sup> Read the MFMA s 46(2).

<sup>160</sup> Read the MFMA s 46(3)-(4).

<sup>161</sup> Note that a municipality's long-term debt must be consistent with its capital budget referred to in s 17(2). Read the MFMA s 46(5)-(6).

Both short-term and long-term debt may be incurred only if the debt is denominated in Rand and is not indexed to, or affected by, fluctuations in the value of the Rand against any foreign currency and section 48(3) of the MFMA has been complied with, if security is to be provided by the municipality. With reference to security of debt, the MFMA provides that a municipality may, by resolution of its council, provide security for:

- (a) any of its debt obligations;
- (b) any debt obligations of a municipal entity under its sole control; or
- (c) contractual obligations of the municipality undertaken in connection with capital expenditure by other persons on property, plant or equipment to be used by the municipality or such other person for the purpose of achieving the objects of local government in terms of section 152 of the Constitution.<sup>162</sup>

A municipality may provide any appropriate security, including by:

- (a) giving a lien on, or pledging, mortgaging, ceding or otherwise hypothecating, an asset or right, or giving any other form of collateral;
- (b) undertaking to effect payment directly from money or sources that may become available and to authorise the lender or investor direct access to such sources to ensure payment of the secured debt or the performance of the secured obligations, but this form of security may not affect compliance with section 8(2) of the MFMA;
- (c) undertaking to deposit funds with the lender, investor or third party as security;
- (d) agreeing to specific payment mechanisms or procedures to ensure exclusive or dedicated payment to lenders or investors, including revenue intercepts, payments into dedicated accounts or other payment mechanisms or procedures;
- (e) ceding as security any category of revenue or rights to future revenue;
- (f) undertaking to have disputes resolved through mediation, arbitration or other dispute resolution mechanisms;
- (g) undertaking to retain revenues or specific municipal tariffs or other charges, fees or funds at a particular level or at a level sufficient to meet its financial obligations;

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<sup>162</sup> Refer to the MFMA ss 47 and 48(1)(a)-(c).

- (h) undertaking to make provision in its budgets for the payment of its financial obligations, including capital and interest;
- (i) agreeing to restrictions on debt that the municipality may incur in future until the secured debt is settled or the secured obligations are met; and
- (j) agreeing to such other arrangements as the municipality may consider necessary and prudent.<sup>163</sup>

A council resolution authorising the provision of security must determine whether the asset or right with respect to which the security is provided is necessary for providing the minimum level of basic municipal services and, if so, must indicate the manner in which the availability of the asset or right for the provision of that minimum level of basic municipal services will be protected. If the resolution has determined that the asset or right is necessary for providing the minimum level of basic municipal services, neither the party to whom the municipal security is provided nor any successor or assignee of such party may deal with the asset or right in a manner that would preclude or impede the continuation of that minimum level of basic municipal services in the event of a default by the municipality.<sup>164</sup>

When interacting with a prospective lender or when preparing documentation for consideration by a prospective investor, any person involved in the borrowing of money by a municipality must disclose all information in that person's possession or within that person's knowledge that may be material to the decision of that prospective lender or investor and take reasonable care to ensure the accuracy of any information disclosed. Any lender or investor may rely on written representations of the municipality signed by the accounting officer, if the lender or investor did not know and had no reason to believe that those representations were false or misleading.<sup>165</sup>

With reference to municipal guarantees, a municipality may not issue any guarantee for any commitment or debt of any organ of state or person, except on the following conditions:

- (a) The guarantee must be within limits specified in the municipality's approved budget;
- (b) a municipality may guarantee the debt of a municipal entity under its sole

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<sup>163</sup> See the MFMA s 48(2)(a)-(j).

<sup>164</sup> See the MFMA s 48(3)-(4) and also s 48(5) of the Act.

<sup>165</sup> The MFMA s 49(1)-(2).

control only if the guarantee is authorised by the council in the same manner and subject to the same conditions applicable to a municipality in terms of this chapter if it incurs debt;

- (c) a municipality may guarantee the debt of a municipal entity under its shared control or of any other person, but only with the approval of the National Treasury, and then only if (i) the municipality creates, and maintains for the duration of the guarantee, a cash-backed reserve equal to its total potential financial exposure as a result of such guarantee; or (ii) the municipality purchases and maintains in effect for the duration of the guarantee, a policy of insurance issued by a registered insurer, which covers the full amount of the municipality's potential financial exposure as a result of such guarantee.<sup>166</sup>

**(f) Responsibilities of mayors under the MFMA**

Under the new financial legislative framework, the mayor of a municipality must provide general political guidance over the fiscal and financial affairs of the municipality. In providing such general political guidance, the mayor may monitor and, to the extent provided in the MFMA, oversee the exercise of responsibilities assigned in terms of the Act to the accounting officer and the chief financial officer, but may not interfere in the exercise of those responsibilities. The mayor must take all reasonable steps to ensure that the municipality performs its constitutional and statutory functions within the limits of the municipality's approved budget and must, within 30 days of the end of each quarter, submit a report to the council on the implementation of the budget and the financial state of affairs of the municipality. Finally, all mayors must exercise the other powers and perform the other duties assigned to them in terms of the MFMA or delegated by the council to them.<sup>167</sup>

With regard to the budget processes and other related matters the mayor must do the following:

- (a) provide general political guidance over the budget process and the priorities that must guide the preparation of a budget;
- (b) co-ordinate the annual revision of the integrated development plan in terms of section 34 of the Municipal Systems Act and the preparation of the annual

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<sup>166</sup> Read the MFMA s 50(a)-(c). Note that neither the national nor a provincial government may guarantee the debt of a municipality or municipal entity except to the extent that the Public Finance Management Act ch 8 provides for such guarantees. See the MFMA s 51.

<sup>167</sup> See the MFMA s 52(a)-(e).

budget, and determine how the integrated development plan is to be taken into account or revised for the purposes of the budget; and

(c) take all reasonable steps to ensure:

- (i) that the municipality approves its annual budget before the start of the budget year;
- (ii) that the municipality's service delivery and budget implementation plan is approved by the mayor within 28 days after the approval of the budget; and
- (iii) that the annual performance agreements as required in terms of section 57(1)(b) of the Municipal Systems Act for the municipal manager and all senior managers:
  - (aa) comply with this act in order to promote sound financial management;
  - (bb) are linked to the measurable performance objectives approved with the budget and to the service delivery and budget implementation plan; and
  - (cc) are concluded in accordance with section 57(2) of the Municipal Systems Act.<sup>168</sup>

The mayor must further promptly report to the municipal council and the MEC for finance in the province any delay in the tabling of an annual budget, the approval of the service delivery and budget implementation plan or the signing of the annual performance agreements. He/she must also ensure that the revenue and expenditure projections for each month and the service delivery targets and performance indicators for each quarter, as set out in the service delivery and budget implementation plan, are made public no later than 14 days after the approval of the service delivery and budget implementation plan and that the performance agreements of the municipal manager, senior managers and any other categories of officials as may be prescribed are made public no later than 14 days after the approval of the municipality's service delivery and budget implementation plan. Copies of such performance agreements must be submitted to the council and the MEC for local government in the province.<sup>169</sup>

On receipt of a statement or report submitted by the accounting officer of the municipality in terms of sections 71 or 72 of the MFMA, the mayor must:

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<sup>168</sup> See the MFMA s 53(1)(a)-(c).

<sup>169</sup> The MFMA s 53(2)-(3).

- (a) consider the statement or report;
- (b) check whether the municipality's approved budget is implemented in accordance with the service delivery and budget implementation plan;
- (c) consider and, if necessary, make any revisions to the service delivery and budget implementation plan, provided that revisions to the service delivery targets and performance indicators in the plan may only be made with the approval of the council following approval of an adjustments budget;
- (d) issue any appropriate instructions to the accounting officer to ensure:
  - (i) that the budget is implemented in accordance with the service delivery and budget implementation plan; and
  - (ii) that spending of funds and revenue collection proceed in accordance with the budget;
- (e) identify any financial problems facing the municipality, including any emerging or impending financial problems; and
- (f) in the case of a section 72 report, submit the report to the council by 31 January of each year.<sup>170</sup>

If the municipality faces any serious financial problems, the mayor must

- promptly respond to and initiate any remedial or corrective steps proposed by the accounting officer to deal with such problems, which may include
  - (a) steps to reduce spending when revenue is anticipated to be less than projected in the municipality's approved budget;
  - (b) the tabling of an adjustments budget
  - (c) steps in terms of chapter 13 of the MFMA
- alert the council and the MEC for local government in the province to those problems.

The mayor must ensure that any revisions of the service delivery and budget implementation plan are made public promptly.<sup>171</sup>

If a municipality has not approved an annual budget by the first day of the budget year or if the municipality encounters a serious financial problem referred to in section 136 of the MFMA, then the mayor of the municipality

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<sup>170</sup> See the MFMA s 54(1)(a)-(f).

<sup>171</sup> See the MFMA s 54(2)-(3).

- must immediately report the matter to the MEC for local government in the province
- may recommend to the MEC an appropriate provincial intervention in terms of section 139 of the Constitution.<sup>172</sup>

It is further provided that the mayor of a municipality which has sole or shared control over a municipal entity must guide the municipality in exercising its rights and powers over the municipal entity in a way:

- that would reasonably ensure that the municipal entity complies with this act and at all times remains accountable to the municipality and
- that would not impede the entity from performing its operational responsibilities.

In guiding the municipality in the exercise of its rights and powers over a municipal entity, the mayor may monitor the operational functions of the entity, but may not interfere in the performance of those functions.<sup>173</sup> The council of a municipality which does not have a mayor must designate a councillor to exercise the powers and duties assigned by the MFMA to a mayor. In the case of a municipality which does not have a mayor, a reference in the MFMA to the mayor of a municipality must be construed as a reference to a councillor designated by the council of the municipality to bear the specific responsibilities.<sup>174</sup> In the case of a municipality which has an executive committee, the powers and functions assigned by the MFMA to a mayor must be exercised by the mayor in consultation with the executive committee.<sup>175</sup>

The powers and duties assigned in terms of the MFMA to the mayor of a municipality may be delegated by:

- the executive mayor in terms of section 60(1) of that Act to another member of the municipality's mayoral committee in the case of a municipality which has an executive mayor referred to in section 55 of the Municipal Structures Act
- the council of the municipality to another member of the executive committee in the case of a municipality which has an executive committee referred to in section 43 of the Structures Act or

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<sup>172</sup> Read the MFMA s 55.

<sup>173</sup> Refer to the MFMA s 56(1)-(2).

<sup>174</sup> The MFMA s 57(1)-(2).

<sup>175</sup> The MFMA s 58. It is submitted that "in consultation with" means that the executive committee must be consulted on the matter and that the parties have followed a specified decision-making process. See also Rautenbach and Malherbe (1999) 214-216.



- the council to any other councillor in the case of a municipality which has designated a councilor in terms of section 57(1) of the MFMA.<sup>176</sup>

Any delegation mentioned above:

- must be in writing;
- is subject to any limitations or conditions that the executive mayor or council, as the case may be, may impose; and
- does not divest the mayor of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.

Finally, the mayor may confirm, vary or revoke any decision taken in consequence of a delegation in terms of this section, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.<sup>177</sup>

### **(g) General responsibilities of municipal officials**

According to the MFMA, the municipal manager of a municipality is the accounting officer of the municipality for the purposes of the Act and, as accounting officer, must exercise the functions and powers assigned to an accounting officer in terms of the Act and provide guidance and advice on compliance with the Act to

- the political structures, political office-bearers and officials of the municipality<sup>178</sup>
- any municipal entity under the sole or shared control of the municipality.<sup>179</sup>

The accounting officer of a municipality is obligated to comply with certain fiduciary responsibilities. In this regard the officer must:

- act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs
- disclose to the municipal council and the mayor all material facts which are available to the accounting officer or reasonably discoverable and which in any way might influence the decisions or actions of the council or the mayor and
- seek, within the sphere of influence of the accounting officer, to prevent any

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<sup>176</sup> See the MFMA s 59(1)(a)-(c).

<sup>177</sup> Read the MFMA s 59(2)-(3).

<sup>178</sup> An official in relation to a municipality or municipal entity means (a) an employee of a municipality or municipal entity, (b) a person seconded to a municipality or municipal entity to work as a member of the staff of the municipality or municipal entity or (c) a person contracted by a municipality or municipal entity to work as a member of the staff of the municipality or municipal entity otherwise than as an employee. See the MFMA s 1. Political structures again refer to (a) the council of a municipality or (b) any committee or other collective structure of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act.

<sup>179</sup> The MFMA s 60.

prejudice to the financial interests of the municipality.<sup>180</sup>

An accounting officer may not act in a way that is inconsistent with the duties assigned to accounting officers of municipalities in terms of the MFMA or use the position or privileges of, or confidential information obtained as, accounting officer for personal gain or to improperly benefit another person.<sup>181</sup> The accounting officer of a municipality is further also responsible for managing the financial administration of the municipality and must, for this purpose, take all reasonable steps to ensure that:

- the resources of the municipality are used effectively, efficiently and economically
- full and proper records of the financial affairs of the municipality are kept in accordance with any prescribed norms and standards
- the municipality has and maintains effective, efficient and transparent systems:
  - (a) of financial and risk management and internal control and
  - (b) of internal audit operating in accordance with any prescribed norms and standards
- unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented
- disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of chapter 15 of the MFMA and
- the municipality has and implements:
  - (a) a tariff policy referred to in section 74 of the Municipal Systems Act
  - (b) a rates policy as may be required in terms of any applicable national legislation
  - (c) a credit control and debt collection policy referred to in section 96(b) of the Municipal Systems Act and
  - (d) a supply chain management policy in accordance with chapter 11 of the MFMA.

The accounting officer is responsible for and must account for all bank accounts of the municipality, including any bank account opened for:

- any relief fund, charitable fund, trust or other fund set up by the municipality in terms of section 12 of the MFMA or

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<sup>180</sup> Refer to the MFMA s 61(1).

<sup>181</sup> See the MFMA s 61(2)(a)-(b).

- a purpose referred to in section 48(2)(d) of the Act.<sup>182</sup>

In respect of asset and liability management the accounting officer of a municipality is responsible for the management of the assets of the municipality, including the safeguarding and the maintenance of those assets and the liabilities of the municipality. The accounting officer must for the purposes of these responsibilities take all reasonable steps to ensure that the municipality has and maintains a management, accounting and information system that accounts for the assets and liabilities of the municipality; that the municipality's assets and liabilities are valued in accordance with standards of generally recognised accounting practice and that the municipality has and maintains a system of internal control of assets and liabilities, including an asset and liabilities register, as may be prescribed.<sup>183</sup>

The accounting officer of a municipality is responsible also for the management of the revenue of the municipality. For the purposes of revenue management, the accounting officer must take all reasonable steps to ensure the following:

- (a) that the municipality has effective revenue collection systems consistent with section 95 of the Municipal Systems Act and the municipality's credit control and debt collection policy;
- (b) that revenue due to the municipality is calculated on a monthly basis;
- (c) that accounts for municipal tax and charges for municipal services are prepared on a monthly basis, or less often as may be prescribed where monthly accounts are uneconomical;
- (d) that all money received is promptly deposited in accordance with this act into the municipality's primary and other bank accounts;
- (e) that the municipality has and maintains a management, accounting and information system which:
  - (i) recognises revenue when it is earned;
  - (ii) accounts for debtors; and
  - (iii) accounts for receipts of revenue;
- (f) that the municipality has and maintains a system of internal control in respect of debtors and revenue, as may be prescribed;

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<sup>182</sup> See the MFMA s 62(1)-(2).

<sup>183</sup> Read the MFMA s 63(1)-(2).

- (g) that the municipality charges interest on arrears, except where the council has granted exemptions in accordance with its budget-related policies and within a prescribed framework; and
- (h) that all revenue received by the municipality, including revenue received by any collecting agent on its behalf, is reconciled at least on a weekly basis.<sup>184</sup>

The accounting officer must immediately inform the National Treasury of any payments due by an organ of state to the municipality in respect of municipal tax or for municipal services, if such payments are regularly in arrears for periods of more than 30 days. The accounting officer must also take all reasonable steps to ensure that any funds collected by the municipality on behalf of another organ of state is transferred to that organ of state on at least a weekly basis and that such funds are not used for purposes of the municipality.<sup>185</sup>

The accounting officer of a municipality is also responsible for the management of the expenditure of the municipality. The accounting officer must for such purposes take all reasonable steps to ensure:

- (a) that the municipality has and maintains an effective system of expenditure control, including procedures for the approval, authorisation, withdrawal and payment of funds;
- (b) that the municipality has and maintains a management, accounting and information system which:
  - (i) recognises expenditure when it is incurred;
  - (ii) accounts for creditors of the municipality;<sup>186</sup> and
  - (iii) accounts for payments made by the municipality;
- (c) that the municipality has and maintains a system of internal control in respect of creditors and payments;
- (d) that payments by the municipality are made:
  - (i) directly to the person to whom it is due unless agreed otherwise for reasons as may be prescribed; and

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<sup>184</sup> See the MFMA s 64(1)(a)-(h).

<sup>185</sup> The MFMA s 64(3)-(4).

<sup>186</sup> In relation to a municipality, "creditor" means a person to whom money is owing by the municipality. See the MFMA s 1.

- (ii) either electronically or by way of non-transferable cheques, provided that cash payments and payments by way of cash cheques may be made for exceptional reasons only, and only up to a prescribed limit;
- (e) that all money owing by the municipality be paid within 30 days of receiving the relevant invoice or statement, unless prescribed otherwise for certain categories of expenditure;
- (f) that the municipality complies with its tax, levy, duty, pension, medical aid, audit fees and other statutory commitments;
- (g) that any dispute concerning payments due by the municipality to another organ of state is disposed of in terms of legislation regulating disputes between organs of state;
- (h) that the municipality's available working capital is managed effectively and economically in terms of the prescribed cash management and investment framework;
- (i) that the municipality's supply chain management policy referred to in section 111 of the MFMA is implemented in a way that is fair, equitable, transparent, competitive and cost-effective; and
- (j) that all financial accounts of the municipality are closed at the end of each month and reconciled with its records.<sup>187</sup>

In a format and for periods as may be prescribed, the accounting officer of a municipality must report to the council on all expenditure incurred by the municipality on staff salaries, wages, allowances and benefits, and in a manner that discloses such expenditure per type of expenditure, namely:

- salaries and wages
- contributions for pensions and medical aid
- travel, motor car, accommodation, subsistence and other allowances
- housing benefits and allowances
- overtime payments
- loans and advances and
- any other type of benefit or allowance related to staff.<sup>188</sup>

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<sup>187</sup> See the MFMA s 65(1)-(2).

<sup>188</sup> The MFMA s 66(a)-(g).

Before transferring funds of the municipality to an organisation or body outside any sphere of government otherwise than in compliance with a commercial or other business transaction, the accounting officer must be satisfied that the organisation or body:

- (a) has the capacity and has agreed:
  - (i) to comply with any agreement with the municipality;
  - (ii) for the period of the agreement to comply with all reporting, financial management and auditing requirements as may be stipulated in the agreement;
  - (iii) to report at least monthly to the accounting officer on actual expenditure against such transfer; and
  - (iv) to submit its audited financial statements for its financial year to the accounting officer promptly;
- (b) implements effective, efficient and transparent financial management and internal control systems to guard against fraud, theft and financial mismanagement; and
- (c) has in respect of previous similar transfers complied with all the requirements of this section.<sup>189</sup>

The accounting officer of a municipality must assist the mayor in performing the budgetary functions assigned to the mayor and provide the mayor with the administrative support, resources and information necessary for the performance of those functions.<sup>190</sup> The accounting officer is further responsible for implementing the municipality's approved budget, including taking all reasonable steps to ensure that the spending of funds is in accordance with the budget and is reduced as necessary when revenue is anticipated to be less than projected in the budget or in the service

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<sup>189</sup> See the MFMA s 67(1)(a)-(c). If there has been a failure by an organisation or body to comply with the requirements of ss 67(1) in respect of a previous transfer, the municipality may, despite s 67(1)(c) make a further transfer to that organisation or body, provided that s 67(1)(a) and (b) is complied with and the relevant provincial treasury has approved the transfer. Through contractual and other appropriate mechanisms, the accounting officer must enforce compliance with s 67(1). Furthermore, s 67(1)(a) does not apply to an organisation or body serving the poor or used by government as an agency to serve the poor, provided that the transfer does not exceed a prescribed limit and that the accounting officer: (i) takes all reasonable steps to ensure that the targeted beneficiaries receive the benefit of the transferred funds and (ii) certifies to the Auditor-General that compliance by that organisation or body with ss 67(1)(a) is uneconomical or unreasonable. Read also the MFMA s 67(2)-(4).

<sup>190</sup> The MFMA s 68.

delivery and budget implementation plan and that revenue and expenditure are properly monitored. When necessary, the accounting officer must prepare an adjustments budget and submit it to the mayor for consideration and tabling in the municipal council. No later than 14 days after the approval of an annual budget, the accounting officer must submit to the mayor a draft service delivery and budget implementation plan for the budget year and drafts of the annual performance agreements as required in terms of section 57(1)(b) of the Municipal Systems Act for the municipal manager and all senior managers.<sup>191</sup>

In respect of impending shortfalls, overspending and overdrafts, the accounting officer of a municipality must report in writing to the municipal council any

- impending shortfalls in budgeted revenue
- overspending of the municipality's budget
- steps taken to prevent or rectify such shortfalls or overspending.

If the balance in a municipality's bank account or the consolidated balance in the municipality's bank accounts if the municipality has more than one bank account, shows a net overdrawn position for a period exceeding a prescribed period, then the accounting officer of the municipality must promptly notify the National Treasury in the prescribed format of

- the amount by which the account or accounts are overdrawn
- the reasons for the overdrawn account or accounts
- the steps taken or to be taken to correct the matter.<sup>192</sup>

The accounting officer of a municipality is further obligated to submit, by no later than 10 working days after the end of each month, to the mayor of the municipality and the relevant provincial treasury a statement in the prescribed format on the state of the municipality's budget, which statement should reflect the following particulars for that month and for the financial year up to the end of that month:

- (a) Actual revenue, per revenue source;
- (b) actual borrowings;
- (c) actual expenditure, per vote;
- (d) actual capital expenditure, per vote;

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<sup>191</sup> See the MFMA s 69(1)-(3).

<sup>192</sup> See the MFMA s 70(1)-(3). When determining the net overdrawn position, the accounting officer must exclude any amounts reserved or pledged for any specific purpose or encumbered in any other way.



- (e) the amount of any allocations received;
- (f) actual expenditure on those allocations, excluding expenditure on (i) its share of the local government equitable share; and (ii) allocations exempted by the annual Division of Revenue Act from compliance with this paragraph; and
- (g) when necessary, an explanation of:
  - (i) any material variances from the municipality's projected revenue by source, and from the municipality's expenditure projections per vote;
  - (ii) any material variances from the service delivery and budget implementation plan; and
  - (iii) any remedial or corrective steps taken or to be taken to ensure that projected revenue and expenditure remain within the municipality's approved budget.<sup>193</sup>

The statement mentioned above must include a projection of the relevant municipality's revenue and expenditure for the rest of the financial year and any revisions from initial projections and the prescribed information relating to the state of the budget of each municipal entity as provided to the municipality in terms of section 87(10) of the MFMA. The amounts reflected in the statement must in each case be compared with the corresponding amounts budgeted for in the municipality's approved budget.<sup>194</sup>

The accounting officer of a municipality which has received an allocation referred to in subsection 71(1)(e) of the MFMA during any particular month must submit, by no later than 10 working days after the end of that month, that part of the statement reflecting the particulars referred to in subsection 71(1)(e) and (f) to the national or provincial organ of state or municipality which transferred the allocation. By no later than 22 working days after the end of each month, the provincial treasury must submit to the National Treasury a consolidated statement in the prescribed format on the state of the municipalities' budgets, per municipality and per municipal entity. Within 30 days after the end of each quarter, the provincial treasury must also make public as may be prescribed, a consolidated statement in the prescribed format on the state of municipalities' budgets per municipality and per municipal entity. The MEC for

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<sup>193</sup> The MFMA S 71(1)(a)-(g).

<sup>194</sup> See the MFMA s 71(2)(a)-(b). Note that the statement to the provincial treasury must be in the format of a signed document and in electronic format.

finance must submit such consolidated statement to the provincial legislature no later than 45 days after the end of each quarter.<sup>195</sup>

By 25 January of each year all accounting officers of municipalities must

- assess the performance of the municipality during the first half of the financial year, taking into account
  - (a) the monthly statements referred to in section 71 of the MFMA for the first half of the financial year
  - (b) the municipality's service delivery performance during the first half of the financial year, and the service delivery targets and performance indicators set in the service delivery and budget implementation plan
  - (c) the past year's annual report, and progress on resolving problems identified in the annual report
  - (d) the performance of every municipal entity under the sole or shared control of the municipality, taking into account reports in terms of section 88 of the MFMA from any such entities
- submit a report on such assessment to
  - (a) the mayor of the municipality
  - (b) the National Treasury
  - (c) the relevant provincial treasury.<sup>196</sup>

As part of the review process, the accounting officer must make recommendations as to whether an adjustments budget is necessary and recommend revised projections for revenue and expenditure to the extent that this may be necessary.<sup>197</sup>

The accounting officer of a municipality is obligated to inform the provincial treasury in writing of any failure by the council of the municipality to adopt or implement a budget-related policy or a supply chain management policy referred to in section 111 of the MFMA or any non-compliance by a political structure or office-bearer of the municipality with any such policy.<sup>198</sup> Apart from such obligations, the accounting officer of a municipality must also submit to the National Treasury, the provincial treasury, the department for local government in the province or the Auditor-General

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<sup>195</sup> Read the MFMA s 71(5)-(7).

<sup>196</sup> Refer to the MFMA s 72(1)(a)-(b). The statement referred to in s 71(1) for the sixth month of a financial year may be incorporated into the report referred to in subs (1)(b) of this section.

<sup>197</sup> The MFMA s 72(2)-(3).

<sup>198</sup> See the MFMA s 73(a)-(b).

such information, returns, documents, explanations and motivations as may be prescribed or as may be required. If the accounting officer of a municipality is unable to comply with any of the responsibilities in terms of this Act, he or she must report the inability promptly, together with reasons, to the mayor and the provincial treasury.<sup>199</sup>

In order to facilitate accountability, openness and public participation, the MFMA requires that various aspects of information should be placed on each municipal website. In this regard, the accounting officer of a municipality must place on the website referred to in section 21A of the Municipal Systems Act the following documents of the municipality:

- (a) the annual and adjustments budgets and all budget-related documents;
- (b) all budget-related policies;
- (c) the annual report;
- (d) all performance agreements required in terms of section 57(1)(b) of the Municipal Systems Act;
- (e) all service delivery agreements;
- (f) all long-term borrowing contracts;
- (g) all supply chain management contracts above a prescribed value;
- (h) an information statement containing a list of assets over a prescribed value that have been disposed of in terms of section 14(2) or (4) during the previous quarter;
- (i) contracts to which subsection (1) of section 33 apply, subject to subsection (3) of that section;
- (j) public-private partnership agreements referred to in section 120;
- (k) all quarterly reports tabled in the council in terms of section 52(d); and
- (l) any other documents that must be placed on the website in terms of this act or any other applicable legislation, or as may be prescribed.<sup>200</sup>

All accounting officers are afforded special protection under the MFMA. In this regard the Act determines that any action taken by a political structure or office-bearer of a municipality against the accounting officer of the municipality solely because of that

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<sup>199</sup> Read the MFMA s 74(1)-(2).

<sup>200</sup> See the MFMA s 75(1)(a)-(e). A document referred to in ss 75(1) must be placed on the website not later than five days after its tabling in the council or on the date on which it must be made public, whichever occurs first.

accounting officer's compliance with a provision of this Act is an unfair labour practice for the purposes of the Labour Relations Act.<sup>201</sup>

The MFMA further determines that the top management of a municipality's administration consists of:

- the accounting officer
- the chief financial officer
- all senior managers who are responsible for managing the respective votes of the municipality and to whom powers and duties for this purpose have been delegated and
- any other senior officials designated by the accounting officer.<sup>202</sup>

Each senior manager of a municipality and each official of a municipality exercising financial management responsibilities must take all reasonable steps within their respective areas of responsibility to ensure:

- (a) that the system of financial management and internal control established for the municipality is carried out diligently;
- (b) that the financial and other resources of the municipality are utilised effectively, efficiently, economically and transparently;
- (c) that any unauthorised, irregular or fruitless and wasteful expenditure and any other losses are prevented;
- (d) that all revenue due to the municipality is collected;
- (e) that the assets and liabilities of the municipality are managed effectively and that assets are safeguarded and maintained to the extent necessary;
- (f) that all information required by the accounting officer for compliance with the provisions of this act is timeously submitted to the accounting officer; and
- (g) that the provisions of this act, to the extent applicable to that senior manager or official, including any delegations, are complied with.<sup>203</sup>

The accounting officer of a municipality must, for the proper application of the MFMA in the municipality's administration, develop an appropriate system of delegation that

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<sup>201</sup> See the MFMA s 76 read together with Act 66 of 1995.

<sup>202</sup> The MFMA s 77(1)(a)-(d). The top management must assist the accounting officer in managing and co-ordinating the financial administration of the municipality. It should be remembered that the municipal manager is also the accounting officer of a municipality and thus part of top management.

<sup>203</sup> Note that a senior manager or such official must perform the functions referred to in s 78(1) subject to the directions of the accounting officer of the municipality. See also the MFMA s 78(1)-(2).

will both maximise administrative and operational efficiency and provide adequate checks and balances in the municipality's financial administration. In accordance with that system, such officer may further delegate to a member of the municipality's top management or any other official of the municipality

- any of the powers or duties assigned to an accounting officer in terms of the MFMA
- any powers or duties reasonably necessary to assist the accounting officer in complying with a duty which requires the accounting officer to take reasonable or appropriate steps to ensure the achievement of the aims of a specific provision of the MFMA.

An accounting officer must regularly review delegations issued and, if necessary, amend or withdraw any of those delegations.<sup>204</sup> A delegation in terms of subsection 79(1) of the MFMA:

- must be in writing
- is subject to such limitations and conditions as the accounting officer may impose in a specific case
- may either be to a specific individual or to the holder of a specific post in the municipality
- may, in the case of a delegation to a member of the municipality's top management, authorise that member to sub-delegate the delegated power or duty to an official or the holder of a specific post in that member's area of responsibility and
- does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.<sup>205</sup>

#### **(h) Aspects relating to municipal budget and treasury offices**

Under the MFMA every municipality must have a budget and treasury office. A budget and treasury office consists of a chief financial officer designated by the accounting officer of the municipality, officials of the municipality allocated by the ac-

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<sup>204</sup> Note that the accounting officer may not delegate to any political structure or political office-bearer of the municipality any of the powers or duties assigned to accounting officers in terms of the MFMA. Read also the MFMA s 79(1)-(2).

<sup>205</sup> See the MFMA s 79(3)(a)-(e). The accounting officer may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation in terms of this section, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

counting officer to the chief financial officer and any other persons contracted by the municipality for the work of the office.<sup>206</sup>

Within a treasury office, the chief financial officer of a municipality:

- is administratively in charge of the budget and treasury office
- must advise the accounting officer on the exercise of powers and duties assigned to the accounting officer in terms of the MFMA
- must assist the accounting officer in the administration of the municipality's bank accounts and in the preparation and implementation of the municipality's budget
- must advise senior managers and other senior officials in the exercise of powers and duties assigned to them in terms of section 78 or delegated to them in terms of section 79 of the MFMA and
- must perform such budgeting, accounting, analysis, financial reporting, cash management, debt management, supply chain management, financial management, review and other duties as may be delegated by the accounting officer to the chief financial officer.<sup>207</sup>

The chief financial officer of a municipality may sub-delegate any of the duties referred to in section 81(1)(b), (d) and (e) of the MFMA:

- to an official in the budget and treasury office
- to the holder of a specific post in that office or
- with the concurrence of the accounting officer to
  - (a) any other official of the municipality or
  - (b) any person contracted by the municipality for the work of the office.<sup>208</sup>

If the chief financial officer sub-delegates any duties to a person who is not an employee of the municipality, the chief financial officer must be satisfied that effective systems and procedures are in place to ensure control and accountability. A sub-delegation in terms of subsection (1):

- must be in writing
- is subject to such limitations or conditions as the chief financial officer may impose and

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<sup>206</sup> The MFMA s 80(1)-(2).

<sup>207</sup> See the MFMA s 81(1)(a)-(e). Note that the chief financial officer of a municipality is accountable to the accounting officer for the performance of the duties referred to in the Act s 81(1).

<sup>208</sup> The MFMA s 82(1)(a)-(c).

- does not divest the chief financial officer of the responsibility concerning the delegated duty.<sup>209</sup>

In order to fulfil the vast array of duties and responsibilities, the MFMA sets specific competency levels for financial officials. In this regard the accounting officer, senior managers, the chief financial officer and other financial officials of a municipality must meet the prescribed financial management competency levels. A municipality must provide resources or opportunities for the training of officials referred to above to meet the prescribed competency levels. Both the National Treasury or a provincial treasury may assist municipalities in the training of officials referred to in subsection 83(1) of the MFMA.<sup>210</sup>

#### **(i) Aspects concerning municipal entities**

When considering the establishment of, or participation in, a municipal entity, a municipality must first

- determine precisely the function or service that such entity would perform on behalf of the municipality and
- make an assessment of the impact of the shifting of that function or service to the entity on the municipality's staff, assets and liabilities, including an assessment of:
  - (i) the number of staff of the municipality to be transferred to the entity;
  - (ii) the number of staff of the municipality that would become redundant because of the shifting of that function or service;
  - (iii) the cost to the municipality of any staff retrenchments or the retention of redundant staff;
  - (iv) any assets of the municipality to be transferred to the entity;
  - (v) any assets of the municipality that would become obsolete because of the shifting of that function or service;
  - (vi) any liabilities of the municipality to be ceded to the entity; and
  - (vii) any debt of the municipality attributed to that function or service which the municipality would retain.<sup>211</sup>

A municipality may establish or participate in a municipal entity only if:

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<sup>209</sup> Read the MFMA s 82(2)-(3). Note also that the chief financial officer may confirm, vary or revoke any decision taken in consequence of a sub-delegation, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

<sup>210</sup> See the MFMA s 83(1)-(3).

<sup>211</sup> The MFMA s 84(1)(a)-(b).



- (a) the municipal manager, at least 90 days before the meeting of the municipal council at which the proposed establishment of the entity, or the municipality's proposed participation in the entity, is to be approved –
- (i) has, in accordance with section 21A of the Municipal Systems Act:
    - (aa) made public an information statement setting out the municipality's plans for the municipal entity together with the assessment which the municipality must conduct in terms of subsection (1); and
    - (bb) invited the local community, organised labour and other interested persons to submit to the municipality comments or representations in respect of the matter; and
  - (ii) has solicited the views and recommendations of –
    - (aa) the National Treasury and the relevant provincial treasury;
    - (bb) the national and provincial departments responsible for local government; and
    - (cc) the MEC for local government in the province; and
- (b) the municipal council has taken into account –
- (i) the assessment referred to in subsection (1);
  - (ii) any comments or representations on the matter received from the local community, organised labour and other interested persons;
  - (iii) any written views and recommendations on the matter received from the National Treasury, the relevant provincial treasury, the national department responsible for local government or the MEC for local government in the province.<sup>212</sup>

A municipal entity must open and maintain at least one bank account in the name of the entity. All money received by a municipal entity must be paid into its bank account or accounts, and this must be done promptly and in accordance with any requirements that may be prescribed. A municipal entity may not open a bank account:

- abroad
- with an institution not registered as a bank in terms of the Banks Act<sup>213</sup>
- otherwise than in the name of the entity and

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<sup>212</sup> The MFMA s 84(2)(a)-(b). For the purposes of this section, “establish” includes the acquisition of an interest in a private company that would render that private company a municipal entity.

<sup>213</sup> 94 of 1990.

- without the approval of its board of directors.

Money may be withdrawn from a municipal entity's bank account only in accordance with requirements that may be prescribed. The accounting officer of a municipal entity:

- must administer all the entity's bank accounts
- is accountable to the board of directors of the entity for the entity's bank accounts and
- must enforce any requirements that may be prescribed.<sup>214</sup>

The accounting officer of a municipal entity must submit to the entity's parent municipality, in writing and within 90 days after the entity has opened a new bank account, the name of the bank where the account has been opened and the type and number of the account, and annually before the start of a financial year, the name of each bank where the entity holds a bank account and the type and number of each account. The accounting officer of the municipal entity's parent municipality, or if there is more than one parent municipality, any one of the accounting officers of those municipalities as may be agreed between them must, upon receipt of the information referred to above, submit that information to the Auditor-General, the National Treasury and the relevant provincial treasury, in writing.<sup>215</sup>

In respect of budgets, it is required that for each financial year the board of directors of a municipal entity must submit a proposed budget for the entity to its parent municipality not later than 150 days before the start of the entity's financial year or earlier if requested by the parent municipality. The parent municipality must consider the proposed budget of the entity and assess the entity's priorities and objectives. If the parent municipality makes any recommendations on the proposed budget, the board of directors of the entity must consider those recommendations and, if necessary, submit a revised budget to the parent municipality not later than 100 days before the start of the financial year. The mayor of the parent municipality must table the proposed budget of the municipal entity in the council when the annual budget of the municipality for the relevant year is tabled. The board of directors of a municipal entity must approve the budget of the municipal entity not later than 30 days before

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<sup>214</sup> See the MFMA s 85(1)-(5).

<sup>215</sup> Read the MFMA s 86(1)-(2).

the start of the financial year, taking into account any hearings or recommendations of the council of the parent municipality.<sup>216</sup>

The budget of a municipal entity must conform to the following requirements. It must:

- (a) be balanced;
- (b) be consistent with any service delivery agreement or other agreement between the entity and the entity's parent municipality;
- (c) be within any limits determined by the entity's parent municipality, including any limits on tariffs, revenue, expenditure and borrowing;
- (d) include a multi-year business plan for the entity that –
  - (i) sets key financial and non-financial performance objectives and measurement criteria as agreed with the parent municipality;
  - (ii) is consistent with the budget and integrated development plan of the entity's parent municipality;
  - (iii) is consistent with any service delivery agreement or other agreement between the entity and the entity's parent municipality; and
  - (iv) reflects actual and potential liabilities and commitments, including particulars of any proposed borrowing of money during the period to which the plan relates; and
- (e) otherwise comply with the requirements of section 17(1) and (2) of the MFMA to the extent that such requirements can reasonably be applied to the entity.<sup>217</sup>

With the approval of the mayor, the board of directors of a municipal entity may revise the budget of the municipal entity, but only for the following reasons:

- to adjust the revenue and expenditure estimates downwards if there is material under-collection of revenue during the current year
- to authorise expenditure of any additional allocations to the municipal entity from its parent municipality
- to authorise, within a prescribed framework, any unforeseeable and unavoidable expenditure approved by the mayor of the parent municipality
- to authorise any other expenditure within a prescribed framework.<sup>218</sup>

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<sup>216</sup> Refer to the MFMA s 87(1)-(4).

<sup>217</sup> See the MFMA s 87(5)(a)-(e).

Any projected allocation to a municipal entity from its parent municipality must be provided for in the annual budget of the parent municipality and, to the extent not so provided, the entity's budget must be adjusted. A municipal entity may incur expenditure only in accordance with its approved budget or an adjustments budget. The mayor must table the budget or adjusted budget and any adjustments budget of a municipal entity as approved by its board of directors, at the next council meeting of the municipality. A municipal entity's approved budget or adjusted budget must be made public in substantially the same way as the budget of a municipality must be made public. The accounting officer of a municipal entity must by no later than seven working days after the end of each month submit to the accounting officer of the parent municipality a statement in the prescribed format on the state of the entity's budget reflecting the following particulars for that month and for the financial year up to the end of that month:

- (a) actual revenue, per revenue source;
- (b) actual borrowings;
- (c) actual expenditure;
- (d) actual capital expenditure;
- (e) the amount of any allocations received;
- (f) actual expenditure on those allocations, excluding expenditure on allocations exempted by the annual Division of Revenue Act from compliance with this paragraph; and
- (g) when necessary, an explanation of –
  - (i) any material variances from the entity's projected revenue by source, and from the entity's expenditure projections;
  - (ii) any material variances from the service delivery agreement and the business plan; and
  - (iii) any remedial or corrective steps taken or to be taken to ensure that projected revenue and expenditure remain within the entity's approved budget.<sup>219</sup>

The statement mentioned above must include a projection of revenue and expenditure for the rest of the financial year and any revisions from initial projections.

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<sup>218</sup> The MFMA s 87(6)(a)-(d).

<sup>219</sup> See the MFMA s 87(7)-(11).

Amounts reflected in the statement must in each case be compared with the corresponding amounts budgeted for in the entity's approved budget. Finally, the statement to the accounting officer of the municipality must be in the format of a signed document and in electronic format.<sup>220</sup>

The accounting officer of a municipal entity must by 20 January of each year

- assess the performance of the entity during the first half of the financial year, taking into account the monthly statements referred to in section 87 of the MFMA for the first half of the financial year and the targets set in the service delivery, business plan or other agreement with the entity's parent municipality and the entity's annual report for the past year, and progress on resolving problems identified in the annual report
- submit a report on such assessment to
  - (a) the board of directors of the entity
  - (b) the parent municipality of the entity.<sup>221</sup>

The parent municipality of a municipal entity must determine the upper limits of the salary, allowances and other benefits of the chief executive officer and senior managers of the entity and monitor and ensure that the municipal entity reports to the council on all expenditure incurred by that municipal entity on directors and staff remuneration matters and in a manner that discloses such expenditure per type of expenditure. This should include:

- salaries and wages
- contributions for pensions and medical aid
- travel, motor car, accommodation, subsistence and other allowances
- housing benefits and allowances
- overtime payments
- loans and advances
- any other type of benefit or allowance related to directors and staff.<sup>222</sup>

A municipal entity may not transfer ownership as a result of a sale or other transaction or otherwise dispose of a capital asset needed to provide the minimum level of basic municipal services. Municipal entities may transfer ownership or otherwise

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<sup>220</sup> Read the MFMA s 87(12)-(14).

<sup>221</sup> See the MFMA s 88(1)-(2). A report referred to above must be made public.

<sup>222</sup> Read the MFMA s 89(a)-(b).

dispose of a capital asset other than an asset contemplated in subsection 90(1) of the MFMA, but only after the council of its parent municipality, in a meeting open to the public has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services and has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset. A decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services may not be reversed by the municipality or municipal entity after that asset has been sold, transferred or otherwise disposed of. Furthermore, a municipal council may delegate to the accounting officer of a municipal entity its power to make the determinations referred to in subsection 90(2)(a) and (b) in respect of movable capital assets of the entity below a value determined by the council. Any transfer of ownership of a capital asset in terms of subsection 90(2) or (4) of the MFMA must be fair, equitable, transparent and competitive and consistent with the supply chain management policy which the municipal entity must have and maintain in terms of section 111 of the MFMA.<sup>223</sup>

The financial year of a municipal entity must be the same as that of municipalities and the Auditor-General must audit and report on the accounts, financial statements and financial management of each municipal entity.<sup>224</sup> The chief executive officer of a municipal entity is the accounting officer of the entity. The accounting officer of a municipal entity has various fiduciary duties. He or she must:

- (a) exercise utmost care to ensure reasonable protection of the assets and records of the entity;
- (b) act with fidelity, honesty, integrity and in the best interest of the entity in managing the financial affairs of the entity;
- (c) disclose to the entity's parent municipality and the entity's board of directors all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the parent municipality or the board of directors; and

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<sup>223</sup> Note that s 90 does not apply to the transfer of a capital asset to a municipality or another municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework. See the MFMA s 90(1)-(6).

<sup>224</sup> Refer to the MFMA ss 91 and 92.

(d) seek, within the sphere of influence of that accounting officer, to prevent any prejudice to the financial interests of the parent municipality or the municipal entity.<sup>225</sup> The accounting officer may not act in a way that is inconsistent with the responsibilities assigned to accounting officers of municipal entities in terms of this act or use the position or privileges of, or confidential information obtained as accounting officer, for personal gain or to improperly benefit another person.<sup>226</sup>

The accounting officer of a municipal entity is responsible for managing the financial administration of the entity and must for this purpose take all reasonable steps to ensure:

- (a) that the resources of the entity are used effectively, efficiently, economically and transparently;
- (b) that full and proper records of the financial affairs of the entity are kept;
- (c) that the entity has and maintains effective, efficient and transparent systems-
  - (i) of financial and risk management and internal control; and
  - (ii) of internal audit complying with and operating in accordance with any prescribed norms and standards;
- (d) that irregular and fruitless and wasteful expenditure and other losses are prevented;
- (e) that expenditure is in accordance with the operational policies of the entity; and
- (f) that disciplinary or, when appropriate, criminal proceedings, are instituted against any official of the entity who has allegedly committed an act of financial misconduct or an offence in terms of chapter 15 of the MFMA.<sup>227</sup>

The accounting officer of a municipal entity is responsible for the management of the assets of the entity, including the safeguarding and maintenance of those assets and the liabilities of the entity. For the purposes of subsection 96(1) of the MFMA, the accounting officer must take all reasonable steps to ensure that the entity has and maintains a management, accounting and information system that accounts for proper assets and liabilities of the management systems of the municipal entity and

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<sup>225</sup> See the MFMA s 94(1)(a)-(d).

<sup>226</sup> The MFMA s 94(2)(a)-(b).

<sup>227</sup> Read the MFMA s 95(a)-(f).



a system of internal control of assets and liabilities, including an asset and liabilities register, as may be prescribed.<sup>228</sup> Furthermore, the accounting officer of a municipal entity must take all reasonable steps to ensure:

- (a) that the entity has and implements effective revenue collection systems to give effect to its budget;
- (b) that all revenue due to the entity is collected;
- (c) that any funds collected by the entity on behalf of a municipality-
  - (i) are transferred to that municipality strictly in accordance with the agreement between the entity the municipality; and
  - (ii) are not used for the purposes of the entity;
- (d) that the municipal entity has effective revenue collection systems consistent with those of the parent municipality;
- (e) that revenue due to the entity is calculated on a monthly basis;
- (f) that accounts for service charges are prepared on a monthly basis, or less often as may be prescribed where monthly accounts are uneconomical;
- (g) that all money received is promptly deposited in accordance with this act into the municipal entity's bank accounts;
- (h) that the municipal entity has and maintains a management, accounting and information system which:
  - (i) recognises revenue when it is earned;
  - (ii) accounts for debtors; and
  - (iii) accounts for receipts of revenue;
- (i) that the municipal entity has and maintains a system of internal control in respect of debtors and revenue, as may be prescribed; and
- (j) that all revenue received by the municipal entity, including revenue received by any collecting agent on its behalf, is reconciled at least on a weekly basis.<sup>229</sup>

Monthly reconciliation of revenue and accounts is also required. The accounting officer of a municipal entity must take all reasonable steps to ensure that all revenue received by the entity, including revenue received by any collecting agency on its

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<sup>228</sup> See the MFMA s 96(1)-(2).

<sup>229</sup> See the MFMA s 97(2)(a)-(j). The accounting officer must immediately inform the parent municipality of any payments due by an organ of state to the entity in respect of service charges, if such payments are regularly in arrears for periods of more than 30 days.

behalf, is reconciled on a monthly or more regular basis, and all accounts of the entity are reconciled each month.<sup>230</sup>

Each accounting officer of a municipal entity is responsible for the management of the expenditure of the entity. Such an officer must for the purpose of subsection 99(1) of the MFMA take all reasonable steps to ensure:

- (a) that the entity has and maintains an effective system of expenditure control including procedures for the approval, authorisation, withdrawal and payment of funds;
- (b) that all money owing by the entity is paid within 30 days of receiving the relevant invoice or statement unless prescribed otherwise for certain categories of expenditure;
- (c) that the entity has and maintains a management, accounting and information system which:
  - (i) recognises expenditure when it is incurred;
  - (ii) accounts for creditors of the entity; and
  - (iii) accounts for payments made by the entity;
- (d) that the entity has and maintains a system of internal control in respect of creditors and payments;
- (e) that payments by the entity are made –
  - (i) directly to the person to whom it is due unless agreed otherwise only for reasons as may be prescribed; and
  - (ii) either electronically or by way of non-transferable cheques, provided that cash payments and payments by way of cash cheques may be made for exceptional reasons only, and only up to a prescribed limit;
- (f) that the entity complies with its tax, duty, pension, medical aid, audit fees and other statutory commitments;
- (g) that the entity's available working capital is managed effectively and economically in terms of any prescribed cash management and investment framework; and
- (h) that the entity has and implements a supply chain management policy in accordance with section 111 of the MFMA in a way that is fair, equitable, trans

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<sup>230</sup> The MFMA s 98(a)-(b).

parent and cost-effective.<sup>231</sup>

The accounting officer of a municipal entity is also responsible for implementing the entity's budget, including taking effective and appropriate steps to ensure that

- the spending of funds is in accordance with the budget
- revenue and expenditure are properly monitored
- spending is reduced as necessary when revenue is anticipated to be less than projected in the budget.<sup>232</sup>

It is furthermore required that the accounting officer of a municipal entity must report, in writing, to the board of directors of the entity, at its next meeting, and to the accounting officer of the entity's parent municipality any financial problems of the entity, including:

(a) any impending or actual-

- (i) under collection of revenue due;
  - (ii) shortfalls in budgeted revenue;
  - (iii) overspending of the entity's budget;
  - (iv) delay in the entity's payments to any creditors; or
  - (v) overdraft in any bank account of the entity for a period exceeding 21 days;
- and

(b) any steps taken to rectify such financial problems.<sup>233</sup>

On discovery of any irregular expenditure or any fruitless and wasteful expenditure, the board of directors of a municipal entity must promptly report, in writing, to the mayor and municipal manager of the entity's parent municipality and the Auditor-General

- particulars of the expenditure
- any steps that have been taken
  - (a) to recover the expenditure
  - (b) to prevent a recurrence of the expenditure.

The board of directors of a municipal entity must promptly report to the South African Police Service any irregular expenditure that may constitute a criminal offence and

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<sup>231</sup> Read the MFMA s 99(2)(a)-(h).

<sup>232</sup> The MFMA s 100(a)-(c).

<sup>233</sup> The accounting officer of the municipality must table a report referred to in s 101(1) in the municipal council at its next meeting. See the MFMA s 101(1)-(2).

other losses suffered by the municipal entity which resulted from suspected criminal conduct.<sup>234</sup>

The accounting officer of a municipal entity must promptly report to the speaker of the council of the entity's parent municipality any interference by a councillor outside that councillor's assigned duties in the financial affairs of the municipal entity or the responsibilities of the board of directors of the municipal entity.<sup>235</sup> Except where otherwise provided in the MFMA, the accounting officer of a municipal entity is responsible for the submission by the entity of all reports, returns, notices and other information to the entity's parent municipality as may be required by the Act and must submit to the accounting officer of the entity's parent municipality, the National Treasury, the relevant provincial treasury, the department of local government in the province or the Auditor-General such information, returns, documents, explanations and motivations as may be prescribed or as may be required.<sup>236</sup>

Each official of a municipal entity exercising financial management responsibilities must take all reasonable steps within that official's area of responsibility to ensure that:

- (a) the system of financial management and internal control established for the entity is carried out diligently;
- (b) the financial and other resources of the entity are utilised effectively, efficiently, economically and transparently;
- (c) any irregular expenditure, fruitless and wasteful expenditure and other losses are prevented;
- (d) all revenue due to the entity is collected;
- (e) the provisions of this Act to the extent applicable to that official, including any delegations in terms of section 106 of the MFMA, are complied with; and
- (f) the assets and liabilities of the entity are managed effectively, and that assets are safeguarded and maintained to the extent necessary.<sup>237</sup>

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<sup>234</sup> The MFMA s 102(1)-(2).

<sup>235</sup> The MFMA s 103.

<sup>236</sup> If the accounting officer of a municipal entity is unable to comply with any of the responsibilities in terms of the MFMA, he or she must report the inability to the council of the entity's parent municipality promptly, together with reasons. See the MFMA s 104(1)-(2).

<sup>237</sup> An official of a municipal entity must perform the functions referred to above, subject to the directions of the accounting officer of the entity. Refer to the MFMA s 105(1)-(2).

In respect of the delegation of authority, it is provided that the accounting officer of a municipal entity may delegate to an official of that entity:

- any of the powers or duties assigned or delegated to the accounting officer in terms of the MFMA or
- any powers or duties reasonably necessary to assist the accounting officer in complying with a duty which requires the accounting officer to take reasonable or appropriate steps to ensure the achievement of the aims of a specific provision of the MFMA.

The accounting officer must also regularly review delegations issued and, if necessary, amend or withdraw any of those delegations. A delegation must be in writing, is subject to any limitations and conditions the accounting officer may impose, may be either to a specific individual or to the holder of a specific post in the municipal entity and does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.<sup>238</sup> The accounting officer, senior managers, any chief financial officer and all other financial officials of a municipal entity must meet the prescribed financial management competency levels.<sup>239</sup>

A municipal entity may borrow money, but only in accordance with the entity's multi-year business plan and the provisions of chapter 6 of the MFMA to the extent that those provisions can be applied to a municipal entity. In applying chapter 6 to a municipal entity, a reference in that chapter to a municipality, a municipal council or an accounting officer must be read as referring to a municipal entity, the board of directors of a municipal entity or the accounting officer of a municipal entity, respectively.<sup>240</sup> If a municipal entity experiences serious or persistent financial problems and the board of directors of the entity fails to act effectively, the parent municipality must either

- take appropriate steps in terms of its rights and powers over that entity, including its rights and powers in terms of any relevant service delivery or other agreement

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<sup>238</sup> See the MFMA s 106(1)-(2). Note that an accounting officer may confirm, vary or revoke any decision taken by an official in consequence of a delegation, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

<sup>239</sup> The MFMA s 107.

<sup>240</sup> See the MFMA s 108(1)-(2).

- impose a financial recovery plan, which must meet the same criteria set out in section 142 of the MFMA for a municipal financial recovery plan or
- liquidate and disestablish the entity.<sup>241</sup>

**(j) Issues relating to goods and services**

Each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this part. The supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least the following:

- (a) The range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;
- (b) when a municipality or municipal entity may or must use a particular type of process;
- (c) procedures and mechanisms for each type of process;
- (d) procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;
- (e) open and transparent pre-qualification processes for tenders or other bids;
- (f) competitive bidding processes in which only pre-qualified persons may participate;
- (g) bid documentation, advertising of and invitations for contracts;
- (h) procedures and mechanisms for:
  - (i) the opening, registering and recording of bids in the presence of interested persons;
  - (ii) the evaluation of bids to ensure best value for money;
  - (iii) negotiating the final terms of contracts; and
  - (iv) the approval of bids;
- (i) screening processes and security clearances for prospective contractors on tenders or other bids above a prescribed value;

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<sup>241</sup> Read the MFMA s 109(a)-(c).

- (j) compulsory disclosure of any conflicts of interests prospective contractors may have in specific tenders and the exclusion of such prospective contractors from those tenders or bids;
- (k) participation in the supply chain management system of persons who are not officials of the municipality or municipal entity, subject to section 117 of the MFMA;
- (l) the barring of persons from participating in tendering or other bidding processes, including persons:
  - (i) who were convicted for fraud or corruption during the past five years;
  - (ii) who wilfully neglected, reneged on or failed to comply with a government contract during the past five years; or
  - (iii) whose tax matters are not cleared by South African Revenue Service;
- (m) measures for:
  - (i) combating fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management; and
  - (ii) promoting ethics of officials and other role players involved in municipal supply chain management;
- (n) the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced, including recommendations or decisions that were made, taken or in any way influenced by –
  - (i) councillors in contravention of item 5 or 6 of the Code of Conduct for Councillors set out in Schedule 1 to the Municipal Systems Act; or
  - (ii) municipal officials in contravention of item 4 or 5 of the Code of Conduct for Municipal Staff Members set out in Schedule 2 to that act;
- (o) the procurement of goods and services by municipalities or municipal entities through contracts procured by other organs of state;
- (p) contract management and dispute settling procedures; and
- (q) the delegation of municipal supply chain management powers and duties, including to officials.<sup>242</sup>

With respect to unsolicited bids, a municipality or municipal entity is not obliged to consider an unsolicited bid received outside its normal bidding process. If a municipi-

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<sup>242</sup> See the MFMA ss 111-112. Note that the regulatory framework for municipal supply chain management must be fair, equitable, transparent, competitive and cost effective.



pality or municipal entity decides to consider an unsolicited bid received outside a normal bidding process, it may do so only in accordance with a prescribed framework. Such a framework must strictly regulate and limit the power of municipalities and municipal entities to approve unsolicited bids received outside their normal tendering or other bidding processes.<sup>243</sup>

In respect of the approval tenders, it is stated that if a tender other than the one recommended in the normal course of implementing the supply chain management policy of a municipality or municipal entity is approved, the accounting officer of the municipality or municipal entity must, in writing, notify the Auditor-General, the relevant provincial treasury and the National Treasury and, in the case of a municipal entity, also the parent municipality of the reasons for deviating from such recommendation.<sup>244</sup>

The accounting officer of a municipality or municipal entity must implement the supply chain management policy of the municipality or municipal entity and must take all reasonable steps to ensure that proper mechanisms and separation of duties in the supply chain management system are in place to minimise the likelihood of fraud, corruption, favouritism and unfair and irregular practices. No person may impede the accounting officer in fulfilling this responsibility.<sup>245</sup>

A contract or agreement procured through the supply chain management system of a municipality or municipal entity must

- be in writing
- stipulate the terms and conditions of the contract or agreement, which must include provisions providing for:
  - (a) the termination of the contract or agreement in the case of non- or under-performance
  - (b) dispute resolution mechanisms to settle disputes between the parties
  - (c) a periodic review of the contract or agreement once every three years in the case of a contract or agreement for longer than three years and
  - (d) any other matters that may be prescribed.

The accounting officer of a municipality or municipal entity must also:

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<sup>243</sup> Read the MFMA s 113(1)-(3).

<sup>244</sup> S 114(1) does not apply if a different tender was approved in order to rectify an irregularity. See the MFMA s 114(1)-(2).

<sup>245</sup> The MFMA s 115(1)-(2).

- take all reasonable steps to ensure that a contract or agreement procured through the supply chain management policy of the municipality or municipal entity is properly enforced
- monitor the performance of the contractor under the contract or agreement on a monthly basis
- establish capacity in the administration of the municipality or municipal entity:
  - (a) to assist the accounting officer in carrying out the above duties and
  - (b) to oversee the day-to-day management of the contract or agreement and
- report regularly to the council of the municipality or the board of directors of the entity, as may be appropriate, on the management of the contract or agreement and the performance of the contractor.<sup>246</sup>

A contract or agreement procured through the supply chain management policy of the municipality or municipal entity may be amended by the parties, but only after

- (a) the reasons for the proposed amendment have been tabled in the council of the municipality or, in the case of a municipal entity, in the council of its parent municipality; and
- (b) the local community:
  - (i) has been given reasonable notice of the intention to amend the contract or agreement; and
  - (ii) has been invited to submit representations to the municipality or municipal entity.<sup>247</sup>

According to the MFMA, no councillor of any municipality may be a member of a municipal bid committee or any other committee evaluating or approving tenders, quotations, contracts or other bids, nor attend any such meeting as an observer. No person may further interfere with the supply chain management system of a municipality or municipal entity or amend or tamper with any tenders, quotations, contracts or bids after their submission.<sup>248</sup>

The accounting officer and all other officials of a municipality or municipal entity involved in the implementation of the supply chain management policy of the municipality or municipal entity must meet the prescribed competency levels. A municipality

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<sup>246</sup> The MFMA s 116(2).

<sup>247</sup> See the MFMA s 116(1)-(3).

<sup>248</sup> Read the MFMA ss 117 and 118.

and a municipal entity must for the purposes of subsection 119(1) of the MFMA provide resources or opportunities for the training of officials referred to in that subsection to meet the prescribed competency levels. The National Treasury or a provincial treasury may assist municipalities and municipal entities in the training of officials.<sup>249</sup>

A municipality may enter into a public-private partnership agreement, but only if the municipality can demonstrate that the agreement will:

- provide value for money to the municipality
- be affordable for the municipality and
- transfer appropriate technical, operational and financial risk to the private party.

A public-private partnership agreement must comply with any prescribed regulatory framework for public-private partnerships. If the public-private partnership involves the provision of a municipal service, chapter 8 of the Municipal Systems Act must also be complied with. Before a public-private partnership is concluded, the municipality must conduct a feasibility study that:

- (a) explains the strategic and operational benefits of the public-private partnership for the municipality in terms of its objectives;
- (b) describes in specific terms:
  - (i) the nature of the private party's role in the public-private partnership;
  - (ii) the extent to which this role, both legally and by nature, can be performed by a private party; and
  - (iii) how the proposed agreement will:
    - (aa) provide value for money to the municipality;
    - (bb) be affordable for the municipality;
    - (cc) transfer appropriate technical, operational and financial risks to the private party; and
    - (dd) impact on the municipality's revenue flows and its current and future budgets;
- (c) takes into account all relevant information; and
- (d) explains the capacity of the municipality to effectively monitor, manage and enforce the agreement.<sup>250</sup>

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<sup>249</sup> Refer to the MFMA s 119(1)-(3).

<sup>250</sup> The MFMA s 120(1)-(4).

National government may assist municipalities in carrying out and assessing the feasibility studies referred to above. When a feasibility study has been completed, the accounting officer of the municipality must:

- (a) submit the report on the feasibility study together with all other relevant documents to the council for a decision, in principle, on whether the municipality should continue with the proposed public-private partnership;
- (b) at least 60 days prior to the meeting of the council at which the matter is to be considered, in accordance with section 21A of the Municipal Systems Act-
  - (i) make public particulars of the proposed public-private partnership, including the report on the feasibility study; and
  - (ii) invite the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed public-private partnership; and
- (c) solicit the views and recommendations of-
  - (i) the National Treasury;
  - (ii) the national department responsible for local government;
  - (iii) if the public-private partnership involves the provision of water, sanitation, electricity or any other service as may be prescribed, the responsible national department; and
  - (iv) any other national or provincial organ of state as may be prescribed.<sup>251</sup>

**(k) Requirements regarding financial reporting and auditing**

For each financial year, every municipality and every municipal entity must prepare an annual report in accordance with the MFMA. Within nine months after the end of a financial year the council of a municipality must deal with the annual report of the municipality and of any municipal entity under the municipality's sole or shared control in accordance with section 129 of the Act. The purpose of an annual report is:

- to provide a record of the activities of the municipality or municipal entity during the financial year to which the report relates
- to provide a report on performance against the budget of the municipality or municipal entity for that financial year and

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<sup>251</sup> Note that the MFMA ss 110-119 apply to the procurement of public-private partnership agreements. S 33 also applies if the agreement will have multi-year budgetary implications for the municipality within the meaning of that section. Read also s 110 with reference to the application of the MFMA ss 110-119.

- to promote accountability to the local community for the decisions made throughout the year by the municipality or municipal entity.<sup>252</sup>

The annual report of a municipality must include the following information:

- (a) the annual financial statements of the municipality,<sup>253</sup> and in addition, if section 122(2) of the MFMA applies, consolidated annual financial statements, as submitted to the Auditor-General for audit in terms of section 126(1) of the act;
- (b) the Auditor-General's audit report in terms of section 126(3) on those financial statements;
- (c) the annual performance report of the municipality prepared by the municipality in terms of section 46 of the Municipal Systems Act;
- (d) the Auditor-General's audit report in terms of section 45(b) of the Municipal Systems Act;
- (e) an assessment by the municipality's accounting officer of any arrears on municipal taxes and service charges;
- (f) an assessment by the municipality's accounting officer of the municipality's performance against the measurable performance objectives referred to in section 17(3)(b) of the MFMA for revenue collection from each revenue source and for each vote in the municipality's approved budget for the relevant financial year;
- (g) particulars of any corrective action taken or to be taken in response to issues raised in the audit reports referred to in paragraphs (b) and (d);
- (h) any explanations that may be necessary to clarify issues in connection with the financial statements;
- (i) any information as determined by the municipality;
- (j) any recommendations of the municipality's audit committee; and
- (k) any other information as may be prescribed.<sup>254</sup>

The annual report of a municipal entity must include:

- (a) the annual financial statements of the entity, as submitted to the Auditor-General for audit in terms of section 126(2);

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<sup>252</sup> Read the MFMA s 121(1)-(2).

<sup>253</sup> Such financial statements include statements consisting of at least (a) a statement of financial position, (b) a statement of financial performance, (c) a cash-flow statement, (d) any other statements that may be prescribed and (d) any notes to these statements. See the MFMA s 1.

<sup>254</sup> The MFMA s 121(3)(a)-(k).

- (b) the Auditor-General's audit report in terms of section 126(3) on those financial statements;
- (c) an assessment by the entity's accounting officer of any arrears on municipal taxes and service charges;
- (d) an assessment by the entity's accounting officer of the entity's performance against any measurable performance objectives set in terms the service delivery agreement or other agreement between the entity and its parent municipality;
- (e) particulars of any corrective action taken or to be taken in response to issues raised in the audit report referred to in paragraph (b);
- (f) any information as determined by the entity or its parent municipality;
- (g) any recommendations of the audit committee of the entity or of its parent municipality; and
- (h) any other information as may be prescribed.<sup>255</sup>

For each financial year, every municipality and every municipal entity must prepare annual financial statements which fairly present the state of affairs of the municipality or entity, its performance against its budget, its management of revenue, expenditure, assets and liabilities, its business activities, its financial results and its financial position as at the end of the financial year and disclose the information required in terms of sections 123, 124 and 125 of the MFMA. A municipality which has sole control of a municipal entity or which has effective control of a municipal entity which is a private company within the meaning of the Municipal Systems Act must, in addition to complying with subsection 122(1) of the MFMA, prepare consolidated annual financial statements incorporating the annual financial statements of the municipality and of such entity. Such consolidated annual financial statements must comply with any requirements as may be prescribed. Both annual financial statements and consolidated annual financial statements must be prepared in accordance with generally recognised accounting practice prescribed in terms of section 91(1)(b) of the Public Finance Management Act.<sup>256</sup>

The annual financial statements of a municipality must disclose information on

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<sup>255</sup> The MFMA s 121(4)(a)-(h).

<sup>256</sup> See the MFMA s 122(1)-(3). "Standards of generally recognised accounting practice" refers to an accounting practice complying with standards applicable to municipalities or municipal entities and issued in terms of the Public Finance Management Act ch 11.

- any allocations received by the municipality from
  - (a) an organ of state in the national or provincial sphere of government or
  - (b) a municipal entity or another municipality
- any allocations made by the municipality to
  - (a) a municipal entity or another municipality or
  - (b) any other organ of state
- how any allocations were spent, per vote, excluding allocations received by the municipality as its portion of the equitable share or where prescribed otherwise because of the nature of the allocation
- whether the municipality has complied with the conditions of
  - (a) any allocations made to the municipality in terms of section 214(1)(c) of the Constitution and
  - (b) any allocations made to the municipality other than by national organs of state
- the reasons for any non-compliance with the two conditions referred to directly above and
- whether funds destined for the municipality in terms of the annual Division of Revenue Act were delayed or withheld, and the reasons advanced to the municipality for such delay or withholding.

The annual financial statements of a municipal entity must also disclose information on:

- any allocations received by the entity from any municipality or other organ of state
- any allocations made by the entity to a municipality or other organ of state and
- any other information as may be prescribed.<sup>257</sup>

The notes to the annual financial statements of a municipality must include particulars of

- the salaries, allowances and benefits of political office-bearers and councillors of the municipality, whether financial or in kind, including a statement by the accounting officer whether or not those salaries, allowances and benefits are within the upper limits of the framework envisaged in section 219 of the Constitution
- any arrears owed by individual councillors to the municipality, or a municipal entity under its sole or shared control, for rates or services and which at any time during

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<sup>257</sup> Read the MFMA s 123(1)-(2).



the relevant financial year were outstanding for more than 90 days, including the names of those councillors and

- the salaries, allowances and benefits of the municipal manager, the chief financial officer, every senior manager and such categories of other officials as may be prescribed.

The notes to the annual financial statements of a municipal entity must include particulars of the salaries, allowances and benefits of

- the members of the board of directors of the entity and
- the chief executive officer of the entity, every senior manager and such categories of other officials as may be prescribed.<sup>258</sup>

The notes to the financial statements of a municipality must include:

- a list of all municipal entities under the sole or shared control of the municipality during the financial year and as at the last day of the financial year.
- the total amount of contributions to organised local government for the financial year, and the amount of any contributions outstanding as at the end of the financial year; and
- the total amounts paid in audit fees, taxes, levies, duties and pension and medical aid contributions, and whether any amounts were outstanding as at the end of the financial year.<sup>259</sup>

The notes to the annual financial statements of a municipality or municipal entity must disclose the following information:

- (a) In respect of each bank account held by the municipality or entity during the relevant financial year:
  - (i) the name of the bank where the account is or was held, and the type of account; and
  - (ii) year opening and year end balances in each of these bank accounts;
- (b) a summary of all investments of the municipality or entity as at the end of the financial year;<sup>260</sup>

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<sup>258</sup> See the MFMA s 124(1)-(2).

<sup>259</sup> The MFMA s 125(1).

<sup>260</sup> Investment in relation to funds of a municipality means (a) the placing on deposit of funds of a municipality with a financial institution or (b) the acquisition of assets with funds of a municipality not immediately required, with the primary aim of preserving those funds. See the MFMA s 1.

- (c) particulars of any contingent liabilities of the municipality or entity as at the end of the financial year;
- (d) particulars of:
- (i) any material losses and any material irregular or fruitless and wasteful expenditures, including in the case of a municipality, any material unauthorised expenditure, that occurred during the financial year, and whether these are recoverable;
  - (ii) any criminal or disciplinary steps taken as a result of such losses or such unauthorised, irregular or fruitless and wasteful expenditures; and
  - (iii) any material losses recovered or written off;
- (e) particulars of non-compliance with this act; and
- (f) any other matters that may be prescribed.<sup>261</sup>

It is further determined that the accounting officer of a municipality must prepare the annual financial statements of the municipality and, within two months after the end of the financial year to which those statements relate, submit the statements to the Auditor-General for auditing and in addition, in the case of a municipality referred to in section 122(2) of the MFMA, must prepare consolidated annual financial statements in terms of that section and submit the statements to the Auditor-General for auditing within three months after the end of the financial year to which those statements relate.<sup>262</sup>

It is the responsibility of the accounting officer of a municipal entity to prepare the annual financial statements of the entity and submit the statements to

- the parent municipality of the entity
- the Auditor-General

for auditing within two months after the end of the financial year to which those statements relate. The Auditor-General must audit those financial statements and submit an audit report on those statements to the accounting officer of the municipality or entity within three months of receipt of the statements. If the Auditor-General is unable to complete an audit within three months of receiving the financial statements from an accounting officer, the Auditor-General must promptly submit a report outlining the reasons for the delay to the relevant municipality or municipal entity and to

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<sup>261</sup> See the MFMA s 125(1)-(2).  
<sup>262</sup> The MFMA s 126(1)(a)-(b).

the relevant provincial legislature and Parliament. Once the Auditor-General has submitted an audit report to the accounting officer, no person other than the Auditor-General may alter the audit report or the financial statements to which the audit report relates.<sup>263</sup>

According to the MFMA, within six months after the end of a financial year or on such earlier date as may be agreed between the entity and its parent municipality, the accounting officer of a municipal entity must submit the entity's annual report for that financial year to the municipal manager of the entity's parent municipality. Within seven months after the end of a financial year the mayor of a municipality must table in the municipal council the annual report of the municipality and of any municipal entity under the municipality's sole or shared control. If, for whatever reason, the mayor is unable to table in the council the annual report of the municipality or the annual report of any municipal entity under the municipality's sole or shared control within seven months after the end of the financial year to which the report relates, the mayor must promptly submit to the council a written explanation referred to in section 133(1)(a) of the MFMA, setting out the reasons for the delay, together with any components of the annual report listed in section 121(3) or (4) of the Act that are ready, and also submit to the council the outstanding annual report or the outstanding components of the annual report as soon as possible.<sup>264</sup>

The Auditor-General may submit the financial statements and audit report of a municipality directly to the municipal council, the National Treasury, the relevant provincial treasury, the MEC responsible for local government in the province and any prescribed organ of state, if the mayor fails to comply with subsection 127(2) or (3) of the MFMA or directly to the parent municipality, the National Treasury, the relevant provincial treasury, the MEC responsible for local government in the province and any prescribed organ of state, if the accounting officer of the entity fails to comply with subsection 127(1). In accordance with section 21A of the Municipal Systems Act, the accounting officer of the municipality must make public the annual report and invite the local community to submit representations in connection with the annual report immediately after an annual report is tabled in the council. He or she must also submit the annual report to the Auditor-General, the relevant provincial

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<sup>263</sup> Read the MFMA s 126(2)-(5).

<sup>264</sup> Refer to the MFMA s 127(1)-(3).

treasury and the provincial department responsible for local government in the province.<sup>265</sup>

It is the responsibility of the accounting officer of a parent municipality to monitor whether the accounting officer of any municipal entity under the sole or shared control of the municipality has complied with sections 121(1) and 126(2) of the MFMA, to establish the reasons for any non-compliance and to promptly report any non-compliance, together with the reasons for such non-compliance, to the council of the parent municipality, the relevant provincial treasury and the Auditor-General.<sup>266</sup>

The council of a municipality must consider the annual report of the municipality and any municipal entity under the municipality's sole or shared control, and by no later than two months from the date on which the annual report was tabled in the council in terms of section 127, adopt an oversight report containing the council's comments on the annual report, which must include a statement whether the council:

- has approved the annual report with or without reservations
- has rejected the annual report or
- has referred the annual report back for revision of those components that can be revised.

The accounting officer must also attend council and council committee meetings where the annual report is discussed, for the purpose of responding to questions concerning the report and submit copies of the minutes of those meetings to the Auditor-General, the relevant provincial treasury and the provincial department responsible for local government in the province.<sup>267</sup>

Furthermore and in accordance with section 21A of the Municipal Systems Act, the accounting officer must make public an oversight report referred to above within seven days of its adoption. The National Treasury may issue guidelines on the manner in which municipal councils should consider annual reports and conduct public hearings and the functioning and composition of any public accounts or oversight committees established by the council to assist it to consider an annual report. No

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<sup>265</sup> S 127(5), with the necessary modifications as the context may require, is also applicable if only components of the annual report are tabled in terms of s 127(3). See the MFMA s 127(4)-(6).

<sup>266</sup> Read the MFMA s 128(a)-(c).

<sup>267</sup> The MFMA s 129(1)-(2).

guidelines issued in terms of subsection 129(4) of the MFMA are binding on a municipal council unless adopted by the council.<sup>268</sup>

The meetings of a municipal council at which an annual report is to be discussed or at which decisions concerning an annual report are to be taken must be open to the public and any organs of state, and a reasonable time must be allowed for the discussion of any written submissions received from the local community or organs of state on the annual report and for members of the local community or any organs of state to address the council. Representatives of the Auditor-General are entitled to attend and to speak at any council meeting referred to above.<sup>269</sup>

All municipalities must address any issues raised by the Auditor-General in an audit report. The mayor of a municipality must ensure compliance by the municipality with this requirement. The MEC for local government in the province must also assess all annual financial statements of municipalities in the province, the audit reports on such statements and any responses of municipalities to such audit reports and determine whether municipalities have adequately addressed any issues raised by the Auditor-General in audit reports and within 60 days must report to the provincial legislature any omission by a municipality to address those issues adequately.<sup>270</sup> Various documents must also be submitted to provincial legislatures. Such documents include:

- the annual report of each municipality and each municipal entity in the province or, if only components of an annual report were tabled in terms of section 127(3) of the MFMA, those components and
- all oversight reports on those annual reports adopted in terms of section 129(1) of the MFMA.

The accounting officer of a municipality must submit the documents to the provincial legislature within seven days after the municipal council has adopted the relevant oversight report. The MEC for local government in a province must monitor whether municipalities in the province comply with these requirements. A provincial legisla-

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<sup>268</sup> Read the MFMA s 129(3)-(4). S 129 with the necessary modifications as the context may require, is also applicable if only components of the annual report were tabled in terms of the Act s 127(3).

<sup>269</sup> Again s 130, with the necessary modifications as the context may require, is also applicable if only components of the annual report were tabled in terms of s 127(3). See also the MFMA s 130(1)-(3).

<sup>270</sup> Read the MFMA s 131(1)-(2).

ture may in turn deal with the documents in accordance with its constitutional powers.<sup>271</sup>

If the accounting officer of a municipality or municipal entity fails to submit financial statements to the Auditor-General in accordance with section 126 (1) or (2) of the MFMA, or if the mayor fails to table the annual report of the municipality or a municipal entity in the council in accordance with section 127(2) of the Act, then the mayor must promptly table in the council a written explanation setting out the reasons for the failure. Furthermore, the Auditor-General, in the case of any failure to submit financial statements for auditing, must promptly

- inform the speaker of the council, the National Treasury and the MEC for local government and the MEC for finance in the province of such failure and
- issue a special report on the failure to the relevant provincial legislature.

The municipal council then

- must request the speaker or any other councillor to investigate the reasons for the failure and report to the council
- must take appropriate steps to ensure that the financial statements are submitted to the Auditor-General or that the annual report, including the financial statements and the audit report on those statements, is tabled in the council, as the case may be
- may order that disciplinary steps be taken against the accounting officer or other person responsible for the failure.<sup>272</sup>

The provincial executive may also intervene in the municipality in terms of section 139 of the Constitution. Even the National Treasury and also the provincial treasury may take appropriate steps against the municipality in terms of section 5 of the MFMA.

The Auditor-General must submit to Parliament and the provincial legislatures by no later than 31 October of each year the names of any municipalities or municipal entities which have failed to submit their financial statements to the Auditor-General in terms of section 126 of the MFMA and at quarterly intervals thereafter, the names

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<sup>271</sup> See the MFMA s 132(1)-(5). The National Treasury may issue guidelines on the manner in which provincial legislatures should consider the annual reports of municipalities. No guidelines issued in terms of this subsection are binding on a provincial legislature unless adopted by the legislature.

<sup>272</sup> See the MFMA s 133(1)(a)-(c).

of any municipalities or municipal entities whose financial statements are still outstanding at the end of each interval.<sup>273</sup> As part of the report referred to in section 48 of the Municipal Systems Act, it is also mandatory for the cabinet member responsible for local government to report annually to parliament on actions taken by MECs for local government to address issues raised by the Auditor-General in audit reports on financial statements of municipalities and municipal entities.<sup>274</sup>

### **(l) Resolution of financial problems**

The primary responsibility to avoid, identify and resolve financial problems in a municipality rests with the municipality itself. A municipality must meet its financial commitments. If a municipality encounters a serious financial problem or anticipates problems in meeting its financial commitments, it must immediately seek solutions to the problem, notify the MEC for local government in the province and the MEC for finance in the province and notify organised local government.<sup>275</sup> Apart from the municipality itself, if the MEC for local government in a province becomes aware that there is a serious financial problem in a municipality, the MEC must promptly

- consult the mayor of the municipality to determine the facts
- assess the seriousness of the situation and the municipality's response to the situation
- determine whether the situation justifies or requires an intervention in terms of section 139 of the Constitution.

If the financial problem has been caused by or has resulted in a failure by the municipality to comply with an executive obligation in terms of legislation or the Constitution, and the conditions for an intervention in terms of section 139(1) of the Constitution are met, the provincial executive must promptly decide whether or not to intervene in the municipality. If the provincial executive decides to intervene, section 137 of the MFMA applies. In cases where the municipality has failed to approve a budget or any revenue-raising measures necessary to give effect to the budget, as a result of which the conditions for an intervention in terms of section 139 (4) of the Constitution are met, the provincial executive must intervene in the municipality in accordance with section 26 of the MFMA. Finally, if the municipality, as a result of a

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<sup>273</sup> The MFMA s 133(2)(a)-(b).

<sup>274</sup> Read the MFMA s 134.

<sup>275</sup> See the MFMA s 135(1)-(3).



crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments or admits that it is unable to meet its obligations or financial commitments, as a result of which the conditions for an intervention in terms of section 139(5) of the Constitution are met, the provincial executive must intervene in the municipality in accordance with section 139 of the MFMA.<sup>276</sup>

If the conditions for a provincial intervention in a municipality in terms of section 139(1) of the Constitution are met and the provincial executive decides in terms of section 136(2) of the MFMA to intervene in the municipality, the provincial executive may take any appropriate steps referred to in section 139 (1) of the Constitution, including:

- (a) assessing the seriousness of the financial problem in the municipality;
- (b) seeking solutions to resolve the financial problem in a way that would be sustainable and would build the municipality's capacity to manage its own financial affairs;
- (c) determining whether the financial problem, singly or in combination with other problems, is sufficiently serious or sustained that the municipality would benefit from a financial recovery plan and, if so, requesting any suitably qualified person:
  - (i) to prepare an appropriate financial recovery plan for the municipality;
  - (ii) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and
  - (iii) to submit the recovery plan and any recommendations referred to in subparagraphs (i) and (ii) to the MEC for local government in the province within a period determined by the MEC; and
- (d) consulting the mayor of the municipality to obtain the municipality's cooperation in resolving the financial problem, and if applicable, implementing the financial recovery plan.<sup>277</sup>

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<sup>276</sup> See the MFMA s 136(1)-(4).

<sup>277</sup> Note that the MEC must submit any assessment in terms of ss 137(1)(a), any determination in terms of ss (1)(c) and a copy of any request in terms of ss (1)(c) to the municipality and the Cabinet member responsible for local government. This obligation does not apply to a provincial intervention which is unrelated to a financial problem in a municipality. See the MFMA s 137(1)-(3).

When determining for the purposes of section 137 of the MFMA the seriousness of a financial problem, all relevant facts must be considered, and the following factors, singly or in combination, may indicate a serious financial problem:

- (a) The municipality has failed to make payments as and when due;
- (b) the municipality has defaulted on financial obligations for financial reasons;
- (c) the actual current expenditure of the municipality has exceeded the sum of its actual current revenue plus available surpluses for at least two consecutive financial years;
- (d) the municipality had an operating deficit in excess of five per cent of revenue in the most recent financial year for which financial information is available;
- (e) the municipality is more than 60 days late in submitting its annual financial statements to the Auditor-General in accordance with section 126 of the MFMA;
- (f) the Auditor-General has withheld an opinion or issued a disclaimer due to inadequacies in the financial statements or records of the municipality, or has issued an opinion which identifies a serious financial problem in the municipality;
- (g) any of the above conditions exists in a municipal entity under the municipality's sole control, or in a municipal entity for whose debts the municipality may be responsible, and the municipality has failed to intervene effectively; or
- (h) any other material condition exists which indicates that the municipality, or a municipal entity under the municipality's sole control, is likely to be unable for financial reasons to meet its obligations.<sup>278</sup>

The MFMA also provides for mandatory intervention by provincial governments into the affairs of a municipality. If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the provincial executive must promptly:

- (a) request the Municipal Financial Recovery Service-
  - (i) to determine the reasons for the crisis in its financial affairs;
  - (ii) to assess the municipality's financial state;

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<sup>278</sup> Read the MFMA s 138(a)-(h).

- (iii) to prepare an appropriate recovery plan for the municipality;
- (iv) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and
- (v) to submit to the MEC for finance in the province:
  - (aa) the determination and assessment referred to in subparagraphs (i) and (ii) as a matter of urgency; and
  - (bb) the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) within a period, not to exceed 90 days, determined by the MEC for finance; and
- (b) consult the mayor of the municipality to obtain the municipality's co-operation in implementing the recovery plan, including the approval of a budget and legislative measures giving effect to the recovery plan.<sup>279</sup>

The MEC for finance in the province must submit a copy of any request in terms of subsection 139(1)(a) of the MFMA and of any determination and assessment received in terms of subsection 139(1)(a)(v)(aa) of the Act to the municipality, the Cabinet member responsible for local government and the Minister of Finance. A mandatory intervention supersedes any discretionary provincial intervention, provided that any financial recovery plan prepared for the discretionary intervention must continue until replaced by a recovery plan for the mandatory intervention.<sup>280</sup>

The new financial dispensation also provides certain criteria for determining the seriousness or persistent material breach of financial commitments. When determining whether the conditions for a mandatory intervention referred to in section 139 of the MFMA are met, all relevant facts must be considered. The following factors, singly or in combination, may indicate that a municipality is in serious material breach of its obligations to meet its financial commitments:

- (a) The municipality has failed to make any payment to a lender or investor as and when due;
- (b) the municipality has failed to meet a contractual obligation which provides security in terms of section 48 of the MFMA;
- (c) the municipality has failed to make any other payment as and when due, which individually or in the aggregate is more than an amount as may be pre-

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<sup>279</sup> See the MFMA s 139(1)(a)-(b).

<sup>280</sup> See the MFMA s 139(2)-(3).

scribed or, if none is prescribed, more than two per cent of the municipality's budgeted operating expenditure; or

(d) the municipality's failure to meet its financial commitments has impacted, or is likely to impact, on the availability or price of credit to other municipalities.<sup>281</sup>

Any recurring or continuous failure by a municipality to meet its financial commitments which substantially impairs the municipality's ability to procure goods, services or credit on usual commercial terms, may indicate that the municipality is in persistent material breach of its obligations to meet its financial commitments.<sup>282</sup>

In respect of the preparation of a financial recovery plan, the MFMA determines that any suitably qualified person may, on request by the provincial executive, prepare a financial recovery plan for a discretionary provincial intervention referred to in section 137 of the MFMA. Only the Municipal Financial Recovery Service may prepare a financial recovery plan for a mandatory provincial intervention referred to in section 139 of the MFMA. When preparing a financial recovery plan, the person referred to in subsection 141(1) of the Act or the Municipal Financial Recovery Service must:

(a) consult:

- (i) the relevant municipality;
- (ii) the municipality's principal suppliers and creditors, to the extent they can reasonably be contacted;
- (iii) the MEC for finance and the MEC for local government in the province; and
- (iv) organised labour;

(b) take into account:

- (i) any financial recovery plan that has previously been prepared for the municipality; and
- (ii) any proposed financial recovery plan, or proposals for a financial recovery plan, that may be advanced by the municipality or any creditor of the municipality; and

(c) at least 14 days before finalising the plan:

- (i) submit the plan for comment to:

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<sup>281</sup> The MFMA s 140(1)-(2).

<sup>282</sup> Note that s 140(2) and (3) do not apply to disputed obligations to which there are pending legal actions between the municipality and the creditor, provided that such actions are not instituted to avoid an intervention or obligations explicitly waived by the creditor.

- (aa) the municipality;
  - (bb) the MEC for finance and the MEC for local government in the province;
  - (cc) organised local government in the province;
  - (dd) organised labour; and
  - (ee) any supplier or creditor of the municipality, on request; and
- (ii) publish a notice in a newspaper of general circulation in the municipality:
- (aa) stating the place, including any website address, where copies of the plan will be available to the public free of charge or at a reasonable price; and
  - (bb) inviting the local community to submit written comments in respect of the plan.<sup>283</sup>

The person charged with preparing the financial recovery plan or the Municipal Financial Recovery Service must

- consider any comments received
- finalise the financial recovery plan and
- submit the final plan to the MEC for finance in the province for approval in terms of section 143 of the MFMA.<sup>284</sup>

A financial recovery plan must be aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, and such a plan, whether for a mandatory or discretionary intervention, must:

- identify the financial problems of the municipality
- be designed to place the municipality in a sound and sustainable financial condition as soon as possible
- state the principal strategic objectives of the plan, and ways and means for achieving those objectives
- set out a specific strategy for addressing the municipality's financial problems, including a strategy for reducing unnecessary expenditure and increasing the collection of revenue, as may be necessary
- identify the human and financial resources needed to assist in resolving financial problems, and where those resources are proposed to come from

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<sup>283</sup> The MFMA s 141(1)-(3).

<sup>284</sup> Read the MFMA s 141(4)(a)-(c).

- describe the anticipated time frame for financial recovery, and milestones to be achieved and
- identify what actions are necessary for the implementation of the plan, distinguishing between actions to be taken by the municipality and actions to be taken by other parties.<sup>285</sup>

The plan may also:

- provide for the liquidation of specific assets, excluding those needed for the provision of the minimum level of basic municipal services
- provide for debt restructuring or debt relief in accordance with the MFMA
- provide for special measures to prevent unauthorised, irregular and fruitless and wasteful expenditures and other losses and
- identify any actual and potential revenue sources.<sup>286</sup>

In addition, a financial recovery plan

- for a mandatory intervention must
  - (a) set spending limits and revenue targets
  - (b) provide budget parameters which bind the municipality for a specified period or until stated conditions have been met and
  - (c) identify specific revenue-raising measures that are necessary for financial recovery, including the rate at which any municipal tax and tariffs must be set to achieve financial recovery and
- for a discretionary intervention may suggest, for adoption by the municipality,
  - (a) spending limits and revenue targets
  - (b) budget parameters for a specified period or until stated conditions have been met and (c) specific revenue-raising measures that are necessary for financial recovery.<sup>287</sup>

On receipt of a financial recovery plan pursuant to a discretionary intervention, the MEC for local government in the province may approve the recovery plan with or without amendments, as the MEC considers appropriate. On receipt of a financial recovery plan pursuant to a mandatory intervention, the MEC for finance must verify that the process set out in section 141 of the MFMA has been followed and that the

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<sup>285</sup> See the MFMA s 142(1)(a)(i)-(vii).

<sup>286</sup> The MFMA s 142(1)(b)(i)-(iv).

<sup>287</sup> Read the MFMA s 142(2)(a)-(b).

criteria contained in section 142 of the Act are met and if so approve the recovery plan or if not direct what defects must be rectified. The responsible MEC must submit an approved recovery plan to the municipality, the Minister and the Cabinet member responsible for local government, the Auditor-General and organised local government in the province.<sup>288</sup>

The MEC for local government or the MEC for finance in the province may at any time, but subject to section 141(1) and (2) of the MFMA, request any suitably qualified person or the Municipal Financial Recovery Service to prepare an amended financial recovery plan in accordance with the directions of the MEC. Section 141 of the Act, read with such changes as the context may require, apply to the amendment of a financial recovery plan in terms of this section. No amendment of a recovery plan may impede the implementation of any court order made or agreement reached in terms of the plan before the amendment.<sup>289</sup>

If a financial recovery plan was prepared in a discretionary provincial intervention, the municipality must implement the approved recovery plan and report monthly to the MEC for local government in the province on the implementation of the plan, in such manner as the plan may determine. The financial recovery plan binds the municipality in the exercise of its executive authority, but only to the extent to resolve the financial problems of the municipality. If the municipality cannot or does not implement the approved recovery plan, the provincial executive may in terms of section 139(1) or (4) of the Constitution take further appropriate steps to ensure implementation of the plan.<sup>290</sup> If the recovery plan was prepared in a mandatory provincial intervention referred to in section 139 of the MFMA

- the municipality must implement the approved recovery plan
- all revenue, expenditure and budget decisions must be taken within the framework of, and subject to the limitations of, the recovery plan and
- the municipality must report monthly to the MEC for finance in the province on the implementation of the plan in such manner as the plan may determine.

The financial recovery plan binds the municipality in the exercise of both its legislative and executive authority, including the approval of a budget and legislative meas-

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<sup>288</sup> See the MFMA s 143(1)-(3).

<sup>289</sup> See the MFMA s 144(1)-(3).

<sup>290</sup> Note that the Municipal Structures Act ss 34(3) and (4) and 35 apply if a provincial executive dissolves a municipal council in terms of s (3). See also the MFMA s 145(1)-(4).



ures giving effect to the budget, but only to the extent necessary to achieve the objectives of the recovery plan. The provincial executive must in terms of section 139(5)(b) of the Constitution either

- dissolve the council of the municipality, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures necessary to give effect to the recovery plan within the time frames specified in the plan and
  - (a) appoint an administrator until a newly elected council has been declared elected and
  - (b) approve a temporary budget and revenue-raising measures, and other measures to give effect to the recovery plan and to provide for the continued functioning of the municipality.
- assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not take executive measures to give effect to the recovery plan.<sup>291</sup>

At least every three months the MEC for local government or the MEC for finance in a province must review any discretionary provincial intervention referred to in section 137 or any mandatory provincial intervention referred to in section 139 of the MFMA, including progress with resolving the municipality's financial problems and its financial recovery and the effectiveness of any financial recovery plan. He/she must also submit progress reports and a final report on the intervention to the municipality, the Minister, the Cabinet member responsible for local government, the provincial legislature and organised local government in the province.<sup>292</sup> A discretionary intervention must end if it is terminated in terms of section 139(2)(b) of the Constitution or when the municipality is able and willing to fulfil the executive obligation in terms of legislation or the Constitution that gave rise to the intervention and the financial problem that has been caused by or has caused the failure by the municipality to comply with that obligation is resolved.<sup>293</sup> A mandatory intervention must end when the crisis in the municipality's financial affairs has been resolved and the municipality's ability to

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<sup>291</sup> See the MFMA s 146(1)-(4). The Municipal Structures Act ss 34(3) and (4) and 35 apply when a provincial executive dissolves a municipal council in terms of the Constitution s 139(5)(b)(i).

<sup>292</sup> The MEC for local government or the MEC for finance may request the person who prepared the recovery plan, or the Municipal Financial Recovery Service, to assist the MEC in complying with s 147(1). See the MFMA s 147(1)-(2).

<sup>293</sup> The MFMA s 148(1)(a)-(b).

meet its obligations to provide basic services or its financial commitments is secured.<sup>294</sup>

When a provincial intervention ends, the MEC for local government or the MEC for finance in the province must notify:

- (a) the municipality;
- (b) the Minister, in the case of a mandatory intervention;
- (c) the Cabinet member responsible for local government;
- (d) any creditors having pending litigation against the municipality;
- (e) the provincial legislature; and
- (f) organised local government in the province.<sup>295</sup>

In respect of national interventions, the MFMA determines that if the conditions for a provincial intervention in a municipality in terms of section 139(4) or (5) of the Constitution are met and the provincial executive cannot or does not adequately exercise the powers or perform the functions referred to in that section, then the national executive must consult the relevant provincial executive and act or intervene in terms of that section in the stead of the provincial executive. If the national executive intervenes in a municipality in terms of subsection 150(1) of the MFMA, then:

- (a) the national executive assumes for the purposes of the intervention the functions and powers of a provincial executive in terms of this chapter;
- (b) the Minister assumes for the purposes of the intervention the functions and powers of an MEC for finance in terms of this chapter; and
- (c) a reference in this chapter:
  - (i) to a provincial executive must be read as a reference to the national executive;
  - (ii) to an MEC for finance must be read as a reference to the Minister; and
  - (iii) to a provincial intervention must be read as a reference to a national intervention.<sup>296</sup>

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<sup>294</sup> See the MFMA s 148(2)(a)-(b).

<sup>295</sup> Read the MFMA s 148(3)(a)-(f). Note that if a provincial executive intervenes in a municipality in terms of the Constitution s 139, the provincial executive and its representatives have access to such information, records and documents of the municipality or of any municipal entity under the sole or shared control of the municipality as may be necessary for the intervention, including for identifying or resolving the financial problem of the municipality. Refer also to the MFMA s 149.

<sup>296</sup> See the MFMA s 150(1)-(2).

Apart from the possibility of national interventions, the MFMA also protects the rights of third parties. The MFMA determines that, except as expressly provided for in the Act, nothing in the Act limits or affects:

- the rights of any creditor or other person having a claim against a municipality
- any person's access to ordinary legal process in accordance with the common law and relevant legislation or
- the rights of a municipality or municipal entity, or of the parties to a contract with a municipality or municipal entity, to alternative dispute resolution mechanisms, notice procedures and other remedies, processes or procedures.<sup>297</sup>

Furthermore, if a municipality is unable to meet its financial commitments, it may apply to the High Court for an order to stay, for a period not exceeding 90 days, all legal proceedings, including the execution of legal process, by persons claiming money from the municipality or a municipal entity under the sole control of the municipality. Notice of such an application must be given to:

- the MEC for local government and the MEC for finance in the province
- the Minister
- the Cabinet member responsible for local government
- organised local government and
- to the extent that they can reasonably be contacted, all persons to whom the municipality or the municipal entity owes an amount in excess of a prescribed amount, or if no amount is prescribed, in excess of R100 000.<sup>298</sup>

A municipality may also apply to the High Court for an order:

- to stay, for a period not exceeding 90 days at a time, all legal proceedings, including the execution of legal process, by persons claiming money from the municipality
- to suspend the municipality's financial obligations to creditors, or any portion of those obligations, until the municipality can meet those obligations or
- to terminate the municipality's financial obligations to creditors, and to settle claims in accordance with a distribution scheme referred to in section 155.<sup>299</sup>

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<sup>297</sup> The MFMA ss 151(a)-(c).

<sup>298</sup> Note that an application in terms of s 152(1) may for the purposes of the Constitution s 139(5) be regarded as an admission by the municipality that it is unable to meet its financial commitments. See the MFMA s 152(1)-(3).

<sup>299</sup> The MFMA s 153(1)(a)-(c).

The court may make an order in terms of subsection 153(1) of the MFMA only if

- the provincial executive has intervened in terms of section 139 and a financial recovery plan to restore the municipality to financial health has been approved for the municipality
- the financial recovery plan is likely to fail without the protection of such an order
- section 154 of the MFMA has been complied with, in the case of an application for an order referred to in subsection 153(1)(b) and
- section 155(1) has been complied with, in the case of an application for an order referred to in subsection 153(1)(c).<sup>300</sup>

Notice of an application in terms of subsection 153(1) must be given to

- all creditors to whom the municipality owes an amount in excess of a prescribed amount, or if no amount is prescribed, in excess of R100 000, insofar as those creditors can reasonably be contacted
- the MEC for finance and the MEC for local government in the province
- the Minister
- the Cabinet member responsible for local government and
- organised labour.<sup>301</sup>

Before issuing an order in terms of section 153(1)(b) of the MFMA for the suspension of a municipality's financial obligations to creditors, the court must be satisfied that

- the municipality cannot currently meet its financial obligations to creditors and
- all assets not reasonably necessary to sustain effective administration or to provide the minimum level of basic municipal services have been or are to be liquidated in accordance with the approved financial recovery plan for the benefit of meeting creditors' claims.<sup>302</sup>

Before issuing an order for the termination of a municipality's financial obligations to creditors in terms of section 153(1)(c) of the MFMA, the court must be satisfied that

- the municipality cannot meet its financial obligations to its creditors and is not likely to be able to do so in the foreseeable future
- all assets not reasonably necessary to sustain effective administration or to provide the minimum level of basic municipal services have been liquidated in accor-

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<sup>300</sup> The MFMA s 153(2)(a)-(d).

<sup>301</sup> Read the MFMA s 153(3)(a)-(e).

<sup>302</sup> Refer to the MFMA s 154(a)-(b).

dance with the approved financial recovery plan for the benefit of meeting creditors' claims and

- all employees have been discharged except those affordable in terms of reasonably projected revenues as set out in the approved financial recovery plan.

If the court issues an order referred to subsection 155(1) of the Act, the MEC for finance in the province must appoint a trustee to prepare a distribution scheme for the proportional settlement of all legitimate claims against the municipality as at the date of the order. Those claims must be settled against the amount realised from the liquidation of assets referred to in subsection 155(1)(b) of the Act.<sup>303</sup>

A distribution scheme must

- determine the amount available for distribution
- list all creditors with claims which qualify for the purposes of the distribution scheme, indicating which of those are secured and the manner in which they are secured and
- provide for the distribution of the amount available amongst creditors in the following order of preference:
  - (i) First preference must be given to the rights of secured creditors as to the assets with which they are secured in terms of section 48, provided the security in question was given in good faith and at least six months before the mandatory provincial intervention in terms of section 139 began;
  - (ii) thereafter the preferences provided for in the Insolvency Act,<sup>304</sup> read with the necessary changes as the context may require, must be applied; and
  - (iii) thereafter non-preferent claims must be settled in proportion to the amount of the different claims.<sup>305</sup>

The Minister, acting with the concurrence of the Cabinet member responsible for local government, must by regulation in terms of section 168 of the MFMA provide for an equitable process for the recognition of claims against a municipality for the purposes of sharing in a distribution scheme, provided that rejection of any claim does not prevent a creditor from proving the claim in a court and provide for public

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<sup>303</sup> See the MFMA s 155(1)-(2).

<sup>304</sup> 24 of 1936.

<sup>305</sup> Note that a distribution scheme may not be implemented unless approved by the court. See the MFMA s 155(3)-(4).

access to a distribution scheme.<sup>306</sup> The MFMA also establishes a so-called Municipal Financial Recovery Service (MFRS). According to section 157 of the Act a Municipal Financial Recovery Service is established as an institution within the public service. The Municipal Financial Recovery Service forms part of, and functions within, the National Treasury.<sup>307</sup> The Municipal Financial Recovery Service:

- must perform the duties and may exercise the powers assigned to the Service in terms of this Act
- may, on request by the MEC for finance in a province, prepare a financial recovery plan for a municipality or, with the approval of the Director-General of the National Treasury, instruct any suitably qualified person to prepare the plan in accordance with the directions of the Service
- may, on request by the MEC for finance in the province, monitor the implementation of any financial recovery plans that it has prepared, and may recommend such amendments and revisions as are appropriate
- may, on request by any municipality that is experiencing financial problems, and in co-ordination with any other provincial or national efforts, assist the municipality to identify the causes of, and potential solutions for, these financial problems
- may, with the approval of the Director-General of the National Treasury, obtain the services of any financial expert to perform any specific work for the Service; and
- may collect information on municipal financial problems and on best practices in resolving such problems.<sup>308</sup>

It is the responsibility of the Minister of Finance to appoint a person as the Head of the MFRS, subject to subsection 159(2) of the MFMA and legislation governing the public service. A person appointed as the Head of the Service holds office in the National Treasury on terms and conditions set out in a written employment contract, which must include terms and conditions setting performance standards.<sup>309</sup> The Head of the Service is responsible for the performance by the Service of its functions and the exercise of its powers and takes all decisions of the Service in the performance of its functions and the exercise of its powers, except those decisions of the

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<sup>306</sup> The MFMA s 156(a)-(b).

<sup>307</sup> Read the MFMA s 157(1)-(2).

<sup>308</sup> See the MFMA s 158(a)-(f).

<sup>309</sup> The MFMA s 159(1)-(2).

Service taken in consequence of a delegation in terms of section 162 of the Act.<sup>310</sup> The staff of the Municipal Financial Recovery Service consists of the Head of the Service, persons in the service of or contracted by the National Treasury and designated by the Director-General of the National Treasury for the work of the Service and persons seconded from an organ of state or organisation to the Service by agreement between the Director-General and that organ of state or organisation.<sup>311</sup> Finally, the Head of the Service may delegate any of the powers or duties of the Service to a member of the staff of the Service. Such a delegation must be in writing, is subject to the limitations or conditions which the Head of the Service may impose and does not divest the Head of the Service of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty. The Head of the Service may confirm, vary or revoke any decision taken in consequence of a delegation in terms of subsection 162(1), provided that no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.<sup>312</sup>

**(m) General treasury matters, financial misconduct and miscellaneous provisions**

No municipality or municipal entity may incur a liability or risk payable in a foreign currency. Subsection 163(1) does not apply to debt regulated in terms of section 47 of the MFMA or to the procurement of goods or services denominated in a foreign currency but the Rand value of which is determined at the time of procurement or, where this is not possible and risk is low, at the time of payment.<sup>313</sup> Furthermore, no municipality or municipal entity may:

- conduct any commercial activities
  - (a) otherwise than in the exercise of the powers and functions assigned to it in terms of the Constitution or national or provincial legislation
  - (b) outside the borders of the Republic
- provide a municipal service in an area outside its jurisdiction except with the approval of the council of the municipality having jurisdiction in that area or

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<sup>310</sup> Note that the Head of the Service performs the functions of office subject to the directions of the Director-General of the National Treasury. Read the MFMA s 160(1)-(2).

<sup>311</sup> Refer to the MFMA s 161(a)-(c).

<sup>312</sup> Read the MFMA s 162(1)-(3).

<sup>313</sup> The MFMA s 163(1)-(2).



- make loans to
  - (a) councillors or officials of the municipality;
  - (b) directors or officials of the entity or
  - (c) members of the public.<sup>314</sup>

Each municipality and each municipal entity must have an internal audit unit, subject to subsection 165(3) of the MFMA. The internal audit unit of a municipality or municipal entity must:

- prepare a risk-based audit plan and an internal audit program for each financial year
- advise the accounting officer and report to the audit committee on the implementation of the internal audit plan and matters relating to internal audit, internal controls, accounting procedures and practices, risk and risk management, performance management, loss control and compliance with the MFMA, the annual Division of Revenue Act and any other applicable legislation and
- perform such other duties as may be assigned to it by the accounting officer.<sup>315</sup>

Apart from an internal audit unit, each municipality and each municipal entity must have an audit committee, subject to subsection 166(6) of the MFMA. An audit committee is an independent advisory body which must:

- advise the municipal council, the political office-bearers, the accounting officer and the management staff of the municipality or the board of directors, the accounting officer and the management staff of the municipal entity on matters relating to:
  - (a) internal financial control and internal audits
  - (b) risk management
  - (c) accounting policies
  - (d) the adequacy, reliability and accuracy of financial reporting and information
  - (e) performance management
  - (f) effective governance

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<sup>314</sup> Note that if on the date on which this section takes effect a municipality or municipal entity is engaged in any activity prohibited by s 164(1)(a) or (b) and which is otherwise lawful, the municipality or entity must take all reasonable steps to rectify its position and to comply with that subsection as soon as may be reasonable in the circumstances. See the MFMA s 164(1)-(2).

<sup>315</sup> The internal audit function may be outsourced if the municipality or municipal entity requires assistance to develop its internal capacity and the council of the municipality or the board of directors of the entity has determined that this is feasible or cost-effective. Read the MFMA s 165(1)-(3).

- (g) compliance with this Act, the annual Division of Revenue Act and any other applicable legislation
- (h) performance evaluation and
- (i) any other issues referred to it by the municipality or municipal entity
- review the annual financial statements to provide the council of the municipality or, in the case of a municipal entity, the council of the parent municipality and the board of directors of the entity, with an authoritative and credible view of the financial position of the municipality or municipal entity, its efficiency and effectiveness and its overall level of compliance with this Act, the annual Division of Revenue Act and any other applicable legislation
- respond to the council on any issues raised by the Auditor-General in the audit report
- carry out such investigations into the financial affairs of the municipality or municipal entity as the council of the municipality, or in the case of a municipal entity, the council of the parent municipality or the board of directors of the entity may request and
- perform such other functions as may be prescribed.<sup>316</sup>

In performing its functions, an audit committee has access to the financial records and other relevant information of the municipality or municipal entity and must liaise with the internal audit unit of the municipality and the person designated by the Auditor-General to audit the financial statements of the municipality or municipal entity. An audit committee must also consist of at least three persons with appropriate experience, of whom the majority may not be in the employ of the municipality or municipal entity and meet as often as is required to perform its functions, but at least four times a year.<sup>317</sup>

A municipality may remunerate its political office-bearers and members of its political structures, but only within the framework of the Public Office-Bearers Act,<sup>318</sup>

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<sup>316</sup> The MFMA s 166(1)-(2).

<sup>317</sup> Note that the members of an audit committee must be appointed by the council of the municipality or, in the case of a municipal entity, by the council of the parent municipality. One of the members who is not in the employ of the municipality or municipal entity must be appointed as the chairperson of the committee. No councillor may be a member of an audit committee. Furthermore, a single audit committee may be established for a district municipality and the local municipalities within that district municipality and a municipality and municipal entities under its sole control. See the MFMA s 166(3)-(6).

<sup>318</sup> 20 of 1998.

setting the upper limits of the salaries, allowances and benefits for those political office-bearers and members and in accordance with section 219(4) of the Constitution. Any remuneration paid or given in cash or in kind to a person as a political office-bearer or as a member of a political structure of a municipality otherwise than in accordance with subsection 167(1) of the MFMA, including any bonus, bursary, loan, advance or other benefit, is an irregular expenditure, and the municipality must, and has the right to, recover that remuneration from the political office-bearer or member and may not write off any expenditure incurred by the municipality in paying or giving that remuneration.<sup>319</sup>

Relating to treasury regulations and guidelines, the MFMA determines that the Minister of Finance, acting with the concurrence of the Cabinet member responsible for local government, may make regulations or guidelines applicable to municipalities and municipal entities, regarding:

- (a) any matter that may be prescribed in terms of this act;
- (b) financial management and internal control;
- (c) a framework for regulating the exercise of municipal fiscal and tariff-fixing powers;
- (d) a framework regulating the financial commitments of municipalities and municipal entities in terms of public-private partnership agreements;
- (e) the establishment by municipalities of, and control over-
  - (i) municipal entities; and
  - (ii) business units contemplated in section 76(a)(ii) of the Municipal Systems Act;
- (f) the safe-guarding of the financial affairs of municipalities and of municipal entities when assets, liabilities or staff are transferred from or to a municipality or a municipal entity;
- (g) the alienation, letting or disposal of assets by municipalities or municipal entities;
- (h) internal audit units and their functioning;

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<sup>319</sup> See the MFMA s 167(1)-(3). The MEC for local government in a province must report to the provincial legislature any transgressions of ss 167(1) and any non-compliance with the MFMA ss 17(3)(k)(i) and (ii) and 124(1)(a).

- (i) the information to be disclosed when municipalities or municipal entities issue or incur debt and the manner in which such information must be disclosed, including by way of a prospectus or other document;
- (j) the circumstances under which further or specific disclosures are required after money has been borrowed by a municipality or municipal entity;
- (k) the circumstances under which documentation or information pertaining to municipal debt must be lodged or registered;
- (l) the establishment of a registry for the registration of documentation and information pertaining to municipal borrowing;
- (m) the settlement of claims against a municipality following an order of court in terms of section 153;
- (n) the information that must be placed on the websites of municipalities;
- (o) a framework regulating investments by municipal entities; and
- (p) any other matter that may facilitate the enforcement and administration of this act.<sup>320</sup>

A regulation or guideline may:

- differentiate between different
  - (a) kinds of municipality, which may, for the purposes of this section, be defined either in relation to categories, types or budgetary size of municipalities or in any other manner
  - (b) categories of municipal entity
  - (c) categories of accounting officer or
  - (d) categories of official or
- may be limited in its application to a particular:
  - (a) kind of municipality, which may, for the purposes of this section, be defined either in relation to a category, type or budgetary size of municipality or in any other manner
  - (b) category of municipal entity
  - (c) category of accounting officer or
  - (d) category of official.<sup>321</sup>

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<sup>320</sup> the MFMA s 168(1)(a)-(p).

<sup>321</sup> The MFMA s 168(2)(a)-(b). No guidelines issued in terms of ss (1) are binding on a municipality unless adopted by its council or a municipal entity unless adopted by the council of the entity's parent municipality. The MFMA s 168(3)(a)-(b).

Before regulations in terms of section 168 of the MFMA are promulgated, the Minister must consult organised local government on the substance of those regulations and publish the draft regulations in the *Government Gazette* for public comment. Regulations made must be submitted to Parliament for parliamentary scrutiny at least 30 days before their promulgation.<sup>322</sup> The National Treasury may on good grounds approve a departure from a treasury regulation or from any condition imposed in terms of the Act. Non-compliance with a regulation or with a condition imposed by the National Treasury in terms of the Act may, on good grounds shown, be condoned by the Treasury.<sup>323</sup>

The MFMA also provides for aspects regarding the financial misconduct by municipal officials and entities. The Act thus provides that the accounting officer of a municipality commits an Act of financial misconduct if that accounting officer deliberately or negligently:

- (a) contravenes a provision of the act;
- (b) fails to comply with a duty imposed by a provision of the act on the accounting officer of a municipality;
- (c) makes or permits, or instructs another official of the municipality to make, an unauthorised, irregular or fruitless and wasteful expenditure; or
- (d) provides incorrect or misleading information in any document which in terms of a requirement of the act must be (i) submitted to the mayor or the council of the municipality, or to the Auditor-General, the National Treasury or other organ of state; or (ii) made public.<sup>324</sup>

Furthermore, the chief financial officer of a municipality commits an act of financial misconduct if that officer deliberately or negligently:

- (a) fails to carry out a duty delegated to that officer in terms of section 79 or 81(1)(e) of the MFMA;
- (b) contravenes or fails to comply with a condition of any delegation of a power or duty in terms of section 79 or 81(1)(e) of the MFMA;
- (c) makes or permits, or instructs another official of the municipality to make, an unauthorised, irregular or fruitless and wasteful expenditure; or

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<sup>322</sup> Read the MFMA s 169(1)-(2).

<sup>323</sup> The MFMA s 170(1)-(2).

<sup>324</sup> See the MFMA s 171(1)(a)-(d).

(d) provides incorrect or misleading information to the accounting officer for the purposes of a document referred to in subsection 171(1)(d) of the MFMA.<sup>325</sup>

A senior manager or other official of a municipality exercising financial management responsibilities and to whom a power or duty was delegated in terms of section 79 of the MFMA commits an act of financial misconduct if that senior manager or official deliberately or negligently:

- fails to carry out the delegated duty
- contravenes or fails to comply with a condition of the delegated power or duty
- makes an unauthorised, irregular or fruitless and wasteful expenditure or
- provides incorrect or misleading information to the accounting officer for the purposes of a document referred to in subsection 171(1)(d) of the Act.

A municipality must investigate allegations of financial misconduct against the accounting officer, the chief financial officer, a senior manager or other official of the municipality unless those allegations are frivolous, vexatious, speculative or obviously unfounded. If the investigation warrants such a step, a municipality must institute disciplinary proceedings against the accounting officer, chief financial officer or that senior manager or other official in accordance with systems and procedures referred to in section 67 of the Municipal Systems Act, read with Schedule 2 of that Act.<sup>326</sup>

In respect of offences, it is determined that the accounting officer of a municipality is guilty of an offence if that accounting officer:

- deliberately or in a grossly negligent way:
  - (a) contravenes or fails to comply with a provision of section 61(2)(b), 62(1), 63(2)(a) or (c), 64(2)(a) or (d) or 65(2)(a), (b), (c), (d), (f) or (i) of the MFMA
  - (b) fails to take reasonable steps to implement the municipality's supply chain management policy referred to in section 111
  - (c) fails to take all reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure or
  - (d) fails to take all reasonable steps to prevent corruptive practices:
    - (i) in the management of the municipality's assets or receipt of money or

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<sup>325</sup> Read the MFMA s 171(2)(a)-(d).

<sup>326</sup> See the MFMA s 171(3)-(4). Similar requirements have been laid down regarding financial misconduct by officials of municipal entities. See the MFMA s 172(1)-(4).

(ii) in the implementation of the municipality's supply chain management policy

- deliberately misleads or withholds information from the Auditor-General on any bank accounts of the municipality or on money received or spent by the municipality or
- deliberately provides false or misleading information in any document which in terms of a requirement of this Act must be:
  - (a) submitted to the Auditor-General, the National Treasury or any other organ of state or
  - (b) made public.<sup>327</sup>

A senior manager or other official of a municipality or municipal entity exercising financial management responsibilities and to whom a power or duty was delegated in terms of section 79 or 106 of the MFMA is guilty of an offence if that senior manager or official deliberately or in a grossly negligent way contravenes or fails to comply with a condition of the delegation. A councillor of a municipality is guilty of an offence if that councillor:

- (a) deliberately influences or attempts to influence the accounting officer, the chief financial officer, a senior manager or any other official of the municipality to contravene a provision of the act or to refrain from complying with a requirement of the act;
- (b) interferes in the financial management responsibilities or functions assigned in terms of the act to the accounting officer of the municipality or delegated to the chief financial officer of the municipality in terms of the act;
- (c) interferes in the financial management responsibilities or functions assigned in terms of the act to the accounting officer of a municipal entity under the sole or shared control of the municipality; or
- (d) interferes in the management or operational activities of a municipal entity under the sole or shared control of the municipality.<sup>328</sup>

A councillor, an official of a municipality or municipal entity, a member of the board of directors of a municipal entity or any other person is guilty of an offence if that per

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<sup>327</sup> See the MFMA s 173(1)(a)-(c). Similar offences are created for the accounting officer of a municipal entity. See the MFMA s 173(2)(a)-(c).

<sup>328</sup> See the MFMA s 173(2).



son deliberately or in a grossly negligent way:

- impedes an accounting officer from complying with a provision of the Act
- gives incorrect, untrue or misleading information material to an investment decision relating to borrowing by a municipality or municipal entity
- makes a withdrawal in contravention of section 11 of the MFMA
- fails to comply with section 49 of the Act
- contravenes a provision of section 115(2), 118 or 126(5) of the Act or
- provides false or misleading information for the purposes of any document which must in terms of a requirement of the Act be:
  - (a) submitted to the council, mayor or accounting officer of a municipality or to the Auditor-General or the National Treasury or
  - (b) made public.<sup>329</sup>

A person is liable on conviction of an offence in terms of section 173 of the MFMA to imprisonment for a period not exceeding five years or to an appropriate fine determined in terms of applicable legislation.<sup>330</sup>

The Minister, acting with the concurrence of the Cabinet member responsible for local government, may make regulations prescribing:

- (a) the manner, form and circumstances in which allegations and disciplinary and criminal charges of financial misconduct must be reported to the National Treasury, the MEC for local government in the province and the Auditor-General, including (i) particulars of the alleged financial misconduct; and (ii) steps taken in connection with such financial misconduct;
- (b) matters relating to internal investigations by municipalities and municipal entities of allegations of financial misconduct;
- (c) the circumstances in which the National Treasury or the MEC for local government in the province may direct that disciplinary steps be taken or criminal charges be laid against a person for financial misconduct;
- (d) criteria for the composition and functioning of a disciplinary board which hears a charge of financial misconduct;

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<sup>329</sup> Refer to the MFMA s 173(3)-(5).

<sup>330</sup> The MFMA s 174.

- (e) the circumstances in which the findings of a disciplinary board and any sanctions imposed by the board must be reported to the National Treasury, the MEC for local government in the province and the Auditor-General; and
- (f) any other matters to the extent necessary to enforce the provisions of the act.

A regulation in terms of subsection (1) may:

- differentiate between different:
  - (a) kinds of municipality, which may, for the purposes of this section, be defined either in relation to categories, types or budgetary size of municipalities or in any other manner
  - (b) categories of municipal entity
  - (c) categories of accounting officer or
  - (d) categories of other official or
- be limited in its application to a particular:
  - (a) kind of municipality, which may, for the purposes of this section, be defined either in relation to a category, type or budgetary size of municipality or in any other manner
  - (b) category of municipal entity
  - (c) category of accounting officer or
  - (d) category of other official.<sup>331</sup>

No municipality or any of its political structures, political office-bearers or officials, no municipal entity or its board of directors or any of its directors or officials and no other organ of state or person exercising a power or performing a function in terms of the MFMA is liable in respect of any loss or damage resulting from the exercise of that power or the performance of that function in good faith. Without limiting liability in terms of the common law or other legislation, a municipality may recover from a political office-bearer or official of the municipality, and a municipal entity may recover from a director or official of the entity, any loss or damage suffered by it because of the deliberate or negligent unlawful actions of that political office-bearer or official when performing a function of office.<sup>332</sup> Various cases concerning the recovery of damages caused by municipal office bearers or political representatives have

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<sup>331</sup> Read the MFMA s 175(a)-(b).

<sup>332</sup> Refer to the MFMA s 176(1)-(2).

already been decided. On this point, the new legal system has significantly increased and enhanced the accountability of municipal politicians and officials.<sup>333</sup>

The Minister may by notice in the *Gazette*:

- delay the implementation of a provision of the Act for a transitional period not exceeding five years from the date when this section takes effect or
- where practicalities impede the strict application of a specific provision of the Act, exempt any municipality or municipal entity from, or in respect of, such provision for a period and on conditions determined in the notice. A delay or exemption in terms of subsection (1) may:
  - (a) apply to:
    - (i) municipalities generally; or
    - (ii) municipal entities generally; or
  - (b) be limited in its application to a particular-
    - (i) municipality;
    - (ii) kind of municipality, which may, for the purposes of this section, be defined either in relation to a category, type or budgetary size of municipality or in any other manner;
    - (iii) municipal entity; or
    - (iv) category of municipal entities.<sup>334</sup>

To facilitate the restructuring of the electricity industry as authorised by the Cabinet member responsible for such restructuring, the Minister, acting with the concurrence of the Cabinet member responsible for local government and after consultation with organised local government, may, by notice in the *Gazette*, exempt any municipality or municipal entity from any specific provision of the MFMA for a period of not more than four years and on conditions determined in the notice, provided that such ex-

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<sup>333</sup> See, eg, the case of *Moodley v Umzinto North Town Board* 1998 (2) SA 188 (SCA). In this case the town treasurer made certain investments on behalf of the Town Board. A claim for damages was instituted against him for the recovery of R300 000, which was lost as a result of an investment in a company which was subsequently liquidated. In his defence, the treasurer argued that his liability was exempted by virtue of the Local Authorities Ordinance 25 of 1974 (N) s 99, which stated that an official of a council, acting under the direction of the council and in the scope of his authority, could not be held liable for losses incurred. The court found that the treasurer exceeded his authority, however, and thus rendered himself vulnerable. He could not rescue himself by simply stating that he had acted within the course of his employment. See paras G-I at 194.

<sup>334</sup> The MFMA s 177(1)-(2).

emption may not be understood as obligating any municipality to transfer any staff, assets or liabilities.<sup>335</sup>

#### **(n) Transitional provisions and the amendment of other legislation**

The MFMA specifically determines that anything done in terms of a provision repealed by section 179(1) of the Act, which can be done in terms of a provision of the Act, must be regarded as having been done in terms of the Act. Within three months of the date on which this section takes effect, all municipalities must submit to the National Treasury a list of:

- all corporate entities in which the municipality or a municipal entity under its sole or shared control has an interest, specifying:
  - (a) the name and address of the corporate entity
  - (b) the purpose, extent and other particulars of the interest
  - (c) if such corporate entity is a municipal entity, whether the entity is under the sole or shared control of the municipality and
  - (d) such other information as may be required by the National Treasury
- all public-private partnerships to which the municipality is a party, with a value of more than one million Rands in total or per annum, specifying:
  - (a) the name and physical address of the private party participating in the public-private partnership
  - (b) the purpose and other particulars of the public-private partnership and
  - (c) such other information as may be required by the National Treasury and
- all other types of contract of the municipality for a period beyond 1 January 2007 and with a value of more than one million Rands in total or per annum.<sup>336</sup>

According to the new financial system for local government in South Africa and subject to the provisions of the supreme Constitution, parliament is confirmed as the highest legislature as far as public finance in general is concerned. In this regard, parliament will and has already enacted various pieces of legislation which affect the financial affairs of all three spheres of government. Some of these legislative enact-

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<sup>335</sup> See the MFMA s 177(3).

<sup>336</sup> See the MFMA s 178(1)-(2). Note that the legislation referred to in the second column of the schedule to the MFMA is hereby amended or repealed to the extent indicated in the third column of the schedule. Despite the repeal of s 10G of the LGTA 209 of 1993 by s 179(1) of this section, the provisions contained in ss (6), (6A) and (7) of s 10G remain in force until the legislation envisaged in the Constitution s 229(2)(b) is enacted. The repeal of the Municipal Accountants Act 21 of 1988 takes effect on a date determined by the Minister by notice in the *Gazette*.

ments were put in place before the new constitutional dispensation commenced, and others have recently been finalised by parliament.<sup>337</sup> Many Acts passed by parliament before the new Constitution took effect still affect the financial affairs of local governments today. In many instances, such Acts still compel municipalities to undertake specific functions, with or without financial assistance.<sup>338</sup>

### **18.3.2 Provincial control over municipal financial matters**

Before the former provincial councils were abolished in July 1986, all of them passed various ordinances which, *inter alia*, contained important provisions regarding the financial management and financial affairs of local authorities within their territories.<sup>339</sup> Many of these ordinances have not yet been repealed or replaced and, in accordance with the Constitution, they still remain in force and effect. It is submitted that all legislatures, especially parliament, should take cognisance of the laws that are still in place and should ensure that no duplication or lacunas in the law occur when new laws are promulgated.

### **18.3.3 Financial control by local authorities**

Apart from the control over municipal finance by the two higher spheres of government, each local government has also been afforded significant powers and duties concerning the management and control of its own financial affairs. Arguably the most important local control mechanism is the passing and implementation of municipal by-laws on financial matters. The existence and scope of such by-laws must be passed in each specific case and must be in compliance with the general legal requirements relevant and applicable to the lawful enactment of municipal legislative authority.

## **18.4 General comments on the principles relating to municipal fiscal management**

In view of all the activities and functions of municipalities, it is submitted that municipal fiscal management is a vast and complicated exercise. There are many aspects

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<sup>337</sup> Reference should again be made to the Constitution Sch 6 Item 2, which provides that all legislation which was in force when the new Constitution became effective will continue to be in force until amended or if such legislation is inconsistent with the Constitution.

<sup>338</sup> See, eg, the Health Act 63 of 1977, which compels local authorities to perform specific health services. Refer also to the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>339</sup> See Cloete (1997) 116. The most important ordinances are the Local Authorities Ordinance, 1974 (O 25 of 1974) applicable in the former province of Natal; Local Government Ordinance, 1939 (O 17 of 1939) applicable in the former Transvaal province; Local Government Ordinance, 1962 (O

*continued on next page*

in relation to financial management that must be fulfilled, and the overall financial system consists of a number of distinct and important activities. Some of such activities are summarised briefly below.

#### **18.4.1 *Municipal budgeting***

One of the most important financial activities of each municipal government is the annual preparation of a municipal budget. Before the commencement of the new local government dispensation, the preparation and handling of all municipal budgets were controlled by various provincial ordinances. Although such ordinances are still applicable in the new dispensation, they are subject to the new constitutional requirements and demands of new order national and provincial legislation. In the past a municipal budget had to be prepared for 12 months for all municipalities, but the budget procedures differed from one province to another because of the different legislative provisions. Every municipality should realise that its municipal budget is regarded as the foremost financial statement of the municipality, as it reflects the financial capacity and state of affairs within the municipality. It was general practice in the past for the municipal executive to prepare and submit a municipal budget. In practice the former town clerk in co-operation with the city treasurer prepared draft sections of the budget and then submitted them to a council-in-committee. Only once such a council-in-committee has considered the draft budget is it formally discussed and approved by the council. Such council meeting was usually open to the public.<sup>340</sup> The MFMA now determines and regulates the main aspects of a municipal budget.

#### **18.4.2 *Financial records, auditing and financial management***

It is imperative for all municipalities to keep proper records of all its financial affairs. This was also the position under the former provincial ordinances and is continued under the new local government system. Apart from the financial records, municipalities must also submit their accounts for proper auditing procedures. Previously, auditing had to be undertaken by the Auditor-General or by auditors that were registered in terms of the Public Accountants and Auditors Act.<sup>341</sup> More specific

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8 of 1962) applicable in the Free State and Municipal Ordinance, 1974 (O 29 of 1974), which applied in the Cape Province.

<sup>340</sup> See Cloete (1997) 118. The writer mentions that some of the former ordinances specifically prescribed that the budgets had to be open for inspection by the public. According to the Constitution s 215(1) all budgetary processes must promote transparency.

<sup>341</sup> 80 of 1991.

details regarding the auditing procedures, as well as the duties and responsibilities of auditors of municipal accounts, were contained in the relevant provincial ordinances. Under the new local government system, both parliament and the provincial legislatures are required to enact legislation to deal with municipal financial affairs.<sup>342</sup>

#### **18.4.3 Municipal expenditure**

It is self evident that all municipalities have enormous expenses in order to fulfil their duties and perform their functions. All municipalities therefore use funds from their revenue accounts to purchase materials and equipment and to employ personnel.<sup>343</sup>

All former provincial ordinances had specific requirements regarding the expenditure of municipalities in each province, which laws must now be read together with both national and provincial laws dealing with such issues.

#### **18.4.4 Loan funds, stocks and capital goods**

In order to perform their functions, many municipalities are forced to take up certain loans. Often municipalities do not have sufficient income to pay for extensive developments or infrastructure upgrading. In the past the powers of municipalities to negotiate and raise loans were strictly controlled in terms of the provisions of the relevant provincial ordinances.<sup>344</sup> Strict control over loans by municipalities is essential to safeguard the public and future residents of a particular municipal jurisdiction from negative loan-repayment obligations and unpopular service fees increases. Loans can also be negotiated as bank overdrafts or by issuing stocks or debentures. In order to prevent maladministration and ineffective financial control, municipalities are nowadays required to keep and prepare separate budgets for loan funds. This was also the position in the former local government dispensation.<sup>345</sup> It is also a common occurrence that many municipalities have extensive pieces of land at their disposal which land can be sold. One must, however, remember that such land is regarded as public property that belongs to the general public or residents of that municipal area and may thus be disposed of only by the municipality under strict control. In general

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<sup>342</sup> Again one should remember that the Constitution Sch 6 provides for the continuation of 'old order legislation' subject to amendment and consistency with the Constitution.

<sup>343</sup> In general about 30% of revenue is spent on materials and equipment, 35% on salaries and allowances and 25% on interest on loans.

<sup>344</sup> See, eg, the Provincial Ordinances read together with other national legislative enactments such as the Health Act 63 of 1984 and the Housing Act 4 of 1966.

<sup>345</sup> See, eg, the Transvaal Municipal Consolidated Loans Fund Ordinance, O 9 of 1952.



municipalities have the authority to buy, sell or even expropriate land should such expropriation be essential in rendering a municipal/public service.

#### **18.4.5 Municipal credit control and debt collection**

It is of obvious importance, especially for the long-term financial viability of all municipalities, to collect revenues due to them effectively. Such effective collection programmes presupposes that appropriate credit control mechanisms must be established. As a first step, all municipalities must be able to measure the number of services that they must render and bill their consumers accordingly. It is essential that consumers receive regular and accurate bills for the services rendered to them in a format which is easy and clear to understand. Municipalities must also establish mechanisms to enable poor households to apply and qualify for rebates on service charges. Effective measures should be in place, however, to deal with those households or consumers who can afford to pay for services but neglect to do so timeously. It is of fundamental importance that municipalities retain the authority to discontinue certain services to consumers who do not fulfil their responsibilities to their relevant municipalities. Strict credit control measures are thus essential for municipalities to maintain effective and equitable financial management practices. It is this writer's submission that the new legal order adequately addresses such requirements.

Under the new local government legal system, various legislative provisions have been enacted in order to ensure effective credit control and debt collection measures. According to the Local Government: Municipal Systems Act,<sup>346</sup> various requirements have been laid down to enhance effective credit control and municipal debt collection. The measures are briefly discussed below.

##### **18.4.5.1 Customer care and management**

Municipalities are obligated within their financial and administrative capacities and in relation to the levying of rates and other taxes and the charging of fees for municipal services to establish, provide and ensure specific aspects. These aspects are:<sup>347</sup>

- (a) establish a sound customer management system that aims to create a positive and reciprocal relationship between persons liable for these payments and the municipality, and where applicable, a service provider;

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<sup>346</sup> 32 of 2000.

<sup>347</sup> See the Systems Act s 95(a)-(i).

- (b) establish mechanisms for users of services and ratepayers to give feedback to the municipality or other service provider regarding the quality of the services and the performance of the service provider;
- (c) take reasonable steps to ensure that users of services are informed of the costs involved in service provision, the reasons for the payment of service fees, and the manner in which monies raised from the service are utilised;
- (d) where the consumption of services has to be measured, take reasonable steps to ensure that the consumption by individual users of services is measured through accurate and verifiable metering systems;
- (e) ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due;
- (f) provide accessible mechanisms for those persons to query or verify accounts and metered consumption, and appeal procedures which allow such persons to receive prompt redress for inaccurate accounts;
- (g) provide accessible mechanisms for dealing with complaints from such persons, together with prompt replies and corrective action by the municipality;
- (h) provide mechanisms to monitor the response time and efficiency in complying with paragraph (g); and
- (i) provide accessible pay points and other mechanisms for settling accounts or for making pre-payments for services.

It is clear from these requirements that the legislator intended that all municipalities create a financial system that is directed at effective and sufficient service provision but which also provides for customer care and public involvement in respect of municipal rates, taxes and service charges.

#### **18.4.5.2 Debt collection and credit control policy**

Without a system in place which can ensure effective debt collection, all municipalities will encounter financial restraints in varying degrees. In light of the fact that municipal income is dependent largely on regular and up-to-date payment for services rendered, every municipality must provide and enforce proper debt collection procedures. According to the new legislative framework, all municipalities must collect all money that is due and payable to them. This obligation is subject to the provisions of applicable legislation. Furthermore, all municipalities, for the purpose of debt collection, must adopt, maintain and implement a credit-control and debt-collection policy which is consistent with their rates and tariffs policies and which complies with the

provisions of the Municipal Systems Act.<sup>348</sup> There is thus a clear and direct responsibility on municipalities to collect debt and to do so in a clear and informative manner. It is further also provided that the contents of a credit control and debt collection policy must provide for various issues.<sup>349</sup> The policy must include at least the following:

- (a) credit control procedures and mechanisms;
- (b) debt collection procedures and mechanisms;
- (c) provision for indigent debtors that is consistent with its rates and tariff policies and any national policy on indigents;
- (d) realistic targets consistent with-
  - (i) general recognised accounting practices and collection ratios; and
  - (ii) the estimates of income set in the budget less an acceptable provision for bad debts;
- (e) interest on arrears, where appropriate;
- (f) extensions of time for payment of accounts;
- (g) termination of services or the restriction of the provision of services when payments are in arrears;
- (h) matters relating to unauthorised consumption of services, theft and damages; and
- (i) any other matters that may be prescribed by regulation in terms of section 104 of the Systems Act.

Apart from the minimum requirements mentioned above, it is important to note that the policy may differentiate between different categories of ratepayer, user of services, debtor, tax, service, service standard and other matter, as long as the differentiation does not amount to unfair discrimination. It seems that the intention is to give municipalities a broad discretion to differentiate between different municipal debtors. In this respect, emphasis should again be placed on the provisions of the Constitution, which in section 9 of the Bill of Rights outlaws unfair discrimination. Where municipalities thus differentiate between municipal debtors, such differentiation must

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<sup>348</sup> See the Systems Act s 96(a)-(b).

<sup>349</sup> Refer to the Systems Act s 97.

be lawful under the Constitution and may not amount to unfair discrimination.<sup>350</sup> To ensure the effective application and enforcement of a municipal credit control and debt collection policy, municipalities are obligated to adopt by-laws to give effect to such policies.<sup>351</sup> Again provision is made that such by-laws may differentiate between categories of municipal debtor, as long as such differentiation does not amount to unfair discrimination. It is submitted that an evaluation of a policy, whether it amounts to unfair discrimination or not, requires an objective assessment of the relevant circumstances of each case.<sup>352</sup>

#### 18.4.5.3 Supervisory and implementing authority

According to the new legislative framework, specific provision is made for the supervisory and implementing authority of a municipality's credit control and debt collection policy and by-laws. The Systems Act specifically determines that a municipality's executive committee or executive mayor, or if there is no executive committee or executive mayor, then the municipal council itself or a committee appointed by the council, is designated as the supervisory authority and must oversee and monitor the implementation and enforcement of the municipality's credit control and debt collec-

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<sup>350</sup> See the Systems Act s 97(2), read together with the Constitution s 9. Many precedents have also been established in dealing with aspects concerning whether or not particular differentiation practices amounted to unconstitutional conduct.

<sup>351</sup> See the Systems Act s 98(1) and (2).

<sup>352</sup> Debt collection has always been a contentious issue and has often been the focus of legal disputes. Various cases concerning issues of municipal debt collection were reported in recent years. In *Cape Town Transitional Metropolitan Substructure v ILCO Homes Ltd* 1996 (3) SA 492 (C) the court was faced with legal proceedings in terms of the Municipal Ordinance 20 of 1974 (C) s 93(1) for the recovery of rates. The section required authorisation by the Administrator or Premier of the province to institute legal proceedings after the expiration of a period of 12 months from the date upon which the rates became due and payable. It was held that such authorisation could be given before or after the expiration date. Authorisation could further be given after the institution of legal proceedings and could thus be ratified. In *Midrand/Rabie Ridge/Ivory Park Metro Substructure v Lanmer (Pty) Ltd* 2001 (2) SA 516 (T) the court was faced with the issue concerning the recovery of interest on outstanding rates. With reference to debt due to a local authority, the Local Government Ordinance 17 of 1939 (T) provided that a local authority could recover interest at a rate not more than the rate determined by the Local Authorities Loans Fund Board in terms of the Local Authorities Loans Fund Act 67 of 1984 s 11(2)(b). The board determined such maximum interest to be equal to the prime rate charged by the commercial banking industry at the time. The court concluded that such a determination of the interest rate was not vague and required only an investigation into the prime rate applicable at the time. See also *Eastern Metropolitan Substructure v Peter Klein Investments* 2001 (4) SA 661 (W). The case concerned the Local Government Ordinance 17 of 1939 (T) s 49, which permitted the recovery of moneys due for sanitary services from both the owner and occupier jointly and severally of the applicable premises. Refer also to *De Beer NO v North-Central Local Council ETC* 2002 (1) SA 429 (CC). The case concerned the Durban Extended Powers Consolidated Ordinance 18 of 1976 (N) s 105. According to the ordinance, a municipal council had to send out three notices to a delinquent ratepayer before it could institute court proceedings against him/her. The court confirmed *inter alia* that municipal money had to be raised as

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tion policy and related by-laws. The designated supervisory authority is also obligated to oversee and monitor the performance of the municipal manager in implementing the policy and applicable by-laws.<sup>353</sup> The supervisory authority must also, when necessary, evaluate or review the policy and by-laws or the implementation thereof in order to improve the efficiency of its credit-control and debt-collection mechanisms, processes and procedures. Regular reports to the municipal council in respect of the policy are also required.<sup>354</sup> In contrast with the supervisory authority, it is required that the municipal manager or particular service provider, if applicable, must implement and enforce the municipality's credit-control and debt-collection policy and by-laws; must establish effective administrative mechanisms, processes and procedures to collect money that is due and payable to the municipality and must also report to the supervisory authority at such intervals as may be determined by the municipal council.<sup>355</sup>

#### **18.4.5.4 Additional powers of municipalities in respect of their credit control and debt collection procedures**

The Systems Act states that at all reasonable hours the occupier of a premises in a municipality must give an authorised representative of that municipality or of a service provider access to the premises in order to read, inspect, install or repair any meter or service connection for the reticulation of a service or to disconnect, stop or restrict the provision of any service.<sup>356</sup> Municipalities are furthermore allowed to consolidate any separate accounts of persons liable for payments to the municipality, to credit a payment by a person against any account of that person and to implement any of the debt-collection and credit-control measures in relation to any arrears on any of the accounts of such a person.<sup>357</sup> If a person that is liable to the municipality for the payment of rates, taxes or fees consents to it, a municipality may enter into an agreement with that person's employer to deduct from his or her salary or wages:

- any outstanding amounts due to the municipality or

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speedily as possible because it was used by the council to fulfil its constitutional obligations in relation to the delivery of services.

<sup>353</sup> See the Systems Act s 99(a)(i)-(ii).

<sup>354</sup> Refer to the Systems Act s 99(b)-(c).

<sup>355</sup> See the Systems Act s 100(a)-(c).

<sup>356</sup> See the Systems Act s 101.

<sup>357</sup> See the Systems Act s 102(1)(a)-(c). It should be noted that the provisions of the subsection do not apply to cases where there is a dispute between the municipality and the debtor concerning any specific amount claimed by the municipality from that person. S 102(2).

- such monthly amounts/instalments as may be agreed between the parties.

The effect of such an agreement can be regarded as a so-called “emolument attachment order”.<sup>358</sup> Municipalities may also provide for special incentives for employers to enter into such agreements and for employees to consent to such agreement.<sup>359</sup> It is submitted that such incentives could contribute significantly to the collecting of bad debt, which so many municipalities are facing in South Africa. The aim of such incentives is to collect *some* bad debt rather than nothing at all.

#### **18.4.5.5 Regulations and guidelines in respect of credit control and debt collection provisions**

In respect of credit control and debt collection measures, the minister responsible for local government may make regulations or issue guidelines to provide for or to regulate various matters. The matters are the following:<sup>360</sup>

- (a) the particulars that must be contained in the municipal manager’s report in terms of section 100(c);
- (b) the identification of municipal services provided by the municipality or other service providers to users of services where the use of the service by the user can reasonably be determined, measured or estimated per quantity used or per frequency of such use;
- (c) the determination, measurement or estimate of the use by each user of each service so identified;
- (d) user agreements, and deposits and bank guarantees for the provision of municipal services;
- (e) the rendering of accounts to ratepayers and users and the particulars to be contained in the accounts;
- (f) the action that may be taken by municipalities and service providers to secure payment of accounts that are in arrear, including –
  - (i) the termination of municipal services or the restriction of the provision of services;
  - (ii) the seizure of property;
  - (iii) the attachment of rent payable on a property; and

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<sup>358</sup> See the Systems Act s 103(a)(i)-(iii).

<sup>359</sup> Refer to the Systems Act s 103(b)(i)-(iii).

<sup>360</sup> Read the Systems Act s 104(1)(a)-(n).

- (iv) the extension of liability to a director, a trustee or a member if the debtor is a company, a trust or a close corporation;
- (g) appeals against the accuracy of accounts for municipal taxes or services;
- (h) the manner in and time within which such appeals must be lodged and determined and the consequences of successful and unsuccessful appeals;
- (i) extensions for the payment of arrears and interest payable in respect of such arrears;
- (j) service connections and disconnections, and the resumption of discontinued services;
- (k) the combating of unauthorised consumption, connection and reconnection and theft of municipal services;
- (l) the development and implementation of an indigent policy;
- (m) the tampering with or theft of meters, service supply equipment and reticulation network and any other fraudulent activity in connection with the provision of municipal services; and
- (n) any other matter that may facilitate –
  - (i) effective and efficient systems of credit control and debt collection by municipalities; or
  - (ii) the application of this chapter.

When the minister makes regulations or issues guidelines, he or she must take into account the capacity of municipalities to comply with such regulations or guidelines and must differentiate between different kinds of municipality according to their respective capacities.<sup>361</sup>

### **18.5 Important revenue sources of local governments**

The success of the new local government system is dependent largely on the availability of resources and, more so, financial resources. Without appropriate financial capacity, most municipalities will not be able to provide or sustain essential services to their respective communities. Municipal revenue sources are therefore just as important as proper financial management and control. Within the new local government system, municipalities have been afforded various ways of ensuring and enhancing local revenue sources. On the issue of municipal revenue sources, it is

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<sup>361</sup> See the Systems Act s 104(2)(a)-(b).



important to distinguish between so-called *own revenue sources* and *outside sources*. Own sources refer to sources of income that a municipality can or must create for itself. Outside sources again refer to revenue that is not directly generated by the municipality itself but falls under examples such as grants from provincial or national governments to local governments.

One of a municipality's most important revenue sources is the *power of taxation*. The power to tax is regarded as an essential prerequisite to ensuring a system of sustainable and accountable local government. According to the White Paper on local government, there are four areas of local decision-making that are important to municipal taxation. These areas are:

- the choice of tax to be imposed
- the definition of the tax base
- the choice of the tax rate and
- the administration of the tax system.<sup>362</sup>

It is also important for municipalities to have freedom and be able to vary their tax rates. Such a situation will not only strengthen local accountability but will also enable communities to challenge municipalities about the value-for-money of the services that they provide. Any *local tax policy* should be seen within the framework of the total tax system of a country, however, and not in isolation. There is a strong need for a coherent and transparent tax system in general. A particular taxation policy should always take into account any adverse or negative consequences which such a system could have on the productiveness of the economy of the region and/or country as a whole. It was thus envisaged that the new legal dispensation with regard to local government matters would specifically incorporate such important aspects within national legislation. Such a national legislative framework would then ensure uniform standards and practices between the various different types of municipality across the country.

### **18.5.1 Property taxation**

Arguably the most important source of local taxation is so-called "property tax" (rates). This type of taxation requires owners of property located within a municipal area to pay a tax to the municipality based on a valuation of their property. The term

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<sup>362</sup> See the White Paper on Local Government (1998) at 133.

*property tax* is generally used to refer to all taxes relating to immovable property (land).<sup>363</sup> The main reasons property tax is regarded as a very suitable local tax are:

- it is easy to collect
- it produces a predictable and stable income
- it is fixed in location and
- it is impossible to conceal.<sup>364</sup>

Property tax is directed mainly at financing municipal service provision, and it is therefore an important source of so-called “discretionary own-revenue” for local governments that enables municipalities to function effectively.

Historically, property rating in South Africa has been done differently in the various provinces. Each of the former four provinces had its own legislation in this regard. Such provincial legislative requirements were never properly co-ordinated, although the legal requirements were very similar in each province. For various reasons the old property rates/tax system was inadequate and ineffective. Such is the importance of municipal property taxation that the Constitution specifically addresses it. According to section 229(2) of the Constitution, all municipalities have the power to impose rates on property. Such a system may be regulated by national legislation, however.<sup>365</sup> Since property taxation was conducted under the former provincial ordinances regulating such property rating and taxation, such enactments stay in force until such time as they are replaced by national legislation. From the outset of the restructuring of the entire local government dispensation, it was envisaged that the old system relevant to municipal property taxation also had to be overhauled.

According to the White Paper on Local Government, national government had to address four main issues with regard to property taxes. These issues can be summarised as follows:

- *To bring untaxed areas into the tax net* Many former black areas are outside the property tax net and effective measures to integrate them must be implemented.

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<sup>363</sup> From an international perspective, property tax is regarded as the single most important tax at local government level, especially in developing countries. The more developed a country becomes, the less dependent it becomes on property taxes as a source of local revenue.

<sup>364</sup> See Franzen RCD “Property tax: Alive and well and Levied in SA” (1996) 8 *SA Merc LJ* at 351.

<sup>365</sup> See the Constitution s 229(2)(b).

- *To establish a uniform property valuation and tax system* An optimal valuation system should be established. The White Paper has identified various possible rating systems.<sup>366</sup>
- *To determine valuation periods* Properties should be valued regularly.
- *To determine relief or partial exemption for the poorest people who genuinely cannot afford such taxes* Any rebates or grants-in-aid should be clearly indicated in the budget of a municipality.

It has also been argued that local governments should have some latitude in decisions apart from those mentioned above with regard to aspects of property taxes in their area, in order to reflect their own unique circumstances and local economic objectives.

### **18.5.2 The valuation of property**

It was mentioned above that the new constitutional scheme entrenches the fact that municipalities are allowed to impose rates on property. Property rates can be levied only on the basis of some or other form of property valuation, however. Although the Constitution is silent on the issue of property valuations, such aspects are normally set out in national legislation.<sup>367</sup> It is also obvious that apart from the requirements set out in national legislation, any valuation of property must be done within the parameters of South Africa's supreme constitution. Any valuation or recovery of rates on property contrary to the provisions of the Constitution are invalid.<sup>368</sup> In the past valuation had to be done by qualified and registered valuers.<sup>369</sup>

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<sup>366</sup> See the White Paper on Local Government (1998) at 135. The systems include *site rating*, or the valuation of land only, the *combined rating* of land and buildings, and *differential or composite rating*, where both land and buildings are rated together but at different rate levels, and where the rate levied on land is higher than that on improvements. A rating system where a uniform rate is used for areas which were not previously rated, irrespective of the value of the property. (This is often called 'flat-rating' in South Africa). The rate is usually lower than the actual value of the property.

<sup>367</sup> The LGTA s 10G(6), eg, required local councils, metro councils and rural councils to ensure that properties within their areas of jurisdiction had to be valued at intervals prescribed by law and that a single valuation roll had to be compiled and had to be open for public inspection.

<sup>368</sup> See, eg, the case of *Lotus River Etc Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C). The court held that increases in rates under the LGTA s 10G(6) and Property Valuation Ordinance 29 of 1944 (C) may not be in limitation of constitutional rights such as the right to equality unless such limitation is permitted under the limitation clause s 36. However, the court mentioned that its role is not to second-guess the legislature but to assess the lawfulness of any limitation. The court was also aware that municipalities inherited several valuation rolls with differing base dates as a result of the restructuring of local government. The court concluded that the uniform rates increase was carefully considered and was adopted only as an interim measure, thereby justifying the limitation.

<sup>369</sup> See, eg, the Valuers Act 23 of 1982.

### **18.5.3 The basis of property valuations**

There are many important aspects that influence the actual basis upon which property valuations are determined. From the outset it is important to distinguish between valuations on land and valuations on buildings. In all the former provincial ordinances the intention was that the value of land should be the amount which the land would have realised had a willing buyer and seller agreed on a free and voluntary sale. This seems to refer to market value. The value of buildings, on the other hand, was determined as the cost of erection at the time of valuation less depreciation. Another option was to value the land/property inclusive of all the improvements and then to subtract one value from the other.<sup>370</sup> In the past, when reference was made to valuation in legislation it usually referred to immovable property (land) and improvements on the land. It was thus often important to determine whether an object on land was fixed to the land permanently or not.<sup>371</sup> Generally speaking the determination of land values is usually done by reference to sale prices of similar land in a particular area, while the estimation of building replacement or erection/building costs can be calculated according to a standard rate per square meter.

Prior to the new local government dispensation, it was a general rule that valuations had to be done every four to five years. If the time gap was too large, then the valuations would no longer relate to the market value, and distortions would appear in the tax base. Furthermore, all former provincial ordinances have prescribed a basic format for a valuation roll in each municipal area. There were also specific requirements regarding valuations courts or boards and the procedures for making a valuation roll.<sup>372</sup>

### **18.5.4 The levying of municipal property rates**

Today it is a constitutional fact that municipalities have the right to levy property rates.<sup>373</sup> Prior to the new legal system, all former provincial ordinances provided for

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<sup>370</sup> See Craythorne (1997) 351.

<sup>371</sup> See, eg, the case of *Standard-Vacuum Refinery of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A).

<sup>372</sup> See Craythorne (1997) 352-354. See also the cases of *Crawford and Others v Borough of Eshove and Another* 1956 (1) SA 147 (N) and *Helderberg Butcheries v Municipal Valuation Court, Somerset West* 1977 (4) SA 99 (C).

<sup>373</sup> See the Constitution s 229. See also *Msunduzi Municipality v MEC for Housing, KZN* 2004 (6) SA 1 (SCA).

the levying of property rates.<sup>374</sup> The levying of property rates was also allowed under the LGTA.<sup>375</sup>

Under the legal system prior to the new constitutional dispensation, various methods of rating existed. Three broad rating methods were generally known. The first method was the so-called “site rating” method. According to this method a rate was levied only on the rateable valuation of the particular land. This method encouraged the development of vacant land or the continuous development of occupied land to its fullest potential. To a great extent speculation in land was minimised, although the method produced less income than others. A second method used was the so-called “flat rating” method. Such a method requires that both land and buildings be rated together. It was a very productive method, as it brought in more revenue. This particular method required more detailed administration, however, and it often discouraged the improvement of property. The third method of rating was known as the “differential” (composite) rating method. This method entailed rating both land and buildings, but at different rates: land was levied at a higher rate than improvements on the land.<sup>376</sup> Within a particular rating system, all the prior provincial ordinances

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<sup>374</sup> Various rates such as general rates, town rates, health rates, water rates, sewerage rates, special rates, sanitary rates and local rates were applicable. See Craythorne (1997) 354-355. See also the cases of *Weenen TLC v Van Dyk* 2000 (3) SA 435 (N), which required that rates and taxes had to be properly promulgated before their introduction. In *Midrand/Rabie Ridge/Ivory Park Metropolitan Substructure v Strydom and Others* 2001 (1) SA 98 (SCA) the case concerned the levying of a rate on property only once a year in terms of the Ordinance on Property Tax 11 of 1977 (T). The court held that under the ordinance a general property tax on property based on the site value was authorised only once a year and the taxpayer was entitled to be informed in advance of such taxes. It should be noted that if the required legal procedure to impose rates or taxes was not followed, then such rates are not eligible. Read *Weenen TLC v Van Dyk* 2002 (4) SA 653 (SCA).

<sup>375</sup> According to the Act s 10G(7)(b) a municipality could even differentiate between different categories of property on such grounds as it deemed reasonable. It is important to note, however, that any differentiation could not amount to unfair discrimination. This would be contrary to the Constitution and thus invalid. For more on this position see *PE Municipality v Prut NO* 1996 (3) SA 533 (SE) and also *Beukes v Krugersdorp Transitional Local Council and Another* 1996 (3) SA 467 (W). The interim Constitution s 178(2) required that municipal rates and taxes had to be levied according to a uniform structure. See also *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374 (CC). Note the case of *Robertson v City of Cape Town/Truman-Baker v City of Cape Town* 2004 (5) SA 412 (CPD). The applicants in the case were dissatisfied with the increase of rates levied on their properties, which were levied on the basis of property valuations contained in a provisional valuation roll. The municipality relied on both the Property Valuation Ordinance 1993 (C) and ss 93(7)-(10) of the Structures Act as amended. The court held *inter alia* that the municipality did not fall within the definition of local authority in s 1 of the Ordinance and could therefore not exercise a power to levy rates on the basis of a provisional valuation roll. The court also held that the amendments to the Structures Act violated ss 154(2) and 229(5) of the Constitution and were unconstitutional and invalid. Refer to para 154 at 459-460.

<sup>376</sup> See Craythorne (1997) 355-356. The writer points out that the site-rating method seems to be the least popular in South Africa and that the flat rating method is used mostly in western countries.

provided for the exemption of certain property from the payment of rates. Exemptions commonly included land that was used for agricultural purposes, education (schools) and religious practices (church buildings).<sup>377</sup>

Under the LGTA,<sup>378</sup> councils were authorised to levy and recover property rates in respect of immovable property within their respective jurisdictions. Specific legal requirements were laid down which had to be followed. The LGTA was only a transitional piece of legislation and would be substituted by a uniform national Act once the restructuring process came to a close. This national Act was finally enacted in 2004, and parts of the Act commenced at such time. The new legal system regulating municipal property taxation is significantly different from the old systems that were applicable under the former four provincial ordinances.

#### **18.5.5 Some important aspects concerning municipal property assessment and taxation**

The adoption and finalisation of new legislative provisions regarding the levying and recovery of property taxes in South Africa was preceded by a strong public outcry about new proposals and suggestions. Many people have called new property taxation proposals a “hidden wealth tax” aimed at over-taxing the already heavily taxed average taxpayer.<sup>379</sup> Other commentators have expressed the view that without a complete overhaul of the property taxation system in South Africa, local governments will not be able to fulfil their constitutional mandates, however.<sup>380</sup> Therefore, the aim of a new system for property taxation is to do away with the previously ambiguous situation of having various property rating systems in the country and to replace them with a uniform system applicable equally throughout the territory of the state.<sup>381</sup>

##### **18.5.5.1 A brief history of property taxation in South Africa**

It is reported that the first land-related tax was introduced into South Africa in 1677. The Cape Ordinance of 1836 introduced the first formal property tax in the Cape

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<sup>377</sup> See, eg, *Mosowitz v Johannesburg City Council* 1957 (4) SA 569 (T); *PE Municipality v Marist Brothers* 1948 (1) SA 637 (E); *De Aar Divisional Council v Convent of the Holy Cross* 1952 (1) SA 495 (C) and *St John's Diocese v Umtata Municipality* 1968 (3) SA 55 (E).

<sup>378</sup> S 10G(7).

<sup>379</sup> Refer to Ratiba MM “The Good, the bad or the ugly? Comments on the property rates bill” (2000) *DR* October at 27-29.

<sup>380</sup> See Franzsen RCD “Property tax: Alive and well and levied in South Africa” (1996) 8 *SA Merc LJ* at 348 *et seq.*

<sup>381</sup> The dual local government system of pre 1994 has created various fiscal disparities between municipalities. White local authorities were financially strong because of fiscal autonomy, which in-

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Province, however, and by the end of the 19<sup>th</sup> century, such a system of taxation, based on capital values, was in place throughout the territories.<sup>382</sup> Property tax was levied on the owner of land, irrespective of whether such land was zoned for residential, commercial or industrial purposes, and the tax could be levied on either the value of the land (site rating), the value of the land and improvements (composite rating) or on a uniform or flat rating system. Land was valued at market value, and all provincial valuation rolls had to include minimum information such as identification of the owner of land, the size and description of land as well as the value of the land together with improvements. It was also possible for land owners to appeal decisions of property valuation to a specific tribunal. Finally, the old system also provided for effective measures to recover outstanding levies. Properties could be sold via public auction, and the Registrar of Deeds was prohibited from transferring property from one owner to another unless a clearance certificate had been obtained from the relevant local authority and submitted to the Registrar.<sup>383</sup> It will become clear that many of the old provisions have been incorporated into the new property rates legislative framework.

#### **18.5.5.2 Reasons for changing the old property rates systems**

There are various reasons for the former legal system of levying and collecting property rates and taxes' having to be overhauled. The following examples are a brief summary of such reasons:

- The entire social and legal framework of local government *per se* has changed. Property taxation now operates within a new supreme constitutional framework. Apart from the structural requirements of the Constitution, the Bill of Rights also determines various substantive compliance.<sup>384</sup> In light of the new constitutional requirements, all local government structures were amalgamated which, in turn, required amendments to the former provincial tax legislation.

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cluded trading account surpluses on water and electricity and property taxes. Black local authorities did not have such income sources and thus had poor financial capabilities.

<sup>382</sup> See Franzsen *supra* fn 380 at 352-353.

<sup>383</sup> The clearance certificate had to verify that all rates and taxes on the property in question was paid in full. This provision provided a significant safeguard for local authorities that property taxes would not be lost when a property was sold.

<sup>384</sup> See, eg, the Bill of Rights s 9. Different tax regimes often militate against individual rights and values. Tax payers must be treated equally. Equality does not imply exactly the same tax liability, however, but rather equal tax for equal value. A proper division of the tax burden among tax or ratepayers is required. Vertically taxpayers must be treated in a similar way to other taxpayers simi-

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- According to the newly established municipal structures, the tax base of many municipalities was extended to areas outside of the boundaries of urban municipalities. Such areas include farmland, state-owned land and also tribal land, on which rates had never before been levied. Provision had to be made to incorporate such areas within the taxation legislation.<sup>385</sup>
- The former system of property taxation was fragmented and ineffective. No uniform system was in place, as property rates and taxes were levied and collected in terms of four different provincial ordinances. Such different rating systems caused financial differences between municipalities which, in turn, created a stumbling block for the implementation of a constitutionally sanctioned fiscal system.
- The two-tier model of local government outside metropolitan areas requires a division of fiscal powers between local municipalities and district municipalities.
- The taxation of so-called “public infrastructure” had to be addressed in new legislation. Previously, public infrastructure such as railways and power stations was exempted from paying property taxes. Such income sources had to be brought into the tax system.<sup>386</sup>
- It was also time to re-evaluate aspects such as the exclusion of certain properties from rates and taxes and the former system of rate-capping for certain property owners, since rates and taxes are an extremely important source of municipal revenue and such exclusion and capping could have significant financial implications for an municipality.<sup>387</sup>
- Different rates for different properties had to be reconsidered. The categories of property and the rates applicable to such properties was in need of re-evaluation. On this point it is reported that there seems to be a trend internationally to levy business property more highly than residential property.<sup>388</sup> Uncontrolled differen-

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larly situated. See Franzsen *supra* fn 380 at 355. Refer also to Franzsen RCD “The present status of property tax in SA” (1999) 4 *Journal of Property Tax Assessment and Administration* at 3-13.

<sup>385</sup> For more on such aspects see Franzsen RCD “Some questions about the introduction of a land tax in rural areas” (1999) 11 *SA Merc LJ* at 259 *et seq.*

<sup>386</sup> It is reported that international practices show that public entities should be rated on at least their operational land. See Franzsen RCD and McCluskey WJ “Some policy issues regarding the Local Government: Property Rates Bill” (2000) 12 *SA Merc LJ* at 213.

<sup>387</sup> Rate-capping refers to a maximum limit that is set on the amount of a particular rate. Rate-capping has been implemented mainly to protect ratepayers against unreasonable rates and taxes.

<sup>388</sup> Refer to McCluskey WJ (ed) “Property tax: An international comparative review” (1999) at 305-307.

tiation between rates for different properties can lead to taxation competition between municipalities, however. Special care should be taken in such instances since the Constitution prohibits the exercise of a rating power that materially and unreasonably prejudices national economic policies and activities.<sup>389</sup> Most businesses are not as concerned about higher rates or taxes, however, since they usually pass such costs on to their consumers or employees.<sup>390</sup>

- Exemptions from property taxes or the possible deduction from income tax of property taxes had to be re-evaluated. Property tax was traditionally allowed as a deduction from income tax when the tax was incurred for the purposes of trade or the production of income. This position has shifted the property tax burden to the national sphere of government. Since property taxes are also extended to rural areas, including commercial farming properties, the South African Revenue Service will have to calculate carefully the taxes that will be lost if property taxes are still income tax deductible.<sup>391</sup>

In light of *inter alia* the abovementioned factors, it became necessary to amend and re-evaluate the system of property taxation in South Africa. It should also be pointed out that the enforcement of property tax also influences and interacts with the land use policies of a state. The sustainability of property taxes depends strongly on stable property values. Such values in turn depend on multiple market factors such as the state of the economy, political policies and programmes and investment initiatives.<sup>392</sup>

Furthermore, property rates are also influenced by the maintenance of up-to-date valuation rolls, regular assessment, billing and rates collection, accountability and transparency and a consumer acceptance of value for money. In South Africa in particular, the issue/culture of payment for services has often been somewhat contentious. Payment was used pre 1994 to force political change, but post 1994 such payment is required to ensure municipal development and the sustainability of ser

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<sup>389</sup> See the Constitution s 229(2).

<sup>390</sup> See Franzsen and McCluskey *supra* fn 386 at 215.

<sup>391</sup> The question of whether property tax should be income-tax deductible or not is a policy consideration for the national government and does not directly need incorporation in the property rates legislation. Deductions will be provided in the Income Tax laws.

<sup>392</sup> It is generally accepted that factors such as land invasions, land reform and settlement programmes, as well as land claims could significantly influence property values and therefore also property rates and taxes. See Franzsen *supra* fn 385 at 358.

vices. There is a general need to build tax morality in local communities which is aimed at ensuring payment for services rendered.<sup>393</sup> Tax morality will be improved only if taxes are fair and acceptable. Before the amalgamation of local authorities under the new legal system, property taxes were regarded as fair and not too burdensome.<sup>394</sup>

It is thus very important that property rates and taxes be carefully researched and evaluated holistically within the broader tax system. The importance of public participation and educational programmes regarding property taxation in general can therefore not be overemphasised.

### **18.5.6 Introduction to the new Municipal Property Rates Act**

The Municipal Property Rates Act (MPRA)<sup>395</sup> was assented to by the president on the 11<sup>th</sup> of May 2004. The main aims of the Act are:

- to regulate the power of a municipality to impose rates on property
- to exclude certain properties from rating in the national interest
- to make provision for municipalities to implement a transparent and fair system of exemptions, reductions and rebates through municipal rating policies
- to make provision for fair and equitable valuation methods of property
- to make provision for objections and appeals processes and
- to amend certain legislation and to provide for matters connected with the Act.<sup>396</sup>

According to the preamble of the Act, it is confirmed that the Constitution entitles municipalities to impose rates on property in their areas, subject to regulation in terms of national legislation. Furthermore, municipalities must be developmentally

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<sup>393</sup> During 1995, national government launched the so-called Operation Masakhane campaign, with the specific aim of enhancing a culture of payment for services. Despite some success, non-payment is still very high. Three main reasons for non-payment have been identified: in the first place many residents are so poor that they do not have the ability to pay for services; secondly, many areas lack proper infrastructure and service delivery is not up to standard and, thirdly, some local residents have unrealistically high and immediate expectations regarding service delivery.

<sup>394</sup> See Franzsen *supra* fn 382 at 352-361. The writer mentions the following reasons for property taxes' being accepted under the former property taxation dispensation: (a) relatively low rates and substantial rebates for residential property owners; (b) relatively low rates and income tax deductibility for commercial property owners; (c) conservative assessed values (generally below fair market value) and well-structured objection and appeal procedures; (d) payment by way of monthly instalments, often in combination with the rest of the municipal bill (electricity and water), which rendered property tax relatively invisible; (e) a general preoccupation with high-profile taxes such as income and value-added tax; and (f) property tax fared well as a perceived benefit tax – services of a high standard were received in return for taxes paid.

<sup>395</sup> 6 of 2004, hereafter referred to as MPRA.

<sup>396</sup> Refer to the long title of the Act.

orientated, and must address service delivery priorities and promote economic and financial municipal viability. Local government needs a sufficient and buoyant source of revenue, and property rates have been identified as a critical source of revenue for municipalities to achieve their constitutional objectives. In light of the fact that the Constitution confers on parliament the power to regulate the exercise by municipalities of their fiscal powers and in order to ensure uniformity and simplicity in property rates collection, the Act has been enacted.<sup>397</sup> The Act has been divided into nine chapters and will be discussed briefly below.

#### **18.5.6.1 Issues concerning the rating of property**

According to the Act, only a metropolitan or local municipality may levy a rate on property in its area. In general, a district municipality may levy a rate on property only if it is in a district management area.<sup>398</sup> The power of a municipality to levy a rate on property is subject to three main prerequisites. Such power must be exercised subject to:

- section 229 of the Constitution and other constitutional provisions
- to the MPRA itself and
- to the rates policy which each municipality must adopt when levying property rates.<sup>399</sup>

#### **18.5.6.2 A municipal rates policy**

The council of a municipality must adopt a rates policy consistent with the MPRA with regard to the levying of rates on rateable property in the municipality.<sup>400</sup> Such a rates policy will take effect on the effective date of the first valuation roll prepared by the municipality in terms of the Act and must accompany the municipality's budget for the financial year concerned, when the budget is tabled in the municipal coun-

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<sup>397</sup> See the preamble of the Act.

<sup>398</sup> See the Act s 2(10) and (2)(a). It should be clear from this wording that all property in SA is subject to a possible property tax unless specifically exempted. One must remember that the whole territory of SA has been demarcated under one form or another of local government. The reference to the area of a municipality also includes a district management area. Refer to the Act s 2(b).

<sup>399</sup> See the Act s (3)(a)-(c). Note that according to the MPRA (a) as a corporate entity, "municipality" means a municipality described in the Municipal Systems Act s 2 and (b) as a geographical area "municipality" means a municipal area demarcated in terms of the Local Government: Municipal Demarcation Act 27 of 1998. See s 1 definitions.

<sup>400</sup> Rateable property means property on which a municipality may in terms of s 2 levy a rate, excluding property fully excluded from the levying of rates in terms of the MPRA s 17. Refer to s 1 definitions.

cil.<sup>401</sup> The MPRA further requires that every rates policy must incorporate the following:<sup>402</sup>

- Treat persons liable for rates equitably.
- Determine the criteria to be applied by the municipality if it levies different rates for different categories of property, if it exempts specific owners from payment of rates, if it grants specific owners of properties a rebate or a reduction in the payable rate or if it increases rates.<sup>403</sup>
- Determine or provide criteria for the determination of categories of property for the purpose of levying different rates and categories of owner of properties or categories of properties for the purpose of granting exemptions, rebates and reductions.
- Determine how the municipality's powers in terms of section 9(1) of the MPRA must be exercised in relation to properties used for multiple purposes.
- Identify and quantify in terms of costs to the municipality and any benefit to the local community any exemptions, rebates and reductions, any exclusions referred to in section 17(1)(a), (e), (g), (h) and (i) of the Act and also rates on properties that must be phased in in terms of section 21.<sup>404</sup>
- Take into account the effect of rates on the poor and include appropriate measures to alleviate the rates burden on them.
- Take into account the effect of rates on organisations conducting specified public benefit activities and registered in terms of the Income Tax Act<sup>405</sup> for tax reductions and which own property in the area.
- Take into account the effect of rates on public service infrastructure.<sup>406</sup>

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<sup>401</sup> See the Act s (2), read with the Municipal Finance Management Act 56 of 2003 s 16(2), which regulates *inter alia* aspects concerning municipal budgets.

<sup>402</sup> Refer to the Act s (3)(a)-(j).

<sup>403</sup> A "rebate" refers to a discount granted in terms of s 15 on the amount of the rate payable on the property. A "reduction" means the lowering in terms of s 15 of the amount for which the property was valued and the rating of the property at that lower amount. See the MPRA s 1 definitions.

<sup>404</sup> "Local community", in relation to a municipality (a) means that body of persons comprising (i) the residents of the municipality, (ii) the ratepayers of the municipality, (iii) any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality and (iv) visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality and (b) includes, more specifically, the poor and other disadvantaged sections of such body of persons. See the MPRA s 1.

<sup>405</sup> 58 of 1962.

<sup>406</sup> Public service infrastructure means publicly controlled infrastructure of the following kinds: (a) national, provincial or other public roads on which goods, services or labour move across a municipal boundary; (b) water or sewer pipes, ducts or other conduits, dams, water supply reservoirs, water treatment plants or water pumps forming part of a water or sewer scheme serving the public; (c)

*continued on next page*

- Allow the municipality to promote local, social and economic development.
- Identify all rateable properties in the municipal area that are not rated in terms of section 7(2)(a) of the Act.

The MPRA specifically requires that when a municipality is considering the criteria to be applied in respect of any exemptions, rebates and reductions on property used for agricultural purposes, a municipality must take account of the following:<sup>407</sup>

- (a) the extent of services provided by the municipality for such properties;
- (b) the contribution of agriculture to the local economy;
- (c) the extent to which agriculture assists in meeting the service delivery and development obligations of the municipality; and
- (d) the contribution of agriculture to the social and economic welfare of farm workers.

It is further provided that any exemptions, rebates or reductions provided for in the rates policy must comply with and be implemented in accordance with a national framework that may be prescribed after consultation with Organised Local Government (OLG). No municipality may grant relief in respect of payment of a rate to a category of owners of properties or to the owners of a category of properties, other than by way of an exemption, rebate or reduction provided for in the rates policy and granted in terms of section 15 of the Act. No relief may be granted to owners of properties on an individual basis.<sup>408</sup>

Before it adopts its rates policy, a municipality must also follow a process of community participation.<sup>409</sup> The municipality must also ensure that the municipal manager, who is obligated to do so, has conspicuously displayed the draft rates policy for

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power stations, power substations or power lines forming part of an electricity scheme serving the public; (d) gas or liquid fuel plants or refineries or pipelines for gas or liquid fuels, forming part of a scheme for transporting such fuels; (e) railway lines forming part of a national railway system; (f) communication towers, masts, exchanges or lines forming part of a communications system serving the public; (g) runways or aprons at national or provincial airports; (h) breakwaters, sea walls, channels, basins, quay walls, jetties, roads, railway or infrastructure used for the provision of water, lights, power, sewerage or similar services of ports, or navigational aids comprising lighthouses, radio navigational aids, buoys, beacons or any other device or system used to assist the safe and efficient navigation of vessels; (i) any other publicly controlled infrastructure as may be prescribed; or (j) rights of way, easements or servitudes in connection with infrastructure mentioned in para (a)-(i). See the MPRA s 1 definitions.

<sup>407</sup> S 3(4)(a)-(d). Note that agricultural purpose, in relation to the use of a property, excludes the use of a property for the purpose of eco-tourism or for the trading in or hunting of game. S 1 definitions.

<sup>408</sup> See ss 3(5) and (6)(a)-(b).

<sup>409</sup> Such a process is set out in the Local Government: Municipal Systems Act ch 4.



a period of at least 30 days at the municipality's head an satellite offices and libraries and, if the municipality has an official website, on that website.<sup>410</sup> The municipal manager must also advertise in the media a notice stating that a draft rates policy has been prepared for submission to the council, that the draft rates policy is available for public inspection during office hours and that the local community is invited to submit comments and representation to the municipality within a period specified in the notice.<sup>411</sup> A municipal council must take into account all comments and representations made or received when it considers the draft rates policy. A rates policy must be reviewed annually by a municipal council and must be amended if necessary. Any amendments to such a policy must be annexed to the municipality's annual budget when tabled. The requirements of section 3(3)-(6) of the MPRA also apply to any amendment of a rates policy. It should be noted, however, that community participation in amendments to a rates policy is not facilitated under section 4 of the Act, but must be effected through the municipality's annual budget process in terms of sections 22 and 23 of the Municipal Finance Management Act.<sup>412</sup>

Finally, all applicable municipalities must adopt by-laws to give effect to the implementation of their rates policies. Such a by-law may differentiate between different categories of property and also between different categories of property owner liable for the payment of rates.<sup>413</sup>

### **18.5.6.3 Aspects concerning the levying of rates**

In general, when rates are levied, a municipality must levy rates on all rateable property in its area. However, a municipality is not obliged to levy rates on

- property which the municipality owns
- public service infrastructure owned by the municipality
- properties defined as a right registered against immovable property in the name of a person, excluding a mortgage bond registered against the property and properties in respect of which it is impossible or unreasonably difficult to establish a mar-

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<sup>410</sup> Refer in this instance also to the Systems Act s 21B.

<sup>411</sup> The notice period may not be less than 30 days, however. See the Act s 4(2)-(3).

<sup>412</sup> See Act 56 of 2000 read with the MPRA s 5(1)-(2).

<sup>413</sup> Refer to the Property Rates Act s (6)(1)-(2). It would seem that the intention of the legislator is that a rates policy, even if adopted by a council, cannot be enforced and implemented if it has not been included and adopted as a municipal by-law. If such interpretation is indeed correct, then it is obvious that the implementation of a rates policy is more cumbersome than a normal municipal by-law. A municipality must first complete all the legal requirements mentioned above before the by-law, which also requires specific procedures, is adopted.



ket value because of legally insecure tenure resulting from past racially discriminatory laws or practices.<sup>414</sup>

Although rateable property must be levied, a municipality is not prevented from granting exemptions, rebates or deductions.<sup>415</sup> Under the new legal dispensation a municipality may, in terms of the criteria set out in its rates policy, levy different rates for different categories of rateable property, which may include categories determined according to

- the use of the property
- the permitted use of the property or
- the geographical area in which the property is situated.<sup>416</sup>

The levying of different rates is subject to section 19 of the MPRA, however.<sup>417</sup> According to the Act, the categories of rateable property include the following:<sup>418</sup>

- (a) Residential properties;
- (b) Industrial properties;
- (c) Business and commercial properties;
- (d) Farm properties used for agricultural purposes; other business and commercial purposes; residential purposes or other purposes;
- (e) Farm properties not used for any purpose;
- (f) Smallholdings used for agricultural, residential, industrial, business, commercial or other purposes;

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<sup>414</sup> See the MPRA s 7(1)-(2).

<sup>415</sup> Read the MPRA s 7(2)(b) with s 15. This was also the position under previous laws. Refer to the case of *Association for the Aged v Ethekwini Municipality* 2004 (3) SA 81 (D). In this case, the Association/applicant sought an order declaring certain properties to be exempt from rates according to the Local Authorities Ordinance 25 of 1974 (KZN) s 153. The applicant was registered as a *bona fide* welfare organisation. The court held that the onus was on the applicant to show that it qualified for an exemption under the ordinance. The court also held that an exemption clause should be restrictively interpreted. Since the applicant sold life rights and used the premises exclusively to alleviate distress amongst aged persons and to promote their welfare, security and happiness, the properties were exempt from rates under the ordinance. See paras D-E at 87.

<sup>416</sup> "Permitted use in relation to a property" means the limited purposes for which the property may be used in terms of (a) any restrictions imposed by (i) a condition of title, (ii) a provision of a town planning or land use scheme or (iii) any legislation applicable to any specific property or properties or (b) any alleviation of any such restrictions. Refer to the MPRA s 1.

<sup>417</sup> See the MPRA s 8(1)(a)-(c).

<sup>418</sup> See the Act s 8(2)(a)-(r). Note that property in general means (a) immovable property registered in the name of a person, including, in the case of sectional title scheme, a sectional title unit registered in the name of a person, (b) a right registered against immovable property in the name of a person, excluding a mortgage bond registered against the property, (c) a land tenure right registered in the name of a person or granted to a person in terms of legislation or (d) public service infrastructure. Note also that reference to a person also includes an organ of state. See the MPRA s 1.

- (g) State-owned properties;
- (h) Municipal properties;
- (i) Public Service Infrastructure properties;
- (j) Privately owned towns serviced by the owner
- (k) Formal and informal settlements;
- (l) Communal land defined in the Communal Land Rights Act;<sup>419</sup>
- (m) State trust land;<sup>420</sup>
- (n) Properties acquired through the Provision of Land and Assistance Act<sup>421</sup> or the Restitution of Land Rights Act<sup>422</sup> or which properties are subject to the Communal Property Associations Act;<sup>423</sup>
- (o) Protected areas;<sup>424</sup>
- (p) Properties on which national monuments are proclaimed;
- (q) Properties owned by public benefit organisations and which are used for any specific public benefit activities listed in part 1 of the ninth schedule to the Income Tax Act;
- (r) Properties used for multiple purposes. According to section 9 of the PRA a property used for multiple purposes must, for rates purposes, be assigned to a category determined by the municipality for properties used for:
  - (a) a purpose corresponding with the permitted use of the property if so regulated;
  - (b) a purpose corresponding with the dominant use of the property; or
  - (c) as a multiple purposes category in terms of section 8(2)(r) of the act.<sup>425</sup>

The Act contains a specific provision regarding the levying of a rate on property in sectional title schemes. Sectional title schemes are created to cater for mainly resi-

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<sup>419</sup> 11 of 2004.

<sup>420</sup> "State trust land" refers to land owned by the state (a) in trust for persons communally inhabiting the land in terms of a traditional system of land tenure, (b) over which land tenure rights were registered or granted or (c) which is earmarked for disposal in terms of the Restitution of Land Rights Act 22 of 1994. The MPRA s 1 definitions.

<sup>421</sup> 126 of 1993.

<sup>422</sup> 22 of 1994.

<sup>423</sup> 28 of 1996.

<sup>424</sup> Such areas mean an area that is or has to be listed in the register referred to in the Protected Areas Act s 10, which refers to the National Environmental Management: Protected Areas Act 57 of 2003.

<sup>425</sup> Refer to the MPRA s 9(1)(a)-(c). A rate levied on a property categorised for use for multiple purposes must be determined by apportioning the market value of the property to the different use purposes and by applying the rates applicable to the categories for properties used for these purposes to the different market value apportionments. See the MPRA s 9(2)(a)-(b).

dential and sometimes business or commercial uses. According to the MPRA, a rate on sectional-title properties must be levied on the individual sectional-title units and not on the property as a whole.<sup>426</sup>

It is further provided that rates levied by municipalities must be in a rand amount and must be based on:

- the market value of the property or
- in the case of public service infrastructure, on the market value thereof, less 30% of that value or on such a lower percentage as the minister for Local Government may determine.<sup>427</sup>

Property mentioned in section 17(1)(h) of the MPRA is to be levied on the market value less the amount allowed in the section or by the minister.<sup>428</sup> An important confirmation is that properties with a market value below a prescribed valuation level may be levied at a uniform fixed amount per property. This provision thus allows the imposition of a so-called flat rate on certain properties. Municipalities are not obligated to implement a flat rate or uniform fixed rate, but if they do opt for such a rate on a specific category of properties, then such fixed amount may not exceed a prescribed percentage of the amount due for rates payable on a property in that category with a market value equal to the prescribed valuation level.<sup>429</sup>

When rates are being levied, a municipality must levy them for a financial year. Rates lapse at the end of the financial year for which they were levied. The levying of rates must further form part of a municipality's annual budget process and annually, at the time of its budget process, a municipality must review the amount in the rand of its current rates in line with its annual budget for the next financial year. Rates levied for a financial year may be increased during the year only in terms of section 28(6) of the Municipal Finance Management Act.<sup>430</sup> Rates further become payable as of the start of a financial year or, if the municipality's annual budget is not approved by the start of a financial year, then from such later date when the budget,

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<sup>426</sup> See the MPRA s 10 read with s 92.

<sup>427</sup> See the MPRA s 11(1)(a)-(b) read with s 17.

<sup>428</sup> The MPRA s 11(1)(c). According to the definitions in the Act, "market value" in relation to a property means the value of the property as determined in the Act s 46. Refer to the MPRA s 1 read with s 46.

<sup>429</sup> See the MPRA s 11(2)(3).

<sup>430</sup> It is imperative to read both the MPRA and the MFMA together in respect of a period of levying of rates. See the MPRA s 12(1)-(3).

including a resolution to levy rates, is approved by the provincial executive in terms of the Municipal Finance Management Act.<sup>431</sup>

A rate is levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members. This apparently refers to an absolute majority of the members of a council.<sup>432</sup> A resolution to levy rates must further be promulgated by publishing the resolution in the *Provincial Gazette*. The municipality must also without delay conspicuously display the resolution for 30 days at the head and satellite offices and libraries and on the municipal website if applicable. An advertisement in the media is also required, stating that a resolution to levy rates has been passed and that it is available for inspection.<sup>433</sup>

According to section 15 and in terms of the criteria set out in its rates policy, a municipality may exempt a specific category of owners of properties or the owners of specific categories of properties from payment of a levied rate. Rebates or reductions in rates may also be granted. When granting exemptions, rebates or reductions in respect of owners of categories of property, a municipality may determine such categories in accordance with section 8(2) of the MPRA and in respect of categories of owners of properties may include in such categories:

- indigent owners
- owners dependant on pensions or social grants
- owners temporarily without income
- owners of property situated within an area affected by disaster or any other serious adverse social or economic conditions<sup>434</sup>
- owners of residential properties with a market value lower than an amount determined by the municipality or
- owners of agricultural properties who are *bona fide* farmers.<sup>435</sup>

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<sup>431</sup> The term “annually” means once every financial year and “financial year” again means the period starting from 1 July in a year to 30 June the next year. See the MPRA s 1 definitions as well as s 13(1)-(2). The payment of rates per year can further be regulated. See also the MPRA ss 17, 55 and 78(4) respectively.

<sup>432</sup> An “absolute majority” refers to a majority of 50% + 1 of the total number of members of a municipal council. If, eg, a council thus consists of 100 members, at least 51 members must vote in favour of levying rates. An absolute majority is more difficult to obtain than a normal majority, as the latter requires only 50% + 1 of the members forming a quorum, which is normally 50% of the total number of members of a council.

<sup>433</sup> See the MPRA s 14(2)-(3).

<sup>434</sup> “Disaster” is defined in terms of the Disaster Management Act 57 of 2002.

<sup>435</sup> The MPRA s 15(2)(a)-(f).

Again it is the responsibility of the municipal manager annually to table in the council a list of exemptions, rebates and reductions during the previous financial year and also to submit a statement reflecting the income forgone by way of such exemptions, rebates and reductions, or exclusions in terms of section 17 of the Act or phasing-in discounts in terms of section 21.<sup>436</sup> Finally, all exemptions, rebates and reductions projected for a financial year must be reflected in the municipality's annual budget for that year as income on the revenue side and expenditure on the expenditure side.<sup>437</sup>

#### **18.5.6.4 Limitations on levying of rates and additional rates**

The MPRA reiterates the constitutional requirements set out in section 229(2)(a) of the Constitution. Municipalities may not exercise powers to levy rates on property that would materially and unreasonably prejudice national economic policies, economic activities across municipal boundaries or the national mobility of goods, services, capital or labour. If a rate is contra the constitutional prescriptions, then the Minister of Local Government, after notifying the Minister of Finance, should give notice to a municipality by notice in the national *Gazette* that the rate must be limited to an amount in rand that is specified in the notice. A municipality must then give effect to the notice and, if necessary, accordingly adjust its budget for the next financial year.<sup>438</sup> The determination of whether a rate is contra the Constitution is not a clear-cut case, and it is submitted that an objective test is required to make such a finding. However, the MPRA states that any sector of the economy, after consulting the applicable municipality(s) and OLG, may request the minister to evaluate evidence to the effect that a rate is materially and unreasonably prejudicing any of the matters listed above.<sup>439</sup> If the minister is convinced of any material and unreasonable effect, he/she must act as set out in subsection 16(2) of the Act. Any notice issued under subsection 16(2) of the Act must be accompanied by reasons why a rate is contra subsection 16(1) and thus also contra section 229 of the Constitution. In order to help municipalities, the minister of Local Government, after consultation with the minister of finance, may by notice issue guidelines to assist municipalities in the exercise of their power to levy rates.<sup>440</sup>

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<sup>436</sup> Refer to the MPRA s 15(3)(a)-(b).

<sup>437</sup> The MPRA s 15(4)(a)-(b).

<sup>438</sup> See the MPRA s 16(1)-(2).

<sup>439</sup> Read the Constitution ss 16(1) and (3)(a) with s 229.

<sup>440</sup> See the MPRA s 16(4)-(5).

The new legal framework also determines other impermissible rates that a municipality may not levy. Such impermissible rates include the following:<sup>441</sup>

- (a) a rate on the first 30% of the market value of public service infrastructure;<sup>442</sup>
- (b) a rate on any part of the seashore;<sup>443</sup>
- (c) a rate on any part of the territorial waters of the RSA;<sup>444</sup>
- (d) a rate on any island of which the state is owner;<sup>445</sup>
- (e) a rate on those parts of a special nature reserve, national park or nature reserve or of a national botanical garden, which are not developed or used for commercial, business, agricultural or residential purposes;
- (f) a rate on mineral rights;<sup>446</sup>
- (g) a rate on a property belonging to a land reform beneficiary or his/her heirs, provided that such an exclusion lapses after ten years from the date on which such title was registered in the office of the registrar of deeds;<sup>447</sup>
- (h) a rate on the first R15 000 of the market value of a property assigned in the municipal valuation roll to a category determined by the municipality for (i) residential properties; or (ii) for properties used for multiple purposes of which one purpose is for residential purposes;<sup>448</sup>
- (i) a rate on a property registered in the name of and used primarily as a place of public worship by a religious community, including an official residence regis-

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<sup>441</sup> See the MPRA s 17(1)(a)-(i).

<sup>442</sup> Note the minister for Local Government may lower the percentage, but only after consultation. See the MPRA s 17(4)(a)-(c).

<sup>443</sup> Refer to the definition of the "seashore" as defined in the Seashore Act 21 of 1935.

<sup>444</sup> See the definition of "territorial waters" determined in terms of the Maritime Zones Act 15 of 1994.

<sup>445</sup> This includes the Prince Edward Islands referred to in the Prince Edward Islands Act 43 of 1948.

<sup>446</sup> See the definition of "property" in the MPRA s 1.

<sup>447</sup> "Land reform beneficiary", in relation to a property, means a person who (a) acquired the property through (i) the Provision of Land and Assistance Act 126 of 1993 or (ii) the Restitution of Land Rights Act 22 of 1994, (b) holds the property subject to the Communal Property Associations Act 28 of 1996 or (c) holds or acquires the property in terms of such other land tenure reform legislation as may pursuant to the Constitution s 25(6) and (7) be enacted after this Act has taken effect. See the MPRA s 1.

<sup>448</sup> The aim of the legislator is clearly to benefit poor households by not levying rates on property below R15 000 market value. In order to be equitable, every owner will receive such an exemption. Similar provisions have been made in respect of a minimum free water and electricity supply. One must note that such an exemption is applicable only to property being used for residential purposes. Business and commercial properties do not receive the same exemption and are thus treated indifferently. There seems to be a legitimate reason for exempting residential property in this manner and, more specifically, in light of the constitutional objects and demands on local government, a constitutional attack on equality grounds will not easily suffice. The minister of Local Government may increase the monetary threshold. See the MPRA s 17(3).

tered in the name of that community which is occupied by an office bearer of that community.<sup>449</sup>

The exclusion from rates lapses if the status of a property changes, from national land to something else, for example. If an exemption is withdrawn, rates by a private owner that would have been payable were it not for the exemption become payable.<sup>450</sup> The amount payable when an exemption is withdrawn must be regarded as rates in arrears, and interest is applicable on such an amount. Such a position seems somewhat unreasonable. Why should an owner be liable for rates which have been legally exempted and for the interest on such rates? The MPRA clarifies the situation somewhat by stating that such rates and interest are applicable only if the declaration of the property was withdrawn because of a decision of the private owner to withdraw from the agreement regarding the property or because of a decision by the state to withdraw from the agreement because of a breach of the agreement by the private owner.<sup>451</sup> It is of interest to note that a municipality is permitted to apply, in writing, to the minister of Local Government, to be exempted from paragraph 17(a), (e), (g) or (h) of the MPRA if it can demonstrate that an exclusion to levy such rates is compromising or impeding its ability or right to exercise its powers or to perform its functions within the meaning of the Constitution.<sup>452</sup> What this position really means is that, in certain instances, municipalities may be permitted to levy rates on property which are usually regarded as impermissible/exempted rates. Any exemption granted by the minister must be in writing and is subject to such limitations or conditions as he/she may determine.<sup>453</sup>

In order to protect owners of properties, the MPRA determines that a municipality may not levy:

- different rates on residential property, except as provided for in sections 11, 21 and 89 of the Act

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<sup>449</sup> Although such exemption was also allowed under the previous legal dispensation, religious communities should note the requirements of the MPRA s 16(1)(i) regarding the exemption of official residences of religious communities. Exclusion from these rates also lapses if the property is disposed of by the religious community or if the residence is not used as required. See the MPRA s 17(5).

<sup>450</sup> See the MPRA s 17(2).

<sup>451</sup> The MPRA s 17(d)(i)-(ii).

<sup>452</sup> Read the MPRA s 18(1) with the Constitution s 151(4).

<sup>453</sup> The MPRA s 18(2)(a)-(b).



- a rate on non-residential properties that exceeds a prescribed ratio to the rate on residential properties<sup>454</sup>
- rates which unreasonably discriminate between categories of non-residential properties or
- any additional rates except as provided for in section 22 of the Act.<sup>455</sup>

It is further the responsibility of the minister of Local Government, with the concurrence of the minister of finance, to set an upper limit on the percentage by which rates on properties or a rate on a specific category of properties may be increased. However, different limits may be set for:

- different kinds of municipality or
- different categories of property, subject to section 19.<sup>456</sup>

The MPRA also determines a compulsory phasing-in of certain rates. According to the Act, a rate levied on newly rateable property must be phased in over a period of three financial years, subject to subsection 21(5) of the Act.<sup>457</sup> Furthermore, a rate levied on property belonging to a land reform beneficiary must be phased in over a period of three financial years after the exclusion period set out in section 17(1)(g) has lapsed, subject to section 21(5). A rate levied on newly rateable property owned and used by organisations conducting specified public benefit activities and who are registered in terms of the Income Tax Act for those activities must be phased in over a period of four financial years.<sup>458</sup> In the first year, the phasing-in discount on newly rateable properties or on properties belonging to a land reform beneficiary must be at least 75% of the rate otherwise applicable to the property for that year, in the second year at least 50%, and in the third year at least 25%.<sup>459</sup> During the first year no rate may be levied on newly rateable property owned and used by organisations conducting specified public benefit activities. After the first year, the phasing-in discount on

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<sup>454</sup> See the MPRA s 19(a)(b) read with s 11(1)(a). The ratio may only be prescribed with the concurrence of the minister of finance. S 19(2).

<sup>455</sup> See the MPRA s 19(1)(a)-(d).

<sup>456</sup> The minister may on application by a municipality and on good cause exempt a municipality from a set limit. See the MPRA s 20(1)-(4) read together with the MFMA s 43.

<sup>457</sup> Note that according to the definitions in the MPRA s 1, "newly rateable property" means any rateable property on which property rates were not levied before the end of the financial year preceding the date on which the Act took effect. Properties which were (a) incorrectly omitted from the valuation roll or (b) identified by the minister where the phasing-in of a rate is not justified, are excluded from the definition.

<sup>458</sup> Refer to the MPRA s 21(a)-(c).

<sup>459</sup> The MPRA s 21(2)(a)-(e).

such property must be at least 75% in the second year, at least 50% in the third year and at least 25% in the fourth year.<sup>460</sup> A rate levied may also not be higher than a rate levied on similar property or category of property. On written request by a municipality, the MEC for Local Government may extend the phasing-in periods mentioned above. No phasing-in period may exceed six financial years, however.<sup>461</sup> If the MEC has extended a phasing-in period, he/she must determine the minimum phasing-in discount during each financial year of the extended period.

The new rating legislation also provides for additional rates and special rating areas. According to section 22 of the MPRA and by resolution of its council, a municipality may:

- determine an area as a special rating area
- levy an additional rate on property in that area for the purpose of raising funds for improving or upgrading that area
- differentiate between categories of properties when levying an additional rate.<sup>462</sup>

Since additional rates would place a more significant financial burden on certain property owners, it is required that before a municipality determines a special rating area, it must first consult the local community on the proposed boundaries of the area and also on the proposed improvement or upgrading required. Apart from this mandatory consultation obligation, the municipality must also obtain the consent of the majority of members of the local community in the proposed special rating area, who will be liable for paying the additional rate.<sup>463</sup> When a municipality determines a special rating area, it must:

- determine the boundaries of the area

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<sup>460</sup> See the MPRA s 21(3)(a)-(c). It must be noted that according to the definitions of the Act that specified public benefit activity means an activity listed in the Income Tax Act Ninth Sch Part 1 Item 1 (welfare and humanitarian), Item 2 (health care) and Item 4 (education and development).

<sup>461</sup> See the MPRA s 21(4)-(6).

<sup>462</sup> Refer to the MPRA s 22(1)(a)-(c). Since the resolution of the council concerns the levy of rates, it is submitted that such a resolution requires also an absolute majority of members to vote in favour thereof. The differentiation mentioned in s 22(1)(c) could, eg, result in business properties' bearing the brunt of an additional levy, while residential properties in the particular area are excused from such additional levies. It seems clear that additional levies may be levied only if funds are needed to improve or upgrade a particular area. Cross-subsidising through additional levies are not allowed. An objective assessment of all relevant factors must be conducted in this regard.

<sup>463</sup> "A majority" in this respect seems to refer to 50% + 1 of the total number of members of the relevant local community. It should be noted that not all members of the community need to be consulted, but only those members who will be liable for paying the additional rate. The intention of the legislator thus seems only to obtain a majority decision from persons/institutions responsible for pay property rates. See the MPRA s 2(a)-(b).

- determine how the area is to be improved or upgraded from the additional funds
- establish separate accounting and other record-keeping systems regarding the revenue generated by the additional rate and the improvement or upgrading of the particular area(s).

A municipality may further establish a committee comprising persons representing the community in the area as a consultative/advisory forum for the municipality on the improvement/upgrading. Representivity must be taken into account when the committee is established. The committee must then further be a subcommittee of the ward committee(s) in the area, if ward committees are applicable.<sup>464</sup> A special rating area must not be used to reinforce existing inequities in the development of the municipality and must also be consistent with the objectives of the municipality's integrated development plan.<sup>465</sup>

#### **18.5.6.5 The municipal register of properties**

All municipalities levying rates on property are obligated to establish and maintain a property register in respect of all properties situated within the municipal area. Such a register must consist of two parts: a part A and a part B. Part A should consist of the current valuation roll of the municipality and, if applicable, supplementary valuation rolls. Part B must specify which properties are subject to exemption, rebate, reduction in phasing-in rate or an exclusion.<sup>466</sup> The register must be open for inspection by the public during office hours and displayed on the municipal website if applicable. Finally, a municipality must regularly, but at least once a year, update part B of the register.<sup>467</sup>

#### **18.5.6.6 Liability for property rates**

A rate levied on property must be paid by the owner of the property.<sup>468</sup> Joint owners are normally jointly and severally liable for the amounts due for rates on that property. In respect of agricultural property owned by more than one owner in individual

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<sup>464</sup> The MPRA s 22(3)(a)-(d).

<sup>465</sup> See the MPRA s 22(4). Read also the Systems Act s 85 if additional rates are applied to providing funding for an internal municipal service district.

<sup>466</sup> Read the MPRA s 23(1)-(3) with ss 15, 21 and 17.

<sup>467</sup> The MPRA s 23(4)-(5). Part A must be updated in accordance with the provisions of the MPRA relating to the updating and supplementary of valuation rolls. Refer to the MPRA ch 8 for more details. Note that the term "register" generally means (a) to record in a register in terms of (i) the Deeds Registries Act 47 of 1937 or (ii) the Mining Titles Registration Act 16 of 1967 and (b) includes any other formal Act in terms of any other legislation to record (i) a right to use land for or in connection with mining purposes or (ii) a land tenure right. See the MPRA s 1.

<sup>468</sup> See the MPRA s 24(1) read with the Systems Act ch 9.

shares as legally allowed before the commencement of the Subdivision of Agricultural Land Act,<sup>469</sup> a municipality is allowed to hold any one of the joint owners liable for all rates or hold any joint owner liable for only that portion of the rates that represents his/her undivided share in the property.<sup>470</sup> One must note that the term “owner” has an expansive meaning. According to section 1 of the MPRA, the term *owner* means:

- a person in whose name ownership of property is registered
- a person in whose name a right to property is registered
- a person in whose name a land tenure right is registered or to whom the right was granted
- the organ of state which owns or controls a public service infrastructure. Apart from the abovementioned categories, the following persons/functionaries may for the purposes of the MPRA be regarded by a municipality as the owner of property in the following circumstances:
  - (a) a trustee of property in a trust<sup>471</sup>
  - (b) an executor or administrator of property in a deceased estate
  - (c) a trustee or liquidator of property in an insolvent estate/liquidation
  - (d) a judicial manager of property of a person under judicial management
  - (e) a curator of property of a person under curatorship
  - (f) a person in whose name a usufruct or other personal servitude is registered regarding property subject to such usufruct or personal servitude
  - (g) a lessee of a property that is registered in the name of a municipality and is leased by it<sup>472</sup>
  - (h) a buyer of a property sold by a municipality and of which possession was given to the buyer pending registration of ownership in the name of the buyer.<sup>473</sup>

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<sup>469</sup> 70 of 1970.

<sup>470</sup> See the MPRA s 25(a)-(b).

<sup>471</sup> State trust land is however excluded in this regard.

<sup>472</sup> In this regard, lessees and a lawyer advising such lessees should take into account that the lessee could be held liable for property rates even though the property belongs to a municipality. A clear compromise or deduction from rent should be negotiated and contractually confirmed.

<sup>473</sup> Again this provision requires careful consideration by prospective buyers, property lawyers and estate agents. Buyers must be advised of this liability. In cases where properties which do not belong to a municipality are sold, it would appear that the seller/current registered owner will stay liable for property rates up until the registration of transfer of the property to the new

*continued on next page*

Rates levied on a sectional title unit are payable by the owner of the unit. Municipalities may not recover the rates on sectional title units or any parts thereof from the body corporate, except when the body corporate is the owner of any specific sectional-title unit. Body corporates are equally not permitted to apportion and collect rates from owners of units.<sup>474</sup>

In respect of the method and time of payment, it is determined that a municipality may recover a rate on a monthly basis or annually, as may be agreed to with the property owner. Rates are payable on or before a date(s) determined by the municipality. Only in special circumstances may the payment of a rate be deferred.<sup>475</sup> A municipality is obligated to furnish each person/owner liable for the payment of a rate with a written account, which account must specify the following:

- the amount due for rates
- the date for payment
- how the amount was calculated
- the market value of the property
- the phasing-in discount, if applicable
- any additional rates, if applicable.<sup>476</sup>

Delivery of an account is no prerequisite for collecting the applicable rate, however. A person/owner is liable for payment whether or not he/she has received an account. If no account is received, the onus is on the person/owner to make the necessary inquiries from the municipality.<sup>477</sup> If an amount due for rates is unpaid after the determined date, then the municipality may recover the amount in whole or in part from a tenant or occupier of the property, despite any contractual obligation to the contrary on the tenant or occupier.<sup>478</sup> The amount may be recovered only after the municipality has served a written notice on the tenant or occupier. The amount recoverable from a tenant/occupier is limited to the amount of rent or other money

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owner/purchaser. Parties will be well advised to specify and address such issues in clear terms in their agreements of sale.

<sup>474</sup> See the MPRA s 25(1)-(4) read with s 92.

<sup>475</sup> See the MPRA s 26(1)-(3). Recovery of rates may also take place less often than a month as prescribed in terms of the MFMA.

<sup>476</sup> Refer to the MPRA s 27(1)(a)-(f).

<sup>477</sup> Read the MPRA s 27(2)-(3). Note also that the furnishing of accounts is subject to the Systems Act s 102.

<sup>478</sup> "An occupier", in relation to a property, means a person in actual occupation of a property, whether or not that person has a right to occupy the property.

due and payable, but which has not yet been paid to the owner of the property, however. The tenant must set off any such amount paid to the municipality against any money owed by the tenant/occupier to the owner.<sup>479</sup> A further method of recovery of rates is provided through section 29 of the MPRA. According to this section and despite the Estate Agents Affairs Act,<sup>480</sup> a municipality may recover the amount due for rates on a property in whole or in part from the agent of the owner, if such a way is more convenient for the municipality. Again the agent must be served with a written notice to recover the due rates, and the amount recoverable is limited to the amount of any rent or other money received by the agent on behalf of the owner, less any commission due to the agent.<sup>481</sup> On request, the agent must furnish the municipality with a written statement specifying all payments received by the agent on behalf of the owner.<sup>482</sup>

#### **18.5.6.7 General aspects concerning the valuation of rateable property**

In accordance with the MPRA, a municipality that intends to levy a rate on property must cause a general valuation to be made of all properties in its area and prepare a valuation roll of such properties.<sup>483</sup> All the rateable properties in a municipal area must be valued during a general valuation exercise, including all properties fully or partially excluded from rates. Properties referred to in section 7(2) of the Act must be valued only to the extent that rates are to be levied on them. The minister of Local Government may further fully or partially exempt a municipality from the obligation to value properties excluded from rates in section 17(1)(e), (g) and (i) of the Act, if the municipality can demonstrate that the valuation of such properties is too onerous for

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<sup>479</sup> It is clear that the legislator's intention is to allow municipalities a quick mechanism to recover non-levy payments by property owners. Although such mechanism is laudable, it is somewhat uncertain if such statutory form of recovery and obligation for set off by the tenant/occupier will withstand constitutional or other legal challenges. It is very likely that tenants/occupiers in such circumstances will suffer victimisation and other pressures from property owners. To what extent a tenant and property owner can be forced to make public the content and value of a private lease agreement or to what extent the contractual freedom between the parties can be overruled from the outside is unknown and somewhat problematic. There seems also to be an unnecessary burden on tenants/occupiers in cases where property owners default on the rates payments. In this regard, eg, a tenant/occupier must on request by a municipality furnish it with a written statement specifying all payments to be made by the tenant/occupier to the owner of the property for rent or other money payable on the property. See the MPRA s 28(4).

<sup>480</sup> 112 of 1975.

<sup>481</sup> "An agent", in relation to the owner of a property, means a person appointed by the owner of the property (a) to receive rental or other payments in respect of the property on behalf of the owner or (b) to make payments in respect of the property on behalf of the owner. See the MPRA s 1.

<sup>482</sup> See the MPRA s 29(1)-(4).

<sup>483</sup> Read the MPRA s 30(1)(a)-(b) with ss 30(2) and (3).

it, given its financial and administrative capacity. All valued properties must be included in the valuation roll.<sup>484</sup> For purposes of the general valuation, a municipality must determine a date that may not be more than 12 months before the start of the financial year in which the valuation roll is first to be implemented. The general valuation must reflect the market value of the properties in accordance with market conditions at the date of the valuation and other statutory requirements.<sup>485</sup>

A valuation roll mentioned above will take effect from the start of the financial year following the completion of the public inspection period set out in section 49 of the MPRA. The valuation roll further remains valid for that financial year or for one or more subsequent financial years as the municipality may decide. In normal circumstances, no valuation roll may remain valid for longer than four financial years.<sup>486</sup> The MEC for local government may extend the period for which a valuation roll remains valid to five years maximum, however. Such extension is permitted only if the provincial executive has intervened in the municipality or on request by the municipality, in exceptional circumstances which warrant such extension.<sup>487</sup> It must also be noted that a valuation roll remains valid for one year after the date on which the roll has lapsed if the provincial executive intervenes in terms of section 139 of the Constitution, which intervention could have been either before or after such a date. However, this position is subject to the fact that the intervention was caused by a municipality's failure to determine a date of valuation for its general valuation or its failure to designate a person as its municipal valuer.<sup>488</sup> It is therefore clear that unless exceptional circumstances exist, a municipality will have to conduct a general valuation of all property in its area every four years or on such intervals as it may have decided.

In order to compile a valuation roll, a municipality must designate a person as its municipal valuer before the date of valuation. This person may either be one of the financial officials of the municipality or a person in private practice. If a private practitioner is appointed, the municipality must follow an open, competitive and transparent process and must designate the successful bidder as its municipal valuer by way

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<sup>484</sup> See the MPRA s 30(2)-(3).

<sup>485</sup> Read the MPRA s 31(1)-(2).

<sup>486</sup> See the MPRA s 32(1)(a)-(b). This position reflect to some degree the similar position as was applicable under the previous legal dispensation.

<sup>487</sup> Read the MPRA s 32(2)(a)-(b) together with the Constitution s 139.

<sup>488</sup> Refer to the MPRA s 32(3)(a)-(b) read with ss 31 and 33.



of a written contract.<sup>489</sup> The designation/appointment of a municipal valuer may be withdrawn/cancelled only on the grounds of misconduct, incapacity, incompetence, non-compliance with the MPRA, under-performance or breach of contract, if applicable.<sup>490</sup>

A municipal valuer has a vast number of functions to perform. Such a person is obligated, *inter alia*, to

- value all properties
- prepare a valuation roll
- sign and certify the valuation roll
- submit the valuation roll to the municipal manager
- consider and decide objections to the roll
- attend every meeting of an appeal board hearing appeals or reviews of his/her decisions
- prepare supplementary rolls
- assist the municipality in collection/obtaining postal addresses of property owners
- generally provide appropriate administrative support incidental to the valuation roll.<sup>491</sup>

In order to assist a municipal valuer, a municipal manager may designate officials/persons in private practice as assistant municipal valuers. Similar requirements applicable to the municipal valuer are prescribed in relation to assistant municipal valuer.<sup>492</sup> A municipal manager may also designate officials or even non-officials of the municipality as data-collectors in order to assist the municipal valuer with the collection of data and other related work. Data-collectors appointed from outside the municipal staff component are remunerated from municipal funds, but only in terms of the contracts concluded with them.<sup>493</sup>

In an effort to help a municipal valuer to fulfil his/her functions and obligations, the MPRA determines that the valuer may delegate any powers or duties reasonably

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<sup>489</sup> See the MPRA s 33(1)-(2), read with the MFMA ch 11. The written contract should set out the terms and conditions of the designation and the person must be issued with an identity card with personal photograph for identification purposes. Read the MPRA s 33(3).

<sup>490</sup> The MPRA s 33(4)(a)-(d).

<sup>491</sup> See the MPRA s 34(a)-(i).

<sup>492</sup> Refer to the MPRA s 35(1)-(5).

<sup>493</sup> All data-collectors are also issued with ID cards and may be removed from such a designation. Normal contractual laws should be applicable in such instances. See the MPRA s 36(1)-(5). A data-collector is a person designated as such. Refer to s 1 definitions.

necessary to an assistant municipal valuer to assist the valuer. Powers and duties in the collection and processing of data may also be delegated to a data-collector. The valuer must regularly review such delegations and, if necessary, amend or withdraw such delegations. Delegations must be in writing, subject to the limitations and conditions determined in the delegation and not divest the valuer of the responsibility of the delegated powers. The valuer may also confirm, vary or revoke any decision taken in terms of the delegation, but any such action may not detract from any rights that may have accrued as a result of the decision.<sup>494</sup> In order to save costs and obtain expertise, a municipality may enter into an agreement with another municipality(s) to designate a single municipal valuer and to share the costs of preparing the different municipal valuation rolls. This sharing possibility is not permitted if the municipality concerned agrees to appoint an official of one of the partaking municipalities as the municipal valuer.<sup>495</sup>

Specific qualifications of municipal valuers are prescribed. The new legislative system determines that a municipal valuer:

- must be registered as a professional valuer or associated valuer in terms of the Property Valuers Profession Act<sup>496</sup> and
- may not be a councillor of the designating municipality or other involved municipalities.<sup>497</sup>

An assistant valuer must also have the same qualifications of a municipal valuer, except that a candidate valuer registered under the Property Valuers Profession Act may also be designated.<sup>498</sup> Before assuming office, a valuer or assistant valuer must make a prescribed declaration before a Commissioner of Oaths regarding the performance of the office and must lodge a copy of such a declaration with the municipal manager.<sup>499</sup>

It is common cause that all rateable property must be valued in order to determine the applicable rate payable. In order to value property and to establish the municipal valuation roll, access to all rateable property is required. To facilitate such access,

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<sup>494</sup> The MPRA s 37(1)-(3).

<sup>495</sup> Refer to the MPRA s 38(1)-(2). Sharing of a municipal valuer is thus permitted only if the designated person is a private practitioner.

<sup>496</sup> 47 of 2000.

<sup>497</sup> See the MPRA s 39(1)(a)-(b).

<sup>498</sup> The MPRA s 39(2)(a)-(b). No councillor may be an assistant municipal valuer.

<sup>499</sup> The MPRA s 40(a)-(b).

the MPRA states that subject to any legislation that restricts or prohibits entry to any specific property, the municipal valuer, assistant valuer, data-collector or other authorised person may enter any property that must be valued and inspect that property for purposes of the valuation, between 07:30 and 19:00 on any day, except a Sunday or public holiday. When entering a property, the person must, on demand by a person on that property, produce his/her identification card. The valuer or other official may also be accompanied by an interpreter or other functionaries.<sup>500</sup> A municipal valuer/other functionary may further require the owner/tenant/occupier of a property to give the valuer access to any document or information in his/her possession, which document or information is reasonably required for purposes of valuing the property. The valuer may make extracts from such documents or information and may also in writing require the owner/tenant/occupier or agent of owner, to provide the valuer either in writing or orally with particulars regarding the property which the valuer reasonably requires for the valuation.<sup>501</sup> Owners/occupiers/tenants should be careful about refusing to supply the information/documentation, since the MPRA determines that where a document/information was not provided, but the owner later relies on such a document/information in an appeal against the valuation, the appeal board hearing such an appeal may make an order as to costs if the board is of the view that the failure has placed an unnecessary burden on the functions of the valuer or appeal board.<sup>502</sup>

Valuers and assistant valuers are obligated to conduct the functions within a certain code of conduct. Every municipal valuer/assistant valuer must disclose any personal or private business interest to the municipality regarding any property in the municipality. The position/office as valuer may also not be used for private gain or improperly benefit another person. Furthermore each valuer/assistant valuer must comply with the code of conduct for municipal officials, as set out in Schedule 2 of the Systems Act.<sup>503</sup> A valuer/assistant valuer who contravenes/fails to comply with

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<sup>500</sup> See the MPRA s 41(1)-(3). In certain circumstances a valuer or other inspecting person may also be accompanied by security personnel, should such assistance be required by the circumstances. It is also submitted that any access to property must at least comply with any constitutional requirements. Examples of such rights are the right to privacy and property, to name but two.

<sup>501</sup> Read the MPRA s 42(1)(a)-(c).

<sup>502</sup> The MPRA s 42(2).

<sup>503</sup> Read the MPRA s 43(1)(a)-(c) together with the Municipal Systems Act Sch 2. According to s 43(2), a municipal valuer/assistant valuer who is not an official of a municipality must comply with the code of conduct as if that person is such an official.

the requirements is guilty of misconduct and subject to dismissal. A decision to dismiss a valuer/assistant who is an employee of the municipality must be based on a finding of an enquiry conducted in terms of the terms and conditions of employment of the person.<sup>504</sup> If a municipal valuer/assistant has an interest in property or his/her spouse, parent, child, partner or business associate, the municipal manager must designate a special valuer to perform such valuation.<sup>505</sup> Owners of the property should note that a municipal valuer or other functionary may not disclose to any person any information obtained except

- if allowed to in terms of the MPRA
- for the purpose of legal proceedings or
- in terms of court orders.<sup>506</sup>

#### **18.5.6.8 Aspects concerning property valuation criteria**

The new uniform Property Rates Act determines that all property must be valued in accordance with generally recognised valuation practices, methods and standards. Physical inspection, all often very useful, is optional. Comparative, analytical or even other systems or techniques may be used, including aerial photography and computer-assisted mass appraised systems/techniques. In cases where the available market-related data of any category of rateable property is not sufficient, such property may be valued in terms of mass-valuation systems. Such mass-evaluation systems/techniques should be approved by the municipality concerned after having considered any recommendations of its municipal valuer and as may be appropriate in the circumstances. Mass-valuation systems/techniques may include a system based on predetermined bands of property values and the designation of properties to one of those bands on the basis of minimal market-related data.<sup>507</sup> Subject to the provisions of the MPRA, the market value of a property is the amount that the property would have realised had it been sold on the date of valuation in the open market by a willing seller to a willing buyer. In order to determine the market value of a prop-

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<sup>504</sup> The section thus requires an inquiry in accordance with applicable labour relations practices and requirements. The municipality's normal disciplinary procedures would thus come into play. See the MPRA s 43(3)-(4).

<sup>505</sup> See the MPRA s 43(5). A special valuer must be qualified similarly to the normal municipal valuer. Refer to s 39 qualifications.

<sup>506</sup> See the MPRA s 44(1)(a)-(d). The protection of information clause is also applicable to any person accompanying a municipal valuer or other functionary, when performing his/her functions under the MPRA s 41(1).

<sup>507</sup> See the MPRA s 45(1)-(3).

erty, the following aspects must be considered for purposes of valuating a property:<sup>508</sup>

- (a) the value of any license, permission or other privilege legally granted to the property;
- (b) the value of any immovable improvement on the property that was erected or is being used for a purpose which is inconsistent with or in contravention of the permitted use of the property;
- (c) the value of the use of the property for a purpose which is inconsistent with the permitted use.<sup>509</sup>

The following issues must be disregarded for purposes of valuation:<sup>510</sup>

- the value of any building or other immovable structure under the surface of the property which is the subject of any mining authorisation or mining right as defined in the Minerals Act<sup>511</sup>
- the value of any equipment or machinery which is regarded as immovable property, excluding a lift, an escalator, an air-conditioning plant, fire extinguishing apparatus, a water pump installation for a swimming pool/irrigation or domestic purposes and any other equipment/machinery that may be prescribed<sup>512</sup>
- any unregistered lease in respect of the property.

When determining the market value of a property used for agricultural purposes, the value of any annual crops or growing timber that have not yet been harvested at the date of the valuation must be disregarded.<sup>513</sup> Where available, the market value of public service infrastructure may be valued in accordance with any other prescribed method of valuation.<sup>514</sup> In respect of sectional-title schemes, the valuer must determine the market value of each sectional title unit in accordance with the provisions of section 46 of the MPRA.<sup>515</sup>

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<sup>508</sup> See the MPRA s 46(a) and (c).

<sup>509</sup> Any unlawful use/improvement is regarded for valuation purposes as if the use/improvement was lawful.

<sup>510</sup> See the MPRA s 46(3)(a).

<sup>511</sup> 50 of 1991.

<sup>512</sup> Prescribed in this sense refer to prescribe by regulation in terms of the MPRA s 83.

<sup>513</sup> Refer to the MPRA s 46(4).

<sup>514</sup> The MPRA s 46(5).

<sup>515</sup> See the MPRA s 47.

### 18.5.6.9 Aspects regarding municipal valuation rolls

All valuation rolls must list all rateable properties in their respective municipal areas. Specific particulars that must be reflected on the roll, if such information is reasonably determinable, are:

- the registered or other description of the property
- the category in which the property falls
- the physical address
- the extent of the property
- the market value, if valued
- the name of the owner and
- any other prescribed particulars.<sup>516</sup>

The municipal valuer must submit the certified valuation roll to the municipal manager, who must within 21 days of receipt of the roll publish in the *Provincial Gazette*, once a week for two consecutive weeks, a notice stating:

- that the roll is open for public inspection for a specified period and
- which invites every person who wishes to lodge an objection against the roll in the prescribed manner and period.<sup>517</sup>

The municipal manager must further disseminate the substance of the notice to the local community and serve by ordinary mail, if appropriate, on every owner a copy of the notice, together with an extract of the valuation roll pertaining to the relevant property.<sup>518</sup> Both the notice and the valuation roll must also be published on the municipality's website, if applicable. Any person may, after publication of the notice, inspect the roll during office hours, and on payment of a reasonable fee, request extracts from the roll and may also lodge an objection with the municipal manager against any matter reflected/omitted from the roll. An objection must be in relation to a specific individual property and not against the valuation roll as such.<sup>519</sup> Objectors

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<sup>516</sup> Read the MPRA s 48(1)-(2)(a)-(g). The minister may prescribe further particulars.

<sup>517</sup> See the MPRA s 49(1)(a)(i)-(ii). The inspection period may not be less than 30 days from the date of the publication of the last/second notice in the *Provincial Gazette*.

<sup>518</sup> Refer to the MPRA s 49(1)(b)-(c). These requirements must be read with the requirements set out in the Municipal Systems Act ch 4 and s 115.

<sup>519</sup> It seems that since the Act allows *any person* (own emphasis added) to lodge an objection, it is therefore not necessarily the owner of a particular property that has such a right. It would thus seem possible that a person could lodge an objection to the valuation of other property owners. See the MPRA s 50(1).

who are unable to read or write must be assisted by the municipal manager.<sup>520</sup> It is not only private persons that may lodge an objection; a municipal council itself may lodge an objection with the municipal manager against the valuation roll that affects the interests of the municipality. The municipal manager must within 14 days of the end of the objection period submit all objections to the municipal valuer, who is again obligated to decide and dispose of the objections promptly. It is important to note that the lodging of an objection does not defer liability of payment of rates beyond the payment date.<sup>521</sup> When considering and processing objections, the municipal valuer must promptly consider the objections, decide them on facts and adjust or add to the valuation roll, depending the decision taken.<sup>522</sup>

The new legislative framework also provides for the compulsory review of decisions of the municipal valuer. In this regard it is provided that if a municipal valuer adjusts the valuation of a property by more than 10% upwards or downwards, then the valuer must give written reasons for such a decision to the municipal manager, who must, in turn, promptly submit the relevant valuation decision, together with reasons and documentation, to the relevant valuation appeal board, for review.<sup>523</sup> The relevant appeal board is then obligated to review the decision and either to confirm, amend or revoke the decision.<sup>524</sup>

It is further required that a municipal valuer must in writing notify every objector and also the owner of a property if not the same, of the valuer's decision, any adjustments made to the roll and whether a section 52 automatic appeal is applicable.<sup>525</sup> An objector or owner may in writing, and within 30 days after such notification, apply to the municipal manager for reasons for the decision. A prescribed fee must accompany the application. Within 30 days after receipt of such application through the

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<sup>520</sup> It seems obvious that the Act does not require the municipal manager to act in his/her personal capacity, but rather that personnel from his/her office provide such assistance. The municipal manager stays finally responsible for such assistance, however. The MPRA s 50(3).

<sup>521</sup> See the MPRA s 50(4)-(6). Payment of rates by property owners whilst an objection is still undecided, is somewhat controversial. It seems that the Act requires payment first and possible settlement/adjustments later. Such a situation could put legitimate objectors in a negative position vis-à-vis their relevant municipalities. The constitutionality of such a position is somewhat doubtful.

<sup>522</sup> Note that the minister may prescribe the objection procedure and also that the objections should be evaluated with due regard to the submissions of an objector, which can be the owner of the property concerned or any other person. See the MPRA s 51(a)-(c).

<sup>523</sup> Read the MPRA s 52(1)(a)-(b).

<sup>524</sup> If an appeal board amends or revokes a decision, the chairperson of such a board and the valuer must ensure that the valuation roll is adjusted according to the decision of the board. the MPRA S 52(3).

<sup>525</sup> See the MPRA s 53(1)(a)-(c).



municipal manager, the relevant valuer must then provide the applicant the reasons for the decision in writing.<sup>526</sup> After receipt of the written reasons for a decision, an appeal to an appeal board against the decision may be lodged in the prescribed manner with the office of the municipal manager. Such an appeal may be lodged by either an objector, an owner of a property who is affected by the decision and the municipal council concerned, if the municipality's interests are affected. An appeal by an objector must be lodged within 30 days after the date on which the written notice was sent to the objector or after 21 days after the day on which the reasons for a decision were sent to an objector who has requested such reasons. An owner of a property must lodge an appeal within 30 days after the date on which the written notice was sent, or within 21 days after the date on which the decision was taken.<sup>527</sup> A municipal manager must then forward any appeal to the chairperson of the appeal board within 14 days after the end of any applicable appeal period. The chairperson of the appeal board must then, for purposes of considering any appeal, convene a meeting of the board within 60 days after an appeal has been forwarded. A copy of the appeal must also be submitted to the municipal valuer concerned. Again the MPRA determines that an appeal lodged does not defer liability for payment.<sup>528</sup> Finally, it is determined in the Act that any adjustments or additions made to a valuation roll will take effect on the effective date of the valuation roll.<sup>529</sup> If an adjustment in the valuation of a property affects the amount due for rates, then the municipal manager must calculate the amount actually paid and the amount payable in terms of the adjustment calculated since the effective date. The municipal manager must then recover or repay the rates to the liable person: the difference together with interest at a prescribed rate.<sup>530</sup>

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<sup>526</sup> The MPRA s 53(2)-(3).

<sup>527</sup> See the MPRA s 54(1)-(2).

<sup>528</sup> Refer to the MPRA s 54(3)-(4).

<sup>529</sup> According to the definitions set out in the MPRA s 1, the term "effective date" means the date on which a valuation roll has taken effect in terms of the Act s 32(1) or the date on which a supplementary valuation roll has taken effect in terms of the Act s 78(2)(b).

<sup>530</sup> See the MPRA s 55(1)-(3). Where additions to a valuation roll were made, the municipal manager must also recover from the liable person, payment of the rate because of the addition, plus interest as prescribed.

#### 18.5.6.10 Requirements and determinations pertaining to valuation appeal boards

The MEC for local government in a province is authorised to establish as many appeal boards in the province as may be necessary. There must be no fewer than one such an appeal board in each district municipality and each metropolitan municipality, however.<sup>531</sup> If more than one appeal board is established in a district municipality, each board must be established for one or more local municipalities or even district management areas.<sup>532</sup> The main function of an appeal board is twofold:

- It should hear and decide appeals under the Act.
- It should review decisions of a municipal valuer submitted under section 52 of the Act.<sup>533</sup>

With reference to the composition of an appeal board, the PRA determines that each appeal board should consist of a chairperson, who must be a person with legal qualifications and sufficient experience in the administration of justice, and not fewer than two and not more than four other members with sufficient knowledge of or experience in the valuation of property. Of such persons, at least one must be a professional valuer registered in terms of the Property Valuers Profession Act. All members of an appeal board must be appointed by the MEC, taking into account the need for including representivity as well as gender representivity. When making appointments, the MEC must follow a transparent process.<sup>534</sup> The following persons are legally disqualified from being a member of an appeal board, however:

- an unrehabilitated insolvent
- a person under curatorship
- a person declared to be of unsound mind by a court of the Republic of South Africa
- a person who, after 24 April 1994, was convicted of an offence and sentenced to imprisonment without an option of a fine for a period of not less than 12 months
- a person who has been disqualified in terms of applicable legislation from practising as a valuer or a lawyer<sup>535</sup>

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<sup>531</sup> Notice of the appeal boards must be given in the *Provincial Gazette* of the province.

<sup>532</sup> See the MPRA s 56(1)-(2).

<sup>533</sup> Read the MPRA s 57(a)-(b).

<sup>534</sup> See the MPRA s 58(1)-(3).

<sup>535</sup> Refer to the Property Valuers Profession Act 47 of 2000 and the Attorney's Act 53 of 1979.

- a person who is in arrears to a municipality for rates or services charges for a period longer than three months.<sup>536</sup>

A member of an appeal board who is a councilor, employee or valuer of a municipality must withdraw from the proceedings of the board if a matter concerning that municipality's valuation roll is being considered by the board.<sup>537</sup> The normal term of office of members of an appeal board is four years, but members are eligible to be reappointed.<sup>538</sup> After consultation with the MEC, the minister of Local Government must determine the conditions of appointment of members of an appeal board. Conditions of appointment may differ between the chairperson and other members. The municipality or municipalities for which an appeal board was established must remunerate the members of the board according to the conditions of appointment and the directions of the MEC.<sup>539</sup> All members of appeal boards must perform their duties in good faith and without fear, favour or prejudice. Any personal or private business interest of a member in a matter on appeal must be disclosed, and such a member must withdraw from the proceedings, unless the board decides that the interest is trivial or not relevant. Such a decision should be announced in public at the first available sitting of the board. No member may use his/her position or privileges for private gain or to improperly benefit another person. Members may also not act in any way that compromises the credibility, impartiality, independence or integrity of an appeal board. If a member contravenes the code of conduct mentioned above, he/she will be guilty of misconduct.<sup>540</sup>

It is also provided that a member of an appeal board ceases to be a member when that person resigns, is no longer eligible or is removed from office. Only the MEC may remove a member from office and only on the grounds of misconduct, incapacity or incompetence. A decision to remove a member must be based on a finding of misconduct or incompetence by an investigating tribunal appointed by the MEC. Members under investigation may be suspended from office by the MEC.<sup>541</sup> The

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<sup>536</sup> The MPRA s 59(1)(a)-(f). The disqualification because of an offence ends five years after the imprisonment has been completed.

<sup>537</sup> The MPRA s 59(3).

<sup>538</sup> No specific terms are laid down in the MPRA. A member can thus be reappointed several times. Refer to the MPRA s 60.

<sup>539</sup> The MPRA s 61(1)-(3).

<sup>540</sup> Refer to the MPRA s 62(1)-(2).

<sup>541</sup> See the MPRA s 63(1)-(4).

MEC may further appoint alternative members of an appeal board. An alternative member acts as a member when a member is absent, has recused him/herself or when the filling of a vacancy on the board is pending.<sup>542</sup>

The chairperson on an appeal board decides where and when a board meets, but he/she must promptly convene a meeting if a majority of members of the board so request in writing, at a time and place set out in the request. When a board is hearing an appeal, it must sit in a municipality whose valuation roll is the subject of the appeal or being reviewed.<sup>543</sup> If a chairperson is absent or not available, or if there is a vacancy in the office of the chairperson, then the other members of the board must elect a member with experience in the administration of justice or elect the alternative as chairperson to preside at the meeting. Meetings are open to the public, but a board may adjourn in closed session when deliberating an issue.<sup>544</sup> An appeal board may further request a municipality whose valuation roll is under consideration to provide it with the necessary office accommodation and other administrative assistance, inclusive of staff for the board. All reasonable requests in this regard must be complied with by the municipality, which is subsequently also liable for the costs of the appeal board.<sup>545</sup> The internal procedure of a board may be determined by the board, subject to any procedures that may be prescribed.<sup>546</sup> A majority of members of an appeal board serving at any relevant time constitutes a quorum for a meeting, and a matter before the board is decided by a supporting vote of a majority of the members. If on any matter there is an equality of votes, then the member presiding must exercise a casting vote in addition to that person's normal vote as a member.<sup>547</sup> It is the responsibility of the chairperson of an appeal board and of the valuer

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<sup>542</sup> See the MPRA s 64(1)-(3).

<sup>543</sup> It seems that the intention of the legislator is for the board to sit and convene within the municipal offices of the municipality concerned. See the MPRA s 65(2).

<sup>544</sup> Read the MPRA s 55(1)-(4).

<sup>545</sup> Refer to the MPRA s 66(1)-(2).

<sup>546</sup> The MPRA s 67.

<sup>547</sup> The MPRA is somewhat unclear on the aspect of decision making. There seem to be two possibilities. Since a majority (50% + 1) of members of a board forms a quorum, such a quorum must normally be present before a meeting and subsequent decision is taken. The Act s 68 determines that any matter before the board is decided by a supporting vote of a majority of the members of the board, however, and not a majority of the members present that formed a quorum. To illustrate the position, let us imagine an appeal board that consists of five members. Refer again to the Act s 58. A quorum would be three members. If the legislator intended that a majority (absolute majority) of the members of a board must support a matter before the board, then all three members must support a decision. If the intention was to refer to a supporting vote of a majority of members present that form a quorum, then only 2 (50% + 1 of the members present) would allow a

*continued on next page*

of a municipality to ensure that that valuation roll is adjusted or added to in accordance with the decisions taken by the board.<sup>548</sup> When an appeal board gives a decision, it may issue an order with regard to costs, as it sees just and equitable. Persons whose appeals or opposition to an appeal were in bad faith or frivolous may be ordered to compensate the municipality concerned in full or in part for costs incurred by the municipality in the appeal.<sup>549</sup> It is also determined that the MEC may on request by an appeal board authorise the board to establish one or more committees to assist it in the performance of its duties. When appointing members of a committee, the board is not restricted to members of the appeal board. Furthermore, the board

- must determine the duties of a committee
- must appoint a chairperson and other members
- must authorise the committee to co-opt advisory members within the limits determined by the board
- may remove members
- may also determine a committee's procedure.

The board can also dissolve a committee at any time.<sup>550</sup>

Similarly to a municipal valuer, an appeal board may enter any property that is subject of an appeal and inspect the property. When entering a property, a member or assistant of the board must identify himself or herself and may be accompanied by an interpreter or other functionaries.<sup>551</sup> Members of appeal boards may require access to documents or information relevant to the appeal/review and may make extracts thereof. They can also require written or oral particulars regarding the property relevant to the appeal/review.<sup>552</sup> Information obtained may not be disclosed, except as authorised under the MPRA.<sup>553</sup>

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decision. The latter would seem the more likely interpretation, since the contrary would make the provision of s 68(1) rather meaningless.

<sup>548</sup> Refer to the MPRA s 69(1)-(3). Where an adjustment affects the amount due for rates, then s 55 must be applied.

<sup>549</sup> The MPRA s 70(1)-(2).

<sup>550</sup> See the MPRA s 71(1)-(5). Note also that ss 61-66(2)(b), read with the necessary changes, apply to the conditions of appointment of members of a committee who are not members of an appeal board.

<sup>551</sup> For the full details read the MPRA s 71(1)-(3). The MEC must issue all members of an appeal board an identity card with the photographs of that person for identification purposes.

<sup>552</sup> Refer to the MPRA s 73(a)-(c).

<sup>553</sup> Read the MPRA s 74(1)(a)-(d).

In order for an appeal board to function properly, the MPRA determines that an appeal board may by notice summon a person to appear before it in order to give evidence or to produce documents specified in the summons/notice. The board may also call a person present at a meeting, whether summoned or not, to give evidence or to produce a document in that person's custody. For evidential purposes, the board may administer an oath or solemn affirmation to a person and question or have a person questioned. Documents obtained may be retained by the board for a reasonable period.<sup>554</sup> It is further also provided that a person who is appearing before an appeal board, whether summoned or not, may at his/her own expense be assisted by a legal representative. When a person is summoned before a board, he/she is entitled to witness fees paid to state witnesses in criminal proceedings in a criminal court. Such fees are payable by the relevant municipality. It should be noted that the law regarding privilege to a witness in a criminal case applies before an appeal board.<sup>555</sup> In the last instance, it is provided that legal proceedings by or against an appeal board may be instituted in the name of the board, and any costs awarded in any legal proceedings against such a board must be borne by the municipality concerned.<sup>556</sup>

#### **18.5.6.11 Aspects regarding the updating of municipal valuation rolls**

All applicable municipalities must regularly, but at least once a year, update its valuation roll by preparing either a supplementary valuation roll or amending its current valuation roll.<sup>557</sup> In respect of supplementary valuations, a municipality must, whenever necessary, cause a supplementary valuation to be made in respect of all rateable property that

- was incorrectly omitted from the roll
- was included in a municipality after the last general valuation
- was subdivided or consolidated after the last general valuation of which the market value has substantially increased or decreased
- was substantially incorrectly valued during the last general valuation

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<sup>554</sup> See the MPRA s 75(1)(a)-(e).

<sup>555</sup> For more details refer to the MPRA s 75(2)-(4).

<sup>556</sup> It seems therefore that an appeal board is afforded legal personality, which can take legal action itself or against which legal action can be instituted. The MPRA is somewhat vague about this particular aspect. See the MPRA s 76(1)-(2).

<sup>557</sup> The MPRA s 77(a)-(b).

- must be revealed because of other exceptional reasons.<sup>558</sup>

A municipal valuer who prepared the valuation roll may be designated for the preparation and completion of the supplementary roll. A supplementary roll takes effect on the first day of the month following the completion of the public inspection period, and it remains valid for the duration of the municipality's current valuation roll.<sup>559</sup>

Supplementary valuations must reflect the market value of properties as determined in accordance with market conditions that prevailed at the date of the valuation determined for the purposes of the municipality's last general valuation and other provisions of the MPRA. Rates applicable to a supplementary valuation roll become payable with effect from:

- the effective date of the supplementary roll
- the date on which the property was included in the municipality
- the date on which the subdivision or consolidation of the property was registered in the deeds office or
- the date on which the market value has substantially increased or decreased.<sup>560</sup>

All municipalities must regularly amend their valuation roll to reflect any changes to the particular roll. Changes to the roll in circumstances under section 78 of the MPRA may be effected only through a supplementary roll, however.<sup>561</sup>

#### **18.5.6.12 Miscellaneous matters pertaining to the new property rates legislation**

The MPRA determines that, on good cause shown and on such conditions as the MEC may impose, the MEC for Local Government in a province may condone any non-compliance with a provision of the Act which requires any Act to be done within a specified period or pertaining to any Act to be done within a specified period. Any

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<sup>558</sup> See the MPRA s 78(1)(a)-(f). Note that the provisions of ch 4 Part 2 and also chs 5, 6 and 7 are applicable to the updating of valuation rolls.

<sup>559</sup> Read the MPRA s 78(2)(a)-(b) together with s 49.

<sup>560</sup> Refer to the MPRA s 78(3)-(4). It seems clear from the Act that not only increases in the value of property are provided for, but also decreases. When the valuation of a property is negatively impacted, eg, through fire or other natural disaster, then a property owner would be well advised to notify the relevant municipal manager of such an occurrence and request the municipal valuer to investigate the matter and to make an adjustment accordingly. It is submitted in this regard that unless an adjustment to the valuation roll by means of a supplementary roll has been made, a property owner will have to pay the rates due on that property as was valued in terms of the previous valuation. A possible refund could be applicable later when the supplementary valuation roll is in effect.

<sup>561</sup> The MPRA s 79.



non-compliance with sections 21, 31 or 32 of the Act may not be condoned.<sup>562</sup> The MEC must further monitor whether municipalities comply with the provisions of the Act. If municipalities fail to comply with the Act, the MEC may take any appropriate steps to ensure compliance, which steps could include a proposal to intervene in accordance with section 139 of the Constitution.<sup>563</sup> Even the minister may monitor or investigate and even issue a public report on the effectiveness, consistency, uniformity and application of municipal valuations. Such an investigation may include studies of the ratio of valuations to sale prices and also other appropriate statistical measures in order to determine the accuracy of valuations.<sup>564</sup> The minister is furthermore authorised to make regulations which are not inconsistent with the Act, and which concern:<sup>565</sup>

- (a) any matter that may be prescribed in the act;
- (b) matters that refer to the preparation, contents, adoption and enforcement of a municipal rates policy;
- (c) the manner in which rates referred to in section 21 of the MPRA must be phased in together with the criteria that municipalities must take into account;
- (d) the property register;
- (e) the form and content of any document referred to in the act, including a declaration, authorization, valuation roll, objection, appeal and notice;
- (f) the valuation and rating of public service infrastructure;
- (g) procedures to be followed in connection with appeals and reviews of decisions of municipal valuers;
- (h) aspects of condonement of non-compliance;
- (i) the giving of reasons by an appeal board;
- (j) the funding of appeal boards;
- (k) inquiries by investigating tribunals for appeal boards;
- (l) inquiries of alleged misconduct of valuers;
- (m) fees payable for information or issuing of documents;

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<sup>562</sup> The MPRA s 80(1)-(3). The power to condone may also only be exercised within a framework, as may be prescribed by regulation by the minister.

<sup>563</sup> Read the MPRA s 81(1)-(2).

<sup>564</sup> Investigations may be undertaken in respect of one, more or all municipalities. See the MPRA s 82(1)-(3).

<sup>565</sup> See the MPRA s 83(1)(a)-(n).

(n) any other matter in the opinion of the minister that is necessary for the effective carrying out or furtherance of the objects of the act.

Furthermore, the minister may declare by regulation a contravention of or failure to comply with any specific regulation to be an offence.<sup>566</sup> Before regulations are promulgated, the minister must consult with OLG on the substance of those regulations and must also publish the draft regulations in the *Government Gazette* for public comment.<sup>567</sup> It is also provided that the copyright of valuation rolls and other documents produced by municipal functionaries under the Act vests in the relevant municipality concerned.<sup>568</sup>

The MPRA determines that a person is guilty of an offence if that person:<sup>569</sup>

- (a) contravenes section 43(1)(a) or (b), 44, 62(1)(b) or (c) or section 74 of the act;
- (b) willfully obstructs, hinders or threatens a valuer or other authorized person when performing a duty or exercising a power in terms of the act;
- (c) willfully gives information in an objection in terms of section 50(1)(c) of the act or in an appeal which is false in any material aspect;
- (d) after having been summoned, fails to be present at a meeting, fails to remain present until excused or fails to produce a document specified in the summons;
- (e) after having been called under section 75 of the act, refuses to appear, answer any question, except where the answer might incriminate the person or to produce a document in the person's custody;
- (f) fails to comply with a request under section 29, 42 or 73 of the act or willfully supplies false or incorrect information in any material respect.

A valuer is guilty of an offence even if he/she is grossly negligent in the exercise of the functions of the office. For someone convicted of an offence, the penalty under the Act is the liability of imprisonment, which may not exceed two years, or a fine as may be prescribed in relevant national legislation. A person convicted of an offence in terms of section 83(2) of the Act is liable only for a fine or imprisonment not exceeding six months, however.<sup>570</sup> Finally, it is determined that the MPRA prevails in

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<sup>566</sup> See the MPRA s 83(2). It should be noted that regulations may treat different categories of property or different categories of owner of property differently.

<sup>567</sup> Reer to the MPRA s 84(a)-(b).

<sup>568</sup> The MPRA s 85.

<sup>569</sup> See the MPRA s 86(1)(a)-(f).

<sup>570</sup> Read the MPRA s 86(1)-(4).

the event of any inconsistency between it and any other legislation regulating the levying of municipal rates.<sup>571</sup>

#### **18.5.6.13 Aspects concerning transitional arrangements and the amendment and repeal of legislation**

According to the MPRA, municipal valuations and property rating conducted by a municipality in an area in terms of legislation which is repealed by the MPRA before the commencement of the Act may, despite such repeal, continue to be conducted in terms of that legislation until the date on which the valuation roll covering that particular area prepared in terms of the Act takes effect in terms of section 32(1).<sup>572</sup> Until a municipality prepares a valuation roll in terms of the MPRA, a municipality may continue to use a valuation roll and supplementary roll that was in force and may levy rates against property values as shown on that roll. Where valuation rolls were prepared by different predecessor municipalities, the current/new municipality may impose different rates based on the different rolls. The amounts payable on similarly situated properties should be more or less similar. The transitional requirements lapse within four years from the date of commencement of the MPRA, however.<sup>573</sup> Similar to valuation rolls, a rates policy adopted before the commencement of the Act continues to be of force until the date on which the first valuation roll prepared under the Act takes effect.<sup>574</sup> Transitional arrangements regarding section 21 applications, the liability of bodies corporate of sectional title schemes and special rating areas are also determined by the MPRA.<sup>575</sup> Finally, the MPRA amends and repeals various pieces of national and provincial legislation. For details on such legislation, refer to the schedule annexed to the Act.<sup>576</sup> In contrast with the levying of property taxes on privately owned land, the state is sometimes exempted from having to pay taxes to local authorities. According to the Rating of State Property Act,<sup>577</sup>

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<sup>571</sup> The enforcement of so-called "old-order" legislation, which is still in existence in the various provinces, is thus subjected to the MPRA. See the MPRA s 87.

<sup>572</sup> See the MPRA s 88(1)-(2).

<sup>573</sup> Read the MPRA s 89(2)-(3). When the old order laws lapse, then the old valuation rolls/supplementary rolls may not be used anymore.

<sup>574</sup> See the MPRA s 90(1)-(2). Any review of such an old rates policy after the commencement of the Act must take the aims of the MPRA s 3(3) into account.

<sup>575</sup> Refer to the MPRA ss 91, 92 and 93 respectively.

<sup>576</sup> See the Act s 95 together with the Sch. The Act comes into operation only on a date to be determined by the president by proclamation. The MPRA s 96. It should specifically be noted that the MPRA repeals the whole of the Rating of State Property Act 79 of 1984.

<sup>577</sup> 79 of 1984.

state property is also rateable. Exemptions are possible, however.<sup>578</sup> This Act was repealed by the MPRA, however.

### **18.5.7 Fees, service charges and tariffs**

Municipalities have always been very dependent on financial income derived from fees, service or user charges and various tariff obligations. All former provincial ordinances provided for such revenue arrangements. Section 10G(7) of the LGTA empowered municipalities to levy and recover levies, taxes, fees and tariffs and also prescribed the procedures for doing so. Unless repealed or contrary to the Constitution, such requirements are still applicable and enforceable. According to the new constitutional scheme, that is, section 229, municipalities are empowered to impose taxes, levies and duties apart from property rates and surcharges on fees if authorised by national legislation. Income tax, general sales tax, and value added tax are excluded, however.<sup>579</sup>

Generally speaking, a “charge” is regarded as a payment for something to be done, for example an electricity or water connection. The fee or charge is then a once-off payment. A “tariff”, on the other hand, refers to a continuing fee or charge for a service that is being rendered or for a function that is to be performed on a continuing basis. Examples of tariffs included tariffs for the supply of water or electricity, refuse removal or even public transport. In essence the purpose of fees, charges and tariffs is to recover the cost of providing such a service or to perform such a function.<sup>580</sup> Fees, tariffs and service charges are often divided into different categories. A distinction is made between *trading services*, *necessary services* and *social services*. Trading/utility services include water and electricity services. Normally it is expected that municipalities do not make a profit on such services, as it could be oppressive to poor households. In many instances in the past profits were indeed achieved on electricity and sometimes on water services. Necessary charges or fees relate mostly to sewerage, refuse removal and associated services. *Social services* refers to services such as clinics, building control, markets, halls, libraries,

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<sup>578</sup> See the Act s 3(3).

<sup>579</sup> The Constitution does not define what is meant by levies or taxes. Taxes must be levied and recovered according to the law, however.

<sup>580</sup> See Craythorne (1997) 360-361. The writer mentions that sometimes the amount charged will cover the entire cost of the service or function, and sometimes the cost will amount to only a contribution of the costs. The balance will then often be subsidised from other sources such as rate

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parks and other recreational facilities. Such services are regarded as important for the growth and development of a community. They are often very expensive and are subsidised from other sources.

It is evident that user charges form an important source of municipal own revenue and that the cost recovery of such charges is essential. Many municipalities under the new legal system contain several backlogs in respect of payment for these services. In an effort to assist municipalities in meeting the capital costs of bulk connector infrastructure, national government has provided for the Consolidated Municipal Infrastructure Programme (CMIP). There is a general obligation on municipalities to develop clear tariff policies and also to ensure that poor/indigent households have access to basic services. It is also important that tariff enforcement and credit control mechanisms should be improved. In an effort to guide tariff policies, government and other stakeholders have agreed on the following guidelines:<sup>581</sup>

- *Payment in proportion to the amount consumed* As far as is practically possible, consumers should pay in proportion to the number of services consumed.
- *Full payment of service costs* All households, with the exception of the indigent, should pay the full costs of the services consumed.
- *Ability to pay* Municipalities should develop a system of targeted subsidies to ensure that poor households have access to at least a minimum level of basic services.
- *Fairness* Tariff policies should be fair, in that all people should be treated equitably.
- *Transparency* Tariff policy should be transparent to all consumers and any subsidies and concessions which exist must be visible and understood by all consumers.
- *Local determination of tariff levels* Municipalities should have the flexibility to develop their own tariffs in keeping with the above principles.
- *Consistent tariff enforcement* A consistent policy for dealing with non-payment of tariffs needs to be developed. This must be targeted and enforced with sensitivity to local conditions.

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charges. If full cost were to be charged, ie for public swimming pool amenities, such facilities would be beyond the financial reach of many local residents.

<sup>581</sup> See the White Paper on Local Government (1998) at 137.

- *Ensure local economies are competitive* Local tariffs must not unduly burden local business through higher tariffs, as these costs affect the sustainability and competitiveness of such businesses and firms.

#### **18.5.8 Trading enterprises and subsidies**

It has always been customary for local governments to participate in trading enterprises. Trading enterprises are associated with activities such as the provision of water, electricity, transport and fresh produce. Trading enterprises should be balanced within the overall tariffs policy to enhance income, on one hand, but not to overburden consumers/residents on the other. In the past it was expected of local authorities to generate sufficient income to carry out their activities. Little financial or other assistance was received from the other spheres of government. Municipalities were exempted from revenue sources such as income tax, stamp duties and the taxation on gifts, however. Subsidies were also received from the central and provincial authorities. The provisions of section 214 of the Constitution, which requires the equitable division of revenue raised nationally, should significantly enhance the financial support from the two higher spheres of government to the lowest spheres. Both national and provincial governments are legally obligated to support municipalities from *inter alia* a financial point of view.

#### **18.5.9 RSC levies and intergovernmental transfers**

In the recent past, Regional Service Council levies have developed into an important source of revenue for especially metropolitan and district councils. Although often controversial, these taxes are important for municipal revenue and should be retained until a suitable alternative is found. Some of the general criticism levelled against RSC levies is the costs of collection and the fact that the tax is directed on staff or labour. This is often perceived to reinforce a bias against labour-intensive enterprises and could therefore negatively impact on development. It is submitted, however, that as long as such levies are restricted to low levels and are effectively controlled, the potentially negative effects should be minimised.<sup>582</sup>

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<sup>582</sup> See the Regional Services Act 109 of 1985, which provides for the payment to councils of a regional services levy by every employer and a so-called "regional establishment levy" payable by every person carrying on an enterprise in the area of a particular council. Refer also to the case of *Greater Johannesburg TMC v Eskom* 2000 (1) SA 866 (SCA). The dispute concerned the liability for regional establishment levies on the part of Eskom to the particular municipal council. According to the RSC Act s 12, every person carrying on an enterprise within a region/jurisdiction is subject to such a levy. Eskom Act 40 of 1987 s 24 exempted Eskom from payment of levies that would other-

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In light of the constitutional obligation that municipalities are entitled to an equitable share of national revenue as well as the obligation on national and provincial governments to support municipalities financially, the principle of intergovernmental transfers (IGT) has become very important. According to the White Paper on local government, three basic types of transfer were identified:<sup>583</sup>

- There are agency payments paid by provincial governments to municipalities for services rendered by the municipalities on behalf of the provinces.
- There are direct grants from higher spheres to municipalities to subsidise the capital costs of investment in municipal infrastructure.
- There are grants to support the operating budget of municipalities.

Municipalities must ensure that the agency payments they receive are sufficient to cover the full cost of the services which they deliver. The possibility of unfunded mandates should be guarded against. It is important that the new system of IGT should address not only the vertical division of revenue but also the horizontal division of revenue between municipalities *inter se*. The vertical division is decided via the national budgeting process. It is also important to note that the equitable share from national revenue covers only funds transferred to cover operating costs of municipalities. Capital grants are classified under so-called “additional grants”. From the horizontal divisional point of view, all municipalities must be able to provide a basic level of services and have at least an administrative infrastructure sufficient to govern its area effectively.

#### **18.5.10      *Municipal loans and capital funds***

It was mentioned above that the Constitution allows municipalities to raise loans for capital or current expenditure.<sup>584</sup> Such loan capacity refers to external loans such as bank overdrafts. Municipalities must be very cautious not to over-exceed their borrowing possibilities and end up having a negative credit rating, however. In order to ensure that a municipality does not fall into a trap of debts, strict requirements are set out before a loan can lawfully be obtained.<sup>585</sup> Loans for bridging finance may be raised only during a financial year and also only to finance current expenditure in

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wise have been payable to the state. Court held that the reference to “state” in the Act was to the state in all its manifestations, including local authorities such as RSC or TMC. Eskom was accordingly exempted from paying regional establishment levies.

<sup>583</sup> See White Paper on Local Government (1998) at 139.

<sup>584</sup> See the Constitution s 230.

<sup>585</sup> See the LGTA s 10G(8) and the various provisions under the LGMFMA discussed above.



anticipation of the receipt of revenue to be collected. Apart from raising loans, municipalities can also utilise internal capital funds as a resource for funding less expensive capital purchases such as equipment and minor building works.

#### **18.5.11      *Municipal stocks***

Another method used in the past in raising capital by municipalities was through the issuing of municipal stock. Stock refers to a fixed amount of money invested by an individual or institution. It is a form of loan. In return for the investment, a certificate is issued as evidence of ownership of a fixed amount of stock. Normally a stock certificate is transferable at a price determined by the prevailing money market. Craythorne identifies three types of stock.<sup>586</sup> These are *bearer stock*, *inscribed stock* and *registered stock*. Transfer of stock takes place through the transfer or surrender of the stock certificates. In South Africa this method of raising money is preferred because of security offered by the stocks and also easy accounting control. Finally, there are two methods of issuing stock: one is through the so-called “fixed price” system and the other is through the “tender” system. Under the tender system municipal stock is put up for public tender, and an issue is made to the highest bidder.<sup>587</sup>

### **18.6 Conclusion**

It is obvious to conclude that the restructuring process of local government and the various constitutional demands placed on municipalities have introduced many financial challenges. These challenges include a dramatic increase in services responsibilities, escalation in municipal salaries, higher administrative costs and often a significant reduction in experienced personnel.<sup>588</sup> Most of these challenges have placed severe pressure on the cash flows and financial control mechanisms of all newly amalgamated municipalities.

There seems to be a strong need and indeed constitutional obligation for municipalities to restore and implement strict financial discipline and to take effective steps to recover outstanding debts and to fully utilise all local methods to generate the necessary revenue. Without sufficient revenue at their disposal, municipalities will not be able to fulfil and complete their constitutional obligations. It is further also

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<sup>586</sup> See Craythorne (1997) 364.

<sup>587</sup> Craythorne (1997) 364-365.

<sup>588</sup> Refer to the White Paper on Local Government (1998) at 147.

essential that municipalities are properly assisted and supported by both the national government and the provincial authorities. The success of municipal fiscal management lies in strict control and oversight, however. In this regard the higher spheres of government have important control functions to fulfil.

It is submitted that the new legislative provisions, within the basic framework of the Constitution, indeed create a legal dispensation that should allow all municipalities to enhance and secure sufficient financial revenue and thereby provide and sustain essential municipal services. Such support and financial entitlements are not unrestricted, and various measures of control and accountability over fiscal matters have been provided for. Clear and decisive provisions are also made to ensure higher-sphere involvement in municipal financial affairs and to provide for oversight and even national and provincial intervention in cases where municipal finances are inappropriately managed. The new legal framework also allows for much stronger public participation in financial affairs, which in turn should foster stronger relationships of trust and support between local residents and their respective municipal governments. However, the ultimate success of the new system lies in the way in which the new system is implemented and in the manner in which all roleplayers exercise and fulfil their distinctive legal obligations.

## **The principles of municipal public administration and the requirements of performance management, capacity building, accountability and public participation**

### **19.1 Introduction**

The importance of the relationship between municipalities and residents as well as between municipalities and the two higher spheres of government have been emphasised in many previous chapters of this work. These relationships have been given constitutional importance and significance under the new overall constitutional scheme. Especially since the Constitution is the supreme law of the state, all constitutional requirements dealing with the public administration and the relations between the public and government institutions must be strictly complied with. Under the previous local government system, many of these issues were not legally enforceable or were largely downplayed in mostly provincial ordinances. This position has now changed fundamentally under the new constitutional dispensation.

As a basic point of departure, the meaning of administration (ie municipal administration) refers to the overall management of the public affairs of a certain organisation.<sup>1</sup> On a municipal level, public administration encapsulates a special relationship between politics and administrative organs. The politicians are concerned with the uses of power, whilst the administration is concerned with translating the political decisions into practical implementation. Furthermore, the political dimension is subject to change, whereas the administration is characterised by stability and routine.

In terms of public administration, it must be remembered that the concept includes aspects such as policy, decisions, staffing matters, organising, planning and also resource allocations. The concept also differs widely from one administration to an-

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<sup>1</sup> Craythorne (1997) 65.

other. Municipal administration is undoubtedly part of public administration in general, but it also has a more distinctive importance; for example:<sup>2</sup>

- It operates in a political field.
- It operates within the context of democratic notions of an open, responsive and accountable government institution.
- It is decentralised and, to a certain degree, self-financing.
- It is the part of government which is closest to the citizens of a particular state.

### **19.2 Basic aspects concerning municipal public relations**

All forms of government accept in general that their actions have to be acceptable by their subjects. This realisation provides the basis for the development of a relationship of trust and support between the state and its people. In modern day governments this relationship is very important because a government is generally accountable to the people who have elected it to power. This position is particularly true for local governments. Because local authorities provide essential goods and services which affect people directly, it is acceptable that the public at large should be sensitive about the performance of both political office-bearers and administrative staff components.

In contrast to the public relations activities of private enterprises which are directed at sales and profits, public relations programmes of public institutions are usually approached from the point of view of promoting general welfare. Public institutions are mostly monopolistic enterprises with no real competitors. This position has changed somewhat under the new South African constitutional scheme as competitiveness, accountability and responsiveness in providing services and attracting investment have become familiar catch-phrases. Because of their prominent caretaker roles in society, public institutions such as municipalities are subjected to various legal requirements in respect of the exercise and fulfilment of their functions.<sup>3</sup> It is further also an established requirement that public functionaries maintain high ethical standards. This position is so because of the important public responsibilities which municipalities must perform.

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<sup>2</sup> See Craythorne (1997) 71.

<sup>3</sup> See Cloete (1997) 152. The writer mentions that the public does not always understand the reasons for administrative red tape. There are often very good reasons for such requirements, however. The introduction of Public/Private Partnerships (PPP) has also boosted municipal competitiveness and profit targeting.

Municipal public relations are affected by every action of a political or staff representative. The activities of municipalities will always be evaluated carefully by local residents and other stakeholders. If respect is to be achieved, officials and political representatives should foster an attitude of commitment to the general public. It is thus safe to say that the state of public relations is largely dependent upon the conduct and performance of every functionary involved in public administration. Because of its importance, every municipality should appoint officials that are charged exclusively with the handling of its public relations.<sup>4</sup> One of the many difficult tasks of a public relations officer is to determine public opinion and attitudes and to accommodate such opinions and attitudes. Quick and reliable information is very important here.

### **19.3 The constitutional requirements affecting municipal public administration**

In light of the importance and responsibilities of public administration at large, the new constitutional scheme specifically entrenches certain basic values and principles that govern it. These basic values and principles are important to not only the public administration *per se*, but also the public services throughout all three spheres of government. Unless the Constitution is amended, the basic values and principles have been afforded supreme legal status and must be complied with.

#### **19.3.1 *The basic values and principles governing public administration***

In section 195 of the Constitution, the following values and principles relevant to the overall public administration are mentioned as follows:<sup>5</sup>

- A high standard of professional ethics must be promoted and maintained.
- Efficient, economic and effective use of resources must be promoted.
- Public administration must be development-orientated.
- Services must be provided impartially, fairly, equitably and without bias.
- People's needs must be responded to and the public must be encouraged to participate in policy-making.
- Public administration must be accountable.
- Transparency must be fostered by providing the public with timely, accessible and accurate information.

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<sup>4</sup> Such personnel are usually known as "public relations officers" (PROs) and "publicity officers" (media liaison officers).

<sup>5</sup> See the Constitution s 195(1)(a)-(i).

- Good human-resource management and career-development practices must be cultivated to maximise human potential.
- Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress imbalances of the past to achieve broad representation.

All of the abovementioned values and principles are obligatory and must be complied with. The Constitution is clear on the fact that public administration must be governed by the democratic values and principles enshrined in the Constitution and not only those mentioned in section 195(1).<sup>6</sup> Apart from the values and principles mentioned, the Constitution confirms that the principles apply to the public administration in every sphere of government, organ of state and public enterprise. Without a doubt such principles are therefore relevant to all municipalities.<sup>7</sup> The Constitution further requires the enactment of national legislation which must ensure the promotion of the mentioned values and principles.<sup>8</sup> It is also permitted that the national legislation envisaged above may allow for differentiation between aspects regulating public administration between different sectors, administrations or institutions. In this regard the particular nature and functions of different sectors, institutions or administration should be taken into account when the legislation regulating the public administration is enacted. Furthermore, it seems clear from the Constitution that not all aspects concerning the public administration of all administrations or sectors should be precisely the same.<sup>9</sup> The national legislation envisaged in section 195 has been enacted as the Public Service Act.<sup>10</sup> *Inter alia*, the Act provides for the broad principles on the functioning of the public service in general, thereby also including various aspects important to municipal public administration. The Act must also be read in conjunction with section 197 of the Constitution, which in essence creates a public service for the entire Republic of South Africa. According to the Constitution, there is a public service within the overall public administration. Such public service must function

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<sup>6</sup> See the Constitution s 195(1).

<sup>7</sup> See the Constitution s 195(2)(a)-(c).

<sup>8</sup> See the Constitution s 195(3).

<sup>9</sup> See the Constitution s 195(4)-(6).

<sup>10</sup> 103 of 1994 as amended by Act 86 of 1998. Note that the Act is applicable to only the national and provincial spheres of government. Municipalities currently still determine their own conditions of service and determine their own salary scales.

and be structured in terms of national legislation, and the public service must execute the lawful policies of the government of the day loyally.<sup>11</sup> The terms and conditions in the public service must also be regulated by national legislation, and public service employees are entitled to a fair pension. No employee may be favoured or prejudiced because that person supports a particular political party or cause. Finally it is the responsibility of provincial governments to manage the public service in their administrations. They may do so only within a framework of uniform norms and standards applying to the public service.<sup>12</sup>

It was mentioned above that municipal administrations are clearly part of the public administration at large and that the principles and requirements mentioned in the Constitution and national legislation are equally applicable to them. Apart from the national legislative requirements for all administrations, certain specific aspects have also been included in selective laws dealing specifically with local government matters. Such legislative provisions will be discussed below. Finally, it must be pointed out that the Constitution also establishes a single Public Service Commission for the Republic of South Africa. The commission must be independent and impartial and must exercise and perform its functions in the interests of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The commission is regulated by national legislation and therefore it also plays an important role in overseeing and controlling aspects of public service and administration within the municipal public administrative domain.<sup>13</sup> The commission has various constitutionally entrenched powers and functions and also certain additional powers and functions prescribed by national legislation.<sup>14</sup>

### **19.3.2 Issues concerning municipal administration**

In follow-up of the constitutional requirements mentioned above, the new local government legislative framework also provides for aspects relevant to local public administration. According to the Local Government: Municipal Systems Act,<sup>15</sup> the local public administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution. It is further provided that in the administering of

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<sup>11</sup> See the Constitution s 197(1).

<sup>12</sup> Refer to the Constitution s 197(2)-(4).

<sup>13</sup> See the Constitution s 196(1)-(2).

<sup>14</sup> See the Constitution s 196(4)(a)-(g).

<sup>15</sup> 32 of 2000.



its affairs, municipalities must strive to achieve the objects of local government as set out in section 152 of the Constitution and also comply with the duties of local governments.<sup>16</sup> In furtherance of the developmental duties of municipalities, the Systems Act determines that, within their administrative and financial capacity, all municipalities must establish and organise their administration in a manner that would enable municipalities to comply with various administrative and financial requirements. These requirements are the following:<sup>17</sup>

- to be responsive to the needs of the local community
- to facilitate a culture of public service and accountability amongst its staff
- to be performance orientated and focused on the objects and developmental duties of local government
- to ensure that its political structures, political office bearers and managers and other staff members align their roles and responsibilities with the priorities and objectives of the municipality's integrated developmental plan
- to establish clear relationships and to facilitate co-operation, co-ordination and communication between its political structures and political office bearers and its administration; and between its political structures, political office bearers and administration and the local community
- to organise its political structures, political office bearers and administration in a flexible way in order to respond to the changing priorities and circumstances of the municipality
- to perform its functions through operationally effective and appropriate administrative units and mechanisms, including departments and other functional or business units and also, when necessary, to perform such functions on a decentralised basis
- to assign clear responsibilities for the management and co-ordination of the administrative units and mechanisms
- to hold the municipal manager accountable for the overall performance of the administration
- to maximise efficiency of communication and decision-making within the administration

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<sup>16</sup> See the Systems Act s 50(1)-(2).

<sup>17</sup> See the Systems Act s 51(a)-(m).

- to delegate responsibility to the most effective level within the administration
- to involve staff in management decisions as far as is practicable
- to provide an equitable, fair, open and non-discriminatory working environment.

The requirements mentioned above are subject to any applicable labour legislation, however. Applicable labour legislation will prevail if any inconsistencies arise.<sup>18</sup> It seems that the intention of the legislature was to allow municipalities considerable leeway in order to create an effective municipal administration, but not to do so at the expense of established and recognised labour interests.

#### **19.4 Principles of municipal accountability and public participation**

It is an historical fact that to a large extent community participation and municipal accountability were neglected under the former local government dispensation. One of the core elements of change was allowing people to have a say in the decisions that affected their lives. Participation and accountability of representatives are therefore not new concepts in South African public life. Under the new dispensation these concepts have been afforded significant recognition. The supreme law of the state now recognises that participation and accountability are core and crucial principles for ensuring sustainable, democratic and developmental local government. According to the founding provisions and the objectives of local government, the aim of the new constitutional dispensation is to establish a democratic government founded *inter alia* on the values of accountability, responsiveness and openness. These sentiments are echoed in the objectives of local government, which affirms the aim of providing democratic and accountable local governments for local communities and encouraging their involvement in local government matters.<sup>19</sup> With this new constitutional mandate, the principles of participation and accountability are central to the new local government dispensation and the final transformation of the previous system.

The process of ensuring participation and accountability in local government represents major challenges for all municipalities. The transition to the new system was long and difficult, and many adaptations were required in order to accommodate new structures and processes. Central to the success of establishing a new system has been the participation by citizens and the accountability of those in positions of

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<sup>18</sup> See the Systems Act s 52.

<sup>19</sup> See the Constitution ss 1 and 152.

power. There are many shortcomings in the new system, however, and constant development of participation and accountability is required.

#### **19.4.1 Participation, communication and partnerships**

The essence of the concept of participation is giving people, and more specifically local residents, a real say in decisions that affect their lives. In order to take part in such decision-making processes, people must have access to decision-making structures in order to make their voices heard. Real participation strengthens the legitimacy of municipal decision making. South African local governments face various challenges to ensure participation, however. Many members of society do not have the opportunities that others do to express themselves. The lack of resources and education often excludes people from participatory processes. There are two key ways in which participation can be facilitated. They are

- to improve and maintain existing channels of communication
- to form new and strong partnerships between municipalities and local stakeholders.

#### **19.4.2 Channels of communication**

It is a fact that in systems where there are open channels of communication meaningful participation usually occurs. The following different channels of communication should enhance participation between citizens and municipalities.<sup>20</sup>

- *As voters* One of the commonly known and important ways through which citizens can voice their opinions in terms of governmental decision making is through the process of voting. Every adult South African citizen has the right to vote and to take part in elections for any legislative body established in terms of the Constitution.<sup>21</sup> This constitutionally protected right is important not only to ensure a democratic society but also to allow the voters to have a direct say in the choice of their political leaders and their policies. As with all government structures, municipalities have an obligation to make voters aware of their right to vote and to motivate them to exercise such right.
- *As consumers of services* Most people have direct contact with their municipalities through the use of and payment for municipal services. Through this channel

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<sup>20</sup> See LGIS no 2 "Participation and Accountability" (1999) at 3-8.

<sup>21</sup> Read the Constitution s 19(3)(a).

of regular contact, many aspects of municipal decision making can be communicated.

- *As an organised interest group* People often organise themselves in different interest groups. Such groups include political parties, NGOs and a range of Community Based Organisations (CBOs) such as ratepayers associations, church groups etc. Business people also organise themselves into groups that look after their interests and the interests of the region. A local chamber of commerce is a good example of a business organisation that could have an important influence with the local authority and which could serve as an acknowledged and influential communication instrument.
- *Through specialised structures* Communication can also be significantly enhanced through specialised local structures. A ward committee is such a structure and could play a very important intermediary between local residents and their local municipality. Ward committees are best suited to detecting local problems and to communicating such problems quickly and effectively. Apart from ward committees, which interact with the specific ward representative, residents can also communicate and participate with their local municipality through their traditional leaders or other community organisations. The existence of traditional leadership in many regions in South Africa and its role and involvement with local municipalities should also provide a powerful mechanism for participating and communicating with their municipal structures.<sup>22</sup> It is essential that municipalities should ensure that the channels mentioned above are kept open and effective. To this end the new local government legislative framework provides specifically for a chapter on community participation.<sup>23</sup> A further example of a specialised structure is the existence of organised labour. Organised labour should also be consulted by municipalities when issues are considered that could have an impact on them. In the case of *SAMWU v City of Cape Town and Others*<sup>24</sup> the Supreme Court of Appeal stated that the provisions of sections 16-21 of the Systems Act foster

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<sup>22</sup> Municipalities can also ensure participation through the establishment of internal municipal committees, eg, an advisory committee. Such a committee is specifically formed to address the need for effective communication with the public and can act as a vital link between the municipality and its local community.

<sup>23</sup> See the Systems Act ch 4, which is discussed later in this ch.

<sup>24</sup> 2004 (1) SA 548 (SCA).

community participation in municipal decision-making processes. Such participation could include organised labour.<sup>25</sup>

#### **19.4.3 Participation through partnerships**

When channels of communication are open and effective, conditions are conducive for partnerships to be formed. Examples of these are partnerships between the municipality and the police in combating crime, and between local business enterprises to alleviate social upliftment. The new legal framework provides specifically for such programmes and partnerships.<sup>26</sup>

#### **19.4.4 The new legislative provisions regarding community participation**

Under the new local government legislative framework, specific provision has been made for ensuring and protecting the participation of local communities. Chapter 4 of the Municipal Systems Act features various legal obligations to which municipalities must comply. From the start the Act determines that municipalities develop a culture of municipal governance that complements formal representative government with a system of participatory governance. In an effort to achieve and develop such a culture, municipalities must encourage and create conditions for the local community to participate in the affairs of the municipality. Participation should include participation in:

- the preparation, implementation and review of the municipal integrated development plan
- the establishment, implementation and review of the performance management system
- the monitoring and review of performance in general, including outcomes and impact of performance
- the preparation of the municipal budget
- strategic decisions relating to the provision of municipal services.<sup>27</sup>

Municipalities must further contribute to building the capacity of the local community in order to enable it to participate, and to enable councillors and staff members to foster community participation. Municipal resources and funds that are allocated

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<sup>25</sup> Refer to the *SAMVU* case *supra* fn 24 at 551-555.

<sup>26</sup> See the Systems Act ch 4.

<sup>27</sup> Refer to the Systems Act s 16(1)(a)(i)-(v).

annually from the municipal budget should be provided in order to achieve the mentioned participatory objectives.<sup>28</sup>

Specific mechanisms, processes and procedures for community participation have also been provided for. The Systems Act determines that participation by the local community in the affairs of the municipality must take place through various mechanisms.<sup>29</sup> All municipalities must establish appropriate mechanisms, processes or procedures to enable the local community to participate in the affairs of the municipality. In this respect, municipalities must provide for

- the receipt, processing and consideration of petitions and complaints lodged by members of the local community
- notification and public comment procedures
- public meetings and hearings by the municipal council, other political structures and political office bearers, when appropriate
- consultative sessions with locally recognised community organisations and where appropriate, traditional authorities
- report-back mechanisms to the local community.<sup>30</sup>

When a municipality establishes mechanisms or processes of participation, it must take into account the special needs of people who cannot read or write, people who have disabilities, women and various disadvantaged groups. A municipal council may also establish one or more advisory committees to advise the council on any matter within the council's competence.<sup>31</sup>

A further important provision is that municipalities must communicate to their relevant communities information concerning *inter alia* the available mechanisms to encourage and facilitate community participation, the matters on which participation is encouraged and also the rights and duties of members of the local community.

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<sup>28</sup> See the Systems Act s 16(1)(b)-(c). It should be pointed out that the mechanisms to encourage participation must not be interpreted as permitting interference with a municipal council's rights to govern and to exercise executive and legislative authority. In instances where participatory schemes would interfere with municipal administration or the effective provision of services, such schemes must be overruled in favour of a municipality's right to govern and to exercise its functions and obligations. See the Act s 16(2).

<sup>29</sup> See the Systems Act s 17(1)(a)-(e). It is envisaged that participation must take place through (a) political structures; (b) other mechanisms, processes and procedures provided for in terms of the Systems Act; (c) other appropriate mechanisms, processes and procedures established by the municipality; (d) councillors; and (e) generally applying the provisions for participation as provided for in the Systems Act.

<sup>30</sup> See the Systems Act s 17(2)(a)-(e).

<sup>31</sup> See the Systems Act s 17(3)(a)-(d) and s 17(4).

When such information is being communicated by a municipality to its local community, it is obligatory for the municipality to take into account the language preferences and usage in the municipality and the special needs of people who cannot read or write.<sup>32</sup> Participation is also enhanced through giving notice to the public of municipal council meetings and giving them admission to these. It is now required by law that the municipal manager of a municipality give notice to the public of the time, date and venue of every ordinary meeting of the council and also special or urgent meetings, except when time constraints make such notice impossible.<sup>33</sup> As was stated elsewhere in this work, a municipal council must conduct its business in an open manner and may close its sittings only when it is reasonable to do so.<sup>34</sup> The constitutional requirement is reiterated in the new legislative framework. Meetings of a municipal council and of its committees are open to the public, including the media, and neither the public nor the media may be excluded from council or committee meetings except when:

- it is reasonable to do so because of the nature of the business being transacted *and*
- a by-law or resolution of the council specifying the circumstances in which the council/committee may close a meeting, authorises the council or committee to close the meeting to the public.<sup>35</sup> The public or media, may not be excluded, from a council or committee meeting when any of the following matters are being considered or being voted on:<sup>36</sup>
  - (a) a draft by-law tabled in council
  - (b) a budget tabled in council
  - (c) the municipality's draft IDP or amendments thereto, tabled in council
  - (d) the municipality's draft performance management system or amendments, tabled in council
  - (e) the decision to enter into a service delivery agreement in terms of section 76

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<sup>32</sup> Refer to the Systems Act s 18(1)-(2).

<sup>33</sup> See the Systems Act s 19(a)-(b). The manner in which the notice is to be given must be determined by the municipal council.

<sup>34</sup> See the Constitution s 160(7).

<sup>35</sup> See the Systems Act s 20(1)(a)-(b). Note that decisions by local governments are taken via specific resolutions or via the adoption of a by-law. Resolutions can however be *more easily amended* or changed than by-laws.

<sup>36</sup> See the Systems Act s 20(2)(a)-(f).



- (f) any other matter prescribed by regulation.

However, it is interesting to note that, subject to reasonability and the nature of the business being transacted, an executive committee and a mayoral committee may close any or all of its meetings to the public and media.<sup>37</sup> Finally, a municipal council, within its financial and administrative capacity, must provide space for the public in the chambers where the council or committees meet, and it may also take reasonable steps to regulate public access to and public conduct at such meetings.<sup>38</sup>

The new local government legislative framework also determines specific requirements in respect of communications to the local community. When a municipality needs to notify the community of anything through the media, it must do so in the local newspaper(s) of the area, in newspapers circulating in the area and in newspapers determined by the council to be newspapers of record; alternatively, notices can be sent by radio broadcasts covering the area of the municipality.<sup>39</sup> Any notification must be in the official language(s) determined by the council, with consideration of the language preference and usage within its area. Notices must also be displayed at the municipal offices. When a local community is invited to submit comments to the council, the invitation notice must state that municipal staff members will assist persons who cannot write. Similar provisions are set when members of the public are required to fill in forms. Persons who cannot read or write must be assisted.<sup>40</sup>

Specific provisions regarding the publicity of documents have also been included. According to the Systems Act, all documents that must be made public by a municipality in terms of a requirement of the Act, the Municipal Finance Management Act or any other applicable legislation must be conveyed to the local community by displaying the documents at the municipality's head and satellite offices and libraries, on the municipality's official website if available and by notifying the local community of the place and address where detailed particulars concerning the documents can be obtained.<sup>41</sup> Each municipality is also obligated to establish its own official website if it decides that it is affordable, and place on such website all information required under

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<sup>37</sup> The Systems Act s 20(3).

<sup>38</sup> The Systems Act s 20(4)(a)-(b).

<sup>39</sup> See the Systems Act s 21(1)(a)-(c).

<sup>40</sup> See the Systems Act s 21(2)-(5).

<sup>41</sup> See s 21A of the Systems Act as inserted by Act 44 of 2003 s 5. If appropriate, a notification mentioned above must invite the local community to submit written comments or representations to the municipality in respect of the relevant documents.

the Systems Act and the Municipal Finance Management Act. If no website is established, all relevant information should be displayed on an organised local government website sponsored or facilitated by the National Treasury. It is the overall responsibility of the municipal manager to ensure maintenance and regular updating of the electronic information of a municipality.<sup>42</sup>

Under the new legislative framework, the minister of local government is also authorised to make regulations or issue guidelines on various aspects concerning public participation in local municipal affairs. The minister should take into account whether municipalities have the capacity to fulfil extra regulatory or guiding requirements, however.<sup>43</sup>

#### **19.4.5 Local municipal accountability**

It was explained above that accountability is one of the founding values of the new South African constitutional state and is applicable to all spheres of government including the local government sphere. In essence, accountability refers to the need to explain or to defend certain actions or conduct. Accountability is needed to ensure that people in positions of power can be held accountable and responsible for their actions and conduct. Accountability therefore plays an important role in ensuring stability and acceptance of a particular democratic system. It ensures appropriate checks and balances for local residents with regard to their elective representatives. Accountability means not only taking responsibility, but also ensuring liability in certain instances. See, for example, the case of *Umzinto North Town Board v Moodley*.<sup>44</sup> In this case a duly appointed town treasurer, purporting to act under delegated authority, invested municipal funds contrary to the Local Authorities Ordinance<sup>45</sup>. The town treasurer/defendant argued that he was exempt from liability under the Ordinance. However, the court held *inter alia* that the defendant bore the onus of proving that he was entitled to an exemption, that he acted wilfully and knowingly that his investment decision was not covered by the ordinance and that his conduct

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<sup>42</sup> Read s 21B of the Systems Act as inserted by Act 44 of 2003 s 5.

<sup>43</sup> For more details refer to the Systems Act s 22(1)-(4). Note the difference between the words "responsible" and "accountable". Responsibility refers to the fulfilling of a duty, whilst accountability also includes the obligation to provide answers for specific actions/conduct. See also the LG: Municipal Planning and Performance Management Regulations published under GNR 796 in GG 22605 of 24 August 2001. Item 15 of the regulations deals with community participation in respect of IDP and performance management.

<sup>44</sup> 1996 (1) SA 539 (D).

<sup>45</sup> Ordinance 25 of 1974 (N).

was not excused by the ordinance. He was thus liable for the damage caused by his actions.<sup>46</sup> All three components of a municipality must be accountable in municipal matters.<sup>47</sup> There seems to be a stronger awareness of the importance of accountability and our courts should take bold action if accountability is not assured.<sup>48</sup> A system which encourages participation also deepens local democracy, as citizens feel more confident about participating when they know that their inputs count and that those responsible can be held accountable. Accountability in local government further ensures that the actions of the council also reflect the aspirations of the relevant community.

#### **19.4.6 Establishing paths of accountability**

In view of the importance of local accountability, it is essential for all local governments to establish all possible paths/methods to enhance and assure a truly accountable government. There are therefore various paths of accountability, some within the municipality itself and others between the municipality and the particular local community. The following diagram provides an overview of the various paths.<sup>49</sup>

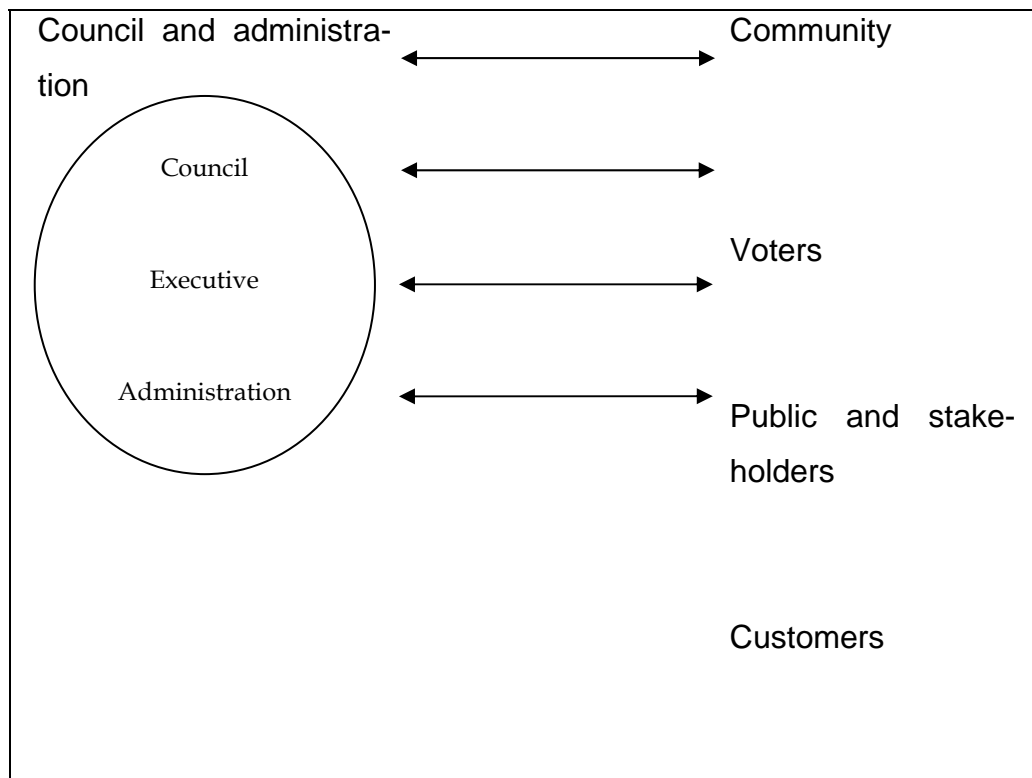
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<sup>46</sup> See the *Umzinto* case *supra* fn 44 at 543-545.

<sup>47</sup> The three components are the political office bearers, the municipal staff members and, to a lesser extent, the local community members.

<sup>48</sup> See in this regard the unreported case of *LR Brink and G Nieuwoudt v Die Speaker van die Munisipale Raad van Nala Plaaslike Munisipaliteit en een ander*, Free State High Court, December 10 2001 under case no 2125/2001. The case concerned mainly the suspension of two councillors from the municipal council. The court found on the facts that the grounds for suspension were frivolous and devoid of the rules of natural justice. The court held that the actions of certain councillors were so unreasonable and tainted by racism and maliciousness that it would be unfair to apply ratepayers' money to funding the action and that the costs of the matters should be paid by the relevant councillors out of their own pockets. The Constitution demands rational decision making, openness and fairness. Such features are essential to legitimacy, public confidence and acceptance of any administration. According to the Constitution, and more particularly s 152, municipal governments must be accountable governments. It is submitted by some legal experts that accountability can now be seen to extend further than the administrative organ itself and, in some extreme cases, can even mean personal accountability of those individuals who collectively make up the particular organ. See also Barrie G "Caveat town councillors" *Without Prejudice* (2001) 8. For a similar example of collective accountability, also refer to the Constitution ss 80(4) and 122(4), which allows the Constitutional Court to order unsuccessful applicants of the National Assembly or a provincial legislature to pay the legal costs of an application under the sections.

<sup>49</sup> Diagram taken from LGIS no 2 "Participation and Accountability" (1999) at 10.



As was mentioned above, a municipality is accountable to both institutions inside the municipality and to the public and other stakeholders outside the municipality. On the external level, municipalities are accountable to the public which they serve. External accountability manifests in different ways. There is, for example, the accountability of a ward councillor to the ward inhabitants. If the population of a ward is not satisfied with such a councillor, they should vote the person out of office in the next election. Non-ward councillors are also held accountable through pressure on the relevant political party that they represent. According to the new local government system, all councils must put an integrated development plan in place, which plan is linked with the five-year term of office of councillors. Councillors can thus be held accountable in respect of their performance relative to such an IDP. It is not only the political office-bearers that are accountable to the public, however; the municipal administration is also accountable. It must be emphasised that the relationship between the administration of a municipality and its local public is very important. Quality and professional service fosters public support and participation.<sup>50</sup> It is ultimately the

<sup>50</sup> Public accountability of municipal administrative staff has always been somewhat problematic, but in many municipalities it seems to have taken a turn for the worse. Both national and provincial governments have recognised the need for improvement in such regard. The *Batho Pele* (people first) programme is but one new initiative, which aims to ensure accountability through im-

*continued on next page*

responsibility of each municipality to ensure that it has implemented effective mechanisms and procedures to ensure that accountability is achieved. It should further be pointed out that organised labour is also accountable to the broader community. Unions have a duty to encourage their members to serve their communities. Ultimately what is needed is a balance between the needs and aspirations of workers and the needs of the community towards affordable and accessible services.<sup>51</sup>

Accountability must also be provided for within a municipal administration. In such instances various forms of accountability can be distinguished. Firstly, there should be strong accountability between the executive authority and the municipal council. Under new policy directives and emerging legislation, the role of executive structures within the council has been enhanced. The introduction of a speaker particularly enhanced executive accountability to the council and public.<sup>52</sup> Apart from being accountable to the executive authority, the council and the administration are accountable to one another. The administration has to answer to the council's political leaders, but the leader must support the administration in doing its work. On this point it should be noted that the new developmental nature of local government, with its greater emphasis on participation and accountability, has resulted in many changes in the way in which municipalities function.<sup>53</sup> Accountability is also required between the municipality as employer and organised labour. Various strategies should be developed to ensure that workers have a say in the way in which a municipality is to function. Finally, municipalities are also accountable to the other spheres of government, which are reciprocally accountable to them. For example, municipalities are required to implement national and provincial development programmes, but both national and provincial governments have a supporting, co-ordinating and monitoring role with regard to municipalities. All in all, the three

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proved customer management and service provision. See LGIS no 2 "Participation and Accountability" (1999) at 11.

<sup>51</sup> According to the White Paper on Local Government, labourer' interests should not stand in the way of transformation or delivery objectives. It is envisaged that the new South African Local Government Bargaining Council must play a critical role in enhancing positive partnerships between labour, management, the council and, finally, the relevant local community.

<sup>52</sup> Refer to all the special functions that the speaker must perform and oversee. The speaker functions as a person who is charged with ensuring that the council and its structures are accountable for the way in which they function.

<sup>53</sup> The enforcement of party political idealism within a particular administration often does not encourage co-operation and can be very destructive. See LGIS no 2 "Participation and Accountability" (1999) at 14.

spheres of government have an overarching constitutional accountability to the new constitutional model and to the nation at large. Such accountability is founded on the Constitution itself, as it requires a system of democratic government founded on *inter alia* the values of accountability, responsiveness and openness.<sup>54</sup>

In an effort to ensure that accountability is achieved, many new initiatives have been implemented. It is submitted that these initiatives should go a long way towards enhancing and achieving accountability. Some of the new initiatives are summarised briefly as follows:<sup>55</sup>

- *Codes of conduct* Codes of conduct have been introduced for councillors, traditional leaders and officials. Such codes should ensure that those individuals act in the interest of the communities that they serve and that they are accountable for their actions.
- *Full-time appointed councillors* Full-time councillors will have more time to fulfil their functions, which should improve effectiveness and accountability.
- *New structures and functionaries* Under the new legislative system, new and enhanced structures and functionaries such as the office of the executive mayor and the new municipal manager have been created. These structures and functionaries have specifically allocated powers, responsibilities and functions and should also play an important role in ensuring municipal compliance to all its duties and objectives.
- *Performance management* Under the new system, municipal performance is measured against key performance indicators (KPI). The KPI should be set up in consultation with the public and other stakeholders and should encourage participation and accountability through regular monitoring.
- *Public rights and responsibilities* Residents in particular municipal jurisdictions have both rights and obligations. Such a system, which requires a balanced approach, should also enhance municipal accountability and effectiveness.

#### **19.4.7 Developing programmes for participation**

It was mentioned above, that all municipalities are now legally obliged to develop systems of public participation. Such development requires different phases. In the first phase, municipalities should build up a relationship with all the relevant stake-

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<sup>54</sup> Refer to the Constitution the Preamble and s 1(d).

<sup>55</sup> Refer to LGIS no 2 "Participation and Accountability" (1999) at 12.

holders in their communities and develop a shared vision for the area as a whole. All interest groups should be involved. This process can be initiated through various strategies such as publicity days and local media coverage. Care should be taken not to marginalise groups within communities. People must also see that the municipal initiative is genuine and that serious consideration is given to their involvement. The second phase should involve the internal restructuring of municipal administrations. Existing staff members and councillors should change their attitudes toward public participation and their own accountability. Once a new relationship has been established the new system of interaction and participation should be maintained.

From the discussion above it is clear that the new local government system is significantly different from the one that existed prior to the new constitutional dispensation. Municipalities are now constitutionally obliged to provide democratic and accountable governance for all local communities. New laws provide the basis for making the new system a reality. The key to the success lies in the capacity and willingness of all stakeholders to take the processes forward, however.

### **19.5 Aspects concerning municipal performance management and capacity building**

The new legislative framework for local government has also established new demands on the performance of municipal staff members to ensure that the objectives of local government are met. After the transformation process had been initiated, municipal administrations were faced with various new challenges and demands: municipal jurisdictions were enlarged, many service backlogs became evident, a new constitutional vision and place for local governments was created, new boundaries were drawn and finally a new legal framework for local governments was initiated. Special directives and assistance to municipal administrations are therefore essential in order to ensure a more efficient, customer-orientated and developmentally creative local government dispensation. In order to create such a system, proper performance management within all municipal administrations is generally regarded as a prerequisite; performance management is seen as a strategic tool that can encourage new attitudes, skills and competencies within the new local government dispensation.

In essence, performance management can be summarised as a process whereby municipalities seek to improve and monitor their functioning and accountability on an ongoing basis. Performance is then regularly assessed to determine whether plans



have been implemented, resources are being used effectively and whether the municipality is fulfilling its duties and responsibilities. If municipal performance management is implemented correctly, it should enable municipalities to deliver quality services in a cost-effective, efficient and accountable manner. In light of the fact that performance management is a new concept for local administrations, there is no uniform or general model available which municipalities can implement with guaranteed success. An effective and efficient performance management system must be developed to meet the unique circumstances that exist in modern local governments in South Africa.<sup>56</sup>

The previous local government dispensation never provided properly for a comprehensive performance management system. Consumers or the public at large never had the opportunity to measure the effectiveness of municipal service delivery and quality of services. Under the new constitutional requirements local governments are obliged to meet the basic needs of citizens, and especially provincial governments are tasked with monitoring the performance, capacity and effectiveness of municipalities within their respective jurisdictions. In follow-up on the constitutional provisions, the new legislative framework for local governments provides specifically for the enhancing of municipal performance management.<sup>57</sup> The need for a general performance management system for all municipal governments was already envisaged in the White Paper on Local Government. The White Paper confirmed that the aim of a new national performance management system is to:<sup>58</sup>

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<sup>56</sup> Under the new constitutional system, various systems have been proposed to establish an effective performance management system. One such proposal was the *Batho Pele* (people first) vision for managing performance in the broader public sector. The *Batho Pele* proposal is aimed at delivering the best service to the public. The proposal consisted of eight service delivery principles (ie consultation, service standards, access, courtesy, information, openness and transparency, redress and value for money). *Batho Pele* also aims at constantly improving the quality of services through the implementation of an eight-step process. Such steps, which could serve as an important guide for municipalities that embark on performance improvement programmes, are: identification of the customer; establishing customer needs and priorities; determining the current service baseline; identifying the improvement gap; setting service standards; gearing up for delivery; announcing service standards and finally monitoring delivery against standards and publishing the results. These principles should form the basis for any new local government performance management system. The overall aim is to make municipalities efficient, customer-orientated, developmentally creative institutions that enable citizens to obtain better service delivery. See LGIS no 2 "Performance Management" (1999) at 4-5.

<sup>57</sup> See the Local Government: Municipal Systems Act ch 6. The aim of the new legal framework is to: define goals and priorities; establish objectives, set indicators for performance, measure performance; review and adjust service delivery mechanism and finally to report on the progress made.

<sup>58</sup> Refer to the White Paper on Local Government (1998) at 51-52.

- assess the overall state of local government
- monitor the effectiveness of development and delivery strategies of municipalities and ensure that scarce resources are utilised efficiently
- provide early warning signals
- allow for performance comparison between municipalities across the country
- identify successful approaches or best practises
- provide a national set of performance indicators.

The envisaged system is not aimed at imposing additional burdens on municipalities but rather at seeking a change in the way in which municipalities perform and fulfil their duties and responsibilities.

#### ***19.5.1 The new legislative requirements regarding municipal performance management***

As was envisaged in the White Paper on Local Government, national legislation under the new local government dispensation specifically determines various aspects regarding municipal performance management. All municipalities are now legally obligated to establish and develop performance management systems (PMS) and to review such systems. The new legal requirements relevant to municipal performance management are briefly as follows:

- *The establishment and development of performance management systems* Each municipality established under the new local government dispensation must establish a performance management system that is commensurate with its resources, that is best suited to its circumstances and is in line with the priorities, objectives, indicators and targets contained in its integrated development plan. Municipalities must further promote a culture of performance management among their political structures, office bearers, councillors and municipal administrations. They must also ensure that their affairs are administered in an economical, effective, efficient and accountable manner.<sup>59</sup> Specific responsibility has been placed on the executive committee or executive mayor, whichever is applicable, or a committee of councillors appointed by the municipal council in the absence of an executive committee or executive mayor,

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<sup>59</sup> See the Systems Act s 38(a)-(c).

- (a) to manage the development of a municipality's performance management system
- (b) to assign certain responsibilities of the system to the municipal manager
- (c) to submit the proposed system to the municipal council for adoption.<sup>60</sup>

All municipalities must further establish mechanisms to monitor and review their performance management system.<sup>61</sup>

- *The core components and community involvement in municipal performance management systems* Every performance management system is required to include various core components. Accordingly, in terms of its performance management system and any other regulations and guidelines that may be prescribed, every municipality must incorporate and provide for the following.<sup>62</sup>

- (a) setting appropriate key performance indicators (KPIs) as a yardstick for measuring municipal performance, including outcomes and impact, with regard to the municipality's development priorities and objectives set out in its IDP
- (b) setting measurable performance targets for each of the development priorities and objectives
- (c) monitoring performance and measuring and reviewing performance at least once a year against the development priorities and KPIs
- (d) taking steps to improve performance where targets have not been met
- (e) establishing a process of regular reporting to the council, political structures, office bearers, staff, the public and appropriate organs of state.<sup>63</sup>

It is further also obligatory for a municipality to involve the local community in the development, implementation and review of the municipality's PMS and also to allow the community to participate in the setting of appropriate key performance indicators and performance targets.<sup>64</sup>

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<sup>60</sup> Refer to the Systems Act s 39(a)-(c).

<sup>61</sup> The new legal framework does not provide guidelines on what mechanisms should be employed. It seems that if it is left to each municipal council to decide on what mechanisms to employ to monitor and review performance. See the Systems Act s 40.

<sup>62</sup> See the Systems Act s 41(1)(a)-(e).

<sup>63</sup> In this regard, appropriate organs of state should include provincial governments which are tasked to oversee and monitor municipal performance. Ss 41(2) requires the PMS applied by a municipality to be so devised that it could serve as an early warning indicator of under-performance.

<sup>64</sup> See the Systems Act s 42. This section entrenches for the first time real and constructive public participation in respect of municipal performance control and oversight. It is submitted that

*continued on next page*

- *The setting of key performance indicators and the audit of performance measurements* Under the new legal framework for local government, after consultation with the MEC for local government and organised local government nationally, the minister for local government may prescribe by regulation general key performance indicators that are appropriate and that can be applied to local government generally. The minister may also review and adjust those KPIs when necessary.<sup>65</sup> All municipalities are further required, in a manner determined by their council, to make known to the general public, both internally and externally, which KPI and performance targets are set by the municipality for purposes of its PMS. The results of such a PMS and performance measurements must be audited as part of the municipality's internal auditing processes and also annually by the auditor-general.<sup>66</sup>
- *Requirements regarding reports on the PMS and the making of regulations and guidelines* Apart from the establishment of a municipal performance management system, each municipality must prepare for each financial year an annual report consisting of *inter alia* a performance report. Such a performance report should reflect:
  - (a) the performance of the municipality and each external service provider during that financial year
  - (b) a comparison of the performances with the targets set for them and also the performances in the previous financial year
  - (c) measures taken to improve performance.<sup>67</sup>

It should be noted that an annual performance report must form part of a municipality's annual report as is determined in chapter 12 of the Municipal Finance Management Act.<sup>68</sup>

Apart from the reporting responsibility on the municipal manager, the newly enacted legislative requirements also place a similar responsibility on the MEC and the minister concerned. In this regard, the MEC for local government in a province is obliged

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this enhancement of public participation would significantly contribute to more active public involvement in municipal affairs.

<sup>65</sup> See the Systems Act s 43(1)(a)-(b). General KPIs must be included in a municipal PMS where applicable. See s 43(2).

<sup>66</sup> Refer to the Systems Act ss 44 and 45 respectively.

<sup>67</sup> Read s 46(1)(a)-(c) of the Systems Act as substituted by Act 44 of 2003 s 6.

<sup>68</sup> See s 46(2) of the Systems Act as amended.

annually to compile and submit to the provincial legislature and the national minister responsible for local government a consolidated report on the performance of municipalities in that province. The consolidated report must identify all municipalities that have underperformed during the year, as well as the proposed remedial action to be taken. The report must then be published in the *Provincial Gazette*.<sup>69</sup> Finally, the minister responsible for local government must annually compile and submit to parliament and the nine MECs for local government in the provinces a consolidated report of local government performance in general, in terms of general key performance indicators. Such a report must be published in the *National Gazette*.<sup>70</sup>

In confirmation of the fact that the new legislative requirements are not a complete legal system and in order to cater for the effectiveness of the system, the national minister is permitted to make regulations or to issue guidelines to provide or regulate certain issues. These are:<sup>71</sup>

- incentives to ensure municipalities establish PMSs within a prescribed period and comply to the Act
- the setting of KPIs by a municipality with regard to its development objectives
- the identification of appropriate general KPIs that can be applied to municipalities generally
- the regular review by a municipality of its KPIs
- the setting of a framework for performance targets by municipalities consistent with their development priorities, objectives and strategies set out in their IDPs
- mechanisms, systems and processes for the monitoring and measurement of performance by a municipality with regard to its development objectives
- the internal auditing of performance measurements
- the assessment of those performance measurements by a municipality;
- the assessment of progress by a municipality with the implementation of its IDP
- the improvement of performance
- any other matter that may facilitate the implementation by municipalities of an effective and efficient PMS or the application of chapter 6 of the Systems Act.

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<sup>69</sup> See the Systems Act s 47(1)-(2). The MEC is also tasked to submit a copy of the report to the NCoP S 47(3) of the Act.

<sup>70</sup> See the Systems Act s 48.

<sup>71</sup> See the Systems Act s 49(1)(a)-(k).

It is clear that the legislator's intention was to give the minister a wide authority to make regulations or to issue guidelines. When the minister makes regulations or issues guidelines he/she must take the capacity of municipalities into account and he/she must differentiate between different kinds of municipality.<sup>72</sup>

### **19.5.2 *Creating and maintaining an effective system of municipal performance management***

With reference to the abovementioned legislative requirements in relation to municipal performance management, two key elements seem to be significant. At first, each municipality will have to identify and prioritise those areas where performance improvement is most required. Such areas will include both external developmental priorities and internal transformation necessities. National government should assist municipalities by identifying common performance areas that are applicable to all municipalities, such as access to basic services such as water, sanitation, electricity and housing. Through national minimum standards, municipalities will be guided when defining their own goals within their unique circumstances and will consolidate existing fragmented approaches to services. The second key element is performance assessment. An objective performance assessment is crucial for the creation and maintenance of an economic, efficient and effective local government performance management system.<sup>73</sup>

Apart from the two key elements of an effective and efficient PMS, all performance management systems should contain six core elements. Each element is important to make the system work, and are discussed briefly as follows:

- *Performance measurement* Performance measurement requires a relatively objective framework for assessing performance. Measurement is achieved by setting

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<sup>72</sup> Refer to the Systems Act s 49(2)-(4). The minister is also permitted to phase in some or all of the applications of the provisions of the chapter on performance management, which provisions place a financial or administrative burden on municipalities.

<sup>73</sup> To illustrate the functioning of such an objective performance assessment system, imagine the following example: Two municipalities, A and B, with similar budgets, responsibilities and staff both decide to undertake similar-sized housing development projects. How would their respective performance with reference to the project be assessed? It is submitted that the first step would be to assess the economic factors of the project. Such measures look at the cost of resources. If one municipality spent more on materials, such a position would be one indication of performance. Cost measures alone can be misleading, as poorer quality material are cheaper. Quality is thus also important. The second phase of assessment should evaluate quantity and quality in relation to resources used. Finally the effectiveness should be evaluated. It is important to assess what effective contribution to the overall developmental objectives of a municipality has been achieved through the project. See also LGIS no 2 "Performance Management" (1999) at 11.

performance indicators and linking them to performance targets. Performance indicators indicate how performance will be measured; that is, the number of households to receive water connections. Performance targets again refer to the result to be achieved within a given timeframe (eg 5000 connections by yearend 2005). Performance indicators can be determined only once a municipality has identified the key objectives for development in its area and with the municipality's overall developmental goals and priorities in mind. Many municipalities have set various performance indicators through their development-planning processes. A distinction should be made between general performance indicators and local performance indicators. General performance indicators refer to such indicators that are applicable to all municipalities, while local indicators reflect particular local developmental priorities and objectives. Any KPI should ensure that the right area of performance is measured and that the quality of performance is also assessed. Part of any process of performance measurement involves the establishment of targets for each performance indicator. Performance is then measured within a given timeframe, according to whether targets for each indicator have been achieved. The setting of performance targets can be a somewhat complicated exercise and should ultimately result in realistic and achievable objectives. In determining proper targets it is suggested that certain guidelines be used and that a checklist be developed when targets are set for particular indicators.<sup>74</sup>

- *Performance monitoring and evaluation* The monitoring and assessment of the performance of municipalities is a crucial aspect of any successful PMS. Monitoring and evaluation are processes aimed at assessing the performance of municipalities and the people that work for them. It is important to note that the assessment of people refers not only to municipal staff members but also to external contractors that do work or provide services on behalf of a municipality. Generally speaking, performance monitoring is an ongoing process to determine whether targets are being met and whether development objectives are being

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<sup>74</sup> According to LGIS no 2 "Performance Management" (1999) at 14 the following guidelines and checklist questions should be useful in determining performance targets: Guidelines are preciseness and measurability, relevance to user, being demanding but realistic, approved by politicians and providing communication to the public. Checklist questions could include the number of each service provided, how many new services were provided in a year, what trends are impacting on the service, what customers expect, the municipality's realistic capacity and what other similar municipalities are achieving.



achieved. Performance management must be conducted very carefully, and information should not be manipulated to produce results that appear better than they really are. Uncompromising integrity of performance management is therefore essential. In contrast with the monitoring process, performance evaluation is a deeper and more detailed process of performance analysis. Such an evaluation process looks not only at whether a municipality is performing adequately but also at the areas of underperformance. All municipalities should make special arrangements to evaluate performance regularly. A further key element of the monitoring and evaluation process is so-called “performance auditing”. This process involves verifying that the measurement mechanisms and results are accurate and that proper procedures have been followed to evaluate and improve performance. The checks built into the new legislative framework should ensure objective verification of performance results and should ultimately enhance municipal service provision and compliance with the new constitutional demands.<sup>75</sup>

- *Performance reporting* Under the new legal framework, all municipalities are obliged to submit annual performance reports to the public and higher spheres of government. It is submitted that the reporting requirement should significantly enhance public participation and municipal accountability and should therefore be strictly enforced.
- *Capacity building* Without the necessary capacity, municipalities will not be able to perform and fulfil their duties and responsibilities. Municipal capacity building must therefore be a core element of a broader performance management strategy. Capacity building is a process of developing the ability for improved performance within municipalities and will be discussed in more detail elsewhere in this chapter.
- *Intervention* It was mentioned earlier that the Constitution allows and demands intervention into the affairs of local government when necessary. Especially the provinces are tasked with oversight and intervention powers into the affairs of municipalities when cases of non-performance are reported. Such interventions should be based on accurate diagnostic results, however, and should be undertaken on an objective basis. When intervention is allowed on subjective grounds

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<sup>75</sup> See LGIS no 2 “Performance Management” (1999) at 16-17. A further check on performance monitoring and evaluation is public participation. Public involvement and pressure for improved performance  
*continued on next page*

or without proper justification, the new constitutionally entrenched status of local government as an independent sphere of government would be unnecessarily jeopardised. In this regard it should be emphasised that the ultimate aim of intervention is not to create a hierarchy of one sphere of government over another but to ensure that citizens receive the essential services that are promised under the new constitutional scheme.

- *Performance incentives* Ultimately the performance of any particular municipality and its staff depends on certain incentives within the PMS. Good performance should be rewarded whilst poor performance should be penalised. Various means of incentive are possible, such as fiscal and political motivators, rewards, competitions and individual motivational schemes.

### **19.5.3 Implementing performance management**

The implementation and maintenance of an effective PMS is in essence founded on the new constitutional foundation. All spheres of government are constitutionally obliged to fulfil their duties and responsibilities according to the constitutional prescriptions and to ensure a general system of democratic government that is accountable, responsive and open. Local governments are further tasked with specific developmental duties and the achievement of specified municipal objectives.<sup>76</sup> In order to determine whether such objects and duties are being met, a proper system of accountability and performance management is necessitated. Under the provisions of the Systems Act, a new legal framework for national performance management has been enacted. In essence, the new system will function as follows:

- *Step 1:* All municipalities must identify the areas that require performance measuring and improvement. This will be an integral part of the IDP process and the setting of development objectives.
- *Step 2:* Once the areas have been identified, a municipality will monitor and measure its performance by developing indicators and targets for each of the development priorities.
- *Step 3:* A municipality will then have to evaluate its performance and take steps to improve performance when targets are not being met.

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formance should be protected as an important part of the overall PMS of a municipal government.  
<sup>76</sup> See the Constitution ss 1, 152 and 153.

- *Step 4:* In addition to those areas identified by a municipality, some areas fundamental to the overall reconstruction and development of South Africa will be identified by national government, through consultation with key stakeholders such as SALGA and provincial governments.
- *Step 5:* Each municipality will be expected to report on these areas through the prescribed national indicators and targets.
- *Step 6:* A municipality will be able to exceed the targets set by national government, but it will not be able to perform below those targets.

To illustrate the practical application of the new PMS, the example is given of a municipality where 50% of the residents do not have access to clean drinking water. Water is arguably the single most essential municipal service, as it is needed for drinking, cooking, washing and cleaning. Without water, communities suffer severe discomfort and disease. As a first step, the particular municipality will identify water provision as an area that requires performance measuring and improvement. Water provision to all residents will be set as a priority with a correlating objective of giving all residents access to at least a certain number of litres of drinkable water per day. The objective will then translate into development strategies which could include major investment programmes in water schemes. Strategies could also include cross-subsidising between consumers if necessary.

As a second step, and once the area of performance have been identified, then a municipality will have to monitor and measure its performance. This is achieved through the development of KPIs and targets for each of the identified priorities. The following KPIs and targets could be relevant to the example mentioned above:

KPIs:

- the percentage of households that do not have access to water (measure growth)
- the bacterial count in water (measure quality of water)
- average time spent by community members (measure impact of scheme on community to bring water to their houses)
- percentage of residents paying for services (measure sustainability and financial impact).

Targets:

- to reduce households without water from 50% - 30% in two years
- to ensure quality of water is up to standard
- to reduce travel time for community to fetch water

- to ensure measures are taken to service payment collections better.

Under the third step, the municipality will have to evaluate its performance and will have to take steps to improve performance when targets are not met. Measurement mechanisms can include:

- keeping data of households with water
- testing water quality regularly
- surveying residents' activities and the implementation of a proper billing and credit control system.

Finally, the municipality must report on its performance management in each area as is required by law.

Although the many benefits of a proper PMS are very clear, the implementation of such a system does present various challenges. Challenges that are most common are limited financial resources, inadequate administrative capacity, poor public participation and a slow ability to adapt to the new legal order. In order for effective and efficient performance management to occur, it is suggested that all municipalities will have to commit themselves to this end and dedicate their energy to overcoming the different challenges and finding new ways to fulfil their duties and obligations. Other spheres of government must assist municipalities in this endeavour, but ultimately the responsibility lies with municipalities all over the country to start focusing on the new outcomes of municipal services and programmes.<sup>77</sup>

## **19.6 Aspects regarding municipal capacity building**

### **19.6.1 Introduction**

It is a general phenomenon all over the world that local governments are pushing for autonomy and decentralised decision making. More autonomy and decentralised powers often leave municipalities with many new performance demands, however. The position in South Africa under the new local government legislative framework is no different. The new local government dispensation has created strict legal demands on municipalities to comply and fulfil certain duties and responsibilities. Without a sufficient capacity, municipalities will not be able to fulfil such duties and

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<sup>77</sup> In order to enhance the new legislative requirements dealing with performance management the LG: Municipal Planning and Performance Management Regulations were promulgated. See GNR 796 in GG 22605 of 24 August 2001. The regulations provide for *inter alia* the nature of a performance management system, the adoption of a PMS, the setting of key performance indicators, general key performance indicators, the setting of performance targets and the monitoring review and internal auditing of performance measurements.

responsibilities, however. It is of paramount importance therefore that municipalities themselves, as well as the two higher spheres of government, ensure that municipal capacity is adequate to ensure compliance with their new constitutional and other legislative obligations. Municipal capacity building is thus regarded as one of the more important tools available to municipalities to ensure service delivery and the overall fulfilment of their duties and responsibilities. Capacity building should therefore form one of the strategic programmes that municipalities must put in place.

During the former local government dispensation, capacity building was often racially determined and did not support democratic municipal development. Under the new system municipalities have been afforded distinctive autonomy and powers and are supported to handle their own affairs in accordance with their own priorities. Capacity building should be a very important objective for all municipalities, as it will ensure various advantages. The following advantages will be secured through a solid municipal capacity:

- services are delivered as is legally required
- more powers can be delegated down to a municipal level
- better investment opportunities can be created.

Capacity building is therefore very important and should be done on the political, financial management and administrative levels. It speaks for itself that capacity building cannot be done without proper training.<sup>78</sup> With the restructuring of local government, the overall local government capacity building scheme had to be revisited and changed. It was especially envisaged that the new system should ensure the following results:<sup>79</sup>

- to respond to municipal needs
- to be acceptable and aimed at all people
- to offer capacity building that qualifies officials and frontline workers for promotion and further development

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<sup>78</sup> Under the former system two training bodies made up local government training. There was the Local Government Training Board (LGTB), established under the Local Government Training Act, and the Apprenticeship Training Board for Local Authorities (ATBLA), established under the Manpower Act. The two structures operated separately and addressed different fields in the training sector. Coordination was poor, and the absence of a common national vision on capacity building led to a lack of objectives, fragmentation of training programmes and poor staff development results. The two bodies later merged into the Local Government Education and Training Board (LGETB).

<sup>79</sup> See LGIS no 2 "Capacity building" (1999) at 5.

- to address the capacity building needs of rural municipalities
- to ensure the involvement of all role players to find solutions for municipal challenges.

### **19.6.2 Establishing a new local government training system**

In the White Paper on Local Government, a vision and framework was provided within which local government capacity building was to be developed. The previous system had to be changed to become a more flexible, decentralised and demand-driven system with continuous improvement of municipal staff members and political office bearers.<sup>80</sup> In response to the new changes and challenges of the new system, a new set of skills and competences had to be created to ensure an overall developmental local government. Various initiatives have thus been piloted in a variety of newly created capacity building programmes and schemes.<sup>81</sup>

In follow-up on the vision in the White Paper on Local Government, various laws have been passed or amended to give more meaning and substance to the new local government capacity-building system. See, for example, the Skills Development Act,<sup>82</sup> which Act requires a Sector Education Training Authority (SETA) to be established in every sector of the South African workforce in order to develop skills.

This LGSETA will be made up of representatives of both organised labour such as SAMWU and IMATU and organised employer's organisations, which are represented under SALGA. Specific functions have been envisaged for the new LGSETA to fulfil. Such functions include:<sup>83</sup>

- Preparing a Local Government Skills Plan.
- Implementing the Local Government Skills Plan by
  - (a) establishing learnerships
  - (b) approving workplace skills plans
  - (c) allocating grants to employers, education and training providers and workers

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<sup>80</sup> See the White Paper on Local Government (1998) at 115.

<sup>81</sup> Examples of some of the new competencies and capacity-building programmes are: councilors' code of conduct, falling under SALGA training; performance management, falling under the department of Constitutional Development; integrated development planning, falling under the department of Constitutional Development; local economic development, falling under the department of Constitutional Development and NGO's financial management; voter education, falling under the IEC and senior management development, falling under university-based training programmes. See LGIS no 2 "Capacity building" (1999) at 7.

<sup>82</sup> 97 of 1998.

<sup>83</sup> See LGIS no 2 "Capacity building" (1999) at 9.

- (d) monitoring local government education and training in the sector.
- Promoting learnerships by
  - (a) identifying work places for practical work experience
  - (b) supporting the development of learning materials
  - (c) improving the facilitation of learning
  - (d) assisting in the conclusion of learnership agreements.
- Registration of learnership agreements.
- Applying to SAQA for accreditation as an Education and Training Quality Authority (ETQA).
- Collecting Skills Development Levies and disbursing these to municipalities.
- Reporting on income and expenditure and the implementation of its sector skills plan to the Director-General of Labour.
- Appointing staff for the performance of its functions.

The Skills Development Act also introduces a new learnership approach to skills development. This approach requires a combination of institutional learning and workplace learning/experience. Skills development, which will require substantial financial resources, is financed largely through the Skills Development Levies Act.<sup>84</sup> The levies are not sufficient to meet the existing training needs, and it is clear that other funding sources such as private donors, business or even other spheres of government should be explored.

It was mentioned above that it is not only municipal staff members that are in need of new training, but also political office bearers. The new constitutional and other legislative requirements have placed important responsibilities on political representatives. In this regard SALGA has developed a so-called "councillor-training programme" for all councillors. In order to ensure quality in the new training programmes, the South African Qualifications Authority Act,<sup>85</sup> has established the South African Qualifications Authority (SAQA), which must oversee the implementation of a national qualifications framework (NQF). The NQF is seen as a new way of "grading" learning achievements by using eight NQF levels.<sup>86</sup> The new NQF ap-

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<sup>84</sup> 9 of 1999.

<sup>85</sup> 58 of 1995.

<sup>86</sup> The lowest NQF level is level 1, which is the equivalent of grades 7-9 of the traditional high school education grading system. Level 4 corresponds to grade 12. In future, most officials will be trained against the eight NQF levels.



proach towards learning is different from the past, as it is based on learning outcomes, which are measured by the ability of a learner after training to convert his/her learning into work performance. SAQA and the NQF also promote a system for the recognition of prior learning and so-called “life-long learning”. These initiatives should allow people gradually to qualify themselves and to help to develop the careers of staff members and ensure that local government becomes an attractive place of work.

### **19.6.3 Mechanisms to enhance municipal capacity building**

In light of the new legal requirements, it is obvious that all local governments will have to establish various training and development programmes. Such programmes and initiatives will necessarily be different for each of the different categories and types of municipality because of their diverse circumstances and responsibilities. In many instances, the new local government dispensation is characterised by various performance gaps, some of which can be filled only through the training of councillors, officials and other frontline workers. What municipalities need is a good training programme. In order to establish such a training programme municipalities need to determine which of the problems they encounter can be solved through building the capacity of staff and which cannot. In instances where internal capacity building cannot solve the problems, alternative approaches exist such as outsourcing or the conclusion of partnerships with other private or public institutions. It is also very important for municipalities to prioritise their capacity-building strategy as part of their integrated development plan. In this regard it is suggested that every IDP should incorporate a skills-development plan as a key component, which should facilitate capacity-building solutions within the municipality.<sup>87</sup> Under the new constitutional dispensation, all provinces are obliged to build the capacity of local governments. Various interactions and cooperation strategies must still be developed between municipalities and their respective provincial governments in order to fulfil the constitutional vision and obligations.

## **19.7 Conclusion**

In conclusion, it is submitted that the principles of public administration, performance management and municipal capacity building are currently in need of major trans

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<sup>87</sup> See LGIS no 2 “Capacity building” (1999) at 16.

formation. According to the new legal framework, an entirely new approach towards capacity building, performance management and public participation has been mandated. All municipalities will have to take and implement new initiatives to ensure compliance with the newly established legislative requirements. All in all one can conclude that the new vision for local government is to create an essentially customer-orientated public service. The codes of conduct for both councillors and staff members set out basic requirements for accountability and control. It is further submitted that the new legal framework indeed lays a sound foundation for a more people-orientated local government system, which should be able to meet the demands of all South African people and should ensure a better and brighter future for all.

## Municipal development planning

### 20.1 Introduction

According to the new legal framework for local governments, a significant measure of responsibility relating to municipal planning has been decentralised to local government structures. Although municipal planning is incorporated as a functional area of concurrent national and provincial legislative competence,<sup>1</sup> all municipalities are constitutionally obligated to structure and manage their administrations and budgeting and planning process in such a way as to give priority to the basic needs of their communities. All municipalities must also promote the social and economic development of their communities.<sup>2</sup> The new constitutional dispensation furthermore determines that one of the objects of local government in general is to promote social and economic development and to promote a safe and healthy environment.<sup>3</sup> Because of this new constitutional mandate, the new local government system is often referred to as a developmentally orientated local government system. It is obvious from the abovementioned requirements that local government planning processes must be structured and organised so as to achieve the objects of the new local government dispensation and also to give priority to the basic needs of their respective communities. If local governments are to achieve such a developmental system, they are to be thoroughly supported by the two higher spheres of government. Both national and provincial laws are therefore needed to ensure municipalities fulfil their developmental duties. Whereas provincial laws will often differ in content and approach, national legislation should provide an overarching set of regulatory provisions so as to enable municipalities to create a basic planning framework. In compliance with its responsibility in this regard, parliament has enacted the Local

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<sup>1</sup> See the Constitution Part B Sch 4.

<sup>2</sup> Refer to the Constitution s 153(a).

<sup>3</sup> See the Constitution s 152(c)-(d).

Government Municipal Systems Act.<sup>4</sup> The provisions of the Act relating to planning and environmental issues will be discussed below.

## **20.2 National principles concerning local government developmental planning**

### **20.2.1 General requirements relating to municipal development planning**

According to the Local Government: Municipal Systems Act, local government planning is to be developmentally orientated. In order to achieve this objective, all municipalities must undertake developmentally orientated planning so as to ensure three purposes:<sup>5</sup>

- that municipalities strive to achieve the objects of local government set out in the Constitution
- that municipalities give effect to their developmental duties set out in the Constitution and
- that municipalities with other organs of state contribute to the progressive realisation of the (socio-economic) fundamental rights contained in the Constitution.<sup>6</sup>

In order to achieve and undertake planning processes that are developmentally oriented, the Systems Act determines that its provisions in this regard must also be read in conjunction with chapter I of the Development Facilitation Act.<sup>7</sup>

A second important feature of the new local government planning framework is that the planning processes undertaken by a municipality must be aligned with and must complement the development plans and strategies of other affected municipalities and other organs of state. The purpose of such alignment and complementation of different development plans and strategies is aimed at giving effect to the principles of co-operative government as is contained in the Constitution.<sup>8</sup>

Apart from the requirements of co-operation in municipal planning processes, municipalities are also obligated to participate in national and provincial developmental programmes. Such participation is directly required by the Constitution and is also a

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<sup>4</sup> 32 of 2000 as amended. The Act aims *inter alia* to establish a simple and enabling framework for the core processes of planning, which process *should* underpin the notion of developmental local government. Refer also to the long title of the Act.

<sup>5</sup> See the Systems Act s 23(1)(a)-(c).

<sup>6</sup> Refer to the Constitution ch 2s 24, 25, 26, 27 and 29.

<sup>7</sup> See the Systems Act s 23(2) as well as the Development Facilitation Act 67 of 1995.

<sup>8</sup> Refer to the Systems Act s 24(1) read together with the Constitution ss 40 and 41. According to s 41, all three spheres of government and all organs of state within each sphere must adhere to the principles of co-operative government as are set out in the Constitution. The main objective of co-operative government is to ensure co-operation and co-ordination between the various role players.

national consequence of the fact that both national and provincial governments have concurrent legislative competence over municipal planning activities.<sup>9</sup> The new legal framework also determines that if municipalities are required to comply with planning requirements in terms of national or provincial legislation, then the responsible organ of state must

- align the implementation of that legislation with the provisions of chapter 5 of the Systems Act and
- consult with the affected municipality in such implementation and take reasonable steps to assist the municipality in meeting the legal requirements relevant to its IDP.<sup>10</sup>

Before either national or provincial legislation affecting municipal planning issues is introduced in parliament or a provincial legislator, the organ initiating the legislation must consult with OLG. Similar consultation is required in respect of subordinate legislation before such legislation is enacted.<sup>11</sup> Again the underlining principle of co-operation and co-ordination as part of a system of co-operative government is emphasised.

The new legal framework directed at municipal planning also requires specific requirements regulating the adoption of IDPs. According to the Systems Act, each municipal council must adopt a single, inclusive and strategic plan for the development of the municipality within a prescribed period after the start of its elected term. Such plan should have the following aims:<sup>12</sup>

- (a) to link, integrate and co-ordinate plans and to take into account proposals for the development of the municipality;
- (b) to align the resources and capacity of the municipality with the implementation of the plan;
- (c) to form the policy framework and general basis on which annual budgets must be based;
- (d) to comply with other provisions of the Systems Act;
- (e) to ensure compatibility with national and provincial development plans and planning requirements binding on the municipality in terms of legislation.

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<sup>9</sup> Refer to the Constitution s 153(b), which specifically requires this participation.

<sup>10</sup> See the Systems Act s 24(3)(a)-(b).

<sup>11</sup> See the Systems Act s 24(4).

<sup>12</sup> See the Systems Act s 25(1)(a)-(e).

An IDP adopted by a municipal council as mentioned above may be amended, but it remains in force until a new IDP is adopted by the next elected council.<sup>13</sup> A newly elected municipal council may adopt the IDP of its predecessor, but must comply with certain requirements.<sup>14</sup> Finally, it is required for all municipalities to give notice to the public of such adoption within 14 days of the adoption of its IDP and also to make copies or extracts from the plan available for public inspection. A summary of the plan must also be published.<sup>15</sup>

### **20.2.2 The contents and core components of Integrated Development Plans**

The new national regulatory legislation furthermore sets specific core components that IDP must incorporate. According to the Systems Act, an IDP must reflect the following:<sup>16</sup>

- (a) the municipal council's vision for the long term development of the municipality with special emphasis on the municipality's most critical development and internal transformation needs;
- (b) an assessment of the existing level of development in the municipality, which must include an identification of communities which do not have access to basic municipal services;
- (c) the council's development priorities and objectives for its elected term, including its local economic development aims and its internal transformation needs;
- (d) the council's development strategies which must be aligned with any national or provincial sectoral plans and planning requirements binding on the municipality in terms of legislation;
- (e) a spatial development framework which must include the provision of basic guidelines for a land use management system for the municipality;
- (f) the council's operational strategies;
- (g) applicable disaster management plans;
- (h) a financial plan, which must include a budget projection for at least the next three years; and
- (i) the key performance indicators and performance targets determined in terms of section 41.

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<sup>13</sup> See the Systems Act ss 34 and 25(2).

<sup>14</sup> Read the Systems Act ss 25(3)(a) and 29(1)(b)(i), (c) and (d) in conjunction with one another.

<sup>15</sup> See the Systems Act s 25(4)(a)-(b).

<sup>16</sup> See the Systems Act s 26(a)-(i).

It is quite clear that the IDP has a central and very important function within the new local government system. The IDP serves basically as a guiding document for the short term developmental needs and initiatives of every municipal government in South Africa. For this reason, special provision regarding the status of an IDP has been made and will be discussed later.<sup>17</sup>

### **20.2.3 Requirements regarding the process for planning, drafting, adopting and reviewing Integrated Development Plans**

The Systems Act also determines specific procedures regarding the framework for integrated development planning, for adoption and review procedures of IDP(s) and for the role players involved during the various processes.

In order to establish a framework for integrated development planning, each district municipality must adopt a framework for integrated development planning in its area as a whole. The adoption of this framework is to be effected within a prescribed period after the start of the elected term of the council and also after a consultative process with the other local municipalities in the area has been followed. After adoption, the IDP framework binds both the district municipality and local municipalities in the relevant area jurisdiction of the particular district.<sup>18</sup> At the very least, the framework must

- identify the plans and planning requirements binding in terms of national or provincial legislation on the district municipality, the local municipalities or even any specific municipality on its own within the area
- identify the matters to be included in the IDPs of the district and local municipalities that require alignment
- specify the principles to be applied and co-ordinate the approach to be adopted in respect of the alignment of IDP matters
- determine procedures for consultation between the district and local municipalities during the process of drafting their respective IDPs and also the procedures to be implemented in order to effect essential amendments to the framework.<sup>19</sup>

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<sup>17</sup> See the Systems Act s 35. Refer also to item 2 of the local government: Municipal planning and performance management regulations as published under GNR 796 in GG 22605 of 24 August 2001. Item 2 deals with the details of an IDP.

<sup>18</sup> See the Systems Act s 27(1)-(2).

<sup>19</sup> Refer to the Systems Act s 27(2)(a)-(d). It should be noted that these provisions are applicable only between a district municipality and its various local municipalities. In a metropolitan area,

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Through their municipal councils and within a prescribed period after the start of their elected term, all municipalities are obliged to adopt a process set out in writing to guide the planning, drafting, adoption and review of their IDPs, however.<sup>20</sup> Through the various mechanisms of public participation, a municipality must consult with its local community before adopting the process mentioned above and must give notice to the local community regarding the particulars of the process it intends to follow.<sup>21</sup>

With reference to the process to be followed by a municipality to draft its IDP, the municipality must ensure the following requirements:<sup>22</sup>

- that the process is in accordance with a predetermined programme which must specify timeframes for different steps
- that mechanisms of public participation allow for
  - (a) the local community to be consulted on its development needs and priorities
  - (b) local community participation in the drafting of the IDP
  - (c) organs of state, traditional authorities and other role players to be identified and consulted on the drafting of the IDP
- that the identification of all plans and planning requirements that are binding on the municipality in terms of national and provincial legislation are provide for
- that the IDP is consistent with any other matters that may be prescribed by regulation.

In areas outside metropolitan areas, all district municipalities must plan integrated development for the area as a whole but in close consultation with the local municipalities and must draft its IDP after having taken into account the integrated development processes of and proposals submitted to it by the local municipalities in its area. Simultaneously, all local municipalities must align their IDPs with the framework adopted by the district municipality and must draft their IDPs, after taking into account the IDP process and proposals from the district municipality.<sup>23</sup>

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no such co-operation and alignment is necessary, as the metro municipality is the only local government operating in the particular area of jurisdiction.

<sup>20</sup> The new requirements make it clear that each and every local government is legally required to draft and adopt an IDP for its area. See the Systems Act s 28(1).

<sup>21</sup> See the Systems Act s 28(2)-(3).

<sup>22</sup> See the Systems Act s 29(1)(a)-(d).

<sup>23</sup> See the Systems Act s 29(2)-(3). It is clear that in the new legal system a district council's responsibility for a district IDP is a statutory requirement. All district councils must formulate district wide IDPs, which must include a framework for the IDPs of local councils in their areas of jurisdiction.

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The management of the IDP drafting processes falls under the responsibility of the executive committee or executive mayor of a municipality or under a committee of councillors appointed by the municipal council if it is a municipality without an executive committee or an executive mayor. The responsible committee or person must manage the drafting of the IDP, must assign responsibilities to the municipal manager in the IDP process and must submit the draft plan to the municipal council for adoption by the council.<sup>24</sup> Further monitoring and support to the process of integrated development planning is provided for in that the MEC for local government in the province may:

- monitor the process followed by a municipality
- assist a municipality with the planning, drafting, adoption and review of its IDP
- facilitate co-ordination and alignment of the IDPs of different municipalities and the strategies and programmes of national and provincial organs of state.

The MEC may take any appropriate steps to resolve disputes or differences in connection with the IDP processes between a municipality and its local community or between municipalities.<sup>25</sup>

After an IDP has been adopted or amended, the municipal manager of a municipality must submit a copy of the IDP to the MEC for local government in the province within ten (10) days after such adoption/amendment. The copy of the IDP must further be accompanied by a summary of the pre-adoption process, a statement that the process has been complied with, together with explanations where necessary, and finally in the case of a district and local municipality, a copy of the framework adopted for integrated development planning between the municipalities.<sup>26</sup> The MEC may within 30 days of receiving a copy of an IDP or amendment thereto, or within such reasonable longer period as may be approved by the minister of local government, request the relevant municipal council to adjust the plan or the amendment, in

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tion. District IDPs should thus determine a strategy for promoting economic development in the entire district and ensure upliftment of all communities. Such IDPs should guide revenue-raising and service-delivery activities and promote interaction between citizens, councillors, officials and higher spheres of government. It is important that District and Local IDPs be drawn up parallel to each other and inform and reinforce one another. District councils are thus responsible for aligning and co-ordinating potentially contradictory municipal IDPs. District IDPs are an important tool for integrating service-delivery activities and municipal goals.

<sup>24</sup> See s 30(a)-(c) of the Systems Act.

<sup>25</sup> See s 31(a)-(d) of the Systems Act. The monitoring and provincial supervision is subject to any other law(s) enacted to regulate such supervision in local government spheres, however.

<sup>26</sup> Refer to the Systems Act s 32(1)(a)-(b)(i)-(iii).

accordance with the MEC's proposals, if the plan/amendment does not comply with a requirement of the Systems Act or is in conflict or not aligned with the development plans and strategies of other affected municipalities or organs of state. The MEC may then request a municipal council to comply with the provisions of the Systems Act.<sup>27</sup> A municipal council must consider the MEC's proposals and, within 30 days of receipt of such proposals, adjust its IDP accordingly, if it agrees with the proposals. If a municipality disagrees with the proposals, it must object thereto and must furnish the MEC with written reasons for disagreeing. On receipt of such an objection, the MEC may refer the objection to an *ad hoc* committee for a decision. If the MEC decides to refer the objection, it must be referred within 21 days of receipt of the objection.<sup>28</sup>

The *ad hoc* committee mentioned above must be appointed by the MEC, whenever necessary. The committee must consist of members representing local government, the provincial government and national government. The MEC appoints the members of an *ad hoc* committee with the concurrence of the municipality concerned, the provincial organ or organs involved and with the concurrence of the national organ or organs of state involved in the dispute or in whose functional area the disputed is located.<sup>29</sup> The procedure of the *ad hoc* committee must be dealt with in accordance with procedures prescribed by regulation.<sup>30</sup> A matter before an *ad hoc* committee is decided if at least two spheres of government agree on the matter. If the committee rejects the objection(s) of the municipality, the municipality must comply with the initial request by the MEC within 30 days of the decision and after having been informed of the decision.<sup>31</sup>

All municipalities are also obligated to review their IDPs annually in accordance with an assessment of their performance measurements under section 41 of the Systems Act and also to the extent that changing circumstances so demand. The amendment procedure should be in accordance with a prescribed process.<sup>32</sup>

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<sup>27</sup> See the Systems Act s 32(2)(a)-(b).

<sup>28</sup> It seems clear from the Act that the MEC has a discretion either to refer such a dispute to an *ad hoc* committee or not to. Should he decide not to refer it, it seems that his decision would be final. See the Systems Act s 32(3)-(4).

<sup>29</sup> See s 33(2)(a)-(c) for more details.

<sup>30</sup> See the Systems Act ss 33(3) and 37.

<sup>31</sup> See the Systems Act s 33(4)-(5).

<sup>32</sup> Refer to the Systems Act s 34(a)-(b).

#### **20.2.4 Miscellaneous aspects concerning municipal integrated development planning**

The new legislative framework also affords specific status to a particular IDP. The Systems Act determines that an IDP adopted by a municipal council has the following importance:

- It serves as the principal strategic planning instrument which guides and informs all planning and development and decisions relating thereto in a municipal area.
- It binds the municipality in the exercise of its executive authority, except to the extent of any inconsistency between a municipality's IDP and national or provincial legislation, in which case such legislation is to prevail.
- It binds all other persons to the extent that those parts of the IDP that impose duties or affect the rights of those persons have been passed as a by-law.<sup>33</sup> It should be noted that a spatial development framework contained in an IDP prevails over a plan as is defined in section 1 of the Physical Planning Act of 1991.<sup>34</sup>

Finally, the Systems Act determines that all municipalities must give effect to their IDPs and conduct their affairs in a manner which is consistent with their IDPs. The national minister is further authorised, for the purposes of municipal integrated development planning, to make regulations or to issue guidelines in terms of section 120 of the Act and to provide or to regulate certain matters. Such matters are the following.<sup>35</sup>

- (a) incentives to ensure that municipalities adopt their integrated development plans within the applicable prescribed period, and comply with the provisions of the Act concerning the planning, drafting, adoption and review of those plans;
- (b) the detail of integrated development plans taking into account the requirements of other applicable national legislation;
- (c) criteria municipalities must take into account when planning, drafting, adopting or reviewing their integrated development plans;

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<sup>33</sup> See the Systems Act s 35(a)-(c). Although an IDP has been given statutory recognition and status, if certain parts of an IDP impose duties or affect the rights of other persons, such as the local community, eg, then such aspects should have been incorporated in a by-law and should have been passed as such to have binding force over such persons. See s 35(1)(c).

<sup>34</sup> 125 of 1991 and the Systems Act s 35(2).

<sup>35</sup> See the Systems Act s 37(1)(a)-(i).

- (d) the detail of the process for the planning, drafting, adoption and review of integrated development plans;
- (e) a process for the amendment of integrated development plans;
- (f) the manner in which an objection must be referred to an *ad hoc* committee envisaged in section 33;
- (g) the manner in which written evidence or documents must be submitted to an *ad hoc* committee;
- (h) the proceedings of an *ad hoc* committee; and
- (i) any other matter that may facilitate –
  - (i) integrated development planning and the drafting of integrated development plans; or
  - (ii) the application of this chapter.

When the minister makes regulations or issues guidelines to regulate matters under subsection 37(1)(b)-(e), he/she must take into account the capacity of municipalities to comply with those matters and must differentiate between different kinds of municipality according to their respective capacities. Furthermore, the minister is authorised to phase in the application of the provisions of the chapter on integrated development planning where such provisions place a financial or administrative burden on such municipalities.<sup>36</sup>

### 20.3 Conclusion

It was demonstrated above that municipal development planning is not only a legal obligation for all municipalities but that without such planning municipalities will not be in a position to fulfil their obligations and responsibilities. The new local government dispensation is developmentally orientated, which in essence requires progress in the real realisation of developmental goals. Municipalities must therefore move forward and should enhance and create a better living environment for all South African citizens. Development planning is not something that can be done in isolation by individual municipalities. It requires constructive involvement of all three spheres of government on a vertical axis and also all relevant municipalities *inter se*, on a horizontal axis. The constitutional obligations and principles of co-operative govern-

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<sup>36</sup> See the Systems Act s 37(3)-(4). Refer again to the LG: Municipal Planning and Performance Management Regulations as published under GNR 796 of GG 22605 of 24 August 2001. Apart from the details of an IDP, the regulations also address the process for amending IDPs, referring of objections to IDPs to an *ad hoc* committee, as well as requirements giving effect to an IDP.

ment are therefore of significant importance in relation to developmental strategies and interaction between the various organs of state. Such co-operation will benefit not only municipalities but also both national and provincial policies and programmes.

Municipal development planning is incorporated mainly in a Municipal Integrated Development Plan (MIDP), which serves as a single, inclusive and strategic plan for the development of the municipal area. All MIDP must incorporate certain minimum core components as they guide the short-term development of local governments in South Africa. Because of its importance, an MIDP is strongly protected, and strict requirements for its adoption and amendment are determined by law. Such plans are flexible, living documents, however, and should be reviewed annually to keep up with the changing demands and circumstances in municipal jurisdictions. All in all, the new requirements and status of MIDP should go a long way towards helping the new local government structures to manage and achieve their important constitutional obligations.

## **Basic legal matters relevant to local government structures**

### **21.1 Introduction**

In light of the various aims and responsibilities of local governments, it is generally accepted that such governments are confronted with almost all aspects of the law. It was explained in chapter 10 that municipalities have been established throughout the whole territory of South Africa, and therefore there is no area that does not fall under the direct authority of a particular municipal council. The importance of legal knowledge regarding not only the composition and functioning of municipalities, but also other fields of law is of significant importance. No legal practitioner can practise law in a particular area in our country without a sound knowledge of the legal rules that are applicable to local governments. Every now and then a practitioner will be confronted with legal disputes that concern the particular local authority either directly or indirectly. In many areas, the local municipality is often the largest employer organisation and also the largest economically active entity. In short, one can say that a legal adviser for a local government or a practitioner advising clients on local government matters should have a sound legal knowledge of almost all the different fields of the South African law.

In order to be able to handle and address legal problems, it is important to know the law and where to find the law. As the law is constantly changing and developing, it is obvious that all role players in local government should be able to access and then apply the relevant legal rules that encompass the new local government dispensation. All role players must have a sound knowledge of the different sources of local government law. These sources are mentioned briefly below.

### **21.2 Sources of local government law**

In principle, there are three main sources of local government law. They are :

- legislation
- a combination of common law and customary law



- legal precedents.

It is only legislation and case law that are of importance to local government practitioners and legal scholars, however. Since local government law is part of the broader constitutional system of South Africa, customary and common law rules have very little or no influence or impact as a source of local government law.<sup>1</sup>

### **21.2.1 Legislation as a source of local government law**

Legislation is without a doubt the most important and influential source of local government law. It was discussed and explained above that the new local government dispensation was not only created in terms of legislation but that it also functions and operates according to various pieces of legislation. Such legislative requirements can be from either the national or a provincial government.<sup>2</sup> It should be pointed out that the term “legislation “ as referred to here, is a wide term and includes both national and provincial laws, as well as proclamations and regulations made by ministers or MECs.<sup>3</sup>

Within the ambit of legislation, it should be obvious and self-explanatory that the Constitution of the Republic of South Africa, which is a very unique and important legislative source of the country’s legal system, forms the basic legal framework on which the new local government system has been founded. The Constitution defines mainly the powers and functions of all three spheres of government and, in particular, the powers and functions of all local governments.<sup>4</sup>

Apart from the constitutional text itself, the Constitution further mandates the enactment of various other national and provincial laws, with the purpose of giving body to the basic legal framework of local governments. Such Acts, as was mentioned and discussed in the previous chapters of this work, then complete the legal framework within which local governments are operating.<sup>5</sup>

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<sup>1</sup> For more on this point see the cases of *In re: Certification of the Constitution of the RSA 1998*, 1996 (4) SA 744 (CC) and also *President of the RSA v Hugo* 1997 (4) SA 1 (CC).

<sup>2</sup> Because of the ever-changing needs of society, local government law is contained and regulated mainly by legislation.

<sup>3</sup> See the Constitution s 239 for a more exact definition of the term “legislation”.

<sup>4</sup> As the supreme law of the state, the provisions and requirements of the Constitution are non-negotiable. Non-compliance with the Constitution would result in invalidation. See the Constitution s 2.

<sup>5</sup> It was mentioned above that local government *per se* is not a concurrent legislative competence or exclusive legislative competence in terms of the Constitution Sch 4 and 5. This position seems to indicate that it is left for mostly the national government to legislate on local government matters, if so allowed by the Constitution. See the Constitution s 163. Only when the Constitution allows provincial laws over certain matters will it be possible for provincial governments to legislate

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### **21.2.2 The importance of customary and common law principles**

Basically there are two main reasons for both the common law and customary law not featuring as important sources of local government law. In the first instance, the new local government system is a totally new legal system which had its origins within the new constitutional legal foundation. The new system was totally overhauled to such an extent that common law rules are no longer of any importance. Secondly, the Constitution also does not contain a provision to the extent that the former common law or customary law principles still continue.<sup>6</sup> Apart from this position, the former local government system was regulated mainly by legislation under the then government of South Africa. The influence of common law or customary law under the former system was largely non-existent. Finally, it was held by the highest judicial authority in South Africa that even from a constitutional viewpoint there are no common law powers left that were derived from the former royal prerogatives. All such powers have now been enumerated within the text of the Constitution or other legislation.<sup>7</sup>

### **21.2.3 Judicial precedent as a source of local government law**

Apart from legislation, judicial precedents, or what are commonly referred to as “case law”, are the second most important source of local government law. The importance of legal jurisprudence is founded on two issues in particular. Firstly, South Africa follows the legal doctrine of *stare decisis*, which means that the lower courts in the hierarchy of judicial bodies are compelled to follow the decisions, in similar cases, handed down by the higher courts. Secondly, the Constitution clearly spells out the importance and role of the judicial authority in our legal system. According to the Constitution, the judicial authority of the Republic of South Africa is vested in the courts and the courts are subject to the Constitution and the law only. Any order or decision by a court binds all persons to whom it applies, including the state.<sup>8</sup> The importance of judicial precedents is therefore self-evident, and local government

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over such matters. See, eg, the Constitution s 139. Provincial laws relevant to local governments are therefore much less important than their national counterparts.

<sup>6</sup> Under the 1983 Constitution s 88 such conventions still continued to be in force. The 1996 Constitution does not provide for such continuation.

<sup>7</sup> See the *First Certification Judgment* 1996 1996 (1) SA 1 (CC); *President of the RSA v Hugo* 1997 (4) SA 1 (CC) and *President of the RSA v SARFU* 2000 (1) SA 1 (CC).

<sup>8</sup> See the Constitution s 165(1)-(5).

practitioners and scholars must ensure that they keep up to date with decisions of our courts regarding local government legal matters.

Apart from the sources mentioned above, there are no other real sources of local government law. Although the works and writings of legal scholars, the discussion and deliberations of politicians and the submissions of the concerned public at large are of importance to legal development, such aspects are not sources of local government law and should be regarded only as primary information sources from which the content of the law can sometimes be determined.

### **21.3 Important fields of law relevant to local government law**

It was mentioned above that local government administrations often face a large variety of legal issues. In order to cope with such issues, most municipal councils that can afford to do so have a specific legal section that advises and handles legal problems for both the political and administrative branches of the local authority. Municipal legal advisors are therefore responsible for both internal and external legal matters. Such a situation often demands broad legal and paralegal expertise. Local government matters are important not only to the political office bearers and administrative personnel, however. Such matters are also regularly of importance to the relevant local community. Of the three spheres of government, citizens of a state are most likely, at some stage, to be involved in a legal dispute with their local authority. Against this background it is obvious that local community members are in need of professional and expert legal advice and assistance regarding local government legal matters.

It falls way beyond the scope of this work to discuss or even try to explain the various legal fields that are of importance in municipal matters. What is of interest, however, is to highlight briefly some of the most common areas of legal dispute that involve local governments. While it is the task of lawyers and legal advisors to keep knowledgeable about the law in general, some of the specialised legal issues are also of value for both the political and administrative components of a municipality in order for them successfully to fulfil and maintain their duties and responsibilities.

#### **21.3.1 Common legal issues relevant to local governments**

- *The law of contract* The law of contract is particularly important to local government legal advisors. All municipalities are involved in various legal contractual re-

relationships on a regular basis. As a sphere of government and a legal entity, municipalities are legally empowered to enter and conclude contracts.<sup>9</sup>

- *Property law* The law concerning property and other related issues is also of regular importance to local governments. Property is regarded as of such importance in our modern democracy that it has been afforded direct protection under the Constitution.<sup>10</sup> Property law also includes issues regarding
  - (a) expropriation
  - (b) property leasing
  - (c) purchase, sale and acquisition
  - (d) transfer of property ownership
  - (e) other related land use rights such as the restitution of land rights, land reform measures, communal property associations, informal land rights issues and eviction requirements and procedures.<sup>11</sup>

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<sup>9</sup> See also *Keyser v Orkney Town Council* 2003 (4) SA 131 (T) with reference to lease agreements. In *Gordon v Pietermaritzburg-Msunduzi: TLC and Another* 2001 (4) SA 972 (N) it was mentioned that with the advent of SA's new constitutional dispensation, momentous changes were brought about to local government. The court held that the contract concluded between the parties was impossible to perform and, although it was true that the state was bound by ordinary commercial contracts concluded by it, in cases of impossible performance, the law of contract allows for the cancellation of the agreement. In the case certain regulations, which formed the basis of the contractual relationship between the parties, were repealed in the context of an entirely new constitutional dispensation, which included local government. See paras B-D at 978.

<sup>10</sup> According to the Constitution s 25, no *person* may be deprived of property except in terms of a law of general application. Arbitrary deprivation of property is specifically outlawed. Although property may be expropriated, there are specified requirements under which such expropriation must be done. Refer also to the case of *Modderfontein Squatters, Greater Benoni City Council v Modderklip boerdery (Pty) Ltd (Agri SA and Legal Resources Centre as amici curiae)*, also referred to as *President of the RSA v Modderklip boerdery* 2004 (6) SA 40 (SCA).

<sup>11</sup> Most of these issues are regulated in terms of specific Acts of parliament. For more on municipal property-related issues, refer to Nonyana MR "Communal Property Associations for convenience v townships for services and maintenance" *Property Law Digest* August 2000 Butterworths at 3. The writer refers to the Communal Property Association Act 28 of 1996 which has improved communal land ownership. See also the following cases: *De Villiers en 'n Ander v Stadsraad van Mamelodi en 'n Ander* 1995 (4) SA 347 (T) dealing with expropriation under the Expropriation Act 63 of 1975. See also *Cape Town Municipality v Table Mountain Aerial Cableway Co Ltd* 1996 (1) SA 909 (C). In *Southern Metropolitan Substructure v Thompson and Others* 1997 (2) SA 799 (W) it was held that a local authority's duty to provide and allocate housing cannot lawfully be fettered by contractual undertakings not to evict illegal occupiers of land. When land/property is sold, it must be described sufficiently in accordance with the Alienation of Land Act 68 of 1981. Faultless description is not required. See *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA). See also *M & J Morgan Investments (Pty) Ltd v Pinetown Municipality* 1997 (4) SA 427 (SCA), and *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) dealing with expropriation issues. Refer also to *Skinberg v South Peninsula Municipality* 2001 (4) SA 1144 (C). It was stated as a *semble* to the case that despite the clear distinction made in the Constitution s 25 between deprivation and expropriation of property, there may be room for the development of a doctrine akin to constructive expropriation in South Africa, particularly where a public body utilises a regulatory power in a manner which, taken in isolation, can be categorised as a deprivation of prop-

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An interesting aspect regarding land is the Subdivision of Agricultural Land Act,<sup>12</sup> which requires that agricultural land may not be subdivided unless the Minister of Agriculture has given his written consent thereto.<sup>13</sup> Section 12 of the Local Government: Municipal Structures Act<sup>14</sup> allowed for the establishment of new municipalities for the entire territory of South Africa, however.<sup>15</sup> Accordingly, it is argued by some that all land now falls within the jurisdiction of a municipality.<sup>16</sup> Since agricultural land also falls within the jurisdiction of a municipal council, it seems that section 3 of the Subdivision of Agricultural Land Act no longer has application.

- *The law of delict* The law of delict is an equally important field of law within the local government domain. All municipalities face delictual accountability on a daily basis. Delictual liability is confined not only to general delictual claims but also more specialised claims under the legal protection of vicarious liability, defamation and other unique forms of delictual accountability. The law of delict is a vast and often complex field of the law and should be studied carefully.<sup>17</sup>

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erty rights and not an expropriation, but which has the effect, albeit indirectly, of transferring those rights to the public body. Other issues dealing with property-related matters were decided in *Bailes v Town and Regional Planning Commission* 2002 (2) SA 589 (N), *Kotzé v Minister of Landbou en Andere* 2003 (1) SA 445 (T), *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn* 2003 (6) SA 140 (C) and *Baartman and Others v Port Elizabeth Municipality* 2003 (3) SA 560 (SCA). Refer also to Griffiths G "Not so fast – that's municipal land: A discourse on the acquisition of municipal property under the Cape Municipal Ordinance 20 of 1974" *Property Law Digest* (1999) Butterworths at 11.

<sup>12</sup> 70 of 1970.

<sup>13</sup> Refer to the Act s 3.

<sup>14</sup> 117 of 1998.

<sup>15</sup> Read also the Constitution s 151(1), which states that the local sphere of government consists of municipalities which must be established for the whole territory of the Republic.

<sup>16</sup> See the letter of MJ Meyer "Is Act 70 of 1970 still necessary?" *DR* December 2001 at 5.

<sup>17</sup> Judicial examples of recent delictual cases concerning local authorities are the following: *Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 (4) SA 745 (O), dealing with the responsibility of a municipal airstrip; *Gardner v Whitaker* 1995 (2) SA 672 (E), dealing with issues of defamation; *Cape Town Municipality v Butters* 1996 (1) SA 473 (C), dealing with public liability; *Cape Town Municipality v Bakkerud* 1997 (4) SA 356 (C), concerning municipal liability for damages resulting from an omission to repair streets and pavements; *Welkom Municipality v Masureik and Herman t/a Lotus Corp* 1997 (3) SA 363 (SCA); *Pretoria City Council v De Jager* 1997 (2) SA 46 (SCA), dealing with the liability when failing to take reasonable precautions to prevent foreseeable harm on municipal sidewalks; *Graham v Cape Metropolitan Council* 1999 (3) SA 356 (C); *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA); *Grootboom v Graaff-Reinet Municipality* 2001 (3) SA 373 (E); *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA); *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA), concerning liability for municipal council's water main bursting and *Minister of Safety and Security v Duivenboden* 2002 (6) SA 431 (SCA) relevant to municipal security/police services. See also the following academic research: Scott J "Grootboom v Graaff-Reinet Municipality" *De Jure* 2002 at 635; Scott J "Re-affirmation of the doctrine of immunity of municipalities against liability for wrongful omissions assessed and rejected – Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA) *THRHR* 2001 (64) at 502; Scott J "The Cape Metropolitan Council v Noel Raymond Graham case no 157/99 (C)" *De Jure* (2001) at 198; Scott J "Cape Town Municipality v Butters 1996 (1) SA 473 (C)" *De Jure* (1996) at 379 and Smith A "Mu-

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- *Constitutional law and administrative law* The importance of constitutional law, which includes not only formal constitutional law but also aspects of fundamental rights law, administrative law, environmental law, legal interpretation and even some aspects of public international law have been highlighted above. Apart from the obvious importance of the Constitution and its Bill of Rights, the legal rules regulating the field of administrative law are also of particular importance to all local government bodies. Many municipal actions form part of the executive authority of the state and therefore fall under the rules of administrative law. The importance of administrative law was specifically highlighted in the case of *Fed-sure Life Assurance v Greater Johannesburg TMC*.<sup>18</sup> In this case it was mentioned that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates or determines appropriations to be made out of public funds, such a power is peculiar to elected legislative bodies. Such powers are exercised by democratically elected representatives after due deliberation of the circumstances and cannot be classed as administrative action.<sup>19</sup> Not only the legal advisors of a municipality, but all municipal administrators, should have a basic understanding and knowledge of administrative law and its various related legal rules.<sup>20</sup>
- *Criminal law* Municipalities are also often involved within the ambit of criminal law. Such issues are confined not only to incidents where municipal personnel are implicated in criminal activity but can also relate to incidents where municipal employees or even councillors are held criminally liable for activities within a particular municipality. So, for example, is it possible for a municipal official, mostly the municipal manager, to be held liable for non-compliance with certain

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municipalities mend your ways" *The Quarterly Law Review* for people in business vol 8 part 2 (2000) at 40.

<sup>18</sup> 1999 (1) SA 374 (CC).

<sup>19</sup> Refer to para 45 at 396-397.

<sup>20</sup> For more on constitutional and administrative law see the cases of *Claude Neon Ltd v Germiston City Council and Another* 1995 (3) SA 710 (W), where the court held that an undertaking by a local authority official to notify a person is an administrative act that gives rise to a legitimate or reasonable expectation. See also *Tony Rahme Marketing Agencies SA (Pty) Ltd and another v Greater JHB TMC* 1997 (4) SA 213 (W); *Gencor SA Ltd v TC for Rustenburg and Environs and another* 1998 (2) SA 1052 (T); *Erf one six seven Orchards CC v Greater JHB Metro Council and Another* 1999 (1) SA 104 (SCA) and *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA). See *City of Cape Town v Rudolph and others* 2004 (5) SA 39 (CPD) regarding a housing dispute under s 26 of the Constitution.

legislative requirements.<sup>21</sup> The importance of criminal law within the new local government dispensation should not be underestimated, therefore.

- *Labour law* The importance of labour law for municipal governments is particularly highlighted by the fact that municipalities are often one of the larger employer organisations within a particular municipal area. Depending on the size of the municipality, municipal councils employ hundreds or even thousands of personnel. Labour law issues are thus part and parcel of a municipal administration, and a sound knowledge of labour law is essential. Apart from normal labour issues such as wage negotiations, promotions and disciplinary action against employees, local government administration also encounter more specialised labour issues such as disputes within essential services areas. Because of the importance of labour law in local government, most municipalities have established personnel and labour relations departments to handle such matters. There is even a specific bargaining council that was established to resolve and deal with municipal labour issues between municipalities as employers, and labour unions as representatives of municipal employees.<sup>22</sup>
- *Building regulations and town and regional planning law* All municipalities are required to be involved in local planning processes and developmental programmes. Each municipal government is therefore regularly involved in town planning activities, and municipalities must also ensure that minimum building standards are complied with.<sup>23</sup>

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<sup>21</sup> See the Occupational Health and Safety Act 85 of 1993 as an example.

<sup>22</sup> For typical examples of labour-related issues in local authorities see *Cape Local Authorities Employers Organisation v IMATU* 1997 (1) SA 656 (C) and *Mhlambi v Matjhabeng Municipality and another* 2003 (5) SA 89 (O). In the latter case the court held *inter alia* that a reasonable request for further particulars in a disciplinary action is an ingredient of the right to a fair hearing and that the principles of natural justice demanded that such information be furnished.

<sup>23</sup> For more on town planning and building requirements see the National Building Regulations and Building Standards Act 103 of 1977. Refer also to cases such as: *Sandton Town Council v Gourmet Property Investments CC* 1994 (4) SA 569 (A) dealing with national building regulations; *Diepsloot Residents and Landowners Association and Another v Administrator Tvl* 1994 (3) SA 336 (A); *Schapenrome Investments (Edms) Bpk v Sandtonse Stadsraad* 1994 (2) SA 34 (A); *Stands 5/1 Wierda Valley (Pty) Ltd and Another v Sandton Town Council* 1994 (1) SA 333 (A); *Knop v JHB City council* 1995 (2) SA 1 (A); *Huisman v Minister of Local Government, Housing and Works* 1996 (1) SA 836 (A); *East Zulu Motors v Empangeni/Ngwelezane TLC* 1998 (2) SA 61 (CC) and also *Paola v Jeeva and others* 2004 (1) SA 396 (SCA), concerning the value of a view of a property. Refer also to Van Wyk J and Van Wyk D "Planning law, administrative justice and the Constitution: *Van Juyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C)" *THRHR* 1996 (59) at 675 *et seq*; *Gildenhuys A "Omgewingsbewaring beperkings op grondgebruiksveranderingen"* *Butterworths Property Law Digest* (2000) at 13 and Van Wyk J "Planning Law – Will Cinderella emerge a princess?" *THRHR* 1996 (59) at 1. See also the case of *Humphrys NO v Barnes* 2004 (2) SA 577

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- *Environmental law* It was mentioned above that all three spheres of government must comply with the new constitutional requirements. One such requirement is the provision of a clean and healthy environment. Environmental laws are therefore of significant importance for all local authorities. It is essential for municipalities to determine their responsibilities under current legislative provisions and to ensure compliance with their obligations in that regard.<sup>24</sup>

#### **21.4 Special legal matters pertaining to local government**

Apart from the general legal fields that have an impact on local governments, the new local government legal framework also provides for specific legal matters that are of particular importance to local authorities.<sup>25</sup> These special provisions regarding municipal legal matters must be read in conjunction with the general provisions of the law.

##### **21.4.1 Legal proceedings**

According to the Systems Act, all municipalities are authorised to compromise or compound any action, claim or proceedings and may submit to arbitration any matter other than a matter involving a decision on its status, powers, duties or the validity of its actions or by-laws.<sup>26</sup> The particular subsection is somewhat dubious and unclear. As a legal person all municipalities have legal standing and may thus institute or defend any legal action in which they have a direct, or sometimes indirect, interest. However, this position is conditional to the extent that the particular legal action is indeed permissible under the law in general.

##### **21.4.2 Legal representation for employees or councillors of a municipality**

Under the new legal framework, it is permissible for a municipality, subject to such terms and conditions as it may determine, to provide an employee or a councillor of

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(CPD) regarding the collapsing of a boundary wall between two private property owners. Refer also to *Botha v White* 2004 (3) SA 184 (TPD) regarding the use of a property contrary to the applicable zoning. See also *Clark v Faraday and Another* 2004 (4) SA 564 (CPD) regarding the approval of building plans and a neighbour's view. The court held *inter alia* that an owner of land who uses his/her property in an ordinary and natural manner is not guilty of committing an *injuria* to other property owners.

<sup>24</sup> For more on environmental aspects see *Verstappen v Port Edward Town Board and Others* 1994 (3) SA 569 (D), the Environmental Conservation Act 73 of 1989 and Witbooi E "Obligations on property owners to control alien invasive vegetation on their land" *Butterworths Property Law Digest* March 2003 at 3.

<sup>25</sup> Refer to the Local Government: Municipal Systems Act 32 of 2000 ch 11 as amended by Act 40 of 2002 s 2(1).

<sup>26</sup> See the Systems Act s 109(2).

the municipality with legal representation where applicable. Such legal representation is limited to only two instances, however.<sup>27</sup>

- where legal proceedings have been instituted against the employee or councillor as a result of any act or omission by that person in the exercise of his or her powers or the performance of his or her duties or
- where the employee or councillor has been summoned to attend any inquest or inquiry arising from the exercise of his or her powers or the performance of his or her duties.

It should be noted that employees or councillors are not automatically entitled to the legal representation mentioned above. The decision to provide for such representation lies with the municipal council. All legal assistance not addressed in the two instances above should be for the employee's or councillor's own account and should not be funded from the municipal/public purse.

#### **21.4.3 Issues concerning evidence**

The Systems Act specifically provides that in legal proceedings against a municipality a certificate which purports to be signed by a staff member of the municipality and which claims that the municipality used the best known or only or most practicable and available methods in exercising any of its powers or performing its functions must, on its mere production by any person, be accepted by a court as evidence of that fact.<sup>28</sup> It is further provided that a copy of the *Provincial Gazette* in which a by-law was published may, on its mere production in a court by any person, be used as evidence that that by-law was passed by a municipality concerned.<sup>29</sup>

#### **21.4.4 Fines, bail and the prosecution of offences**

Under the new legal framework, a staff member of a municipality so authorised may institute criminal proceedings and conduct the prosecution in respect of a contravention of or failure to comply with a provision of

- a by-law or regulation of the municipality
- other legislation administered by the municipality or

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<sup>27</sup> See the Systems Act s 109A(a)-(b).

<sup>28</sup> The Systems Act s 110.

<sup>29</sup> Refer to the Systems Act s 111. It is submitted, however, that such a situation should prevail only in instances where no contrary evidence is presented to a particular court.

- other legislation as determined by the National Director of Public Prosecutions in terms of section 22(8)(b) of the National Prosecuting Act of 1998.<sup>30</sup>

It is also provided that fines and bails that were recovered in respect of offences or alleged offences referred to in item 2 of Schedule 4 to the Public Finance Management Act<sup>31</sup> must be paid into the revenue fund of the municipality concerned.<sup>32</sup>

#### **21.4.5 Time of notices, payments and the service of documents and process**

A payment may be made at a municipality only during the normal or extended office hours of a municipality, except when payment is made by electronic transfer or at an agency pay-point. These times also apply to when any notice or other document may be served on the municipality, including its council, other structures, functionaries or staff members in an official capacity. There are exceptions to this rule in urgent matters, however.<sup>33</sup> Any notice or other document that is served on a person in terms of the Systems Act or by a municipality in terms of any legislation is regarded as having been served when:

- it has been delivered to that person
- it has been left at that person's place of residence or business in the Republic of South Africa with a person apparently over the age of sixteen years
- it has been posted by registered or certified mail to that person's last known residential or business address in the Republic of South Africa and an acknowledgement of the posting thereof is obtained from the relevant postal service
- it has been served on a person's agent or representative in the Republic of South Africa in a manner provided for above if that person's address in the RSA is unknown
- it has been posted in a conspicuous place on the property or premises of the person to which it relates if that person's address or agent in the Republic of South Africa is unknown.<sup>34</sup>

It is also provided that when any notice or other document must be authorised or served on the owner, occupier or holder of any property or right in any property, that it is sufficient if that person is described in the notice or document as the owner,

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<sup>30</sup> A staff member may prosecute or conduct criminal proceedings only if so authorised in terms of the National Prosecuting Authority Act 32 of 1998 s 22(8)(f).

<sup>31</sup> 1 of 1999.

<sup>32</sup> See the Systems Act s 113.

<sup>33</sup> See the Systems Act s 114(a)-(b).

<sup>34</sup> See the Systems Act s 115(a)-(e) as amended by Act 6 of 2004 see 94.

occupier or holder of the property. In such cases it is not necessary to name the person specifically. Finally, any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a person in attendance at the municipal manager's office. Outside parties thus seeking to serve on a municipality documents of whatever nature should serve such documents on the office of the municipal manager.<sup>35</sup>

A further important practical aspect concerning the institution of legal proceedings against a municipal council is the provision of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act<sup>36</sup>. According to this Act a notice must be sent to a municipality informing it of a claim against the municipality. According to section 2 of the Act such a notice/letter of demand must be sent to the council within 90 days of the date of the cause of action. After such notice, no formal summons may be issued against the municipality concerned, unless the claim has been rejected or a further 90 day period has lapsed. It must also be noted that the Act also requires that a claim prescribes against a council unless summons has been issued within 24 months since the occurrence of liability. Several case law precedents have been developed over such matters. See for example *Ntanga v Butterworth Municipality and another*<sup>37</sup> and also *East London Municipality v Abrahamse*.<sup>38</sup> In many instances the requirements of the Act were strictly enforced. Refer to *De Klerk en 'n ander v Groter Kroonstad Plaaslike Oorgangsraad*.<sup>39</sup> In *Provinsie van die Vrystaat v Williams No*<sup>40</sup> the Appellate Division confirmed that the term/word "liability" in the context of the Act has a wide meaning. Finally, the Constitutional Court in 2001 held that the Limitation of Legal Proceedings Act, which requires the specific notice within a short period of time and with limited scope for condonation for non-compliance, constitutes a material limitation of an individual's right of access to a court under section 34 of the Constitution and that such limitation could not be justified under section 36 of the Constitution. Accordingly, the court held that section 2(1)(a) of the Act was unconstitutional and invalid. See *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre*

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<sup>35</sup> Refer to the Systems Act s 115(2)-(3).

<sup>36</sup> 94 of 1970.

<sup>37</sup> 1995 (4) SA 437 (Tks).

<sup>38</sup> 1997 (4) SA 613 (SCA).

<sup>39</sup> 1999 (2) SA 870 (O).

<sup>40</sup> 2000 (3) SA 65 (SCA).

as *Amicus Curiae*).<sup>41</sup> In a follow-up case, the Constitutional Court further held that the invalidation of section 2(1)(a) of the Act operated retrospectively to the moment the Constitution came into effect. Since the Constitution came into effect, the inconsistency of the Act has become evident and, as a matter of law, the provision of the Act has been a nullity since that date.<sup>42</sup>

#### **21.4.6 Public servitudes and the custody of documents**

Similar to the situation under some of the former ordinances that affected local governments, the Systems Act now confirms that all public servitudes in favour of a municipality are under the control of the municipality. A municipality must further protect and enforce the rights of the local community arising from those servitudes.<sup>43</sup> It is also the responsibility of the municipal manager to take custody and control of all of a municipality's records and documents, unless where otherwise provided.<sup>44</sup>

#### **21.4.7 Restraint on transfer of property**

All municipalities are directly involved in the process of transferring property (land) from one person or institution to another. Similarly to the South African Revenue Service, a municipality must provide a clearance certificate stating that all levies, duties or taxes payable to the municipality have been paid up to date before a particular property can be transferred. In order to protect a municipality, and thus also its public community, from losing valuable revenue for service already rendered, the Systems Act determines that a registrar of deeds may not register the transfer of property except on production to that Registrar of Deeds of a prescribed certificate which :

- was issued by the municipality or municipalities in which that property is situated and
- certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.<sup>45</sup>

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<sup>41</sup> 2001 (4) SA 491 (CC).

<sup>42</sup> Refer to *Ex parte Women's Legal Centre v Greater Germiston TLC* 2001 (4) SA 1288 (CC).

<sup>43</sup> See the Systems Act s 116.

<sup>44</sup> The Systems Act s 117.

<sup>45</sup> See the Systems Act s 118(1)(a)-(b). The certificate is valid for a period of 120 days from the date it was issued. The Act s 118(1A). This was also the position under some of the former provincial ordinance. Refer also to *Venter NO v Eastern Metro Substructure, Greater JHB TC* 1998 (3) SA

*continued on next page*

In the case of a transfer of property by a trustee of an insolvent estate, the transfer and recovery of monies are subject to section 89 of the Insolvency Act.<sup>46</sup> To help secure municipal funds even more efficiently, it is specifically provided that an amount due for

- municipal service fees
- surcharges on fees
- property rates and other municipal taxes
- levies or duties

is a charge upon the property in connection with which the amount is owing and that such a claim enjoys preference over any mortgage bond registered against the property.<sup>47</sup> The requirement of a clearance certificate does not apply to a transfer from the national government, a provincial government or a municipality of a residential property which was financed with funds or loans made available by any of the three spheres of government, and when the vesting of ownership as a result of a conversion of land tenure rights into ownership in terms of the Upgrading of Land Tenure Rights Act of 1991.<sup>48</sup> However, municipalities are not precluded from collecting any amounts owed to them in respect of such a property at the time of the transfer or conversion.<sup>49</sup> Finally, the preference that is enjoyed over any mortgage bond does not apply to any amount referred to which became due before a transfer of a residential property or a conversion of land tenure rights into ownership.<sup>50</sup>

Although the protection of municipal service fees, surcharges, property rates and other taxes or levies is not something new, its new statutory protection has been the

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1076 (W). For an example of a certificate under s 118 see GN 686 as published in GG 24886 of 23 May 2003.

<sup>46</sup> 24 of 1936. S 89(4) provides that notwithstanding the provisions of any law which prohibited the transfer of any immovable property, unless any tax as defined in ss (5) due thereon had been paid, that law would not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate if he had paid the tax which might have been due on that property in respect of the periods mentioned in ss (1) and that no other preference would be accorded to any claim for such tax in respect of any other period. S 89(5) provided that, for the purposes of subss (1) and (4), 'tax' in relation to immovable property meant any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established under the authority of any law in discharge of a liability to make such periodical payments if that liability was an incident of the ownership of that property.

<sup>47</sup> See the Systems Act s 118(3).

<sup>48</sup> See Act 112 of 1991.

<sup>49</sup> The Systems Act s 118(4)(a)-(b).

<sup>50</sup> The Systems Act s 118(5).

focus of legal debate and even strong judicial challenge. In the matter between *Greater Johannesburg TMC v Galloway No and Others*<sup>51</sup> the first respondent, a liquidator of a company, had sold immovable property belonging to the company to the second respondent. In order to proceed with the transfer of the property, the first respondent applied to the municipality/applicant for clearance figures in order to pay such and to obtain a clearance certificate in accordance with section 50 of the Local Government Ordinance.<sup>52</sup> Upon receipt of the figures, the first respondent disputed certain amounts claimed by the council. The respondent also took the view that he was not required to pay the disputed levies/taxes by reason of section 89 of the Insolvency Act.<sup>53</sup> The court held that section 89(4) overrode the provisions of any other law which prohibited the transfer of any immovable property unless any tax defined under section 89(5) due on the property in question had been paid. The liquidator thus had to pay certain taxes. Any items prescribed by section 50 of the Ordinance which fell outside the definition of a tax set out in section 89(5) were not payable by the liquidator in order to obtain the clearance certificate.<sup>54</sup> The court further held that section 89(4) did not extend to water, electricity and refuse removal charges. Such items were not in respect of the property but were in respect of the agreements which had been entered into for the provision of such services and therefore in respect of the services themselves. Charges in respect of electricity, water and refuse removal were not in respect of the property and could not be recovered as a prerequisite before the clearance certificate was issued. The application by the council was accordingly dismissed.<sup>55</sup> A similar issue was decided in *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council v Venter NO*.<sup>56</sup> The case concerned a liquidator of a close corporation who had paid to the local authority under protest certain amounts for basic water and sewerage charges. The respondent argued that such charges did not constitute taxes under section 89(1) and 89(5) of the Insolvency Act and that he was not obligated to pay such amounts in order to obtain a clearance certificate under section 50 of Ordi-

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<sup>51</sup> 1997 (1) SA 348 (W).

<sup>52</sup> O 17 of 1939 (T) which provided that the transfer of land was not to be effected unless certain amounts due to the council had been paid.

<sup>53</sup> 24 of 1936.

<sup>54</sup> At 355-356.

<sup>55</sup> Refer to paras C-D at 360.

<sup>56</sup> 2001 (1) SA 360 (SCA).



nance 17 of 1939 (T). Rezoning fees under sections 48 and 63 of the Town Planning and Townships Ordinance 15 of 1986 (T) were also in issue. Contrary to the decision in *Greater JHB TMC v Galloway NO* above, the Supreme Court of Appeal held that there was no basis on which it could be contended that amounts not constituting taxes listed in section 50(1) of the Ordinance did not have to be paid by the respondent in order to obtain a clearance certificate. Although the amounts were not taxes, the council was entitled to withhold the clearance certificate until they were paid.<sup>57</sup> The court further held that once it had been accepted that the amounts were due and owing in terms of section 50, there was no legal basis for the amounts to be repaid to the respondent. Since the respondent wished to transfer the properties, he had to pay the amounts due in respect of the rezoning fee, and the basic water and sewerage charges so as to have the embargo created by section 50 lifted.<sup>58</sup> Section 118 of the Systems Act was also subjected to constitutional challenge. In *Geyser and another v Msunduzi Municipality and others*<sup>59</sup> it was argued by the applicant/owner of a property who was held liable by the respondent municipality for municipal service fees due on the property which the applicant leased to a tenant, that the charges were unconstitutional since they resulted in arbitrary destruction and deprivation of the property owner's rights under section 25 of the Constitution. The court held that although section 118 of the Act clearly envisaged deprivation of the property, the purpose of the deprivation was to facilitate debt recovery, which was a legitimate and important purpose essential for the economic viability and sustainability of municipalities in South Africa. There was thus a rational connection between the means employed and the desired result. The limitation on property owners' rights was reasonable and reflected a fair balance between public interest and the property owner's interest. Section 118 is thus not arbitrary and not inconsistent with the Constitution.<sup>60</sup> The court also held that municipal service fees were based on consumption and thus could not refer to rates on property. Such fees included charges for electricity and water consumption supplied to the owner/occupier of the property. The section also applied to all municipalities in the Republic, thus excluding incapacity in application. Notwithstanding the court's decision, some commentators have

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<sup>57</sup> See paras D-F at 369.

<sup>58</sup> At paras B-C at 370.

<sup>59</sup> 2003 (5) SA 18 (N).

<sup>60</sup> Refer to paras A-D at 38-39.

argued that the obligation on owners to pay all outstanding arrears is contrary to the Constitution.<sup>61</sup>

#### **21.4.8 Miscellaneous provisions**

The Systems Act also provides for a few miscellaneous legal aspects.<sup>62</sup> In the first place it is provided that a councillor who attempts to influence the municipal manager or any other staff member or even agent of a municipality not to enforce an obligation in terms of the law or a decision of the council is guilty of an offence and is on conviction liable to a fine or to imprisonment for a period not exceeding two years.<sup>63</sup> A person acceding to such an attempt is also guilty of an offence punishable with the same sanction. If a person is convicted of an offence and is subsequently sentenced to more than 12 months' imprisonment without the option of a fine, he/she is disqualified from remaining a councillor and cannot become a councillor of any municipality during a period of five years from the date of the conviction.<sup>64</sup>

The minister concerned with local government is also authorised to make regulations on certain matters and to issue guidelines that are not inconsistent with the Act.<sup>65</sup>

Finally, the Systems Act provides for certain transitional arrangements and the phasing in of the provisions of the Act itself. Under transitional arrangements, it is provided that any written agreement on the exercise of executive authority in an area of another municipality, which agreement existed immediately before the Act took effect, must be regarded as having been concluded in terms of the relevant provisions of the Systems Act.<sup>66</sup> The minister must also initiate steps for the rationalisation of existing national and provincial planning legislation applicable to municipalities in order to facilitate local development planning as an integrated concept within the system of co-operative government as is envisaged in section 41 of the Constitution. Mechanisms for facilitating co-ordination between sectoral regulation of local government matters must also be established.<sup>67</sup> In order to facilitate a smooth transition,

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<sup>61</sup> Refer to Kidson J "Rights of local government to collect service arrears" March (2002) *DR* at 8-9. The writer submits various arguments to explain why outstanding arrears are not payable.

<sup>62</sup> See the Systems Act ch 12.

<sup>63</sup> The Systems Act s 119.

<sup>64</sup> The Systems Act s 119(4).

<sup>65</sup> See the Act s 120(1)-(7) as amended for more full particulars on the procedures and requirements relevant to the making of regulations and guidelines.

<sup>66</sup> See the Systems Act s 122(1) read with s 11(2).

<sup>67</sup> See the Systems Act s 122(2)(a)-(b).

the minister is authorised to phase in the various applications of the provisions of the Systems Act which place a financial or administrative burden on municipalities.<sup>68</sup>

### **21.5 Conclusion**

It seems obvious that the application of the law is of significant importance to all local government structures. The law in general and, more particularly, the law relating to municipal affairs form not only the basis on which all municipalities must function, but also set the scene within which municipalities are to fulfil and perform their new constitutional role and obligations. It is clear in this respect that a sound knowledge of all the relevant legal principles relating to local government matters is an essential requirement for legal advisors, private practitioners, local administrators and political office bearers alike.

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<sup>68</sup> The Systems Act s 123.

## Concluding remarks

### 22.1 Introduction

It is clear from the above that the third sphere of government has changed drastically from the order that was in place prior to 1994. The new supreme Constitution with its comprehensive Bill of Rights has set a new legal paradigm for municipal government. It is especially the founding values and specific municipal objects of the new constitutional dispensation that had an unprecedented impact.<sup>1</sup> Compliance with the new constitutional provisions is imperative whether that relates to legislative or executive actions or even the conduct of bodies or institutions within the state. The Constitution however only provides a basic constitutional framework. In many instances the basic framework had to be completed through the enactment of various national or provincial laws.<sup>2</sup>

In chapter one of this research it was stated that the aim of the research is two-fold. The first objective was to provide a systematic and comprehensive exposition of the new constitutional and other national legislative provisions relevant to the new system of local government. In this respect it is submitted that the preceding chapters do indeed achieve such an objective. Almost all legislative provisions relevant to local government have been systematically subdivided into the various chapters and have been grouped together according to their topics and relevance. It is submitted that the compilation and systemisation of the many legal requirements should indeed contribute to making the legal dispensation regarding local government law more accessible which in turn could enhance more research and debate in this often neglected albeit important field of law.

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<sup>1</sup> Read s 1 of the Constitution. According to s 2 the Constitution is entrenched as the supreme law of the SA state and any law or conduct inconsistent with the Constitution is invalid. All the obligations imposed by the Constitution must be fulfilled.

<sup>2</sup> See again the provisions set out in ss 151(3), 154(1), 155(2) and (3), 157(2), 160(5) and 164 of the Constitution which specifically require either national or both national or provincial laws on issues directly relevant to local government matters.

The second aim was to evaluate the extent of compliance with the new local government legal system, to the key normative principles set out in the Constitution and which underpins the new legal government system. Such a evaluation can only be conducted after due regard to all the constitutional and subsequent national legislative requirements. In an effort to link the various preceding chapters together and to tie-up the research as a whole, a brief summary of the extent of compliance with the key constitutional requirements and prerequisites is provided in this conclusion. The summary follows the same chronological sequence as was provided for in the introductory chapter of this work.

## **22.2 Evaluating compliance with the key normative principles of the new local government legal dispensation**

### **22.2.1 *Is the new local government legal dispensation non-racial and truly democratic?***

The new dispensation has undoubtedly overturned the segregation and apartheid policies of the past and has provided a platform for a uniform democratic local sphere of governance where municipal services are rendered for the benefit of all people. The confirmation within the supreme law of the South African state of *inter alia* the founding values of equality, democracy, freedom, non-racialism and non-sexism has created a strong foundation to ensure that all spheres of government are constitutionally obligated to ensure a non-racial and democratic government.

### **22.2.2 *Does the new nature, rights and duties of municipalities comply with the new constitutional vision?***

It was indicated above that the new local government system does not only provide local government with a distinctive legal nature, but also sets down clear and precise rights and duties for all local government structures.<sup>3</sup> This is necessary to ensure local governments are empowered to fulfil their duties. The new system not only provides local authorities with the required foundation to act, but also incorporates constitutional values of accountability and public participation. These values are particularly promoted through legislative provisions which confirm that local government consists out of political, administrative and local community components. As such, the new legal framework should enhance and promote the underlying values

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<sup>3</sup> Read ss 4, 5 and 6 of the Municipal Structures Act together with s 156 of the Constitution.

that the Constitution demands.

### **22.2.3 *Municipal government and the principles of co-operative government***

The Constitution obligates all three spheres of government to comply with specific principles aimed at ensuring a system of co-operative federalism. All spheres have been allocated with specific functional activities. Although significant protection of such powers is provided for, many overlaps between the specified functions do occur. Such overlaps in turn again require proper co-operation between the spheres in order to fulfil their functions and responsibilities. In an effort to ensure such co-operation the Constitution determines various principles with which all spheres must comply.<sup>4</sup> The new legal framework, *via* the Municipal Systems Act, specifically expands on the basic constitutional provisions and thus enhances the envisaged constitutional scheme.

### **22.2.4 *The establishment of a new system and structure for local government***

It is a specific constitutional obligation, that all former local governments had to be restructured and that new institutional models for local government structures had to be provided for. Furthermore, the whole territory of the Republic had to be included in the jurisdiction of a specific municipal authority.<sup>5</sup> The new legal dispensation indeed complies with these constitutional requirements. In the first instance, the entire territory of the South African state falls within the jurisdiction of a demarcated municipal government. Even areas that are not viable to have their own direct local government, ie district management areas, fall under the control of a district municipality within that area. Secondly, the Municipal Structures Act provides for various new institutional models of local government. Apart from the constitutionally defined categories of municipalities the act provides for the establishment of various models of municipal types by combining various municipal systems.<sup>6</sup>

In total five systems have been created. Three are so-called executive systems whilst two are participatory systems. Since the powers, functions and circumstances of municipalities differ it is submitted that the various combination possibilities indeed should be able to cater for the different needs and responsibilities of all municipalities. The new legal framework further aims not only to achieve more effective execu

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<sup>4</sup> Refer to ss 40 and 41 of the Constitution.

<sup>5</sup> See s 151 of the Constitution.

<sup>6</sup> See s 7 of the Structures Act.

tive functioning but also to ensure public involvement and participation, which again should enhance the underlying values of the Constitution. Although a clear division of the roles and responsibilities of the various types of municipalities has been determined, there seems to be some uncertainty in practise. Uncertainty especially exists relating to the division of powers and functions between local municipalities and their relevant district municipalities. Notwithstanding such difficulties, the new legislative provisions have ensured that all municipal institutions have been re-established and all former municipal authorities have been replaced by newly transformed local authorities. Municipal boundaries were re-determined and many municipalities were amalgamated into new enlarged and supposedly more effective institutions.

A significant number of municipalities however still face enormous challenges relating to their new structures and boundaries and the amalgamation of municipal administrations and personnel. Further legal directions are needed to address some of these challenges more effectively.

#### **22.2.5 Confirmation of new municipal boundaries**

It is clear from the new constitutional framework, that municipal boundaries had to be re-determined. This requirement was specifically fulfilled *via* the Municipal Demarcation Act which established an independent Municipal Demarcation Board.<sup>7</sup> This board has demarcated all municipal boundaries and has fulfilled the requirement of creating a system of wall to wall municipal government in South Africa. Under the Constitution, national legislation had to determine the criteria and procedures to determine municipal boundaries by an independent authority.<sup>8</sup> Two national acts, the Local Government: Municipal Structures Act and the Local Government: Municipal Demarcation Act were enacted.<sup>9</sup> Together these two acts, address the overall constitutional obligations towards municipal boundaries.

Boundaries are important to ensure local governments can provide municipal services in an equitable and sustainable manner. It would seem that the new laws indeed comply and fulfil the constitutional demands. It should be noted however that the determination and internal delimitation of municipal boundaries are not once off

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<sup>7</sup> Read ss 151(1) and 155(3)(b) of the Constitution together with the provisions of Act 27 of 1998.

<sup>8</sup> S 155(3)(b) of the Constitution.

<sup>9</sup> 117 of 1998 and 27 of 1998.



exercises but are continuous in nature. Regular evaluation of municipal boundaries is thus required. It is also notable that after the demarcation process, the number of official local authorities were reduced from over 800 to 284.<sup>10</sup> The demarcation process thus significantly rationalized local government structures. Such rationalization was needed under the Constitution to create a system of local governance that is effective and efficient and that would ensure the achievement of the objects of local government as set out under the Constitution.

#### **22.2.6 Adhering to the founding values and the Bill of Rights**

The Constitution specifically requires radical changes to the composition and election of municipal councils. In essence the new local government system had to be redesigned to ensure and achieve compliance to the Constitution's founding values and a truly democratic state. In order to complete such a system, many new changes had to be affected. On a closer evaluation, it seems acceptable to conclude that the new legal framework, indeed completes the basic framework of the Constitution regarding the composition and election of municipal councils. Local governments are now truly democratic spheres of government.

The new system is unique in some instances. For example, although the term of local governments is now similar to national or provincial governments, local governments are composed according to a electoral system that provides for a combination of proportional representation and constituency based electoral systems.<sup>11</sup> The unique features have been included to enhance the unique features of local governments and to ensure better representation and accountability. It seems as if the new legal system is well equipped to fulfil the broad constitutional requirements.

#### **22.2.7 Recognising the role of traditional leadership**

One area where the new local government legal dispensation still seems to lack clear direction is with regards to the role and involvement of traditional leaders in local government structures. Although the institution of traditional leaders is constitutionally recognised and protected,<sup>12</sup> the precise role of traditional leaders, specially in local government, has not been properly defined. This problem is confirmed by na-

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<sup>10</sup> The number of 284 is composed out of 6 Metropolitan municipalities, 47 District municipalities and 231 Local municipalities. For more detail refer to [www.info.gov.za/localgovernment](http://www.info.gov.za/localgovernment) visited on 18/07/2005.

<sup>11</sup> Read ss 157(1) and (2)(a)-(b) of the Constitution.

<sup>12</sup> See ss 211 and 212 of the Constitution.

tional government, which has embarked on new policy and legislative initiatives aimed at clarifying the current uncertainties.<sup>13</sup> Traditional leaders form an important part of traditional African cultures and structures and they should not only be included in municipal decision-making processes, but they can play a positive role in ensuring the ultimate success of especially rural municipalities.

The Constitution however only creates three spheres of government and allocates powers or authority only to such spheres and not to traditional leaders. One can thus argue, that unless a constitutional amendment is carried through, traditional leaders will be subjected to the authority of the local governments in which area such leaders fall. Since traditional leaders play an important role in maintaining traditional African customs, their roles should thus be more clearly defined. In view of the fact that the Constitution is the supreme law of the state, the role and functions of traditional leaders must comply with the Constitution. Traditional leaders are thus not autonomous institutions but function within the broad constitutional system. A strong need exists for co-operation and consultation between traditional leaders and local government structures. Clear national guidelines on such issues should ensure positive co-operation between the two institutions. Such legislative requirements are urgently needed.

#### ***22.2.8 The division of the powers and functions between the three spheres of government***

Under the Constitution, local government is not only recognised as distinctive and autonomous sphere of government but the Constitution also determines the specific powers and functions of municipal governments. Such powers and functions are thus constitutionally entrenched and cannot be taken away unless constitutional amendments are executed.<sup>14</sup> Local government powers are however not absolute, and are subject to national and provincial laws. In essence municipal powers and functions must be exercised to fulfil constitutional objectives and developmental duties. Under the constitutional framework, both the Structures Act and the Systems Act expand upon municipal powers and functions. It is of interest to note that within the new constitutional dispensation, local government powers are regarded as original pow-

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<sup>13</sup> See the Traditional Leadership and Governance Framework Act 41 of 2003.

<sup>14</sup> Read s 156 together with parts B of Sch 4 and 5 of the Constitution.

ers.<sup>15</sup> The Constitution does however not directly distinguish between the powers and functions of the different categories of municipalities *inter se*. Although it is constitutionally envisaged that a proper division of municipal powers should be made, such division had to be conducted in terms of national legislation.<sup>16</sup> Since category A or Metropolitan councils have exclusive executive and legislative powers, the division is only relevant between Local Council and their relevant District Councils. This division is specifically provided under the Local Government: Municipal Structures Act.<sup>17</sup> Powers not specifically allocated to a district will vest in the local municipality.

It is thus submitted that the new legal framework indeed complies to the broad constitutional requirements regarding the identification of municipal powers and functions and the division of such powers and functions between category B and C municipalities. Assignment of powers or functions are also permitted, and it is regulated through provisions set out in the Systems Act.<sup>18</sup> The new system also provides for municipal financial powers. The current system however still faces problems relating to old order laws that are still applicable and new proposals that have not yet materialized. Although the national legislative framework has been enacted, both provincial and even municipal laws are needed to complete the overall legal framework.

### **22.2.9 Evaluating the new legal rules dealing with internal mechanisms and municipal leadership**

It is an obvious fact that municipal governments are becoming more and more complex in comparison with their predecessors from yester year. Such complexities and duties require an effective, committed and educated leadership. On evaluation of the new legal framework, it would seem as if the new legal rules indeed support and facilitate the creation of such internal procedures and functions. The new system provides for various leadership options depending on the circumstances relevant in each particular municipal jurisdiction. To enhance and regulate municipal leadership,

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<sup>15</sup> See *Fedsure Life Assurance v Greater JHB TMC* 1999 (1) SA 3741 (CC).

<sup>16</sup> According to s 155(3)(c) the Constitution determines the following: “[S]ubject to section 229, [National Legislation must] make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality”.

<sup>17</sup> See ss 83-84 of the Systems Act.

<sup>18</sup> See ss 8-9 of the Systems Act.

the Constitution directly regulates the internal procedures of municipal councils.<sup>19</sup> These requirements are indispensable for effective municipal decision-making and the achievement of municipal goals and duties.

Both the Systems and the Structures Acts specifically expand on the basic constitutional provisions and thereby support and enhance the constitutional vision. Since the functioning of a local government is largely dependant on the effective exercise of functions, the new legal dispensation provides for specific codes of conduct for both political office bearers and also municipal administrative personnel.<sup>20</sup> It is thus submitted that the new legal provisions indeed have a significant role in regulating and controlling internal municipal functioning. Although the framework is extensive, regular overview should be employed and swift legal changes could be enacted to rectify or expand on existing rules in order to enhance or comply with practical problems.

#### **22.2.10 Ensuring sustainable municipal service delivery**

The new legal dispensation for local government also addresses the important aspect of service delivery and identifies various basic municipal services and functional activities. It must be remembered that the main objective/reason for existence of local governments is to provide sustainable and effective municipal services to local residents. Without such service delivery, local settlements cannot be sustained and the overall governmental structure of the state will be placed in jeopardy. The new system demands a system for service delivery that is accessible, simple, affordable, of high quality with incorporation of the values of accountability, sustainability and value for money.<sup>21</sup>

In compliance with the constitutional prerequisites, the Systems Act determines specific duties and requirements for all local governments in respect of municipal service provision and related aspects.<sup>22</sup> The act is however silent on which mechanism municipal councils should use to achieve and comply with the abovementioned requirements. Municipal councils must put their own policies and programmes in place and should be monitored and controlled by the two higher spheres. Possible expansion on the current legal regulation could enhance better achievement of the

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<sup>19</sup> See s 160 of the Constitution.

<sup>20</sup> Refer to Sch's 1 and 2 of the Municipal Systems Act.

<sup>21</sup> Read again ss 1, 152 and 153 of the Constitution.

<sup>22</sup> See s 73 of the Systems Act.

mentioned goals. Municipal councils must also adopt tariff policies for the levying of fees for municipal services.<sup>23</sup> Services can be provided via internal mechanisms or external ones.<sup>24</sup> Although municipal services per se are not absolutely defined and other services can also be assigned to municipalities, the Constitution together with the new laws, determines what should be regarded as basic municipal services. The achievement and compliance with the constitutional demand on services, will largely depend on how local governments structure their policies and also to what extent effective oversight by national/provincial governments are provided.

#### **22.2.11 Establishing a new local government personnel corps**

In relation to municipal staff the Constitution determines that all municipal councils can employ personnel that are necessary for the effective performance of their functions.<sup>25</sup> Local governments are thus empowered to employ such staff members that are needed to fulfil their obligations and duties. The new requirements have specifically been incorporated to enhance the organisational efficiency of municipalities but vigorous training of personnel is required. Municipal personnel matters should not be seen in isolation but together with other labour related requirements that are set out in other laws.<sup>26</sup> The new dispensation determines that the municipal manager is the head of the municipal administration and as such has been given a wide range of duties and responsibilities. Such a person is also the highest accountable official.<sup>27</sup>

Employment, especially of senior staff is linked to new performance standards and evaluations. Senior staff are mostly employed for fix periods only<sup>28</sup> and a comprehensive code of conduct for staff members has been included.<sup>29</sup> Continuous training and support is however a prerequisite for effective local government administrations. It is submitted that old order bureaucracies should be avoided and regular evaluation of the organizational structures of municipalities must be undertaken. Municipal staff matters should further be linked to the requirements of the public administration and guidelines on financial management. All in all it appears as if the basic constitutional

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<sup>23</sup> S 74 of the Systems Act.

<sup>24</sup> Ss 26-81 of the Systems Act.

<sup>25</sup> S 160(1)(c) read with s 156(5) of the Constitution.

<sup>26</sup> Read for example acts such as the Labour Relations Act 66 of 1995 and also the Basic Conditions of Employment Act 75 of 1997.

<sup>27</sup> See s 55 of the Systems Act.

<sup>28</sup> See s 7 of the Systems Act.

<sup>29</sup> Refer to Sch 2 of the Systems Act.

demands are met and that local government administrations and personnel structures are adequately empowered to achieve and fulfil their important constitutional obligations.

#### **22.2.12 Regulation of municipal fiscal management and fiscal powers**

Mention was made above that municipal administrations and staff members are partly regulated in terms of a new and reformed legislative framework dealing with municipal finance and fiscal management. Without a proper financial system and effective control mechanisms, local governments will not be able to fulfil their obligations. Financial powers and proper fiscal management are essential in the new local government dispensation. From the chapter on municipal finance discussed above it becomes obvious that an entire new legal framework has been established. Not only does the Constitution determine basic fiscal requirements and obligations, but also that new national legislative provisions are authorized to create a uniform system for property tax assessments and recovery as well as a comprehensive system aimed at regulating municipal fiscal management.<sup>30</sup> It is suggested that the new dispensation indeed fulfils the constitutional demands but that the system should be constantly monitored to ensure effectiveness and efficiency. Swift amendments should be considered to better and regulate the new system should new financial challenges arise. Financial discipline is a key component for the success of local governments and careful and continuous oversight by national/provincial governments is essential. It is submitted that the new dispensation, if applied correctly, indeed should enhance and ensure effective municipal financial capacity and fiscal management.

#### **22.2.13 Compliance to new vision for public administration**

It was mentioned above that the Constitution sets various requirements dealing with the public administration and other related matters. The new legal system supports such requirements and seeks to adhere and advance to the supreme constitutional demands.<sup>31</sup> Apart from the provisions dealing with the public administration, various other requirements such as principles and provisions of performance management, capacity building, municipal accountability and public participation have been included in the new system. Such provisions are aimed at fulfilling the new constitu-

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<sup>30</sup> 56 of 2003.

<sup>31</sup> See ss 195, 196, 50 and 51 of the Systems Act.

tional values set out in the founding provisions of our supreme law.<sup>32</sup> The new dispensation aims at ensuring a more customer orientated public service with strict requirements of accountability and control. One can indeed argue that a sound foundation for a general people orientated local government system has been established, which system should not only ensure constitutional compliance but also a more brighter future for all South Africans.

**22.2.14 Adhering to the principles of municipal development, planning, performance management, capacity building and public participation**

The new legal dispensation also incorporates significant provisions relating to municipal development planning and the regulation of basic legal matters. Important aspects relating to municipal planning have been decentralized to municipal governments, and although municipal planning is a functional area of concurrent national and provincial legislative competence, all municipalities are constitutionally obligated to ensure proper and effective municipal development planning. Proper municipal planning is needed to structure and manage municipal administrations in such a way as to give priority to the basic needs of their communities. Municipalities are also obligated to promote the social and economic development of their communities and to ensure a safe and healthy environment. The Constitution specifically requires national laws to provide an overarching set of regulatory provisions to enable all municipalities to create and cater for basic planning needs. This requirement was partly met in the provisions of the Systems Act.<sup>33</sup> Integrated Development Planning is now a core component of the new legal framework and should significantly allow municipalities to fulfil their developmental responsibilities. Municipal Integrated Development Planning should however be continuously monitored and adjusted to keep abreast with local changes and circumstances.

Since municipalities are established throughout the territory of South Africa and since they have a large impact on local communities, many general legal rules are applicable to local government administrations. Apart from a general understanding and knowledge of the different legal fields relevant to the South African legal system, various unique legal provisions are also highlighted. Such unique legal matters pertaining to local government only have been identified in national legislation and is

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<sup>32</sup> See s 1 of the Constitution read together with ch 4 and 6 of the Systems Act.

<sup>33</sup> See ss 24-29 of the Systems Act.



directly regulated in terms of the Systems Act.<sup>34</sup> As a sphere of government, local governments are faced with general legal matters on a daily basis, and as such a complete understanding and compliance with the law of the state in general is a prerequisite for municipalities to be able to perform their functions and achieve their goals.

#### **22.2.15 *Evaluating the new status and autonomy of local government institutions***

One of the more distinct features of the new face of local government in South Africa is the fact that it now has a new enhanced and protected status and autonomy. All local government institutions have been confirmed as a distinct and interdependent sphere of government.<sup>35</sup> Notwithstanding the constitutional confirmation of the new status and subsequent autonomy of local governments, such autonomy is not absolute and is often subjected to the oversight and control of both the national and provincial spheres of government.<sup>36</sup> In light of the constitutional provisions, the autonomy of municipalities is regarded as a limited or restricted autonomy. The crux of the limitation lies in the confirmation within the Constitution itself in that municipalities are in some instances subjected to national and provincial legislation. Any encroachment on the autonomy of a local authority must be justified and permitted under the Constitution or else it would be unconstitutional and invalid. Since the Constitution itself entrenches only a limited autonomy for local government, any dispute relating to such an issue should be resolved with reference and interpretation of the overall constitutional scheme. Many aspects could have an impact in such cases, for example the Bill of Rights, the principles of co-operative government or even the requirements dealing with government finance. It is however submitted that the limited autonomy of local government should not detract from the new role local governments are to play in our new constitutional dispensation.

#### **22.2.16 *Achieving the five core objects of local government***

Arguably the most important function of a local authority, seen from a local community point view, is the provision of sustainable service delivery. This core function of all municipal governments has been at the forefront of municipal development, not

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<sup>34</sup> See ch 11 of the Act for more detail.

<sup>35</sup> Refer to s 40 of the Constitution.

<sup>36</sup> See s 151(3) and (4) of the Constitution.

only in the South African context, but all over the world. It was explained above that the main reason for the existence of local authorities was to ensure and secure sustainable provision of certain municipal services to local communities. The most common problem facing local governments today is the lack or insufficient provision of such services. Since the provision of services is such a fundamental function of a local government, the new constitutional dispensation has specifically incorporated such a function within the new legal framework.<sup>37</sup> The provision of municipal services however is not the only important municipal object and therefore the Constitution has identified and entrenched five core objects of the new local government dispensation.<sup>38</sup> All municipalities are obligated to strive, within their financial and administrative capacities, to achieve the five objects mentioned above. Although the new legal framework should facilitate and enhance the fulfilment of the core objects of local government, it is ultimately left to municipal governments themselves to ensure that they structure their finances and administrations in a manner that will achieve the objects. Many municipalities in South Africa are not complying with this important constitutional requirement and subsequently many are not providing sustainable services and are not achieving the lawful expectations of local communities. It is this writer's submission that the new legal framework indeed fosters and ensures a legal order within which municipalities should be able to achieve their goals and objects. One should however not lose sight of the important role both national and provincial governments must play to ensure through oversight and control measures, that municipalities are indeed making positive progress in the achievement of local government objectives.

#### ***22.2.17 The principle of creating a local government dispensation that is developmentally orientated***

Apart from the core objects of local government the new constitutional scheme also requires all municipalities to be developmentally orientated regarding their duties.<sup>39</sup> In essence, the developmental approach of local government entails the improvement of the quality of life of all municipal communities. In order to achieve the obliga-

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<sup>37</sup> S 152(1)(b) of the Constitution states that one of the objects of local government is to ensure the provision of services to *local* communities in a sustainable manner.

<sup>38</sup> Refer to s 152(1)(a)-(e) of the Constitution. The objects are: democratic and accountable governance, provision of services, promotion of social and economic development, promotion of a safe and healthy environment and lastly the encouragement of public participation in municipal matters.

<sup>39</sup> See s 153 of the Constitution.

tion of being developmental in nature, all municipalities are obligated to do two things: (a) they must structure and manage their administrations and budgeting/planning processes in such a way as to give priority to the basic needs of their respective communities and thereby help to promote the social and economic development of such communities; (b) they must participate in national and provincial development programmes.<sup>40</sup> In view of the new legal system for local government, which includes aspects such as co-operative government and the new internal municipal structures and procedures, it is again writers submission that the new legal dispensation indeed caters and fosters a local government system where developmental duties and objects can be realised. Success however will ultimately depend on the manner in which municipalities themselves structure and manage their institutions in order to achieve such duties at best.

### **22.3 Conclusion**

It is writer's overall conclusion that the new legal dispensation relevant to local government institutions of South Africa, as was created within the general constitutional framework, not only complies with the overall constitutional demands, but if correctly applied and if the envisaged support and oversight is provided, should indeed succeed in steering local government to be a more developmental and more people orientated sphere of local government. A broad and seemingly effective legal system has been created to allow and ensure that municipalities can achieve their specified constitutional duties and objects. The new dispensation not only seems to cover all necessary components of a successful legal dispensation but also provides for various mechanisms to ensure proper control and oversight. Many commentators have in the recent years suggested that both the two higher spheres of government were dragging their feet in completing the legal system for local government, and that especially national government has failed to timeously fulfil its constitutional obligations. In view of the extent and content of the new legal system and upon close evaluation of all the new laws that were enacted, one can however understand that the completion of the new system was not as elementary as many initially believed. It is this writers opinion that the new established legal system indeed signifies a monumental advancement in the creation of an effective and supported municipal government in the new South African constitutional state.

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<sup>40</sup> See s 153(a)-(b) of the Constitution.

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## **Municipal services and service delivery and the basic functional activities of municipal governments**

### **16.1 Introduction**

In their capacity as the third and lowest sphere of government and the one that functions closest to local communities, municipal governments have often been described as comprising the sphere of government that is tasked mainly with the development and provision of services to communities. Some writers have even commented that if a municipality cannot or does not perform its service provision obligations, it should forfeit its right to exist.<sup>1</sup> This idealism is strongly entrenched in the new constitutional framework that has been devised for local government.<sup>2</sup>

Although all municipalities have been constitutionally tasked with providing sustainable and effective services, such a realisation is not as easy as it may seem. There are many different aspects that must integrate with one another before a municipality will be able to succeed in this mammoth task. One should therefore look not only at the different services that should be provided by local governments but also to the various obstacles and problems to their fulfilling their mandate. Factors that influence services and service delivery change drastically from one municipal term to the next, and continuous and long term planning is of the order of the day.<sup>3</sup>

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<sup>1</sup> See Craythorne (1997) 391.

<sup>2</sup> According to the Constitution s 152(b), one of the main objectives of local government is to ensure the provision of services to communities in a sustainable manner. The provision of services is thus a cardinal function, if not the most important function, of every municipal government.

<sup>3</sup> New demands on services and service provisions are especially relevant in many formerly underdeveloped areas and also in areas where drastic urbanisation is taking place. Without proper planning, future service delivery objectives will most definitely be jeopardised.

## **16.2 The new vision of local government service delivery**

### **16.2.1 *Assessing basic needs***

It has been mentioned above that local government administrations have been undergoing radical changes under the new constitutional dispensation of South Africa. Unfortunately many of such changes have not been driven by clear and precise visions of the role and responsibilities that all municipalities should play. A practice that was introduced during the process of amalgamating and restructuring municipal administrations and which was subsequently proceeded with in the new local government system was to adopt and extent the structures and functioning of the former established municipal administrations without significant changes.<sup>4</sup>

On the contrary, it must be said that many municipalities indeed used the amalgamation process to initiate processes of review of their administrative organisation. This is how many innovative approaches to especially strategic management procedures were introduced, for example. Such approaches focussed mainly on technical problems, however, and little attention was given to rethinking the basic principles on which the administrations were organised. For the transformation and new local government system to be successful, a process of administrative reorganisation is required. This is particularly essential if all municipalities are to achieve the new constitutional obligations.<sup>5</sup> In order to enhance service delivery, almost all municipalities have wide-ranging options. Most prominent, however, is the need to assess and plan strategically for the most appropriate and effective forms of service delivery mechanisms within each particular municipal area. Municipal administrations must choose those delivery options that would ensure maximum benefit and efficiency.

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<sup>4</sup> In order to minimise administrative disruption, minimal changes were made to many municipality's organisational structures. This aspect was, and still is, not absolutely favoured by the ruling government, as it perceives the old structures as ineffective and disruptive to the new local government vision. See the White Paper on Local Government (1998) at 111.

<sup>5</sup> Again, emphasis should be placed on the fact that the central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all South African communities. The provision of basic services enhances the quality of life of all citizens, and it increases many new economic opportunities and productive initiatives.

### 16.2.2 *Basic principles and approaches on service delivery*

In order to achieve optimal service delivery, each municipal government should choose a delivery system that is best suited to the type of municipality concerned and after taking into account all the special needs of the local communities. When municipalities are deciding on the particular delivery options for their areas, they should be guided by certain basic principles.<sup>6</sup> The principles can be summarised as follows:

- *Accessibility* All communities should have access to at least a minimum level of services. This is not a goal, but a constitutional obligation. The many imbalances that still exist regarding equal access to services should be addressed through the development of new infrastructure and the rehabilitation and upgrading of existing infrastructure.
- *Simplicity* Municipal services should not only be accessible, they should also be easy and convenient to use. In this regard it is of special importance that municipalities should aim to ensure that people with disabilities or that are illiterate should be able to access and use municipal services with ease.
- *Affordability* It is a given that many services remain unaffordable for many South African residents. In order to enhance quality of life, municipalities should strive to make services as affordable as possible. This is not an easy task, as many factors have an impact on the pricing of services.<sup>7</sup>
- *Quality* Services should not be rendered below a certain determined quality. In this regard, services should be suitable for their purpose, should be timeously provided, should be safe and should be accessible on a continuous basis. Service users will not pay and support their municipal service providers promptly if services are sub-standard and of a poor quality. Not only the services themselves but also back up maintenance and support should comply with the minimum quality standard.

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<sup>6</sup> See the White Paper on Local Government (1998) at 113-114. The principles mentioned in the White Paper should not be regarded as a *numerus clausus*, but should serve as a basic point of departure.

<sup>7</sup> Again one must remember that municipalities have a constitutional obligation to provide at least certain minimum services to people, even though they cannot pay for such services. See, eg, the socio-economic rights set out in the Constitution ch 2, as well as ch 7 ss 152 and 153. In compliance with these requirements, many municipalities have introduced so-called "sliding scale payment schemes", where all residents are provided with a predetermined quantity of water and electricity free of charge.

- *Accountability* The new South African state, which includes local governments, is founded on, *inter alia*, the values of a democratic government, which includes principles of accountability and responsiveness.<sup>8</sup> Whenever a delivery system is adopted by a particular municipal government, therefore, it remains the responsibility of that municipality to be accountable for all its activities, which includes the assurance of service provision of an acceptable quality.
- *Integration* All municipalities should adopt an integrated approach to planning and ensuring municipal service provision. The integration of municipal services requires specifically that each municipality take into account the economic and social impact of service provision in relation to overall municipal policy objectives such as poverty eradication and job creation.
- *Sustainability* The provision of services to local communities in a sustainable manner is also a constitutional imperative for all municipal governments.<sup>9</sup> In light of this constitutional requirement, service provision is an ongoing process. However, ongoing service provision depends on municipal institutions that are properly managed both financially and administratively.
- *Value for money* Municipal services should account for value for money. Municipalities should strive to provide not only sustainable services but services that provide value for money for all services users. In this respect, value for money and affordability goes hand in hand.
- *Promotion of competitiveness* All municipalities should take cognisance of the fact that job generation and the competitive nature of local commerce and industry could be adversely affected by imposing higher rates and service charges on such industries in order to subsidise domestic users. Such practices could have a negative impact on local economic development, as many potential investors or businesses could be scared or lured away to other jurisdictions. In this regard, sufficient transparency is needed to ensure that all investors are aware of the costs of doing business in a particular local area.

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<sup>8</sup> See the Constitution s 1(d).

<sup>9</sup> Refer to the Constitution s 152(1)(b).



- *Promotion of the new constitutional values* Lastly, it is not only a legal prerequisite for all municipalities to comply and adhere to the new constitutional values and requirements, it is also an essential recipe for all local governments to achieve optimal sufficiency and support. Municipal administrations must therefore fulfil and promote the democratic and other administrative values and principles that are enshrined in the Constitution.

After the abovementioned criteria have been taken into account, a municipality should be in a good position to determine which service delivery options would be best for its particular area of jurisdiction. In appropriate circumstances, a special mixture of different delivery options can be implemented. Apart from the delivery option or options, most municipalities can further enhance service delivery through the implementation of specific delivery mechanisms. Such mechanisms include the following:<sup>10</sup>

- *Building on existing capacity* It is a known fact that municipal governments throughout South Africa have different levels of administrative capacity. Many municipalities have however a sound existing infrastructure and established municipal capacity. Without ignoring new initiatives, it is very important for all municipal governments to build on their already existing capacity and potential. Reinvention of the wheel so to speak will only result in poor service delivery and unnecessary expenditure. Not all existing capacities are however suitable for expansion. In many instances drastic reform measures should be introduced as a matter of urgency. Such measures could include the introduction of performance-based contracts for senior staff members, the development of new codes of conduct, the implementation of reform policies such as affirmative action programmes, training and empowering the skills of frontline workers to interact with the communities, the decentralisation of operational management responsibilities and, lastly, the development of new strategies through consultation and communication.
- *Corporatisation* In essence the term corporatisation refers to the separation of service delivery units from the specific municipal council. This in turn should enable a council to determine specific policy goals and to set

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<sup>10</sup> See the White Paper on Local Government (1998) at 115-121.

service standards to which corporate units can be held responsible. Corporatisation also offers greater autonomy and flexibility to the management of the different service units which could allow for commercial management practices to be introduced.<sup>11</sup>

- *Establishment of public-public partnerships* The establishment of public-public partnerships or so-called public joint ventures can allow for horizontal co-operation between municipalities. Such partnerships are often common in other countries especially in areas such as joint purchasing, training initiatives and technical support.<sup>12</sup> Within the new local government scheme of South Africa, municipalities should begin to explore these innovative partnership agreements with other state institutions or parastatals such as the Post Office for the collection of municipal revenue. Obvious benefits can be derived from such partnerships, not only for the municipalities concerned, but also for the benefit of local residents.
- *Establishment of partnerships with community-based organisations and non-governmental organisations* Partnerships with community-based organisations (CBOs) and non-governmental organisations (NGOs) can be very effective in involving local communities and also to stimulate local economic development. Often such organisations have particular skills that could enhance and facilitate new development initiatives and serve as an effective intermediary in local initiatives. In the new area of local government development, municipalities should consider involving CBOs and NGOs in partnerships with other public or private institutions. Even so-called three-way-partnerships between a public, a private and a CBO/NGO can be very effective.<sup>13</sup>
- *Public-private partnerships* Municipalities should also explore the possibilities of entering into partnerships with local businesses. Apart from

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<sup>11</sup> Corporatisation can take a number of forms, from public institutions such as Water Boards or Town Planning Boards to joint ventures between municipalities. Corporatisation is of particular value in large municipal jurisdictions.

<sup>12</sup> Refer to the White Paper on Local Government (1998) at 117.

<sup>13</sup> In such a partnership a municipality can, eg, provide funding for a project, a private contractor can provide skills and equipment, whilst a CBO can facilitate the recruitment and management of local labour and community support. The advantage of such a partnership is that skills are effectively transferred, employment is created and effective services are provided without exhausting municipal capacity.

stimulating the local economy, such partnerships should also ensure effective services and less financial expenditure for the local authority.

- *Out sourcing/out contracting* For many years already, many municipalities have benefited from the practice to contract certain services out to specialist private companies. Such specialist companies can often provide such services more effectively than in-house municipal departments can. It is however important for municipalities that when services are contracted out the municipality should protect and ensure minimum standards, contract specifications and an overall control and monitoring capacity. The modern trend in local government seems to be that services are outsourced by way of tender procedures and not by subjective unilateral decision making, or even auction procedures. During a tender process, the lowest bidder is not always the best contractor. Various factors such as the financial standing of the contractor, the inclusion of local labour and technical capacity and quality control should be taken into account. Municipalities must ensure that all legal requirements are adhered to in this regard. Contracting out should be most effective when municipalities are clear about the services they are seeking from a private contractor, and when they have the capacity to manage the tender process and monitor the rendering of the services to ensure that municipal objectives are met.
- *Leases and concessions* A further approach to service delivery is the conclusion of either lease or concession agreements. Such agreements are forms of public-private partnerships that are most common for services where large-scale capital investment is required. The agreements are characterised by an often long contractual period extending over many years, a contractor that is required to take charge of the assets and infrastructure associated with the service for the duration of the contract, which requires substantial investment from the contractor's side. Because the contractor is taking on more risk, it normally demands the transfer of the responsibility for revenue collection in order to minimise financial losses. The long contract period is usually long enough to allow the contractor to recover its initial investment through the revenue that is generated from the provision of the services. In almost all instances the contractor will require ownership of the assets for the duration of the

contract period. When the contract lapses, ownership and infrastructure is then transferred to the municipality.<sup>14</sup> Lease and concession agreements can be concluded in various formats. There are so-called build-operate-transfer (BOT) agreements, where a contractor builds an asset, operates it for a period of time and then transfers it to a municipality. Then there is the build-own-operate-transfer (BOOT) agreement, which further gives ownership of the assets or infrastructure to the contractor for the length of the contract period. Lastly, there is also a build-operate-train-transfer (BOTT) variation which specifically provides for training for municipal employees during the contract period, which will then operate and manage the facilities and services, after the contract period has come to an end. Apart from the obvious benefits of such partnerships, there are high financial risks if such partnerships are managed or structured poorly. To avoid such negative possibilities, national government has put forward certain regulatory requirements to ensure public accountability and consumer protection. Some of these requirements will be discussed elsewhere in this chapter.

- *Privatisation/transfer of ownership* The last procedure to enhance service delivery refers to the transfer of ownership from municipalities to private or community-based entities. The transfer of ownership in this respect particularly refers to the sale of municipal assets, together with the transfer of responsibilities for the management of such services. Such a process is more generally referred to as privatisation. Although privatisation should not easily be considered with reference to primary/core municipal services such as water, electricity and solid waste disposal, it certainly could have positive outcomes in respect of secondary services such as municipal

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<sup>14</sup> Although this form of service provision is not entirely new to government institutions, it has only recently started to take effect. A good example of such a partnership is the partnership between the department of correctional services and private institutions to build and manage new correctional facilities. The private companies have agreed and contracted with government to build new prisons, which they will then manage for a certain period in lieu of payment for such services. After the contract period has lapsed, the prison and other assets will fall back on the government. There are many areas in local government service provision, where such partnerships can be very effective. One such example is the possible upgrading and management of old power stations in municipal areas. Private companies can reinvest in such stations and then sell the electricity to the local municipality. After a certain period, the power station and new infrastructure will again be owned by the municipality, to utilise to the benefit of its local communities.

maintenance, parks and recreation and even refuse removal services.<sup>15</sup> All in all, the privatisation of non-core assets can boost municipal capacity and revenue in order for municipalities to focus on the delivery of strategic and core municipal services. Although there seems to be no clear consensus on which municipal services should be regarded as core or non-core services, national guidelines provide more clarity in this respect. It is, however, the final responsibility of each municipal council to make its own assessments in relation to what services are core services and what are not. In this regard, municipalities should be guided by the strategic policies put forward in each municipally integrated development plan.

### **16.2.3 Some basic administrative capacities that will enhance municipal development**

In order to play and ensure a developmental role effectively and to improve performance in respect of service delivery, all municipalities will need to develop at least the following capacities:

- Municipalities will have to become more strategic in their orientation. They should be open and flexible to new or unforeseen demands.
- They will have to maximise integrated capacity, both inside and outside the municipal jurisdiction.<sup>16</sup>
- They will have to become much more community orientated.

Municipal councils need to develop mechanisms to interact with community groups and to identify service needs and priorities. Without the capacity to strategise, integrate and interface with non-municipal groups, many local governments are unlikely to be sustainable in the future. The implementation of new strategies and policies requires a strong municipal leadership, with the necessary support and belief of the municipal council. Continuous communication between all role players and regular oversight and training should be provided.<sup>17</sup>

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<sup>15</sup> With special emphasis on the central role that municipalities are constitutionally obligated to play in meeting the material, social and economic needs of communities, it is undesirable that ownership of core infrastructure and assets is removed from the municipal/public sphere.

<sup>16</sup> The vertical integration of national and provincial programmes with municipal administrative systems may be a particularly effective way for rural municipalities to build their administrative capacity.

<sup>17</sup> It should be noted that the training of municipal councillors falls under SALGA, which in turn should ensure that an intensive councillor training programme is provided for after

Suffice it to say that the approaches to improving service delivery efficiency and quality, which build on existing capacity, are more likely to succeed if they are structured as a partnership between council, management, labour and the community. Although labour protects particular interests, such interests should not prevent effective service delivery to communities. In this respect the South African Local Government Bargaining Council (SALGBC) will play a critical role in achieving new service delivery standards and development objectives. The SALGBC will have to look specifically at new measures to ensure more flexibility in the retraining and redeployment of municipal staff, the introduction of a more customer- and performance-orientated service system and the improvement of accountability and commitment to delivery within municipal administrations. Finally, one should remember that it is ultimately the responsibility of national and provincial governments to monitor and oversee the effective performance by municipalities of their functions.<sup>18</sup>

### **16.3 The new legislative requirements regarding municipal services and service provision**

#### **16.3.1 *The constitutional legal basis***

According to the new constitutional framework, all municipalities are obligated to provide certain services and to achieve certain objectives. In this regard there is a strong relationship between the functions that municipalities should fulfil and the services and objectives that they should achieve and provide. It is interesting to note that the Constitution itself does not go into much detail regarding all the services that a modern municipal government should provide. The Constitution merely states that all municipalities must strive, within their financial and administrative capacities, to achieve the objectives of:

- a democratic and accountable government
- the provision of services in a sustainable manner
- social and economic development
- safe and healthy environments

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every election of new municipal councillors. See the White Paper on Local Government (1998) at 125.

<sup>18</sup> See again the Constitution ss 154(1) and 155(6).

- community involvement in local government matters.<sup>19</sup>

The Constitution also mandates all municipalities to structure and manage their administrations, budgets and planning processes to give priority to the basic needs of their communities and to promote social and economic development.<sup>20</sup> What the basic needs of communities are is not altogether certain. Some core/basic needs are universal, however, and should take centre stage in any municipal service provision planning. Such basic services would normally include water and electricity provision, as well as solid waste disposal and general municipal infrastructure. These services must be provided in an equitable and sustainable manner.<sup>21</sup> The Constitution again does not provide more guidance regarding specific services that should be rendered.

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<sup>19</sup> Refer again to the Constitution s 152(1)(a)-(e). It is self evident that without the necessary financial and administrative capacity the mentioned objectives will not be achieved. Various strategic programmes and initiatives should be implemented in order to enhance both financial and administrative capacities.

<sup>20</sup> See the Constitution s 153(a)-(b).

<sup>21</sup> In terms of s 155(4) of the Constitution, national legislation must take into account the need of municipalities to provide municipal services in an equitable and sustainable manner.



Apart from the fact that municipalities are obligated to provide certain core services to their residents, a municipality must be legally authorised to provide such a service or to impose fees or tariffs for such services. Without legal authorisation, a municipal government will not be entitled to render particular services or to impose fees for such services.<sup>22</sup>

In an effort to further enhance the achievement and fulfilment of their obligations towards service provision, the Constitution requires provincial governments to establish municipalities in a manner that will promote the development of local government capacity in each province so as to enable municipalities to perform their functions and manage their own affairs.<sup>23</sup> Only time will tell if the different types of municipality that have been established under provincial authorisation will indeed promote the development capacities as is required. On this point, it is also important to mention that both national and provincial governments, through their legislative and executive powers, should see to the effective performance by a municipality of its functions in relation to the matters listed in Schedules 4 and 5 of the Constitution.<sup>24</sup> Furthermore, a municipality, in the effective performance of its functions, has the right to exercise any power concerning a matter that is reasonably necessary for or incidental to the performance of its normal functions.<sup>25</sup> In this respect one should remember that it is the municipal council itself that makes decisions concerning the exercise of powers and the performance of all

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<sup>22</sup> See, eg, the case of *Kajee v Stanger Borough Town Council* 1994 (3) SA 9 (A). In this case the appellant's property was situated outside the municipal area and not connected to the respondent's electricity system. The respondent's main electricity cable, however, passed within 23 metres of appellant's property; accordingly, the respondent alleged, the appellant was liable in terms of the Local Authorities Ordinance 25 of 1974 (N) s 266(1)(f), which provides that the town council can make by-laws prescribing, *inter alia*, "an availability electricity charge in respect of properties ... which are not connected to the council's electricity scheme if such properties can reasonably be so connected". These charges were purportedly fixed and levied in terms of two municipal notices promulgated by a resolution of the council. However, on appeal the respondent was unable to produce a by-law authorising the council to impose such charges, but referred instead to s 268 of the ordinance (as it existed prior to its amendment in 1985), which, after dealing with the procedure to be followed for the making of valid by-laws, provided in ss (4) that "notwithstanding anything in s 266 contained, the council shall impose fees and frame tariffs of charges only by resolution". The court held that before the council could impose fees or frame tariffs it had to be properly empowered to do so. Because no valid by-law had been passed, the municipality had no power to prescribe or recover the particular tariff. See paras C-D at 14.

<sup>23</sup> See the Constitution s 155(6)(b). This establishment took place during the 2000 local government elections and with the beginning of the final phase of the restructuring process.

<sup>24</sup> See the Constitution s 155(7).

<sup>25</sup> This aspect is confirmed in the Constitution s 156(5).

functions of a municipality and also employing the necessary personnel to perform its functions effectively.<sup>26</sup>

In light of the abovementioned, it seems acceptable to argue that the constitutional drafters did not want to address extensively all the various legal aspects and specific services that municipalities in the new legal scheme have to comply with. Basically they left it open for parliament to address these issues in more detail and with more certainty, and created only a broad framework wherein such services had to be identified and sufficiently provided for. In this respect the Municipal Systems Act contains numerous legal requirements relating to municipal service provision and fulfilment.

### **16.3.2 General provisions regarding municipal services according to national legislation**

#### **16.3.2.1 The general duty on municipalities in respect of municipal services and basic aspects concerning service tariffs**

In compliance with the basic constitutional provisions and requirements in respect of municipal service provision, the Local Government: Municipal Systems Act<sup>27</sup> determines specific duties and requirements for all municipalities, which must be complied with. As a general duty, a (or all) municipality must give effect to the provisions of the Constitution and must:

- give priority to the basic needs of the local community
- promote the development of the local community
- ensure that all members of the local community have access to at least the minimum level of basic municipal services.<sup>28</sup>

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<sup>26</sup> The Constitution S 160(1)(a) and (d).

<sup>27</sup> 32 of 2000 as amended.

<sup>28</sup> See the Systems Act s 73. According to s 1 of the Act, the term “basic municipal services” is defined to mean a municipal service that is necessary to ensure an acceptable and reasonable quality of life and that, if not provided, would endanger public health or safety or the environment. Although the definition provides some guidance, an exact determination of what should be regarded as a basic municipal service is very open ended and will have to be determined on a case-to-case basis and after consideration of all relevant circumstances. See the case of *Manqele v Durban TMC* 2002 (6) SA 423 (D). The Water Services Act 108 of 1997 s 2(a) sets out that one of the main objectives of the Act is to provide for “the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being”. In terms of the Act s 3 everyone has “a right of access to basic water supply and basic sanitation”, and every water service institution must take reasonable measures to realise these rights. In terms of the definitions in the Act s 1, “basic water supply” means the “prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene”, whilst “prescribe” itself means “prescribe

The Systems Act furthermore identifies five specific requirements that municipal services must adhere to. These requirements are:<sup>29</sup>

Municipal services must be:

- equitable and accessible
- provided in a manner that is conducive to prudent, economic, efficient and effective use of available resources and the improvement of standards of quality over time
- financially sustainable
- environmentally sustainable
- regularly reviewed with a view to upgrading, extension and improvement.<sup>30</sup>

The Act is unfortunately silent on ways or mechanisms whereby municipalities are to achieve and adhere to the mentioned requirements. It seems that the main initiatives in this regard should come from individual municipalities themselves. All municipal councils should therefore take full cognisance of the listed requirements and put policies and programmes in place in order that they do not fall foul of the broad and more specific legal obligations. It is also submitted, however, that national and provincial governments should do more

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by regulation". In the absence of regulations defining the extent of the right of access to a basic water supply, the court has no guidance from the legislature or the executive to enable it to interpret the content of the right to basic water supply embodied in the Act s 3. The applicant approached a Local Division after the discontinuation by the respondent of the water supply to the premises she occupied together with four of her own children and three other children, as a result of non-payment of the applicant's water account. The relief sought was predicated on the existence of the applicant's "right" to a basic water supply as referred to in the Act s 3. The court held that, in the absence of prescription of the minimum standard of water supply services necessary to constitute a basic water supply, the interpretation that the applicant wanted the court to place on the Act s 3 required it to pronounce upon and enforce upon the respondent, a local authority, the quantity of water that the applicant was entitled to have access to, the quality of such water and acceptable parameters for "access" to such basic water supply. Those were policy matters which fell outside the purview of the court's role and function and were inextricably linked to the availability of resources. See also *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 (6) SA 66 (T), where the court held *inter alia* that the attitude adopted by the respondents in their answering affidavits reflected a certain contempt for the plight of the people whose water supply had been cut off; a degree of unwillingness to co-operate that was unacceptable on the part of an organ of state.

<sup>29</sup> See the Systems Act s 73(2)(a)-(e).

<sup>30</sup> It is interesting to note that according to recent case law it was stated that there is no language anywhere in the Act which expressly requires one to confine the ordinary meaning of the wide expression "municipal services", where it appears in the Act, to municipal services which are charged for or which are notionally capable of being charged for and which have identifiable users. It cannot be accepted that throughout the whole of the Act any reference to municipal services must be taken to be confined to services which are chargeable to individual users. See *SAMWU v City of Cape Town* 2004 (1) SA 548 (SCA) para 8 at 550.

to assist and support municipalities in complying with their general service delivery duties. This can be achieved through the enactment of more detailed legislative or even executive guidelines.<sup>31</sup>

Apart from the basic duties and requirements on local governments in respect of municipal services, the Systems Act further determines that all municipal councils must adopt and implement a tariff policy on the levying of fees for municipal services that are provided by the municipality itself or by way of service delivery agreements. Such a tariff policy must then comply with the provisions of the Systems Act, the MFMA, as well as with any other applicable legislation.<sup>32</sup> The Act then determines that the mentioned tariff policy must reflect at least a certain minimum principles. These minimum requirements are the following:<sup>33</sup>

- (a) users of municipal services should be treated equitably in the application of tariffs;
- (b) the amount individual users pay for services should generally be in proportion to their use of that service;
- (c) poor households must have access to at least basic services. This can be achieved through tariffs that cover only operating and maintenance costs, by introducing special tariffs or life line tariffs for low levels of use or consumption or for basic levels of service, or by any other direct or indirect method of subsidisation of tariffs;
- (d) the tariff policy must reflect the costs reasonably associate with rendering the service, including capital, operating, maintenance, administration and replacement costs, and also interest charges;
- (e) tariffs must be set at levels that facilitate the financial sustainability of the service, taking into account the subsidisation from sources other than the particular service concerned;

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<sup>31</sup> In this regard, emphasis should again be placed on the constitutional obligations placed on national or provincial governments as set out in the Constitution ss 151(3) and (4), 154(1), 155(4), (6)(b) and (7). Even if such provisions are viewed to be inadequate, then s 164 should be helpful, which determines that any matter concerning local government that has not been dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.

<sup>32</sup> See the Systems Act s 74(1) as substituted by Act 44 of 2003 s 10.

<sup>33</sup> See the Systems Act s 74(2)(a)-(i).

- (f) provision may be made in appropriate circumstances for a surcharge on the tariff for a particular service;
- (g) provision may be made for the promotion of local economic development through special tariffs for certain categories of commercial and industrial users;
- (h) the policy must also encourage the economical, efficient and effective use of resources, the recycling of waste and other appropriate environmental objectives to be achieved;
- (i) the policy should also fully disclose the extent of subsidisation of tariffs for poor households and other categories of users.<sup>34</sup>

Apart from the basic tariff policy principles mentioned above, special cognisance should be taken of the fact that a tariff policy may lawfully differentiate between various categories of service user, debtor, service provider, service, service standard, geographical area and other matter, as long as such differentiation does not amount to unfair discrimination.<sup>35</sup>

When the tariff policy has been finalised, a municipal council must adopt by-laws to give effect to the implementation and enforcement of such a tariff policy. Again, such by-laws may differentiate between different categories of user, debtor, service provider, service, service standard and geographical area as long as such differentiation does not amount to unfair discrimination.<sup>36</sup>

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<sup>34</sup> It is submitted that this provision should have the positive support of the tariff policy in general. Many South African citizens do accept that there are enormous gaps between average households and very poor households, which in turn requires special measures in order to provide basic life-supporting services to such households. However, when municipalities are not clear and transparent about their policies and reasons for special measures to support such poor households, many other service users can feel that they are not being treated equally and fairly, and thus they object and do not support such initiatives.

<sup>35</sup> See the Systems Act s 74(3). This reasoning seems in line with the general principle of the rule of law which requires a legitimate governmental purpose to exist if people are treated differently as well as direct provisions set out in the Constitution. The Bill of Rights s 9 allows for the unequal treatment of people in certain circumstances. Such treatment would be constitutionally sanctioned and would not be unjustifiable and unreasonable in terms of the Constitution s 36. However, care must be taken not to exceed the constitutional provisions and thus allow for unconstitutional policies or conduct. When the provisions of the Constitution are breached, such conduct or actions would be invalid. Refer to the Constitution s 2.

<sup>36</sup> See the Systems Act s 75.

Apart from the tariff policy, municipalities are afforded a general power to levy and recover fees, charges and tariffs. Accordingly, the Systems Act determines that a municipality may

- levy and recover fees, charges or tariffs in respect of any function or service of the municipality
- recover collection charges and interest on any outstanding amount.

The mentioned fees, charges and tariffs are levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members.<sup>37</sup> After such a resolution has been passed, the municipal manager must do the following without delay:

- Conspicuously display a copy of the resolution for a period of at least 30 days at the main administrative office of the municipality and at such other places within the municipality to which the public has access. Such other places may be determined by the municipal manager.
- Publish in a newspaper of general circulation in the municipal jurisdiction a notice stating that a resolution in respect of fees, charges or tariffs has been passed by the municipal council and that a copy thereof is available for public inspection during office hours at the main administrative office of the municipality and at other places specified in the notice. The notice must also indicate the date on which the determination will come into operation.
- Seek to convey the information of the notice to the local community by means of radio broadcasts covering the area of municipal jurisdiction.<sup>38</sup> As soon as the notice of any fees, charges or tariffs has been published in a newspaper, the municipal manager must forthwith send a copy of the notice to the MEC for local government in the province concerned.<sup>39</sup>

### **16.3.2.2 National legislative requirements regarding the provisions of municipal services**

According to the new national legislative framework for local government, a municipality may provide a municipal service in its area or a part of its area.

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<sup>37</sup> See the Systems Act s 75A(1) and (2). It is submitted that the section refers to an absolute majority of 50% + 1 of the total number of members of the relevant municipal council.

<sup>38</sup> Refer to the Systems Act s 75A(3)(c).

<sup>39</sup> The Systems Act s 75A(4).

Such a service or services may be provided through an internal mechanism or external mechanism. *Internal mechanisms* include

- a department or other administrative unit within the municipal administration
- any business unit devised by the municipality, provided that such a unit operates within the municipality's administration and under the control of the municipal council in accordance with its operational and performance criteria
- any other component of the municipal administration.<sup>40</sup>

On the other hand, an *external mechanism* refers to a service delivery agreement that has been entered into between a municipality and any of the following institutions:

- a municipal entity
- another municipality
- an organ of state, including a water services committee established in terms of the Water Services Act of 1997, a traditional authority or any other registered service provider registered or recognised in terms of national legislation
- a CBO or NGO that are legally competent to enter into such an agreement
- any other institution, entity or person legally competent to operate a business activity.

It is striking and rather unfortunate that the Act does not require the partners in an external service delivery agreement to be competent and able to provide the municipal service relevant to the contract. It is therefore left to a municipality itself to determine if a party to a service delivery agreement is indeed competent to provide a specific municipal service in the municipal area or a part thereof. Municipalities are therefore obligated to review or decide on an appropriate mechanism to provide a municipal service. In cases of a service provision which is provided through an internal mechanism, municipalities must review or decide on an appropriate service provision mechanism when:

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<sup>40</sup> See the Systems Act s 76(a)(i)-(iii).



- an existing municipal service is to be significantly upgraded, extended or improved
- a performance evaluation requires a review of the existing mechanism
- the municipality is restructured or re-organised in terms of the Municipal Structures Act.<sup>41</sup>

When a municipal service is provided through an external mechanism, a municipality must review or decide on an appropriate mechanism to provide a particular service when:

- a performance evaluation requires a review of the particular service delivery agreement<sup>42</sup>
- the service delivery agreement is anticipated to expire or be terminated within the next 12 months or
- an existing municipal service or part thereof is to be significantly upgraded, extended or improved and such an event is not addressed in the relevant service delivery agreement.<sup>43</sup>

A municipality must also review and decide on an appropriate mechanism in order to provide a municipal service when a review of such a service is required by an intervention in terms of section 139 of the Constitution. The same obligation is required when a new municipal service is to be provided or when the local community has requested such review or when a review of the municipalities IDP also requires a review of the delivery mechanisms regarding a service or services.<sup>44</sup>

Apart from the obligation placed on municipalities to review and decide on mechanisms to provide municipal services, certain criteria and processes for deciding on such mechanisms have been statutorily provided for. Accordingly, when a municipality has decided on a particular mechanism to provide a municipal service or to review any existing mechanism, it must first assess five particular criteria. These criteria are the following:<sup>45</sup>

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<sup>41</sup> See the Systems Act s 77(a)(i)-(iii).

<sup>42</sup> In order to determine if such a performance evaluation is required, refer to the Systems Act ch 6.

<sup>43</sup> See the Systems Act s 77(b)(i)-(iii).

<sup>44</sup> See the Systems Act s 77(c)-(f). The procedure for review on request by the local community is determined in terms of the Act ch 14.

<sup>45</sup> See the Systems Act s 78(1)(a)(i)-(v).

- The direct and indirect costs and benefits associated with the project if the service is provided by the municipality through an internal mechanism. Part of this assessment must also include the expected effect the mechanism could have on the environment, on human health and well-being, as well as safety.
- The municipality's capacity and potential future capacity to furnish the skills, expertise and resources that are necessary or will become necessary for the provision of the service through an internal mechanism.
- The extent to which the re-organisation of the municipality's administration and the development of the human resource capacity within that administration could be utilised to provide a service through an internal mechanism.
- The likely impact the decision could have on aspects such as development, job creation and employment patterns in the municipality.
- The views of organised labour.

It is important to note that all of the abovementioned aspects must be assessed. After thorough assessment has taken place a municipality may also take into account any developing trends that are generally applicable to the sustainable provision of municipal services.<sup>46</sup> After the abovementioned criteria have been applied, a municipality may decide on an appropriate internal mechanism to provide the service or, before it takes a decision on an appropriate mechanism, explore the possibility of providing such a service through an external mechanism. If it decides to explore an external mechanism, the municipality must give notice to the local community of its intention to explore the provision of the service through an external mechanism and must also assess the various delivery options as are mentioned in section 76(b) of the Systems Act. When assessing such options, the municipality must take into account similar criteria, as would be the case under section 78(1)(a) of the Systems Act.<sup>47</sup> The municipality must also

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<sup>46</sup> Refer to the Systems Act s 78(1)(b).

<sup>47</sup> See the Systems Act s 78(2) and (3). The mentioned criteria are: (i) the direct and indirect costs and benefits associated with the project, including the expected effect of any service delivery mechanism on the environment and on human health, well-being and safety; (ii) the capacity and potential future capacity of prospective service providers to furnish the skills, expertise and resources necessary for the provision of the service; (iii) the

conduct or commission a feasibility study which must be taken into account before a final decision is taken. The feasibility study must include the following:<sup>48</sup>

- a clear identification of the municipal service for which the municipality intends to consider an external mechanism
- an indication of the number of years for which the provision of the service through an external mechanism might be considered
- the projected outputs which the provision of the service might be expected to produce
- an assessment as to the extent to which the provision of the service will provide value for money, address the needs of the poor, be affordable for the municipality and residents and impact of the transfer of appropriate technical, operational and financial risk
- the projected impact on the municipality's staff, assets and liabilities
- the projected impact on the municipality's integrated development plan
- the projected impact on the municipality's budget including impacts on revenue, expenditure, borrowing, debt and tariffs
- any other matter that may be prescribed.

After having applied and assessed the mentioned criteria, a municipality must decide on an appropriate internal or external mechanism that would ultimately result in or achieve the best outcome.<sup>49</sup>

On the question of whether a municipality is obligated to assess or take into account the views of organised labour before making a decision to establish a (municipal police) service, the Supreme Court of Appeal stated that while provisions 16-21 of the Systems Act, which foster participation by the community in municipal decision-making processes, are expressed in relatively wide and general terms, the provisions of section 78 of the Act are not. Section 78 provisions are applicable only when a municipality has

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views of the local community; (iv) the likely impact on development and employment patterns in the municipality; and (v) the view of organised labour.

<sup>48</sup> See s 78(3)(c)(i)-(viii) of the Systems Act.

<sup>49</sup> It is important to note that when a municipality is following the abovementioned requirements, it must comply with any applicable legislation that is relating to the appointment of a service provider other than the municipality itself and also any other additional requirements that may be prescribed by regulations. See the Systems Act ss 78(4)-(5).

decided on a mechanism to provide or review a municipal service in terms of section 77. Section 78 provisions are not applicable to the anterior decision to provide or extend a municipal service. Sections 77 and 78 of the Act are concerned with the question of how things (services) are to be done and not whether they should be done. The purpose of sections 77 and 78 of the Act is to compel a municipality to consider how a particular service can be done and through which appropriate internal mechanism it can be done. Only after that has been done may the provision of a service through an external mechanism be considered. It is in considering these questions that section 78(1)(a)(v) and (3)(b)(v) oblige the municipality to assess and take into account the views of *inter alia* organised labour. Section 78 also postulates that a decision has already been made to provide or review a municipal service.<sup>50</sup>

Apart from the determining criteria discussed above, a further important obligation on municipalities is that, if a municipality has decided to provide a municipal service through an internal mechanism, it must allocate sufficient human, financial and other resources to the particular unit that might be necessary for the proper provision of such service and must also transform the actual provision of that service in accordance with, and thus in compliance with, the provisions of the Systems Act.<sup>51</sup> If a municipality decides to provide a service through a service delivery agreement in terms of section 76(b) of the Systems Act with:

- a municipal entity or another municipality, it may, subject to subsection (3) of the Act, negotiate and enter into such an agreement with the relevant municipal entity or municipality without applying part 3 of chapter 8 of the Systems Act which refers to service delivery agreements involving competitive bidding

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<sup>50</sup> Refer to *SAMWU v City of Cape Town* 2004 (1) SA 548 (SCA). The court held that the provisions of ss 77 and 78 do not have to be complied with before a decision to provide a new service or to upgrade or review an existing service is reached. Paras 11-14 at 551-552 and also at 555.

<sup>51</sup> See the Systems Act s 79(a)-(b). In determining what would be sufficient resources, all relevant circumstances should be taken into account. Various factors can have an impact on such a determination. It is suggested that if a municipality makes an objective and informed determination, such a determination would hardly fall foul of the requirements of the Act.

- a national or provincial organ of state, it may enter into such an agreement with the relevant organ of state without applying the principles of competitive bidding
- any institution or entity, or any person, either juristic or natural, which was not mentioned above in either paragraphs (a) or (b), then it must apply part 3 referring to competitive bidding before entering into an agreement with such institution, entity or person.<sup>52</sup>

It is further provided that before a municipality enters into a service delivery agreement with an external service provider it must establish a programme for community consultation and information dissemination regarding the appointment of the external service provider and the contents of the service delivery agreement. The contents of a service delivery agreement must be communicated to the local community through the media. In instances where a municipality decides to enter into a service delivery agreement with another municipality, that other municipality must conduct or commission a feasibility study and take it into account before the agreement is entered into.<sup>53</sup>

The new legislative framework also establishes specific responsibilities of municipalities when they provide services through service delivery agreements with other external mechanisms. In such instances it is required that if a municipal service is provided through a service delivery agreement with an external mechanism the municipality remains responsible for ensuring that such service is provided to the local community in accordance with new legal standards.<sup>54</sup> In order to oversee and ensure its obligations of final service provision, all municipalities must do the following:<sup>55</sup>

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<sup>52</sup> See s 80(1)(a)-(b) of the Systems Act as substituted by Act 44 of 2003 s 12. Note that a 'municipal entity' means a private company, a service utility or a multi-jurisdictional service utility. A 'multi-jurisdictional service utility' again means a body established in terms of s 87 of the Systems Act. Refer to the definitions of the Act, s 1 as amended by Act 44 of 2003.

<sup>53</sup> Read ss 80(3)(a)-(b) of the Systems Act. Note that the feasibility study must include an assessment on the impact on the budget and other assets, liabilities and staff expenditure, an assessment whether staff should be increased, an assessment on the ability of the other municipality to absorb any commitments, liabilities or employees involved, when the appointment ends and finally any other relevant information as may be prescribed.

<sup>54</sup> Such provisions confirm the new constitutional obligations in terms of accountability and sustainable service provisions. Municipalities cannot contract their responsibilities away regarding service provision.

<sup>55</sup> See the Systems Act s 81(1)(a)-(e).

- regulate the provision of the service in accordance with section 41 of the Systems Act, which sets certain core components for performance management
- monitor and assess the implementation of the service agreement and performance management of the particular service provider<sup>56</sup>
- perform its functions and exercise its powers according to the Systems Act if the municipal service falls within a development priority or objective of the municipality's IDP
- control the setting and adjustment of tariffs by the service provider for the service, within the council's tariff policy
- general exercise its service authority to ensure uninterrupted delivery of service in the best interests of the local community.

Through its conclusion of a service delivery agreement, a municipality is legally authorised to do the following<sup>57</sup> in order to ensure effective, sustainable and uninterrupted municipal services:

- It may assign to a service provider the responsibility for
  - (a) developing and implementing detailed service delivery plans (SDP) within the framework of the municipality's IDP
  - (b) the operational planning, management and provision of the municipal service
  - (c) the undertaking of social and economic development that is directly related to the provision of the service
  - (d) customer management
  - (e) managing its own accounting, financial management, budgeting, investment and borrowing activities within the framework of transparency, accountability, reporting and financial control determined by the municipality, all of which are subject to the MFMA.<sup>58</sup>

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<sup>56</sup> Such evaluation of performance by a service provider must be done in terms of s 41 provisions.

<sup>57</sup> See the Systems Act s 81(2)(a)-(e).

<sup>58</sup> See the Local Government: Municipal Finance Management Act 56 of 2003.

- (f) the collection of service fees for its own account from users of services, in accordance with the municipality's tariff policy and credit control measures.<sup>59</sup>
- It may pass on funds for the subsidisation of services to the poor to the service provider through a transparent system, which must be subject to performance monitoring and audit.
  - It must ensure that the agreement provides for a dispute-resolution mechanism to settle disputes between the municipality and the service provider.
  - It may transfer or second any staff members to the service provider, with the concurrence of the staff member concerned and in accordance with applicable labour legislation.
  - It must ensure continuity of the service if the service provider is placed under judicial management, becomes insolvent, is liquidated or for any other reason is unable to continue performing its functions and obligations in terms of the particular service delivery agreement.
  - It must, where applicable, take over the service, including all assets, when the service delivery agreement expires or is terminated.

The municipal council is also permitted to set, review or adjust the tariffs within its tariff policy. The service delivery agreement may further provide for the adjustment of tariffs by the service provider, within certain limits set by the municipal council<sup>60</sup> It is further possible for a service delivery agreement to be amended by agreement between the parties, except where an agreement has been concluded, following a competitive bidding process. Where a service agreement has been concluded following a competitive bidding process, an amendment can be made only after the local community has been given:

- reasonable notice of the intention to amend the agreement, including the reasons for the proposed amendment
- sufficient opportunity to make representations to the municipality.<sup>61</sup>

It is important to note that no councillor or staff member may share in any profits or improperly receive any benefits from a service provider providing or

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<sup>59</sup> See also the Act ch 9 which deals with aspects concerning credit control and debt collection.

<sup>60</sup> See the Systems Act s 81(3).

<sup>61</sup> See the Systems Act s 81(4)(a)-(b).



proposing to provide any municipal service in terms of a service delivery agreement.<sup>62</sup>

### **16.3.2.3 Service delivery agreements that involve competitive bidding**

The Systems Act further provides that if a municipality decides to provide a municipal service through a service delivery agreement with a person referred to in section 80(1)(b) of the Act, it is obliged to select such a service provider through a selection process which

- complies with chapter 11 of the MFMA
- allows all prospective service providers to have equal and simultaneous access to information relevant to the bidding process
- minimises the possibility of fraud and corruption
- makes the municipality accountable to the local community with regard to the progress of selecting a service provider and the reasons for any decision in this regard
- takes into account the need to promote the empowerment of small and emerging enterprises.<sup>63</sup>

It is also provided for, but subject to the provisions of the Preferential Procurement Policy Framework Act,<sup>64</sup> that a municipality may determine a preference for categories of service providers in order to advance the interests of persons disadvantaged by unfair discrimination, as long as such preference is exercised in a manner that does not compromise or limit the quality, coverage cost and developmental impact of the services.<sup>65</sup> The selection of preferential service provider contenders must be fair, equitable, transparent, cost-effective and competitive.<sup>66</sup> Such requirements may be

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<sup>62</sup> Such prohibition on receiving any profits or benefits is in line with new procedures to eradicate corruption and bribery. Apart from possible criminal prosecution, councillors and staff members that receive such profits or benefits will also contravene their respective codes of conduct and can also be held punishable under such codes.

<sup>63</sup> See the Systems Act s 83(1)(a)-(e).

<sup>64</sup> Act 5 of 2000, which aims at giving effect to the Constitution s 217(3) by providing a framework for the implementation of a procurement policy.

<sup>65</sup> In other words, preferential service providers such as affirmative action appointments or black empowerment groups may be preferred, as long as certain minimum standards and obligations are not compromised.

<sup>66</sup> See *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) where it was submitted that the Preferential Procurement Policy Framework Act requires organs of state to establish a procurement policy, and also makes it obligatory for organs of state to

provided for in other applicable national legislation. Even in cases of the consideration of a municipality to select a service provider, the selection process must also apply with the criteria listed in section 78 of the Systems Act in addition to the preferences for certain categories referred to in this subsection.<sup>67</sup>

It is also required that on the basis of the bidding documents, any addenda, amendments or variations that were provided to all bidders after a prospective service provider has been selected, the municipality must negotiate the final terms and conditions of the service delivery agreement with the preferred service provider. If the negotiations are successful, the municipality must then enter into the agreement on such terms and conditions that were specified in the bidding documents, together with additions thereto. It should be noted that modifications to the bidding process must not materially affect the bid in any manner that would compromise the integrity of the bidding process. If the terms and conditions of an agreement cannot be agreed upon within a reasonable time, the municipality may negotiate a possible agreement with the next-ranked prospective service provider.<sup>68</sup> When a municipality has entered into a service delivery agreement it must

- make copies of the agreement available at its offices for public inspection
- give notice in the media of the particulars of the service that will be provided in terms of the agreement, the name of the selected service provider and the place and period where copies of the agreement will be available for public inspection.<sup>69</sup>

#### **16.3.2.4 The legal requirements relating to internal municipal service districts**

It is generally understood that the provision of municipal services, according to the new constitutional and other legal requirements, is not an easy task.

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follow a tender procedure for the procurement of goods and services. If such requirements are not met, then the tender process, if any, was unlawful.

<sup>67</sup> See the Systems Act s 83(2) and (3).

<sup>68</sup> The bidding process is therefore not to be repeated because the first preferred service provider did not accept the conditions of the agreement. The reference to a reasonable time for the negotiations will depend on the circumstances of each case. The more urgent the service that should be provided, the less time would be regarded as reasonable. It is, however, advisable for municipalities to communicate in writing the circumstances and urgency of each case and to put the preferred bidder on terms to either accept or withdraw from the bidding process.

<sup>69</sup> Refer to the Systems Act s 84(1)-(3).

Even more difficult is the provision of services in large metropolitan or district municipal jurisdictions. In an effort to lighten the burden on service delivery and in order to ensure effective and sustainable service provision, the new legislative framework on local

government allows for the establishment of so-called “internal municipal service districts”. In this regard and in accordance with its policy framework, a municipality is allowed to establish part of the municipality as an Internal Municipal Service District (IMSD) to facilitate the provision of a municipal service in that part of the municipality. Before an IMSD is established, the municipality must:

- consult the local community on the following matters:
  - (a) the proposed boundaries of the service district
  - (b) the proposed nature of the municipal service
  - (c) the proposed method of financing the service
  - (d) the proposed mechanism for provision of the service and
- obtain the consent of the majority of the members of the local community in the proposed IMSD that will be required to contribute to the provision of the municipal service.<sup>70</sup>

Following on subsection 85(2), when a municipality establishes an IMSD, the municipality must determine the boundaries of the district, the mechanism to provide the service and establish a separate accounting system and other record-keeping systems in respect of the service. The municipality may also set a tariff or levy for the service, impose a special surcharge in the district for the service or increase the tariff in the district for the service. The municipality may further establish a committee comprising persons representing the community of the IMSD to act as a consultative or advisory forum regarding the management and other matters of the service.<sup>71</sup> In areas where IMSDs are considered, a municipality must develop and adopt a policy framework for the establishment, regulation and management of such an IMSD. Such a policy framework must reflect at least the following aspects:

- the development needs and priorities of designated parts of the municipality which must be balanced against the needs and priorities of the municipality as a whole and
- the extent to which the establishment of one or more IMSDs will promote the local economic development of the municipality as a whole, will

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<sup>70</sup> See the Systems Act s 85(1) and (2).

<sup>71</sup> See the Systems Act s 85(3)(a)-(e). Note that the committee proposed in s 3(e) should be established on the basis of gender representivity.

contribute to enhancing the social, economic and spatial integration of the municipality and which may not entrench or contribute to further disparities in service provision in the municipal jurisdiction.<sup>72</sup>

According to wide-ranging amendments to the Systems Act during 2003, various new issues have been incorporated under section 86 of the Act. Section 86A provides now for the following:

The Minister may for purposes of municipal services, make regulations or issue guidelines in accordance with section 120 of the Act, in order to provide for or regulate the following matters:

- The preparation, adoption and implementation of a municipal tariff policy
- the subsidisation of tariffs for poor households through cross-subsidisation within and between services, equitable share allocations to municipalities and national and provincial grants to municipalities
- limits on tariff increases
- criteria to be taken into account by municipalities when imposing surcharges on tariffs for services and determining the duration thereof
- incentives and penalties to encourage the economical, efficient and effective use of resources when providing services; the recycling of waste and other environmental objectives
- criteria to be taken into account by municipalities when assessing options for the provision of a municipal service
- measures against malpractice in selecting and appointing service providers, including measures against the stripping of municipal assets
- mechanisms and procedures for the co-ordination and integration of sectoral requirements in terms of legislation and the manner in which municipalities must comply with these
- standard draft service delivery agreements
- the minimum content and management of service delivery agreements
- additional matters that must be included in a feasibility study in terms of section 78(3)(c) of the Act, which may include the strategic and operational costs and benefits of an external mechanism in terms of the municipality's strategic objectives, an assessment of the municipality's capacity to

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<sup>72</sup> Refer to the Systems Act s 86(1) and (2).

effectively monitor the provision of the municipal service through an external mechanism and to enforce the service delivery agreement

- performance guarantees by service providers and
- any other matter that would facilitate the effective and efficient provision of municipal services or the application of the provisions of the Act.<sup>73</sup>

The Minister may make regulations and issue guidelines relating to fiscal matter only after consulting with the Minister of Finance and any other Cabinet member whose portfolio is affected by such regulations and guidelines. When making regulations or issuing guidelines, the Minister must take into account the capacity of municipalities to comply with such regulations and guidelines and differentiate between different kinds of municipality according to their respective capacities.<sup>74</sup>

The Act specifically determines that there are the following kinds of municipal entity:

- a private company established by one or more municipalities in terms of Part 2 of the Act or in which one or more municipalities have acquired or hold an interest according to Part 2 of the Act
- a service utility established by a municipality in terms of Part 3 of the Act and
- a multi-jurisdictional service utility established by two or more municipalities in terms of Part 4.<sup>75</sup>

It is specifically provided that no municipality may establish, or participate in the establishment of, or acquire or hold an interest in, a corporate body, including a trust, except where such corporate body is a private company, service utility or multi-jurisdictional service utility referred to above or a fund for the benefit of its employees in terms of a law regulating pensions or medical aid schemes. However, such requirements do not apply to the acquisition by a municipality for investment purposes of securities in a company listed on the Johannesburg Securities Exchange in accordance with

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<sup>73</sup> See s 86A(1)(a)-(m) of the Systems Act.

<sup>74</sup> Refer to ss 86A(2)-(3) of the Systems Act.

<sup>75</sup> Read s 86B(a)-(c) of the Systems Act.

the investment framework envisaged in section 13 of the Municipal Finance Management Act.<sup>76</sup>

It is further provided that a municipality may, subject to subsection 86C (2), establish or participate in the establishment of a private company in accordance with the Companies Act,<sup>77</sup> or acquire or hold an interest in a private company in accordance with the Companies Act. In this regard it is further permitted that:

- A municipality may in terms of subsection 86C(1)(a) or (b) either acquire or hold full ownership of a private company or acquire or hold a lesser interest in a private company.
- A municipality may acquire or hold such a lesser interest in a private company only if all the other interests are held by (i) another municipality or municipalities, (ii) a national or provincial organ of state or organs of state or (iii) any combination of institutions referred to in (i) and (ii).
- A municipality may, despite paragraph (b), acquire or hold an interest in a private company in which an investor other than another municipality or a national or provincial organ of state has an interest, but only if effective control in the private company vests in that municipality, another municipality, or that municipality and another municipality collectively.<sup>78</sup>

It is also important to note that a private company referred to in section 86C(1) is a municipal entity if a municipality, or two or more municipalities collectively, have effective control of that private company or is a public entity to which the Public Finance Management Act applies, if ownership control in the company is held by a national or provincial organ of state.<sup>79</sup> A private company which is a municipal entity must further restrict its activities to the purpose for which it is used by its parent municipality in terms of section 86E(1)(a) of the Systems Act and it has no competence to perform any activity which falls outside the

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<sup>76</sup> See ss 86B(2)-(3) of the Systems Act.

<sup>77</sup> 61 of 1973.

<sup>78</sup> Refer to ss 86C(1)-(3) of the Systems Act. Note that if a municipality establishes a private company or acquires or holds an interest in such a company, it must comply with the Companies Act and any other law regulating companies. If any conflict however arises between the Companies Act or other law and a provision of the Systems Act, then the Systems Act prevails.

<sup>79</sup> See Act 1 of 1999 read together with s 86D(1) of the Systems Act.



functions and powers of its parent municipality contemplated by section 8 of the Act.<sup>80</sup>

Municipalities may further establish a private company or acquire an interest in such a company only for the purpose of utilising the company as a mechanism to assist it in the performance of any of its functions or powers or if the municipality can demonstrate that there is a need to perform that function or power in accordance with business practices in order to achieve the strategic objectives of the municipality more effectively and that the company would benefit the local community. It is also imperative that all other conditions that may be prescribed have been complied with. It should be noted however that if a municipality establishes a private company or acquires an interest in such a company for the purpose of using that company as a mechanism to provide a municipal service, then the provisions of Chapter 8 of the Systems Act are applicable.<sup>81</sup>

According to the new amendments, if two or more municipalities intend to establish a private company or to acquire interests in the same private company, each of those municipalities must:

- comply with section 86E of the Systems Act
- consider and reach agreement on proposals for shared control of the company and
- consider cash flow projections of the company's proposed operations for at least three financial years.<sup>82</sup>

A municipality may further transfer ownership or otherwise dispose of a wholly owned private company, subject to the Municipal Finance Management Act, or an interest in a private company subject to section 14 of the Municipal Finance Management Act and only if that transfer or disposal would not result in an infringement of section 86C (2) of the Systems Act by another municipality which holds an interest in the company.<sup>83</sup>

In respect of the establishment of a service utility, it is now statutorily permitted for a municipality to pass a by-law establishing such a service utility. A by-law establishing a service utility must: state the purpose for which the

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<sup>80</sup> Read ss 86D(1)-(2) of the Systems Act.

<sup>81</sup> Ss 86E(1)-(2) of the Systems Act.

<sup>82</sup> See s 86F of the Systems Act.

<sup>83</sup> Read s 86G of the Systems Act.

service utility is established, confer the powers and impose the duties on the service utility which are necessary for the attainment of such purpose and provide for the following aspects:

- a board of directors to manage the service utility
- the number of directors to be appointed
- the appointment of directors, the filling of vacancies and the replacement and recall of directors by the parent municipality
- the terms and conditions of appointment of directors

- the appointment of a chairperson
- the operating procedures of the board of directors
- the delegation of powers and duties to the board of directors
- any other matter necessary for the proper functioning of the board of directors
- the acquisition of infrastructure, goods, services, supplies or equipment by the service utility, or the transfer of infrastructure, goods, services, supplies or equipment to the service utility
- the appointment of staff by the service utility or the transfer or secondment of staff to the service utility in accordance with applicable labour legislation
- the terms and conditions on which any acquisition, transfer, appointment or secondment is made
- the governance of the service utility and
- any other matter necessary for the proper functioning of the service utility.

The by-law may also determine budgetary and funding arrangements for its implementation. No by-law may confer on a service utility any functions or powers falling outside the competence of the parent municipality contemplated by section 8 of the Systems Act.<sup>84</sup> It should also be noted that a service utility is a juristic person and a municipal entity under the sole control of the municipality which established it. All service utilities must restrict their activities to the purpose for which they were established and have no competence to perform any activity which falls outside their functions or powers as are determined in terms of the by-law of the municipality.<sup>85</sup>

Apart from establishing IMSDs, municipalities may also establish so-called Multi-jurisdictional Municipal Service Utilities (MMSUs).<sup>86</sup> In this regard it is provided that two or more municipalities, by written agreement, may establish a multi-jurisdictional service utility to perform any function or power envisaged by section 8 of the Systems Act, in their municipal areas or in any designated parts of their municipal areas. The Minister may, in the national interest and in consultation with the Cabinet member responsible for the functional area in question, request two or more municipalities to establish a multi-jurisdictional

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<sup>84</sup> Read ss 86H(1)-(4) of the Systems Act.

<sup>85</sup> See s 86I(1)-(2) of the Systems Act.

<sup>86</sup> See s 87 of the Systems Act as substituted by s 19 of Act 4 of 2003.

service utility to conform to the requirements of national legislation applicable to the provision of a specific municipal service. The

municipalities that receive such a request must within two months decide whether to accede to the request, and convey their decision to the Minister.<sup>87</sup>

An agreement establishing a multi-jurisdictional service utility must describe the rights, obligations and responsibilities of the parent municipalities, and must :

- determine the boundaries of the area for which the multi-jurisdictional service utility is established
- identify the municipal service or other function to be provided in terms of the agreement
- determine budgetary and funding arrangements for implementation of the agreement
- provide for a board of directors for the multi-jurisdictional service utility, the appointment of directors by the respective parent municipalities, the filling of vacancies and the replacement and recall of directors, the number of directors appointed by each parent municipality, the terms and conditions of appointment of directors, the appointment of a chairperson, the operating procedures of the board of directors, the delegation of powers and duties to the board of directors and any other matter relating to the proper functioning of the board of directors
- provide for the acquisition of infrastructure, goods, services, supplies or equipment by the multi-jurisdictional service utility or the transfer of infrastructure, goods, services, supplies or equipment to the multi-jurisdictional service utility; the appointment of staff by the multi-jurisdictional service utility or the transfer or secondment of staff to the multi-jurisdictional service utility in accordance with applicable labour legislation and the terms and conditions on which any acquisition, transfer, appointment or secondment is made
- determine the conditions for, and consequences of, the withdrawal from the agreement of a parent municipality
- determine the conditions for, and consequences of, the termination of the agreement, including the method and schedule for winding-up the operations of the multi-jurisdictional service utility; the distribution of the

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<sup>87</sup> See s 88 as amended by s 20 of Act 44 of 2003.

proceeds and the allocation among the parent municipalities of any assets and liabilities

- provide for the governing of the multi-jurisdictional service utility, compulsory written reports regarding the activities and performance of the multi-jurisdictional service utility to a parent municipality, information that may be requested from the multi-jurisdictional service utility by a parent municipality, the amendment of the agreement and any other matter necessary for the proper functioning of the multi-jurisdictional service utility.<sup>88</sup>

A multi-jurisdictional service utility is further accountable to the parent municipality(ies) and must comply with the Municipal Finance Management Act. Parent municipalities are again entitled to receive such regular written reports from the multi-jurisdictional service utility with respect to its activities and performance, as may be set out in the agreement establishing the multi-jurisdictional service utility. They may also request the multi-jurisdictional service utility to furnish them with such information regarding its activities as the parent municipality(ies) may reasonably require. Parent municipalities may also appoint a nominee to inspect, at any time during normal business hours, the books, records, operations and facilities of the multi-jurisdictional service utility and those of its contractors relating to the performance of the function or power for which the multi-jurisdictional service utility is established.<sup>89</sup>

Multi-jurisdictional service utilities terminate automatically, when there is only one remaining parent municipality or by written agreement among all of the parent municipalities or upon the termination date or the fulfilment of any condition for termination contained in the agreement establishing the multi-jurisdictional service utility.<sup>90</sup>

The parent municipality(ies) of a municipal entity have specific duties towards such a municipal entity and must:

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<sup>88</sup> See s 90 of the Systems Act as substituted by s 22 of Act 44 of 2003. A (MMSU) is a juristic person and falls under the control/shared control of the parent municipalities. All (MMSU) must restrict their actions to the object of their establishment and they have no other competencies outside the functions set out in their establishment agreement.

<sup>89</sup> Read s 92 as substituted by s 24 of Act 44 of 2003.

<sup>90</sup> S 92 as substituted.

- exercise any shareholder, statutory, contractual or other rights and powers it may have in respect of the municipal entity to ensure that both the municipality and the municipal entity comply with this Act, the Municipal Finance Management Act and any other applicable legislation and that the municipal entity is managed responsibly and transparently and meets its statutory, contractual and other obligations
- allow the board of directors and chief executive officer of the municipal entity to fulfil their responsibilities and
- establish and maintain clear channels of communication between the municipality and the municipal entity.<sup>91</sup>

In instances where a parent municipality, which has sole control of a municipal entity, or effective control in the case of a municipal entity which is a private company, the parent municipality must ensure that annual performance objectives and indicators for the municipal entity are established by agreement with the municipal entity and included in the municipal entity's multi-year business plan in accordance with section 87 (5) (d) of the Municipal Finance Management Act. The parent municipality is further obligated to monitor and annually review, as part of the municipal entity's annual budget process, the performance of the municipal entity against the agreed performance objectives and indicators and may liquidate and disestablish the municipal entity if the performance of the municipal entity is unsatisfactory, if the municipality does not impose a financial recovery plan in terms of the Municipal Finance Management Act and the municipal entity continues to experience serious or persistent financial problems or if the municipality has terminated the service delivery agreement or other agreement it had with the municipal entity.<sup>92</sup> Parent municipalities that have shared control of a municipal entity must enter into a mutual agreement determining and regulating the following:

- their mutual relationships in relation to the municipal entity
- the exercise of any shareholder, contractual or other rights and powers they may have in respect of the municipal entity

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<sup>91</sup> Refer to s 93A as inserted by s 26 of Act 44 of 2003.

<sup>92</sup> See s 93B of the Systems Act.



- the exercise of their powers and functions in terms of the Systems Act and the Municipal Finance Management Act with respect to the municipal entity
- measures to ensure that annual performance objectives and indicators for the municipal entity are established by agreement with the municipal entity and included in the municipal entity's multi-year business plan in accordance with section 87 (5) (d) of the Municipal Finance Management Act
- the monitoring and annual review, as part of the municipal entity's annual budget process as set out in section 87 of the Municipal Finance Management Act, of the performance of the municipal entity against the established performance objectives and indicators
- the payment of any monies by the municipalities to the municipal entity or by the municipal entity to the municipalities
- procedures for the resolution of disputes between those municipalities
- procedures governing conditions for and consequences of withdrawal from the municipal entity by a municipality
- procedures for terminating the appointment and utilisation of the municipal entity as a mechanism for the performance of a municipal function
- the disestablishment of the municipal entity, the division, transfer or liquidation of its assets and the determination of the responsibility for its liabilities and
- any other matter that may be prescribed.

Parent municipalities may further liquidate and disestablish the municipal entity if the performance of the municipal entity is unsatisfactory, if the municipality does not impose a financial recovery plan in terms of the Municipal Finance Management Act and the municipal entity continues to experience serious or persistent financial problems, or if the municipality has terminated the service delivery agreement or other agreement it had with the municipal entity.<sup>93</sup>

In respect of municipal representatives, it is now determined that the council of a parent municipality must designate a councillor or an official of the parent municipality, or both, as the representative or representatives of the parent

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<sup>93</sup> Read s 93C as inserted by s 26 of Act 44 of 2003.

municipality. The functions of such representative(s) are to represent the parent municipality as a non-participating observer at meetings of the board of directors of the municipal entity concerned and to attend shareholder meetings and exercise the parent municipality's rights and responsibilities as a shareholder, together with such other councillors or officials that the council may designate as representatives. It is further important to note that the official lines of communication between a municipal entity and the parent municipality exist between the chairperson of the board of directors of the municipal entity and the mayor or executive mayor, as the case may be, of the parent municipality. The mayor or executive mayor, as the case may be, of a parent municipality may at any time call or convene any meeting of shareholders or other general meeting comprising the board of directors of the municipal entity concerned and the representatives of the parent municipality, in order for the board of directors to give

account for actions taken by it. The council of a parent municipality may also determine the reporting responsibilities of a municipal representative. A municipal representative is strictly obligated to represent the parent municipality faithfully at shareholder meetings, without consideration of personal interest or gain, and must keep the council informed of how voting rights were exercised and of all relevant actions taken on behalf of the municipality by the representative. A municipal representative must further act in accordance with the instructions of the council and may be reimbursed for expenses in connection with his or her duties as a municipal representative. The municipal representative may not receive any additional compensation or salary for such duties, however.<sup>94</sup>

It is also provided that the board of directors of a municipal entity must have the requisite range of expertise to effectively manage and guide the activities of the municipal entity. The board must consist also of at least a third non-executive directors and must have a non-executive chairperson. Before nominating or appointing a director, it is the responsibility of the parent municipality of a municipal entity to establish a process through which applications for nomination or appointment are widely solicited, to compile a list of all applicants and any prescribed particulars concerning applicants and to ensure that the municipal council makes the appointment or nomination from such list.<sup>95</sup> A person is not eligible to be a director of a municipal entity if he or she:

- holds office as a councillor of any municipality
- is a member of the National Assembly or a provincial legislature
- is a permanent delegate to the National Council of Provinces
- is an official of the parent municipality of that municipal entity
- was convicted of any offence and sentenced to imprisonment without the option of a fine, and a period of five years since completion of the sentence has not lapsed
- has been declared by a court to be of unsound mind or
- is an unrehabilitated insolvent.

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<sup>94</sup> See s 93D of the Systems Act as amended.

<sup>95</sup> See s 93E of the Systems Act.

If a director of a municipal entity during that person's term of office becomes disqualified on a ground mentioned above, then such a person ceases to be a director from the date of becoming disqualified.<sup>96</sup> The parent municipality of a municipal entity is further authorised to remove or recall a director appointed or nominated by that municipality. Such removal or recall is permitted only when the performance of the director is unsatisfactory; when the director, either through illness or for any other reason is unable to perform the functions of office effectively or if the director, whilst holding office, is convicted of fraud or theft or any offence involving fraudulent conduct or has failed to comply with or breached any legislation regulating the conduct of directors, including any applicable code of conduct.<sup>97</sup>

The board of directors of a municipal entity has also been afforded specific duties and responsibilities. As such, the board must provide effective, transparent, accountable and coherent corporate governance and conduct effective oversight of the affairs of the municipal entity. It must also ensure that it and the municipal entity comply with all applicable legislation and agreements and communicate openly and promptly with the parent municipality of the municipal entity. In general, the board must deal in good faith with the parent municipality of the municipal entity. A director of a municipal entity is further obligated to disclose to the board of directors and to the representative of the parent municipality any direct or indirect personal or business interest that the director or his or her spouse or partner may have in any matter before the board, and must withdraw from the proceedings of the board when that matter is considered, unless the board decides that the director's direct or indirect interest in the matter is trivial or irrelevant. Directors must at all times act in accordance with the Code of Conduct for directors referred to in section 93L of the Systems Act, which is referred below.<sup>98</sup> In respect of meetings of the board of directors it is provided that such meetings must be open to the municipal representatives referred to in section 93D of the Systems Act. Municipal representatives have non-participating observer

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<sup>96</sup> Refer to s 93F of the Systems Act.

<sup>97</sup> Read s 93G of the Systems Act as inserted by s 26 of Act 44 of 2003.

<sup>98</sup> See s 93H of the Systems Act.

status in a meeting of the board of directors of a municipal entity.<sup>99</sup> It is also determined that the board of directors of a municipal entity must appoint a chief executive officer of the municipal entity. Such a chief executive officer is accountable to the board of directors for the management of the municipal entity.<sup>100</sup>

Municipal entities may not establish or participate in the establishment of a company or any other corporate body, including a trust, or acquire or hold an interest in a company or any other corporate body, including a trust. This prohibition does not apply, however, to the acquisition by a municipal entity of securities in a company listed on the Johannesburg Securities Exchange for investment purposes, subject to any applicable provisions of the Municipal Finance Management Act or a fund for the benefit of employees of a municipal entity in terms of a law regulating pensions or medical aid schemes.<sup>101</sup>

Mention was made earlier in this chapter that the Systems Act now provides for a specific Code of Conduct for directors and members of staff of a municipal entity. In this regard, it is provided that the Code of Conduct for councillors contained in Schedule 1 of the Act also applies, with the necessary changes, to directors of a municipal entity. In the application of item 14 of Schedule 1 of the Act to directors of a municipal entity, that item must be regarded as providing that:

- the board of directors of a municipal entity may investigate and make a finding on any alleged breach of a provision of this Code by a director or establish a special committee to investigate and make a finding on any alleged breach of a provision of this Code by a director or make appropriate recommendations to the board of directors
- if the board of directors or special committee finds that a director has breached a provision of this Code, the board of directors may issue a formal warning to the director, reprimand the director, fine the director or recommend to the parent municipality that the director be removed or recalled

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<sup>99</sup> Refer to s 93I of the Systems Act.

<sup>100</sup> S 93J of the Systems Act.

<sup>101</sup> Read s 93K of the Systems Act.

- the board of directors of a municipal entity must inform a parent municipality of that entity of any action taken against a director in terms of the Code of Conduct.

The Code of Conduct for municipal staff members contained in Schedule 2 of the Systems Act applies, with the necessary changes, to the members of staff of a municipal entity. For purposes of this provision, any reference in Schedule 1 or 2 of the Act to a 'councillor', 'MEC for local government in the province', 'municipal council', 'municipality' and 'rules and orders' must, unless inconsistent with the context or otherwise clearly inappropriate, be construed as a reference to a director of a municipal entity, parent municipality, board of directors, municipal entity and procedural rules, respectively.<sup>102</sup>

#### **16.4 An overview of services that are generally provided by local governments**

##### **16.4.1 *General factors that impact on municipal services***

It has been explained in the introductory chapters of this work that the provision of municipal services is arguably the most important reason for the existence and creation of local government structures. So important and fundamental is the provision of municipal services to local communities that it has been incorporated and entrenched within the new constitutional framework of South Africa. Before one investigates the basic services that municipalities should provide, it is important to look briefly at specific factors that have an impact on service provision and service levels, however. To a large extent these factors are determining factors in achieving a system of effective and sustainable service provision. The factors can be summarised as follows:

- *Financial resources* Finance is often regarded as the oil that keeps the engine of government running smoothly.<sup>103</sup> Without financial resources there can be no effective and sustainable provision of municipal services. All municipalities should maximise their potential financial income and should utilise such resources sparsely and diligently. Municipal finances are generated mainly via two sources:

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<sup>102</sup> Refer to s 93L of the Systems Act as inserted by s 26 of Act 44 of 2003.

<sup>103</sup> See Craythorne (1997) 391.

- (a) the sharing in revenue that is raised nationally
  - (b) revenue that is generated locally through the collection of rates, taxes and surcharges on services.
- *Training and municipal planning* The restructuring of municipal governments since 1993 has had a somewhat negative impact on skilled municipal employees. Many municipalities have lost the services of highly skilled and experienced municipal personnel. Coupled with the reality of a new legal and administrative framework, all municipalities are in need of extensive training and education programmes to ensure services are provided in compliance with the new legal foundation. Local governments should not be short sighted in respect of the importance of new training initiatives. The new local government systems must be supported by a comprehensive and continuous programme of training and skills development. Without proper attention to such aspects, sustainable service provision might be an unattainable ideal. Equally important to training is the principle of municipal planning. Planning in general is an inseparable part of the processes of public administration and accordingly requires specific consideration.<sup>104</sup> In basic terms, municipal planning means looking ahead by anticipating and making arrangements for dealing with future problems by projecting trends. One such trend is, for example, the migration of people. Migration of people from mostly rural areas to more developed areas such as towns or cities is a universal phenomenon. People migrate from one place to another in the hope of obtaining work and achieving a better quality of life. The most important consideration in municipal planning in terms of accommodating migration trends is to anticipate future demand for basic municipal services such as water, sanitation, refuse removal and primary health care facilities and means. Often migration patterns are difficult to anticipate, because many informal settlements are established almost anywhere. In light of such sudden municipal demands, municipal planning is a *sine qua non* for a successful local government system.

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<sup>104</sup> See Craythorne (1997) 400-402. The writer refers to certain definitions of the term "planning", which in essence means that objectives need to be clarified, whereafter specific actions should be implemented to achieve the desired goals. Planning involves not only the financial inputs necessary but also who the various role players should be.



Planning thus has its roots in the past, but with a view to deciding the future in the present.<sup>105</sup>

- *Accountability, effective decision making and local democratic governance* The new constitutional dispensation of South Africa, which includes local governments, is founded *inter alia* on the values of a democratic, accountable, responsive and open government.<sup>106</sup> All municipal governments must therefore structure and manage their affairs in compliance with such values. Municipalities must take decisive steps to eradicate all forms of maladministration and corruption and must align themselves with the new supreme values in the state. Without a concerted effort to establish a new, clean and accountable local governance, there is little chance that the newly established local government structures will secure and fulfil their obligations towards effective and sustainable service delivery.<sup>107</sup>
- *Public participation and social and economic development* Public participation within all spheres of government is a constitutional prerequisite. This is of particular importance since the former local government dispensation excluded many people from its processes and decision-making procedures. Without proper participation of all the role players in local communities, the new local government dispensation is stillborn from the outset. In general, participation leads to information, which in turn ensures support. It is further a well-known fact that people generally support and participate in processes in which they have a direct or even an indirect stake. Communities need to realise that local governments are there mainly to provide services and to manage and control the local area to the benefit of all that are living or working there. As a counterweight, municipalities must assure and provide their services so as to ensure social and economic development which in turn will ensure a

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<sup>105</sup> See Craythorne (1997) 402.

<sup>106</sup> See the Constitution s 1(d).

<sup>107</sup> The more money is lost or wasted because of maladministration and corruption, the fewer resources are available to provide much-needed services and infrastructure to service hungry local communities.

better future for all residents. The importance of this objective has been given constitutional protection.<sup>108</sup>

## **16.4.2 Municipal services to be provided under the Constitution**

### **16.4.2.1 Distinguish between functions and services**

Before one looks at the different services a municipality is required to provide, it is of value to distinguish between the terms functions and services. As defined by Craythorne,<sup>109</sup> a municipal function is something that is linked to the nature of governance. A government must govern, and in order to govern it must perform certain functions, such as making laws, levying taxes, employing personnel and allocating resources. On the other hand, a service is something that is provided by one person or institution to another person or groups of persons. In this regard, a service is something that is to be rendered to others.<sup>110</sup>

### **16.4.2.2 Specific municipal services**

It is interesting to note that within the new constitutional dispensation no direct or specific mention is made with regard to the specific services that municipalities should ordinarily render to their communities. On the contrary, the new legal framework refers to the powers, functions, objects and duties of municipalities. A closer evaluation of such powers, functions, objects and duties the terms seem to indicate reveals, albeit indirectly, certain services that should be rendered. However, it is submitted that it is not altogether certain whether certain powers, functions or duties also require municipalities specifically to render services regarding such matters.<sup>111</sup> In summary, municipalities have executive and legislative powers with regard to the matters listed in Part B of Schedule 4 and 5 of the Constitution, as well as with

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<sup>108</sup> See the Constitution s 152.

<sup>109</sup> See Craythorne (1997) 409.

<sup>110</sup> The main objective of municipalities, not only historically, but also according to the Constitution, is to provide effective and sustainable services to their respective communities. In order to provide such services, a municipality must also perform certain functions. The provision of services is therefore dependent on the ability to perform certain functions.

<sup>111</sup> The Constitution Sch 4 Part B and Sch 5 Part B identify the functional areas of municipal executive authority and also indirectly municipal legislative authority. Only a few of these functional areas refer to a service or services that are to be rendered. Sch 4 Part B refers only to fire fighting services, municipal health services and water and sanitation services. Sch 5 Part B does not refer to any services that should be provided. In this regard it is somewhat uncertain if the other functional areas also refer to a service that should be rendered regarding such areas or if they are only to be regulated through executive and legislative actions.

regard to those matters that have been assigned to them in terms of national or provincial legislation.<sup>112</sup> Apart from the functional areas mentioned above, all municipalities have to strive, within their financial and administrative capacities, to achieve the objects set out in section 152(1)(a)-(e) of the Constitution.<sup>113</sup> Seen in context, the areas or matters mentioned in Part B of Schedules 4 and 5 indicate the type of service that local government should provide for. These seem to be areas that neither the national nor the provincial government would be able to provide without unnecessary bureaucratic growth. Before the different services are discussed briefly, it must be remembered that, according to item 2 of Schedule 6 of the Constitution, much old order legislation, for example old provincial ordinances, are still in force, and many of them require extra services or functions to be rendered.<sup>114</sup>

Upon a close evaluation of the different municipal services that should be rendered, two broad categories of such service are recognisable. Some services are regarded as *support services*, while others are classified as *operational services*. Support services refer broadly to those services that are vital for the efficient and effective operation of the overall municipal machine and differ from one municipality to another, according to size and capacity. Operational services again refer to those services that are generally considered to be services that a municipality should render to its local community. The different services in each category can be summarised briefly as follows:

**(a) General municipal support services**

- *Legal services* All municipalities need legal advice and support in order to ensure that they operate within the Constitution and the law in general. Basically all the different branches of the law are applicable and relevant to municipal operations and activities. There are hardly any legal aspects,

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<sup>112</sup> See the Constitution s 156(1)(a)-(b). Again reference should be made to the obligation on the two higher spheres of government to assign to municipalities those matters listed in Schs 4 and 5 Part A, which necessarily relates to local government. See the Constitution s 156(4)(a)-(b).

<sup>113</sup> See the Constitution s 152(2).

<sup>114</sup> Only if such old-order laws are contrary to the Constitution or have been repealed would they be of no further force. See, eg, also the matters listed in the LGTA Schs 2 and 2A. The LGTA has been revoked, however, and is no longer applicable.

apart from aspects such as international relations, that are not applicable within some municipal situation. In order to deal with the many legal aspects, municipalities appoint either their own legal staff or make use of various private legal advisors.

- *Financial services* Internal financial advice services are indispensable for all municipalities. Without such advice, municipalities will not be able to plan and realise their other responsibilities according to the new constitutional requirements.<sup>115</sup> The importance of financial services therefore speaks for itself.
- *Personnel services* As a legal person, no municipality can act without natural persons that act on behalf of the municipality. This municipal corps or administration is thus vital to any local government. All in all personnel services refers to the recruitment, selection, appointment, placement, promotion and disciplinary procedures relating to the members of staff of a particular municipal government.
- *Secretarial services* These services refer mainly to the overall administration of a municipality. All internal procedural aspects are handled mostly through such services which include internal correspondence and also the finalisation of council agendas and the keeping of council minutes.
- *Repair and maintenance services* Municipalities need a very large infrastructure to operate effectively. This infrastructure requires various movable assets, which assets should be maintained and repaired from time to time. Basically all municipi

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<sup>115</sup> See again the Constitution ss 152(2) and 153.

palities therefore provide for internal repair and maintenance services.

- *Information and technology services* In the 21st century, no government can operate effectively and sufficiently without the modern world's new technological development. It is especially the computerised information services that have revolutionised all institutions. No local government can afford to be without such services.
- *Supply services* All municipalities must provide for a certain number of supplies that should be available for effective and smooth operations. Such services are a vital support service to municipal operations. Supplies include aspects such as stationery, furniture, and other supplies, to name but a few.

**(b) Municipal operational services:**<sup>116</sup>

- *Air pollution* Municipalities similar to the two higher spheres of government are also responsible for environmental protection. Air pollution from car exhaust fumes or industrial smoke is an important environmental concern and should be addressed and controlled on a local level.<sup>117</sup>
- *Building regulations* The control and oversight of building activities is generally regarded as one of the so-called "inspection services". All municipalities should control and inspect compliance to building regulations and standards. This is a very important service to the public in general, as substandard building or dwellings can have life-threatening consequences. Although building regulations and standards are set nationally, it is their enforcement and control on a municipal level that ensures a safe and acceptable system.<sup>118</sup>
- *Childcare facilities* The provision and control of childcare facilities is also a municipal matter. Neither national government nor the provincial governments are in an ideal position to address and control such a functional area. It is for municipalities themselves to determine local needs and expectations and to provide for them as may be required. Although

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<sup>116</sup> See the Constitution Schs 4 and 5 Parts B.

<sup>117</sup> Municipalities are constitutionally obliged to promote a safe and healthy environment. The Constitution s 152(d).

<sup>118</sup> See the National Building Regulations and Building Standards Act 103 of 1977. Many municipalities also provide for their own town-planning schemes, which also require certain standards regarding building activities. Some municipal by-laws are also important in this regard.

childcare facilities and services have also been allocated to local governments, the specific role of such governments is not clearly explained. Some commentators have already suggested that new legislative guidance is needed to rectify such a position.<sup>119</sup>

- *Electricity and gas reticulation* Arguably one of the most common and important services that are provided for by municipalities is electricity and/or gas reticulation. This is an example of a traditional service that has become indispensable within a modern society. The service does not necessarily relate to the generation of electricity or exploitation of gas, but rather to providing such commodities to local premises for utilisation.

In a similar way to water provision, electricity is normally rendered to local residents after such residents have concluded a service-provision agreement with their local municipality. When such services are received, residents are normally responsible for paying for such services.<sup>120</sup> Most municipalities are mere suppliers of electricity to local residents. In order to become a supplier, a municipality must become a licensee, as is intended in national legislation.<sup>121</sup> Once a municipality has started to supply electricity to consumers, it is prohibited from disconnecting such supply if such a consumer has paid the full amount due in respect of the supply of electricity. This is the position regardless of whether the consumer owes any other amount to the municipality for other services or other causes of

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<sup>119</sup> See Zaal and Matthais "Local Government and the Provision of Childcare Services: An Essential area for legislative reform" *SALJ* 119 (1) 138 *et seq.* The writers mention that the potential importance of the role of local authorities was recognised by the drafters of the 1996 Constitution: therefore its inclusion in Sch 4B. They finally reiterate that local government authorities have a constitutional obligation to provide services for children but that such an obligation has largely gone unrecognised, and needs urgent attention. They conclude by suggesting that the best way to redress this serious inadequacy is for the national legislature to promulgate additional legislation. At 153-154.

<sup>120</sup> See *Wellington Court Shareblock v Johannesburg City Council* 1995 (3) SA 827 (A). In the case the appellants, each of whom owned immovable property within the respondent's municipal jurisdiction, concluded agreements with the respondent in terms of which the respondent was to supply the properties in question with electricity and water. In its particulars of claim in an action in a local division the respondent alleged that the appellants were liable to it for the payment of certain amounts in respect of such services. The appellants excepted to these particulars on the ground that the agreements were *ultra vires* the relevant by-laws and could accordingly not support a claim for payment. The local division assumed, for the sake of argument, that the agreements were indeed *ultra vires*, but held, on the authority of a long line of cases, that the appellant, having received benefits under the contract, was estopped from raising the *ultra vires* defence.

<sup>121</sup> See the Electricity Act 41 of 1987.

action.<sup>122</sup> Generally a municipality is required to supply electricity to consumers. To supply means to make available rather than to actually deliver. Electricity is normally also supplied to consumers and not a property. There can thus be more than one consumer on a particular erf.<sup>123</sup> Generation or exploitation is normally done nationally, although it is not entirely uncommon for certain municipalities to generate electricity for themselves.<sup>124</sup> Generally municipalities are responsible for the establishment and maintenance of the electricity provision network and for providing support services thereto. Local authorities must note that they are not generally allowed to discontinue one service because of arrear rates for another. In the case of *Hartzenberg v Nelson Mandela Metropolitan Municipality (Despatch admin unit)*,<sup>125</sup> the court held that although the applicants were in unlawful occupation of houses and were in arrears with payments for water supplies, the respondent municipality could not disconnect the electricity supply to the properties. The court held that neither the relevant Electricity Supply by-law nor the Local Government: Municipal Systems Act gave the respondent such authority. The respondent was thus not entitled to discontinue the electricity supply because of the arrears on the water accounts.<sup>126</sup>

- *Fire fighting services* The provision of fire fighting services is the first service that is specifically referred to in Part B of Schedule 4 of the Constitution. It is self-explanatory that this service is of cardinal importance to all residents of municipal areas. Every day local residents are at risk in respect of fires. In this respect, such services are often lifesaving. Municipalities should ensure that fire stations are ideally located within each particular municipal jurisdiction, in order to provide a rapid and effective service. The nature of the service at hand requires the quickest response possible. The personnel that provide the service must be properly trained and should be effectively equipped to handle any foreseeable

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<sup>122</sup> See *Senekal Inwonersvereniging v Plaaslike Oorgangsraad* 1998 (3) SA 719 (O). The court held that the disconnection of the electricity supply of residents who had not paid all accounts in respect of services or rates in full could not be valid. At 727 paras H-I.

<sup>123</sup> See *Omters (Edms) Bpk v Welkom Stadsraad* 1999 (3) SA 787 (SCA).

<sup>124</sup> See the Electricity Act 41 of 1987 and the Gas Act 48 of 2001 for more details.

<sup>125</sup> 2003 (3) SA 633 (SE).

<sup>126</sup> See at 638E-F.



situation. Emphasis should be placed not only on corrective fire-fighting services, but also on preventative initiatives. Such initiatives and responsibilities are especially important in high-risk areas such as informal settlements. Fire-fighting services are controlled mainly through national legislation.<sup>127</sup> It should be noted that fire-fighting services are not free of charge and that fees could be recovered by the service provider.<sup>128</sup>

- *Local tourism* In an effort to attract national or even international investment, all municipalities should explore local investment opportunities. Tourism is one such opportunity that could be a significant enhancement in municipal financial income and one which should be explored thoroughly. Local tourism is something that cannot be done locally on an isolated basis, however; it needs to tie in with an overall national programme for the country as a whole.
- *Municipal airports* In some municipal areas there might be a need to provide and or maintain a municipal airport. To this extent, such a service should be provided to fulfil local needs, depending on financial resources and overall strategic programmes. When such a service is indeed provided for, municipal governments should take note of the various responsibilities and possible liabilities that accompany the provision of such a service.
- *Municipal planning* It has been stated several times in this work that all municipalities are obligated to provide and ensure proper municipal planning services. Such services refer mainly to various aspects of the management and control of land use or land use rights. There are many laws applicable in relation to municipal planning services, ranging from national laws such as the Physical Planning Act<sup>129</sup> and the Development

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<sup>127</sup> See the Fire Brigade Services Act 99 of 1987.

<sup>128</sup> See, eg, *Tuinroete Klein Karoo Distriksmunisipaliteit v Lategan* 2003 (2) SA 683 (C). The Fire Brigade Services Act 99 of 1987 (the Act) s 10 creates a statutory obligation to pay for fire brigade services, coupled with an effective debt-recovery mechanism. The Act s 10(1) authorises a controlling authority (which is a local authority in terms of the Act s 1) to determine the fees payable by a person on whose behalf fire-fighting services were rendered. The subsection creates a *sui generis* cause of action. It does not exclude the recovery of compensation for the rendering of services on common-law grounds. The chief fire officer who wishes to recover compensation from a person on whose behalf fire-fighting services were rendered has a choice to institute action for compensation on a common-law cause of action or to recover the moneys as determined by the controlling authority.

<sup>129</sup> 88 of 1967 and also the Physical Planning Act 125 of 1991.

Facilitation Act<sup>130</sup>, provincial laws and ordinances and also relevant local by-laws and town planning schemes.<sup>131</sup>

- *Municipal health services* All municipalities are involved in ensuring and providing certain minimum health services to their local communities. Such service provision is essential to everyday life, and municipalities are best suited to provide and ensure such services. Again, one should remember that such services interact with national and provincial programmes on health services.
- *Municipal public transport* Public transport is an indispensable service to the public at large. Depending on the size and density of a local area, municipalities should plan and make provision for public transport facilities. These services are very expensive and need to be justified according to local needs.
- *Municipal public works* Municipalities should also provide for certain municipal public works. Such works refer only to facilities or services that are required in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under the Constitution or any other law. Most other public works services are to be provided by the higher spheres of government.
- *Municipal services relating to pontoons, ferries, jetties, piers and harbours* Depending on location and geographical features, some municipalities are required to provide, maintain and control certain services where water is applicable. Often such services are also regulated in terms of higher legislative provisions. In some instances municipal involvement is entirely excluded. The regulation of, for example, international and national shipping and matters related thereto are exempt from local government control.
- *Storm water management systems in built-up areas* As municipal jurisdictions are becoming more and more developed, the management, provision and maintenance of storm-water systems are becoming ever so troublesome. Urbanisation with complaisant modern infra-structure such as

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<sup>130</sup> 67 of 1995.

<sup>131</sup> See, eg, the old Transvaal ordinance on town planning and towns, ordinance 15 of 1986 and the former Pretoria town-planning scheme 1974, which was enacted in accordance and on the authority of s 19 of the ordinance.

tarred roads and roofed buildings increasingly causes severe flooding in residential areas. Municipalities therefore need to plan and provide for sufficient infrastructure to handle and control such higher volumes of storm water.

- *Trading regulations* The modern 21st century city has undergone significant changes from its humble beginnings a few hundred years ago. Many changes in society, especially in some third world countries and economies, have led to new approaches regarding trading patterns in especially highly populated areas. In many towns and cities, residents have become accustomed to informal trading practices that are permitted throughout the municipal area. However, such trading habits can sometimes have a negative impact on long-established and more traditional business establishments, which in turn could negatively affect new job creation and sustainable enterprises.<sup>132</sup>
- *Water and sanitation services* The provision of water, and more specifically drinking water, to local residents is generally accepted as one of the most basic of services that municipalities must render.<sup>133</sup> Without water and basic sanitation infrastructure and services, it is difficult to imagine how such settlements can sustain and survive. Accordingly, water and sanitation services are seen to tie in strongly with the developmental duties and objectives of municipalities that have been entrenched in the Constitution.<sup>134</sup>
- *Beaches and amusement facilities* Coastal municipalities have an additional service to their communities, in that they must control and manage local beaches in their areas. Apart from beachfront management,

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<sup>132</sup> Most informal or so-called "street trader" do not pay levies for being able to trade in certain areas and it is the responsibility of formal business owners to cross-subsidise for loss in municipal revenue. These practices not only create unequal trading standards but they often also pose environmental and safety hazards. The trading of goods and services within municipal areas should therefore be regulated and controlled, to the benefit of all parties concerned.

<sup>133</sup> See the Water Services Act 108 of 1997. See also *Manqele v Durban TMC* 2002 (6) SA 423 (D).

<sup>134</sup> Refer to the Constitution ss 152(d) and 153. Water is an essential life-sustaining commodity and is also indispensable to ensure a healthy environment. Municipal water and sanitation services are, however, limited to portable water supply systems and domestic wastewater and sewage disposal systems. As is the case with many other services, water and sanitation services should link up with national and provincial programmes and initiatives.

all municipalities are to a greater or lesser degree responsible for the control and management of amusement facilities.

- *Billboards and the display of advertisements in public places* The advertising industry has become a very competitive and fast-growing business. Every municipal administration is therefore regularly confronted with new developments regarding advertisement initiatives. Because of factors such as traffic safety, environmental considerations and an overall aesthetic presentation of a particular area, proper management and control over billboards and the display of advertisements in public is necessary. Under the Constitution, special attention should be given to the regulation of billboards and the display of advertisements in public places. In light of the fact that the Bill of Rights protects the right to freedom of expression, which right also includes commercial free speech, municipalities must ensure that their policies and by-laws do not limit such a right unreasonably. For more on such aspects see *African Billboard Advertising v NSS Central Local Councils*.<sup>135</sup> In this case the applicant erected certain advertising signs on property in the Durban area which was owned by Spoornet. Acting in terms of its local building by-laws, the respondent objected to the presence of the signs on the basis that they had been erected either in contravention of its by-laws or without the requisite permission to do so, and it placed the applicant on terms to remove them. When the applicant failed to oblige, the respondent engaged the services of a contractor to remove them. The applicant demanded its property back. The court held that the removal of the billboards was unlawful and that the by-law in question had not intended that such signs be removed without a court order. The respondent was subsequently ordered to re-erect the signs.<sup>136</sup>
- *Cemeteries, funeral parlours and crematoria* Providing for cemeteries, crematoria and funeral parlours has always been a function of local governments. Such services are important in the day-to-day living experiences of all communities and should thus be provided on a continuous basis.

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<sup>135</sup> 2004 (3) SA 223 (N).  
<sup>136</sup> See pages 228-229.

- *Cleansing services* According to the Constitution, the provision of cleansing services is also regarded as a local government matter that falls within the functional areas of exclusive provincial legislative competence. What is included under such services is not clear. It is submitted that cleansing services are closely related to municipal health services, however, and that a strong link between the two types of services is self-evident.
- *Control of public nuisances* Municipalities are also responsible for controlling public places within their relevant municipal jurisdiction, and they must therefore also provide for control measures to ensure that public nuisances are addressed. Typical examples of public nuisances that should be controlled are matters that relate to noise control, zoning-scheme contraventions and aspects that have their origin in bad neighbour relations. Municipalities should ensure that community members live as far as possible in harmony with one another and that clear and effective mechanisms exist in order to address any negative or nuisance-like actions or activities that do arise.
- *Control of undertakings that sell liquor to the public* The selling of liquor to the public has always been a contentious and often difficult issue, as there are many negative consequences attached to such activities. Because of the enormous extent of the liquor industry and liquor consumption in our country, control over the liquor trade is something that must be exercised in all three spheres of government. Various national and provincial laws are directed at the liquor trade, and municipalities must also do their bit in order to complete and enhance the overall regulatory framework.<sup>137</sup>
- *Facilities for the accommodation, care and burial of animals* The keeping of animals for farming or as pets is part of human life all over the world. To accommodate aspects relating to animals, especially within modern urbanised areas, certain services should be provided to address issues such as the accommodation, care and disposal of animals. Often the neglect of such services could lead to health risks or could even cause the outbreak of infectious diseases, which in turn could have enormous

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<sup>137</sup> Eg, see the Liquor Act 27 of 1989 as amended.

consequences, not only within a particular municipal area but even for the country as a whole.<sup>138</sup>

- *Fencing and fences* Depending on local circumstances, issues relating to fencing and fences within a municipal area could also have important implications. Not only are fences and issues relating to fencing important for private and public safety reasons, they often also assist in preventing damage to property or even disputes relating to ownership of goods or animals. The control and services relating to fences are therefore often more important in rural or farming communities than in some urban developments.
- *Licensing of dogs* Mention was made of the fact that many people keep so-called “domestic animals” as pets on their properties. The control over such animals is much less of a problem in rural communities, as they are within modernised towns or cities. Arguably the most common domesticated pet and security measure is a dog. In light of the nature of such animals, certain minimum controls should be exercised, and thus municipalities are empowered to insist that dogs within their areas of jurisdiction be licensed.
- *Licensing and control of undertakings that sell food to the public* In an effort to ensure and enhance public health standards, municipalities should provide for measures that regulate the licensing and the control over undertakings that sell food to the public. There are various standards and requirements that must be enforced to ensure and promote a safe and healthy environment.<sup>139</sup> Municipalities are often best suited to ensuring and enforcing such standards and requirements.

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<sup>138</sup> One should recall the attention that was given to the outbreak of mad cow disease and foot and mouth disease in Britain, eg, to see what devastation such diseases can create within a country.

<sup>139</sup> Note the case of *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1994 (3) SA 170 (A). The appellant, a bottler and distributor of soft drinks, was convicted in a magistrate’s court of contravening by-law 18(c) of the City of Durban Food By-Laws, which had been promulgated in terms of the Local Government Ordinance 21 of 1942 (N) s 197(1)(f). The conviction was based on an admission at the appellant’s trial that it had sold a bottle of carbonated mineral water which contained a bee to a supermarket in Durban. The magistrate found that by-law 18(c) imposed a strict liability. The court held that the contamination was foreseeable and that the appellant had been negligent in preventing foreign objects from passing into the consumable products.

- *Local amenities* Municipalities should make a determination with regard to local needs in respect of possible amenities and should then provide, manage and control such amenities. The availability of resources and budget priorities would impact considerably on the variety and extent of local amenities provided. General amenities are municipal pools, picnic areas, caravan parks and even resorts.
- *Local sport facilities* South Africa is generally recognised as a sporting nation. Our climate and weather patterns allow for favourable outdoor sporting activities. Sport forms an important part of many people's private lives and social interactions. Most people do not have the financial capacity to build and maintain their own private sporting facilities. Local governments are therefore tasked and best suited to provide, manage and maintain such facilities.
- *Markets* In large metropolitan areas, some municipalities also provide and manage market facilities. A market is a place where people trade in various items, but mostly in foodstuff. The existence of fresh produce markets or wholesale flower markets is well known in this respect.
- *Municipal abattoirs* In some instances, and depending on local circumstances, some municipalities are also required to provide and control municipal abattoirs. An abattoir is a place where animals are slaughtered and meat is prepared for public consumption. Strict hygiene and health requirements must be adhered to at all times.
- *Municipal parks and recreation* All municipalities should provide so-called "open spaces" or municipal parks where members of local communities can relax and where children can meet and play. In modern urbanised areas, many residents in high-rise compartment blocks do not have gardens or play areas of their own. It is thus a responsibility of municipal governments to create and maintain such public recreational areas.
- *Municipal roads* Municipal infrastructure plays an important role in achieving social and economic development and ensuring that other essential services can also be rendered. In this regard, the proper control and maintenance of municipal roads are of paramount importance. The control and maintenance of municipal roads cannot be done on an isolated basis and must interact with national and provincial initiatives and



schemes. Maintenance of municipal roads also includes the provision and maintenance of storm-water systems citywide.

- *Noise pollution* Within the new constitutional scheme, environmental issues are the responsibility of all three spheres of government. Various national and provincial laws are applicable in order to enhance the protection of environmental demands and requirements. Noise pollution, especially in urban areas, is an aspect that ties in with other environmental interests, and municipalities are best suited within their local jurisdictions to address and control such a matter.
- *Pounds* It is advisable for municipalities to provide for so-called “municipal pounds” where stray animals, illegally parked vehicles or other unauthorised goods can be stored and secured. Pounds vary accordingly to what is to be secured. Proper measures should be introduced to ensure that municipal councils do not incur civil liability for goods or property that have been impounded.
- *Public places* The provision and maintenance of public places is also an important local service that should be provided to local communities. The availability of finances will determine to what extent such places can be afforded.
- *Refuse removal, refuse dumps and solid waste disposal* It is an essential service for municipalities to provide for both domestic and industrial refuse or solid waste removal and dumping facilities. Such services are needed in every community and must be rendered and controlled effectively in order to prevent possible health risks. Because of environmental importance, services relevant to refuse removal, dumps and solid waste disposal mechanisms must comply with legislative requirements from the higher spheres of government.
- *Street trading* Many municipal functions and services are interrelated with other services. The control and management of street trading is a good example. Street trading also ties in with general trading regulations and is directed at controlling and managing trading activities that are conducted next to municipal streets. Other functions such as traffic, parking and municipal roads are also relevant to trading services.

- *Street lighting* Apart from addressing the services relating to municipal roads and public transport, municipalities should also provide street lighting in certain areas. The provision of street lighting is particularly important for road safety and personal security. Not all municipal roads can be provided with lighting facilities, and municipalities should conduct investigations to determine which streets require lighting.
- *Traffic and parking* Traffic control and parking facilities are among the most common municipal services that have been rendered over the years. Such services must interrelate with other similar services such as municipal transport and municipal roads. Various national and provincial laws also exist regarding such matters and must be complied with in the fulfilment or rendering of such services. Traffic control is regarded as an area-bound service and should be managed through strict command and control procedures.

The abovementioned areas of municipal service provision have been entrenched within the new constitutional dispensation of South Africa and cannot be taken away unless the Constitution so permits.<sup>140</sup> Apart from the areas mentioned in the Constitution, some older laws that are still in place and in effect also identify and confirm certain services or functions to be fulfilled by local governments. Some such services or functions are the following:

- *Civil protection services* All municipalities should plan and provide for emergency protection or even disaster management services. In this regard, all possible scenarios should be investigated and potential crisis areas or hazards should be identified. Common aspects that should be provided for are, for example, floods or

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<sup>140</sup> See the Constitution Sch 4 and 5 Part B.

other natural disasters, outbreaks of infectious diseases and possible human-made emergency situations such as terrorist attacks or arson incidents. The prevention and management of such incidents is very important and should not be neglected.<sup>141</sup>

- *Housing* All spheres of government are involved in providing housing services in South Africa. Therefore, housing is one of the most needed commodities in our new state. Many people are living in extreme poverty and with no roof over their heads. Because of the special need of new houses, the national government has introduced various housing schemes.<sup>142</sup> Broadly speaking, the provision of housing services includes aspects such as low-cost housing, modern township developments, retirement homes and facilities, as well as rental properties. Municipalities must interact with the programs of the two higher spheres of government and must also assess and evaluate local housing needs. It is submitted that without the provision of proper housing services there can be no real social and economic development. Housing is thus a high priority service in the new governmental systems in South Africa.
- *Licensing services* In many instances municipalities are tasked with certain licensing services that are to be performed within their areas of jurisdiction. Such services are often required by either national and provincial laws, which in turn mandate local authorities to act as a so-called “controlling” or “inspection” authorities. Examples of these services include business- and vehicle-licensing services, inspection of the premises of liquor-selling businesses and also building regulation fulfilments.
- *Civic centres, city halls and public libraries* Over the years, it has been customary for local authorities to provide and maintain civic centres and city halls. Such centres play an important role in building a local symbolic identity. City halls or civic centres provide a place for public gatherings, official and ceremonial functions and also cultural activities. It is obvious that such centres fulfil an important role in local community activities. Such

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<sup>141</sup> In South Africa special attention must be given to frequent fires that occur within rural areas and also within informal settlements. As prevention is better than cure, local governments should not be unaware of the devastating effect such incidents could have on local communities.

<sup>142</sup> See, eg, the Redistribution and Development Program, which specifically provides for the provision of housing developments.

services are very expensive, however, and careful prioritisation should be done locally. Building town halls or city halls is very costly, but most towns or cities in South Africa already possess one, and these should be maintained and controlled.<sup>143</sup> Providing a library service is not a specific function of municipalities, but many municipalities often provided such a service. A library service is directed at serving the local population through the provision of educational and recreational information. In light of modern electronic development, such centres should also provide internet and even e-mail facilities.

- *Law enforcement and municipal police services* It was explained above that municipalities have various law-enforcement obligations and services that must be rendered. Such services differ from building inspections, town planning scheme control, various health and safety measures and also road traffic law enforcement. Apart from providing such services, municipalities are also permitted to establish and maintain a municipal police service.<sup>144</sup> It should be pointed out that local governments do not have an automatic right to establish a municipal police service.<sup>145</sup> Specific requirements must be met before permission can be granted for the establishment of a municipal police service.

## 16.5 Conclusion

As is the case with many other aspects of the new local government dispensation, it is imperative that municipal services and service provision should comply and conform to the new constitutional vision and requirements. Municipal services must be equitable and accessible for all local residents and must enable all municipalities to achieve and fulfil their objectives and duties.

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<sup>143</sup> City halls are often rich with local heritage and traditions.

<sup>144</sup> According to the Constitution s 205(1), the national police services must be structured to function in the national, provincial and, where appropriate, local spheres of government. S 206(7) further states that national legislation must provide a framework for the establishment, powers, functions and control of municipal police services. For more detail, see the South African Police Service Act 68 of 1995.

<sup>145</sup> *In re Certification of the Constitution of the RSA, 1996 1996 (4) SA 744 (CC)* the Constitutional Court held that whereas the interim Constitution required provision to be made for the establishment by a local government of a municipal or metropolitan police service whose functions would be restricted to crime prevention and the enforcement of municipal and metropolitan by-laws, there was no comparable provision in the new text. Local policing was a matter to be dealt with by an Act of parliament. See paras 395-401 at 888-890.

The basic municipal services are set out in Part B of Schedules 4 and 5 of the Constitution. Apart from such services, national or provincial governments may assign other matters to municipalities via legislation.<sup>146</sup> One can thus conclude that municipal services are not absolutely defined or identified and can differ from one municipality to another as circumstances may require. Within the new local government legislative framework there seems to be rediscovery of the basic essential services that a municipality is supposed to render. This development has caused almost all local governments to focus mainly on the core services and to deregulate or even privatise many other secondary services.

The Constitution compels all municipalities to strive within their financial and administrative capacities to achieve the objectives and therefore the services that were identified above. Services should be provided and rendered to uplift and enhance the quality of life of all local people without a sacrifice in quality or sustainability. In many cases services should be decentralised or even privatised in order to allow local governments all over South Africa to focus and achieve their main constitutional service objectives.

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<sup>146</sup> See the Constitution s 156(1)(b). Subs (4) further enhances such assignment as national and provincial governments must assign to a municipality the administration of a matter listed in the Constitution Sch 4 or 5 Part A, which matter necessarily relates to local government.

## Municipal personnel, labour relations and staffing matters

### 17.1 Introduction

It is an obvious observation that no municipality would be able to fulfil its obligations and duties without basic personnel administration and management. Not only are employees necessary, they have to be motivated, dedicated and properly trained. In light of their vast and diverse functions, municipalities need a mix of personnel that vary from general administrative officials, such as administrative clerks and office personnel, to highly qualified experts such as engineers, town planners, lawyers, accountants and personnel managers. Without the abovementioned personnel corps in place, no municipal government will be able to perform and fulfil its constitutional duties and obligations, and the Constitution specifically states that a municipal council may employ personnel that are necessary for the effective performance of its functions.<sup>1</sup> All municipalities therefore have to evaluate and determine their specific personnel needs in order to perform their functions. It goes without saying that it is not only the appointment of personnel that is important in this regard; so is the management, control and performance measurement of such personnel.

According to the Constitution, municipalities have significant powers regarding personnel matters.<sup>2</sup> One must be aware of the fact that other national or provincial legislation also impacts on personnel matters or even labour relations, however, and that municipalities may not act contrary to such laws.<sup>3</sup> When municipal personnel, also often referred to as the municipal administration, is discussed, it is again important to remember the three components that together complete a local government. All

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<sup>1</sup> See the Constitution s 160(1)(c).

<sup>2</sup> The Constitution s 156(5) states that a municipality has the right to exercise *any power* concerning a matter that is reasonable necessary for, or incidental to, the *effective performance of its functions* (own emphasis added). Since the appointment of personnel is essential for the effective performance of municipal functions, municipalities should be able to exercise strong powers in this respect.

<sup>3</sup> See the Constitution s 156(3).

municipal governments consist of a combination of political functionaries, administrative personnel and a specific local community.<sup>4</sup> Together the three components comprise a municipal government. The importance of a municipal personnel corps is thus self-evident. However, one should guard against possible confusion between municipal administrative personnel and office bearers representing political structures. Municipal personnel are not elected political representatives; they are employees in the normal sense of a municipal council.<sup>5</sup>

## **17.2 The broad organisational structure and overall personnel administration of local governments**

### **17.2.1 Basic organisational systems**

In the past the organisational structure of a municipal government could be compared with a human body:

- A particular structure (the skeleton) exists to ensure effectiveness.
- Staff (the muscles) are needed to perform functions and ensure movement
- A decision-making body (the brain) is required, through which communication is achieved between the decision-making body and the staffing component, which must then perform the instruction given.<sup>6</sup>

Broadly speaking, two types of organisational structure have been identified. There is the *mechanistic/closed type* of structure, in which duties are precisely defined and where a high value is placed on precision, specified job descriptions and strong loyalty to the organisation. Functional tasks are differentiated, and there is a hierarchical structure of command. The manager or head of the organisation is often deemed to be omniscient, as he or she possesses all important knowledge. Factors such as authority, coordination and efficiency are strongly emphasised. Job responsibilities are mainly routine, with most decisions and knowledge coming from the top. Contrary to the closed organisational structure, one finds the *organic or open type* of organisational structure. Such a structure was developed and adopted to handle

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<sup>4</sup> See ch 7 of the work and also the Systems Act s 2(b)(i) and (ii).

<sup>5</sup> Again notice should be taken of the fact that it is a municipal council, as a legal entity that acts as an employer and that appoints or concludes services/employment contracts with potential employees. The position regarding political office bearers, as was discussed elsewhere, is quite different. Anyone who is appointed by or in the service of a municipality is normally not eligible to be a member of the political component of that municipal council. Refer to the Constitution s 58(1)(a) and (b).

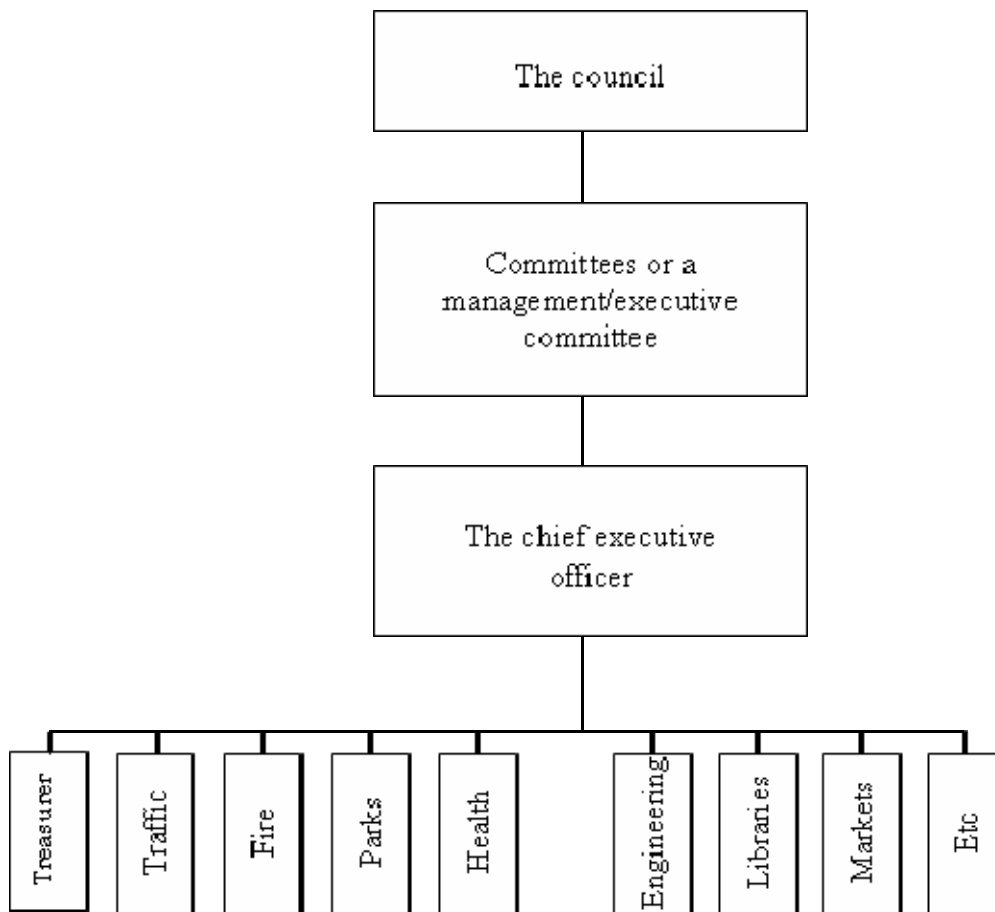
<sup>6</sup> See Craythorne (1997) 279.



unstable and continuously changing conditions. Many internal jobs have little formal definition, and functions are not precisely demarcated. Responsibilities and tasks are constantly redefined. In an organic structure the emphasis is on getting the job done, and thus individual responsibilities are not precisely defined.<sup>7</sup> It is also possible to find institutions that incorporate a combination of the two types of organisational structure.

From a municipal government point of view, municipalities exist to provide services to their inhabitants. They must therefore have a structure within which staff can be deployed and organised to ensure that the required services are indeed provided. Craythorne mentions that in the South African local government of the past it was usual to encounter two forms of organisational structure. One was identified as a long, flat organisation with many departments. The other form was more of a pyramidal type, with fewer departments.<sup>8</sup>

(A)

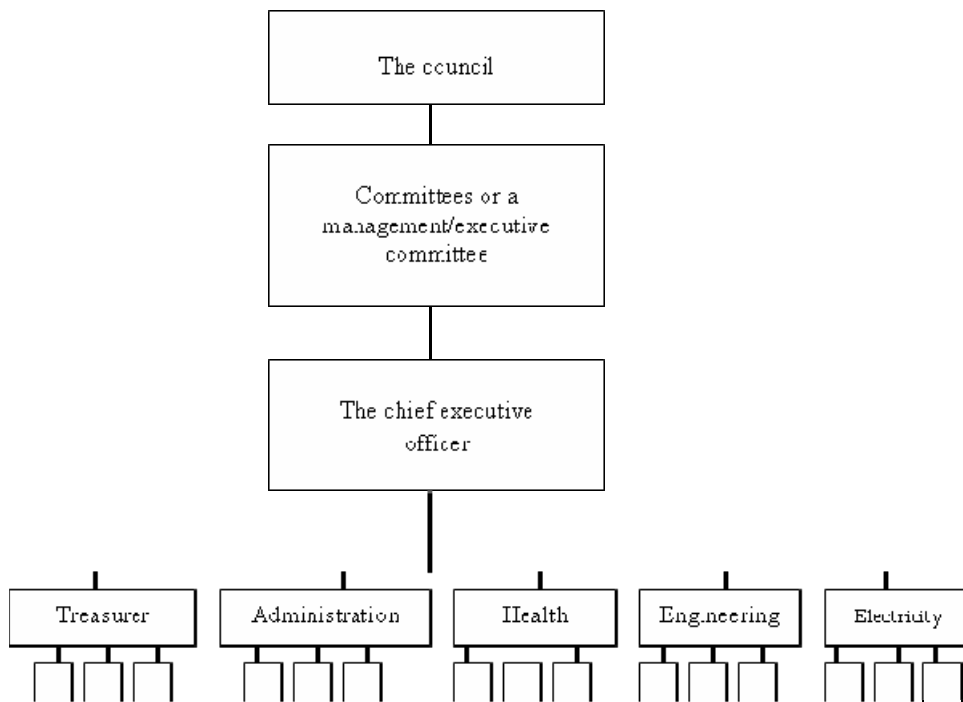


<sup>7</sup> See Craythorne (1997) 282-283.

<sup>8</sup> See Craythorne (1997) 283-285.

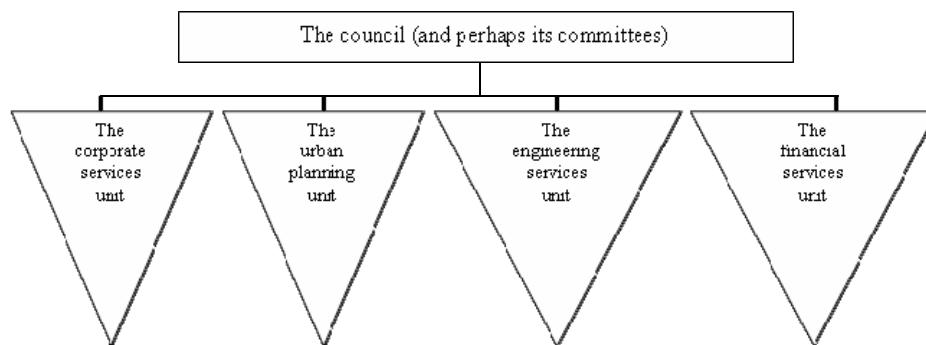
In more recent years, a new local government organisational structure, generally termed the business unit model, was developed. In such a model, the municipal organisation is divided into semi-autonomous business units. Especially from a concentration of skills and expertise point of view, the business unit model has definite advantages.

(B)



Specialised branches within departments

(C)



It is important to remember, however, that in a public-sector body, where control over policy and decision making is necessarily political, it is not possible to have a truly decentralised structure. Although many decisions should be delegated to strategic officials, ultimately the overall policy and political decisions must be made at municipal council level.

In the new local government dispensation, municipalities have been established and are constitutionally required to render effective, efficient and sustainable services. Depending on the services, this obligation often requires professional experts and technicians and a careful preplanning and evaluation of the organisational structure is thus essential. It is also generally accepted that the personnel of specialised services such as engineering, town planning, accounting and also legal services should not be lumped together, but should rather be placed within separate specialised units, which are then tasked with only that specialised service.<sup>9</sup>

### **17.2.2 Internal mechanisms to enhance organisational efficiency**

No organisation can be efficient and effective without certain control measures' being put in place. It is a fact of any organisational structure that not all members or staff can be expected to meet standards voluntarily. Measures of control in local governments arise from various sources, such as from the political leadership, internal leadership structures and even through public complaints and requests. The main objective of control within the public sector is to ensure accountability for everything the public authority does.<sup>10</sup> Another form of external control over the public sector is via the law and judicial structures. Many legal rules have been developed to ensure that the public service is regulated within certain minimum standards. The judicial structures are also properly empowered to oversee public sector compliance with the law.<sup>11</sup>

Local governments should further also guard against the familiar concept of empire building in public structures. Empire building arises mostly from personal motivations such as ambition, a desire for status, a lust for power and also professional jealousy. Status-driven and power-orientated personnel see the organisation in which they work merely as a tool for achieving personal goals. Ineffective and unnecessary empires are commonly developed through a process of lengthening work outputs

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<sup>9</sup> See Craythorne (1997) 290. In many instances, professional personnel are controlled and supervised by their professional body (eg the South African Law Society for attorneys, and a minimum standard of professionalism is required which may not be reduced or limited by political intervention. A municipality can therefore not prescribe to a professional employee such as a civil engineer to design structures that would not comply with minimum safety requirements but would save the municipality lots of money. Minimum professional standards may never be compromised.

<sup>10</sup> For more on this point see Cloete (1997) 184, and also Craythorne (1997) 297.

<sup>11</sup> Within the new constitutional dispensation of South Africa, the importance of control and minimum standard setting within the public sector is strongly echoed in the Constitution ch 10, which sets basic values and principles to which the public administration must adhere. See the Constitution s 195 in particular.

and by creating the impression that a certain post has more responsibilities than it really has. This is then followed by requests for additional posts and the upgrading of the original post to a unit supervisor or leader.

One should not mistake genuine personnel enlargements with the concept of empire building, however. Many municipalities in South Africa are facing severe shortages of qualified and properly trained personnel. There are many internal departments that are functioning with only 50% or even less of the minimum staff that are required to perform the particular workload. This situation has become critical since the commencement of the final phase of the new local government restructuring. Many newly established municipalities have lost vast numbers of highly trained and experienced municipal personnel and do not have appropriate replacements on hand. This situation has resulted in many inexperienced personnel being appointed to often strategic positions or municipal councils being indecisive in appointing and filling urgently needed vacant posts.

Since the beginning of the restructuring of local governments, it has always been envisaged that the overall internal organisational structures of all municipalities should be reviewed and reorganised. This is a difficult and ongoing process, however, and many local governments are in need of professional assistance to achieve a genuinely effective and streamlined municipal corps. Most jobs will have to be re-analysed to ensure that they are suitably defined.

Another important aspect of a municipal organisation is municipal leadership. Every municipal structure must have a leader that is not only knowledgeable in terms of local government affairs but who is also followed and respected by the general personnel corps. Municipalities differ from many other organisations in that they have a number of leaders, such as the councillors, the municipal manager, heads of department and sub-units. Each official in charge of a unit is a leader, but at a different level.<sup>12</sup>

No organisation can establish and maintain a successful organisational structure without a proper personnel administration in place. Personnel administration is a key activity in local government administrations and, if handled effectively, it will contribute significantly to the existence and maintenance of a healthy municipal organisa

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<sup>12</sup> See Craythorne (1997) 302-303.

tion. Even the smallest local authority must devote some of the time allocated to administrative duties to employment-related matters such as conditions of service and remuneration and recruitment/appointment procedures. Municipal councils should provide for at least the following regarding personnel management:

- a written service contract which explains the general conditions of service
- an employee file setting out the date of appointment, the position and basic remuneration package
- basic job description lists
- grievance and disciplinary procedures.

Every council should have a data base containing a record of all the posts and jobs in that council's service. In planning and improving on the structure of a municipal organisation, posts should be ranked and grouped together in appropriate departments or sectors. It is also a good policy to review the staff establishment periodically in order to ensure that the administrative structure is still streamlined and effective.<sup>13</sup> In recent years, many questions have been asked about the overall remuneration packages that are paid to municipal personnel. According to media reports, some municipal managers have even bigger remuneration packages than the president of the country. It follows, therefore, that an urgent investigation of how such remuneration rates are determined should be undertaken. Craythorne identifies methods that can be used to determine an acceptable remuneration rate for a particular post.<sup>14</sup> The methods are:

- to compare a post with a similar post in the private sector
- to compare posts between different municipal councils
- to use a cost of living index
- to look at customary or trade rates in a particular area.

Apart from establishing an effective administrative personnel corps, municipalities should also ensure that proper manpower planning initiatives are put in place. According to Craythorne, personnel planning is concerned with identifying the personnel needs of a particular organisation. Proper planning is required to replace those staff mem-

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<sup>13</sup> It is of interest to note that the staff component of a municipality constitutes a large proportion of the costs of that council's operating budget and that there has to be proper control over the number of posts permitted. Employee remuneration comprises a large part of a municipal budget, and it includes not only the basic salary packages but also issues such as housing subsidies, pension or provident scheme contributions, medical aid, life insurance, bonuses and long-service awards.

<sup>14</sup> See Craythorne (1997) 310-312.

bers who leave the organisation by resigning, retiring, or for other reasons. Personnel planning is essential if municipalities are to fulfil their objectives and duties.<sup>15</sup> Apart from personnel planning, municipal councils as employers should also spend considerable time on the motivation and development of their human resources. Often municipal employees work in unpleasant and highly stressful circumstances, and it is important for the managerial structures to ensure that employees are motivated. Without a motivated personnel corps the desired, and indeed required, results are not likely to be achieved. Various practical steps have been developed to motivate employees.<sup>16</sup>

One of the most important challenges facing the new local government dispensation is ensuring and building properly trained local government administrations. South Africa requires trained municipal employers in order to meet the needs of local populations. Without adequately trained personnel, many service standards will decline, and some municipal governments will not be able to fulfil and adhere to their new constitutional obligations. In an effort to enhance the training of municipal personnel, various initiatives have been introduced which, through proper application, could significantly boost training targets.<sup>17</sup>

### **17.3 New legislative provisions regarding municipal staff matters**

#### **17.3.1 *The appointment and employment conditions of municipal managers***

Under the new local government legislative framework, the head of the municipal administration is called the “municipal manager”.<sup>18</sup> In his/her capacity as the head of the administration of a municipality, the municipal manager is tasked with a wide range of responsibilities and is also the final accountable official for many municipal affairs. Both the responsibilities and accountable duties are subject to the policy directions of the particular municipal council, however.<sup>19</sup> It is generally accepted that

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<sup>15</sup> See Craythorne (1997) 317. In essence, personnel planning ensures that an organisation will have and continue to have a certain required number and quality of personnel that are able to perform the tasks of the organisation in order for it to be successful.

<sup>16</sup> Some of these steps are: to ensure that the organisation has a shared objective or mission statement; to enhance aspects of team spirit or esprit de corps; by sharing responsibility and authority; by rewarding excellence; by allowing inputs from employees in relation to work procedures; through proper training initiatives; by clearly identifying expectations and tasks; by introducing regular performance appraisals and by treating employees as human beings. See Craythorne (1997) 322-323.

<sup>17</sup> See Craythorne (1997) 323 *et seq.*

<sup>18</sup> This office was formerly known as the Chief Executive Officer (CEO) during the transitional phases, and the Town or City Clerk under the old dispensation.

<sup>19</sup> See the Systems Act s 55(1).

the municipal manager is the chief of a municipal administration and that he/she is also the chief agent of that municipality. This position has already been confirmed in a number of judicial decisions. In *Gcali NO v MEC for Housing & Local Government, EC*<sup>20</sup> the court held that in authorising the institution of legal proceedings, a town clerk acted as an agent for the municipality. Furthermore, when the interests of the municipality so demanded, the town clerk had to act as a *negotiorum gestor* on behalf of the municipality and had no authority to institute legal action on behalf of the municipality without instructions to do so.<sup>21</sup> In the case of *King William's Town TLC v Border Alliance Taxi Association (Bata)*<sup>22</sup> it was mentioned that the town clerk as chief executive officer was not merely the recipient of instructions, he/she was

- privy to the council's deliberations, debates and decisions
- in as good a position as any other to give evidence of the collective mind of the council over years
- the proper person/functionary to testify to the reasons for council decisions.

Such evidence is admissible and relevant to show that the council applied its corporate mind to a particular issue.<sup>23</sup> According to the new legal order, a municipal manager is responsible and accountable for the following:<sup>24</sup>

- the formation and development of an economical, effective, efficient and accountable administration that is equipped to carry out the task of implementing the municipality's IDP, to operate in accordance with the municipality's performance management system and to be responsive to the needs of the local community in order to participate in the affairs of the municipality<sup>25</sup>
- the management of the municipal administration in general
- the implementation of the municipality's IDP as well as the monitoring of progress with the implementation of the plan
- the management of the provision of services to the local community in a sustainable and equitable manner

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<sup>20</sup> 1996 (4) SA 456 (TkS).

<sup>21</sup> See paras E-H at 463.

<sup>22</sup> 2002 (4) SA 152 (E).

<sup>23</sup> See paras B-E at 156.

<sup>24</sup> See the Systems Act s 55(1)(a)-(q).

<sup>25</sup> It is therefore the municipal manager's responsibility to ensure that a proper municipal administration is established and maintained in order for that municipality to fulfil its obligations and duties.



- the appointment of staff other than the staff that are appointed by the municipal council itself<sup>26</sup>
- the management, effective utilisation and training of staff
- the maintenance of discipline of staff
- the promotion of sound labour relations and compliance by the municipality with applicable labour legislation
- advising the political structures and political office bearers of the municipality
- managing the communications between the administration and political structures
- carrying out the decisions of the political structures
- overseeing the administration and implementation of the municipal by-laws and other legislation
- the exercise of any power or performance of any duties delegated by the municipal council or other body under a sub-delegation to the (office of the) municipal manager
- facilitating the participation by the local community in the affairs of the municipality
- developing and maintaining a system whereby community satisfaction with municipal services is assessed
- ensuring or overseeing the implementation of national and provincial legislation applicable to the municipality
- performing any other function that may be assigned by the municipal council to the municipal manager.

A further important responsibility of the municipal manager is to ensure and oversee the municipality's financial and fiscal matters. The municipal manager is *ex officio* and *ex lege* the accounting officer of a municipality and as accounting officer he/she is responsible and accountable for

- all income and expenditure of the municipality
- all assets and the discharge of all liabilities of the municipality
- the proper and diligent compliance with the Municipal Finance Management Act.<sup>27</sup>

In light of the aforementioned, it is clear that from an administrative point of view the municipal manager is the final responsible and accountable person in relation to the

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<sup>26</sup> See the Systems Act s 55(1)(e) read with s 56(a). Note that the appointment of staff is subject to various legislative requirements, including the Employment Equity Act 55 of 1998.

<sup>27</sup> See the Systems Act s 55(2)(a)-(c) as amended by Act 44 of 2003. Refer also to ch 17 of this work.

general obligations and duties of a municipality. It goes without saying that the tasks and responsibilities of the municipal manager are enormous and that, unless he/she is assisted by a dedicated and effective municipal administration, it is difficult to imagine how all the responsibilities falling under such a post can properly be fulfilled.

In an effort to assist a municipal manager in the fulfilment of his/her responsibilities, the new legislative system developed for local government specifically envisages the appointment of managers that are directly accountable to the municipal manager. In this regard it is required that after consultation with the municipal manager a municipal council should appoint a manager (or managers) that are directly accountable to the municipal manager. The appointment of managers should enable a municipal manager to fulfil the diverse responsibilities vested in the position.<sup>28</sup> A person that is appointed as a manager must have the relevant skills and expertise to perform the duties that are associated with the post in question. For example, if a manager is appointed to manage municipal finance, that person must have the necessary skills and expertise to perform such duties. These are usually acquired through academic studies and practical experience.<sup>29</sup>

The appointment of municipal managers and other managers accountable to the municipal managers is further regulated through various legislative provisions. In this respect, it is required that a municipal manager or other managers be appointed to such posts only in terms of written employment contracts with the municipality and subject to separate performance agreements that are concluded annually between the council and the incumbents.<sup>30</sup> The performance agreement must be concluded within a reasonable time after a person is appointed and thereafter within one month after the beginning of the municipality's next financial year. When a performance agreement is concluded with a municipal manager, the agreement must be entered into with the municipality as represented by the mayor or executive mayor, and when

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<sup>28</sup> Note that it is the responsibility of the municipal council to appoint the managers under the municipal manager. Although prior consultation between the council and the municipal manager should take place, it is still the council's decision whom to appoint as managers. Only consultation is required; not consensus or agreement. It would be unwise to appoint managers with whom the municipal manager is not satisfied or comfortable, however. A strong and united managerial team should be pursued. Although the Systems Act refers only to the appointment of a manager, it is submitted that the intention of the legislator was the appointment of one or more such managers. See the Systems Act s 56(a).

<sup>29</sup> When managers or other personnel are appointed, the requirements of any applicable affirmative action policy should be considered. See the Systems Act s 56(b).

<sup>30</sup> See the Systems Act s 57(1)(a)-(b).

entered into with other managers, as represented by the municipal manager.<sup>31</sup> With regard to the performance agreement, it is required that such an agreement include:

- the performance objectives and targets that must be met, as well as the time frames within which targets must be met
- the standards and procedures for evaluating performance and intervals for evaluation
- the consequences of substandard performance.<sup>32</sup>

Finally, it is required that the employment contract for a municipal manager be concluded for a fixed term of employment, which term may not exceed a period ending two years after the election of the next council of the municipality. The term may thus be no longer than seven years.<sup>33</sup> The contract must also provide for a cancellation clause should there be non-compliance with the employment conditions.<sup>34</sup> Although the term of the contract must be fixed, it is possible for the renewal of the employment relationship. The only statutory requirements in this regard are that although the renewal of the employment contract is permitted it can be done only by agreement between the relevant parties. In the last instance, the municipal manager's employment contract must reflect the values and principles referred to in section 50 of the Systems Act, the code of conduct for municipal staff members as well as the management standards and practices that are contained in section 51 of the Systems Act. On this point it should be noted that the requirements relating to the em-

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<sup>31</sup> See the Systems Act s 57(2) and (3). The employment contract mentioned above must include details of duties, remuneration, benefits and other terms and conditions of the employment. All related employment particulars are subject to applicable labour legislation. It should be noted that under old-order laws, many of which are still applicable, issues such as medical aid schemes, pension schemes etc. were also addressed. Such aspects should be closely considered. See, eg, the case of *Munimed v Premier, Gauteng and Others* 1999 (4) SA 351 (T), where the court held that by establishing a medical aid scheme contrary to the provisions of s 79bis(1) of the Local Government Ordinance 17 of 1939 (T), the administrator had acted beyond the scope of his powers.

<sup>32</sup> The performance objectives and targets must be practical, measurable and based on the key performance indicators set out in the municipality's IDP. The provisions of the MFMA conferring responsibilities on the accounting officer of a municipality must be regarded as forming part of the performance agreement of a municipal manager. It should also be noted that bonuses based on performance may be awarded to a municipal manager or a manager directly accountable to the municipal manager after the end of the financial year and only after an evaluation of performance and approval of such evaluation by the municipal council. See ss 4A and 4B as inserted by Act 44 of 2003 s 8. Refer also to s 57(5) of the Systems Act.

<sup>33</sup> The normal term of a municipal council is 5 years plus the maximum 2 years mentioned above.

<sup>34</sup> Such conditions may also include the fulfilment or compliance with the relevant performance agreement conditions as were agreed upon. See the Systems Act s 57(6)(b).

ployment contract of a municipal manager may also be extended to the contract of any other manager that is directly accountable to the municipal manager.<sup>35</sup>

An aspect that has become very controversial in recent times is the remuneration packages that are paid to municipal managers and other managers. It is reported that in some instances, particularly where metropolitan councils are involved, the municipal managers earn very high remuneration packages; in some cases these are even more than members of the national government. This situation seems somewhat distorted and is currently under investigation. One must remember, however, that a municipal manager is not a political functionary in a municipal government, but is part of the administrative component. A comparison between the salary of such a person and a political functionary is therefore not necessary. Salaries of municipal staff members, including a municipal manager, form part of the public administration and should be regulated under such principles. In principle, it is advisable for government to structure the remuneration of the public service in a uniform manner within all spheres of government and after all relevant considerations have been taken into account. With regard to the remuneration of municipal managers or other managers, the Systems Act required that on or before 31 October of each year a municipality had to publish in the media the salary scales and benefits of the municipal manager and other managers directly accountable to the municipal manager.<sup>36</sup>

### ***17.3.2 Basic principles relating to local public administration and internal municipal organisation***

It was mentioned above that issues concerning the local public administration and internal municipal organisational structures are also regulated within the framework of national legislation and that compliance to such requirements must also form part of the conditions of employment of a municipal manager. With reference to the values and principles of local public administration, the new legislative framework states that the local public administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution. Furthermore, in the administra-

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<sup>35</sup> See the Systems Act s 57(7). Note that the Act ss 50 and 51 deals with the basic values and principles relevant to local public administration and organisational requirements of municipal administrations respectively. Such requirements are discussed below.

<sup>36</sup> There seems to be no legislative regulation in relation to what such salaries or benefits should be. It is thus up to especially national government to regulate such issues via uniform legislative provisions. Note that s 58 was repealed by Act 44 of 2003 s 9.

tion of its affairs a municipality must strive to achieve the objectives of local government and the general duties of municipalities.<sup>37</sup>

Apart from the general principles that regulate public administration, all municipalities must establish and organise their administration, within their administrative and financial capacity, in a manner that would enable a municipality to achieve and comply with certain objectives/requirements. These objectives are the following:<sup>38</sup>

- to be responsive to the needs of the local community
- to facilitate a culture of public service and accountability amongst municipal staff
- to be performance orientated and focused on the objectives and duties of local government in general
- to ensure that political structures, political office bearers and managers and other staff members align their roles and responsibilities with the priorities and objectives set out in the municipality's IDP
- to establish clear relationships and to facilitate co-operation, co-ordination and communication between political structures, office bearers and the administration and the local community
- to organise the political structures, office bearers and the administration in a flexible way in order to respond to changing priorities and circumstances
- to perform municipal functions through operationally effective and appropriate administrative units and mechanisms, including through departments and other functional or business units; such functions, when necessary, may also be performed on a decentralised basis
- to assign clear responsibilities for the management and co-ordination of the administrative units and mechanisms
- to hold the municipal manager accountable for the overall performance of the administration
- to maximise efficiency of communication and decision making within the administration
- to delegate responsibility to the most effective level within the administration
- to involve staff in management decisions as far as is practicable

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<sup>37</sup> See the Systems Act s 50(1) and (2). The values set out in s 195 will be discussed in a separate chapter dealing with the basic principles concerning the public administration.

<sup>38</sup> See the Systems Act s 51(a)-(m).

- to provide an equitable, fair, open and non-discriminatory working environment.

Suffice it to say that the structuring and management of a municipal administration is quite a complex and extensive exercise. The internal arrangements are therefore likely to differ from one municipality to another as circumstances may require or depending on the category of municipality in question. There seem to be no uniform models of how a municipal administration should be established. What is certain, however, is that municipalities must establish and organise their administrations to ensure compliance with the set criteria, and the way in which the administration is structured and organised may vary from one municipality to another, as long as the minimum objectives are attained. Because of a possible conflict between municipal staff affairs and labour legislation in general, it is determined that in the event of any inconsistency between a provision in the Systems Act relating to municipal organisational matters, including the code of conduct for municipal staff members and any applicable labour legislation, such labour legislation should prevail.<sup>39</sup> In this regard it should be obvious that all municipalities under the new local government dispensation must familiarise themselves with applicable labour laws and developments and must ensure compliance with such laws.<sup>40</sup>

### **17.3.3 Municipal staff matters**

According to the Systems Act, it is the responsibility of the municipal manager to

- approve a staff structure for the municipality
- provide a job description for each post
- attach to the posts the remuneration and service conditions as may be determined
- establish a process or mechanism to evaluate the staff establishment regularly and, if necessary, to review such establishment and the remuneration or conditions of service.<sup>41</sup>

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<sup>39</sup> See the Systems Act s 52. In situations of conflict, provisions of the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997 or other labour legislation will prevail over the aspects directed at the structuring and management of internal municipal administrations set out in the Systems Act or regulations made under the Act.

<sup>40</sup> For examples of such labour disputes see the cases of *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) and also *Ntshotsho v Umtata Municipality* 1998 (3) SA 102 (Tk). Even part-time employees of municipalities are protected under labour laws, and they cannot be dismissed contrary to their employment contracts and without proper cause.

<sup>41</sup> These obligations do not apply to the employment contracts of managers directly accountable to the municipal manager. See the Systems Act s 66(1)-(2). The obligations on the municipal manager are subject to any applicable legislation and the policy framework that has been determined by the relevant municipal council. The protection given under any applicable legislation is to ensure

*continued on next page*

All municipalities are obligated to develop and adopt appropriate systems and procedures that are directed at achieving fair, efficient, effective and transparent personnel administrations. Such systems and procedures must comply with applicable laws and are also subject to any applicable collective agreements that are in effect. The systems and procedures should provide for the following aspects:<sup>42</sup>

- the recruitment, selection and appointment of persons as staff members
- service conditions of staff
- supervision and management of staff
- monitoring, measuring and evaluating the performance of staff
- the promotion and demotion of staff
- the transfer of staff
- grievance and disciplinary procedures
- investigations of allegations of misconduct or complaints against staff
- the dismissal and retrenchment of staff
- any other matter prescribed by regulation.

It is the responsibility of the municipal manager to ensure that every staff member or relevant trade union has easy access to a copy of the staff systems and procedures. On the written request of a staff member, a copy or part of the relevant staff systems and procedures must be made available to that staff member. It is also the responsibility of the municipal manager to ensure that all staff members have been informed about the systems and procedures.<sup>43</sup>

Municipalities should also develop various capacity-building initiatives. All municipalities are obligated to develop their human resources capacities in order to perform their functions and to exercise their powers as is required by the Constitution and other applicable legislation. In this respect, the provisions of the Skills Development Act,<sup>44</sup> as well as the Skills Development Levies Act,<sup>45</sup> are of particular importance and must be complied with. Apart from any training levies required by law, a municipality may in addition provide in its budget for the development and training pro-

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that a municipal manager cannot unilaterally change or amend conditions of employment of members of staff. Strict requirements are set in this regard by mainly the Labour Relations Act.

<sup>42</sup> See the Systems Act s 67(1)(a)-(k).

<sup>43</sup> Refer to the Systems Act s 67(4)(a)-(c). Special attention must be given to informing staff members who cannot read.

<sup>44</sup> 97 of 1998.

<sup>45</sup> 9 of 1999.



grammes of municipal personnel. If a municipality does not have the financial means to provide additional funds for training, it may apply to the Sector Education and Training Authority (SETA) for local government for such funds. The SETA was established in terms of the Skills Development Act to assist municipalities in training programmes.<sup>46</sup>

#### **17.3.4 The code of conduct for municipal staff members**

Similar to the position regarding political office bearers of municipalities, all municipal staff members must adhere to a particular code of conduct that is very similar to the code of conduct applicable to municipal councillors. The code of conduct is set out in Schedule 2 of the Systems Act, and it states the following:

- *General conduct* All staff members of municipalities must at all times:
  - (a) execute loyally the lawful policies of the municipal council
  - (b) perform the functions of office in good faith, diligently, honestly and in a transparent manner
  - (c) act in such a way that the spirit, purport and objects of a municipal administration are promoted<sup>47</sup>
  - (d) act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised
  - (e) act impartially and treat all people, including other staff members, equally without favour or prejudice.<sup>48</sup>
- *Commitment to serving the public interest* In light of the fact that every municipal staff member is recognised as a public servant in a developmental local system, all staff members must:
  - (a) implement the provisions of organisational systems as is set out in section 50(2), (b)
  - (b) foster a culture of commitment to serving the public, together with a sense of responsibility for performance in terms of standards and targets
  - (c) promote and implement the basic values and principles of the public administration

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<sup>46</sup> For more details see both the Skills Development Act and Skills Development Levies Act mentioned above. Refer also to the Systems Act s 68(1)-(3).

<sup>47</sup> See the Systems Act s 50 for such objects.

<sup>48</sup> Refer to the Systems Act Sch 2 Item 2.

- (d) seek to implement the objectives of the municipal IDP and to achieve the performance targets set for each performance indicator
- (e) participate in the overall performance management system as well as the individual performance appraisal and reward system.<sup>49</sup>
- *Personal gain* A staff member of a municipality may not use his/her position or privileges or confidential information for private gain or to improperly benefit another person. Personnel may also not take a decision on behalf of the municipality concerning a matter in which that staff member, his/her spouse, partner or business associate has a direct or indirect personal or private business interest.<sup>50</sup> Furthermore, and unless a staff member has obtained prior consent from the council, no staff member may be a party to a contract for the provision of goods or services to the municipality or may not perform any other work for the municipality apart from the duties associated with his/her employment contract. Staff may also not obtain a financial interest in any business of the municipality or be engaged in any business, trade or profession, other than his/her work for the municipality.<sup>51</sup>
  - *Disclosure of benefits* Any direct benefit from a contract concluded between the municipality and a staff member or spouse, partner or business associate of such a staff member must be disclosed in writing and with full particulars. This disclosure does not apply to a benefit which a member of staff has acquired in common with all other residents of the municipality, however.<sup>52</sup>
  - *Unauthorised disclosure of information* Without permission, members of a municipal staff may not disclose to an unauthorised person any privileged or confidential information obtained. On this point, privileged or confidential information includes any information that
    - (a) is determined as such by the municipal council or any of its structures or functionaries
    - (b) is discussed in closed session by the council or a committee
    - (c) would violate a person's right to privacy

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<sup>49</sup> See the Systems Act Sch 2 Item 3.

<sup>50</sup> According to the Act, a "partner" refers to a person who permanently lives with another person in a manner as if they are married.

<sup>51</sup> See the Systems Act Sch 2 Item 4.

<sup>52</sup> See the Systems Act Sch 2 Item 5.

(d) is declared to be privileged, confidential or secret in terms of the law.<sup>53</sup>

- *Unduly influence* A staff member of a municipality may not unduly influence or attempt to influence the council, a structure, functionary, or councillor with a view to obtaining any appointment, promotion, privilege, advantage or benefit, or for such a benefit or advantage for a friend, associate or family member. Furthermore, members of staff may not mislead or attempt to mislead the council, municipal structures or functionaries in their consideration of any matter. No member of staff may be involved in a business venture with a councillor unless prior written consent of the council has been obtained.<sup>54</sup>
- *Receiving gifts, favours or rewards* Municipal staff may not request, solicit or accept any reward, gift or favour in return for
  - (a) persuading the council or any structure or functionary to exercise any power or perform any duty
  - (b) making a representation to the council or any structure
  - (c) disclosing any privileged or confidential information
  - (d) doing or not doing anything within that staff member's powers or duties.<sup>55</sup>

It seems from the wording of the item that an innocent gift received by a staff member for having done his/her work well or because he/she has "gone the extra mile" would not be in contravention of the code of conduct. Personnel should be very careful, however, and should not accept gifts from the public or immediately report such a gift or favour to their superiors or the speaker of the council. It is common practice for municipal staff to receive flowers, a box of chocolates, a bottle of wine or free tickets for a meal or sports happening as a gesture of appreciation from a member of the local community. The acceptance of such gifts should not be seen as a contravention of the code, but staff should be careful not to create a wrong impression. It is advisable for municipalities to establish a clear policy on such matters.

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<sup>53</sup> See the Systems Act Sch 2 Item 6. It should be noted that the prohibition to disclose information does not derogate from a person's right to access to information, which is provided for in terms of national legislation. For more, see the Promotion of Access to Information Act 2 of 2000.

<sup>54</sup> See the Systems Act Sch 2 Item 7.

<sup>55</sup> All staff must report to either a superior official or to the speaker of the council without delay any offer which, if accepted, would constitute a breach of this subitem. Municipal staff are thus obligated to report any attempts from other persons or institutions to solicit a bribe or to try and buy favours. Refer to the Systems Act Sch 2 Item 8.

- *Council property, payment in arrears and staff participation in elections* No member of a municipal staff may use, take, acquire or benefit from any property or asset owned, controlled or managed by that municipality. Again it is submitted that the circumstances of each case will be indicative of whether or not there is a real contravention of this prohibition. Innocent usage, without real benefit to the staff member, should not be regarded as a breach of this item.<sup>56</sup>

Similar to municipal councillors, no member of staff may be in arrears to the municipality for rates and services charges, for a period longer than three months. After this period, municipalities are permitted to deduct any outstanding amounts from staff members' salaries. This stipulation is somewhat controversial, however. Although it is acceptable that staff members and councillors should set an example regarding payment for municipal rates and service charges, it is not clear why outstanding amounts may be deducted from staff members' salaries but not from the salaries of councillors.<sup>57</sup> Furthermore, it seems unlawful to recover outstanding debts without an investigation regarding the merits of each case.<sup>58</sup> It is submitted that such automatic recovery of outstanding amounts should not be permitted, as it raises several legal and even constitutional issues. Municipalities should be obligated to follow the normal procedure applicable for the recovery of outstanding rates and services charges under the law in general.

A further and somewhat unclear provision in the code of conduct is that municipal staff are prohibited from participating in an election of the council of the municipality, other than in an official capacity or pursuant to any constitutional right. Staff members also have constitutional rights regarding the participation in municipal elections, and the purpose of this item is not clear.<sup>59</sup>

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<sup>56</sup> Eg, if a staff member uses the internet and prints a report for a personal use, or if member uses stationery that belongs to the council, such events should not constitute a breach of the code. The well-known maxim of South African law, namely *de minimus non curat lex*, should be applicable in such instances. See the Act Sch 2 Item 9.

<sup>57</sup> Cf Sch 2 Item 10 and Sch 1 Item 12A as inserted by Act 51 of 2002.

<sup>58</sup> It is quite possible for a municipal staff member to be in a dispute with his/her local municipality and subsequent employer regarding the correctness of a municipal account. To allow a council to deduct any amounts it deems outstanding from the salary of the staff member would not only negatively prejudice such a staff member, but would probably also not pass the test under the Bill of Rights s 36. A staff member should be able to argue that he/she is being treated unequally and that normal recourse under the law has been restricted.

<sup>59</sup> See the Systems Act Sch 2 Item 11. See also the Constitution s 19, which refers to the political rights of every adult citizen.

- *Sexual harassment* Following on other legislative prohibitions, no staff member of a municipality may embark on any action amounting to sexual harassment. The purpose of this item is self-evident, and breaches will depend on the circumstances of each case.<sup>60</sup>

Finally, the code of conduct obligates all staff members to report such possible breach without delay to a superior officer or to the speaker of the council whenever staff members have reasonable grounds to believe that there has been a breach of this code. Any breach or breaches of the code must be dealt with in terms of the relevant disciplinary procedures that are in force within the relevant municipality.<sup>61</sup> It is the responsibility of the municipal manager to ensure that a copy of the code of conduct or any amendments thereof have been provided to every member of the staff, if applicable. The municipal manager must also ensure that the purpose, content and consequences of the code have been explained to staff members who cannot read and furthermore to communicate to the local community the sections of the code that affect the public.<sup>62</sup>

#### **17.3.5 Miscellaneous aspects relevant to municipal staff members and the organisational structure of a municipal administration**

In order to address any shortcomings in the new legislative framework enacted to regulate the internal organisational structures of municipalities as well as related staff matters, the Systems Act allows the minister responsible for local government to make regulations or to issue guidelines covering a vast array of matters. In relation to the making of regulations, the Systems Act confirms that the following matters may be extended by regulations:<sup>63</sup>

- the procedure to be followed in appealing against decisions taken in terms of delegated powers and the disposal of such appeals
- the suspension of decision on appeal

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<sup>60</sup> See the Systems Act Sch 2 Item 12.

<sup>61</sup> It is thus safe to conclude that a *prima facie* breach of the code does not (allow or) permit a municipality to act against such a staff member other than according to the normal disciplinary processes. A breach of the code thus creates a ground or grounds for further disciplinary action and does not allow immediate termination of the employment relationship between the parties. See the Systems Act Sch 2 Items 13 and 14 as amended. Note that a breach of the code is not only a ground for dismissal or other disciplinary steps, but that such steps may include a suspension without pay for no longer than three months; a demotion; a transfer to another post; a reduction in salary, allowances or benefits or an appropriate fine. See item 14A as added by Act 44 of 2003 s 29.

<sup>62</sup> See the Systems Act s 70(1) and (2).

<sup>63</sup> See the Act s 72(1)(a)(i)-(vi).

- the setting of uniform standards for municipal staff establishments, municipal staff systems and any other matters concerning municipal personnel administration
- capacity building within municipal administrations
- training of staff, including in-house-training subject to national legislation<sup>64</sup>
- any other matter that may facilitate the application of the chapter and requirements regarding local public administration and human resources.

On the other hand, it is also provided that the minister may issue guidelines to provide for the following matters:<sup>65</sup>

- the establishment of job evaluation systems
- the regulation of remuneration and other conditions of service of staff members of municipalities
- the measuring and evaluation of staff performance
- the development of remuneration grading and incentive frameworks for staff members
- corrective steps in cases of substandard performance by staff members
- any other matter that may facilitate the implementation by a municipality of an efficient and effective system of personnel administration.

When making regulations or issuing guidelines, the minister must take into account the capacity of municipalities to comply with such matters and differentiate between the different kinds of municipality, according to their capacities. Issues regarding local public administration and human resources which place a financial or administrative burden on municipalities may be phased in by the minister. Such phasing in is done by notice in the *Government Gazette*.<sup>66</sup> Finally, it is also important to note that apart from relevant labour legislation that must be adhered to, municipalities are also obliged to comply with any collective agreements that have been concluded by organised local government within its mandate on behalf of local government in the specific bargaining council that has been established for municipalities.<sup>67</sup>

#### **17.4 Conclusion**

It can be concluded that municipalities, in similar fashion to all other private or public entities, need an effective and efficient personnel corps in order to fulfil their vast array

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<sup>64</sup> See again the Skills Development Act and Skills Development Levies Act.

<sup>65</sup> See the Systems Act s 72(1)(b)(i)-(vi).

<sup>66</sup> See the Systems Act s 72(2)-(4).

<sup>67</sup> See the Systems Act s 71.

of municipal services and obligations. There is no doubt therefore that municipalities must make every possible effort to maintain, control, educate, train and motivate their respective administrative functionaries. In the past, local governments too often neglected their personnel obligations and political ambitions overshadowed people-related interests.

Under the new local government dispensation a rejuvenated effort has been launched to protect and enhance municipal labour- and staff-related matters. Local government does not operate in an exclusive environment, however, and therefore must adhere to standard labour laws and practices. In light of the specific tasks and obligations of all local governments, it is very important for all municipal administrations to organise and structure their respective administrations in such a manner that optimal efficiency is obtained. Bureaucratic institutions should be avoided and regular evaluation of the organisational structure must be undertaken.

Various new initiatives have been incorporated into the new legal framework to ensure more professional and skilled local government administrations. Such initiatives include *inter alia* the introduction of key performance indicators to measure overall performance, fixed term service contracts for senior personnel and a comprehensive code of conduct for all administrative staff. A municipal manager as head and chief of the municipal administration has been legally entrenched and is finally tasked with overall personnel accountability. All municipal managers should have strong leadership and human relations qualities, and municipal councils must ensure that properly trained and suitably experienced candidates are appointed to such positions. The influence of the municipal manager is of fundamental importance to the overall success of a particular local government.

With due regard to the various constitutional requirements, such as the principles of the public administration and financial management, read together with the new criteria on municipal administrative management, it is submitted that local governments should be able to perform and fulfil their legal functions and obligations. There seems to be a stronger realisation that without effective and efficient municipal administrations most, if not all, local governments will not be able to succeed in their roles as the third branch of the overall governmental structure of a new and truly democratic state.



## Issues relating to municipal finance and municipal fiscal management

### 18.1 Introduction

The overall reform and transformation of the new local government dispensation has not only affected the composition and internal functioning of all local governments in South Africa, it has also significantly impacted on municipal financial affairs. It is clear that municipalities need adequate financial resources to achieve their new constitutional objectives. From the outset it is important to note not only that municipal income sources should be protected, but also sound expenditure policies and financial control mechanisms must be implemented.<sup>1</sup> In light of the new constitutional dispensation, all governmental expenditure and financial management practices must adhere to the basic values of accountability and transparency.<sup>2</sup> Strict control over municipal financial matters is thus a *sine quo non* for a successful and effective local government sphere.

Against this background, a new legal framework has been developed to manage and control the financial affairs of all municipalities. At the centre of the new framework is the Constitution, which specifically requires that all local governments must be developmentally orientated and that they aim at meeting the basic needs of their respective communities in their budgeting and administrations.<sup>3</sup> Furthermore, municipalities must also strive to achieve various constitutional objectives, which spe-

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<sup>1</sup> No local government will be able to fulfil its overall constitutional objectives and duties without effective and strict monetary control. See also Cloete (1997) 108.

<sup>2</sup> These values are the basic foundations upon which the new governmental structure, including the new local government dispensation, is based. Refer also to the Constitution s 1.

<sup>3</sup> See the Constitution ss 152 and 153 respectively.

cifically include the provision of basic services to local residents in a sustainable manner.<sup>4</sup>

In order for the new framework of municipal finance to be effective, the White Paper on local government has identified three aspects which the new financial framework had to incorporate:

- The new system had to be developmentally orientated and had to address the root causes of current financial problems.
- A balance had to be achieved between programmes for poverty eradication combined with strategies of growth and job creation.
- All local governments had to be empowered to fulfil their overall constitutional mandates.<sup>5</sup>

It is further imperative that the new framework recognises and accommodates the difference between the three categories of municipality. In this respect it is important to take cognisance of the fact that urban and rural municipalities have very different financial circumstances and capacities.<sup>6</sup> In light of the abovementioned factors, the Department of Constitutional Development and Local Government has embarked on a programme to establish and enact various legislative provisions in order to establish a broad financial framework for local governments. Although it is hoped that the new legal framework will be effective in order to secure the responsibilities that local governments must meet, the department has encountered many delays in finalising the proposed legal framework.<sup>7</sup>

## **18.2 The new legislative framework for municipal financial management**

Within the new constitutional dispensation of South Africa, all local governments are specifically entrenched as being part of the government of the Republic, and their existence and functioning are thus constitutionally controlled and regulated. This is also the position regarding the principles of municipal finance. The Constitution pro-

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<sup>4</sup> In this regard it is submitted that sustainable services refer to services that can be continued on a day-to-day basis. Apart from sustainability, services should also be affordable to all members of local communities which in turn often require some form of local cross-subsidisation within a matrix of affordability, efficiency and constitutional effectiveness. See Craythorne (1997) 342.

<sup>5</sup> See the White Paper on Local Government (1998) at 129.

<sup>6</sup> See the three categories of municipality set out in the Constitution s 155. Against the backdrop of a combination of various factors, such as the system of segregation, poor administration and inadequate control measures, many local governments, especially in rural areas, do not have adequate tax bases to fund and sustain basic service delivery.

<sup>7</sup> It took nearly five years to finalise the new Local Government: Municipal Property Rates Act, and the Local Government: Municipal Finance Management Act.

vides the basic foundation and directives which have to be observed and complied with by all spheres of government, including municipalities. In relation to municipal finance, the Constitution incorporates various directives, and accordingly the new restructured system of municipal finance needs to be founded on the supreme constitutional foundation. Apart from such constitutional provisions, both national and provincial legislatures are authorised to enact further legal rules in order to complete the new envisaged system. Each of the new legislative sources is discussed below.

### **18.2.1 The broad constitutional foundation relevant to municipal finance**

According to the Constitution, all municipalities are obligated to structure and manage their administrations, budgeting and planning processes in such a way as to give priority to the basic needs of their respective communities and also to promote the social and economic development of such communities. In order to achieve these constitutional duties, all municipalities are obligated to participating in national and provincial development programmes.<sup>8</sup> A further important constitutional requirement that impacts on municipal financial affairs is the fact that neither national government nor provincial governments may compromise or impede a municipality's ability or right to exercise its powers or perform its functions. Both higher spheres of government must support and strengthen the capacity of municipalities to manage their own affairs and to exercise and perform their powers and functions.<sup>9</sup> It is clear from the constitutional text that the two higher spheres of government have a significant responsibility to ensure that municipalities are capacitated and able to perform their powers and functions. Apart from the provisions mentioned above, the chapter on local government in the Constitution contains no requirements regarding the system of municipal finance. However, the broad requirements relating to municipal finance are set out in chapter 13 of the Constitution, which deals with the financial affairs of all three spheres of government. In this regard, the Constitution deals with the following:

- *National revenue fund* The Constitution determines that a national revenue fund be established and that all money which is received by the national government

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<sup>8</sup> Refer to the Constitution s 153. This section must be read together with s 152, which confirms the various objects that municipalities must strive to achieve, depending on their financial and administrative capacities.

<sup>9</sup> See the Constitution s 151(4) read with s 154(1).

be paid into such national revenue fund. Only money that is reasonably excluded by an Act of parliament may be deposited in another fund(s).<sup>10</sup>

- *Equitable shares and allocations of revenue* According to the Constitution, an Act of parliament must provide for *inter alia*, the equitable division of revenue that has been raised nationally among the national, provincial and local spheres of government and also for any other allocations of revenue to provinces. The Act must also provide for any other allocations to the provinces or *local government or municipalities* from the national government's share of that revenue and any conditions on which those allocations may be made.<sup>11</sup> The Act of parliament that regulates the equitable share and allocation of revenue raised nationally may be enacted only be after the provincial governments, Organised Local Government (OLG) and the Financial and Fiscal Commission (FFC) have been consulted, and after any recommendations of the commission have been considered. Furthermore, the Act must take various factors into account, such as *inter alia*:
  - (a) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them
  - (b) the fiscal capacity and efficiency of the provinces and municipalities
  - (c) the developmental and other needs of provinces and municipalities
  - (d) the various obligations of the provinces and municipalities that have been allocated to them in terms of national legislation.<sup>12</sup>

In essence, the Constitution addresses intergovernmental fiscal relations in two broad respects. On one hand the Constitution entitles the local sphere of government to an equitable share of revenue raised nationally. Such sharing of national revenue is generally referred to as "intergovernmental transfers" (IGTs). Apart from the entitlement to share in revenue, the Constitution specifically entrenches oversight and regulation of the financial affairs of municipalities in the national government.<sup>13</sup>

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<sup>10</sup> See the Constitution s 213(1)-(3).

<sup>11</sup> Refer to the Constitution s 214(1)(a)-(b). In compliance with s 214(1)(a) national parliament has enacted the Division of Revenue Act 7 of 2003. The Act specifically provides for the equitable division of revenue between the three spheres of government.

<sup>12</sup> For more details see the Constitution s 214(2)(a)-(j). The use of the terms "local governments" and "municipalities" in s 214 is somewhat unclear and unnecessary, as both terms are synonymous with one another.

<sup>13</sup> This oversight and control is protected in various sections of the Constitution. For more details, refer to the Constitution ss 100, 139, 155(7), 229 and 230A. Many other sections regarding

- *National, provincial and municipal budgets* The new constitutional dispensation envisages an overall financial system for all spheres of government that is transparent, effective and accountable and regards it as obligatory. All national, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.<sup>14</sup> Again, the Constitution itself requires national legislation to further complete and regulate such financial processes. The national legislation must prescribe the form of the budgets in all three spheres of government, and all budgets must show the sources of revenue and the way in which proposed expenditure will comply with national legislative requirements.<sup>15</sup> The Constitution further determines that each budget in each sphere of government, including all municipal budgets, must contain specific information. For example, each budget must contain estimates of revenue and expenditure, proposals for financing any anticipated deficit and an indication of intentions regarding borrowing and also other forms of public liability that will increase public debt.<sup>16</sup>
- *Treasury control and procurement* The Constitution also requires national legislation to establish a national treasury and to prescribe measures to ensure both transparency and expenditure control in each sphere of government. Such measures are to be achieved by introducing generally recognised accounting practices, by uniform expenditure classifications and through uniform treasury norms and standards. It is the responsibility of the national treasury to enforce compliance with the measures that have been mentioned above. If an organ of state commits a serious or persistent material breach of the mentioned measures, then the national treasury may stop the transfer of funds to that organ or organs.<sup>17</sup> It is evident that the Constitution, as with other issues, vests the final oversight and control with the national sphere of government, within which sphere the national treasury operates. This is also the case concerning municipal treasury control.

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finance such as ss 215 and 216 grant further powers to the national treasury to regulate municipal financial affairs. The Act will therefore set financial controls for all spheres of government and will impose responsibilities and penalties on not only accounting officers, but also on the municipal manager and political heads. Refer also to the White Paper on Local Government (1998) at 130-131.

<sup>14</sup> See the Constitution s 215(1).

<sup>15</sup> Refer to the Constitution s 215(2)(a)-(c).

<sup>16</sup> See the Constitution s 215(3)(a)-(c).

<sup>17</sup> See the Constitution s 216(1) and (2).

*Requirements regarding aspects of procurement* These are also constitutionally entrenched. When an organ of state in any sphere or any other institution so identified in national legislation contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and also cost effective. Procurement procedures or policies may further provide for categories of preference in the allocation of contracts and also for the protection or advancement of persons or categories of persons that have been disadvantaged by unfair discrimination.<sup>18</sup> National legislation must again prescribe a framework within which the procurement policy is to be implemented.<sup>19</sup>

In accordance with the abovementioned constitutional imperative set out in section 217 of the Constitution, national parliament has enacted the Preferential Procurement Policy Framework Act (PPPFA).<sup>20</sup> The main aim of the Act is to give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2). The PPPFA determines that organs of state, including municipalities, must determine their preferential procurement policies and also implement them within the following framework:<sup>21</sup>

- (a) A preference points system must be followed.
- (b) For contracts with a rand value above a prescribed amount, a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d), provided that the lowest acceptable tender scores 90 points for price. For contracts with a rand value equal to or below a prescribed amount, a maximum of 20 points may be allocated for specific goals, provided that the lowest acceptable tender scores 80 points for price.<sup>22</sup>

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<sup>18</sup> This preferential treatment is a good example of so-called "affirmative action" initiatives. It is submitted that although such initiatives are constitutionally permitted, the relevant institutions do not have a carte blanche freedom over the contract requirements with outside institutions. Such appointments or awarding of contracts must also comply with other constitutional requirements. See, eg, the provisions of s 9 (equality) and s 33 (fair administration action) set out in the Bill of Rights.

<sup>19</sup> See the Constitution s 217(1)-(3).

<sup>20</sup> 5 of 2000.

<sup>21</sup> See the PPPFA s 2(1)(a)-(g).

<sup>22</sup> "Prescribed" in this sense means prescribed by regulation by the Minister of Finance. See the PPPFA ss 1 and 5 respectively. Read also with the Act s 2(1)(d). Note also that an "acceptable tender" means any tender which in all respects complies with the specifications and conditions of tender set out in the tender document.

- (c) Any other acceptable tenders which are higher in price must score fewer points, on a *pro rata* basis. Points are calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula.
- (d) The specific goals may include the contracting with persons or categories of persons that have been historically disadvantaged by unfair discrimination on the basis of race, gender or disability and the implementing of the programmes of the Reconstruction and Development Programme.<sup>23</sup>
- (e) Any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender.<sup>24</sup>
- (f) The contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer.
- (g) Any contract awarded on account of false information by a tenderer to secure preference may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have in terms of the law.

On request, however, the Minister of Finance may exempt an organ of state from any or all of the provisions of the Act. Such exemption is permitted only if it is in the interests of national security, if the likely tenderers are international suppliers or if it is in the public interest to grant exemption.<sup>25</sup> Any procurement processes implemented under a preferential procurement policy, where the invitation to tender was advertised before the commencement of the PPPFA, must be finalised as if the Act had not come into operation. Furthermore, the minister may make regulations regarding any matter that may be necessary or expedient in order to achieve the objectives of the Act.<sup>26</sup> With reference to the tender processes of municipalities, the supreme court of appeal in *Metro Projects CC and Another v Klerksdorp Local Municipality and Others*<sup>27</sup> held that any tender process must be fair, equitable and cost effective. As an organ of state in the local government sphere, a municipality, in awarding a tender, is obliged to comply with section

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<sup>23</sup> See *Government Gazette* 16085 of 23/11/1994.

<sup>24</sup> Such goals must be measurable, quantifiable and monitored for compliance. See the Act s (2).

<sup>25</sup> Read the PPPFA s 3(a)-(e).

<sup>26</sup> Refer to the PPPFA ss 4 and 5.

<sup>27</sup> 2004 (1) SA 16 (SCA).



10G(5)(a) of the Local Government Transition Act,<sup>28</sup> read with section 217(1) of the Constitution. These provisions mandate it to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The PPPFA requires organs of State to establish a procurement policy, and also makes it obligatory for the first respondent, as an organ of state in the local sphere, to follow a tender procedure for the procurement of goods and services.

There is also another reason why the tender procedure of a local authority must be fair. Invitations by organs of state to tender and the awarding of tenders where it is done in the exercise of public power is an administrative process. Section 3(2)(a) of the Promotion of Administrative Justice Act<sup>29</sup> requires the process to be lawful, procedurally fair and justifiable. Fairness must be decided on the circumstances of each case. In given circumstances it may be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake and, particularly in a complex tender, it may be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.<sup>30</sup>

- *Government guarantees* Governments, including municipalities, may guarantee a loan or loans only if the guarantee complies with the conditions set out in national legislation.<sup>31</sup> In order to ensure accountability and transparency, the Constitution demands that every government publish a report each year on the guarantees it has granted. This is an important requirement, since a government guarantee is a legally binding instrument whereby such government has financially bound itself to the extent of that guarantee.
- *The remuneration of persons that are holding public office* In the former system for local government in South Africa, the remuneration of municipal office bearers had a significant impact on municipal finance. According to the Act on the remuneration of town clerks,<sup>32</sup> the town clerk was the highest paid official of a municipality, and his or her salary scale was the sealing of all salaries for a particular

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<sup>28</sup> 209 of 1993.

<sup>29</sup> 3 of 2000.

<sup>30</sup> See pages 20-21.

<sup>31</sup> See the Constitution s 218. The national legislation referred to in this section may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

<sup>32</sup> 115 of 1984.

municipality. Municipalities were further divided into categories, rated from 1 to 14, 1 being the smallest municipality and 14 the biggest. The top salary, that of the town clerk, was determined according to the specific category. Town clerks of category 14 municipalities earned much more than their counterparts in smaller local government structures. Under the new dispensation, the Constitution requires that an Act of parliament establish a framework for determining the upper limits of salaries, allowances or benefits of *inter alia* municipal councils of the different categories of municipality.<sup>33</sup> In order to make recommendations concerning the salaries, allowances and benefits mentioned above, the Constitution obligates national parliament to enact national legislation, which must then establish an independent commission to undertake such tasks. The provisions of such a national law may be implemented only by government institutions, including municipalities, after the consideration of any recommendations of the independent commission.<sup>34</sup>

- *The establishment of the Financial and Fiscal Commission* Under the new financial framework, the Constitution confirms that there is a Financial and Fiscal Commission (FFC) for the Republic of South Africa which makes recommendations on government fiscal matters to parliament, provincial legislatures or other authorities. The commission is independent and subject only to the Constitution and the law. It must also be impartial and must perform its functions in terms of an Act of parliament.<sup>35</sup> The commission consists out of a chairperson and a deputy chairperson, one person nominated by the executive councils of each of the nine provinces, two persons nominated by organised local government and nine other

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<sup>33</sup> See the Constitution s 219(1)(b). It is interesting to note that only the *upper limit of salaries, allowances or benefits* of members of provincial legislatures, MECs and members of municipal councils must be established in terms of national legislation. See the Constitution s 219(1)(a). The Constitution does not require the national Act to prescribe only the upper limits of salaries or benefits of members of the NA or NCoP, cabinet, deputy ministers, traditional leaders or members of councils of traditional leaders. The Act must establish the specific salaries or benefits that are applicable. This position seems to indicate that a similar system as was used under the Act for the remuneration of town clerks is proposed for local government.

<sup>34</sup> Refer to the Constitution s 219(2) and (4). In compliance with this requirement, parliament has enacted the Independent Commission for the Remuneration of Public Office-bearers Act 92 of 1997.

<sup>35</sup> See the Constitution s 220. Furthermore, the Financial and Fiscal Commission Act 99 of 1997 has been enacted to give effect to the constitutional requirements that relates to the FFC.

persons.<sup>36</sup> Finally the FFC is obligated to report regularly, both to parliament and to the provincial legislatures.<sup>37</sup>

- *Provincial revenue funds and national sources of provincial and local government funding* Apart from the national revenue fund, the Constitution also determines that there should be a provincial revenue fund for each of the provinces into which all money received by a provincial government must be paid.<sup>38</sup> Money may be withdrawn from a provincial revenue fund only in terms of an appropriation allowed by a provincial Act. More importantly is the provision that revenue allocated through a province to local governments in terms of section 214(1) of the Constitution is a direct charge against that province's revenue fund.<sup>39</sup> It is furthermore determined that local government and each province is entitled to:
  - (a) an equitable share of revenue raised nationally to enable it to provide basic services and to perform the functions allocated to it
  - (b) receive other allocations from national government revenue, either conditionally or unconditionally.<sup>40</sup>

An important provision in this regard is that the Constitution protects additional revenue raised by provinces or municipalities. Such additional revenue may not be deducted from their share of revenue raised nationally or from any other allocations made to them. If a municipality is thus entitled to a specific share of revenue, but it has also earned additional revenue, by whatever means, such revenue may not be deducted from its original share amount. The intention of the constitutional

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<sup>36</sup> There should thus be in total 22 members of the commission. Members must also have appropriate expertise, which would include financial and public affairs expertise. See the Constitution s 221.

<sup>37</sup> Refer to the Constitution s 222.

<sup>38</sup> Exceptions may be provided for through an Act of parliament.

<sup>39</sup> Refer to the Constitution s 226. The Constitution further states that national legislation may determine a framework within which revenue allocated through a province to local government in that province, must be paid to municipalities in the province. In this regard the Intergovernmental Fiscal Relations Act 97 of 1997 has been enacted. The purposes of the act are to promote co-operation between the spheres of government relating to fiscal and budgetary matters, and to ensure equitable sharing and the allocation of revenue.

<sup>40</sup> See the Constitution s 227(1)(a)-(b). It is of interest to note that in the case of *In re: Certification of the Constitution of the RSA 1996*, 1996 (4) SA 744 (CC) the Constitutional Court held that the absence in the new text of the Constitution of a provision equivalent to the interim Constitution s 158(b), which provided that [the] financial allocations by the national government to local government shall ordinarily be made through the provincial government of the province in which the local government is situated was not a material diminution in the powers of provincial governments. S 158(b) established [only] the possibility, not the certainty, that provincial government could be utilised as a conduit through which funds raised nationally could be allocated to local government.

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drafters seems to be to promote and encourage provinces and municipalities to implement initiatives, so as to earn additional income. If such income were to be deducted from a municipality's share in income then there would be no motivation or purpose for it to secure additional revenue. By protecting additional revenue, municipalities are encouraged to devise new initiatives in order to raise more money for themselves and to thus be more able to fulfil and perform their functions and duties. As a counter protection, the Constitution also determines that there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.<sup>41</sup> It is submitted that although national government is under no obligation to compensate the two lower spheres of government for their own ineffectiveness to raise revenue which they should have raised, national government, being the highest sphere of government, is still constitutionally obligated to intervene and oversee the fulfilment of the duties and functions of the lower spheres.<sup>42</sup>

- *Municipal fiscal powers and functions* The chapter on finance in the Constitution specifically determines certain fiscal powers and functions for municipalities. In this regard municipalities may impose:
  - (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality
  - (b) other taxes, levies and duties appropriate to local government or the specific category concerned if so authorised by national legislation.<sup>43</sup>

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Such a section did not purport to create provincial powers in respect of such revenue. See para 430 at 897.

<sup>41</sup> See the Constitution s 227(2).

<sup>42</sup> See the Constitution ss 100, 139 and 154 respectively. Refer also to the case of *Member of the Executive Council for Local Government, Mpumalanga v IMATU and Others* 2002 (1) SA 76 (SCA). The court stated that the Constitution ss 139 and 154 do not impose on a provincial government the constitutional duty towards a local authority to provide it with funds to enable it to pay its debts. See paras 8-10 at 79.

<sup>43</sup> Refer to the Constitution s 229(a)-(b). National legislation must therefore determine such other taxes or levies before local governments may impose them. See also *Gerber and others v Member of the Executive Council for Development, Planning and Local Government, Gauteng and Another* 2003 (2) SA 344 (SCA). The case concerned an appeal regarding the legality of land rates imposed on owners of agricultural land. The local authority argued that it was entitled to impose a flat rate under the provisions of the Ordinance for the Transvaal Board for the Development of Peri-Urban Areas 20 of 1943 (T). The court held that the original powers granted to municipalities in terms of the Constitution s 229(1)(a) were to impose a property rate. "Rate" referred to rate on property in relation to size or value of property. S 229 did not depart from such a meaning. The LGTA s 10G(6) stated in pre-emptory terms that if not feasible to value or measure a property, rates could be determined as prescribed. Data of the properties was provided. The court held that there was no correlation between the size of the property and the rate imposed, thus the rate imposed

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It is, however, specifically determined that no municipality may impose income tax, value-added tax, general sales tax or customs duty. Such taxes may be imposed only by the national government; not even by provincial governments.<sup>44</sup> Municipalities clearly have the authority to impose rates on property and surcharges on fees for services and other taxes, levies or duties. However, such power or authority may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries or the national mobility of goods, services, capital or labour. National legislation is again envisaged to regulate such powers of municipalities.<sup>45</sup> When two municipalities have the same fiscal powers and functions in an area, an appropriate division of such powers and functions must be made in terms of national legislation. The division may be made only after at least the following criteria have been taken into account:<sup>46</sup>

- (a) the need to comply with sound principles of taxation
- (b) the powers and functions performed by each municipality
- (c) the fiscal capacity of each municipality
- (d) the effectiveness and efficiency of raising taxes, levies and duties
- (e) equity.

There is no prohibition on the sharing of revenue raised between municipalities that have fiscal powers in the same area. It is important that division of powers and the sharing of revenue between municipalities in the same area should be carefully considered and monitored. National legislation as well as the involve-

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treated landowners unequally. Owners of smaller pieces of land paid as much as owners of larger tracts of land within same area. Since the council relied on the Constitution s 229(1)(a) and not s 229(1)(b), which allowed a levy on property, its basis for calculation of the levy/rate was irrational, unfair and discriminatory. The rates were thus set aside. See para 25-28 at 354 and para 36 at 357. Refer also to *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (CPD). The case concerned the validity of a municipality levying service charges comprising part property rates and part service fees. The court held that there was nothing in the Constitution or other legislation that precluded a municipality from levying service charges that comprise both property rates and user fees. The court concluded that such authority is permitted under the LGTA, s 229 of the Constitution and ss 74-75 of the LG: Municipal Systems Act. See pages 560-561.

<sup>44</sup> See the Constitution s 228(1), which determines that provincial legislatures may impose taxes, levies and duties *other than* income tax, value-added tax, general sales tax, rates on property or customs duties. See the Constitution s 228(1)(a) read with s 229(1)(a).

<sup>45</sup> See the Constitution s 229(2).

<sup>46</sup> Refer to the Constitution s 229(3)(a)-(e).

ment of the FFC should play a vital role in creating an effective and equitable system of sharing revenue.<sup>47</sup>

- *Municipal loans* The Constitution determines that a municipal council may, in accordance with national legislation:
  - (a) raise loans for capital or current expenditure for the municipality
  - (b) bind itself and a future council in the exercise of its legislative and executive authority in order to secure loans or investments for the municipality.

It must be noted, however, that loans for current expenditure may be raised only when it is necessary for bridging purposes during a fiscal year.<sup>48</sup> The national legislation that authorises municipal loans may be enacted only after recommendations of the FFC have been considered.

It is clear from sections 229 and 230A of the Constitution that the Constitution grants municipalities considerable taxation and borrowing powers, but subject such powers to national legislative control and regulation. Municipal taxation powers are further also limited, in that they may not unreasonably prejudice national economic policies and activities. Finally, the prohibition that borrowings may not fund budget deficits effectively outlaws deficit budgeting on local government level. It is quite evident that the new constitutional framework specifically demands that local authorities adhere to specific constitutional directives when dealing with financial matters. These basic directives may be expanded upon by parliament through the enactment of new national legislation.

### **18.2.2 The new basic policy objectives**

In order to meet the new supreme objectives as set out in the Constitution, a new system of municipal finance had to be created. Such reconstruction had to conform

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<sup>47</sup> The sharing of revenue between municipalities in the same area is applicable only between category B and C municipalities, and national legislation must regulate the position. Such national legislation may be enacted only after organised local government and the FFC have been consulted and any of their recommendations have been considered, however. See the Constitution s 229(5). See also *Robertson & Another v City of Cape Town and Another* 2004 (5) SA 412 (CPD), where the court held that bilateral consultation had to take place between the FFC and the Minister or Parliament regarding the provisions of the Structures Act as amended, before such provisions could be enacted. Refer to para 109-110 at 446-448.

<sup>48</sup> The importance of municipal loans should not be underestimated, and such loans could have a significant impact on the fulfilment of the powers and functions of future councils. Because of this important impact, only the municipal council may conclude loans and may not delegate such authority. See the Constitution s 160(2)(d) read together with s 230A.



to a number of basic policy principles. According to the White Paper on local government, the principles for the new system can *inter alia* be summarised as follows:<sup>49</sup>

- *Revenue adequacy and certainty* All municipalities need to have access to adequate revenue sources to fulfil their powers and functions. Such sources should then be fully exploited in order for municipalities to meet their developmental objectives. In order to ensure compliance with their objectives, municipalities will need certainty regarding their revenue so as to allow them to plan realistically for the future.
- *Sustainability* Financial sustainability requires municipalities to ensure that their budgets are balanced. Income should cover expenditure adequately. In order to achieve sustainability, services should be provided at affordable levels, and municipalities must recover the costs of service delivery. Bail-outs for overspending on budgets or improper financial management will not be provided by higher spheres. In this regard, it is the responsibility of the political leadership to ensure that realistic budgets are set.
- *Effective and efficient use of resources*: Generally speaking, municipal resources are scarce and should be used in the best possible way to ensure maximum benefit for local communities. All communities should ensure through participation that their elected municipal council adheres to this important principle.
- *Accountability, transparency and good governance* Municipalities should be held responsible and accountable to local taxpayers for the use of public funds. Expenditure decisions must be explained in detail. The overall fiscal system should be designed to encourage accountability and should be open to public scrutiny. Community participation in the budgeting processes should be encouraged, and people should understand why decisions or priorities were taken. In general, the accounting procedures should allow for minimal opportunities for corruption and malpractice.
- *Equity and redistribution* Citizens must be treated equitably and within the ambit of the law. This treatment is also relevant to the provision of services. Municipalities themselves should also be treated equitably by the higher spheres of government regarding intergovernmental transfers. In order to ensure equity, municipalities are allowed to cross-subsidise between high and low-income con-

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<sup>49</sup> See the White Paper on Local Government (1998) at 131-132.



sumers. The extent of cross-subsidisation is a local choice and needs to be exercised very carefully within the overall framework of a municipality's integrated development plan.

- *Adhering to national policies* Municipalities form an important part of the public sector in South Africa. Many actions or decisions of local governments can substantially affect national policy. Municipalities thus need to operate and fulfil the obligations within the national macro-economic framework of the state.

### **18.2.3 Financial matters under the Local Government Transition Act**

Under the provisions of the LGTA, every municipality had to adhere to certain principles in respect of the management of its financial affairs. In this regard municipalities had to:<sup>50</sup>

- conduct their affairs in an effective, economical and efficient manner with a view to optimising the use of their resources in addressing the needs of the community
- conduct their financial affairs in an accountable and transparent manner
- prepare a financial plan in accordance with the IDP
- structure and manage their administration, budgeting and planning processes to give priority to the basic needs of their communities, to promote social and economic development and to support the implementation of national and provincial development programmes
- manage their financial resources so as to meet and sustain their objectives
- regularly monitor and assess their performance against their IDP
- annually report to and receive comments from their community regarding the objectives set out in their IDPs.

According to the LGTA, the chief executive officer (CEO) was responsible for keeping accounting records that reflected the transactions and financial state of affairs of a municipality. All money received had to be deposited in a banking account in the name of the municipality. Every municipality was also obligated to establish and maintain a system of internal financial control. Furthermore, all municipal financial years were to end on 30 June of each year, and all accounts had to be audited by the Auditor-General.<sup>51</sup> The report of the Auditor-General had to be submitted to the council, and notice of such referral to the council had to be given in a newspaper

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<sup>50</sup> See LGTA s 10G(1)(a)-(g).

<sup>51</sup> See the LGTA s 10G(2)(c)-(d).

circulating in the area. The council meeting on the report had to be open to the public, and the CEO had to be present to answer possible questions in his/her capacity as accounting officer.<sup>52</sup>

On the point of accountability, the LGTA stated that if a person who is or was in the employ of a municipality caused a loss or damage for the municipality because he/she:

- failed to collect money owing to the municipality for which collection he/she was responsible
- was responsible for an irregular payment of money or payment not supported by a proper voucher
- was responsible for fruitless expenditure due to an omission
- was responsible for the destruction or damage to council property or
- was responsible, due to an omission, for a claim against the municipality, the CEO or the council, who had to determine the amount of such loss or damage, had to take disciplinary action where possible and had to recover the loss or damage in appropriate cases.

Any fraudulent and corrupt actions by employees had to be reported to the SANPS.<sup>53</sup> According to the Act, an expenditure was unauthorised if payment was made:

- by the CEO without provision having been made therefore by any budget or if payment resulted in the total amount of the approved annual operating or capital expenditure budget was exceeded
- if the CEO was unable to produce to the Auditor General (AG) or MEC or council authority for the payment as was required by law or where the CEO made a payment inconsistent with a provision by any law.

Any unauthorised expenditure had to be disallowed until approved by the responsible authority. Any unauthorised expenditure had to be recovered from the CEO if he/she was unwilling to recover such from either the beneficiary or person responsible for the expenditure. An interesting provision on this point was that in instances where unauthorised expenditure has been effected on a written instruction of a councillor or as a result of a council resolution in favour of which a councillor voted,

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<sup>52</sup> Refer to the LGTA s 10G(e)(i)-(iii).

<sup>53</sup> See the LGTA s 10G(2)(f)-(i).

unless it was recorded that the councillor voted against such resolution, the expenditure had to be recovered from the councillor(s) concerned.<sup>54</sup>

The LGTA also provided for strong oversight procedures regarding the financial management of municipalities. If the MEC was of the opinion that the finances of a municipality were or became unsound, he/she could instruct the council to take certain steps specified in writing.<sup>55</sup>

In respect of municipal budgets, the LGTA stated that a municipality had to compile and approve annually a budget with a two-thirds majority of all members of its council. The budget had to provide for operating income and expenditure and for capital expenditure which had to reflect the sources of finance, future capital charges, operating and maintenance costs as well as the consequential influence thereof on levies, rates and services charges. All municipalities had to ensure that they did not budget for a year-end deficit on their operating accounts and that their budgets were in accordance with their IDPs. Expenditure could be incurred only in accordance with the approved budget. Any decision to incur expenditure had to be taken by a majority of votes cast in council. It was also possible for the Minister of Finance to determine maximum expenditure limits for municipal budgets.<sup>56</sup> If a budget did not comply with the maximum expenditure limits, it had to be referred back to the council for reconsideration and amendment. In some cases, certain exceptions were allowed.

A further important provision in the LGTA was that municipalities had to award contracts for goods and services in accordance with a system which had to be fair, equitable, transparent, competitive and cost-effective. Preference could be given to persons previously disadvantaged by unfair discrimination. In cases of emergency, municipalities could dispense with the calling of tenders or if such option was allowed by law. Properties had to be valued and a single valuation roll for all properties had to be compiled, which had to be open to the public. Councils could levy and recover property rates, and metropolitan councils had to determine a common rating system.

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<sup>54</sup> Refer to the LGTA s 10G(2)(k)-(l).

<sup>55</sup> See the LGTA s 10G(2)(m)(i)-(iii). The term "unsound" also included any failure to claim or collect income, to control expenditure or to compile and approve an operating budget. If a municipality did not comply to the instructions of the MEC, the MEC could take such steps as he/she deemed necessary to restore the finances to a sound footing.

<sup>56</sup> See the LGTA s 10G(3)-(4). A municipal budget had to be submitted to the minister of Finance within 14 days of its adoption. The minister could delegate this monitoring power to the MEC.

Municipalities could also levy and recover levies, fees, taxes and tariffs, also known as charges. A municipality could also

- differentiate between different categories of user or property on such grounds as it deemed reasonable
- in respect of charges, amend or withdraw previous determinations
- recover any charges, including interest on any outstanding amount.<sup>57</sup>

Municipalities could also obtain money and raise loans for capital expenditure. The Minister of Finance could determine reasonable conditions and criteria regarding loans, however. Loans for bridging finance, which included bank overdrafts, could be raised by a municipality during a financial year only in order to finance current expenditure in anticipation of the receipt of revenue in that year. Municipalities could not raise loans denominated in a foreign currency and were not permitted to incur any other liability or risk payable in a foreign currency without approval by the minister of Finance. Any money borrowed by a municipality was a financial obligation of the municipality and was chargeable and payable from the revenues and assets of that municipality.<sup>58</sup>

In respect of investment policies, a municipality could make investment in various instruments with the concurrence of the minister of Finance. Such instruments included *inter alia*

- deposits with registered banks
- securities issued by the national government
- municipal stock
- long-term securities offered by insurance companies.<sup>59</sup>

With the concurrence of the Minister of Finance, the minister of Local Government could determine other investment instruments. Full details of any investments had to be published. Finally, municipalities had to ensure that the acquisition, disposal, utilisation, control and maintenance of its assets were carried out in an economic, efficient and effective manner.<sup>60</sup>

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<sup>57</sup> See the LGTA s 10G(7)(a)-(b). Decisions regarding charges had to be passed on to the MEC and to the public, who could lodge objections.

<sup>58</sup> See the LGTAs 10G(8).

<sup>59</sup> See the LGTA s 10G(9)(a)(i)-(ix).

<sup>60</sup> Refer to the LGTA s 10G(10)-(12). No claim of any creditor of any municipality could attach or be paid out of the national revenue fund or be paid by the national or any provincial government, unless this was specifically authorised by such government.

### **18.3 Legislative control mechanisms over municipal finance matters**

#### **18.3.1 Parliamentary control**

In compliance with the new constitutional demands and in order to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government and furthermore to establish treasury norms and standards for the local sphere of government, the national parliament has enacted the Local Government: Municipal Finance Management Act (MFMA).<sup>61</sup> The object of the MFMA is to be achieved by establishing norms and standards and other requirements for the following issues:<sup>62</sup>

- (a) ensuring transparency, accountability and appropriate lines of responsibility in the financial and fiscal affairs of municipalities and municipal entities;
- (b) the management of revenues, expenditures, assets, liabilities and the handling of municipal financial dealings;
- (c) budgetary and financial processes and the co-ordination of those processes with the processes of organs of state in other spheres of government;
- (d) borrowing;
- (e) the handling of financial problems in municipalities;
- (f) supply chain management; and
- (g) other financial matters.

##### **18.3.1.1 The broad requirements of the Local Government: Municipal Finance Management Act**

###### **(a) Application and aspects of supervision over local government financial management**

The MFMA applies to

- all municipalities
- all municipal entities<sup>63</sup>
- national and provincial organs of state to the extent of their financial dealings with municipalities.<sup>64</sup>

In the event of any inconsistency between a provision of the MFMA and any other legislation in force when the MFMA took effect and which regulates any aspect of the

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<sup>61</sup> 56 of 2003, hereafter referred to as the MFMA. See also the long title of the MFMA.

<sup>62</sup> See the MFMA s 2(a)-(g).

<sup>63</sup> A municipal entity is defined in terms of the Municipal Systems Act s 1.

<sup>64</sup> The MFMA s 3(1)(a)-(c).

fiscal and financial affairs of municipalities or municipal entities, the provision of the MFMA prevails.<sup>65</sup> Draft national legislation directly or indirectly amending the MFMA or providing for the enactment of subordinate legislation that may conflict with the Act may be introduced in Parliament only after the Minister of Finance and the Financial and Fiscal Commission have been consulted in writing on the contents of the draft legislation, and after they have responded in writing.<sup>66</sup>

The MFMA further determines general functions of the National Treasury and provincial treasuries. The National Treasury must:

- fulfil its responsibilities in terms of Chapter 13 of the Constitution and the Act
- promote the object of the Act as stated in section 2
  - (a) within the framework of co-operative government set out in chapter 3 of the Constitution and
  - (b) when coordinating intergovernmental financial and fiscal relations in terms of the Intergovernmental Fiscal Relations Act, the annual Division of Revenue Act and the Public Finance Management Act<sup>67</sup> and
- enforce compliance with the measures established in terms of section 216(1) of the Constitution, including those established in terms of the MFMA.<sup>68</sup>

To the extent necessary to comply with the general functions mentioned above, the National Treasury may:

- (a) monitor the budgets of municipalities to establish whether they:
  - (i) are consistent with the national government's fiscal and macro-economic policy; and
  - (ii) comply with chapter 4;
- (b) promote good budget and fiscal management by municipalities, and for this purpose monitor the implementation of municipal budgets, including their expenditure, revenue collection and borrowing;
- (c) monitor and assess compliance by municipalities and municipal entities with—
  - (i) the act; and
  - (ii) any applicable standards of generally recognised accounting practice and uniform expenditure and revenue classification systems;

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<sup>65</sup> The MFMA s 3(2).

<sup>66</sup> See the MFMA s 4.

<sup>67</sup> The Act provided for under the Constitution s 214(1) and also Act 97 of 1997 respectively.

<sup>68</sup> See the MFMA s 5(1)(a)-(c).

- (d) investigate any system of financial management and internal control in any municipality or municipal entity and recommend improvements;
- (e) take appropriate steps if a municipality or municipal entity commits a breach of the act, including the stopping of funds to a municipality in terms of section 216(2) of the Constitution if the municipality, or a municipal entity under the sole or shared control of that municipality, commits a serious or persistent material breach of any measures referred to in that section; and
- (f) take any other appropriate steps necessary to perform its functions effectively.<sup>69</sup>

In turn, a provincial treasury must in accordance with a prescribed framework

- fulfil its responsibilities in terms of the Act
- promote the object of the Act as stated in section 2 within the framework of co-operative government set out in chapter 3 of the Constitution and
- assist the National Treasury in enforcing compliance with the measures established in terms of section 216(1) of the Constitution, including those established in terms of the Act.<sup>70</sup>

To the extent necessary to comply with the abovementioned requirements, a provincial treasury:

- (a) must monitor –
  - (i) compliance with the act by municipalities and municipal entities in the province;
  - (ii) the preparation by municipalities in the province of their budgets;
  - (iii) the monthly outcome of those budgets; and
  - (iv) the submission of reports by municipalities in the province as required in terms of the act;
- (b) may assist municipalities in the province in the preparation of their budgets;
- (c) may exercise any powers and must perform any duties delegated to it by the National Treasury in terms of the act; and
- (d) may take appropriate steps if a municipality or municipal entity in the province commits a breach of the act.<sup>71</sup>

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<sup>69</sup> See the MFMA s 5(2)(a)-(f).

<sup>70</sup> See the MFMA s 5(3)(a)-(c).

<sup>71</sup> The MFMA s 5(4)(a)-(d).



It should be noted that the functions assigned to the National Treasury or a Provincial Treasury in terms of the MFMA are additional to those assigned to the National Treasury or a Provincial Treasury in terms of the Public Finance Management Act.<sup>72</sup> The Minister of Finance, as the head of the National Treasury, takes all decisions of the National Treasury in terms of the Act, except those decisions taken as a result of a delegation in terms of section 6(1). Similarly, the MEC for finance in a province, as the head of the provincial treasury, takes all decisions of the provincial treasury in terms of the Act, except those decisions taken as a result of a delegation in terms of section 6(4). A provincial treasury must submit all information submitted to it in terms of the MFMA to the National Treasury on a quarterly basis, or when so requested.<sup>73</sup>

According to the MFMA, both the National Treasury and provincial treasuries are authorised to delegate their powers. On a national level the minister may delegate any of the powers or duties assigned to the National Treasury in terms of the MFMA to

- the Director-General of the National Treasury or
- the MEC responsible for a provincial department, as the minister and the MEC may agree.<sup>74</sup>

It should be noted, however, that the minister may not delegate the National Treasury's power to stop funds to a municipality in terms of section 5(2)(e).<sup>75</sup> A delegation authorised under section 6(1) is restricted as follows:

- (a) must be in writing;
- (b) is subject to any limitations or conditions which the minister may impose;
- (c) may, subject to any such limitations or conditions, authorise –
  - (i) the Director-General of the National Treasury to sub-delegate a delegated power or duty to a staff member of the National Treasury; and
  - (ii) the MEC responsible for the relevant provincial department to sub-delegate a delegated power or duty to a staff member of that department; and
- (d) does not divest the National Treasury of the responsibility concerning the

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<sup>72</sup> 1 of 1999.

<sup>73</sup> See the MFMA s 5(5)-(8).

<sup>74</sup> Refer to the MFMA s 6(1)(a)-(b).

<sup>75</sup> The MFMA s 6(2).

exercise of the delegated power or the performance of the delegated duty.<sup>76</sup>

The MEC for finance in a province may also delegate any of the powers or duties assigned to a provincial treasury in terms of the Act to the head of the relevant provincial department of which the provincial treasury forms part. Such delegation is subjected to the same conditions as are required on national level.<sup>77</sup> Both the minister or MEC for finance in a province may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.<sup>78</sup>

### **(b) Aspects relating to municipal revenue**

Under the new legislative framework, every municipality must open and maintain at least one bank account in the name of the municipality. All money received by a municipality must be paid into its bank account or accounts, and this must be done promptly and in accordance with the MFMA and any requirements that may be prescribed. A municipality may not open a bank account:

- abroad
- with an institution not registered as a bank in terms of the Banks Act<sup>79</sup> or
- otherwise than in the name of the municipality.<sup>80</sup>

Money may be withdrawn from a municipal bank account only in terms of the procedure set out in section 11(1) of the MFMA.

It is further required for each municipality to have a primary bank account. If a municipality has only one bank account, that account is its primary bank account. If it has more than one bank account, it must designate one of those bank accounts as its primary bank account.<sup>81</sup> Specific moneys must be paid into a municipality's primary bank account. Such moneys include:

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<sup>76</sup> See the MFMA s 6(3)(a)-(d).

<sup>77</sup> Read the MFMA ss 6(3) and 6(5) together.

<sup>78</sup> The MFMA s 6(6).

<sup>79</sup> 94 of 1990.

<sup>80</sup> See the MFMA s 7(1)-(2).

<sup>81</sup> The MFMA s 8(1)(a)-(b).

- all allocations to the municipality, including those made to the municipality for transmission to a municipal entity or other external mechanism assisting the municipality in the performance of its functions<sup>82</sup>
- all income received by the municipality on its investments
- all income received by the municipality in connection with its interest in any municipal entity, including dividends
- all money collected by a municipal entity or other external mechanism on behalf of the municipality and
- any other moneys as may be prescribed.<sup>83</sup>

The accounting officer of a municipality must submit to the National Treasury, the relevant provincial treasury and the Auditor-General, in writing, the name of the bank where the primary bank account of the municipality is held and the type and number of the account. If a municipality wants to change its primary bank account, it may do so only after the accounting officer has informed the National Treasury and the Auditor-General, in writing, at least 30 days before effecting the change.<sup>84</sup>

Each accounting officer of a municipality must submit to the relevant provincial treasury and the Auditor-General, in writing, the following information:

- within 90 days after the municipality has opened a new bank account, the name of the bank where the account has been opened, and the type and number of the account and
- annually before the start of a financial year, the name of each bank where the municipality holds a bank account, and the type and number of each account.<sup>85</sup>

It is the responsibility of the accounting officer of a municipality to

- administer all the municipality's bank accounts

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<sup>82</sup> "Allocation" in relation to a municipality means: (a) a municipality's share of the local government's equitable share referred to in the Constitution s 214(a); (b) an allocation of money to a municipality in terms of the Constitution s 214(1)(c); (c) an allocation of money to a municipality in terms of a provincial budget; or (d) any other allocation of money to a municipality by an organ of state, including by another municipality, otherwise than in compliance with a commercial or other business transaction. See the MFMA s 1 definitions.

<sup>83</sup> Refer to the MFMA s 8(2)(a)-(e). A municipality must take all reasonable steps to ensure that all moneys referred to above are paid into its primary bank account. Furthermore, no organ of state in the national, provincial or local sphere of government may transfer an allocation of money referred to above to a municipality, except through the municipality's primary bank account. All allocations due by an organ of state to a municipal entity must be made through the parent municipality, or if there is more than one parent municipality, any of those parent municipalities as may be agreed between the parent municipalities.

<sup>84</sup> Refer to the MFMA s 8(5).

<sup>85</sup> See the MFMA s 9(a)-(b).

- account to the municipal council for the municipality's bank accounts
- enforce compliance with the requirements of the MFMA.

The accounting officer may delegate the duties referred to above to the municipality's chief financial officer only.<sup>86</sup>

Only the accounting officer or the chief financial officer of a municipality or any other senior financial official acting on the written authority of the accounting officer may withdraw money or authorise the withdrawal of money from any of the municipality's bank accounts, and may do so only:

- (a) to defray expenditure appropriated in terms of an approved budget;<sup>87</sup>
- (b) to defray expenditure authorised in terms of section 26(4) of the MFMA;
- (c) to defray unforeseeable and unavoidable expenditure authorised in terms of section 29(1) of the MFMA;
- (d) in the case of a bank account opened in terms of section 12 of the MFMA, to make payments from the account in accordance with subsection (4) of that section;
- (e) to pay over to a person or organ of state money received by the municipality on behalf of that person or organ of state, including –
  - (i) money collected by the municipality on behalf of that person or organ of state by agreement; or
  - (ii) any insurance or other payments received by the municipality for that person or organ of state;
- (f) to refund money incorrectly paid into a bank account;
- (g) to refund guarantees, sureties and security deposits;
- (h) for cash management and investment purposes in accordance with section 13 of the MFMA;
- (i) to defray increased expenditure in terms of section 31 of the act; or
- (j) for such other purposes as may be prescribed.<sup>88</sup>

Any authorisation to a senior financial official to withdraw money or to authorise the withdrawal of money from a bank account must be in accordance with a framework

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<sup>86</sup> See the MFMA s 10(1)-(2).

<sup>87</sup> An "approved budget" means an annual budget (a) approved by a municipal council or (b) approved by a provincial or the national executive following an intervention in terms of the Constitution s 139 and includes such an annual budget as revised by an adjustments budget in terms of the MFMA s 28. See s 1 definitions.

<sup>88</sup> See the MFMA s 11(a)-(j).

as may be prescribed. The accounting officer may not authorise any official other than the chief financial officer to withdraw money or to authorise the withdrawal of money from the municipality's primary bank account if the municipality has a primary bank account which is separate from its other bank accounts.<sup>89</sup>

Within 30 days after the end of each quarter, it is the responsibility of the accounting officer to table in the municipal council a consolidated report of all withdrawals made in terms of subsection 11(1)(b) to (j) of the Act during that quarter and to submit a copy of the report to the relevant provincial treasury and the Auditor-General.<sup>90</sup>

No political structure or office-bearer of a municipality may set up a relief fund, charitable fund, trust or other fund of whatever description, except in the name of the municipality. Only the municipal manager may be the accounting officer of any such fund. A municipality may open a separate bank account in the name of the municipality for the purpose of a relief fund, charitable fund, trust or other fund, however. All money received by the municipality for the purpose of such a fund must be paid into a bank account of the municipality or into a separate bank account if one has been opened. Money in a separate account may be withdrawn from the account without appropriation in terms of an approved budget, but only by or on the written authority of the accounting officer acting in accordance with decisions of the municipal council and also only for the purposes for which the fund was established or the money in the fund was donated.<sup>91</sup>

The MFMA further provides that the minister, acting in concurrence with the Cabinet member responsible for local government, may prescribe a framework within which municipalities must conduct their cash management and investments and invest money not immediately required. Each municipality must establish *an appropriate and effective cash management and investment policy* in accordance with any framework that may be prescribed.<sup>92</sup> A bank where a municipality holds a bank account at the end of a financial year, or held a bank account at any time during a financial year, must:

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<sup>89</sup> Note that money may be withdrawn from a bank account in terms of s 11(1)(b) to (j) without appropriation in terms of an approved budget. See the MFMA s 11(3).

<sup>90</sup> Refer to the MFMA ss 11(4)(a)-(b). A "quarter" is defined under the MFMA as any of the following periods in a financial year: (a) 1 July to 30 September, (b) 1 October to 31 December, (c) 1 January to 31 March, or (d) 1 April to 30 June. See s 1 definitions.

<sup>91</sup> See the MFMA s 12(1)-(4).

<sup>92</sup> See the MFMA s 13(1)-(2).

- within 30 days after the end of that financial year notify the Auditor-General, in writing, of such bank account, including
  - (a) the type and number of the account and
  - (b) the opening and closing balances of that bank account in that financial year and
- promptly disclose information regarding the account when so requested by the National Treasury or the Auditor-General.

A bank, insurance company or other financial institution which at the end of a financial year holds, or at any time during a financial year held, an investment for a municipality, must also

- within 30 days after the end of that financial year, notify the Auditor-General, in writing, of that investment, including the opening and closing balances of that investment in that financial year and
- promptly disclose information regarding the investment when so requested by the National Treasury or the Auditor-General.<sup>93</sup>

Under the new legislative dispensation a municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.<sup>94</sup> A municipality may transfer ownership or otherwise dispose of a capital asset other than one mentioned above, but only after the municipal council in a meeting open to the public:

- has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services and
- has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.<sup>95</sup>

After a decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services, such decision may not be reversed by the municipality after that asset has been sold, transferred or otherwise disposed of. A municipal council may delegate to the accounting officer of the mu-

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<sup>93</sup> Refer to the MFMA s 13(3)-(4).

<sup>94</sup> A "basic municipal service" means a municipal service that is necessary to ensure an acceptable and reasonable quality of life and which, if not provided, would endanger public health or safety or the environment. See the MFMA s 1 definitions.

<sup>95</sup> See the MFMA s 14(1)-(2).

municipality its power to make the determinations referred to in subsection (2) (a) and (b) of the MFMA in respect of movable capital assets below a value determined by the council. Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent, competitive and consistent with the *supply chain management policy* which the municipality must have and maintain in terms of section 111 of the MFMA.<sup>96</sup>

### **(c) Aspects relating to municipal budgets**

A municipality may, except where otherwise provided in the MFMA, incur expenditure or appropriate funds only:

- in terms of an approved budget and
- within the limits of the amounts appropriated for the different votes in an approved budget.<sup>97</sup>

For each financial year, the council of a municipality must approve an annual budget for the municipality before the start of that financial year.<sup>98</sup> In order for a municipality to approve an annual budget, the mayor of the municipality must table the annual budget at a council meeting at least 90 days before the start of the budget year.<sup>99</sup>

According to the MFMA, an annual budget of a municipality must be a schedule in the prescribed format and must incorporate the following:

- (a) setting out realistically anticipated revenue for the budget year from each revenue source;
- (b) appropriating expenditure for the budget year under the different votes of the municipality;
- (c) setting out indicative revenue per revenue source and projected expenditure by vote for the two financial years following the budget year;
- (d) setting out –
  - (i) estimated revenue and expenditure by vote for the current year; and

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<sup>96</sup> These requirements do not apply to the transfer of a capital asset to another municipality or to a municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework. See the MFMA s 14(4)-(6).

<sup>97</sup> See the MFMA s 15(a)-(b).

<sup>98</sup> "Financial year" means a year ending on 30 June of a particular year. See the MFMA s 1 definitions.

<sup>99</sup> Refer to the MFMA s 16(1)-(2). It should be noted that the approval of an annual budget does not preclude the appropriation of money for capital expenditure for a period exceeding three financial years, provided that a separate appropriation is made for each of those financial years. The

*continued on next page*



- (ii) actual revenue and expenditure by vote for the financial year preceding the current year; and
- (e) a statement containing any other information required by section 215(3) of the Constitution or as may be prescribed.<sup>100</sup>

An annual budget must generally be divided into a *capital and an operating budget* in accordance with international best practice, as may be prescribed. When an annual budget is tabled, it must be accompanied by the following documents:

- (a) Draft resolutions –
  - (i) approving the budget of the municipality;
  - (ii) imposing any municipal tax and setting any municipal tariffs as may be required for the budget year; and
  - (iii) approving any other matter that may be prescribed;
- (b) measurable performance objectives for revenue from each source and for each vote in the budget, taking into account the municipality's integrated development plan;
- (c) a projection of cash flow for the budget year by revenue source, broken down per month;
- (d) any proposed amendments to the municipality's integrated development plan following the annual review of the integrated development plan in terms of section 34 of the Municipal Systems Act;
- (e) any proposed amendments to the budget-related policies of the municipality;
- (f) particulars of the municipality's investments;
- (g) any prescribed budget information on municipal entities under the sole or shared control of the municipality;
- (h) particulars of all proposed new municipal entities which the municipality intends to establish or in which the municipality intends to participate;
- (i) particulars of any proposed service delivery agreements, including material amendments to existing service delivery agreements;
- (j) particulars of any proposed allocations or grants by the municipality to –
  - (i) other municipalities;

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MFMA s 16(3). A budget year seems to be the year from 1 July of a year until 30 June of the next year.

<sup>100</sup> See the MFMA s 17(1)(a)-(e).

- (ii) any municipal entities and other external mechanisms assisting the municipality in the exercise of its functions or powers;
- (iii) any other organs of state;
- (iv) any organisations or bodies referred to in section 67 (1);
- (k) the proposed cost to the municipality for the budget year of the salary, allowances and benefits of –
  - (i) each political office-bearer of the municipality;<sup>101</sup>
  - (ii) councillors of the municipality; and
  - (iii) the municipal manager, the chief financial officer, each senior manager of the municipality and any other official of the municipality having a remuneration package greater than or equal to that of a senior manager;
- (l) the proposed cost for the budget year to a municipal entity under the sole or shared control of the municipality of the salary, allowances and benefits of –
  - (i) each member of the entity's board of directors; and
  - (ii) the chief executive officer and each senior manager of the entity; and
- (m) any other supporting documentation as may be prescribed.<sup>102</sup>

It is further required that an annual budget may be funded only from

- realistically anticipated revenues to be collected
- cash-backed accumulated funds from previous years' surpluses not committed for other purposes
- borrowed funds, but only for the capital budget referred to in section 17(2).

All revenue projections in the budget must be realistic, taking into account the projected revenue for the current year based on collection levels to date and also the actual revenue collected in previous financial years.<sup>103</sup> Under the new financial dispensation a municipality may spend money on a capital project only if:

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<sup>101</sup> Note that a political office-bearer in relation to a municipality means (a) the speaker, executive mayor, deputy executive mayor, mayor, deputy mayor or a member of the executive or mayoral committee of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act or (b) a councillor referred to in the MFMA s 57(1). See s 1.

<sup>102</sup> See the MFMA s 17(3)(a)-(m). Note that according to the definitions set out in the MFMA, "shared control" means the rights and powers a municipality has over a municipally entity which is (a) a private company in which effective control as defined in the Municipal Systems Act s 1 is vested in that municipality and one or more other municipalities collectively or (b) a multi-jurisdictional service utility in which that municipality participates, and "sole control" means the rights and powers a municipality has over a municipal entity which is (a) a private company in which effective control as defined in the Municipal Systems Act s 1 is vested in that municipality alone or (b) a service utility established by the municipality.

<sup>103</sup> Refer to the MFMA s 18(1)-(2).

- (a) the money for the project, excluding the cost of feasibility studies conducted by or on behalf of the municipality, has been appropriated in the capital budget referred to in section 17(2);
- (b) the project, including the total cost, has been approved by the council;
- (c) section 33 has been complied with, to the extent that that section may be applicable to the project; and
- (d) the sources of funding have been considered, are available and have not been committed for other purposes.<sup>104</sup>

Before approving a capital project the council of a municipality must consider various issues. Such issues include:

- (a) the projected cost covering all financial years until the project is operational; and
- (b) the future operational costs and revenue on the project, including municipal tax and tariff implications.<sup>105</sup>

The MFMA specifically provides that the minister, acting with the concurrence of the Cabinet member responsible for local government, must prescribe the form of the annual budget of municipalities and may prescribe matters such as:

- the form of resolutions and supporting documentation relating to the annual budget
- the number of years preceding and following the budget year for which revenue and expenditure history or projections must be shown in the supporting documentation
- inflation projections to be used with regard to the budget
- uniform norms and standards concerning the setting of municipal tariffs, financial risks and other matters where a municipality uses a municipal entity or other external mechanism for the performance of a municipal service or other function
- uniform norms and standards concerning the budgets of municipal entities or
- any other uniform norms and standards aimed at promoting transparency and expenditure control.<sup>106</sup>

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<sup>104</sup> Read the MFMA s 19(1)(a)-(d).

<sup>105</sup> See the MFMA s 19(2)(a)-(b). A municipal council may approve capital projects below a prescribed value, however. Such approval may be done either individually or as part of a consolidated capital programme. S 19(3).

<sup>106</sup> See the MFMA s 20(1)(b)(i)-(vi). See also the Municipal Investment Regulations and the Municipal Public-Private Partnership Regulations published under the MFMA.

The minister may further take appropriate steps to ensure that a municipality in the exercise of its fiscal powers as is set out in section 229 of the Constitution does not materially and unreasonably prejudice:

- national economic policies, particularly those on inflation, administered pricing and equity
- economic activities across municipal boundaries and
- the national mobility of goods, services, capital or labour.<sup>107</sup>

With regard to the budget preparation processes, the MFMA determines that the mayor of a municipality must:

- (a) co-ordinate the processes for preparing the annual budget and for reviewing the municipality's integrated development plan and budget-related policies to ensure that the tabled budget and any revisions of the integrated development plan and budget-related policies are mutually consistent and credible;<sup>108</sup>
- (b) at least 10 months before the start of the budget year, table in the municipal council a time schedule outlining key deadlines for –
  - (i) the preparation, tabling and approval of the annual budget;
  - (ii) the annual review of –
    - (aa) the integrated development plan in terms of section 34 of the Municipal Systems Act; and
    - (bb) the budget-related policies;
  - (iii) the tabling and adoption of any amendments to the integrated development plan and the budget-related policies; and
  - (iv) any consultative processes forming part of the processes referred to in subparagraphs (i), (ii) and (iii).<sup>109</sup>

When preparing the annual budget, the mayor of a municipality must also:

- (a) take into account the municipality's integrated development plan;

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<sup>107</sup> The MFMA s 20(2)(a)-(c).

<sup>108</sup> A budget-related policy means a municipal policy affecting or affected by the annual budget of the municipality, including (a) the tariffs policy which the municipality must adopt in terms of section 74 of the Municipal Systems Act, (b) the rates policy which the municipality must adopt in terms of legislation regulating municipal property rates or (c) the credit control and debt collection policy which the municipality must adopt in terms of s 96 of the Municipal Systems Act. Refer to the MFMA s 1.

<sup>109</sup> Read the MFMA s 21(1)(a)-(b).

- (b) take all reasonable steps to ensure that the municipality revises the integrated development plan in terms of section 34 of the Municipal Systems Act, taking into account realistic revenue and expenditure projections for future years;
- (c) take into account the national budget, the relevant provincial budget, the national government's fiscal and macro-economic policy, the annual Division of Revenue Act and any agreements reached in the Budget Forum;
- (d) consult –
  - (i) the relevant district municipality and all other local municipalities within the area of the district municipality, if the municipality is a local municipality;
  - (ii) all local municipalities within its area, if the municipality is a district municipality;
  - (iii) the relevant provincial treasury, and when requested, the National Treasury; and
  - (iv) any national or provincial organs of state, as may be prescribed; and
- (e) provide, on request, any information relating to the budget –
  - (i) to the National Treasury;<sup>110</sup> and
  - (ii) subject to any limitations that may be prescribed, to –
    - (aa) the national departments responsible for water, sanitation, electricity and any other service as may be prescribed;
    - (bb) any other national and provincial organ of states, as may be prescribed; and
    - (cc) another municipality affected by the budget.<sup>111</sup>

Immediately after an annual budget is tabled in a municipal council, the accounting officer of the municipality must:

- (a) in accordance with chapter 4 of the Municipal Systems Act –
  - (i) make public the annual budget and the documents referred to in section 17(3); and
  - (ii) invite the local community to submit representations in connection with the budget; and
- (b) submit the annual budget –

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<sup>110</sup> Note that reference to the National Treasury means the National Treasury established by the Public Finance Management Act s 5. See the MFMA s 1.

<sup>111</sup> See the MFMA s 21(2)(a)-(e).

- (i) in both printed and electronic formats to the National Treasury and the relevant provincial treasury; and
- (ii) in either format to any prescribed national or provincial organs of state and to other municipalities affected by the budget.<sup>112</sup>

In an effort to further accountability and public participation, the MFMA requires that when the annual budget has been tabled, the municipal council must consider any views of:

- the local community and
- the National Treasury, the relevant provincial treasury and any provincial or national organs of state or municipalities which made submissions on the budget.

After considering all budget submissions, the council must give the mayor an opportunity:

- to respond to the submissions and
- if necessary, to revise the budget and table amendments for consideration by the council.<sup>113</sup>

The National Treasury may issue guidelines on the manner in which municipal councils should process their annual budgets, including guidelines on the formation of a committee of the council to consider the budget and to hold public hearings. No guidelines issued in terms the MFMA are binding on a municipal council unless adopted by the council.<sup>114</sup>

At least 30 days before the start of their budget years, all municipal councils must consider approval of the annual budget. An annual budget:

- (a) must be approved before the start of the budget year;
- (b) is approved by the adoption by the council of a resolution; and
- (c) must be approved together with the adoption of resolutions as may be necessary –
  - (i) imposing any municipal tax for the budget year;
  - (ii) setting any municipal tariffs for the budget year;
  - (iii) approving measurable performance objectives for revenue from each source and for each vote in the budget;

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<sup>112</sup> The MFMA s 22(a)-(b).

<sup>113</sup> The MFMA s 23(2)(a)-(b).

<sup>114</sup> Read the MFMA s 23(3)-(4).

(iv) approving any changes to the municipality's integrated development plan;  
and

(v) approving any changes to the municipality's budget-related policies.<sup>115</sup>

The accounting officer of a municipality must submit the approved annual budget to the National Treasury and the relevant provincial treasury. If a municipal council fails to approve an annual budget, including revenue-raising measures necessary to give effect to the budget, the council must reconsider the budget and again vote on the budget or on an amended version thereof. This must be done within seven days of the council meeting that failed to approve the budget. The process provided for must be repeated until a budget is approved, including revenue-raising measures necessary to give effect to the budget. If a municipality has not approved an annual budget, including revenue-raising measures necessary to give effect to the budget, by the first day of the budget year, the mayor must immediately comply with section 55 of the MFMA.<sup>116</sup>

If by the start of the budget year a municipal council has not approved an annual budget or any revenue-raising measures necessary to give effect to the budget, the provincial executive of the relevant province must intervene in the municipality in terms of section 139(4) of the Constitution by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the council and

- appointing an administrator until a newly elected council has been declared elected
- continued functioning of the municipality.<sup>117</sup>

When approving a temporary budget for a municipality, the provincial executive is not bound by any provision relating to the budget process applicable to a municipality in terms of the MFMA or other legislation. Such a budget must, after the intervention has ended, be replaced by a budget approved by the newly elected council, provided that the provisions of the Chapter relating to annual budgets in the MFMA are substantially complied with and are in line with any revised time frames approved by the MEC for finance in the province. Until a new budget for the municipality is

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<sup>115</sup> Read the MFMA s 24(1)-(3).

<sup>116</sup> Read the MFMA s 25(1)-(3). According to s 55, the mayor must send a report to the MEC.

<sup>117</sup> See the Municipal Structures Act s 26(1)(a)-(b), read together with ss 34(3) and (4) and 35. The Structures Act applies when a provincial executive dissolves a municipal council.



approved, with the approval of the MEC for finance in the province, funds for the requirements of the municipality may be withdrawn from the municipality's bank accounts in accordance with certain provisions. Such funds may:

- be used only to defray current and capital expenditure in connection with votes for which funds were appropriated in the approved budget for the previous financial year
- may not:
  - (a) during any month, exceed eight per cent of the total amount appropriated in that approved budget for current expenditure, which percentage must be scaled down proportionately if revenue flows are not at least at the same level as the previous financial year
  - (b) exceed the amount actually available.<sup>118</sup>

Upon becoming aware of any impending non-compliance by the municipality of any provisions of the MFMA or any other legislation pertaining to the tabling or approval of an annual budget or compulsory consultation processes, the mayor of a municipality must inform the MEC for finance in the province, in writing, of such impending non-compliance in an effort to ensure effective control and accountability. If the impending non-compliance pertains to a time provision, except section 16(1), the MEC for finance may, on application by the mayor and on good cause shown, extend any time limit or deadline contained in that provision, provided that no such extension may compromise compliance with section 16(1). An MEC for finance must

- exercise the power contained in the MFMA in accordance with a prescribed framework
- promptly notify the National Treasury, in writing, of any extensions given, together with the name of the municipality concerned and the reasons for the extensions.<sup>119</sup>

Upon becoming aware of any actual non-compliance by the municipality of any required provisions, the mayor of a municipality must also inform the council, the MEC for finance and the National Treasury, in writing, of

- such non-compliance

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<sup>118</sup> The funds provided for above are not additional to funds appropriated for the budget year, and any funds so withdrawn must be regarded as forming part of the funds appropriated in a subsequently approved annual budget for the budget year. See the MFMA s 26(3)-(6).

<sup>119</sup> See the MFMA s 27(1)-(2).

- any remedial or corrective measures the municipality intends to implement to avoid a recurrence.<sup>120</sup>

It should again be noted that the provincial executive may intervene in terms of section 139 of the Constitution if a municipality cannot or does not comply with the provisions of this chapter, including a provision relating to process.

A municipality may revise an approved annual budget through an adjustments budget. In this regard an adjustments budget:

- (a) must adjust the revenue and expenditure estimates downwards if there is material under-collection of revenue during the current year;<sup>121</sup>
- (b) may appropriate additional revenues that have become available over and above those anticipated in the annual budget, but only to revise or accelerate spending programmes already budgeted for;
- (c) may, within a prescribed framework, authorise unforeseeable and unavoidable expenditure recommended by the mayor of the municipality;
- (d) may authorise the utilisation of projected savings in one vote towards spending under another vote;
- (e) may authorise the spending of funds that were unspent at the end of the past financial year where the under-spending could not reasonably have been foreseen at the time to include projected roll-overs when the annual budget for the current year was approved by the council;
- (f) may correct any errors in the annual budget; and
- (g) may provide for any other expenditure within a prescribed framework.<sup>122</sup>

Only the mayor may table an adjustments budget in the municipal council. When an adjustments budget is tabled, it must be accompanied by:

- (a) an explanation how the adjustments budget affects the annual budget;
- (b) a motivation of any material changes to the annual budget;
- (c) an explanation of the impact of any increased spending on the annual budget and the annual budgets for the next two financial years; and

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<sup>120</sup> The MFMA s 27(3)-(4). It should be noted that the non-compliance by a municipality with a provision of the chapter relating to the budget process or a provision in any legislation relating to the approval of a budget-related policy does not affect the validity of an annual or adjustments budget.

<sup>121</sup> A current year refers to the financial year which has already commenced, but not yet ended. See the MFMA s 1.

<sup>122</sup> The MFMA s 28(1)-(3). An adjustments budget must be in a prescribed form.

(d) any other supporting documentation that may be prescribed.<sup>123</sup>

It is important to note that municipal tax and tariffs may not be increased during a financial year, except when required in terms of a financial recovery plan.<sup>124</sup> The mayor of a municipality may in emergency or other exceptional circumstances authorise unforeseeable and unavoidable expenditure for which no provision was made in an approved budget. Any such expenditure:

- (a) must be in accordance with any framework that may be prescribed;
- (b) may not exceed a prescribed percentage of the approved annual budget;
- (c) must be reported by the mayor to the municipal council at its next meeting;
- and
- (d) must be appropriated in an adjustments budget.<sup>125</sup>

The appropriation of funds in an annual or adjustments budget lapses to the extent that those funds are unspent at the end of the financial year to which the budget relates, except in the case of an appropriation for expenditure made for a period longer than that financial year in terms of section 16(3).<sup>126</sup> It is further also determined that when funds for a capital programme are appropriated in terms of section 16(3) for more than one financial year, expenditure for that programme during a financial year may exceed the amount of that year's appropriation for that programme, provided that:

- (a) the increase does not exceed 20 per cent of that year's appropriation for the programme;
- (b) the increase is funded within the following year's appropriation for that programme;
- (c) the municipal manager certifies that –
  - (i) actual revenue for the financial year is expected to exceed budgeted revenue; and
  - (ii) sufficient funds are available for the increase without incurring further

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<sup>123</sup> Read the MFMA s 28(5)(a)-(d).

<sup>124</sup> See the MFMA s 28(6)-(7). Ss 22(b), 23(3) and 24(3) apply in respect of an adjustments budget. "Municipal tax" means property rates or other taxes, levies or duties that a municipality may impose. "Municipal tariff" refers to a tariff for services which a municipality may set for the provision of a service to the local community and includes a surcharge on such tariff. See the MFMA s 1.

<sup>125</sup> Read the MFMA s 29(1)-(3). If such adjustments budget is not passed within 60 days after the expenditure was incurred, the expenditure is unauthorised and s 32 applies.

<sup>126</sup> See the MFMA s 30.

- borrowing beyond the annual budget limit;
- (d) prior written approval is obtained from the mayor for the increase; and
- (e) the documents referred to in paragraphs (c) and (d) are submitted to the relevant provincial treasury and the Auditor-General.<sup>127</sup>

Without limiting liability in terms of the common law or other legislation, the MFMA specifically provides for personal accountability and liability over both political office bearers and officials of a municipality that work with financial matters. The MFMA states that:

- a political office-bearer of a municipality is liable for unauthorised expenditure if that office-bearer knowingly or after having been advised by the accounting officer of the municipality that the expenditure is likely to result in unauthorised expenditure, instructed an official of the municipality to incur the expenditure<sup>128</sup>
- the accounting officer is liable for unauthorised expenditure deliberately or negligently incurred by the accounting officer, subject to subsection (3) of the MFMA
- any political office-bearer or official of a municipality who deliberately or negligently committed, made or authorised an irregular expenditure<sup>129</sup> is liable for that expenditure or

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<sup>127</sup> The MFMA s 31(a)-(e).

<sup>128</sup> Note that “unauthorised expenditure” means any expenditure incurred by a municipality otherwise than in accordance with s 15 or 11(3) and includes (a) overspending of the total amount appropriated in the municipality’s approved budget, (b) overspending of the total amount appropriated for a vote in the approved budget, (c) expenditure from a vote unrelated to the department or functional area covered by the vote, (d) expenditure of money appropriated for a specific purpose, otherwise than for the specific purpose, (e) spending of an allocation referred to in para (b), (c) or (d) of the definition of “allocation” otherwise than in accordance with any conditions of the allocation, or (f) a grant by the municipality otherwise than in accordance with this Act. “Overspending” is further defined thus: (a) in relation to the budget of a municipality, it means causing the operational or capital expenditure incurred by the municipality during a financial year to exceed the total amount appropriated in that year’s budget for its operational or capital expenditure, as the case may be, (b) in relation to a vote, it means causing expenditure under the vote to exceed the amount appropriated for that vote or (c) in relation to expenditure under s 26, it means causing expenditure under the section to exceed the limits allowed in ss (5) of that section. See the MFMA s 1.

<sup>129</sup> “Irregular expenditure” means (a) expenditure incurred by a municipality or municipal entity in contravention of, or not in accordance with, a requirement of this Act, and which has not been condoned in terms of s 170, (b) expenditure incurred by a municipality or municipal entity in contravention of, or not in accordance with, a requirement of the Municipal Systems Act and which has not been condoned in terms of that Act, (c) expenditure incurred by a municipality in contravention of, or not in accordance with, a requirement of the Public Office-Bearers Act 20 of 1998 or (d) expenditure incurred by a municipality or municipal entity in contravention of, or not in accordance with, a requirement of the supply chain management policy of the municipality or entity or any of the municipality’s by-laws giving effect to such policy and not condoned in terms of such policy or by-law. Irregular expenditure excludes expenditure by a municipality which falls within the definition of “unauthorised expenditure”. See the MFMA s 1.

- any political office-bearer or official of a municipality who deliberately or negligently made or authorised a fruitless and wasteful expenditure is liable for that expenditure.<sup>130</sup>

A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure unless the expenditure

(a) in the case of unauthorised expenditure, is –

- (i) authorised in an adjustments budget; or
- (ii) certified by the municipal council, after investigation by a council committee, as irrecoverable and written off by the council; and

(b) in the case of irregular or fruitless and wasteful expenditure, is, after investigation by a council committee, certified by the council as irrecoverable and written off by the council.

If the accounting officer becomes aware that the council, the mayor or the executive committee of the municipality, as the case may be, has taken a decision which, if implemented, is likely to result in unauthorised, irregular or fruitless and wasteful expenditure, the accounting officer is not liable for any ensuing unauthorised, irregular or fruitless and wasteful expenditure provided that the accounting officer has informed the council, the mayor or the executive committee, in writing, that the expenditure is likely to be unauthorised, irregular or fruitless and a wasteful expenditure.<sup>131</sup> The accounting officer must further promptly inform the mayor, the MEC for local government in the province and the Auditor-General, in writing, of:

- (a) any unauthorised, irregular or fruitless and wasteful expenditure incurred by the municipality;
- (b) whether any person is responsible or under investigation for such unauthorised, irregular or fruitless and wasteful expenditure; and
- (c) the steps that have been taken –
  - (i) to recover or rectify such expenditure; and
  - (ii) to prevent a recurrence of such expenditure.<sup>132</sup>

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<sup>130</sup> The MFMA s 32(1)(a)-(d). “Fruitless and wasteful expenditure” means expenditure that was made in vain and would have been avoided had reasonable care been exercised. See the MFMA s 1.

<sup>131</sup> See the MFMA s 32(2)-(3).

<sup>132</sup> The MFMA s 32(4)(a)-(c).

It should be noted that the writing off of any unauthorised, irregular or fruitless and wasteful expenditure as irrecoverable is no excuse in criminal or disciplinary proceedings against a person charged with the commission of an offence or a breach of the MFMA relating to such unauthorised, irregular or fruitless and wasteful expenditure. The accounting officer is further obligated to report to the South African Police Service all cases of alleged

- irregular expenditure that constitutes a criminal offence
- theft and fraud that occurred in the municipality.

The council of a municipality must take all *reasonable steps* to ensure that all cases of irregular expenditure, theft or fraud are reported to the South African Police Service if

- the charge is against the accounting officer or
- the accounting officer fails to report such matters.<sup>133</sup>

Under the new financial requirements, a municipality may enter into a contract which will impose financial obligations on the municipality beyond a financial year, but if the contract will impose financial obligations on the municipality beyond the three years covered in the annual budget for that financial year, it may do so only if:

- (a) the municipal manager, at least 60 days before the meeting of the municipal council at which the contract is to be approved –
  - (i) has, in accordance with section 21A of the Municipal Systems Act:
    - (aa) made public the draft contract and an information statement summarising the municipality's obligations in terms of the proposed contract; and
    - (bb) invited the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed contract; and
  - (ii) has solicited the views and recommendations of:
    - (aa) the National Treasury and the relevant provincial treasury;
    - (bb) the national department responsible for local government; and
    - (cc) if the contract involves the provision of water, sanitation, electricity, or any other service as may be prescribed, the responsible national de

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<sup>133</sup> The MFMA s 32(5)-(8). The minister, acting with the concurrence of the cabinet member responsible for local government, may regulate the application of these provisions by regulation. Read also the MFMA s 168.

partment;

(b) the municipal council has taken into account:

- (i) the municipality's projected financial obligations in terms of the proposed contract for each financial year covered by the contract;
- (ii) the impact of those financial obligations on the municipality's future municipal tariffs and revenue;
- (iii) any comments or representations on the proposed contract received from the local community and other interested persons; and
- (iv) any written views and recommendations on the proposed contract by the National Treasury, the relevant provincial treasury, the national department responsible for local government and any national department referred to in paragraph (a) (ii) (cc); and

(c) the municipal council has adopted a resolution in which:

- (i) it determines that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the contract;
- (ii) it approves the entire contract exactly as it is to be executed; and
- (iii) it authorises the municipal manager to sign the contract on behalf of the municipality.<sup>134</sup>

The process set out in subsection 33(1) of the MFMA does not apply to:

- (a) contracts for long-term debt regulated in terms of section 46(3) of the MFMA;
- (b) employment contracts; or
- (c) contracts:
  - (i) for categories of goods as may be prescribed; or
  - (ii) in terms of which the financial obligation on the municipality is below:
    - (aa) a prescribed value; or
    - (bb) a prescribed percentage of the municipality's approved budget for the year in which the contract is concluded.<sup>135</sup>

All contracts referred to above and all other contracts that impose a financial obligation on a municipality:

- must be made available in their entirety to the municipal council and

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<sup>134</sup> Refer to the MFMA s 33(1)(a)-(c).

<sup>135</sup> See the MFMA s 33(2).



- may not be withheld from public scrutiny, except as provided for in terms of the Promotion of Access to Information Act.<sup>136</sup>

**(d) Aspects concerning municipal financial co-operative government**

It is a constitutional prerequisite that the national and provincial governments must by agreement assist municipalities in building their capacities for efficient, effective and transparent financial management. The national and provincial governments must support the efforts of municipalities to identify and resolve their financial problems. When performing its monitoring function in terms of section 155(6) of the Constitution, a provincial government:

- (a) must share with a municipality the results of its monitoring to the extent that those results may assist the municipality in improving its financial management;
- (b) must, upon detecting any emerging or impending financial problems in a municipality, alert the municipality to those problems; and
- (c) may assist the municipality to avert or resolve financial problems.<sup>137</sup>

In an effort to promote co-operative government on a local government level, both national and provincial departments and public entities must:

- (a) in their fiscal and financial relations with the local sphere of government, promote co-operative government in accordance with chapter 3 of the Constitution;
- (b) promptly meet their financial commitments towards municipalities;
- (c) provide timely information and assistance to municipalities to enable municipalities:
  - (i) to plan properly, including in developing and revising their integrated development plans; and
  - (ii) to prepare their budgets in accordance with the processes set out in chapter 4 of this Act; and
- (d) comply with the Public Finance Management Act, the annual Division of Revenue Act and the Intergovernmental Fiscal Relations Act,<sup>138</sup> to the extent

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<sup>136</sup> See Act 2 of 2000 read together with the MFMA s 33(3)-(4).

<sup>137</sup> See the MFMA s 34(1)-(4). Non-compliance with this section or any other provision of this Act by the national or a provincial government does not affect the responsibility of a municipality, its political structures, political office-bearers and officials to comply with this Act.

<sup>138</sup> 97 of 1997.

that those acts regulate intergovernmental relations with the local sphere of government.<sup>139</sup>

In order to provide predictability and certainty about the sources and levels of intergovernmental funding for municipalities, the accounting officer of a national or provincial department and the accounting authority of a national or provincial public entity responsible for the transfer of any proposed allocations to a municipality must, by no later than 20 January of each year notify the National Treasury or the relevant provincial treasury, as may be appropriate, of all proposed allocations, and the projected amounts of those allocations, to be transferred to each municipality during each of the next three financial years. The minister or the MEC responsible for finance in a province must, to the extent possible when tabling the national annual budget in the National Assembly or the provincial annual budget in the provincial legislature, make public particulars of any allocations due to each municipality in terms of that budget, including the amount to be transferred to the municipality during each of the next three financial years.<sup>140</sup>

Municipalities are themselves also required to promote co-operative government. In doing so, municipalities are obligated to:

- promote co-operative government in accordance with chapter 3 of the Constitution and the Intergovernmental Fiscal Relations Act in their fiscal and financial relations with the national and provincial spheres of government and other municipalities
- provide budgetary and other financial information to relevant municipalities and national and provincial organs of state
- promptly meet all financial commitments towards other municipalities or national and provincial organs of state.

In order to enable municipalities to include allocations from other municipalities in their budgets and to plan effectively for the spending of such allocations, the accounting officer of a municipality responsible for the transfer of any allocation to another municipality must notify the receiving municipality of the projected amount of any allocation proposed to be transferred to that municipality during each of the next

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<sup>139</sup> Read the MFMA s 35(a)-(d).

<sup>140</sup> Refer to the MFMA s 36(1)-(2).

three financial years, by no later than 120 days before the start of its budget year.<sup>141</sup> In certain instances the transfer of funds to municipalities may be stopped. In this regard the MFMA determines that the National Treasury may stop:

- the transfer of funds due to a municipality as its share of the local government's equitable share referred to in section 214(1)(a) of the Constitution, but only if the municipality commits a serious or persistent breach of the measures established in terms of section 216(1) of the Constitution or
- the transfer of funds due to a municipality as an allocation referred to in section 214(1)(c) of the Constitution, but only if the municipality or the municipal entity for which the funds are destined
  - (a) commits a serious or persistent breach of the measures established in terms of section 216(1) of the Constitution or
  - (b) breaches or fails to comply with any conditions subject to which the allocation is made.

Before the National Treasury stops the transfer of funds to a municipality, it must:

- (a) give the municipality an opportunity to submit written representations with regard to the proposed stopping of the funds;
- (b) inform the MEC for local government in the province; and
- (c) consult the Cabinet member responsible for the national department making the transfer.<sup>142</sup>

If the stopping of funds affects the provision of basic municipal services in the municipality, the provincial executive must monitor the continuation of those services. Section 139 of the Constitution applies if the municipality cannot or does not fulfil its obligations with regard to the provision of those services. When considering whether to stop the transfer of funds to a municipality, the National Treasury must take into account all relevant facts, including:

- (a) the municipality's compliance with the requirements of this act, in particular those relating to:
  - (i) annual financial statements, including the submission to the Auditor-General of its annual financial statements; and

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<sup>141</sup> See the MFMA s 37(1)-(2).

<sup>142</sup> See the MFMA s 38(1)-(2).

(ii) budgets, including the submission of information on the budget and implementation of the budget to the National Treasury and the relevant provincial treasury; and

(b) the municipality's co-operation with other municipalities on fiscal and financial matters, in the case of district and local municipalities.<sup>143</sup>

A decision by the National Treasury to stop the transfer to a municipality of funds

- lapses after the expiry of 120 days
- may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 75 of the Constitution.

Such a procedure should be prescribed by the joint rules and orders of Parliament. This process must be completed within 30 days of the decision by the National Treasury to stop the transfer of the funds.<sup>144</sup>

Parliament may further renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection 39(1)(b) of the MFMA. Before Parliament approves or renews a decision to stop the transfer of funds to a municipality, the Auditor-General must report to Parliament, if requested to do so by Parliament, and the municipality must be given an opportunity to answer the allegations against it and to state its case before a committee.<sup>145</sup> If the transfer of funds to a municipality has been stopped in terms of section 38(1)(b) for the rest of the relevant financial year, then the accounting officer of the national or provincial department responsible for the transfer must reflect such stopping of funds, together with reasons, in the annual financial statements of the department.<sup>146</sup>

The National Treasury is further obligated to monitor:

- the pricing structure of organs of state for the supply of electricity, water or any other bulk resources that may be prescribed, to municipalities and municipal entities for the provision of municipal services and
- payments made by municipalities and municipal entities for such bulk resources.<sup>147</sup>

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<sup>143</sup> Read the MFMA s 38(3)-(4).

<sup>144</sup> The MFMA s 39(1)(a)-(b).

<sup>145</sup> Read the MFMA s 39(2)-(3).

<sup>146</sup> The MFMA s 40.

<sup>147</sup> Refer to the MFMA s 41(1).

Each organ of state providing such bulk resources to a municipality must within 15 days after the end of each month furnish the National Treasury with a written statement setting out, for each municipality or for each municipal entity providing municipal services on behalf of such municipalities, the following information:

- the amount to be paid by the municipality or municipal entity for such bulk resources for that month, and for the financial year up to the end of that month
- the arrears owing and the age profile of such arrears and
- any actions taken by that organ of state to recover arrears.<sup>148</sup>

In relation to price increases of bulk resources for the provision of municipal services, it is stated that if a national or provincial organ of state which supplies water, electricity or any other bulk resource as may be prescribed to a municipality or municipal entity for the provision of a municipal service intends to increase the price of such resource for the municipality or municipal entity, it must first submit the proposed amendment to its pricing structure to its executive authority within the meaning of the Public Finance Management Act and secondly to any regulatory agency for approval, if national legislation requires such approval.<sup>149</sup> At least 40 days before making a submission, the organ of state referred to above must request the National Treasury and organised local government to provide written comments on the proposed amendment. Any submission must also be accompanied by:

- a motivation of the reasons for the proposed amendment
- an explanation of how the amendment takes account of
  - (a) the national government's inflation targets and other macroeconomic policy objectives
  - (b) steps taken by the organ of state to improve its competitiveness or efficiency in order to reduce costs
  - (c) any objectives or targets as outlined in any corporate or other governance plan applicable to that organ of state
- any written comments received from the National Treasury, organised local government or any municipalities and
- an explanation of how such comments have been taken into account.<sup>150</sup>

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<sup>148</sup> See the MFMA s 41(1)-(2).

<sup>149</sup> See the MFMA s 42(1)(a)-(b).

<sup>150</sup> Read the MFMA s 42(3)(a)-(d).

The executive authority of the organ of state must table the amendment and the documents referred to above either in Parliament or the relevant provincial legislature, as may be appropriate. Unless approved otherwise by the Minister, an amendment to a pricing structure which is tabled in Parliament or the relevant provincial legislature on or before 15 March in any year does not take effect for the affected municipalities or municipal entities before 1 July in that year or after 15 March in any year, does not take effect for the affected municipalities or municipal entities before 1 July the next year.<sup>151</sup>

If a national or provincial organ of state in terms of a power contained in any national or provincial legislation determines the upper limits of a municipal tax or tariff, such determination takes effect for municipalities on a date specified in the determination. Unless the minister approves otherwise on good grounds, the date specified in a determination referred to above may:

- (a) if the determination was promulgated on or before 15 March in a year, not be a date before 1 July in that year; or
- (b) if the determination was promulgated after 15 March in a year, not be a date before 1 July in the next year.<sup>152</sup>

If a municipality has in accordance with section 33 or 46(3) of the MFMA entered into a contract which provides for an annual or other periodic escalation of payments to be made by the municipality under the contract, no determination in terms of a power referred to in subsection 43(1) of the MFMA regarding the upper limits of a municipal tax or tariff applies to that municipality insofar as such upper limits would impair the municipality's ability to meet the escalation of its payments under the contract.

Whenever a dispute of a financial nature arises between organs of state, the parties concerned must as promptly as possible take all reasonable steps that may be necessary to resolve the matter out of court. If the National Treasury is not a party to the dispute, the parties must report the matter to the National Treasury and may request the National Treasury to mediate between the parties or to designate a per-

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<sup>151</sup> See the MFMA s 42(5)(a)-(b).

<sup>152</sup> See the MFMA s 43(1)-(2).

son to mediate between them. If the National Treasury accedes to a request, it may determine the mediation process.<sup>153</sup>

**(e) Aspects concerning municipal debt**

A municipality may incur short-term debt only in accordance with and subject to the provisions of the MFMA and only when necessary to bridge shortfalls within a financial year during which the debt is incurred. Such debt may be incurred only in expectation of specific and realistic anticipated income to be received within that financial year or capital needs within a financial year, to be repaid from specific funds to be received from enforceable allocations or long-term debt commitments.<sup>154</sup> Furthermore, a municipality may incur short-term debt only if a resolution of the municipal council, signed by the mayor, has approved the debt agreement and the accounting officer has signed the agreement or other document which creates or acknowledges the debt. For the purpose of obtaining a resolution to incur short term debt, a municipal council may:

- (a) approve a short-term debt transaction individually; or
- (b) approve an agreement with a lender for a short-term credit facility to be accessed as and when required, including a line of credit or bank overdraft facility, provided that—
  - (i) the credit limit must be specified in the resolution of the council;
  - (ii) the terms of the agreement, including the credit limit, may be changed only by a resolution of the council; and
  - (iii) if the council approves a credit facility that is limited to emergency use, the accounting officer must notify the council in writing as soon as practical of the amount, duration and cost of any debt incurred in terms of such a credit facility, as well as options for repaying such debt.<sup>155</sup>

A municipality must pay off short-term debt within the financial year and may not renew or refinance short-term debt, whether its own debt or that of any other entity, where such renewal or refinancing will have the effect of extending the short-term debt into a new financial year. No lender may wilfully extend credit to a municipality

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<sup>153</sup> See the MFMA s 44(1)-(4). These provisions apply only if at least one of the organs of state is a municipality or municipal entity. Refer again to the principles of co-operative government set out in the Constitution s 41.

<sup>154</sup> Read the MFMA s 45(1)(a)-(b). "Short-term debt" means debt payable over a period not exceeding one year. See the MFMA s 1.

<sup>155</sup> See the MFMA s 45(2)-(3).



for the purpose of renewing or refinancing short-term debt that must be paid off. If a lender wilfully extends credit to a municipality in contravention of the abovementioned provision, then the municipality is not bound to repay the loan or interest on the loan.<sup>156</sup>

With reference to long-term debt,<sup>157</sup> a municipality may incur such debt only in accordance with and subject to any applicable provisions of the MFMA, including section 19. Such debt may be incurred only for the purpose of:

- (a) capital expenditure on property, plant or equipment to be used for the purpose of achieving the objects of local government as set out in section 152 of the Constitution, including costs referred to in subsection 46(4); or
- (b) re-financing existing long-term debt subject to subsection 46(5). A municipality may incur long-term debt only if a resolution of the municipal council, signed by the mayor, has approved the debt agreement and the accounting officer has signed the agreement or other document which creates or acknowledges the debt.<sup>158</sup>

Furthermore, a municipality may incur long-term debt only if the accounting officer of the municipality:

- (a) has, in accordance with section 21A of the Municipal Systems Act:
  - (i) at least 21 days prior to the meeting of the council at which approval for the debt is to be considered, made public an information statement setting out particulars of the proposed debt, including the amount of the proposed debt, the purposes for which the debt is to be incurred and particulars of any security to be provided; and
  - (ii) invited the public, the National Treasury and the relevant provincial treasury to submit written comments or representations to the council in respect of the proposed debt; and

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<sup>156</sup> See the MFMA s 45(4)-(6). It should be noted that the non-repayment of a loan to a lender does not apply if the lender (a) relied in good faith on written representations of the municipality regarding purpose of the borrowing, and (b) did not know and had no reason to believe that the borrowing was for the purpose of renewing or refinancing short-term debt. A "lender" in relation to a municipality, means a person who provides debt finance to a municipality. Refer to s 1 definitions.

<sup>157</sup> "Long-term debt" means debt repayable over a period exceeding one year. See the MFMA s 1.

<sup>158</sup> See the MFMA s 46(1)-(2). Note that debt means (a) a monetary liability or obligation created by a financing agreement, note, debenture, bond or overdraft, or by the issuance of municipal debt instruments or (b) a contingent liability such as that created by guaranteeing a monetary liability or obligation of another. See the MFMA s 1.

- (b) has submitted a copy of the information statement to the municipal council at least 21 days prior to the meeting of the council, together with particulars of-
- (i) the essential repayment terms, including the anticipated debt repayment schedule; and
  - (ii) the anticipated total cost in connection with such debt over the repayment period.<sup>159</sup>

Capital expenditure contemplated in subsection 46(1)(a) may include:

- financing costs, including
  - (a) capitalised interest for a reasonable initial period
  - (b) costs associated with security arrangements in accordance with section 48 of the MFMA
  - (c) discounts and fees in connection with the financing
  - (d) fees for legal, financial, advisory, trustee, credit rating and other services directly connected to the financing and
  - (e) costs connected to the sale or placement of debt, and costs for printing and publication directly connected to the financing
- costs of professional services directly related to the capital expenditure and
- such other costs as may be prescribed.<sup>160</sup>

Municipalities are further allowed to borrow money for the purpose of re-financing existing long-term debt, provided that:

- the existing long-term debt was lawfully incurred
- the re-financing does not extend the term of the debt beyond the useful life of the property, plant or equipment for which the money was originally borrowed
- the net present value of projected future payments (including principal and interest payments) after re-financing is less than the net present value of projected future payments before re-financing and
- the discount rate used in projecting net present value referred to above, and any assumptions in connection with the calculations, must be reasonable and in accordance with criteria set out in a framework that may be prescribed.<sup>161</sup>

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<sup>159</sup> Read the MFMA s 46(2).

<sup>160</sup> Read the MFMA s 46(3)-(4).

<sup>161</sup> Note that a municipality's long-term debt must be consistent with its capital budget referred to in s 17(2). Read the MFMA s 46(5)-(6).

Both short-term and long-term debt may be incurred only if the debt is denominated in Rand and is not indexed to, or affected by, fluctuations in the value of the Rand against any foreign currency and section 48(3) of the MFMA has been complied with, if security is to be provided by the municipality. With reference to security of debt, the MFMA provides that a municipality may, by resolution of its council, provide security for:

- (a) any of its debt obligations;
- (b) any debt obligations of a municipal entity under its sole control; or
- (c) contractual obligations of the municipality undertaken in connection with capital expenditure by other persons on property, plant or equipment to be used by the municipality or such other person for the purpose of achieving the objects of local government in terms of section 152 of the Constitution.<sup>162</sup>

A municipality may provide any appropriate security, including by:

- (a) giving a lien on, or pledging, mortgaging, ceding or otherwise hypothecating, an asset or right, or giving any other form of collateral;
- (b) undertaking to effect payment directly from money or sources that may become available and to authorise the lender or investor direct access to such sources to ensure payment of the secured debt or the performance of the secured obligations, but this form of security may not affect compliance with section 8(2) of the MFMA;
- (c) undertaking to deposit funds with the lender, investor or third party as security;
- (d) agreeing to specific payment mechanisms or procedures to ensure exclusive or dedicated payment to lenders or investors, including revenue intercepts, payments into dedicated accounts or other payment mechanisms or procedures;
- (e) ceding as security any category of revenue or rights to future revenue;
- (f) undertaking to have disputes resolved through mediation, arbitration or other dispute resolution mechanisms;
- (g) undertaking to retain revenues or specific municipal tariffs or other charges, fees or funds at a particular level or at a level sufficient to meet its financial obligations;

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<sup>162</sup> Refer to the MFMA ss 47 and 48(1)(a)-(c).

- (h) undertaking to make provision in its budgets for the payment of its financial obligations, including capital and interest;
- (i) agreeing to restrictions on debt that the municipality may incur in future until the secured debt is settled or the secured obligations are met; and
- (j) agreeing to such other arrangements as the municipality may consider necessary and prudent.<sup>163</sup>

A council resolution authorising the provision of security must determine whether the asset or right with respect to which the security is provided is necessary for providing the minimum level of basic municipal services and, if so, must indicate the manner in which the availability of the asset or right for the provision of that minimum level of basic municipal services will be protected. If the resolution has determined that the asset or right is necessary for providing the minimum level of basic municipal services, neither the party to whom the municipal security is provided nor any successor or assignee of such party may deal with the asset or right in a manner that would preclude or impede the continuation of that minimum level of basic municipal services in the event of a default by the municipality.<sup>164</sup>

When interacting with a prospective lender or when preparing documentation for consideration by a prospective investor, any person involved in the borrowing of money by a municipality must disclose all information in that person's possession or within that person's knowledge that may be material to the decision of that prospective lender or investor and take reasonable care to ensure the accuracy of any information disclosed. Any lender or investor may rely on written representations of the municipality signed by the accounting officer, if the lender or investor did not know and had no reason to believe that those representations were false or misleading.<sup>165</sup>

With reference to municipal guarantees, a municipality may not issue any guarantee for any commitment or debt of any organ of state or person, except on the following conditions:

- (a) The guarantee must be within limits specified in the municipality's approved budget;
- (b) a municipality may guarantee the debt of a municipal entity under its sole

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<sup>163</sup> See the MFMA s 48(2)(a)-(j).

<sup>164</sup> See the MFMA s 48(3)-(4) and also s 48(5) of the Act.

<sup>165</sup> The MFMA s 49(1)-(2).

control only if the guarantee is authorised by the council in the same manner and subject to the same conditions applicable to a municipality in terms of this chapter if it incurs debt;

- (c) a municipality may guarantee the debt of a municipal entity under its shared control or of any other person, but only with the approval of the National Treasury, and then only if (i) the municipality creates, and maintains for the duration of the guarantee, a cash-backed reserve equal to its total potential financial exposure as a result of such guarantee; or (ii) the municipality purchases and maintains in effect for the duration of the guarantee, a policy of insurance issued by a registered insurer, which covers the full amount of the municipality's potential financial exposure as a result of such guarantee.<sup>166</sup>

**(f) Responsibilities of mayors under the MFMA**

Under the new financial legislative framework, the mayor of a municipality must provide general political guidance over the fiscal and financial affairs of the municipality. In providing such general political guidance, the mayor may monitor and, to the extent provided in the MFMA, oversee the exercise of responsibilities assigned in terms of the Act to the accounting officer and the chief financial officer, but may not interfere in the exercise of those responsibilities. The mayor must take all reasonable steps to ensure that the municipality performs its constitutional and statutory functions within the limits of the municipality's approved budget and must, within 30 days of the end of each quarter, submit a report to the council on the implementation of the budget and the financial state of affairs of the municipality. Finally, all mayors must exercise the other powers and perform the other duties assigned to them in terms of the MFMA or delegated by the council to them.<sup>167</sup>

With regard to the budget processes and other related matters the mayor must do the following:

- (a) provide general political guidance over the budget process and the priorities that must guide the preparation of a budget;
- (b) co-ordinate the annual revision of the integrated development plan in terms of section 34 of the Municipal Systems Act and the preparation of the annual

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<sup>166</sup> Read the MFMA s 50(a)-(c). Note that neither the national nor a provincial government may guarantee the debt of a municipality or municipal entity except to the extent that the Public Finance Management Act ch 8 provides for such guarantees. See the MFMA s 51.

<sup>167</sup> See the MFMA s 52(a)-(e).

budget, and determine how the integrated development plan is to be taken into account or revised for the purposes of the budget; and

(c) take all reasonable steps to ensure:

- (i) that the municipality approves its annual budget before the start of the budget year;
- (ii) that the municipality's service delivery and budget implementation plan is approved by the mayor within 28 days after the approval of the budget; and
- (iii) that the annual performance agreements as required in terms of section 57(1)(b) of the Municipal Systems Act for the municipal manager and all senior managers:
  - (aa) comply with this act in order to promote sound financial management;
  - (bb) are linked to the measurable performance objectives approved with the budget and to the service delivery and budget implementation plan; and
  - (cc) are concluded in accordance with section 57(2) of the Municipal Systems Act.<sup>168</sup>

The mayor must further promptly report to the municipal council and the MEC for finance in the province any delay in the tabling of an annual budget, the approval of the service delivery and budget implementation plan or the signing of the annual performance agreements. He/she must also ensure that the revenue and expenditure projections for each month and the service delivery targets and performance indicators for each quarter, as set out in the service delivery and budget implementation plan, are made public no later than 14 days after the approval of the service delivery and budget implementation plan and that the performance agreements of the municipal manager, senior managers and any other categories of officials as may be prescribed are made public no later than 14 days after the approval of the municipality's service delivery and budget implementation plan. Copies of such performance agreements must be submitted to the council and the MEC for local government in the province.<sup>169</sup>

On receipt of a statement or report submitted by the accounting officer of the municipality in terms of sections 71 or 72 of the MFMA, the mayor must:

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<sup>168</sup> See the MFMA s 53(1)(a)-(c).

<sup>169</sup> The MFMA s 53(2)-(3).

- (a) consider the statement or report;
- (b) check whether the municipality's approved budget is implemented in accordance with the service delivery and budget implementation plan;
- (c) consider and, if necessary, make any revisions to the service delivery and budget implementation plan, provided that revisions to the service delivery targets and performance indicators in the plan may only be made with the approval of the council following approval of an adjustments budget;
- (d) issue any appropriate instructions to the accounting officer to ensure:
  - (i) that the budget is implemented in accordance with the service delivery and budget implementation plan; and
  - (ii) that spending of funds and revenue collection proceed in accordance with the budget;
- (e) identify any financial problems facing the municipality, including any emerging or impending financial problems; and
- (f) in the case of a section 72 report, submit the report to the council by 31 January of each year.<sup>170</sup>

If the municipality faces any serious financial problems, the mayor must

- promptly respond to and initiate any remedial or corrective steps proposed by the accounting officer to deal with such problems, which may include
  - (a) steps to reduce spending when revenue is anticipated to be less than projected in the municipality's approved budget;
  - (b) the tabling of an adjustments budget
  - (c) steps in terms of chapter 13 of the MFMA
- alert the council and the MEC for local government in the province to those problems.

The mayor must ensure that any revisions of the service delivery and budget implementation plan are made public promptly.<sup>171</sup>

If a municipality has not approved an annual budget by the first day of the budget year or if the municipality encounters a serious financial problem referred to in section 136 of the MFMA, then the mayor of the municipality

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<sup>170</sup> See the MFMA s 54(1)(a)-(f).

<sup>171</sup> See the MFMA s 54(2)-(3).



- must immediately report the matter to the MEC for local government in the province
- may recommend to the MEC an appropriate provincial intervention in terms of section 139 of the Constitution.<sup>172</sup>

It is further provided that the mayor of a municipality which has sole or shared control over a municipal entity must guide the municipality in exercising its rights and powers over the municipal entity in a way:

- that would reasonably ensure that the municipal entity complies with this act and at all times remains accountable to the municipality and
- that would not impede the entity from performing its operational responsibilities.

In guiding the municipality in the exercise of its rights and powers over a municipal entity, the mayor may monitor the operational functions of the entity, but may not interfere in the performance of those functions.<sup>173</sup> The council of a municipality which does not have a mayor must designate a councillor to exercise the powers and duties assigned by the MFMA to a mayor. In the case of a municipality which does not have a mayor, a reference in the MFMA to the mayor of a municipality must be construed as a reference to a councillor designated by the council of the municipality to bear the specific responsibilities.<sup>174</sup> In the case of a municipality which has an executive committee, the powers and functions assigned by the MFMA to a mayor must be exercised by the mayor in consultation with the executive committee.<sup>175</sup>

The powers and duties assigned in terms of the MFMA to the mayor of a municipality may be delegated by:

- the executive mayor in terms of section 60(1) of that Act to another member of the municipality's mayoral committee in the case of a municipality which has an executive mayor referred to in section 55 of the Municipal Structures Act
- the council of the municipality to another member of the executive committee in the case of a municipality which has an executive committee referred to in section 43 of the Structures Act or

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<sup>172</sup> Read the MFMA s 55.

<sup>173</sup> Refer to the MFMA s 56(1)-(2).

<sup>174</sup> The MFMA s 57(1)-(2).

<sup>175</sup> The MFMA s 58. It is submitted that "in consultation with" means that the executive committee must be consulted on the matter and that the parties have followed a specified decision-making process. See also Rautenbach and Malherbe (1999) 214-216.

- the council to any other councillor in the case of a municipality which has designated a councilor in terms of section 57(1) of the MFMA.<sup>176</sup>

Any delegation mentioned above:

- must be in writing;
- is subject to any limitations or conditions that the executive mayor or council, as the case may be, may impose; and
- does not divest the mayor of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.

Finally, the mayor may confirm, vary or revoke any decision taken in consequence of a delegation in terms of this section, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.<sup>177</sup>

### **(g) General responsibilities of municipal officials**

According to the MFMA, the municipal manager of a municipality is the accounting officer of the municipality for the purposes of the Act and, as accounting officer, must exercise the functions and powers assigned to an accounting officer in terms of the Act and provide guidance and advice on compliance with the Act to

- the political structures, political office-bearers and officials of the municipality<sup>178</sup>
- any municipal entity under the sole or shared control of the municipality.<sup>179</sup>

The accounting officer of a municipality is obligated to comply with certain fiduciary responsibilities. In this regard the officer must:

- act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs
- disclose to the municipal council and the mayor all material facts which are available to the accounting officer or reasonably discoverable and which in any way might influence the decisions or actions of the council or the mayor and
- seek, within the sphere of influence of the accounting officer, to prevent any

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<sup>176</sup> See the MFMA s 59(1)(a)-(c).

<sup>177</sup> Read the MFMA s 59(2)-(3).

<sup>178</sup> An official in relation to a municipality or municipal entity means (a) an employee of a municipality or municipal entity, (b) a person seconded to a municipality or municipal entity to work as a member of the staff of the municipality or municipal entity or (c) a person contracted by a municipality or municipal entity to work as a member of the staff of the municipality or municipal entity otherwise than as an employee. See the MFMA s 1. Political structures again refer to (a) the council of a municipality or (b) any committee or other collective structure of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act.

<sup>179</sup> The MFMA s 60.

prejudice to the financial interests of the municipality.<sup>180</sup>

An accounting officer may not act in a way that is inconsistent with the duties assigned to accounting officers of municipalities in terms of the MFMA or use the position or privileges of, or confidential information obtained as, accounting officer for personal gain or to improperly benefit another person.<sup>181</sup> The accounting officer of a municipality is further also responsible for managing the financial administration of the municipality and must, for this purpose, take all reasonable steps to ensure that:

- the resources of the municipality are used effectively, efficiently and economically
- full and proper records of the financial affairs of the municipality are kept in accordance with any prescribed norms and standards
- the municipality has and maintains effective, efficient and transparent systems:
  - (a) of financial and risk management and internal control and
  - (b) of internal audit operating in accordance with any prescribed norms and standards
- unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented
- disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of chapter 15 of the MFMA and
- the municipality has and implements:
  - (a) a tariff policy referred to in section 74 of the Municipal Systems Act
  - (b) a rates policy as may be required in terms of any applicable national legislation
  - (c) a credit control and debt collection policy referred to in section 96(b) of the Municipal Systems Act and
  - (d) a supply chain management policy in accordance with chapter 11 of the MFMA.

The accounting officer is responsible for and must account for all bank accounts of the municipality, including any bank account opened for:

- any relief fund, charitable fund, trust or other fund set up by the municipality in terms of section 12 of the MFMA or

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<sup>180</sup> Refer to the MFMA s 61(1).

<sup>181</sup> See the MFMA s 61(2)(a)-(b).

- a purpose referred to in section 48(2)(d) of the Act.<sup>182</sup>

In respect of asset and liability management the accounting officer of a municipality is responsible for the management of the assets of the municipality, including the safeguarding and the maintenance of those assets and the liabilities of the municipality. The accounting officer must for the purposes of these responsibilities take all reasonable steps to ensure that the municipality has and maintains a management, accounting and information system that accounts for the assets and liabilities of the municipality; that the municipality's assets and liabilities are valued in accordance with standards of generally recognised accounting practice and that the municipality has and maintains a system of internal control of assets and liabilities, including an asset and liabilities register, as may be prescribed.<sup>183</sup>

The accounting officer of a municipality is responsible also for the management of the revenue of the municipality. For the purposes of revenue management, the accounting officer must take all reasonable steps to ensure the following:

- (a) that the municipality has effective revenue collection systems consistent with section 95 of the Municipal Systems Act and the municipality's credit control and debt collection policy;
- (b) that revenue due to the municipality is calculated on a monthly basis;
- (c) that accounts for municipal tax and charges for municipal services are prepared on a monthly basis, or less often as may be prescribed where monthly accounts are uneconomical;
- (d) that all money received is promptly deposited in accordance with this act into the municipality's primary and other bank accounts;
- (e) that the municipality has and maintains a management, accounting and information system which:
  - (i) recognises revenue when it is earned;
  - (ii) accounts for debtors; and
  - (iii) accounts for receipts of revenue;
- (f) that the municipality has and maintains a system of internal control in respect of debtors and revenue, as may be prescribed;

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<sup>182</sup> See the MFMA s 62(1)-(2).

<sup>183</sup> Read the MFMA s 63(1)-(2).

- (g) that the municipality charges interest on arrears, except where the council has granted exemptions in accordance with its budget-related policies and within a prescribed framework; and
- (h) that all revenue received by the municipality, including revenue received by any collecting agent on its behalf, is reconciled at least on a weekly basis.<sup>184</sup>

The accounting officer must immediately inform the National Treasury of any payments due by an organ of state to the municipality in respect of municipal tax or for municipal services, if such payments are regularly in arrears for periods of more than 30 days. The accounting officer must also take all reasonable steps to ensure that any funds collected by the municipality on behalf of another organ of state is transferred to that organ of state on at least a weekly basis and that such funds are not used for purposes of the municipality.<sup>185</sup>

The accounting officer of a municipality is also responsible for the management of the expenditure of the municipality. The accounting officer must for such purposes take all reasonable steps to ensure:

- (a) that the municipality has and maintains an effective system of expenditure control, including procedures for the approval, authorisation, withdrawal and payment of funds;
- (b) that the municipality has and maintains a management, accounting and information system which:
  - (i) recognises expenditure when it is incurred;
  - (ii) accounts for creditors of the municipality;<sup>186</sup> and
  - (iii) accounts for payments made by the municipality;
- (c) that the municipality has and maintains a system of internal control in respect of creditors and payments;
- (d) that payments by the municipality are made:
  - (i) directly to the person to whom it is due unless agreed otherwise for reasons as may be prescribed; and

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<sup>184</sup> See the MFMA s 64(1)(a)-(h).

<sup>185</sup> The MFMA s 64(3)-(4).

<sup>186</sup> In relation to a municipality, "creditor" means a person to whom money is owing by the municipality. See the MFMA s 1.

- (ii) either electronically or by way of non-transferable cheques, provided that cash payments and payments by way of cash cheques may be made for exceptional reasons only, and only up to a prescribed limit;
- (e) that all money owing by the municipality be paid within 30 days of receiving the relevant invoice or statement, unless prescribed otherwise for certain categories of expenditure;
- (f) that the municipality complies with its tax, levy, duty, pension, medical aid, audit fees and other statutory commitments;
- (g) that any dispute concerning payments due by the municipality to another organ of state is disposed of in terms of legislation regulating disputes between organs of state;
- (h) that the municipality's available working capital is managed effectively and economically in terms of the prescribed cash management and investment framework;
- (i) that the municipality's supply chain management policy referred to in section 111 of the MFMA is implemented in a way that is fair, equitable, transparent, competitive and cost-effective; and
- (j) that all financial accounts of the municipality are closed at the end of each month and reconciled with its records.<sup>187</sup>

In a format and for periods as may be prescribed, the accounting officer of a municipality must report to the council on all expenditure incurred by the municipality on staff salaries, wages, allowances and benefits, and in a manner that discloses such expenditure per type of expenditure, namely:

- salaries and wages
- contributions for pensions and medical aid
- travel, motor car, accommodation, subsistence and other allowances
- housing benefits and allowances
- overtime payments
- loans and advances and
- any other type of benefit or allowance related to staff.<sup>188</sup>

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<sup>187</sup> See the MFMA s 65(1)-(2).

<sup>188</sup> The MFMA s 66(a)-(g).

Before transferring funds of the municipality to an organisation or body outside any sphere of government otherwise than in compliance with a commercial or other business transaction, the accounting officer must be satisfied that the organisation or body:

- (a) has the capacity and has agreed:
  - (i) to comply with any agreement with the municipality;
  - (ii) for the period of the agreement to comply with all reporting, financial management and auditing requirements as may be stipulated in the agreement;
  - (iii) to report at least monthly to the accounting officer on actual expenditure against such transfer; and
  - (iv) to submit its audited financial statements for its financial year to the accounting officer promptly;
- (b) implements effective, efficient and transparent financial management and internal control systems to guard against fraud, theft and financial mismanagement; and
- (c) has in respect of previous similar transfers complied with all the requirements of this section.<sup>189</sup>

The accounting officer of a municipality must assist the mayor in performing the budgetary functions assigned to the mayor and provide the mayor with the administrative support, resources and information necessary for the performance of those functions.<sup>190</sup> The accounting officer is further responsible for implementing the municipality's approved budget, including taking all reasonable steps to ensure that the spending of funds is in accordance with the budget and is reduced as necessary when revenue is anticipated to be less than projected in the budget or in the service

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<sup>189</sup> See the MFMA s 67(1)(a)-(c). If there has been a failure by an organisation or body to comply with the requirements of ss 67(1) in respect of a previous transfer, the municipality may, despite s 67(1)(c) make a further transfer to that organisation or body, provided that s 67(1)(a) and (b) is complied with and the relevant provincial treasury has approved the transfer. Through contractual and other appropriate mechanisms, the accounting officer must enforce compliance with s 67(1). Furthermore, s 67(1)(a) does not apply to an organisation or body serving the poor or used by government as an agency to serve the poor, provided that the transfer does not exceed a prescribed limit and that the accounting officer: (i) takes all reasonable steps to ensure that the targeted beneficiaries receive the benefit of the transferred funds and (ii) certifies to the Auditor-General that compliance by that organisation or body with ss 67(1)(a) is uneconomical or unreasonable. Read also the MFMA s 67(2)-(4).

<sup>190</sup> The MFMA s 68.



delivery and budget implementation plan and that revenue and expenditure are properly monitored. When necessary, the accounting officer must prepare an adjustments budget and submit it to the mayor for consideration and tabling in the municipal council. No later than 14 days after the approval of an annual budget, the accounting officer must submit to the mayor a draft service delivery and budget implementation plan for the budget year and drafts of the annual performance agreements as required in terms of section 57(1)(b) of the Municipal Systems Act for the municipal manager and all senior managers.<sup>191</sup>

In respect of impending shortfalls, overspending and overdrafts, the accounting officer of a municipality must report in writing to the municipal council any

- impending shortfalls in budgeted revenue
- overspending of the municipality's budget
- steps taken to prevent or rectify such shortfalls or overspending.

If the balance in a municipality's bank account or the consolidated balance in the municipality's bank accounts if the municipality has more than one bank account, shows a net overdrawn position for a period exceeding a prescribed period, then the accounting officer of the municipality must promptly notify the National Treasury in the prescribed format of

- the amount by which the account or accounts are overdrawn
- the reasons for the overdrawn account or accounts
- the steps taken or to be taken to correct the matter.<sup>192</sup>

The accounting officer of a municipality is further obligated to submit, by no later than 10 working days after the end of each month, to the mayor of the municipality and the relevant provincial treasury a statement in the prescribed format on the state of the municipality's budget, which statement should reflect the following particulars for that month and for the financial year up to the end of that month:

- (a) Actual revenue, per revenue source;
- (b) actual borrowings;
- (c) actual expenditure, per vote;
- (d) actual capital expenditure, per vote;

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<sup>191</sup> See the MFMA s 69(1)-(3).

<sup>192</sup> See the MFMA s 70(1)-(3). When determining the net overdrawn position, the accounting officer must exclude any amounts reserved or pledged for any specific purpose or encumbered in any other way.

- (e) the amount of any allocations received;
- (f) actual expenditure on those allocations, excluding expenditure on (i) its share of the local government equitable share; and (ii) allocations exempted by the annual Division of Revenue Act from compliance with this paragraph; and
- (g) when necessary, an explanation of:
  - (i) any material variances from the municipality's projected revenue by source, and from the municipality's expenditure projections per vote;
  - (ii) any material variances from the service delivery and budget implementation plan; and
  - (iii) any remedial or corrective steps taken or to be taken to ensure that projected revenue and expenditure remain within the municipality's approved budget.<sup>193</sup>

The statement mentioned above must include a projection of the relevant municipality's revenue and expenditure for the rest of the financial year and any revisions from initial projections and the prescribed information relating to the state of the budget of each municipal entity as provided to the municipality in terms of section 87(10) of the MFMA. The amounts reflected in the statement must in each case be compared with the corresponding amounts budgeted for in the municipality's approved budget.<sup>194</sup>

The accounting officer of a municipality which has received an allocation referred to in subsection 71(1)(e) of the MFMA during any particular month must submit, by no later than 10 working days after the end of that month, that part of the statement reflecting the particulars referred to in subsection 71(1)(e) and (f) to the national or provincial organ of state or municipality which transferred the allocation. By no later than 22 working days after the end of each month, the provincial treasury must submit to the National Treasury a consolidated statement in the prescribed format on the state of the municipalities' budgets, per municipality and per municipal entity. Within 30 days after the end of each quarter, the provincial treasury must also make public as may be prescribed, a consolidated statement in the prescribed format on the state of municipalities' budgets per municipality and per municipal entity. The MEC for

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<sup>193</sup> The MFMA S 71(1)(a)-(g).

<sup>194</sup> See the MFMA s 71(2)(a)-(b). Note that the statement to the provincial treasury must be in the format of a signed document and in electronic format.

finance must submit such consolidated statement to the provincial legislature no later than 45 days after the end of each quarter.<sup>195</sup>

By 25 January of each year all accounting officers of municipalities must

- assess the performance of the municipality during the first half of the financial year, taking into account
  - (a) the monthly statements referred to in section 71 of the MFMA for the first half of the financial year
  - (b) the municipality's service delivery performance during the first half of the financial year, and the service delivery targets and performance indicators set in the service delivery and budget implementation plan
  - (c) the past year's annual report, and progress on resolving problems identified in the annual report
  - (d) the performance of every municipal entity under the sole or shared control of the municipality, taking into account reports in terms of section 88 of the MFMA from any such entities
- submit a report on such assessment to
  - (a) the mayor of the municipality
  - (b) the National Treasury
  - (c) the relevant provincial treasury.<sup>196</sup>

As part of the review process, the accounting officer must make recommendations as to whether an adjustments budget is necessary and recommend revised projections for revenue and expenditure to the extent that this may be necessary.<sup>197</sup>

The accounting officer of a municipality is obligated to inform the provincial treasury in writing of any failure by the council of the municipality to adopt or implement a budget-related policy or a supply chain management policy referred to in section 111 of the MFMA or any non-compliance by a political structure or office-bearer of the municipality with any such policy.<sup>198</sup> Apart from such obligations, the accounting officer of a municipality must also submit to the National Treasury, the provincial treasury, the department for local government in the province or the Auditor-General

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<sup>195</sup> Read the MFMA s 71(5)-(7).

<sup>196</sup> Refer to the MFMA s 72(1)(a)-(b). The statement referred to in s 71(1) for the sixth month of a financial year may be incorporated into the report referred to in subs (1)(b) of this section.

<sup>197</sup> The MFMA s 72(2)-(3).

<sup>198</sup> See the MFMA s 73(a)-(b).

such information, returns, documents, explanations and motivations as may be prescribed or as may be required. If the accounting officer of a municipality is unable to comply with any of the responsibilities in terms of this Act, he or she must report the inability promptly, together with reasons, to the mayor and the provincial treasury.<sup>199</sup>

In order to facilitate accountability, openness and public participation, the MFMA requires that various aspects of information should be placed on each municipal website. In this regard, the accounting officer of a municipality must place on the website referred to in section 21A of the Municipal Systems Act the following documents of the municipality:

- (a) the annual and adjustments budgets and all budget-related documents;
- (b) all budget-related policies;
- (c) the annual report;
- (d) all performance agreements required in terms of section 57(1)(b) of the Municipal Systems Act;
- (e) all service delivery agreements;
- (f) all long-term borrowing contracts;
- (g) all supply chain management contracts above a prescribed value;
- (h) an information statement containing a list of assets over a prescribed value that have been disposed of in terms of section 14(2) or (4) during the previous quarter;
- (i) contracts to which subsection (1) of section 33 apply, subject to subsection (3) of that section;
- (j) public-private partnership agreements referred to in section 120;
- (k) all quarterly reports tabled in the council in terms of section 52(d); and
- (l) any other documents that must be placed on the website in terms of this act or any other applicable legislation, or as may be prescribed.<sup>200</sup>

All accounting officers are afforded special protection under the MFMA. In this regard the Act determines that any action taken by a political structure or office-bearer of a municipality against the accounting officer of the municipality solely because of that

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<sup>199</sup> Read the MFMA s 74(1)-(2).

<sup>200</sup> See the MFMA s 75(1)(a)-(e). A document referred to in ss 75(1) must be placed on the website not later than five days after its tabling in the council or on the date on which it must be made public, whichever occurs first.

accounting officer's compliance with a provision of this Act is an unfair labour practice for the purposes of the Labour Relations Act.<sup>201</sup>

The MFMA further determines that the top management of a municipality's administration consists of:

- the accounting officer
- the chief financial officer
- all senior managers who are responsible for managing the respective votes of the municipality and to whom powers and duties for this purpose have been delegated and
- any other senior officials designated by the accounting officer.<sup>202</sup>

Each senior manager of a municipality and each official of a municipality exercising financial management responsibilities must take all reasonable steps within their respective areas of responsibility to ensure:

- (a) that the system of financial management and internal control established for the municipality is carried out diligently;
- (b) that the financial and other resources of the municipality are utilised effectively, efficiently, economically and transparently;
- (c) that any unauthorised, irregular or fruitless and wasteful expenditure and any other losses are prevented;
- (d) that all revenue due to the municipality is collected;
- (e) that the assets and liabilities of the municipality are managed effectively and that assets are safeguarded and maintained to the extent necessary;
- (f) that all information required by the accounting officer for compliance with the provisions of this act is timeously submitted to the accounting officer; and
- (g) that the provisions of this act, to the extent applicable to that senior manager or official, including any delegations, are complied with.<sup>203</sup>

The accounting officer of a municipality must, for the proper application of the MFMA in the municipality's administration, develop an appropriate system of delegation that

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<sup>201</sup> See the MFMA s 76 read together with Act 66 of 1995.

<sup>202</sup> The MFMA s 77(1)(a)-(d). The top management must assist the accounting officer in managing and co-ordinating the financial administration of the municipality. It should be remembered that the municipal manager is also the accounting officer of a municipality and thus part of top management.

<sup>203</sup> Note that a senior manager or such official must perform the functions referred to in s 78(1) subject to the directions of the accounting officer of the municipality. See also the MFMA s 78(1)-(2).

will both maximise administrative and operational efficiency and provide adequate checks and balances in the municipality's financial administration. In accordance with that system, such officer may further delegate to a member of the municipality's top management or any other official of the municipality

- any of the powers or duties assigned to an accounting officer in terms of the MFMA
- any powers or duties reasonably necessary to assist the accounting officer in complying with a duty which requires the accounting officer to take reasonable or appropriate steps to ensure the achievement of the aims of a specific provision of the MFMA.

An accounting officer must regularly review delegations issued and, if necessary, amend or withdraw any of those delegations.<sup>204</sup> A delegation in terms of subsection 79(1) of the MFMA:

- must be in writing
- is subject to such limitations and conditions as the accounting officer may impose in a specific case
- may either be to a specific individual or to the holder of a specific post in the municipality
- may, in the case of a delegation to a member of the municipality's top management, authorise that member to sub-delegate the delegated power or duty to an official or the holder of a specific post in that member's area of responsibility and
- does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.<sup>205</sup>

#### **(h) Aspects relating to municipal budget and treasury offices**

Under the MFMA every municipality must have a budget and treasury office. A budget and treasury office consists of a chief financial officer designated by the accounting officer of the municipality, officials of the municipality allocated by the ac-

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<sup>204</sup> Note that the accounting officer may not delegate to any political structure or political office-bearer of the municipality any of the powers or duties assigned to accounting officers in terms of the MFMA. Read also the MFMA s 79(1)-(2).

<sup>205</sup> See the MFMA s 79(3)(a)-(e). The accounting officer may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation in terms of this section, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

counting officer to the chief financial officer and any other persons contracted by the municipality for the work of the office.<sup>206</sup>

Within a treasury office, the chief financial officer of a municipality:

- is administratively in charge of the budget and treasury office
- must advise the accounting officer on the exercise of powers and duties assigned to the accounting officer in terms of the MFMA
- must assist the accounting officer in the administration of the municipality's bank accounts and in the preparation and implementation of the municipality's budget
- must advise senior managers and other senior officials in the exercise of powers and duties assigned to them in terms of section 78 or delegated to them in terms of section 79 of the MFMA and
- must perform such budgeting, accounting, analysis, financial reporting, cash management, debt management, supply chain management, financial management, review and other duties as may be delegated by the accounting officer to the chief financial officer.<sup>207</sup>

The chief financial officer of a municipality may sub-delegate any of the duties referred to in section 81(1)(b), (d) and (e) of the MFMA:

- to an official in the budget and treasury office
- to the holder of a specific post in that office or
- with the concurrence of the accounting officer to
  - (a) any other official of the municipality or
  - (b) any person contracted by the municipality for the work of the office.<sup>208</sup>

If the chief financial officer sub-delegates any duties to a person who is not an employee of the municipality, the chief financial officer must be satisfied that effective systems and procedures are in place to ensure control and accountability. A sub-delegation in terms of subsection (1):

- must be in writing
- is subject to such limitations or conditions as the chief financial officer may impose and

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<sup>206</sup> The MFMA s 80(1)-(2).

<sup>207</sup> See the MFMA s 81(1)(a)-(e). Note that the chief financial officer of a municipality is accountable to the accounting officer for the performance of the duties referred to in the Act s 81(1).

<sup>208</sup> The MFMA s 82(1)(a)-(c).



- does not divest the chief financial officer of the responsibility concerning the delegated duty.<sup>209</sup>

In order to fulfil the vast array of duties and responsibilities, the MFMA sets specific competency levels for financial officials. In this regard the accounting officer, senior managers, the chief financial officer and other financial officials of a municipality must meet the prescribed financial management competency levels. A municipality must provide resources or opportunities for the training of officials referred to above to meet the prescribed competency levels. Both the National Treasury or a provincial treasury may assist municipalities in the training of officials referred to in subsection 83(1) of the MFMA.<sup>210</sup>

### **(i) Aspects concerning municipal entities**

When considering the establishment of, or participation in, a municipal entity, a municipality must first

- determine precisely the function or service that such entity would perform on behalf of the municipality and
- make an assessment of the impact of the shifting of that function or service to the entity on the municipality's staff, assets and liabilities, including an assessment of:
  - (i) the number of staff of the municipality to be transferred to the entity;
  - (ii) the number of staff of the municipality that would become redundant because of the shifting of that function or service;
  - (iii) the cost to the municipality of any staff retrenchments or the retention of redundant staff;
  - (iv) any assets of the municipality to be transferred to the entity;
  - (v) any assets of the municipality that would become obsolete because of the shifting of that function or service;
  - (vi) any liabilities of the municipality to be ceded to the entity; and
  - (vii) any debt of the municipality attributed to that function or service which the municipality would retain.<sup>211</sup>

A municipality may establish or participate in a municipal entity only if:

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<sup>209</sup> Read the MFMA s 82(2)-(3). Note also that the chief financial officer may confirm, vary or revoke any decision taken in consequence of a sub-delegation, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

<sup>210</sup> See the MFMA s 83(1)-(3).

<sup>211</sup> The MFMA s 84(1)(a)-(b).

- (a) the municipal manager, at least 90 days before the meeting of the municipal council at which the proposed establishment of the entity, or the municipality's proposed participation in the entity, is to be approved –
- (i) has, in accordance with section 21A of the Municipal Systems Act:
    - (aa) made public an information statement setting out the municipality's plans for the municipal entity together with the assessment which the municipality must conduct in terms of subsection (1); and
    - (bb) invited the local community, organised labour and other interested persons to submit to the municipality comments or representations in respect of the matter; and
  - (ii) has solicited the views and recommendations of –
    - (aa) the National Treasury and the relevant provincial treasury;
    - (bb) the national and provincial departments responsible for local government; and
    - (cc) the MEC for local government in the province; and
- (b) the municipal council has taken into account –
- (i) the assessment referred to in subsection (1);
  - (ii) any comments or representations on the matter received from the local community, organised labour and other interested persons;
  - (iii) any written views and recommendations on the matter received from the National Treasury, the relevant provincial treasury, the national department responsible for local government or the MEC for local government in the province.<sup>212</sup>

A municipal entity must open and maintain at least one bank account in the name of the entity. All money received by a municipal entity must be paid into its bank account or accounts, and this must be done promptly and in accordance with any requirements that may be prescribed. A municipal entity may not open a bank account:

- abroad
- with an institution not registered as a bank in terms of the Banks Act<sup>213</sup>
- otherwise than in the name of the entity and

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<sup>212</sup> The MFMA s 84(2)(a)-(b). For the purposes of this section, “establish” includes the acquisition of an interest in a private company that would render that private company a municipal entity.

<sup>213</sup> 94 of 1990.

- without the approval of its board of directors.

Money may be withdrawn from a municipal entity's bank account only in accordance with requirements that may be prescribed. The accounting officer of a municipal entity:

- must administer all the entity's bank accounts
- is accountable to the board of directors of the entity for the entity's bank accounts and
- must enforce any requirements that may be prescribed.<sup>214</sup>

The accounting officer of a municipal entity must submit to the entity's parent municipality, in writing and within 90 days after the entity has opened a new bank account, the name of the bank where the account has been opened and the type and number of the account, and annually before the start of a financial year, the name of each bank where the entity holds a bank account and the type and number of each account. The accounting officer of the municipal entity's parent municipality, or if there is more than one parent municipality, any one of the accounting officers of those municipalities as may be agreed between them must, upon receipt of the information referred to above, submit that information to the Auditor-General, the National Treasury and the relevant provincial treasury, in writing.<sup>215</sup>

In respect of budgets, it is required that for each financial year the board of directors of a municipal entity must submit a proposed budget for the entity to its parent municipality not later than 150 days before the start of the entity's financial year or earlier if requested by the parent municipality. The parent municipality must consider the proposed budget of the entity and assess the entity's priorities and objectives. If the parent municipality makes any recommendations on the proposed budget, the board of directors of the entity must consider those recommendations and, if necessary, submit a revised budget to the parent municipality not later than 100 days before the start of the financial year. The mayor of the parent municipality must table the proposed budget of the municipal entity in the council when the annual budget of the municipality for the relevant year is tabled. The board of directors of a municipal entity must approve the budget of the municipal entity not later than 30 days before

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<sup>214</sup> See the MFMA s 85(1)-(5).

<sup>215</sup> Read the MFMA s 86(1)-(2).

the start of the financial year, taking into account any hearings or recommendations of the council of the parent municipality.<sup>216</sup>

The budget of a municipal entity must conform to the following requirements. It must:

- (a) be balanced;
- (b) be consistent with any service delivery agreement or other agreement between the entity and the entity's parent municipality;
- (c) be within any limits determined by the entity's parent municipality, including any limits on tariffs, revenue, expenditure and borrowing;
- (d) include a multi-year business plan for the entity that –
  - (i) sets key financial and non-financial performance objectives and measurement criteria as agreed with the parent municipality;
  - (ii) is consistent with the budget and integrated development plan of the entity's parent municipality;
  - (iii) is consistent with any service delivery agreement or other agreement between the entity and the entity's parent municipality; and
  - (iv) reflects actual and potential liabilities and commitments, including particulars of any proposed borrowing of money during the period to which the plan relates; and
- (e) otherwise comply with the requirements of section 17(1) and (2) of the MFMA to the extent that such requirements can reasonably be applied to the entity.<sup>217</sup>

With the approval of the mayor, the board of directors of a municipal entity may revise the budget of the municipal entity, but only for the following reasons:

- to adjust the revenue and expenditure estimates downwards if there is material under-collection of revenue during the current year
- to authorise expenditure of any additional allocations to the municipal entity from its parent municipality
- to authorise, within a prescribed framework, any unforeseeable and unavoidable expenditure approved by the mayor of the parent municipality
- to authorise any other expenditure within a prescribed framework.<sup>218</sup>

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<sup>216</sup> Refer to the MFMA s 87(1)-(4).

<sup>217</sup> See the MFMA s 87(5)(a)-(e).

Any projected allocation to a municipal entity from its parent municipality must be provided for in the annual budget of the parent municipality and, to the extent not so provided, the entity's budget must be adjusted. A municipal entity may incur expenditure only in accordance with its approved budget or an adjustments budget. The mayor must table the budget or adjusted budget and any adjustments budget of a municipal entity as approved by its board of directors, at the next council meeting of the municipality. A municipal entity's approved budget or adjusted budget must be made public in substantially the same way as the budget of a municipality must be made public. The accounting officer of a municipal entity must by no later than seven working days after the end of each month submit to the accounting officer of the parent municipality a statement in the prescribed format on the state of the entity's budget reflecting the following particulars for that month and for the financial year up to the end of that month:

- (a) actual revenue, per revenue source;
- (b) actual borrowings;
- (c) actual expenditure;
- (d) actual capital expenditure;
- (e) the amount of any allocations received;
- (f) actual expenditure on those allocations, excluding expenditure on allocations exempted by the annual Division of Revenue Act from compliance with this paragraph; and
- (g) when necessary, an explanation of –
  - (i) any material variances from the entity's projected revenue by source, and from the entity's expenditure projections;
  - (ii) any material variances from the service delivery agreement and the business plan; and
  - (iii) any remedial or corrective steps taken or to be taken to ensure that projected revenue and expenditure remain within the entity's approved budget.<sup>219</sup>

The statement mentioned above must include a projection of revenue and expenditure for the rest of the financial year and any revisions from initial projections.

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<sup>218</sup> The MFMA s 87(6)(a)-(d).

<sup>219</sup> See the MFMA s 87(7)-(11).

Amounts reflected in the statement must in each case be compared with the corresponding amounts budgeted for in the entity's approved budget. Finally, the statement to the accounting officer of the municipality must be in the format of a signed document and in electronic format.<sup>220</sup>

The accounting officer of a municipal entity must by 20 January of each year

- assess the performance of the entity during the first half of the financial year, taking into account the monthly statements referred to in section 87 of the MFMA for the first half of the financial year and the targets set in the service delivery, business plan or other agreement with the entity's parent municipality and the entity's annual report for the past year, and progress on resolving problems identified in the annual report
- submit a report on such assessment to
  - (a) the board of directors of the entity
  - (b) the parent municipality of the entity.<sup>221</sup>

The parent municipality of a municipal entity must determine the upper limits of the salary, allowances and other benefits of the chief executive officer and senior managers of the entity and monitor and ensure that the municipal entity reports to the council on all expenditure incurred by that municipal entity on directors and staff remuneration matters and in a manner that discloses such expenditure per type of expenditure. This should include:

- salaries and wages
- contributions for pensions and medical aid
- travel, motor car, accommodation, subsistence and other allowances
- housing benefits and allowances
- overtime payments
- loans and advances
- any other type of benefit or allowance related to directors and staff.<sup>222</sup>

A municipal entity may not transfer ownership as a result of a sale or other transaction or otherwise dispose of a capital asset needed to provide the minimum level of basic municipal services. Municipal entities may transfer ownership or otherwise

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<sup>220</sup> Read the MFMA s 87(12)-(14).

<sup>221</sup> See the MFMA s 88(1)-(2). A report referred to above must be made public.

<sup>222</sup> Read the MFMA s 89(a)-(b).

dispose of a capital asset other than an asset contemplated in subsection 90(1) of the MFMA, but only after the council of its parent municipality, in a meeting open to the public has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services and has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset. A decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services may not be reversed by the municipality or municipal entity after that asset has been sold, transferred or otherwise disposed of. Furthermore, a municipal council may delegate to the accounting officer of a municipal entity its power to make the determinations referred to in subsection 90(2)(a) and (b) in respect of movable capital assets of the entity below a value determined by the council. Any transfer of ownership of a capital asset in terms of subsection 90(2) or (4) of the MFMA must be fair, equitable, transparent and competitive and consistent with the supply chain management policy which the municipal entity must have and maintain in terms of section 111 of the MFMA.<sup>223</sup>

The financial year of a municipal entity must be the same as that of municipalities and the Auditor-General must audit and report on the accounts, financial statements and financial management of each municipal entity.<sup>224</sup> The chief executive officer of a municipal entity is the accounting officer of the entity. The accounting officer of a municipal entity has various fiduciary duties. He or she must:

- (a) exercise utmost care to ensure reasonable protection of the assets and records of the entity;
- (b) act with fidelity, honesty, integrity and in the best interest of the entity in managing the financial affairs of the entity;
- (c) disclose to the entity's parent municipality and the entity's board of directors all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the parent municipality or the board of directors; and

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<sup>223</sup> Note that s 90 does not apply to the transfer of a capital asset to a municipality or another municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework. See the MFMA s 90(1)-(6).

<sup>224</sup> Refer to the MFMA ss 91 and 92.



(d) seek, within the sphere of influence of that accounting officer, to prevent any prejudice to the financial interests of the parent municipality or the municipal entity.<sup>225</sup> The accounting officer may not act in a way that is inconsistent with the responsibilities assigned to accounting officers of municipal entities in terms of this act or use the position or privileges of, or confidential information obtained as accounting officer, for personal gain or to improperly benefit another person.<sup>226</sup>

The accounting officer of a municipal entity is responsible for managing the financial administration of the entity and must for this purpose take all reasonable steps to ensure:

- (a) that the resources of the entity are used effectively, efficiently, economically and transparently;
- (b) that full and proper records of the financial affairs of the entity are kept;
- (c) that the entity has and maintains effective, efficient and transparent systems-
  - (i) of financial and risk management and internal control; and
  - (ii) of internal audit complying with and operating in accordance with any prescribed norms and standards;
- (d) that irregular and fruitless and wasteful expenditure and other losses are prevented;
- (e) that expenditure is in accordance with the operational policies of the entity; and
- (f) that disciplinary or, when appropriate, criminal proceedings, are instituted against any official of the entity who has allegedly committed an act of financial misconduct or an offence in terms of chapter 15 of the MFMA.<sup>227</sup>

The accounting officer of a municipal entity is responsible for the management of the assets of the entity, including the safeguarding and maintenance of those assets and the liabilities of the entity. For the purposes of subsection 96(1) of the MFMA, the accounting officer must take all reasonable steps to ensure that the entity has and maintains a management, accounting and information system that accounts for proper assets and liabilities of the management systems of the municipal entity and

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<sup>225</sup> See the MFMA s 94(1)(a)-(d).

<sup>226</sup> The MFMA s 94(2)(a)-(b).

<sup>227</sup> Read the MFMA s 95(a)-(f).

a system of internal control of assets and liabilities, including an asset and liabilities register, as may be prescribed.<sup>228</sup> Furthermore, the accounting officer of a municipal entity must take all reasonable steps to ensure:

- (a) that the entity has and implements effective revenue collection systems to give effect to its budget;
- (b) that all revenue due to the entity is collected;
- (c) that any funds collected by the entity on behalf of a municipality-
  - (i) are transferred to that municipality strictly in accordance with the agreement between the entity the municipality; and
  - (ii) are not used for the purposes of the entity;
- (d) that the municipal entity has effective revenue collection systems consistent with those of the parent municipality;
- (e) that revenue due to the entity is calculated on a monthly basis;
- (f) that accounts for service charges are prepared on a monthly basis, or less often as may be prescribed where monthly accounts are uneconomical;
- (g) that all money received is promptly deposited in accordance with this act into the municipal entity's bank accounts;
- (h) that the municipal entity has and maintains a management, accounting and information system which:
  - (i) recognises revenue when it is earned;
  - (ii) accounts for debtors; and
  - (iii) accounts for receipts of revenue;
- (i) that the municipal entity has and maintains a system of internal control in respect of debtors and revenue, as may be prescribed; and
- (j) that all revenue received by the municipal entity, including revenue received by any collecting agent on its behalf, is reconciled at least on a weekly basis.<sup>229</sup>

Monthly reconciliation of revenue and accounts is also required. The accounting officer of a municipal entity must take all reasonable steps to ensure that all revenue received by the entity, including revenue received by any collecting agency on its

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<sup>228</sup> See the MFMA s 96(1)-(2).

<sup>229</sup> See the MFMA s 97(2)(a)-(j). The accounting officer must immediately inform the parent municipality of any payments due by an organ of state to the entity in respect of service charges, if such payments are regularly in arrears for periods of more than 30 days.

behalf, is reconciled on a monthly or more regular basis, and all accounts of the entity are reconciled each month.<sup>230</sup>

Each accounting officer of a municipal entity is responsible for the management of the expenditure of the entity. Such an officer must for the purpose of subsection 99(1) of the MFMA take all reasonable steps to ensure:

- (a) that the entity has and maintains an effective system of expenditure control including procedures for the approval, authorisation, withdrawal and payment of funds;
- (b) that all money owing by the entity is paid within 30 days of receiving the relevant invoice or statement unless prescribed otherwise for certain categories of expenditure;
- (c) that the entity has and maintains a management, accounting and information system which:
  - (i) recognises expenditure when it is incurred;
  - (ii) accounts for creditors of the entity; and
  - (iii) accounts for payments made by the entity;
- (d) that the entity has and maintains a system of internal control in respect of creditors and payments;
- (e) that payments by the entity are made –
  - (i) directly to the person to whom it is due unless agreed otherwise only for reasons as may be prescribed; and
  - (ii) either electronically or by way of non-transferable cheques, provided that cash payments and payments by way of cash cheques may be made for exceptional reasons only, and only up to a prescribed limit;
- (f) that the entity complies with its tax, duty, pension, medical aid, audit fees and other statutory commitments;
- (g) that the entity's available working capital is managed effectively and economically in terms of any prescribed cash management and investment framework; and
- (h) that the entity has and implements a supply chain management policy in accordance with section 111 of the MFMA in a way that is fair, equitable, trans

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<sup>230</sup> The MFMA s 98(a)-(b).

parent and cost-effective.<sup>231</sup>

The accounting officer of a municipal entity is also responsible for implementing the entity's budget, including taking effective and appropriate steps to ensure that

- the spending of funds is in accordance with the budget
- revenue and expenditure are properly monitored
- spending is reduced as necessary when revenue is anticipated to be less than projected in the budget.<sup>232</sup>

It is furthermore required that the accounting officer of a municipal entity must report, in writing, to the board of directors of the entity, at its next meeting, and to the accounting officer of the entity's parent municipality any financial problems of the entity, including:

(a) any impending or actual-

- (i) under collection of revenue due;
  - (ii) shortfalls in budgeted revenue;
  - (iii) overspending of the entity's budget;
  - (iv) delay in the entity's payments to any creditors; or
  - (v) overdraft in any bank account of the entity for a period exceeding 21 days;
- and

(b) any steps taken to rectify such financial problems.<sup>233</sup>

On discovery of any irregular expenditure or any fruitless and wasteful expenditure, the board of directors of a municipal entity must promptly report, in writing, to the mayor and municipal manager of the entity's parent municipality and the Auditor-General

- particulars of the expenditure
- any steps that have been taken
  - (a) to recover the expenditure
  - (b) to prevent a recurrence of the expenditure.

The board of directors of a municipal entity must promptly report to the South African Police Service any irregular expenditure that may constitute a criminal offence and

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<sup>231</sup> Read the MFMA s 99(2)(a)-(h).

<sup>232</sup> The MFMA s 100(a)-(c).

<sup>233</sup> The accounting officer of the municipality must table a report referred to in s 101(1) in the municipal council at its next meeting. See the MFMA s 101(1)-(2).

other losses suffered by the municipal entity which resulted from suspected criminal conduct.<sup>234</sup>

The accounting officer of a municipal entity must promptly report to the speaker of the council of the entity's parent municipality any interference by a councillor outside that councillor's assigned duties in the financial affairs of the municipal entity or the responsibilities of the board of directors of the municipal entity.<sup>235</sup> Except where otherwise provided in the MFMA, the accounting officer of a municipal entity is responsible for the submission by the entity of all reports, returns, notices and other information to the entity's parent municipality as may be required by the Act and must submit to the accounting officer of the entity's parent municipality, the National Treasury, the relevant provincial treasury, the department of local government in the province or the Auditor-General such information, returns, documents, explanations and motivations as may be prescribed or as may be required.<sup>236</sup>

Each official of a municipal entity exercising financial management responsibilities must take all reasonable steps within that official's area of responsibility to ensure that:

- (a) the system of financial management and internal control established for the entity is carried out diligently;
- (b) the financial and other resources of the entity are utilised effectively, efficiently, economically and transparently;
- (c) any irregular expenditure, fruitless and wasteful expenditure and other losses are prevented;
- (d) all revenue due to the entity is collected;
- (e) the provisions of this Act to the extent applicable to that official, including any delegations in terms of section 106 of the MFMA, are complied with; and
- (f) the assets and liabilities of the entity are managed effectively, and that assets are safeguarded and maintained to the extent necessary.<sup>237</sup>

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<sup>234</sup> The MFMA s 102(1)-(2).

<sup>235</sup> The MFMA s 103.

<sup>236</sup> If the accounting officer of a municipal entity is unable to comply with any of the responsibilities in terms of the MFMA, he or she must report the inability to the council of the entity's parent municipality promptly, together with reasons. See the MFMA s 104(1)-(2).

<sup>237</sup> An official of a municipal entity must perform the functions referred to above, subject to the directions of the accounting officer of the entity. Refer to the MFMA s 105(1)-(2).

In respect of the delegation of authority, it is provided that the accounting officer of a municipal entity may delegate to an official of that entity:

- any of the powers or duties assigned or delegated to the accounting officer in terms of the MFMA or
- any powers or duties reasonably necessary to assist the accounting officer in complying with a duty which requires the accounting officer to take reasonable or appropriate steps to ensure the achievement of the aims of a specific provision of the MFMA.

The accounting officer must also regularly review delegations issued and, if necessary, amend or withdraw any of those delegations. A delegation must be in writing, is subject to any limitations and conditions the accounting officer may impose, may be either to a specific individual or to the holder of a specific post in the municipal entity and does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.<sup>238</sup> The accounting officer, senior managers, any chief financial officer and all other financial officials of a municipal entity must meet the prescribed financial management competency levels.<sup>239</sup>

A municipal entity may borrow money, but only in accordance with the entity's multi-year business plan and the provisions of chapter 6 of the MFMA to the extent that those provisions can be applied to a municipal entity. In applying chapter 6 to a municipal entity, a reference in that chapter to a municipality, a municipal council or an accounting officer must be read as referring to a municipal entity, the board of directors of a municipal entity or the accounting officer of a municipal entity, respectively.<sup>240</sup> If a municipal entity experiences serious or persistent financial problems and the board of directors of the entity fails to act effectively, the parent municipality must either

- take appropriate steps in terms of its rights and powers over that entity, including its rights and powers in terms of any relevant service delivery or other agreement

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<sup>238</sup> See the MFMA s 106(1)-(2). Note that an accounting officer may confirm, vary or revoke any decision taken by an official in consequence of a delegation, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

<sup>239</sup> The MFMA s 107.

<sup>240</sup> See the MFMA s 108(1)-(2).

- impose a financial recovery plan, which must meet the same criteria set out in section 142 of the MFMA for a municipal financial recovery plan or
- liquidate and disestablish the entity.<sup>241</sup>

**(j) Issues relating to goods and services**

Each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this part. The supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least the following:

- (a) The range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;
- (b) when a municipality or municipal entity may or must use a particular type of process;
- (c) procedures and mechanisms for each type of process;
- (d) procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;
- (e) open and transparent pre-qualification processes for tenders or other bids;
- (f) competitive bidding processes in which only pre-qualified persons may participate;
- (g) bid documentation, advertising of and invitations for contracts;
- (h) procedures and mechanisms for:
  - (i) the opening, registering and recording of bids in the presence of interested persons;
  - (ii) the evaluation of bids to ensure best value for money;
  - (iii) negotiating the final terms of contracts; and
  - (iv) the approval of bids;
- (i) screening processes and security clearances for prospective contractors on tenders or other bids above a prescribed value;

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<sup>241</sup> Read the MFMA s 109(a)-(c).



- (j) compulsory disclosure of any conflicts of interests prospective contractors may have in specific tenders and the exclusion of such prospective contractors from those tenders or bids;
- (k) participation in the supply chain management system of persons who are not officials of the municipality or municipal entity, subject to section 117 of the MFMA;
- (l) the barring of persons from participating in tendering or other bidding processes, including persons:
  - (i) who were convicted for fraud or corruption during the past five years;
  - (ii) who wilfully neglected, reneged on or failed to comply with a government contract during the past five years; or
  - (iii) whose tax matters are not cleared by South African Revenue Service;
- (m) measures for:
  - (i) combating fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management; and
  - (ii) promoting ethics of officials and other role players involved in municipal supply chain management;
- (n) the invalidation of recommendations or decisions that were unlawfully or improperly made, taken or influenced, including recommendations or decisions that were made, taken or in any way influenced by –
  - (i) councillors in contravention of item 5 or 6 of the Code of Conduct for Councillors set out in Schedule 1 to the Municipal Systems Act; or
  - (ii) municipal officials in contravention of item 4 or 5 of the Code of Conduct for Municipal Staff Members set out in Schedule 2 to that act;
- (o) the procurement of goods and services by municipalities or municipal entities through contracts procured by other organs of state;
- (p) contract management and dispute settling procedures; and
- (q) the delegation of municipal supply chain management powers and duties, including to officials.<sup>242</sup>

With respect to unsolicited bids, a municipality or municipal entity is not obliged to consider an unsolicited bid received outside its normal bidding process. If a municipi-

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<sup>242</sup> See the MFMA ss 111-112. Note that the regulatory framework for municipal supply chain management must be fair, equitable, transparent, competitive and cost effective.

pality or municipal entity decides to consider an unsolicited bid received outside a normal bidding process, it may do so only in accordance with a prescribed framework. Such a framework must strictly regulate and limit the power of municipalities and municipal entities to approve unsolicited bids received outside their normal tendering or other bidding processes.<sup>243</sup>

In respect of the approval tenders, it is stated that if a tender other than the one recommended in the normal course of implementing the supply chain management policy of a municipality or municipal entity is approved, the accounting officer of the municipality or municipal entity must, in writing, notify the Auditor-General, the relevant provincial treasury and the National Treasury and, in the case of a municipal entity, also the parent municipality of the reasons for deviating from such recommendation.<sup>244</sup>

The accounting officer of a municipality or municipal entity must implement the supply chain management policy of the municipality or municipal entity and must take all reasonable steps to ensure that proper mechanisms and separation of duties in the supply chain management system are in place to minimise the likelihood of fraud, corruption, favouritism and unfair and irregular practices. No person may impede the accounting officer in fulfilling this responsibility.<sup>245</sup>

A contract or agreement procured through the supply chain management system of a municipality or municipal entity must

- be in writing
- stipulate the terms and conditions of the contract or agreement, which must include provisions providing for:
  - (a) the termination of the contract or agreement in the case of non- or under-performance
  - (b) dispute resolution mechanisms to settle disputes between the parties
  - (c) a periodic review of the contract or agreement once every three years in the case of a contract or agreement for longer than three years and
  - (d) any other matters that may be prescribed.

The accounting officer of a municipality or municipal entity must also:

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<sup>243</sup> Read the MFMA s 113(1)-(3).

<sup>244</sup> S 114(1) does not apply if a different tender was approved in order to rectify an irregularity. See the MFMA s 114(1)-(2).

<sup>245</sup> The MFMA s 115(1)-(2).

- take all reasonable steps to ensure that a contract or agreement procured through the supply chain management policy of the municipality or municipal entity is properly enforced
- monitor the performance of the contractor under the contract or agreement on a monthly basis
- establish capacity in the administration of the municipality or municipal entity:
  - (a) to assist the accounting officer in carrying out the above duties and
  - (b) to oversee the day-to-day management of the contract or agreement and
- report regularly to the council of the municipality or the board of directors of the entity, as may be appropriate, on the management of the contract or agreement and the performance of the contractor.<sup>246</sup>

A contract or agreement procured through the supply chain management policy of the municipality or municipal entity may be amended by the parties, but only after

- (a) the reasons for the proposed amendment have been tabled in the council of the municipality or, in the case of a municipal entity, in the council of its parent municipality; and
- (b) the local community:
  - (i) has been given reasonable notice of the intention to amend the contract or agreement; and
  - (ii) has been invited to submit representations to the municipality or municipal entity.<sup>247</sup>

According to the MFMA, no councillor of any municipality may be a member of a municipal bid committee or any other committee evaluating or approving tenders, quotations, contracts or other bids, nor attend any such meeting as an observer. No person may further interfere with the supply chain management system of a municipality or municipal entity or amend or tamper with any tenders, quotations, contracts or bids after their submission.<sup>248</sup>

The accounting officer and all other officials of a municipality or municipal entity involved in the implementation of the supply chain management policy of the municipality or municipal entity must meet the prescribed competency levels. A municipality

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<sup>246</sup> The MFMA s 116(2).

<sup>247</sup> See the MFMA s 116(1)-(3).

<sup>248</sup> Read the MFMA ss 117 and 118.

and a municipal entity must for the purposes of subsection 119(1) of the MFMA provide resources or opportunities for the training of officials referred to in that subsection to meet the prescribed competency levels. The National Treasury or a provincial treasury may assist municipalities and municipal entities in the training of officials.<sup>249</sup>

A municipality may enter into a public-private partnership agreement, but only if the municipality can demonstrate that the agreement will:

- provide value for money to the municipality
- be affordable for the municipality and
- transfer appropriate technical, operational and financial risk to the private party.

A public-private partnership agreement must comply with any prescribed regulatory framework for public-private partnerships. If the public-private partnership involves the provision of a municipal service, chapter 8 of the Municipal Systems Act must also be complied with. Before a public-private partnership is concluded, the municipality must conduct a feasibility study that:

- (a) explains the strategic and operational benefits of the public-private partnership for the municipality in terms of its objectives;
- (b) describes in specific terms:
  - (i) the nature of the private party's role in the public-private partnership;
  - (ii) the extent to which this role, both legally and by nature, can be performed by a private party; and
  - (iii) how the proposed agreement will:
    - (aa) provide value for money to the municipality;
    - (bb) be affordable for the municipality;
    - (cc) transfer appropriate technical, operational and financial risks to the private party; and
    - (dd) impact on the municipality's revenue flows and its current and future budgets;
- (c) takes into account all relevant information; and
- (d) explains the capacity of the municipality to effectively monitor, manage and enforce the agreement.<sup>250</sup>

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<sup>249</sup> Refer to the MFMA s 119(1)-(3).

<sup>250</sup> The MFMA s 120(1)-(4).

National government may assist municipalities in carrying out and assessing the feasibility studies referred to above. When a feasibility study has been completed, the accounting officer of the municipality must:

- (a) submit the report on the feasibility study together with all other relevant documents to the council for a decision, in principle, on whether the municipality should continue with the proposed public-private partnership;
- (b) at least 60 days prior to the meeting of the council at which the matter is to be considered, in accordance with section 21A of the Municipal Systems Act-
  - (i) make public particulars of the proposed public-private partnership, including the report on the feasibility study; and
  - (ii) invite the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed public-private partnership; and
- (c) solicit the views and recommendations of-
  - (i) the National Treasury;
  - (ii) the national department responsible for local government;
  - (iii) if the public-private partnership involves the provision of water, sanitation, electricity or any other service as may be prescribed, the responsible national department; and
  - (iv) any other national or provincial organ of state as may be prescribed.<sup>251</sup>

**(k) Requirements regarding financial reporting and auditing**

For each financial year, every municipality and every municipal entity must prepare an annual report in accordance with the MFMA. Within nine months after the end of a financial year the council of a municipality must deal with the annual report of the municipality and of any municipal entity under the municipality's sole or shared control in accordance with section 129 of the Act. The purpose of an annual report is:

- to provide a record of the activities of the municipality or municipal entity during the financial year to which the report relates
- to provide a report on performance against the budget of the municipality or municipal entity for that financial year and

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<sup>251</sup> Note that the MFMA ss 110-119 apply to the procurement of public-private partnership agreements. S 33 also applies if the agreement will have multi-year budgetary implications for the municipality within the meaning of that section. Read also s 110 with reference to the application of the MFMA ss 110-119.

- to promote accountability to the local community for the decisions made throughout the year by the municipality or municipal entity.<sup>252</sup>

The annual report of a municipality must include the following information:

- (a) the annual financial statements of the municipality,<sup>253</sup> and in addition, if section 122(2) of the MFMA applies, consolidated annual financial statements, as submitted to the Auditor-General for audit in terms of section 126(1) of the act;
- (b) the Auditor-General's audit report in terms of section 126(3) on those financial statements;
- (c) the annual performance report of the municipality prepared by the municipality in terms of section 46 of the Municipal Systems Act;
- (d) the Auditor-General's audit report in terms of section 45(b) of the Municipal Systems Act;
- (e) an assessment by the municipality's accounting officer of any arrears on municipal taxes and service charges;
- (f) an assessment by the municipality's accounting officer of the municipality's performance against the measurable performance objectives referred to in section 17(3)(b) of the MFMA for revenue collection from each revenue source and for each vote in the municipality's approved budget for the relevant financial year;
- (g) particulars of any corrective action taken or to be taken in response to issues raised in the audit reports referred to in paragraphs (b) and (d);
- (h) any explanations that may be necessary to clarify issues in connection with the financial statements;
- (i) any information as determined by the municipality;
- (j) any recommendations of the municipality's audit committee; and
- (k) any other information as may be prescribed.<sup>254</sup>

The annual report of a municipal entity must include:

- (a) the annual financial statements of the entity, as submitted to the Auditor-General for audit in terms of section 126(2);

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<sup>252</sup> Read the MFMA s 121(1)-(2).

<sup>253</sup> Such financial statements include statements consisting of at least (a) a statement of financial position, (b) a statement of financial performance, (c) a cash-flow statement, (d) any other statements that may be prescribed and (d) any notes to these statements. See the MFMA s 1.

<sup>254</sup> The MFMA s 121(3)(a)-(k).

- (b) the Auditor-General's audit report in terms of section 126(3) on those financial statements;
- (c) an assessment by the entity's accounting officer of any arrears on municipal taxes and service charges;
- (d) an assessment by the entity's accounting officer of the entity's performance against any measurable performance objectives set in terms the service delivery agreement or other agreement between the entity and its parent municipality;
- (e) particulars of any corrective action taken or to be taken in response to issues raised in the audit report referred to in paragraph (b);
- (f) any information as determined by the entity or its parent municipality;
- (g) any recommendations of the audit committee of the entity or of its parent municipality; and
- (h) any other information as may be prescribed.<sup>255</sup>

For each financial year, every municipality and every municipal entity must prepare annual financial statements which fairly present the state of affairs of the municipality or entity, its performance against its budget, its management of revenue, expenditure, assets and liabilities, its business activities, its financial results and its financial position as at the end of the financial year and disclose the information required in terms of sections 123, 124 and 125 of the MFMA. A municipality which has sole control of a municipal entity or which has effective control of a municipal entity which is a private company within the meaning of the Municipal Systems Act must, in addition to complying with subsection 122(1) of the MFMA, prepare consolidated annual financial statements incorporating the annual financial statements of the municipality and of such entity. Such consolidated annual financial statements must comply with any requirements as may be prescribed. Both annual financial statements and consolidated annual financial statements must be prepared in accordance with generally recognised accounting practice prescribed in terms of section 91(1)(b) of the Public Finance Management Act.<sup>256</sup>

The annual financial statements of a municipality must disclose information on

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<sup>255</sup> The MFMA s 121(4)(a)-(h).

<sup>256</sup> See the MFMA s 122(1)-(3). "Standards of generally recognised accounting practice" refers to an accounting practice complying with standards applicable to municipalities or municipal entities and issued in terms of the Public Finance Management Act ch 11.



- any allocations received by the municipality from
  - (a) an organ of state in the national or provincial sphere of government or
  - (b) a municipal entity or another municipality
- any allocations made by the municipality to
  - (a) a municipal entity or another municipality or
  - (b) any other organ of state
- how any allocations were spent, per vote, excluding allocations received by the municipality as its portion of the equitable share or where prescribed otherwise because of the nature of the allocation
- whether the municipality has complied with the conditions of
  - (a) any allocations made to the municipality in terms of section 214(1)(c) of the Constitution and
  - (b) any allocations made to the municipality other than by national organs of state
- the reasons for any non-compliance with the two conditions referred to directly above and
- whether funds destined for the municipality in terms of the annual Division of Revenue Act were delayed or withheld, and the reasons advanced to the municipality for such delay or withholding.

The annual financial statements of a municipal entity must also disclose information on:

- any allocations received by the entity from any municipality or other organ of state
- any allocations made by the entity to a municipality or other organ of state and
- any other information as may be prescribed.<sup>257</sup>

The notes to the annual financial statements of a municipality must include particulars of

- the salaries, allowances and benefits of political office-bearers and councillors of the municipality, whether financial or in kind, including a statement by the accounting officer whether or not those salaries, allowances and benefits are within the upper limits of the framework envisaged in section 219 of the Constitution
- any arrears owed by individual councillors to the municipality, or a municipal entity under its sole or shared control, for rates or services and which at any time during

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<sup>257</sup> Read the MFMA s 123(1)-(2).

the relevant financial year were outstanding for more than 90 days, including the names of those councillors and

- the salaries, allowances and benefits of the municipal manager, the chief financial officer, every senior manager and such categories of other officials as may be prescribed.

The notes to the annual financial statements of a municipal entity must include particulars of the salaries, allowances and benefits of

- the members of the board of directors of the entity and
- the chief executive officer of the entity, every senior manager and such categories of other officials as may be prescribed.<sup>258</sup>

The notes to the financial statements of a municipality must include:

- a list of all municipal entities under the sole or shared control of the municipality during the financial year and as at the last day of the financial year.
- the total amount of contributions to organised local government for the financial year, and the amount of any contributions outstanding as at the end of the financial year; and
- the total amounts paid in audit fees, taxes, levies, duties and pension and medical aid contributions, and whether any amounts were outstanding as at the end of the financial year.<sup>259</sup>

The notes to the annual financial statements of a municipality or municipal entity must disclose the following information:

- (a) In respect of each bank account held by the municipality or entity during the relevant financial year:
  - (i) the name of the bank where the account is or was held, and the type of account; and
  - (ii) year opening and year end balances in each of these bank accounts;
- (b) a summary of all investments of the municipality or entity as at the end of the financial year;<sup>260</sup>

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<sup>258</sup> See the MFMA s 124(1)-(2).

<sup>259</sup> The MFMA s 125(1).

<sup>260</sup> Investment in relation to funds of a municipality means (a) the placing on deposit of funds of a municipality with a financial institution or (b) the acquisition of assets with funds of a municipality not immediately required, with the primary aim of preserving those funds. See the MFMA s 1.

- (c) particulars of any contingent liabilities of the municipality or entity as at the end of the financial year;
- (d) particulars of:
- (i) any material losses and any material irregular or fruitless and wasteful expenditures, including in the case of a municipality, any material unauthorised expenditure, that occurred during the financial year, and whether these are recoverable;
  - (ii) any criminal or disciplinary steps taken as a result of such losses or such unauthorised, irregular or fruitless and wasteful expenditures; and
  - (iii) any material losses recovered or written off;
- (e) particulars of non-compliance with this act; and
- (f) any other matters that may be prescribed.<sup>261</sup>

It is further determined that the accounting officer of a municipality must prepare the annual financial statements of the municipality and, within two months after the end of the financial year to which those statements relate, submit the statements to the Auditor-General for auditing and in addition, in the case of a municipality referred to in section 122(2) of the MFMA, must prepare consolidated annual financial statements in terms of that section and submit the statements to the Auditor-General for auditing within three months after the end of the financial year to which those statements relate.<sup>262</sup>

It is the responsibility of the accounting officer of a municipal entity to prepare the annual financial statements of the entity and submit the statements to

- the parent municipality of the entity
- the Auditor-General

for auditing within two months after the end of the financial year to which those statements relate. The Auditor-General must audit those financial statements and submit an audit report on those statements to the accounting officer of the municipality or entity within three months of receipt of the statements. If the Auditor-General is unable to complete an audit within three months of receiving the financial statements from an accounting officer, the Auditor-General must promptly submit a report outlining the reasons for the delay to the relevant municipality or municipal entity and to

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<sup>261</sup> See the MFMA s 125(1)-(2).

<sup>262</sup> The MFMA s 126(1)(a)-(b).

the relevant provincial legislature and Parliament. Once the Auditor-General has submitted an audit report to the accounting officer, no person other than the Auditor-General may alter the audit report or the financial statements to which the audit report relates.<sup>263</sup>

According to the MFMA, within six months after the end of a financial year or on such earlier date as may be agreed between the entity and its parent municipality, the accounting officer of a municipal entity must submit the entity's annual report for that financial year to the municipal manager of the entity's parent municipality. Within seven months after the end of a financial year the mayor of a municipality must table in the municipal council the annual report of the municipality and of any municipal entity under the municipality's sole or shared control. If, for whatever reason, the mayor is unable to table in the council the annual report of the municipality or the annual report of any municipal entity under the municipality's sole or shared control within seven months after the end of the financial year to which the report relates, the mayor must promptly submit to the council a written explanation referred to in section 133(1)(a) of the MFMA, setting out the reasons for the delay, together with any components of the annual report listed in section 121(3) or (4) of the Act that are ready, and also submit to the council the outstanding annual report or the outstanding components of the annual report as soon as possible.<sup>264</sup>

The Auditor-General may submit the financial statements and audit report of a municipality directly to the municipal council, the National Treasury, the relevant provincial treasury, the MEC responsible for local government in the province and any prescribed organ of state, if the mayor fails to comply with subsection 127(2) or (3) of the MFMA or directly to the parent municipality, the National Treasury, the relevant provincial treasury, the MEC responsible for local government in the province and any prescribed organ of state, if the accounting officer of the entity fails to comply with subsection 127(1). In accordance with section 21A of the Municipal Systems Act, the accounting officer of the municipality must make public the annual report and invite the local community to submit representations in connection with the annual report immediately after an annual report is tabled in the council. He or she must also submit the annual report to the Auditor-General, the relevant provincial

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<sup>263</sup> Read the MFMA s 126(2)-(5).

<sup>264</sup> Refer to the MFMA s 127(1)-(3).

treasury and the provincial department responsible for local government in the province.<sup>265</sup>

It is the responsibility of the accounting officer of a parent municipality to monitor whether the accounting officer of any municipal entity under the sole or shared control of the municipality has complied with sections 121(1) and 126(2) of the MFMA, to establish the reasons for any non-compliance and to promptly report any non-compliance, together with the reasons for such non-compliance, to the council of the parent municipality, the relevant provincial treasury and the Auditor-General.<sup>266</sup>

The council of a municipality must consider the annual report of the municipality and any municipal entity under the municipality's sole or shared control, and by no later than two months from the date on which the annual report was tabled in the council in terms of section 127, adopt an oversight report containing the council's comments on the annual report, which must include a statement whether the council:

- has approved the annual report with or without reservations
- has rejected the annual report or
- has referred the annual report back for revision of those components that can be revised.

The accounting officer must also attend council and council committee meetings where the annual report is discussed, for the purpose of responding to questions concerning the report and submit copies of the minutes of those meetings to the Auditor-General, the relevant provincial treasury and the provincial department responsible for local government in the province.<sup>267</sup>

Furthermore and in accordance with section 21A of the Municipal Systems Act, the accounting officer must make public an oversight report referred to above within seven days of its adoption. The National Treasury may issue guidelines on the manner in which municipal councils should consider annual reports and conduct public hearings and the functioning and composition of any public accounts or oversight committees established by the council to assist it to consider an annual report. No

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<sup>265</sup> S 127(5), with the necessary modifications as the context may require, is also applicable if only components of the annual report are tabled in terms of s 127(3). See the MFMA s 127(4)-(6).

<sup>266</sup> Read the MFMA s 128(a)-(c).

<sup>267</sup> The MFMA s 129(1)-(2).

guidelines issued in terms of subsection 129(4) of the MFMA are binding on a municipal council unless adopted by the council.<sup>268</sup>

The meetings of a municipal council at which an annual report is to be discussed or at which decisions concerning an annual report are to be taken must be open to the public and any organs of state, and a reasonable time must be allowed for the discussion of any written submissions received from the local community or organs of state on the annual report and for members of the local community or any organs of state to address the council. Representatives of the Auditor-General are entitled to attend and to speak at any council meeting referred to above.<sup>269</sup>

All municipalities must address any issues raised by the Auditor-General in an audit report. The mayor of a municipality must ensure compliance by the municipality with this requirement. The MEC for local government in the province must also assess all annual financial statements of municipalities in the province, the audit reports on such statements and any responses of municipalities to such audit reports and determine whether municipalities have adequately addressed any issues raised by the Auditor-General in audit reports and within 60 days must report to the provincial legislature any omission by a municipality to address those issues adequately.<sup>270</sup> Various documents must also be submitted to provincial legislatures. Such documents include:

- the annual report of each municipality and each municipal entity in the province or, if only components of an annual report were tabled in terms of section 127(3) of the MFMA, those components and
- all oversight reports on those annual reports adopted in terms of section 129(1) of the MFMA.

The accounting officer of a municipality must submit the documents to the provincial legislature within seven days after the municipal council has adopted the relevant oversight report. The MEC for local government in a province must monitor whether municipalities in the province comply with these requirements. A provincial legisla-

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<sup>268</sup> Read the MFMA s 129(3)-(4). S 129 with the necessary modifications as the context may require, is also applicable if only components of the annual report were tabled in terms of the Act s 127(3).

<sup>269</sup> Again s 130, with the necessary modifications as the context may require, is also applicable if only components of the annual report were tabled in terms of s 127(3). See also the MFMA s 130(1)-(3).

<sup>270</sup> Read the MFMA s 131(1)-(2).

ture may in turn deal with the documents in accordance with its constitutional powers.<sup>271</sup>

If the accounting officer of a municipality or municipal entity fails to submit financial statements to the Auditor-General in accordance with section 126 (1) or (2) of the MFMA, or if the mayor fails to table the annual report of the municipality or a municipal entity in the council in accordance with section 127(2) of the Act, then the mayor must promptly table in the council a written explanation setting out the reasons for the failure. Furthermore, the Auditor-General, in the case of any failure to submit financial statements for auditing, must promptly

- inform the speaker of the council, the National Treasury and the MEC for local government and the MEC for finance in the province of such failure and
- issue a special report on the failure to the relevant provincial legislature.

The municipal council then

- must request the speaker or any other councillor to investigate the reasons for the failure and report to the council
- must take appropriate steps to ensure that the financial statements are submitted to the Auditor-General or that the annual report, including the financial statements and the audit report on those statements, is tabled in the council, as the case may be
- may order that disciplinary steps be taken against the accounting officer or other person responsible for the failure.<sup>272</sup>

The provincial executive may also intervene in the municipality in terms of section 139 of the Constitution. Even the National Treasury and also the provincial treasury may take appropriate steps against the municipality in terms of section 5 of the MFMA.

The Auditor-General must submit to Parliament and the provincial legislatures by no later than 31 October of each year the names of any municipalities or municipal entities which have failed to submit their financial statements to the Auditor-General in terms of section 126 of the MFMA and at quarterly intervals thereafter, the names

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<sup>271</sup> See the MFMA s 132(1)-(5). The National Treasury may issue guidelines on the manner in which provincial legislatures should consider the annual reports of municipalities. No guidelines issued in terms of this subsection are binding on a provincial legislature unless adopted by the legislature.

<sup>272</sup> See the MFMA s 133(1)(a)-(c).



of any municipalities or municipal entities whose financial statements are still outstanding at the end of each interval.<sup>273</sup> As part of the report referred to in section 48 of the Municipal Systems Act, it is also mandatory for the cabinet member responsible for local government to report annually to parliament on actions taken by MECs for local government to address issues raised by the Auditor-General in audit reports on financial statements of municipalities and municipal entities.<sup>274</sup>

### **(l) Resolution of financial problems**

The primary responsibility to avoid, identify and resolve financial problems in a municipality rests with the municipality itself. A municipality must meet its financial commitments. If a municipality encounters a serious financial problem or anticipates problems in meeting its financial commitments, it must immediately seek solutions to the problem, notify the MEC for local government in the province and the MEC for finance in the province and notify organised local government.<sup>275</sup> Apart from the municipality itself, if the MEC for local government in a province becomes aware that there is a serious financial problem in a municipality, the MEC must promptly

- consult the mayor of the municipality to determine the facts
- assess the seriousness of the situation and the municipality's response to the situation
- determine whether the situation justifies or requires an intervention in terms of section 139 of the Constitution.

If the financial problem has been caused by or has resulted in a failure by the municipality to comply with an executive obligation in terms of legislation or the Constitution, and the conditions for an intervention in terms of section 139(1) of the Constitution are met, the provincial executive must promptly decide whether or not to intervene in the municipality. If the provincial executive decides to intervene, section 137 of the MFMA applies. In cases where the municipality has failed to approve a budget or any revenue-raising measures necessary to give effect to the budget, as a result of which the conditions for an intervention in terms of section 139 (4) of the Constitution are met, the provincial executive must intervene in the municipality in accordance with section 26 of the MFMA. Finally, if the municipality, as a result of a

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<sup>273</sup> The MFMA s 133(2)(a)-(b).

<sup>274</sup> Read the MFMA s 134.

<sup>275</sup> See the MFMA s 135(1)-(3).

crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments or admits that it is unable to meet its obligations or financial commitments, as a result of which the conditions for an intervention in terms of section 139(5) of the Constitution are met, the provincial executive must intervene in the municipality in accordance with section 139 of the MFMA.<sup>276</sup>

If the conditions for a provincial intervention in a municipality in terms of section 139(1) of the Constitution are met and the provincial executive decides in terms of section 136(2) of the MFMA to intervene in the municipality, the provincial executive may take any appropriate steps referred to in section 139 (1) of the Constitution, including:

- (a) assessing the seriousness of the financial problem in the municipality;
- (b) seeking solutions to resolve the financial problem in a way that would be sustainable and would build the municipality's capacity to manage its own financial affairs;
- (c) determining whether the financial problem, singly or in combination with other problems, is sufficiently serious or sustained that the municipality would benefit from a financial recovery plan and, if so, requesting any suitably qualified person:
  - (i) to prepare an appropriate financial recovery plan for the municipality;
  - (ii) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and
  - (iii) to submit the recovery plan and any recommendations referred to in subparagraphs (i) and (ii) to the MEC for local government in the province within a period determined by the MEC; and
- (d) consulting the mayor of the municipality to obtain the municipality's cooperation in resolving the financial problem, and if applicable, implementing the financial recovery plan.<sup>277</sup>

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<sup>276</sup> See the MFMA s 136(1)-(4).

<sup>277</sup> Note that the MEC must submit any assessment in terms of ss 137(1)(a), any determination in terms of ss (1)(c) and a copy of any request in terms of ss (1)(c) to the municipality and the Cabinet member responsible for local government. This obligation does not apply to a provincial intervention which is unrelated to a financial problem in a municipality. See the MFMA s 137(1)-(3).

When determining for the purposes of section 137 of the MFMA the seriousness of a financial problem, all relevant facts must be considered, and the following factors, singly or in combination, may indicate a serious financial problem:

- (a) The municipality has failed to make payments as and when due;
- (b) the municipality has defaulted on financial obligations for financial reasons;
- (c) the actual current expenditure of the municipality has exceeded the sum of its actual current revenue plus available surpluses for at least two consecutive financial years;
- (d) the municipality had an operating deficit in excess of five per cent of revenue in the most recent financial year for which financial information is available;
- (e) the municipality is more than 60 days late in submitting its annual financial statements to the Auditor-General in accordance with section 126 of the MFMA;
- (f) the Auditor-General has withheld an opinion or issued a disclaimer due to inadequacies in the financial statements or records of the municipality, or has issued an opinion which identifies a serious financial problem in the municipality;
- (g) any of the above conditions exists in a municipal entity under the municipality's sole control, or in a municipal entity for whose debts the municipality may be responsible, and the municipality has failed to intervene effectively; or
- (h) any other material condition exists which indicates that the municipality, or a municipal entity under the municipality's sole control, is likely to be unable for financial reasons to meet its obligations.<sup>278</sup>

The MFMA also provides for mandatory intervention by provincial governments into the affairs of a municipality. If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the provincial executive must promptly:

- (a) request the Municipal Financial Recovery Service-
  - (i) to determine the reasons for the crisis in its financial affairs;
  - (ii) to assess the municipality's financial state;

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<sup>278</sup> Read the MFMA s 138(a)-(h).

- (iii) to prepare an appropriate recovery plan for the municipality;
- (iv) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and
- (v) to submit to the MEC for finance in the province:
  - (aa) the determination and assessment referred to in subparagraphs (i) and (ii) as a matter of urgency; and
  - (bb) the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) within a period, not to exceed 90 days, determined by the MEC for finance; and
- (b) consult the mayor of the municipality to obtain the municipality's co-operation in implementing the recovery plan, including the approval of a budget and legislative measures giving effect to the recovery plan.<sup>279</sup>

The MEC for finance in the province must submit a copy of any request in terms of subsection 139(1)(a) of the MFMA and of any determination and assessment received in terms of subsection 139(1)(a)(v)(aa) of the Act to the municipality, the Cabinet member responsible for local government and the Minister of Finance. A mandatory intervention supersedes any discretionary provincial intervention, provided that any financial recovery plan prepared for the discretionary intervention must continue until replaced by a recovery plan for the mandatory intervention.<sup>280</sup>

The new financial dispensation also provides certain criteria for determining the seriousness or persistent material breach of financial commitments. When determining whether the conditions for a mandatory intervention referred to in section 139 of the MFMA are met, all relevant facts must be considered. The following factors, singly or in combination, may indicate that a municipality is in serious material breach of its obligations to meet its financial commitments:

- (a) The municipality has failed to make any payment to a lender or investor as and when due;
- (b) the municipality has failed to meet a contractual obligation which provides security in terms of section 48 of the MFMA;
- (c) the municipality has failed to make any other payment as and when due, which individually or in the aggregate is more than an amount as may be pre-

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<sup>279</sup> See the MFMA s 139(1)(a)-(b).

<sup>280</sup> See the MFMA s 139(2)-(3).

scribed or, if none is prescribed, more than two per cent of the municipality's budgeted operating expenditure; or

(d) the municipality's failure to meet its financial commitments has impacted, or is likely to impact, on the availability or price of credit to other municipalities.<sup>281</sup>

Any recurring or continuous failure by a municipality to meet its financial commitments which substantially impairs the municipality's ability to procure goods, services or credit on usual commercial terms, may indicate that the municipality is in persistent material breach of its obligations to meet its financial commitments.<sup>282</sup>

In respect of the preparation of a financial recovery plan, the MFMA determines that any suitably qualified person may, on request by the provincial executive, prepare a financial recovery plan for a discretionary provincial intervention referred to in section 137 of the MFMA. Only the Municipal Financial Recovery Service may prepare a financial recovery plan for a mandatory provincial intervention referred to in section 139 of the MFMA. When preparing a financial recovery plan, the person referred to in subsection 141(1) of the Act or the Municipal Financial Recovery Service must:

(a) consult:

- (i) the relevant municipality;
- (ii) the municipality's principal suppliers and creditors, to the extent they can reasonably be contacted;
- (iii) the MEC for finance and the MEC for local government in the province; and
- (iv) organised labour;

(b) take into account:

- (i) any financial recovery plan that has previously been prepared for the municipality; and
- (ii) any proposed financial recovery plan, or proposals for a financial recovery plan, that may be advanced by the municipality or any creditor of the municipality; and

(c) at least 14 days before finalising the plan:

- (i) submit the plan for comment to:

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<sup>281</sup> The MFMA s 140(1)-(2).

<sup>282</sup> Note that s 140(2) and (3) do not apply to disputed obligations to which there are pending legal actions between the municipality and the creditor, provided that such actions are not instituted to avoid an intervention or obligations explicitly waived by the creditor.

- (aa) the municipality;
  - (bb) the MEC for finance and the MEC for local government in the province;
  - (cc) organised local government in the province;
  - (dd) organised labour; and
  - (ee) any supplier or creditor of the municipality, on request; and
- (ii) publish a notice in a newspaper of general circulation in the municipality:
- (aa) stating the place, including any website address, where copies of the plan will be available to the public free of charge or at a reasonable price; and
  - (bb) inviting the local community to submit written comments in respect of the plan.<sup>283</sup>

The person charged with preparing the financial recovery plan or the Municipal Financial Recovery Service must

- consider any comments received
- finalise the financial recovery plan and
- submit the final plan to the MEC for finance in the province for approval in terms of section 143 of the MFMA.<sup>284</sup>

A financial recovery plan must be aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, and such a plan, whether for a mandatory or discretionary intervention, must:

- identify the financial problems of the municipality
- be designed to place the municipality in a sound and sustainable financial condition as soon as possible
- state the principal strategic objectives of the plan, and ways and means for achieving those objectives
- set out a specific strategy for addressing the municipality's financial problems, including a strategy for reducing unnecessary expenditure and increasing the collection of revenue, as may be necessary
- identify the human and financial resources needed to assist in resolving financial problems, and where those resources are proposed to come from

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<sup>283</sup> The MFMA s 141(1)-(3).

<sup>284</sup> Read the MFMA s 141(4)(a)-(c).

- describe the anticipated time frame for financial recovery, and milestones to be achieved and
- identify what actions are necessary for the implementation of the plan, distinguishing between actions to be taken by the municipality and actions to be taken by other parties.<sup>285</sup>

The plan may also:

- provide for the liquidation of specific assets, excluding those needed for the provision of the minimum level of basic municipal services
- provide for debt restructuring or debt relief in accordance with the MFMA
- provide for special measures to prevent unauthorised, irregular and fruitless and wasteful expenditures and other losses and
- identify any actual and potential revenue sources.<sup>286</sup>

In addition, a financial recovery plan

- for a mandatory intervention must
  - (a) set spending limits and revenue targets
  - (b) provide budget parameters which bind the municipality for a specified period or until stated conditions have been met and
  - (c) identify specific revenue-raising measures that are necessary for financial recovery, including the rate at which any municipal tax and tariffs must be set to achieve financial recovery and
- for a discretionary intervention may suggest, for adoption by the municipality,
  - (a) spending limits and revenue targets
  - (b) budget parameters for a specified period or until stated conditions have been met and (c) specific revenue-raising measures that are necessary for financial recovery.<sup>287</sup>

On receipt of a financial recovery plan pursuant to a discretionary intervention, the MEC for local government in the province may approve the recovery plan with or without amendments, as the MEC considers appropriate. On receipt of a financial recovery plan pursuant to a mandatory intervention, the MEC for finance must verify that the process set out in section 141 of the MFMA has been followed and that the

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<sup>285</sup> See the MFMA s 142(1)(a)(i)-(vii).

<sup>286</sup> The MFMA s 142(1)(b)(i)-(iv).

<sup>287</sup> Read the MFMA s 142(2)(a)-(b).



criteria contained in section 142 of the Act are met and if so approve the recovery plan or if not direct what defects must be rectified. The responsible MEC must submit an approved recovery plan to the municipality, the Minister and the Cabinet member responsible for local government, the Auditor-General and organised local government in the province.<sup>288</sup>

The MEC for local government or the MEC for finance in the province may at any time, but subject to section 141(1) and (2) of the MFMA, request any suitably qualified person or the Municipal Financial Recovery Service to prepare an amended financial recovery plan in accordance with the directions of the MEC. Section 141 of the Act, read with such changes as the context may require, apply to the amendment of a financial recovery plan in terms of this section. No amendment of a recovery plan may impede the implementation of any court order made or agreement reached in terms of the plan before the amendment.<sup>289</sup>

If a financial recovery plan was prepared in a discretionary provincial intervention, the municipality must implement the approved recovery plan and report monthly to the MEC for local government in the province on the implementation of the plan, in such manner as the plan may determine. The financial recovery plan binds the municipality in the exercise of its executive authority, but only to the extent to resolve the financial problems of the municipality. If the municipality cannot or does not implement the approved recovery plan, the provincial executive may in terms of section 139(1) or (4) of the Constitution take further appropriate steps to ensure implementation of the plan.<sup>290</sup> If the recovery plan was prepared in a mandatory provincial intervention referred to in section 139 of the MFMA

- the municipality must implement the approved recovery plan
- all revenue, expenditure and budget decisions must be taken within the framework of, and subject to the limitations of, the recovery plan and
- the municipality must report monthly to the MEC for finance in the province on the implementation of the plan in such manner as the plan may determine.

The financial recovery plan binds the municipality in the exercise of both its legislative and executive authority, including the approval of a budget and legislative meas-

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<sup>288</sup> See the MFMA s 143(1)-(3).

<sup>289</sup> See the MFMA s 144(1)-(3).

<sup>290</sup> Note that the Municipal Structures Act ss 34(3) and (4) and 35 apply if a provincial executive dissolves a municipal council in terms of s (3). See also the MFMA s 145(1)-(4).

ures giving effect to the budget, but only to the extent necessary to achieve the objectives of the recovery plan. The provincial executive must in terms of section 139(5)(b) of the Constitution either

- dissolve the council of the municipality, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures necessary to give effect to the recovery plan within the time frames specified in the plan and
  - (a) appoint an administrator until a newly elected council has been declared elected and
  - (b) approve a temporary budget and revenue-raising measures, and other measures to give effect to the recovery plan and to provide for the continued functioning of the municipality.
- assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not take executive measures to give effect to the recovery plan.<sup>291</sup>

At least every three months the MEC for local government or the MEC for finance in a province must review any discretionary provincial intervention referred to in section 137 or any mandatory provincial intervention referred to in section 139 of the MFMA, including progress with resolving the municipality's financial problems and its financial recovery and the effectiveness of any financial recovery plan. He/she must also submit progress reports and a final report on the intervention to the municipality, the Minister, the Cabinet member responsible for local government, the provincial legislature and organised local government in the province.<sup>292</sup> A discretionary intervention must end if it is terminated in terms of section 139(2)(b) of the Constitution or when the municipality is able and willing to fulfil the executive obligation in terms of legislation or the Constitution that gave rise to the intervention and the financial problem that has been caused by or has caused the failure by the municipality to comply with that obligation is resolved.<sup>293</sup> A mandatory intervention must end when the crisis in the municipality's financial affairs has been resolved and the municipality's ability to

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<sup>291</sup> See the MFMA s 146(1)-(4). The Municipal Structures Act ss 34(3) and (4) and 35 apply when a provincial executive dissolves a municipal council in terms of the Constitution s 139(5)(b)(i).

<sup>292</sup> The MEC for local government or the MEC for finance may request the person who prepared the recovery plan, or the Municipal Financial Recovery Service, to assist the MEC in complying with s 147(1). See the MFMA s 147(1)-(2).

<sup>293</sup> The MFMA s 148(1)(a)-(b).

meet its obligations to provide basic services or its financial commitments is secured.<sup>294</sup>

When a provincial intervention ends, the MEC for local government or the MEC for finance in the province must notify:

- (a) the municipality;
- (b) the Minister, in the case of a mandatory intervention;
- (c) the Cabinet member responsible for local government;
- (d) any creditors having pending litigation against the municipality;
- (e) the provincial legislature; and
- (f) organised local government in the province.<sup>295</sup>

In respect of national interventions, the MFMA determines that if the conditions for a provincial intervention in a municipality in terms of section 139(4) or (5) of the Constitution are met and the provincial executive cannot or does not adequately exercise the powers or perform the functions referred to in that section, then the national executive must consult the relevant provincial executive and act or intervene in terms of that section in the stead of the provincial executive. If the national executive intervenes in a municipality in terms of subsection 150(1) of the MFMA, then:

- (a) the national executive assumes for the purposes of the intervention the functions and powers of a provincial executive in terms of this chapter;
- (b) the Minister assumes for the purposes of the intervention the functions and powers of an MEC for finance in terms of this chapter; and
- (c) a reference in this chapter:
  - (i) to a provincial executive must be read as a reference to the national executive;
  - (ii) to an MEC for finance must be read as a reference to the Minister; and
  - (iii) to a provincial intervention must be read as a reference to a national intervention.<sup>296</sup>

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<sup>294</sup> See the MFMA s 148(2)(a)-(b).

<sup>295</sup> Read the MFMA s 148(3)(a)-(f). Note that if a provincial executive intervenes in a municipality in terms of the Constitution s 139, the provincial executive and its representatives have access to such information, records and documents of the municipality or of any municipal entity under the sole or shared control of the municipality as may be necessary for the intervention, including for identifying or resolving the financial problem of the municipality. Refer also to the MFMA s 149.

<sup>296</sup> See the MFMA s 150(1)-(2).

Apart from the possibility of national interventions, the MFMA also protects the rights of third parties. The MFMA determines that, except as expressly provided for in the Act, nothing in the Act limits or affects:

- the rights of any creditor or other person having a claim against a municipality
- any person's access to ordinary legal process in accordance with the common law and relevant legislation or
- the rights of a municipality or municipal entity, or of the parties to a contract with a municipality or municipal entity, to alternative dispute resolution mechanisms, notice procedures and other remedies, processes or procedures.<sup>297</sup>

Furthermore, if a municipality is unable to meet its financial commitments, it may apply to the High Court for an order to stay, for a period not exceeding 90 days, all legal proceedings, including the execution of legal process, by persons claiming money from the municipality or a municipal entity under the sole control of the municipality. Notice of such an application must be given to:

- the MEC for local government and the MEC for finance in the province
- the Minister
- the Cabinet member responsible for local government
- organised local government and
- to the extent that they can reasonably be contacted, all persons to whom the municipality or the municipal entity owes an amount in excess of a prescribed amount, or if no amount is prescribed, in excess of R100 000.<sup>298</sup>

A municipality may also apply to the High Court for an order:

- to stay, for a period not exceeding 90 days at a time, all legal proceedings, including the execution of legal process, by persons claiming money from the municipality
- to suspend the municipality's financial obligations to creditors, or any portion of those obligations, until the municipality can meet those obligations or
- to terminate the municipality's financial obligations to creditors, and to settle claims in accordance with a distribution scheme referred to in section 155.<sup>299</sup>

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<sup>297</sup> The MFMA ss 151(a)-(c).

<sup>298</sup> Note that an application in terms of s 152(1) may for the purposes of the Constitution s 139(5) be regarded as an admission by the municipality that it is unable to meet its financial commitments. See the MFMA s 152(1)-(3).

<sup>299</sup> The MFMA s 153(1)(a)-(c).

The court may make an order in terms of subsection 153(1) of the MFMA only if

- the provincial executive has intervened in terms of section 139 and a financial recovery plan to restore the municipality to financial health has been approved for the municipality
- the financial recovery plan is likely to fail without the protection of such an order
- section 154 of the MFMA has been complied with, in the case of an application for an order referred to in subsection 153(1)(b) and
- section 155(1) has been complied with, in the case of an application for an order referred to in subsection 153(1)(c).<sup>300</sup>

Notice of an application in terms of subsection 153(1) must be given to

- all creditors to whom the municipality owes an amount in excess of a prescribed amount, or if no amount is prescribed, in excess of R100 000, insofar as those creditors can reasonably be contacted
- the MEC for finance and the MEC for local government in the province
- the Minister
- the Cabinet member responsible for local government and
- organised labour.<sup>301</sup>

Before issuing an order in terms of section 153(1)(b) of the MFMA for the suspension of a municipality's financial obligations to creditors, the court must be satisfied that

- the municipality cannot currently meet its financial obligations to creditors and
- all assets not reasonably necessary to sustain effective administration or to provide the minimum level of basic municipal services have been or are to be liquidated in accordance with the approved financial recovery plan for the benefit of meeting creditors' claims.<sup>302</sup>

Before issuing an order for the termination of a municipality's financial obligations to creditors in terms of section 153(1)(c) of the MFMA, the court must be satisfied that

- the municipality cannot meet its financial obligations to its creditors and is not likely to be able to do so in the foreseeable future
- all assets not reasonably necessary to sustain effective administration or to provide the minimum level of basic municipal services have been liquidated in accor-

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<sup>300</sup> The MFMA s 153(2)(a)-(d).

<sup>301</sup> Read the MFMA s 153(3)(a)-(e).

<sup>302</sup> Refer to the MFMA s 154(a)-(b).

dance with the approved financial recovery plan for the benefit of meeting creditors' claims and

- all employees have been discharged except those affordable in terms of reasonably projected revenues as set out in the approved financial recovery plan.

If the court issues an order referred to subsection 155(1) of the Act, the MEC for finance in the province must appoint a trustee to prepare a distribution scheme for the proportional settlement of all legitimate claims against the municipality as at the date of the order. Those claims must be settled against the amount realised from the liquidation of assets referred to in subsection 155(1)(b) of the Act.<sup>303</sup>

A distribution scheme must

- determine the amount available for distribution
- list all creditors with claims which qualify for the purposes of the distribution scheme, indicating which of those are secured and the manner in which they are secured and
- provide for the distribution of the amount available amongst creditors in the following order of preference:
  - (i) First preference must be given to the rights of secured creditors as to the assets with which they are secured in terms of section 48, provided the security in question was given in good faith and at least six months before the mandatory provincial intervention in terms of section 139 began;
  - (ii) thereafter the preferences provided for in the Insolvency Act,<sup>304</sup> read with the necessary changes as the context may require, must be applied; and
  - (iii) thereafter non-preferent claims must be settled in proportion to the amount of the different claims.<sup>305</sup>

The Minister, acting with the concurrence of the Cabinet member responsible for local government, must by regulation in terms of section 168 of the MFMA provide for an equitable process for the recognition of claims against a municipality for the purposes of sharing in a distribution scheme, provided that rejection of any claim does not prevent a creditor from proving the claim in a court and provide for public

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<sup>303</sup> See the MFMA s 155(1)-(2).

<sup>304</sup> 24 of 1936.

<sup>305</sup> Note that a distribution scheme may not be implemented unless approved by the court. See the MFMA s 155(3)-(4).

access to a distribution scheme.<sup>306</sup> The MFMA also establishes a so-called Municipal Financial Recovery Service (MFRS). According to section 157 of the Act a Municipal Financial Recovery Service is established as an institution within the public service. The Municipal Financial Recovery Service forms part of, and functions within, the National Treasury.<sup>307</sup> The Municipal Financial Recovery Service:

- must perform the duties and may exercise the powers assigned to the Service in terms of this Act
- may, on request by the MEC for finance in a province, prepare a financial recovery plan for a municipality or, with the approval of the Director-General of the National Treasury, instruct any suitably qualified person to prepare the plan in accordance with the directions of the Service
- may, on request by the MEC for finance in the province, monitor the implementation of any financial recovery plans that it has prepared, and may recommend such amendments and revisions as are appropriate
- may, on request by any municipality that is experiencing financial problems, and in co-ordination with any other provincial or national efforts, assist the municipality to identify the causes of, and potential solutions for, these financial problems
- may, with the approval of the Director-General of the National Treasury, obtain the services of any financial expert to perform any specific work for the Service; and
- may collect information on municipal financial problems and on best practices in resolving such problems.<sup>308</sup>

It is the responsibility of the Minister of Finance to appoint a person as the Head of the MFRS, subject to subsection 159(2) of the MFMA and legislation governing the public service. A person appointed as the Head of the Service holds office in the National Treasury on terms and conditions set out in a written employment contract, which must include terms and conditions setting performance standards.<sup>309</sup> The Head of the Service is responsible for the performance by the Service of its functions and the exercise of its powers and takes all decisions of the Service in the performance of its functions and the exercise of its powers, except those decisions of the

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<sup>306</sup> The MFMA s 156(a)-(b).

<sup>307</sup> Read the MFMA s 157(1)-(2).

<sup>308</sup> See the MFMA s 158(a)-(f).

<sup>309</sup> The MFMA s 159(1)-(2).



Service taken in consequence of a delegation in terms of section 162 of the Act.<sup>310</sup> The staff of the Municipal Financial Recovery Service consists of the Head of the Service, persons in the service of or contracted by the National Treasury and designated by the Director-General of the National Treasury for the work of the Service and persons seconded from an organ of state or organisation to the Service by agreement between the Director-General and that organ of state or organisation.<sup>311</sup> Finally, the Head of the Service may delegate any of the powers or duties of the Service to a member of the staff of the Service. Such a delegation must be in writing, is subject to the limitations or conditions which the Head of the Service may impose and does not divest the Head of the Service of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty. The Head of the Service may confirm, vary or revoke any decision taken in consequence of a delegation in terms of subsection 162(1), provided that no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.<sup>312</sup>

**(m) General treasury matters, financial misconduct and miscellaneous provisions**

No municipality or municipal entity may incur a liability or risk payable in a foreign currency. Subsection 163(1) does not apply to debt regulated in terms of section 47 of the MFMA or to the procurement of goods or services denominated in a foreign currency but the Rand value of which is determined at the time of procurement or, where this is not possible and risk is low, at the time of payment.<sup>313</sup> Furthermore, no municipality or municipal entity may:

- conduct any commercial activities
  - (a) otherwise than in the exercise of the powers and functions assigned to it in terms of the Constitution or national or provincial legislation
  - (b) outside the borders of the Republic
- provide a municipal service in an area outside its jurisdiction except with the approval of the council of the municipality having jurisdiction in that area or

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<sup>310</sup> Note that the Head of the Service performs the functions of office subject to the directions of the Director-General of the National Treasury. Read the MFMA s 160(1)-(2).

<sup>311</sup> Refer to the MFMA s 161(a)-(c).

<sup>312</sup> Read the MFMA s 162(1)-(3).

<sup>313</sup> The MFMA s 163(1)-(2).

- make loans to
  - (a) councillors or officials of the municipality;
  - (b) directors or officials of the entity or
  - (c) members of the public.<sup>314</sup>

Each municipality and each municipal entity must have an internal audit unit, subject to subsection 165(3) of the MFMA. The internal audit unit of a municipality or municipal entity must:

- prepare a risk-based audit plan and an internal audit program for each financial year
- advise the accounting officer and report to the audit committee on the implementation of the internal audit plan and matters relating to internal audit, internal controls, accounting procedures and practices, risk and risk management, performance management, loss control and compliance with the MFMA, the annual Division of Revenue Act and any other applicable legislation and
- perform such other duties as may be assigned to it by the accounting officer.<sup>315</sup>

Apart from an internal audit unit, each municipality and each municipal entity must have an audit committee, subject to subsection 166(6) of the MFMA. An audit committee is an independent advisory body which must:

- advise the municipal council, the political office-bearers, the accounting officer and the management staff of the municipality or the board of directors, the accounting officer and the management staff of the municipal entity on matters relating to:
  - (a) internal financial control and internal audits
  - (b) risk management
  - (c) accounting policies
  - (d) the adequacy, reliability and accuracy of financial reporting and information
  - (e) performance management
  - (f) effective governance

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<sup>314</sup> Note that if on the date on which this section takes effect a municipality or municipal entity is engaged in any activity prohibited by s 164(1)(a) or (b) and which is otherwise lawful, the municipality or entity must take all reasonable steps to rectify its position and to comply with that subsection as soon as may be reasonable in the circumstances. See the MFMA s 164(1)-(2).

<sup>315</sup> The internal audit function may be outsourced if the municipality or municipal entity requires assistance to develop its internal capacity and the council of the municipality or the board of directors of the entity has determined that this is feasible or cost-effective. Read the MFMA s 165(1)-(3).

- (g) compliance with this Act, the annual Division of Revenue Act and any other applicable legislation
- (h) performance evaluation and
- (i) any other issues referred to it by the municipality or municipal entity
- review the annual financial statements to provide the council of the municipality or, in the case of a municipal entity, the council of the parent municipality and the board of directors of the entity, with an authoritative and credible view of the financial position of the municipality or municipal entity, its efficiency and effectiveness and its overall level of compliance with this Act, the annual Division of Revenue Act and any other applicable legislation
- respond to the council on any issues raised by the Auditor-General in the audit report
- carry out such investigations into the financial affairs of the municipality or municipal entity as the council of the municipality, or in the case of a municipal entity, the council of the parent municipality or the board of directors of the entity may request and
- perform such other functions as may be prescribed.<sup>316</sup>

In performing its functions, an audit committee has access to the financial records and other relevant information of the municipality or municipal entity and must liaise with the internal audit unit of the municipality and the person designated by the Auditor-General to audit the financial statements of the municipality or municipal entity. An audit committee must also consist of at least three persons with appropriate experience, of whom the majority may not be in the employ of the municipality or municipal entity and meet as often as is required to perform its functions, but at least four times a year.<sup>317</sup>

A municipality may remunerate its political office-bearers and members of its political structures, but only within the framework of the Public Office-Bearers Act,<sup>318</sup>

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<sup>316</sup> The MFMA s 166(1)-(2).

<sup>317</sup> Note that the members of an audit committee must be appointed by the council of the municipality or, in the case of a municipal entity, by the council of the parent municipality. One of the members who is not in the employ of the municipality or municipal entity must be appointed as the chairperson of the committee. No councillor may be a member of an audit committee. Furthermore, a single audit committee may be established for a district municipality and the local municipalities within that district municipality and a municipality and municipal entities under its sole control. See the MFMA s 166(3)-(6).

<sup>318</sup> 20 of 1998.

setting the upper limits of the salaries, allowances and benefits for those political office-bearers and members and in accordance with section 219(4) of the Constitution. Any remuneration paid or given in cash or in kind to a person as a political office-bearer or as a member of a political structure of a municipality otherwise than in accordance with subsection 167(1) of the MFMA, including any bonus, bursary, loan, advance or other benefit, is an irregular expenditure, and the municipality must, and has the right to, recover that remuneration from the political office-bearer or member and may not write off any expenditure incurred by the municipality in paying or giving that remuneration.<sup>319</sup>

Relating to treasury regulations and guidelines, the MFMA determines that the Minister of Finance, acting with the concurrence of the Cabinet member responsible for local government, may make regulations or guidelines applicable to municipalities and municipal entities, regarding:

- (a) any matter that may be prescribed in terms of this act;
- (b) financial management and internal control;
- (c) a framework for regulating the exercise of municipal fiscal and tariff-fixing powers;
- (d) a framework regulating the financial commitments of municipalities and municipal entities in terms of public-private partnership agreements;
- (e) the establishment by municipalities of, and control over-
  - (i) municipal entities; and
  - (ii) business units contemplated in section 76(a)(ii) of the Municipal Systems Act;
- (f) the safe-guarding of the financial affairs of municipalities and of municipal entities when assets, liabilities or staff are transferred from or to a municipality or a municipal entity;
- (g) the alienation, letting or disposal of assets by municipalities or municipal entities;
- (h) internal audit units and their functioning;

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<sup>319</sup> See the MFMA s 167(1)-(3). The MEC for local government in a province must report to the provincial legislature any transgressions of ss 167(1) and any non-compliance with the MFMA ss 17(3)(k)(i) and (ii) and 124(1)(a).

- (i) the information to be disclosed when municipalities or municipal entities issue or incur debt and the manner in which such information must be disclosed, including by way of a prospectus or other document;
- (j) the circumstances under which further or specific disclosures are required after money has been borrowed by a municipality or municipal entity;
- (k) the circumstances under which documentation or information pertaining to municipal debt must be lodged or registered;
- (l) the establishment of a registry for the registration of documentation and information pertaining to municipal borrowing;
- (m) the settlement of claims against a municipality following an order of court in terms of section 153;
- (n) the information that must be placed on the websites of municipalities;
- (o) a framework regulating investments by municipal entities; and
- (p) any other matter that may facilitate the enforcement and administration of this act.<sup>320</sup>

A regulation or guideline may:

- differentiate between different
  - (a) kinds of municipality, which may, for the purposes of this section, be defined either in relation to categories, types or budgetary size of municipalities or in any other manner
  - (b) categories of municipal entity
  - (c) categories of accounting officer or
  - (d) categories of official or
- may be limited in its application to a particular:
  - (a) kind of municipality, which may, for the purposes of this section, be defined either in relation to a category, type or budgetary size of municipality or in any other manner
  - (b) category of municipal entity
  - (c) category of accounting officer or
  - (d) category of official.<sup>321</sup>

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<sup>320</sup> the MFMA s 168(1)(a)-(p).

<sup>321</sup> The MFMA s 168(2)(a)-(b). No guidelines issued in terms of ss (1) are binding on a municipality unless adopted by its council or a municipal entity unless adopted by the council of the entity's parent municipality. The MFMA s 168(3)(a)-(b).

Before regulations in terms of section 168 of the MFMA are promulgated, the Minister must consult organised local government on the substance of those regulations and publish the draft regulations in the *Government Gazette* for public comment. Regulations made must be submitted to Parliament for parliamentary scrutiny at least 30 days before their promulgation.<sup>322</sup> The National Treasury may on good grounds approve a departure from a treasury regulation or from any condition imposed in terms of the Act. Non-compliance with a regulation or with a condition imposed by the National Treasury in terms of the Act may, on good grounds shown, be condoned by the Treasury.<sup>323</sup>

The MFMA also provides for aspects regarding the financial misconduct by municipal officials and entities. The Act thus provides that the accounting officer of a municipality commits an Act of financial misconduct if that accounting officer deliberately or negligently:

- (a) contravenes a provision of the act;
- (b) fails to comply with a duty imposed by a provision of the act on the accounting officer of a municipality;
- (c) makes or permits, or instructs another official of the municipality to make, an unauthorised, irregular or fruitless and wasteful expenditure; or
- (d) provides incorrect or misleading information in any document which in terms of a requirement of the act must be (i) submitted to the mayor or the council of the municipality, or to the Auditor-General, the National Treasury or other organ of state; or (ii) made public.<sup>324</sup>

Furthermore, the chief financial officer of a municipality commits an act of financial misconduct if that officer deliberately or negligently:

- (a) fails to carry out a duty delegated to that officer in terms of section 79 or 81(1)(e) of the MFMA;
- (b) contravenes or fails to comply with a condition of any delegation of a power or duty in terms of section 79 or 81(1)(e) of the MFMA;
- (c) makes or permits, or instructs another official of the municipality to make, an unauthorised, irregular or fruitless and wasteful expenditure; or

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<sup>322</sup> Read the MFMA s 169(1)-(2).

<sup>323</sup> The MFMA s 170(1)-(2).

<sup>324</sup> See the MFMA s 171(1)(a)-(d).

(d) provides incorrect or misleading information to the accounting officer for the purposes of a document referred to in subsection 171(1)(d) of the MFMA.<sup>325</sup>

A senior manager or other official of a municipality exercising financial management responsibilities and to whom a power or duty was delegated in terms of section 79 of the MFMA commits an act of financial misconduct if that senior manager or official deliberately or negligently:

- fails to carry out the delegated duty
- contravenes or fails to comply with a condition of the delegated power or duty
- makes an unauthorised, irregular or fruitless and wasteful expenditure or
- provides incorrect or misleading information to the accounting officer for the purposes of a document referred to in subsection 171(1)(d) of the Act.

A municipality must investigate allegations of financial misconduct against the accounting officer, the chief financial officer, a senior manager or other official of the municipality unless those allegations are frivolous, vexatious, speculative or obviously unfounded. If the investigation warrants such a step, a municipality must institute disciplinary proceedings against the accounting officer, chief financial officer or that senior manager or other official in accordance with systems and procedures referred to in section 67 of the Municipal Systems Act, read with Schedule 2 of that Act.<sup>326</sup>

In respect of offences, it is determined that the accounting officer of a municipality is guilty of an offence if that accounting officer:

- deliberately or in a grossly negligent way:
  - (a) contravenes or fails to comply with a provision of section 61(2)(b), 62(1), 63(2)(a) or (c), 64(2)(a) or (d) or 65(2)(a), (b), (c), (d), (f) or (i) of the MFMA
  - (b) fails to take reasonable steps to implement the municipality's supply chain management policy referred to in section 111
  - (c) fails to take all reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure or
  - (d) fails to take all reasonable steps to prevent corruptive practices:
    - (i) in the management of the municipality's assets or receipt of money or

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<sup>325</sup> Read the MFMA s 171(2)(a)-(d).

<sup>326</sup> See the MFMA s 171(3)-(4). Similar requirements have been laid down regarding financial misconduct by officials of municipal entities. See the MFMA s 172(1)-(4).



(ii) in the implementation of the municipality's supply chain management policy

- deliberately misleads or withholds information from the Auditor-General on any bank accounts of the municipality or on money received or spent by the municipality or
- deliberately provides false or misleading information in any document which in terms of a requirement of this Act must be:
  - (a) submitted to the Auditor-General, the National Treasury or any other organ of state or
  - (b) made public.<sup>327</sup>

A senior manager or other official of a municipality or municipal entity exercising financial management responsibilities and to whom a power or duty was delegated in terms of section 79 or 106 of the MFMA is guilty of an offence if that senior manager or official deliberately or in a grossly negligent way contravenes or fails to comply with a condition of the delegation. A councillor of a municipality is guilty of an offence if that councillor:

- (a) deliberately influences or attempts to influence the accounting officer, the chief financial officer, a senior manager or any other official of the municipality to contravene a provision of the act or to refrain from complying with a requirement of the act;
- (b) interferes in the financial management responsibilities or functions assigned in terms of the act to the accounting officer of the municipality or delegated to the chief financial officer of the municipality in terms of the act;
- (c) interferes in the financial management responsibilities or functions assigned in terms of the act to the accounting officer of a municipal entity under the sole or shared control of the municipality; or
- (d) interferes in the management or operational activities of a municipal entity under the sole or shared control of the municipality.<sup>328</sup>

A councillor, an official of a municipality or municipal entity, a member of the board of directors of a municipal entity or any other person is guilty of an offence if that per

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<sup>327</sup> See the MFMA s 173(1)(a)-(c). Similar offences are created for the accounting officer of a municipal entity. See the MFMA s 173(2)(a)-(c).

<sup>328</sup> See the MFMA s 173(2).

son deliberately or in a grossly negligent way:

- impedes an accounting officer from complying with a provision of the Act
- gives incorrect, untrue or misleading information material to an investment decision relating to borrowing by a municipality or municipal entity
- makes a withdrawal in contravention of section 11 of the MFMA
- fails to comply with section 49 of the Act
- contravenes a provision of section 115(2), 118 or 126(5) of the Act or
- provides false or misleading information for the purposes of any document which must in terms of a requirement of the Act be:
  - (a) submitted to the council, mayor or accounting officer of a municipality or to the Auditor-General or the National Treasury or
  - (b) made public.<sup>329</sup>

A person is liable on conviction of an offence in terms of section 173 of the MFMA to imprisonment for a period not exceeding five years or to an appropriate fine determined in terms of applicable legislation.<sup>330</sup>

The Minister, acting with the concurrence of the Cabinet member responsible for local government, may make regulations prescribing:

- (a) the manner, form and circumstances in which allegations and disciplinary and criminal charges of financial misconduct must be reported to the National Treasury, the MEC for local government in the province and the Auditor-General, including (i) particulars of the alleged financial misconduct; and (ii) steps taken in connection with such financial misconduct;
- (b) matters relating to internal investigations by municipalities and municipal entities of allegations of financial misconduct;
- (c) the circumstances in which the National Treasury or the MEC for local government in the province may direct that disciplinary steps be taken or criminal charges be laid against a person for financial misconduct;
- (d) criteria for the composition and functioning of a disciplinary board which hears a charge of financial misconduct;

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<sup>329</sup> Refer to the MFMA s 173(3)-(5).

<sup>330</sup> The MFMA s 174.

- (e) the circumstances in which the findings of a disciplinary board and any sanctions imposed by the board must be reported to the National Treasury, the MEC for local government in the province and the Auditor-General; and
- (f) any other matters to the extent necessary to enforce the provisions of the act.

A regulation in terms of subsection (1) may:

- differentiate between different:
  - (a) kinds of municipality, which may, for the purposes of this section, be defined either in relation to categories, types or budgetary size of municipalities or in any other manner
  - (b) categories of municipal entity
  - (c) categories of accounting officer or
  - (d) categories of other official or
- be limited in its application to a particular:
  - (a) kind of municipality, which may, for the purposes of this section, be defined either in relation to a category, type or budgetary size of municipality or in any other manner
  - (b) category of municipal entity
  - (c) category of accounting officer or
  - (d) category of other official.<sup>331</sup>

No municipality or any of its political structures, political office-bearers or officials, no municipal entity or its board of directors or any of its directors or officials and no other organ of state or person exercising a power or performing a function in terms of the MFMA is liable in respect of any loss or damage resulting from the exercise of that power or the performance of that function in good faith. Without limiting liability in terms of the common law or other legislation, a municipality may recover from a political office-bearer or official of the municipality, and a municipal entity may recover from a director or official of the entity, any loss or damage suffered by it because of the deliberate or negligent unlawful actions of that political office-bearer or official when performing a function of office.<sup>332</sup> Various cases concerning the recovery of damages caused by municipal office bearers or political representatives have

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<sup>331</sup> Read the MFMA s 175(a)-(b).

<sup>332</sup> Refer to the MFMA s 176(1)-(2).

already been decided. On this point, the new legal system has significantly increased and enhanced the accountability of municipal politicians and officials.<sup>333</sup>

The Minister may by notice in the *Gazette*:

- delay the implementation of a provision of the Act for a transitional period not exceeding five years from the date when this section takes effect or
- where practicalities impede the strict application of a specific provision of the Act, exempt any municipality or municipal entity from, or in respect of, such provision for a period and on conditions determined in the notice. A delay or exemption in terms of subsection (1) may:
  - (a) apply to:
    - (i) municipalities generally; or
    - (ii) municipal entities generally; or
  - (b) be limited in its application to a particular-
    - (i) municipality;
    - (ii) kind of municipality, which may, for the purposes of this section, be defined either in relation to a category, type or budgetary size of municipality or in any other manner;
    - (iii) municipal entity; or
    - (iv) category of municipal entities.<sup>334</sup>

To facilitate the restructuring of the electricity industry as authorised by the Cabinet member responsible for such restructuring, the Minister, acting with the concurrence of the Cabinet member responsible for local government and after consultation with organised local government, may, by notice in the *Gazette*, exempt any municipality or municipal entity from any specific provision of the MFMA for a period of not more than four years and on conditions determined in the notice, provided that such ex-

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<sup>333</sup> See, eg, the case of *Moodley v Umzinto North Town Board* 1998 (2) SA 188 (SCA). In this case the town treasurer made certain investments on behalf of the Town Board. A claim for damages was instituted against him for the recovery of R300 000, which was lost as a result of an investment in a company which was subsequently liquidated. In his defence, the treasurer argued that his liability was exempted by virtue of the Local Authorities Ordinance 25 of 1974 (N) s 99, which stated that an official of a council, acting under the direction of the council and in the scope of his authority, could not be held liable for losses incurred. The court found that the treasurer exceeded his authority, however, and thus rendered himself vulnerable. He could not rescue himself by simply stating that he had acted within the course of his employment. See paras G-I at 194.

<sup>334</sup> The MFMA s 177(1)-(2).

emption may not be understood as obligating any municipality to transfer any staff, assets or liabilities.<sup>335</sup>

#### **(n) Transitional provisions and the amendment of other legislation**

The MFMA specifically determines that anything done in terms of a provision repealed by section 179(1) of the Act, which can be done in terms of a provision of the Act, must be regarded as having been done in terms of the Act. Within three months of the date on which this section takes effect, all municipalities must submit to the National Treasury a list of:

- all corporate entities in which the municipality or a municipal entity under its sole or shared control has an interest, specifying:
  - (a) the name and address of the corporate entity
  - (b) the purpose, extent and other particulars of the interest
  - (c) if such corporate entity is a municipal entity, whether the entity is under the sole or shared control of the municipality and
  - (d) such other information as may be required by the National Treasury
- all public-private partnerships to which the municipality is a party, with a value of more than one million Rands in total or per annum, specifying:
  - (a) the name and physical address of the private party participating in the public-private partnership
  - (b) the purpose and other particulars of the public-private partnership and
  - (c) such other information as may be required by the National Treasury and
- all other types of contract of the municipality for a period beyond 1 January 2007 and with a value of more than one million Rands in total or per annum.<sup>336</sup>

According to the new financial system for local government in South Africa and subject to the provisions of the supreme Constitution, parliament is confirmed as the highest legislature as far as public finance in general is concerned. In this regard, parliament will and has already enacted various pieces of legislation which affect the financial affairs of all three spheres of government. Some of these legislative enact-

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<sup>335</sup> See the MFMA s 177(3).

<sup>336</sup> See the MFMA s 178(1)-(2). Note that the legislation referred to in the second column of the schedule to the MFMA is hereby amended or repealed to the extent indicated in the third column of the schedule. Despite the repeal of s 10G of the LGTA 209 of 1993 by s 179(1) of this section, the provisions contained in ss (6), (6A) and (7) of s 10G remain in force until the legislation envisaged in the Constitution s 229(2)(b) is enacted. The repeal of the Municipal Accountants Act 21 of 1988 takes effect on a date determined by the Minister by notice in the *Gazette*.

ments were put in place before the new constitutional dispensation commenced, and others have recently been finalised by parliament.<sup>337</sup> Many Acts passed by parliament before the new Constitution took effect still affect the financial affairs of local governments today. In many instances, such Acts still compel municipalities to undertake specific functions, with or without financial assistance.<sup>338</sup>

### **18.3.2 Provincial control over municipal financial matters**

Before the former provincial councils were abolished in July 1986, all of them passed various ordinances which, *inter alia*, contained important provisions regarding the financial management and financial affairs of local authorities within their territories.<sup>339</sup> Many of these ordinances have not yet been repealed or replaced and, in accordance with the Constitution, they still remain in force and effect. It is submitted that all legislatures, especially parliament, should take cognisance of the laws that are still in place and should ensure that no duplication or lacunas in the law occur when new laws are promulgated.

### **18.3.3 Financial control by local authorities**

Apart from the control over municipal finance by the two higher spheres of government, each local government has also been afforded significant powers and duties concerning the management and control of its own financial affairs. Arguably the most important local control mechanism is the passing and implementation of municipal by-laws on financial matters. The existence and scope of such by-laws must be passed in each specific case and must be in compliance with the general legal requirements relevant and applicable to the lawful enactment of municipal legislative authority.

## **18.4 General comments on the principles relating to municipal fiscal management**

In view of all the activities and functions of municipalities, it is submitted that municipal fiscal management is a vast and complicated exercise. There are many aspects

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<sup>337</sup> Reference should again be made to the Constitution Sch 6 Item 2, which provides that all legislation which was in force when the new Constitution became effective will continue to be in force until amended or if such legislation is inconsistent with the Constitution.

<sup>338</sup> See, eg, the Health Act 63 of 1977, which compels local authorities to perform specific health services. Refer also to the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>339</sup> See Cloete (1997) 116. The most important ordinances are the Local Authorities Ordinance, 1974 (O 25 of 1974) applicable in the former province of Natal; Local Government Ordinance, 1939 (O 17 of 1939) applicable in the former Transvaal province; Local Government Ordinance, 1962 (O

*continued on next page*

in relation to financial management that must be fulfilled, and the overall financial system consists of a number of distinct and important activities. Some of such activities are summarised briefly below.

#### **18.4.1 *Municipal budgeting***

One of the most important financial activities of each municipal government is the annual preparation of a municipal budget. Before the commencement of the new local government dispensation, the preparation and handling of all municipal budgets were controlled by various provincial ordinances. Although such ordinances are still applicable in the new dispensation, they are subject to the new constitutional requirements and demands of new order national and provincial legislation. In the past a municipal budget had to be prepared for 12 months for all municipalities, but the budget procedures differed from one province to another because of the different legislative provisions. Every municipality should realise that its municipal budget is regarded as the foremost financial statement of the municipality, as it reflects the financial capacity and state of affairs within the municipality. It was general practice in the past for the municipal executive to prepare and submit a municipal budget. In practice the former town clerk in co-operation with the city treasurer prepared draft sections of the budget and then submitted them to a council-in-committee. Only once such a council-in-committee has considered the draft budget is it formally discussed and approved by the council. Such council meeting was usually open to the public.<sup>340</sup> The MFMA now determines and regulates the main aspects of a municipal budget.

#### **18.4.2 *Financial records, auditing and financial management***

It is imperative for all municipalities to keep proper records of all its financial affairs. This was also the position under the former provincial ordinances and is continued under the new local government system. Apart from the financial records, municipalities must also submit their accounts for proper auditing procedures. Previously, auditing had to be undertaken by the Auditor-General or by auditors that were registered in terms of the Public Accountants and Auditors Act.<sup>341</sup> More specific

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8 of 1962) applicable in the Free State and Municipal Ordinance, 1974 (O 29 of 1974), which applied in the Cape Province.

<sup>340</sup> See Cloete (1997) 118. The writer mentions that some of the former ordinances specifically prescribed that the budgets had to be open for inspection by the public. According to the Constitution s 215(1) all budgetary processes must promote transparency.

<sup>341</sup> 80 of 1991.



details regarding the auditing procedures, as well as the duties and responsibilities of auditors of municipal accounts, were contained in the relevant provincial ordinances. Under the new local government system, both parliament and the provincial legislatures are required to enact legislation to deal with municipal financial affairs.<sup>342</sup>

#### **18.4.3 *Municipal expenditure***

It is self evident that all municipalities have enormous expenses in order to fulfil their duties and perform their functions. All municipalities therefore use funds from their revenue accounts to purchase materials and equipment and to employ personnel.<sup>343</sup>

All former provincial ordinances had specific requirements regarding the expenditure of municipalities in each province, which laws must now be read together with both national and provincial laws dealing with such issues.

#### **18.4.4 *Loan funds, stocks and capital goods***

In order to perform their functions, many municipalities are forced to take up certain loans. Often municipalities do not have sufficient income to pay for extensive developments or infrastructure upgrading. In the past the powers of municipalities to negotiate and raise loans were strictly controlled in terms of the provisions of the relevant provincial ordinances.<sup>344</sup> Strict control over loans by municipalities is essential to safeguard the public and future residents of a particular municipal jurisdiction from negative loan-repayment obligations and unpopular service fees increases. Loans can also be negotiated as bank overdrafts or by issuing stocks or debentures. In order to prevent maladministration and ineffective financial control, municipalities are nowadays required to keep and prepare separate budgets for loan funds. This was also the position in the former local government dispensation.<sup>345</sup> It is also a common occurrence that many municipalities have extensive pieces of land at their disposal which land can be sold. One must, however, remember that such land is regarded as public property that belongs to the general public or residents of that municipal area and may thus be disposed of only by the municipality under strict control. In general

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<sup>342</sup> Again one should remember that the Constitution Sch 6 provides for the continuation of 'old order legislation' subject to amendment and consistency with the Constitution.

<sup>343</sup> In general about 30% of revenue is spent on materials and equipment, 35% on salaries and allowances and 25% on interest on loans.

<sup>344</sup> See, eg, the Provincial Ordinances read together with other national legislative enactments such as the Health Act 63 of 1984 and the Housing Act 4 of 1966.

<sup>345</sup> See, eg, the Transvaal Municipal Consolidated Loans Fund Ordinance, O 9 of 1952.

municipalities have the authority to buy, sell or even expropriate land should such expropriation be essential in rendering a municipal/public service.

#### **18.4.5 Municipal credit control and debt collection**

It is of obvious importance, especially for the long-term financial viability of all municipalities, to collect revenues due to them effectively. Such effective collection programmes presupposes that appropriate credit control mechanisms must be established. As a first step, all municipalities must be able to measure the number of services that they must render and bill their consumers accordingly. It is essential that consumers receive regular and accurate bills for the services rendered to them in a format which is easy and clear to understand. Municipalities must also establish mechanisms to enable poor households to apply and qualify for rebates on service charges. Effective measures should be in place, however, to deal with those households or consumers who can afford to pay for services but neglect to do so timeously. It is of fundamental importance that municipalities retain the authority to discontinue certain services to consumers who do not fulfil their responsibilities to their relevant municipalities. Strict credit control measures are thus essential for municipalities to maintain effective and equitable financial management practices. It is this writer's submission that the new legal order adequately addresses such requirements.

Under the new local government legal system, various legislative provisions have been enacted in order to ensure effective credit control and debt collection measures. According to the Local Government: Municipal Systems Act,<sup>346</sup> various requirements have been laid down to enhance effective credit control and municipal debt collection. The measures are briefly discussed below.

##### **18.4.5.1 Customer care and management**

Municipalities are obligated within their financial and administrative capacities and in relation to the levying of rates and other taxes and the charging of fees for municipal services to establish, provide and ensure specific aspects. These aspects are:<sup>347</sup>

- (a) establish a sound customer management system that aims to create a positive and reciprocal relationship between persons liable for these payments and the municipality, and where applicable, a service provider;

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<sup>346</sup> 32 of 2000.

<sup>347</sup> See the Systems Act s 95(a)-(i).

- (b) establish mechanisms for users of services and ratepayers to give feedback to the municipality or other service provider regarding the quality of the services and the performance of the service provider;
- (c) take reasonable steps to ensure that users of services are informed of the costs involved in service provision, the reasons for the payment of service fees, and the manner in which monies raised from the service are utilised;
- (d) where the consumption of services has to be measured, take reasonable steps to ensure that the consumption by individual users of services is measured through accurate and verifiable metering systems;
- (e) ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due;
- (f) provide accessible mechanisms for those persons to query or verify accounts and metered consumption, and appeal procedures which allow such persons to receive prompt redress for inaccurate accounts;
- (g) provide accessible mechanisms for dealing with complaints from such persons, together with prompt replies and corrective action by the municipality;
- (h) provide mechanisms to monitor the response time and efficiency in complying with paragraph (g); and
- (i) provide accessible pay points and other mechanisms for settling accounts or for making pre-payments for services.

It is clear from these requirements that the legislator intended that all municipalities create a financial system that is directed at effective and sufficient service provision but which also provides for customer care and public involvement in respect of municipal rates, taxes and service charges.

#### **18.4.5.2 Debt collection and credit control policy**

Without a system in place which can ensure effective debt collection, all municipalities will encounter financial restraints in varying degrees. In light of the fact that municipal income is dependent largely on regular and up-to-date payment for services rendered, every municipality must provide and enforce proper debt collection procedures. According to the new legislative framework, all municipalities must collect all money that is due and payable to them. This obligation is subject to the provisions of applicable legislation. Furthermore, all municipalities, for the purpose of debt collection, must adopt, maintain and implement a credit-control and debt-collection policy which is consistent with their rates and tariffs policies and which complies with the

provisions of the Municipal Systems Act.<sup>348</sup> There is thus a clear and direct responsibility on municipalities to collect debt and to do so in a clear and informative manner. It is further also provided that the contents of a credit control and debt collection policy must provide for various issues.<sup>349</sup> The policy must include at least the following:

- (a) credit control procedures and mechanisms;
- (b) debt collection procedures and mechanisms;
- (c) provision for indigent debtors that is consistent with its rates and tariff policies and any national policy on indigents;
- (d) realistic targets consistent with-
  - (i) general recognised accounting practices and collection ratios; and
  - (ii) the estimates of income set in the budget less an acceptable provision for bad debts;
- (e) interest on arrears, where appropriate;
- (f) extensions of time for payment of accounts;
- (g) termination of services or the restriction of the provision of services when payments are in arrears;
- (h) matters relating to unauthorised consumption of services, theft and damages; and
- (i) any other matters that may be prescribed by regulation in terms of section 104 of the Systems Act.

Apart from the minimum requirements mentioned above, it is important to note that the policy may differentiate between different categories of ratepayer, user of services, debtor, tax, service, service standard and other matter, as long as the differentiation does not amount to unfair discrimination. It seems that the intention is to give municipalities a broad discretion to differentiate between different municipal debtors. In this respect, emphasis should again be placed on the provisions of the Constitution, which in section 9 of the Bill of Rights outlaws unfair discrimination. Where municipalities thus differentiate between municipal debtors, such differentiation must

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<sup>348</sup> See the Systems Act s 96(a)-(b).

<sup>349</sup> Refer to the Systems Act s 97.

be lawful under the Constitution and may not amount to unfair discrimination.<sup>350</sup> To ensure the effective application and enforcement of a municipal credit control and debt collection policy, municipalities are obligated to adopt by-laws to give effect to such policies.<sup>351</sup> Again provision is made that such by-laws may differentiate between categories of municipal debtor, as long as such differentiation does not amount to unfair discrimination. It is submitted that an evaluation of a policy, whether it amounts to unfair discrimination or not, requires an objective assessment of the relevant circumstances of each case.<sup>352</sup>

### 18.4.5.3 Supervisory and implementing authority

According to the new legislative framework, specific provision is made for the supervisory and implementing authority of a municipality's credit control and debt collection policy and by-laws. The Systems Act specifically determines that a municipality's executive committee or executive mayor, or if there is no executive committee or executive mayor, then the municipal council itself or a committee appointed by the council, is designated as the supervisory authority and must oversee and monitor the implementation and enforcement of the municipality's credit control and debt collec-

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<sup>350</sup> See the Systems Act s 97(2), read together with the Constitution s 9. Many precedents have also been established in dealing with aspects concerning whether or not particular differentiation practices amounted to unconstitutional conduct.

<sup>351</sup> See the Systems Act s 98(1) and (2).

<sup>352</sup> Debt collection has always been a contentious issue and has often been the focus of legal disputes. Various cases concerning issues of municipal debt collection were reported in recent years. In *Cape Town Transitional Metropolitan Substructure v ILCO Homes Ltd* 1996 (3) SA 492 (C) the court was faced with legal proceedings in terms of the Municipal Ordinance 20 of 1974 (C) s 93(1) for the recovery of rates. The section required authorisation by the Administrator or Premier of the province to institute legal proceedings after the expiration of a period of 12 months from the date upon which the rates became due and payable. It was held that such authorisation could be given before or after the expiration date. Authorisation could further be given after the institution of legal proceedings and could thus be ratified. In *Midrand/Rabie Ridge/Ivory Park Metro Substructure v Lanmer (Pty) Ltd* 2001 (2) SA 516 (T) the court was faced with the issue concerning the recovery of interest on outstanding rates. With reference to debt due to a local authority, the Local Government Ordinance 17 of 1939 (T) provided that a local authority could recover interest at a rate not more than the rate determined by the Local Authorities Loans Fund Board in terms of the Local Authorities Loans Fund Act 67 of 1984 s 11(2)(b). The board determined such maximum interest to be equal to the prime rate charged by the commercial banking industry at the time. The court concluded that such a determination of the interest rate was not vague and required only an investigation into the prime rate applicable at the time. See also *Eastern Metropolitan Substructure v Peter Klein Investments* 2001 (4) SA 661 (W). The case concerned the Local Government Ordinance 17 of 1939 (T) s 49, which permitted the recovery of moneys due for sanitary services from both the owner and occupier jointly and severally of the applicable premises. Refer also to *De Beer NO v North-Central Local Council ETC* 2002 (1) SA 429 (CC). The case concerned the Durban Extended Powers Consolidated Ordinance 18 of 1976 (N) s 105. According to the ordinance, a municipal council had to send out three notices to a delinquent ratepayer before it could institute court proceedings against him/her. The court confirmed *inter alia* that municipal money had to be raised as

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tion policy and related by-laws. The designated supervisory authority is also obligated to oversee and monitor the performance of the municipal manager in implementing the policy and applicable by-laws.<sup>353</sup> The supervisory authority must also, when necessary, evaluate or review the policy and by-laws or the implementation thereof in order to improve the efficiency of its credit-control and debt-collection mechanisms, processes and procedures. Regular reports to the municipal council in respect of the policy are also required.<sup>354</sup> In contrast with the supervisory authority, it is required that the municipal manager or particular service provider, if applicable, must implement and enforce the municipality's credit-control and debt-collection policy and by-laws; must establish effective administrative mechanisms, processes and procedures to collect money that is due and payable to the municipality and must also report to the supervisory authority at such intervals as may be determined by the municipal council.<sup>355</sup>

#### **18.4.5.4 Additional powers of municipalities in respect of their credit control and debt collection procedures**

The Systems Act states that at all reasonable hours the occupier of a premises in a municipality must give an authorised representative of that municipality or of a service provider access to the premises in order to read, inspect, install or repair any meter or service connection for the reticulation of a service or to disconnect, stop or restrict the provision of any service.<sup>356</sup> Municipalities are furthermore allowed to consolidate any separate accounts of persons liable for payments to the municipality, to credit a payment by a person against any account of that person and to implement any of the debt-collection and credit-control measures in relation to any arrears on any of the accounts of such a person.<sup>357</sup> If a person that is liable to the municipality for the payment of rates, taxes or fees consents to it, a municipality may enter into an agreement with that person's employer to deduct from his or her salary or wages:

- any outstanding amounts due to the municipality or

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speedily as possible because it was used by the council to fulfil its constitutional obligations in relation to the delivery of services.

<sup>353</sup> See the Systems Act s 99(a)(i)-(ii).

<sup>354</sup> Refer to the Systems Act s 99(b)-(c).

<sup>355</sup> See the Systems Act s 100(a)-(c).

<sup>356</sup> See the Systems Act s 101.

<sup>357</sup> See the Systems Act s 102(1)(a)-(c). It should be noted that the provisions of the subsection do not apply to cases where there is a dispute between the municipality and the debtor concerning any specific amount claimed by the municipality from that person. S 102(2).

- such monthly amounts/instalments as may be agreed between the parties.

The effect of such an agreement can be regarded as a so-called “emolument attachment order”.<sup>358</sup> Municipalities may also provide for special incentives for employers to enter into such agreements and for employees to consent to such agreement.<sup>359</sup> It is submitted that such incentives could contribute significantly to the collecting of bad debt, which so many municipalities are facing in South Africa. The aim of such incentives is to collect *some* bad debt rather than nothing at all.

#### **18.4.5.5 Regulations and guidelines in respect of credit control and debt collection provisions**

In respect of credit control and debt collection measures, the minister responsible for local government may make regulations or issue guidelines to provide for or to regulate various matters. The matters are the following:<sup>360</sup>

- (a) the particulars that must be contained in the municipal manager’s report in terms of section 100(c);
- (b) the identification of municipal services provided by the municipality or other service providers to users of services where the use of the service by the user can reasonably be determined, measured or estimated per quantity used or per frequency of such use;
- (c) the determination, measurement or estimate of the use by each user of each service so identified;
- (d) user agreements, and deposits and bank guarantees for the provision of municipal services;
- (e) the rendering of accounts to ratepayers and users and the particulars to be contained in the accounts;
- (f) the action that may be taken by municipalities and service providers to secure payment of accounts that are in arrear, including –
  - (i) the termination of municipal services or the restriction of the provision of services;
  - (ii) the seizure of property;
  - (iii) the attachment of rent payable on a property; and

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<sup>358</sup> See the Systems Act s 103(a)(i)-(iii).

<sup>359</sup> Refer to the Systems Act s 103(b)(i)-(iii).

<sup>360</sup> Read the Systems Act s 104(1)(a)-(n).



- (iv) the extension of liability to a director, a trustee or a member if the debtor is a company, a trust or a close corporation;
- (g) appeals against the accuracy of accounts for municipal taxes or services;
- (h) the manner in and time within which such appeals must be lodged and determined and the consequences of successful and unsuccessful appeals;
- (i) extensions for the payment of arrears and interest payable in respect of such arrears;
- (j) service connections and disconnections, and the resumption of discontinued services;
- (k) the combating of unauthorised consumption, connection and reconnection and theft of municipal services;
- (l) the development and implementation of an indigent policy;
- (m) the tampering with or theft of meters, service supply equipment and reticulation network and any other fraudulent activity in connection with the provision of municipal services; and
- (n) any other matter that may facilitate –
  - (i) effective and efficient systems of credit control and debt collection by municipalities; or
  - (ii) the application of this chapter.

When the minister makes regulations or issues guidelines, he or she must take into account the capacity of municipalities to comply with such regulations or guidelines and must differentiate between different kinds of municipality according to their respective capacities.<sup>361</sup>

### **18.5 Important revenue sources of local governments**

The success of the new local government system is dependent largely on the availability of resources and, more so, financial resources. Without appropriate financial capacity, most municipalities will not be able to provide or sustain essential services to their respective communities. Municipal revenue sources are therefore just as important as proper financial management and control. Within the new local government system, municipalities have been afforded various ways of ensuring and enhancing local revenue sources. On the issue of municipal revenue sources, it is

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<sup>361</sup> See the Systems Act s 104(2)(a)-(b).

important to distinguish between so-called *own revenue sources* and *outside sources*. Own sources refer to sources of income that a municipality can or must create for itself. Outside sources again refer to revenue that is not directly generated by the municipality itself but falls under examples such as grants from provincial or national governments to local governments.

One of a municipality's most important revenue sources is the *power of taxation*. The power to tax is regarded as an essential prerequisite to ensuring a system of sustainable and accountable local government. According to the White Paper on local government, there are four areas of local decision-making that are important to municipal taxation. These areas are:

- the choice of tax to be imposed
- the definition of the tax base
- the choice of the tax rate and
- the administration of the tax system.<sup>362</sup>

It is also important for municipalities to have freedom and be able to vary their tax rates. Such a situation will not only strengthen local accountability but will also enable communities to challenge municipalities about the value-for-money of the services that they provide. Any *local tax policy* should be seen within the framework of the total tax system of a country, however, and not in isolation. There is a strong need for a coherent and transparent tax system in general. A particular taxation policy should always take into account any adverse or negative consequences which such a system could have on the productiveness of the economy of the region and/or country as a whole. It was thus envisaged that the new legal dispensation with regard to local government matters would specifically incorporate such important aspects within national legislation. Such a national legislative framework would then ensure uniform standards and practices between the various different types of municipality across the country.

### **18.5.1 Property taxation**

Arguably the most important source of local taxation is so-called "property tax" (rates). This type of taxation requires owners of property located within a municipal area to pay a tax to the municipality based on a valuation of their property. The term

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<sup>362</sup> See the White Paper on Local Government (1998) at 133.

*property tax* is generally used to refer to all taxes relating to immovable property (land).<sup>363</sup> The main reasons property tax is regarded as a very suitable local tax are:

- it is easy to collect
- it produces a predictable and stable income
- it is fixed in location and
- it is impossible to conceal.<sup>364</sup>

Property tax is directed mainly at financing municipal service provision, and it is therefore an important source of so-called “discretionary own-revenue” for local governments that enables municipalities to function effectively.

Historically, property rating in South Africa has been done differently in the various provinces. Each of the former four provinces had its own legislation in this regard. Such provincial legislative requirements were never properly co-ordinated, although the legal requirements were very similar in each province. For various reasons the old property rates/tax system was inadequate and ineffective. Such is the importance of municipal property taxation that the Constitution specifically addresses it. According to section 229(2) of the Constitution, all municipalities have the power to impose rates on property. Such a system may be regulated by national legislation, however.<sup>365</sup> Since property taxation was conducted under the former provincial ordinances regulating such property rating and taxation, such enactments stay in force until such time as they are replaced by national legislation. From the outset of the restructuring of the entire local government dispensation, it was envisaged that the old system relevant to municipal property taxation also had to be overhauled.

According to the White Paper on Local Government, national government had to address four main issues with regard to property taxes. These issues can be summarised as follows:

- *To bring untaxed areas into the tax net* Many former black areas are outside the property tax net and effective measures to integrate them must be implemented.

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<sup>363</sup> From an international perspective, property tax is regarded as the single most important tax at local government level, especially in developing countries. The more developed a country becomes, the less dependent it becomes on property taxes as a source of local revenue.

<sup>364</sup> See Franzen RCD “Property tax: Alive and well and Levied in SA” (1996) 8 *SA Merc LJ* at 351.

<sup>365</sup> See the Constitution s 229(2)(b).

- *To establish a uniform property valuation and tax system* An optimal valuation system should be established. The White Paper has identified various possible rating systems.<sup>366</sup>
- *To determine valuation periods* Properties should be valued regularly.
- *To determine relief or partial exemption for the poorest people who genuinely cannot afford such taxes* Any rebates or grants-in-aid should be clearly indicated in the budget of a municipality.

It has also been argued that local governments should have some latitude in decisions apart from those mentioned above with regard to aspects of property taxes in their area, in order to reflect their own unique circumstances and local economic objectives.

### **18.5.2 The valuation of property**

It was mentioned above that the new constitutional scheme entrenches the fact that municipalities are allowed to impose rates on property. Property rates can be levied only on the basis of some or other form of property valuation, however. Although the Constitution is silent on the issue of property valuations, such aspects are normally set out in national legislation.<sup>367</sup> It is also obvious that apart from the requirements set out in national legislation, any valuation of property must be done within the parameters of South Africa's supreme constitution. Any valuation or recovery of rates on property contrary to the provisions of the Constitution are invalid.<sup>368</sup> In the past valuation had to be done by qualified and registered valuers.<sup>369</sup>

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<sup>366</sup> See the White Paper on Local Government (1998) at 135. The systems include *site rating*, or the valuation of land only, the *combined rating* of land and buildings, and *differential or composite rating*, where both land and buildings are rated together but at different rate levels, and where the rate levied on land is higher than that on improvements. A rating system where a uniform rate is used for areas which were not previously rated, irrespective of the value of the property. (This is often called 'flat-rating' in South Africa). The rate is usually lower than the actual value of the property.

<sup>367</sup> The LGTA s 10G(6), eg, required local councils, metro councils and rural councils to ensure that properties within their areas of jurisdiction had to be valued at intervals prescribed by law and that a single valuation roll had to be compiled and had to be open for public inspection.

<sup>368</sup> See, eg, the case of *Lotus River Etc Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C). The court held that increases in rates under the LGTA s 10G(6) and Property Valuation Ordinance 29 of 1944 (C) may not be in limitation of constitutional rights such as the right to equality unless such limitation is permitted under the limitation clause s 36. However, the court mentioned that its role is not to second-guess the legislature but to assess the lawfulness of any limitation. The court was also aware that municipalities inherited several valuation rolls with differing base dates as a result of the restructuring of local government. The court concluded that the uniform rates increase was carefully considered and was adopted only as an interim measure, thereby justifying the limitation.

<sup>369</sup> See, eg, the Valuers Act 23 of 1982.

### **18.5.3 The basis of property valuations**

There are many important aspects that influence the actual basis upon which property valuations are determined. From the outset it is important to distinguish between valuations on land and valuations on buildings. In all the former provincial ordinances the intention was that the value of land should be the amount which the land would have realised had a willing buyer and seller agreed on a free and voluntary sale. This seems to refer to market value. The value of buildings, on the other hand, was determined as the cost of erection at the time of valuation less depreciation. Another option was to value the land/property inclusive of all the improvements and then to subtract one value from the other.<sup>370</sup> In the past, when reference was made to valuation in legislation it usually referred to immovable property (land) and improvements on the land. It was thus often important to determine whether an object on land was fixed to the land permanently or not.<sup>371</sup> Generally speaking the determination of land values is usually done by reference to sale prices of similar land in a particular area, while the estimation of building replacement or erection/building costs can be calculated according to a standard rate per square meter.

Prior to the new local government dispensation, it was a general rule that valuations had to be done every four to five years. If the time gap was too large, then the valuations would no longer relate to the market value, and distortions would appear in the tax base. Furthermore, all former provincial ordinances have prescribed a basic format for a valuation roll in each municipal area. There were also specific requirements regarding valuations courts or boards and the procedures for making a valuation roll.<sup>372</sup>

### **18.5.4 The levying of municipal property rates**

Today it is a constitutional fact that municipalities have the right to levy property rates.<sup>373</sup> Prior to the new legal system, all former provincial ordinances provided for

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<sup>370</sup> See Craythorne (1997) 351.

<sup>371</sup> See, eg, the case of *Standard-Vacuum Refinery of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A).

<sup>372</sup> See Craythorne (1997) 352-354. See also the cases of *Crawford and Others v Borough of Eshove and Another* 1956 (1) SA 147 (N) and *Helderberg Butcheries v Municipal Valuation Court, Somerset West* 1977 (4) SA 99 (C).

<sup>373</sup> See the Constitution s 229. See also *Msunduzi Municipality v MEC for Housing, KZN* 2004 (6) SA 1 (SCA).

the levying of property rates.<sup>374</sup> The levying of property rates was also allowed under the LGTA.<sup>375</sup>

Under the legal system prior to the new constitutional dispensation, various methods of rating existed. Three broad rating methods were generally known. The first method was the so-called “site rating” method. According to this method a rate was levied only on the rateable valuation of the particular land. This method encouraged the development of vacant land or the continuous development of occupied land to its fullest potential. To a great extent speculation in land was minimised, although the method produced less income than others. A second method used was the so-called “flat rating” method. Such a method requires that both land and buildings be rated together. It was a very productive method, as it brought in more revenue. This particular method required more detailed administration, however, and it often discouraged the improvement of property. The third method of rating was known as the “differential” (composite) rating method. This method entailed rating both land and buildings, but at different rates: land was levied at a higher rate than improvements on the land.<sup>376</sup> Within a particular rating system, all the prior provincial ordinances

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<sup>374</sup> Various rates such as general rates, town rates, health rates, water rates, sewerage rates, special rates, sanitary rates and local rates were applicable. See Craythorne (1997) 354-355. See also the cases of *Weenen TLC v Van Dyk* 2000 (3) SA 435 (N), which required that rates and taxes had to be properly promulgated before their introduction. In *Midrand/Rabie Ridge/Ivory Park Metropolitan Substructure v Strydom and Others* 2001 (1) SA 98 (SCA) the case concerned the levying of a rate on property only once a year in terms of the Ordinance on Property Tax 11 of 1977 (T). The court held that under the ordinance a general property tax on property based on the site value was authorised only once a year and the taxpayer was entitled to be informed in advance of such taxes. It should be noted that if the required legal procedure to impose rates or taxes was not followed, then such rates are not eligible. Read *Weenen TLC v Van Dyk* 2002 (4) SA 653 (SCA).

<sup>375</sup> According to the Act s 10G(7)(b) a municipality could even differentiate between different categories of property on such grounds as it deemed reasonable. It is important to note, however, that any differentiation could not amount to unfair discrimination. This would be contrary to the Constitution and thus invalid. For more on this position see *PE Municipality v Prut NO* 1996 (3) SA 533 (SE) and also *Beukes v Krugersdorp Transitional Local Council and Another* 1996 (3) SA 467 (W). The interim Constitution s 178(2) required that municipal rates and taxes had to be levied according to a uniform structure. See also *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374 (CC). Note the case of *Robertson v City of Cape Town/Truman-Baker v City of Cape Town* 2004 (5) SA 412 (CPD). The applicants in the case were dissatisfied with the increase of rates levied on their properties, which were levied on the basis of property valuations contained in a provisional valuation roll. The municipality relied on both the Property Valuation Ordinance 1993 (C) and ss 93(7)-(10) of the Structures Act as amended. The court held *inter alia* that the municipality did not fall within the definition of local authority in s 1 of the Ordinance and could therefore not exercise a power to levy rates on the basis of a provisional valuation roll. The court also held that the amendments to the Structures Act violated ss 154(2) and 229(5) of the Constitution and were unconstitutional and invalid. Refer to para 154 at 459-460.

<sup>376</sup> See Craythorne (1997) 355-356. The writer points out that the site-rating method seems to be the least popular in South Africa and that the flat rating method is used mostly in western countries.



provided for the exemption of certain property from the payment of rates. Exemptions commonly included land that was used for agricultural purposes, education (schools) and religious practices (church buildings).<sup>377</sup>

Under the LGTA,<sup>378</sup> councils were authorised to levy and recover property rates in respect of immovable property within their respective jurisdictions. Specific legal requirements were laid down which had to be followed. The LGTA was only a transitional piece of legislation and would be substituted by a uniform national Act once the restructuring process came to a close. This national Act was finally enacted in 2004, and parts of the Act commenced at such time. The new legal system regulating municipal property taxation is significantly different from the old systems that were applicable under the former four provincial ordinances.

#### **18.5.5 Some important aspects concerning municipal property assessment and taxation**

The adoption and finalisation of new legislative provisions regarding the levying and recovery of property taxes in South Africa was preceded by a strong public outcry about new proposals and suggestions. Many people have called new property taxation proposals a “hidden wealth tax” aimed at over-taxing the already heavily taxed average taxpayer.<sup>379</sup> Other commentators have expressed the view that without a complete overhaul of the property taxation system in South Africa, local governments will not be able to fulfil their constitutional mandates, however.<sup>380</sup> Therefore, the aim of a new system for property taxation is to do away with the previously ambiguous situation of having various property rating systems in the country and to replace them with a uniform system applicable equally throughout the territory of the state.<sup>381</sup>

##### **18.5.5.1 A brief history of property taxation in South Africa**

It is reported that the first land-related tax was introduced into South Africa in 1677. The Cape Ordinance of 1836 introduced the first formal property tax in the Cape

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<sup>377</sup> See, eg, *Mosowitz v Johannesburg City Council* 1957 (4) SA 569 (T); *PE Municipality v Marist Brothers* 1948 (1) SA 637 (E); *De Aar Divisional Council v Convent of the Holy Cross* 1952 (1) SA 495 (C) and *St John's Diocese v Umtata Municipality* 1968 (3) SA 55 (E).

<sup>378</sup> S 10G(7).

<sup>379</sup> Refer to Ratiba MM “The Good, the bad or the ugly? Comments on the property rates bill” (2000) *DR* October at 27-29.

<sup>380</sup> See Franzsen RCD “Property tax: Alive and well and levied in South Africa” (1996) 8 *SA Merc LJ* at 348 *et seq.*

<sup>381</sup> The dual local government system of pre 1994 has created various fiscal disparities between municipalities. White local authorities were financially strong because of fiscal autonomy, which in-

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Province, however, and by the end of the 19<sup>th</sup> century, such a system of taxation, based on capital values, was in place throughout the territories.<sup>382</sup> Property tax was levied on the owner of land, irrespective of whether such land was zoned for residential, commercial or industrial purposes, and the tax could be levied on either the value of the land (site rating), the value of the land and improvements (composite rating) or on a uniform or flat rating system. Land was valued at market value, and all provincial valuation rolls had to include minimum information such as identification of the owner of land, the size and description of land as well as the value of the land together with improvements. It was also possible for land owners to appeal decisions of property valuation to a specific tribunal. Finally, the old system also provided for effective measures to recover outstanding levies. Properties could be sold via public auction, and the Registrar of Deeds was prohibited from transferring property from one owner to another unless a clearance certificate had been obtained from the relevant local authority and submitted to the Registrar.<sup>383</sup> It will become clear that many of the old provisions have been incorporated into the new property rates legislative framework.

#### **18.5.5.2 Reasons for changing the old property rates systems**

There are various reasons for the former legal system of levying and collecting property rates and taxes' having to be overhauled. The following examples are a brief summary of such reasons:

- The entire social and legal framework of local government *per se* has changed. Property taxation now operates within a new supreme constitutional framework. Apart from the structural requirements of the Constitution, the Bill of Rights also determines various substantive compliance.<sup>384</sup> In light of the new constitutional requirements, all local government structures were amalgamated which, in turn, required amendments to the former provincial tax legislation.

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cluded trading account surpluses on water and electricity and property taxes. Black local authorities did not have such income sources and thus had poor financial capabilities.

<sup>382</sup> See Franzsen *supra* fn 380 at 352-353.

<sup>383</sup> The clearance certificate had to verify that all rates and taxes on the property in question was paid in full. This provision provided a significant safeguard for local authorities that property taxes would not be lost when a property was sold.

<sup>384</sup> See, eg, the Bill of Rights s 9. Different tax regimes often militate against individual rights and values. Tax payers must be treated equally. Equality does not imply exactly the same tax liability, however, but rather equal tax for equal value. A proper division of the tax burden among tax or ratepayers is required. Vertically taxpayers must be treated in a similar way to other taxpayers simi-

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- According to the newly established municipal structures, the tax base of many municipalities was extended to areas outside of the boundaries of urban municipalities. Such areas include farmland, state-owned land and also tribal land, on which rates had never before been levied. Provision had to be made to incorporate such areas within the taxation legislation.<sup>385</sup>
- The former system of property taxation was fragmented and ineffective. No uniform system was in place, as property rates and taxes were levied and collected in terms of four different provincial ordinances. Such different rating systems caused financial differences between municipalities which, in turn, created a stumbling block for the implementation of a constitutionally sanctioned fiscal system.
- The two-tier model of local government outside metropolitan areas requires a division of fiscal powers between local municipalities and district municipalities.
- The taxation of so-called “public infrastructure” had to be addressed in new legislation. Previously, public infrastructure such as railways and power stations was exempted from paying property taxes. Such income sources had to be brought into the tax system.<sup>386</sup>
- It was also time to re-evaluate aspects such as the exclusion of certain properties from rates and taxes and the former system of rate-capping for certain property owners, since rates and taxes are an extremely important source of municipal revenue and such exclusion and capping could have significant financial implications for an municipality.<sup>387</sup>
- Different rates for different properties had to be reconsidered. The categories of property and the rates applicable to such properties was in need of re-evaluation. On this point it is reported that there seems to be a trend internationally to levy business property more highly than residential property.<sup>388</sup> Uncontrolled differen-

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larly situated. See Franzsen *supra* fn 380 at 355. Refer also to Franzsen RCD “The present status of property tax in SA” (1999) 4 *Journal of Property Tax Assessment and Administration* at 3-13.

<sup>385</sup> For more on such aspects see Franzsen RCD “Some questions about the introduction of a land tax in rural areas” (1999) 11 *SA Merc LJ* at 259 *et seq.*

<sup>386</sup> It is reported that international practices show that public entities should be rated on at least their operational land. See Franzsen RCD and McCluskey WJ “Some policy issues regarding the Local Government: Property Rates Bill” (2000) 12 *SA Merc LJ* at 213.

<sup>387</sup> Rate-capping refers to a maximum limit that is set on the amount of a particular rate. Rate-capping has been implemented mainly to protect ratepayers against unreasonable rates and taxes.

<sup>388</sup> Refer to McCluskey WJ (ed) “Property tax: An international comparative review” (1999) at 305-307.

tiation between rates for different properties can lead to taxation competition between municipalities, however. Special care should be taken in such instances since the Constitution prohibits the exercise of a rating power that materially and unreasonably prejudices national economic policies and activities.<sup>389</sup> Most businesses are not as concerned about higher rates or taxes, however, since they usually pass such costs on to their consumers or employees.<sup>390</sup>

- Exemptions from property taxes or the possible deduction from income tax of property taxes had to be re-evaluated. Property tax was traditionally allowed as a deduction from income tax when the tax was incurred for the purposes of trade or the production of income. This position has shifted the property tax burden to the national sphere of government. Since property taxes are also extended to rural areas, including commercial farming properties, the South African Revenue Service will have to calculate carefully the taxes that will be lost if property taxes are still income tax deductible.<sup>391</sup>

In light of *inter alia* the abovementioned factors, it became necessary to amend and re-evaluate the system of property taxation in South Africa. It should also be pointed out that the enforcement of property tax also influences and interacts with the land use policies of a state. The sustainability of property taxes depends strongly on stable property values. Such values in turn depend on multiple market factors such as the state of the economy, political policies and programmes and investment initiatives.<sup>392</sup>

Furthermore, property rates are also influenced by the maintenance of up-to-date valuation rolls, regular assessment, billing and rates collection, accountability and transparency and a consumer acceptance of value for money. In South Africa in particular, the issue/culture of payment for services has often been somewhat contentious. Payment was used pre 1994 to force political change, but post 1994 such payment is required to ensure municipal development and the sustainability of ser

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<sup>389</sup> See the Constitution s 229(2).

<sup>390</sup> See Franzsen and McCluskey *supra* fn 386 at 215.

<sup>391</sup> The question of whether property tax should be income-tax deductible or not is a policy consideration for the national government and does not directly need incorporation in the property rates legislation. Deductions will be provided in the Income Tax laws.

<sup>392</sup> It is generally accepted that factors such as land invasions, land reform and settlement programmes, as well as land claims could significantly influence property values and therefore also property rates and taxes. See Franzsen *supra* fn 385 at 358.

vices. There is a general need to build tax morality in local communities which is aimed at ensuring payment for services rendered.<sup>393</sup> Tax morality will be improved only if taxes are fair and acceptable. Before the amalgamation of local authorities under the new legal system, property taxes were regarded as fair and not too burdensome.<sup>394</sup>

It is thus very important that property rates and taxes be carefully researched and evaluated holistically within the broader tax system. The importance of public participation and educational programmes regarding property taxation in general can therefore not be overemphasised.

### **18.5.6 Introduction to the new Municipal Property Rates Act**

The Municipal Property Rates Act (MPRA)<sup>395</sup> was assented to by the president on the 11<sup>th</sup> of May 2004. The main aims of the Act are:

- to regulate the power of a municipality to impose rates on property
- to exclude certain properties from rating in the national interest
- to make provision for municipalities to implement a transparent and fair system of exemptions, reductions and rebates through municipal rating policies
- to make provision for fair and equitable valuation methods of property
- to make provision for objections and appeals processes and
- to amend certain legislation and to provide for matters connected with the Act.<sup>396</sup>

According to the preamble of the Act, it is confirmed that the Constitution entitles municipalities to impose rates on property in their areas, subject to regulation in terms of national legislation. Furthermore, municipalities must be developmentally

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<sup>393</sup> During 1995, national government launched the so-called Operation Masakhane campaign, with the specific aim of enhancing a culture of payment for services. Despite some success, non-payment is still very high. Three main reasons for non-payment have been identified: in the first place many residents are so poor that they do not have the ability to pay for services; secondly, many areas lack proper infrastructure and service delivery is not up to standard and, thirdly, some local residents have unrealistically high and immediate expectations regarding service delivery.

<sup>394</sup> See Franzsen *supra* fn 382 at 352-361. The writer mentions the following reasons for property taxes' being accepted under the former property taxation dispensation: (a) relatively low rates and substantial rebates for residential property owners; (b) relatively low rates and income tax deductibility for commercial property owners; (c) conservative assessed values (generally below fair market value) and well-structured objection and appeal procedures; (d) payment by way of monthly instalments, often in combination with the rest of the municipal bill (electricity and water), which rendered property tax relatively invisible; (e) a general preoccupation with high-profile taxes such as income and value-added tax; and (f) property tax fared well as a perceived benefit tax – services of a high standard were received in return for taxes paid.

<sup>395</sup> 6 of 2004, hereafter referred to as MPRA.

<sup>396</sup> Refer to the long title of the Act.

orientated, and must address service delivery priorities and promote economic and financial municipal viability. Local government needs a sufficient and buoyant source of revenue, and property rates have been identified as a critical source of revenue for municipalities to achieve their constitutional objectives. In light of the fact that the Constitution confers on parliament the power to regulate the exercise by municipalities of their fiscal powers and in order to ensure uniformity and simplicity in property rates collection, the Act has been enacted.<sup>397</sup> The Act has been divided into nine chapters and will be discussed briefly below.

#### **18.5.6.1 Issues concerning the rating of property**

According to the Act, only a metropolitan or local municipality may levy a rate on property in its area. In general, a district municipality may levy a rate on property only if it is in a district management area.<sup>398</sup> The power of a municipality to levy a rate on property is subject to three main prerequisites. Such power must be exercised subject to:

- section 229 of the Constitution and other constitutional provisions
- to the MPRA itself and
- to the rates policy which each municipality must adopt when levying property rates.<sup>399</sup>

#### **18.5.6.2 A municipal rates policy**

The council of a municipality must adopt a rates policy consistent with the MPRA with regard to the levying of rates on rateable property in the municipality.<sup>400</sup> Such a rates policy will take effect on the effective date of the first valuation roll prepared by the municipality in terms of the Act and must accompany the municipality's budget for the financial year concerned, when the budget is tabled in the municipal coun-

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<sup>397</sup> See the preamble of the Act.

<sup>398</sup> See the Act s 2(10) and (2)(a). It should be clear from this wording that all property in SA is subject to a possible property tax unless specifically exempted. One must remember that the whole territory of SA has been demarcated under one form or another of local government. The reference to the area of a municipality also includes a district management area. Refer to the Act s 2(b).

<sup>399</sup> See the Act s (3)(a)-(c). Note that according to the MPRA (a) as a corporate entity, "municipality" means a municipality described in the Municipal Systems Act s 2 and (b) as a geographical area "municipality" means a municipal area demarcated in terms of the Local Government: Municipal Demarcation Act 27 of 1998. See s 1 definitions.

<sup>400</sup> Rateable property means property on which a municipality may in terms of s 2 levy a rate, excluding property fully excluded from the levying of rates in terms of the MPRA s 17. Refer to s 1 definitions.

cil.<sup>401</sup> The MPRA further requires that every rates policy must incorporate the following:<sup>402</sup>

- Treat persons liable for rates equitably.
- Determine the criteria to be applied by the municipality if it levies different rates for different categories of property, if it exempts specific owners from payment of rates, if it grants specific owners of properties a rebate or a reduction in the payable rate or if it increases rates.<sup>403</sup>
- Determine or provide criteria for the determination of categories of property for the purpose of levying different rates and categories of owner of properties or categories of properties for the purpose of granting exemptions, rebates and reductions.
- Determine how the municipality's powers in terms of section 9(1) of the MPRA must be exercised in relation to properties used for multiple purposes.
- Identify and quantify in terms of costs to the municipality and any benefit to the local community any exemptions, rebates and reductions, any exclusions referred to in section 17(1)(a), (e), (g), (h) and (i) of the Act and also rates on properties that must be phased in in terms of section 21.<sup>404</sup>
- Take into account the effect of rates on the poor and include appropriate measures to alleviate the rates burden on them.
- Take into account the effect of rates on organisations conducting specified public benefit activities and registered in terms of the Income Tax Act<sup>405</sup> for tax reductions and which own property in the area.
- Take into account the effect of rates on public service infrastructure.<sup>406</sup>

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<sup>401</sup> See the Act s (2), read with the Municipal Finance Management Act 56 of 2003 s 16(2), which regulates *inter alia* aspects concerning municipal budgets.

<sup>402</sup> Refer to the Act s (3)(a)-(j).

<sup>403</sup> A "rebate" refers to a discount granted in terms of s 15 on the amount of the rate payable on the property. A "reduction" means the lowering in terms of s 15 of the amount for which the property was valued and the rating of the property at that lower amount. See the MPRA s 1 definitions.

<sup>404</sup> "Local community", in relation to a municipality (a) means that body of persons comprising (i) the residents of the municipality, (ii) the ratepayers of the municipality, (iii) any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality and (iv) visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality and (b) includes, more specifically, the poor and other disadvantaged sections of such body of persons. See the MPRA s 1.

<sup>405</sup> 58 of 1962.

<sup>406</sup> Public service infrastructure means publicly controlled infrastructure of the following kinds: (a) national, provincial or other public roads on which goods, services or labour move across a municipal boundary; (b) water or sewer pipes, ducts or other conduits, dams, water supply reservoirs, water treatment plants or water pumps forming part of a water or sewer scheme serving the public; (c)

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- Allow the municipality to promote local, social and economic development.
- Identify all rateable properties in the municipal area that are not rated in terms of section 7(2)(a) of the Act.

The MPRA specifically requires that when a municipality is considering the criteria to be applied in respect of any exemptions, rebates and reductions on property used for agricultural purposes, a municipality must take account of the following:<sup>407</sup>

- (a) the extent of services provided by the municipality for such properties;
- (b) the contribution of agriculture to the local economy;
- (c) the extent to which agriculture assists in meeting the service delivery and development obligations of the municipality; and
- (d) the contribution of agriculture to the social and economic welfare of farm workers.

It is further provided that any exemptions, rebates or reductions provided for in the rates policy must comply with and be implemented in accordance with a national framework that may be prescribed after consultation with Organised Local Government (OLG). No municipality may grant relief in respect of payment of a rate to a category of owners of properties or to the owners of a category of properties, other than by way of an exemption, rebate or reduction provided for in the rates policy and granted in terms of section 15 of the Act. No relief may be granted to owners of properties on an individual basis.<sup>408</sup>

Before it adopts its rates policy, a municipality must also follow a process of community participation.<sup>409</sup> The municipality must also ensure that the municipal manager, who is obligated to do so, has conspicuously displayed the draft rates policy for

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power stations, power substations or power lines forming part of an electricity scheme serving the public; (d) gas or liquid fuel plants or refineries or pipelines for gas or liquid fuels, forming part of a scheme for transporting such fuels; (e) railway lines forming part of a national railway system; (f) communication towers, masts, exchanges or lines forming part of a communications system serving the public; (g) runways or aprons at national or provincial airports; (h) breakwaters, sea walls, channels, basins, quay walls, jetties, roads, railway or infrastructure used for the provision of water, lights, power, sewerage or similar services of ports, or navigational aids comprising lighthouses, radio navigational aids, buoys, beacons or any other device or system used to assist the safe and efficient navigation of vessels; (i) any other publicly controlled infrastructure as may be prescribed; or (j) rights of way, easements or servitudes in connection with infrastructure mentioned in para (a)-(i). See the MPRA s 1 definitions.

<sup>407</sup> S 3(4)(a)-(d). Note that agricultural purpose, in relation to the use of a property, excludes the use of a property for the purpose of eco-tourism or for the trading in or hunting of game. S 1 definitions.

<sup>408</sup> See ss 3(5) and (6)(a)-(b).

<sup>409</sup> Such a process is set out in the Local Government: Municipal Systems Act ch 4.



a period of at least 30 days at the municipality's head an satellite offices and libraries and, if the municipality has an official website, on that website.<sup>410</sup> The municipal manager must also advertise in the media a notice stating that a draft rates policy has been prepared for submission to the council, that the draft rates policy is available for public inspection during office hours and that the local community is invited to submit comments and representation to the municipality within a period specified in the notice.<sup>411</sup> A municipal council must take into account all comments and representations made or received when it considers the draft rates policy. A rates policy must be reviewed annually by a municipal council and must be amended if necessary. Any amendments to such a policy must be annexed to the municipality's annual budget when tabled. The requirements of section 3(3)-(6) of the MPRA also apply to any amendment of a rates policy. It should be noted, however, that community participation in amendments to a rates policy is not facilitated under section 4 of the Act, but must be effected through the municipality's annual budget process in terms of sections 22 and 23 of the Municipal Finance Management Act.<sup>412</sup>

Finally, all applicable municipalities must adopt by-laws to give effect to the implementation of their rates policies. Such a by-law may differentiate between different categories of property and also between different categories of property owner liable for the payment of rates.<sup>413</sup>

### **18.5.6.3 Aspects concerning the levying of rates**

In general, when rates are levied, a municipality must levy rates on all rateable property in its area. However, a municipality is not obliged to levy rates on

- property which the municipality owns
- public service infrastructure owned by the municipality
- properties defined as a right registered against immovable property in the name of a person, excluding a mortgage bond registered against the property and properties in respect of which it is impossible or unreasonably difficult to establish a mar-

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<sup>410</sup> Refer in this instance also to the Systems Act s 21B.

<sup>411</sup> The notice period may not be less than 30 days, however. See the Act s 4(2)-(3).

<sup>412</sup> See Act 56 of 2000 read with the MPRA s 5(1)-(2).

<sup>413</sup> Refer to the Property Rates Act s (6)(1)-(2). It would seem that the intention of the legislator is that a rates policy, even if adopted by a council, cannot be enforced and implemented if it has not been included and adopted as a municipal by-law. If such interpretation is indeed correct, then it is obvious that the implementation of a rates policy is more cumbersome than a normal municipal by-law. A municipality must first complete all the legal requirements mentioned above before the by-law, which also requires specific procedures, is adopted.

ket value because of legally insecure tenure resulting from past racially discriminatory laws or practices.<sup>414</sup>

Although rateable property must be levied, a municipality is not prevented from granting exemptions, rebates or deductions.<sup>415</sup> Under the new legal dispensation a municipality may, in terms of the criteria set out in its rates policy, levy different rates for different categories of rateable property, which may include categories determined according to

- the use of the property
- the permitted use of the property or
- the geographical area in which the property is situated.<sup>416</sup>

The levying of different rates is subject to section 19 of the MPRA, however.<sup>417</sup> According to the Act, the categories of rateable property include the following:<sup>418</sup>

- (a) Residential properties;
- (b) Industrial properties;
- (c) Business and commercial properties;
- (d) Farm properties used for agricultural purposes; other business and commercial purposes; residential purposes or other purposes;
- (e) Farm properties not used for any purpose;
- (f) Smallholdings used for agricultural, residential, industrial, business, commercial or other purposes;

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<sup>414</sup> See the MPRA s 7(1)-(2).

<sup>415</sup> Read the MPRA s 7(2)(b) with s 15. This was also the position under previous laws. Refer to the case of *Association for the Aged v Ethekwini Municipality* 2004 (3) SA 81 (D). In this case, the Association/applicant sought an order declaring certain properties to be exempt from rates according to the Local Authorities Ordinance 25 of 1974 (KZN) s 153. The applicant was registered as a *bona fide* welfare organisation. The court held that the onus was on the applicant to show that it qualified for an exemption under the ordinance. The court also held that an exemption clause should be restrictively interpreted. Since the applicant sold life rights and used the premises exclusively to alleviate distress amongst aged persons and to promote their welfare, security and happiness, the properties were exempt from rates under the ordinance. See paras D-E at 87.

<sup>416</sup> "Permitted use in relation to a property" means the limited purposes for which the property may be used in terms of (a) any restrictions imposed by (i) a condition of title, (ii) a provision of a town planning or land use scheme or (iii) any legislation applicable to any specific property or properties or (b) any alleviation of any such restrictions. Refer to the MPRA s 1.

<sup>417</sup> See the MPRA s 8(1)(a)-(c).

<sup>418</sup> See the Act s 8(2)(a)-(r). Note that property in general means (a) immovable property registered in the name of a person, including, in the case of sectional title scheme, a sectional title unit registered in the name of a person, (b) a right registered against immovable property in the name of a person, excluding a mortgage bond registered against the property, (c) a land tenure right registered in the name of a person or granted to a person in terms of legislation or (d) public service infrastructure. Note also that reference to a person also includes an organ of state. See the MPRA s 1.

- (g) State-owned properties;
- (h) Municipal properties;
- (i) Public Service Infrastructure properties;
- (j) Privately owned towns serviced by the owner
- (k) Formal and informal settlements;
- (l) Communal land defined in the Communal Land Rights Act;<sup>419</sup>
- (m) State trust land;<sup>420</sup>
- (n) Properties acquired through the Provision of Land and Assistance Act<sup>421</sup> or the Restitution of Land Rights Act<sup>422</sup> or which properties are subject to the Communal Property Associations Act;<sup>423</sup>
- (o) Protected areas;<sup>424</sup>
- (p) Properties on which national monuments are proclaimed;
- (q) Properties owned by public benefit organisations and which are used for any specific public benefit activities listed in part 1 of the ninth schedule to the Income Tax Act;
- (r) Properties used for multiple purposes. According to section 9 of the PRA a property used for multiple purposes must, for rates purposes, be assigned to a category determined by the municipality for properties used for:
  - (a) a purpose corresponding with the permitted use of the property if so regulated;
  - (b) a purpose corresponding with the dominant use of the property; or
  - (c) as a multiple purposes category in terms of section 8(2)(r) of the act.<sup>425</sup>

The Act contains a specific provision regarding the levying of a rate on property in sectional title schemes. Sectional title schemes are created to cater for mainly resi-

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<sup>419</sup> 11 of 2004.

<sup>420</sup> "State trust land" refers to land owned by the state (a) in trust for persons communally inhabiting the land in terms of a traditional system of land tenure, (b) over which land tenure rights were registered or granted or (c) which is earmarked for disposal in terms of the Restitution of Land Rights Act 22 of 1994. The MPRA s 1 definitions.

<sup>421</sup> 126 of 1993.

<sup>422</sup> 22 of 1994.

<sup>423</sup> 28 of 1996.

<sup>424</sup> Such areas mean an area that is or has to be listed in the register referred to in the Protected Areas Act s 10, which refers to the National Environmental Management: Protected Areas Act 57 of 2003.

<sup>425</sup> Refer to the MPRA s 9(1)(a)-(c). A rate levied on a property categorised for use for multiple purposes must be determined by apportioning the market value of the property to the different use purposes and by applying the rates applicable to the categories for properties used for these purposes to the different market value apportionments. See the MPRA s 9(2)(a)-(b).

dential and sometimes business or commercial uses. According to the MPRA, a rate on sectional-title properties must be levied on the individual sectional-title units and not on the property as a whole.<sup>426</sup>

It is further provided that rates levied by municipalities must be in a rand amount and must be based on:

- the market value of the property or
- in the case of public service infrastructure, on the market value thereof, less 30% of that value or on such a lower percentage as the minister for Local Government may determine.<sup>427</sup>

Property mentioned in section 17(1)(h) of the MPRA is to be levied on the market value less the amount allowed in the section or by the minister.<sup>428</sup> An important confirmation is that properties with a market value below a prescribed valuation level may be levied at a uniform fixed amount per property. This provision thus allows the imposition of a so-called flat rate on certain properties. Municipalities are not obligated to implement a flat rate or uniform fixed rate, but if they do opt for such a rate on a specific category of properties, then such fixed amount may not exceed a prescribed percentage of the amount due for rates payable on a property in that category with a market value equal to the prescribed valuation level.<sup>429</sup>

When rates are being levied, a municipality must levy them for a financial year. Rates lapse at the end of the financial year for which they were levied. The levying of rates must further form part of a municipality's annual budget process and annually, at the time of its budget process, a municipality must review the amount in the rand of its current rates in line with its annual budget for the next financial year. Rates levied for a financial year may be increased during the year only in terms of section 28(6) of the Municipal Finance Management Act.<sup>430</sup> Rates further become payable as of the start of a financial year or, if the municipality's annual budget is not approved by the start of a financial year, then from such later date when the budget,

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<sup>426</sup> See the MPRA s 10 read with s 92.

<sup>427</sup> See the MPRA s 11(1)(a)-(b) read with s 17.

<sup>428</sup> The MPRA s 11(1)(c). According to the definitions in the Act, "market value" in relation to a property means the value of the property as determined in the Act s 46. Refer to the MPRA s 1 read with s 46.

<sup>429</sup> See the MPRA s 11(2)(3).

<sup>430</sup> It is imperative to read both the MPRA and the MFMA together in respect of a period of levying of rates. See the MPRA s 12(1)-(3).

including a resolution to levy rates, is approved by the provincial executive in terms of the Municipal Finance Management Act.<sup>431</sup>

A rate is levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members. This apparently refers to an absolute majority of the members of a council.<sup>432</sup> A resolution to levy rates must further be promulgated by publishing the resolution in the *Provincial Gazette*. The municipality must also without delay conspicuously display the resolution for 30 days at the head and satellite offices and libraries and on the municipal website if applicable. An advertisement in the media is also required, stating that a resolution to levy rates has been passed and that it is available for inspection.<sup>433</sup>

According to section 15 and in terms of the criteria set out in its rates policy, a municipality may exempt a specific category of owners of properties or the owners of specific categories of properties from payment of a levied rate. Rebates or reductions in rates may also be granted. When granting exemptions, rebates or reductions in respect of owners of categories of property, a municipality may determine such categories in accordance with section 8(2) of the MPRA and in respect of categories of owners of properties may include in such categories:

- indigent owners
- owners dependant on pensions or social grants
- owners temporarily without income
- owners of property situated within an area affected by disaster or any other serious adverse social or economic conditions<sup>434</sup>
- owners of residential properties with a market value lower than an amount determined by the municipality or
- owners of agricultural properties who are *bona fide* farmers.<sup>435</sup>

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<sup>431</sup> The term “annually” means once every financial year and “financial year” again means the period starting from 1 July in a year to 30 June the next year. See the MPRA s 1 definitions as well as s 13(1)-(2). The payment of rates per year can further be regulated. See also the MPRA ss 17, 55 and 78(4) respectively.

<sup>432</sup> An “absolute majority” refers to a majority of 50% + 1 of the total number of members of a municipal council. If, eg, a council thus consists of 100 members, at least 51 members must vote in favour of levying rates. An absolute majority is more difficult to obtain than a normal majority, as the latter requires only 50% + 1 of the members forming a quorum, which is normally 50% of the total number of members of a council.

<sup>433</sup> See the MPRA s 14(2)-(3).

<sup>434</sup> “Disaster” is defined in terms of the Disaster Management Act 57 of 2002.

<sup>435</sup> The MPRA s 15(2)(a)-(f).

Again it is the responsibility of the municipal manager annually to table in the council a list of exemptions, rebates and reductions during the previous financial year and also to submit a statement reflecting the income forgone by way of such exemptions, rebates and reductions, or exclusions in terms of section 17 of the Act or phasing-in discounts in terms of section 21.<sup>436</sup> Finally, all exemptions, rebates and reductions projected for a financial year must be reflected in the municipality's annual budget for that year as income on the revenue side and expenditure on the expenditure side.<sup>437</sup>

#### **18.5.6.4 Limitations on levying of rates and additional rates**

The MPRA reiterates the constitutional requirements set out in section 229(2)(a) of the Constitution. Municipalities may not exercise powers to levy rates on property that would materially and unreasonably prejudice national economic policies, economic activities across municipal boundaries or the national mobility of goods, services, capital or labour. If a rate is contra the constitutional prescriptions, then the Minister of Local Government, after notifying the Minister of Finance, should give notice to a municipality by notice in the national *Gazette* that the rate must be limited to an amount in rand that is specified in the notice. A municipality must then give effect to the notice and, if necessary, accordingly adjust its budget for the next financial year.<sup>438</sup> The determination of whether a rate is contra the Constitution is not a clear-cut case, and it is submitted that an objective test is required to make such a finding. However, the MPRA states that any sector of the economy, after consulting the applicable municipality(s) and OLG, may request the minister to evaluate evidence to the effect that a rate is materially and unreasonably prejudicing any of the matters listed above.<sup>439</sup> If the minister is convinced of any material and unreasonable effect, he/she must act as set out in subsection 16(2) of the Act. Any notice issued under subsection 16(2) of the Act must be accompanied by reasons why a rate is contra subsection 16(1) and thus also contra section 229 of the Constitution. In order to help municipalities, the minister of Local Government, after consultation with the minister of finance, may by notice issue guidelines to assist municipalities in the exercise of their power to levy rates.<sup>440</sup>

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<sup>436</sup> Refer to the MPRA s 15(3)(a)-(b).

<sup>437</sup> The MPRA s 15(4)(a)-(b).

<sup>438</sup> See the MPRA s 16(1)-(2).

<sup>439</sup> Read the Constitution ss 16(1) and (3)(a) with s 229.

<sup>440</sup> See the MPRA s 16(4)-(5).

The new legal framework also determines other impermissible rates that a municipality may not levy. Such impermissible rates include the following:<sup>441</sup>

- (a) a rate on the first 30% of the market value of public service infrastructure;<sup>442</sup>
- (b) a rate on any part of the seashore;<sup>443</sup>
- (c) a rate on any part of the territorial waters of the RSA;<sup>444</sup>
- (d) a rate on any island of which the state is owner;<sup>445</sup>
- (e) a rate on those parts of a special nature reserve, national park or nature reserve or of a national botanical garden, which are not developed or used for commercial, business, agricultural or residential purposes;
- (f) a rate on mineral rights;<sup>446</sup>
- (g) a rate on a property belonging to a land reform beneficiary or his/her heirs, provided that such an exclusion lapses after ten years from the date on which such title was registered in the office of the registrar of deeds;<sup>447</sup>
- (h) a rate on the first R15 000 of the market value of a property assigned in the municipal valuation roll to a category determined by the municipality for (i) residential properties; or (ii) for properties used for multiple purposes of which one purpose is for residential purposes;<sup>448</sup>
- (i) a rate on a property registered in the name of and used primarily as a place of public worship by a religious community, including an official residence regis-

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<sup>441</sup> See the MPRA s 17(1)(a)-(i).

<sup>442</sup> Note the minister for Local Government may lower the percentage, but only after consultation. See the MPRA s 17(4)(a)-(c).

<sup>443</sup> Refer to the definition of the "seashore" as defined in the Seashore Act 21 of 1935.

<sup>444</sup> See the definition of "territorial waters" determined in terms of the Maritime Zones Act 15 of 1994.

<sup>445</sup> This includes the Prince Edward Islands referred to in the Prince Edward Islands Act 43 of 1948.

<sup>446</sup> See the definition of "property" in the MPRA s 1.

<sup>447</sup> "Land reform beneficiary", in relation to a property, means a person who (a) acquired the property through (i) the Provision of Land and Assistance Act 126 of 1993 or (ii) the Restitution of Land Rights Act 22 of 1994, (b) holds the property subject to the Communal Property Associations Act 28 of 1996 or (c) holds or acquires the property in terms of such other land tenure reform legislation as may pursuant to the Constitution s 25(6) and (7) be enacted after this Act has taken effect. See the MPRA s 1.

<sup>448</sup> The aim of the legislator is clearly to benefit poor households by not levying rates on property below R15 000 market value. In order to be equitable, every owner will receive such an exemption. Similar provisions have been made in respect of a minimum free water and electricity supply. One must note that such an exemption is applicable only to property being used for residential purposes. Business and commercial properties do not receive the same exemption and are thus treated indifferently. There seems to be a legitimate reason for exempting residential property in this manner and, more specifically, in light of the constitutional objects and demands on local government, a constitutional attack on equality grounds will not easily suffice. The minister of Local Government may increase the monetary threshold. See the MPRA s 17(3).



tered in the name of that community which is occupied by an office bearer of that community.<sup>449</sup>

The exclusion from rates lapses if the status of a property changes, from national land to something else, for example. If an exemption is withdrawn, rates by a private owner that would have been payable were it not for the exemption become payable.<sup>450</sup> The amount payable when an exemption is withdrawn must be regarded as rates in arrears, and interest is applicable on such an amount. Such a position seems somewhat unreasonable. Why should an owner be liable for rates which have been legally exempted and for the interest on such rates? The MPRA clarifies the situation somewhat by stating that such rates and interest are applicable only if the declaration of the property was withdrawn because of a decision of the private owner to withdraw from the agreement regarding the property or because of a decision by the state to withdraw from the agreement because of a breach of the agreement by the private owner.<sup>451</sup> It is of interest to note that a municipality is permitted to apply, in writing, to the minister of Local Government, to be exempted from paragraph 17(a), (e), (g) or (h) of the MPRA if it can demonstrate that an exclusion to levy such rates is compromising or impeding its ability or right to exercise its powers or to perform its functions within the meaning of the Constitution.<sup>452</sup> What this position really means is that, in certain instances, municipalities may be permitted to levy rates on property which are usually regarded as impermissible/exempted rates. Any exemption granted by the minister must be in writing and is subject to such limitations or conditions as he/she may determine.<sup>453</sup>

In order to protect owners of properties, the MPRA determines that a municipality may not levy:

- different rates on residential property, except as provided for in sections 11, 21 and 89 of the Act

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<sup>449</sup> Although such exemption was also allowed under the previous legal dispensation, religious communities should note the requirements of the MPRA s 16(1)(i) regarding the exemption of official residences of religious communities. Exclusion from these rates also lapses if the property is disposed of by the religious community or if the residence is not used as required. See the MPRA s 17(5).

<sup>450</sup> See the MPRA s 17(2).

<sup>451</sup> The MPRA s 17(d)(i)-(ii).

<sup>452</sup> Read the MPRA s 18(1) with the Constitution s 151(4).

<sup>453</sup> The MPRA s 18(2)(a)-(b).

- a rate on non-residential properties that exceeds a prescribed ratio to the rate on residential properties<sup>454</sup>
- rates which unreasonably discriminate between categories of non-residential properties or
- any additional rates except as provided for in section 22 of the Act.<sup>455</sup>

It is further the responsibility of the minister of Local Government, with the concurrence of the minister of finance, to set an upper limit on the percentage by which rates on properties or a rate on a specific category of properties may be increased. However, different limits may be set for:

- different kinds of municipality or
- different categories of property, subject to section 19.<sup>456</sup>

The MPRA also determines a compulsory phasing-in of certain rates. According to the Act, a rate levied on newly rateable property must be phased in over a period of three financial years, subject to subsection 21(5) of the Act.<sup>457</sup> Furthermore, a rate levied on property belonging to a land reform beneficiary must be phased in over a period of three financial years after the exclusion period set out in section 17(1)(g) has lapsed, subject to section 21(5). A rate levied on newly rateable property owned and used by organisations conducting specified public benefit activities and who are registered in terms of the Income Tax Act for those activities must be phased in over a period of four financial years.<sup>458</sup> In the first year, the phasing-in discount on newly rateable properties or on properties belonging to a land reform beneficiary must be at least 75% of the rate otherwise applicable to the property for that year, in the second year at least 50%, and in the third year at least 25%.<sup>459</sup> During the first year no rate may be levied on newly rateable property owned and used by organisations conducting specified public benefit activities. After the first year, the phasing-in discount on

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<sup>454</sup> See the MPRA s 19(a)(b) read with s 11(1)(a). The ratio may only be prescribed with the concurrence of the minister of finance. S 19(2).

<sup>455</sup> See the MPRA s 19(1)(a)-(d).

<sup>456</sup> The minister may on application by a municipality and on good cause exempt a municipality from a set limit. See the MPRA s 20(1)-(4) read together with the MFMA s 43.

<sup>457</sup> Note that according to the definitions in the MPRA s 1, "newly rateable property" means any rateable property on which property rates were not levied before the end of the financial year preceding the date on which the Act took effect. Properties which were (a) incorrectly omitted from the valuation roll or (b) identified by the minister where the phasing-in of a rate is not justified, are excluded from the definition.

<sup>458</sup> Refer to the MPRA s 21(a)-(c).

<sup>459</sup> The MPRA s 21(2)(a)-(e).

such property must be at least 75% in the second year, at least 50% in the third year and at least 25% in the fourth year.<sup>460</sup> A rate levied may also not be higher than a rate levied on similar property or category of property. On written request by a municipality, the MEC for Local Government may extend the phasing-in periods mentioned above. No phasing-in period may exceed six financial years, however.<sup>461</sup> If the MEC has extended a phasing-in period, he/she must determine the minimum phasing-in discount during each financial year of the extended period.

The new rating legislation also provides for additional rates and special rating areas. According to section 22 of the MPRA and by resolution of its council, a municipality may:

- determine an area as a special rating area
- levy an additional rate on property in that area for the purpose of raising funds for improving or upgrading that area
- differentiate between categories of properties when levying an additional rate.<sup>462</sup>

Since additional rates would place a more significant financial burden on certain property owners, it is required that before a municipality determines a special rating area, it must first consult the local community on the proposed boundaries of the area and also on the proposed improvement or upgrading required. Apart from this mandatory consultation obligation, the municipality must also obtain the consent of the majority of members of the local community in the proposed special rating area, who will be liable for paying the additional rate.<sup>463</sup> When a municipality determines a special rating area, it must:

- determine the boundaries of the area

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<sup>460</sup> See the MPRA s 21(3)(a)-(c). It must be noted that according to the definitions of the Act that specified public benefit activity means an activity listed in the Income Tax Act Ninth Sch Part 1 Item 1 (welfare and humanitarian), Item 2 (health care) and Item 4 (education and development).

<sup>461</sup> See the MPRA s 21(4)-(6).

<sup>462</sup> Refer to the MPRA s 22(1)(a)-(c). Since the resolution of the council concerns the levy of rates, it is submitted that such a resolution requires also an absolute majority of members to vote in favour thereof. The differentiation mentioned in s 22(1)(c) could, eg, result in business properties' bearing the brunt of an additional levy, while residential properties in the particular area are excused from such additional levies. It seems clear that additional levies may be levied only if funds are needed to improve or upgrade a particular area. Cross-subsidising through additional levies are not allowed. An objective assessment of all relevant factors must be conducted in this regard.

<sup>463</sup> "A majority" in this respect seems to refer to 50% + 1 of the total number of members of the relevant local community. It should be noted that not all members of the community need to be consulted, but only those members who will be liable for paying the additional rate. The intention of the legislator thus seems only to obtain a majority decision from persons/institutions responsible for pay property rates. See the MPRA s 2(a)-(b).

- determine how the area is to be improved or upgraded from the additional funds
- establish separate accounting and other record-keeping systems regarding the revenue generated by the additional rate and the improvement or upgrading of the particular area(s).

A municipality may further establish a committee comprising persons representing the community in the area as a consultative/advisory forum for the municipality on the improvement/upgrading. Representivity must be taken into account when the committee is established. The committee must then further be a subcommittee of the ward committee(s) in the area, if ward committees are applicable.<sup>464</sup> A special rating area must not be used to reinforce existing inequities in the development of the municipality and must also be consistent with the objectives of the municipality's integrated development plan.<sup>465</sup>

#### **18.5.6.5 The municipal register of properties**

All municipalities levying rates on property are obligated to establish and maintain a property register in respect of all properties situated within the municipal area. Such a register must consist of two parts: a part A and a part B. Part A should consist of the current valuation roll of the municipality and, if applicable, supplementary valuation rolls. Part B must specify which properties are subject to exemption, rebate, reduction in phasing-in rate or an exclusion.<sup>466</sup> The register must be open for inspection by the public during office hours and displayed on the municipal website if applicable. Finally, a municipality must regularly, but at least once a year, update part B of the register.<sup>467</sup>

#### **18.5.6.6 Liability for property rates**

A rate levied on property must be paid by the owner of the property.<sup>468</sup> Joint owners are normally jointly and severally liable for the amounts due for rates on that property. In respect of agricultural property owned by more than one owner in individual

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<sup>464</sup> The MPRA s 22(3)(a)-(d).

<sup>465</sup> See the MPRA s 22(4). Read also the Systems Act s 85 if additional rates are applied to providing funding for an internal municipal service district.

<sup>466</sup> Read the MPRA s 23(1)-(3) with ss 15, 21 and 17.

<sup>467</sup> The MPRA s 23(4)-(5). Part A must be updated in accordance with the provisions of the MPRA relating to the updating and supplementary of valuation rolls. Refer to the MPRA ch 8 for more details. Note that the term "register" generally means (a) to record in a register in terms of (i) the Deeds Registries Act 47 of 1937 or (ii) the Mining Titles Registration Act 16 of 1967 and (b) includes any other formal Act in terms of any other legislation to record (i) a right to use land for or in connection with mining purposes or (ii) a land tenure right. See the MPRA s 1.

<sup>468</sup> See the MPRA s 24(1) read with the Systems Act ch 9.

shares as legally allowed before the commencement of the Subdivision of Agricultural Land Act,<sup>469</sup> a municipality is allowed to hold any one of the joint owners liable for all rates or hold any joint owner liable for only that portion of the rates that represents his/her undivided share in the property.<sup>470</sup> One must note that the term “owner” has an expansive meaning. According to section 1 of the MPRA, the term *owner* means:

- a person in whose name ownership of property is registered
- a person in whose name a right to property is registered
- a person in whose name a land tenure right is registered or to whom the right was granted
- the organ of state which owns or controls a public service infrastructure. Apart from the abovementioned categories, the following persons/functionaries may for the purposes of the MPRA be regarded by a municipality as the owner of property in the following circumstances:
  - (a) a trustee of property in a trust<sup>471</sup>
  - (b) an executor or administrator of property in a deceased estate
  - (c) a trustee or liquidator of property in an insolvent estate/liquidation
  - (d) a judicial manager of property of a person under judicial management
  - (e) a curator of property of a person under curatorship
  - (f) a person in whose name a usufruct or other personal servitude is registered regarding property subject to such usufruct or personal servitude
  - (g) a lessee of a property that is registered in the name of a municipality and is leased by it<sup>472</sup>
  - (h) a buyer of a property sold by a municipality and of which possession was given to the buyer pending registration of ownership in the name of the buyer.<sup>473</sup>

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<sup>469</sup> 70 of 1970.

<sup>470</sup> See the MPRA s 25(a)-(b).

<sup>471</sup> State trust land is however excluded in this regard.

<sup>472</sup> In this regard, lessees and a lawyer advising such lessees should take into account that the lessee could be held liable for property rates even though the property belongs to a municipality. A clear compromise or deduction from rent should be negotiated and contractually confirmed.

<sup>473</sup> Again this provision requires careful consideration by prospective buyers, property lawyers and estate agents. Buyers must be advised of this liability. In cases where properties which do not belong to a municipality are sold, it would appear that the seller/current registered owner will stay liable for property rates up until the registration of transfer of the property to the new

*continued on next page*

Rates levied on a sectional title unit are payable by the owner of the unit. Municipalities may not recover the rates on sectional title units or any parts thereof from the body corporate, except when the body corporate is the owner of any specific sectional-title unit. Body corporates are equally not permitted to apportion and collect rates from owners of units.<sup>474</sup>

In respect of the method and time of payment, it is determined that a municipality may recover a rate on a monthly basis or annually, as may be agreed to with the property owner. Rates are payable on or before a date(s) determined by the municipality. Only in special circumstances may the payment of a rate be deferred.<sup>475</sup> A municipality is obligated to furnish each person/owner liable for the payment of a rate with a written account, which account must specify the following:

- the amount due for rates
- the date for payment
- how the amount was calculated
- the market value of the property
- the phasing-in discount, if applicable
- any additional rates, if applicable.<sup>476</sup>

Delivery of an account is no prerequisite for collecting the applicable rate, however. A person/owner is liable for payment whether or not he/she has received an account. If no account is received, the onus is on the person/owner to make the necessary inquiries from the municipality.<sup>477</sup> If an amount due for rates is unpaid after the determined date, then the municipality may recover the amount in whole or in part from a tenant or occupier of the property, despite any contractual obligation to the contrary on the tenant or occupier.<sup>478</sup> The amount may be recovered only after the municipality has served a written notice on the tenant or occupier. The amount recoverable from a tenant/occupier is limited to the amount of rent or other money

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owner/purchaser. Parties will be well advised to specify and address such issues in clear terms in their agreements of sale.

<sup>474</sup> See the MPRA s 25(1)-(4) read with s 92.

<sup>475</sup> See the MPRA s 26(1)-(3). Recovery of rates may also take place less often than a month as prescribed in terms of the MFMA.

<sup>476</sup> Refer to the MPRA s 27(1)(a)-(f).

<sup>477</sup> Read the MPRA s 27(2)-(3). Note also that the furnishing of accounts is subject to the Systems Act s 102.

<sup>478</sup> "An occupier", in relation to a property, means a person in actual occupation of a property, whether or not that person has a right to occupy the property.

due and payable, but which has not yet been paid to the owner of the property, however. The tenant must set off any such amount paid to the municipality against any money owed by the tenant/occupier to the owner.<sup>479</sup> A further method of recovery of rates is provided through section 29 of the MPRA. According to this section and despite the Estate Agents Affairs Act,<sup>480</sup> a municipality may recover the amount due for rates on a property in whole or in part from the agent of the owner, if such a way is more convenient for the municipality. Again the agent must be served with a written notice to recover the due rates, and the amount recoverable is limited to the amount of any rent or other money received by the agent on behalf of the owner, less any commission due to the agent.<sup>481</sup> On request, the agent must furnish the municipality with a written statement specifying all payments received by the agent on behalf of the owner.<sup>482</sup>

#### **18.5.6.7 General aspects concerning the valuation of rateable property**

In accordance with the MPRA, a municipality that intends to levy a rate on property must cause a general valuation to be made of all properties in its area and prepare a valuation roll of such properties.<sup>483</sup> All the rateable properties in a municipal area must be valued during a general valuation exercise, including all properties fully or partially excluded from rates. Properties referred to in section 7(2) of the Act must be valued only to the extent that rates are to be levied on them. The minister of Local Government may further fully or partially exempt a municipality from the obligation to value properties excluded from rates in section 17(1)(e), (g) and (i) of the Act, if the municipality can demonstrate that the valuation of such properties is too onerous for

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<sup>479</sup> It is clear that the legislator's intention is to allow municipalities a quick mechanism to recover non-levy payments by property owners. Although such mechanism is laudable, it is somewhat uncertain if such statutory form of recovery and obligation for set off by the tenant/occupier will withstand constitutional or other legal challenges. It is very likely that tenants/occupiers in such circumstances will suffer victimisation and other pressures from property owners. To what extent a tenant and property owner can be forced to make public the content and value of a private lease agreement or to what extent the contractual freedom between the parties can be overruled from the outside is unknown and somewhat problematic. There seems also to be an unnecessary burden on tenants/occupiers in cases where property owners default on the rates payments. In this regard, eg, a tenant/occupier must on request by a municipality furnish it with a written statement specifying all payments to be made by the tenant/occupier to the owner of the property for rent or other money payable on the property. See the MPRA s 28(4).

<sup>480</sup> 112 of 1975.

<sup>481</sup> "An agent", in relation to the owner of a property, means a person appointed by the owner of the property (a) to receive rental or other payments in respect of the property on behalf of the owner or (b) to make payments in respect of the property on behalf of the owner. See the MPRA s 1.

<sup>482</sup> See the MPRA s 29(1)-(4).

<sup>483</sup> Read the MPRA s 30(1)(a)-(b) with ss 30(2) and (3).



it, given its financial and administrative capacity. All valued properties must be included in the valuation roll.<sup>484</sup> For purposes of the general valuation, a municipality must determine a date that may not be more than 12 months before the start of the financial year in which the valuation roll is first to be implemented. The general valuation must reflect the market value of the properties in accordance with market conditions at the date of the valuation and other statutory requirements.<sup>485</sup>

A valuation roll mentioned above will take effect from the start of the financial year following the completion of the public inspection period set out in section 49 of the MPRA. The valuation roll further remains valid for that financial year or for one or more subsequent financial years as the municipality may decide. In normal circumstances, no valuation roll may remain valid for longer than four financial years.<sup>486</sup> The MEC for local government may extend the period for which a valuation roll remains valid to five years maximum, however. Such extension is permitted only if the provincial executive has intervened in the municipality or on request by the municipality, in exceptional circumstances which warrant such extension.<sup>487</sup> It must also be noted that a valuation roll remains valid for one year after the date on which the roll has lapsed if the provincial executive intervenes in terms of section 139 of the Constitution, which intervention could have been either before or after such a date. However, this position is subject to the fact that the intervention was caused by a municipality's failure to determine a date of valuation for its general valuation or its failure to designate a person as its municipal valuer.<sup>488</sup> It is therefore clear that unless exceptional circumstances exist, a municipality will have to conduct a general valuation of all property in its area every four years or on such intervals as it may have decided.

In order to compile a valuation roll, a municipality must designate a person as its municipal valuer before the date of valuation. This person may either be one of the financial officials of the municipality or a person in private practice. If a private practitioner is appointed, the municipality must follow an open, competitive and transparent process and must designate the successful bidder as its municipal valuer by way

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<sup>484</sup> See the MPRA s 30(2)-(3).

<sup>485</sup> Read the MPRA s 31(1)-(2).

<sup>486</sup> See the MPRA s 32(1)(a)-(b). This position reflect to some degree the similar position as was applicable under the previous legal dispensation.

<sup>487</sup> Read the MPRA s 32(2)(a)-(b) together with the Constitution s 139.

<sup>488</sup> Refer to the MPRA s 32(3)(a)-(b) read with ss 31 and 33.

of a written contract.<sup>489</sup> The designation/appointment of a municipal valuer may be withdrawn/cancelled only on the grounds of misconduct, incapacity, incompetence, non-compliance with the MPRA, under-performance or breach of contract, if applicable.<sup>490</sup>

A municipal valuer has a vast number of functions to perform. Such a person is obligated, *inter alia*, to

- value all properties
- prepare a valuation roll
- sign and certify the valuation roll
- submit the valuation roll to the municipal manager
- consider and decide objections to the roll
- attend every meeting of an appeal board hearing appeals or reviews of his/her decisions
- prepare supplementary rolls
- assist the municipality in collection/obtaining postal addresses of property owners
- generally provide appropriate administrative support incidental to the valuation roll.<sup>491</sup>

In order to assist a municipal valuer, a municipal manager may designate officials/persons in private practice as assistant municipal valuers. Similar requirements applicable to the municipal valuer are prescribed in relation to assistant municipal valuer.<sup>492</sup> A municipal manager may also designate officials or even non-officials of the municipality as data-collectors in order to assist the municipal valuer with the collection of data and other related work. Data-collectors appointed from outside the municipal staff component are remunerated from municipal funds, but only in terms of the contracts concluded with them.<sup>493</sup>

In an effort to help a municipal valuer to fulfil his/her functions and obligations, the MPRA determines that the valuer may delegate any powers or duties reasonably

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<sup>489</sup> See the MPRA s 33(1)-(2), read with the MFMA ch 11. The written contract should set out the terms and conditions of the designation and the person must be issued with an identity card with personal photograph for identification purposes. Read the MPRA s 33(3).

<sup>490</sup> The MPRA s 33(4)(a)-(d).

<sup>491</sup> See the MPRA s 34(a)-(i).

<sup>492</sup> Refer to the MPRA s 35(1)-(5).

<sup>493</sup> All data-collectors are also issued with ID cards and may be removed from such a designation. Normal contractual laws should be applicable in such instances. See the MPRA s 36(1)-(5). A data-collector is a person designated as such. Refer to s 1 definitions.

necessary to an assistant municipal valuer to assist the valuer. Powers and duties in the collection and processing of data may also be delegated to a data-collector. The valuer must regularly review such delegations and, if necessary, amend or withdraw such delegations. Delegations must be in writing, subject to the limitations and conditions determined in the delegation and not divest the valuer of the responsibility of the delegated powers. The valuer may also confirm, vary or revoke any decision taken in terms of the delegation, but any such action may not detract from any rights that may have accrued as a result of the decision.<sup>494</sup> In order to save costs and obtain expertise, a municipality may enter into an agreement with another municipality(s) to designate a single municipal valuer and to share the costs of preparing the different municipal valuation rolls. This sharing possibility is not permitted if the municipality concerned agrees to appoint an official of one of the partaking municipalities as the municipal valuer.<sup>495</sup>

Specific qualifications of municipal valuers are prescribed. The new legislative system determines that a municipal valuer:

- must be registered as a professional valuer or associated valuer in terms of the Property Valuers Profession Act<sup>496</sup> and
- may not be a councillor of the designating municipality or other involved municipalities.<sup>497</sup>

An assistant valuer must also have the same qualifications of a municipal valuer, except that a candidate valuer registered under the Property Valuers Profession Act may also be designated.<sup>498</sup> Before assuming office, a valuer or assistant valuer must make a prescribed declaration before a Commissioner of Oaths regarding the performance of the office and must lodge a copy of such a declaration with the municipal manager.<sup>499</sup>

It is common cause that all rateable property must be valued in order to determine the applicable rate payable. In order to value property and to establish the municipal valuation roll, access to all rateable property is required. To facilitate such access,

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<sup>494</sup> The MPRA s 37(1)-(3).

<sup>495</sup> Refer to the MPRA s 38(1)-(2). Sharing of a municipal valuer is thus permitted only if the designated person is a private practitioner.

<sup>496</sup> 47 of 2000.

<sup>497</sup> See the MPRA s 39(1)(a)-(b).

<sup>498</sup> The MPRA s 39(2)(a)-(b). No councillor may be an assistant municipal valuer.

<sup>499</sup> The MPRA s 40(a)-(b).

the MPRA states that subject to any legislation that restricts or prohibits entry to any specific property, the municipal valuer, assistant valuer, data-collector or other authorised person may enter any property that must be valued and inspect that property for purposes of the valuation, between 07:30 and 19:00 on any day, except a Sunday or public holiday. When entering a property, the person must, on demand by a person on that property, produce his/her identification card. The valuer or other official may also be accompanied by an interpreter or other functionaries.<sup>500</sup> A municipal valuer/other functionary may further require the owner/tenant/occupier of a property to give the valuer access to any document or information in his/her possession, which document or information is reasonably required for purposes of valuing the property. The valuer may make extracts from such documents or information and may also in writing require the owner/tenant/occupier or agent of owner, to provide the valuer either in writing or orally with particulars regarding the property which the valuer reasonably requires for the valuation.<sup>501</sup> Owners/occupiers/tenants should be careful about refusing to supply the information/documentation, since the MPRA determines that where a document/information was not provided, but the owner later relies on such a document/information in an appeal against the valuation, the appeal board hearing such an appeal may make an order as to costs if the board is of the view that the failure has placed an unnecessary burden on the functions of the valuer or appeal board.<sup>502</sup>

Valuers and assistant valuers are obligated to conduct the functions within a certain code of conduct. Every municipal valuer/assistant valuer must disclose any personal or private business interest to the municipality regarding any property in the municipality. The position/office as valuer may also not be used for private gain or improperly benefit another person. Furthermore each valuer/assistant valuer must comply with the code of conduct for municipal officials, as set out in Schedule 2 of the Systems Act.<sup>503</sup> A valuer/assistant valuer who contravenes/fails to comply with

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<sup>500</sup> See the MPRA s 41(1)-(3). In certain circumstances a valuer or other inspecting person may also be accompanied by security personnel, should such assistance be required by the circumstances. It is also submitted that any access to property must at least comply with any constitutional requirements. Examples of such rights are the right to privacy and property, to name but two.

<sup>501</sup> Read the MPRA s 42(1)(a)-(c).

<sup>502</sup> The MPRA s 42(2).

<sup>503</sup> Read the MPRA s 43(1)(a)-(c) together with the Municipal Systems Act Sch 2. According to s 43(2), a municipal valuer/assistant valuer who is not an official of a municipality must comply with the code of conduct as if that person is such an official.

the requirements is guilty of misconduct and subject to dismissal. A decision to dismiss a valuer/assistant who is an employee of the municipality must be based on a finding of an enquiry conducted in terms of the terms and conditions of employment of the person.<sup>504</sup> If a municipal valuer/assistant has an interest in property or his/her spouse, parent, child, partner or business associate, the municipal manager must designate a special valuer to perform such valuation.<sup>505</sup> Owners of the property should note that a municipal valuer or other functionary may not disclose to any person any information obtained except

- if allowed to in terms of the MPRA
- for the purpose of legal proceedings or
- in terms of court orders.<sup>506</sup>

#### **18.5.6.8 Aspects concerning property valuation criteria**

The new uniform Property Rates Act determines that all property must be valued in accordance with generally recognised valuation practices, methods and standards. Physical inspection, all often very useful, is optional. Comparative, analytical or even other systems or techniques may be used, including aerial photography and computer-assisted mass appraised systems/techniques. In cases where the available market-related data of any category of rateable property is not sufficient, such property may be valued in terms of mass-valuation systems. Such mass-evaluation systems/techniques should be approved by the municipality concerned after having considered any recommendations of its municipal valuer and as may be appropriate in the circumstances. Mass-valuation systems/techniques may include a system based on predetermined bands of property values and the designation of properties to one of those bands on the basis of minimal market-related data.<sup>507</sup> Subject to the provisions of the MPRA, the market value of a property is the amount that the property would have realised had it been sold on the date of valuation in the open market by a willing seller to a willing buyer. In order to determine the market value of a prop-

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<sup>504</sup> The section thus requires an inquiry in accordance with applicable labour relations practices and requirements. The municipality's normal disciplinary procedures would thus come into play. See the MPRA s 43(3)-(4).

<sup>505</sup> See the MPRA s 43(5). A special valuer must be qualified similarly to the normal municipal valuer. Refer to s 39 qualifications.

<sup>506</sup> See the MPRA s 44(1)(a)-(d). The protection of information clause is also applicable to any person accompanying a municipal valuer or other functionary, when performing his/her functions under the MPRA s 41(1).

<sup>507</sup> See the MPRA s 45(1)-(3).

erty, the following aspects must be considered for purposes of valuating a property:<sup>508</sup>

- (a) the value of any license, permission or other privilege legally granted to the property;
- (b) the value of any immovable improvement on the property that was erected or is being used for a purpose which is inconsistent with or in contravention of the permitted use of the property;
- (c) the value of the use of the property for a purpose which is inconsistent with the permitted use.<sup>509</sup>

The following issues must be disregarded for purposes of valuation:<sup>510</sup>

- the value of any building or other immovable structure under the surface of the property which is the subject of any mining authorisation or mining right as defined in the Minerals Act<sup>511</sup>
- the value of any equipment or machinery which is regarded as immovable property, excluding a lift, an escalator, an air-conditioning plant, fire extinguishing apparatus, a water pump installation for a swimming pool/irrigation or domestic purposes and any other equipment/machinery that may be prescribed<sup>512</sup>
- any unregistered lease in respect of the property.

When determining the market value of a property used for agricultural purposes, the value of any annual crops or growing timber that have not yet been harvested at the date of the valuation must be disregarded.<sup>513</sup> Where available, the market value of public service infrastructure may be valued in accordance with any other prescribed method of valuation.<sup>514</sup> In respect of sectional-title schemes, the valuer must determine the market value of each sectional title unit in accordance with the provisions of section 46 of the MPRA.<sup>515</sup>

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<sup>508</sup> See the MPRA s 46(a) and (c).

<sup>509</sup> Any unlawful use/improvement is regarded for valuation purposes as if the use/improvement was lawful.

<sup>510</sup> See the MPRA s 46(3)(a).

<sup>511</sup> 50 of 1991.

<sup>512</sup> Prescribed in this sense refer to prescribe by regulation in terms of the MPRA s 83.

<sup>513</sup> Refer to the MPRA s 46(4).

<sup>514</sup> The MPRA s 46(5).

<sup>515</sup> See the MPRA s 47.

### 18.5.6.9 Aspects regarding municipal valuation rolls

All valuation rolls must list all rateable properties in their respective municipal areas. Specific particulars that must be reflected on the roll, if such information is reasonably determinable, are:

- the registered or other description of the property
- the category in which the property falls
- the physical address
- the extent of the property
- the market value, if valued
- the name of the owner and
- any other prescribed particulars.<sup>516</sup>

The municipal valuer must submit the certified valuation roll to the municipal manager, who must within 21 days of receipt of the roll publish in the *Provincial Gazette*, once a week for two consecutive weeks, a notice stating:

- that the roll is open for public inspection for a specified period and
- which invites every person who wishes to lodge an objection against the roll in the prescribed manner and period.<sup>517</sup>

The municipal manager must further disseminate the substance of the notice to the local community and serve by ordinary mail, if appropriate, on every owner a copy of the notice, together with an extract of the valuation roll pertaining to the relevant property.<sup>518</sup> Both the notice and the valuation roll must also be published on the municipality's website, if applicable. Any person may, after publication of the notice, inspect the roll during office hours, and on payment of a reasonable fee, request extracts from the roll and may also lodge an objection with the municipal manager against any matter reflected/omitted from the roll. An objection must be in relation to a specific individual property and not against the valuation roll as such.<sup>519</sup> Objectors

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<sup>516</sup> Read the MPRA s 48(1)-(2)(a)-(g). The minister may prescribe further particulars.

<sup>517</sup> See the MPRA s 49(1)(a)(i)-(ii). The inspection period may not be less than 30 days from the date of the publication of the last/second notice in the *Provincial Gazette*.

<sup>518</sup> Refer to the MPRA s 49(1)(b)-(c). These requirements must be read with the requirements set out in the Municipal Systems Act ch 4 and s 115.

<sup>519</sup> It seems that since the Act allows *any person* (own emphasis added) to lodge an objection, it is therefore not necessarily the owner of a particular property that has such a right. It would thus seem possible that a person could lodge an objection to the valuation of other property owners. See the MPRA s 50(1).



who are unable to read or write must be assisted by the municipal manager.<sup>520</sup> It is not only private persons that may lodge an objection; a municipal council itself may lodge an objection with the municipal manager against the valuation roll that affects the interests of the municipality. The municipal manager must within 14 days of the end of the objection period submit all objections to the municipal valuer, who is again obligated to decide and dispose of the objections promptly. It is important to note that the lodging of an objection does not defer liability of payment of rates beyond the payment date.<sup>521</sup> When considering and processing objections, the municipal valuer must promptly consider the objections, decide them on facts and adjust or add to the valuation roll, depending the decision taken.<sup>522</sup>

The new legislative framework also provides for the compulsory review of decisions of the municipal valuer. In this regard it is provided that if a municipal valuer adjusts the valuation of a property by more than 10% upwards or downwards, then the valuer must give written reasons for such a decision to the municipal manager, who must, in turn, promptly submit the relevant valuation decision, together with reasons and documentation, to the relevant valuation appeal board, for review.<sup>523</sup> The relevant appeal board is then obligated to review the decision and either to confirm, amend or revoke the decision.<sup>524</sup>

It is further required that a municipal valuer must in writing notify every objector and also the owner of a property if not the same, of the valuer's decision, any adjustments made to the roll and whether a section 52 automatic appeal is applicable.<sup>525</sup> An objector or owner may in writing, and within 30 days after such notification, apply to the municipal manager for reasons for the decision. A prescribed fee must accompany the application. Within 30 days after receipt of such application through the

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<sup>520</sup> It seems obvious that the Act does not require the municipal manager to act in his/her personal capacity, but rather that personnel from his/her office provide such assistance. The municipal manager stays finally responsible for such assistance, however. The MPRA s 50(3).

<sup>521</sup> See the MPRA s 50(4)-(6). Payment of rates by property owners whilst an objection is still undecided, is somewhat controversial. It seems that the Act requires payment first and possible settlement/adjustments later. Such a situation could put legitimate objectors in a negative position vis-à-vis their relevant municipalities. The constitutionality of such a position is somewhat doubtful.

<sup>522</sup> Note that the minister may prescribe the objection procedure and also that the objections should be evaluated with due regard to the submissions of an objector, which can be the owner of the property concerned or any other person. See the MPRA s 51(a)-(c).

<sup>523</sup> Read the MPRA s 52(1)(a)-(b).

<sup>524</sup> If an appeal board amends or revokes a decision, the chairperson of such a board and the valuer must ensure that the valuation roll is adjusted according to the decision of the board. the MPRA S 52(3).

<sup>525</sup> See the MPRA s 53(1)(a)-(c).

municipal manager, the relevant valuer must then provide the applicant the reasons for the decision in writing.<sup>526</sup> After receipt of the written reasons for a decision, an appeal to an appeal board against the decision may be lodged in the prescribed manner with the office of the municipal manager. Such an appeal may be lodged by either an objector, an owner of a property who is affected by the decision and the municipal council concerned, if the municipality's interests are affected. An appeal by an objector must be lodged within 30 days after the date on which the written notice was sent to the objector or after 21 days after the day on which the reasons for a decision were sent to an objector who has requested such reasons. An owner of a property must lodge an appeal within 30 days after the date on which the written notice was sent, or within 21 days after the date on which the decision was taken.<sup>527</sup> A municipal manager must then forward any appeal to the chairperson of the appeal board within 14 days after the end of any applicable appeal period. The chairperson of the appeal board must then, for purposes of considering any appeal, convene a meeting of the board within 60 days after an appeal has been forwarded. A copy of the appeal must also be submitted to the municipal valuer concerned. Again the MPRA determines that an appeal lodged does not defer liability for payment.<sup>528</sup> Finally, it is determined in the Act that any adjustments or additions made to a valuation roll will take effect on the effective date of the valuation roll.<sup>529</sup> If an adjustment in the valuation of a property affects the amount due for rates, then the municipal manager must calculate the amount actually paid and the amount payable in terms of the adjustment calculated since the effective date. The municipal manager must then recover or repay the rates to the liable person: the difference together with interest at a prescribed rate.<sup>530</sup>

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<sup>526</sup> The MPRA s 53(2)-(3).

<sup>527</sup> See the MPRA s 54(1)-(2).

<sup>528</sup> Refer to the MPRA s 54(3)-(4).

<sup>529</sup> According to the definitions set out in the MPRA s 1, the term "effective date" means the date on which a valuation roll has taken effect in terms of the Act s 32(1) or the date on which a supplementary valuation roll has taken effect in terms of the Act s 78(2)(b).

<sup>530</sup> See the MPRA s 55(1)-(3). Where additions to a valuation roll were made, the municipal manager must also recover from the liable person, payment of the rate because of the addition, plus interest as prescribed.

#### 18.5.6.10 Requirements and determinations pertaining to valuation appeal boards

The MEC for local government in a province is authorised to establish as many appeal boards in the province as may be necessary. There must be no fewer than one such an appeal board in each district municipality and each metropolitan municipality, however.<sup>531</sup> If more than one appeal board is established in a district municipality, each board must be established for one or more local municipalities or even district management areas.<sup>532</sup> The main function of an appeal board is twofold:

- It should hear and decide appeals under the Act.
- It should review decisions of a municipal valuer submitted under section 52 of the Act.<sup>533</sup>

With reference to the composition of an appeal board, the PRA determines that each appeal board should consist of a chairperson, who must be a person with legal qualifications and sufficient experience in the administration of justice, and not fewer than two and not more than four other members with sufficient knowledge of or experience in the valuation of property. Of such persons, at least one must be a professional valuer registered in terms of the Property Valuers Profession Act. All members of an appeal board must be appointed by the MEC, taking into account the need for including representivity as well as gender representivity. When making appointments, the MEC must follow a transparent process.<sup>534</sup> The following persons are legally disqualified from being a member of an appeal board, however:

- an unrehabilitated insolvent
- a person under curatorship
- a person declared to be of unsound mind by a court of the Republic of South Africa
- a person who, after 24 April 1994, was convicted of an offence and sentenced to imprisonment without an option of a fine for a period of not less than 12 months
- a person who has been disqualified in terms of applicable legislation from practising as a valuer or a lawyer<sup>535</sup>

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<sup>531</sup> Notice of the appeal boards must be given in the *Provincial Gazette* of the province.

<sup>532</sup> See the MPRA s 56(1)-(2).

<sup>533</sup> Read the MPRA s 57(a)-(b).

<sup>534</sup> See the MPRA s 58(1)-(3).

<sup>535</sup> Refer to the Property Valuers Profession Act 47 of 2000 and the Attorney's Act 53 of 1979.

- a person who is in arrears to a municipality for rates or services charges for a period longer than three months.<sup>536</sup>

A member of an appeal board who is a councilor, employee or valuer of a municipality must withdraw from the proceedings of the board if a matter concerning that municipality's valuation roll is being considered by the board.<sup>537</sup> The normal term of office of members of an appeal board is four years, but members are eligible to be reappointed.<sup>538</sup> After consultation with the MEC, the minister of Local Government must determine the conditions of appointment of members of an appeal board. Conditions of appointment may differ between the chairperson and other members. The municipality or municipalities for which an appeal board was established must remunerate the members of the board according to the conditions of appointment and the directions of the MEC.<sup>539</sup> All members of appeal boards must perform their duties in good faith and without fear, favour or prejudice. Any personal or private business interest of a member in a matter on appeal must be disclosed, and such a member must withdraw from the proceedings, unless the board decides that the interest is trivial or not relevant. Such a decision should be announced in public at the first available sitting of the board. No member may use his/her position or privileges for private gain or to improperly benefit another person. Members may also not act in any way that compromises the credibility, impartiality, independence or integrity of an appeal board. If a member contravenes the code of conduct mentioned above, he/she will be guilty of misconduct.<sup>540</sup>

It is also provided that a member of an appeal board ceases to be a member when that person resigns, is no longer eligible or is removed from office. Only the MEC may remove a member from office and only on the grounds of misconduct, incapacity or incompetence. A decision to remove a member must be based on a finding of misconduct or incompetence by an investigating tribunal appointed by the MEC. Members under investigation may be suspended from office by the MEC.<sup>541</sup> The

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<sup>536</sup> The MPRA s 59(1)(a)-(f). The disqualification because of an offence ends five years after the imprisonment has been completed.

<sup>537</sup> The MPRA s 59(3).

<sup>538</sup> No specific terms are laid down in the MPRA. A member can thus be reappointed several times. Refer to the MPRA s 60.

<sup>539</sup> The MPRA s 61(1)-(3).

<sup>540</sup> Refer to the MPRA s 62(1)-(2).

<sup>541</sup> See the MPRA s 63(1)-(4).

MEC may further appoint alternative members of an appeal board. An alternative member acts as a member when a member is absent, has recused him/herself or when the filling of a vacancy on the board is pending.<sup>542</sup>

The chairperson on an appeal board decides where and when a board meets, but he/she must promptly convene a meeting if a majority of members of the board so request in writing, at a time and place set out in the request. When a board is hearing an appeal, it must sit in a municipality whose valuation roll is the subject of the appeal or being reviewed.<sup>543</sup> If a chairperson is absent or not available, or if there is a vacancy in the office of the chairperson, then the other members of the board must elect a member with experience in the administration of justice or elect the alternative as chairperson to preside at the meeting. Meetings are open to the public, but a board may adjourn in closed session when deliberating an issue.<sup>544</sup> An appeal board may further request a municipality whose valuation roll is under consideration to provide it with the necessary office accommodation and other administrative assistance, inclusive of staff for the board. All reasonable requests in this regard must be complied with by the municipality, which is subsequently also liable for the costs of the appeal board.<sup>545</sup> The internal procedure of a board may be determined by the board, subject to any procedures that may be prescribed.<sup>546</sup> A majority of members of an appeal board serving at any relevant time constitutes a quorum for a meeting, and a matter before the board is decided by a supporting vote of a majority of the members. If on any matter there is an equality of votes, then the member presiding must exercise a casting vote in addition to that person's normal vote as a member.<sup>547</sup> It is the responsibility of the chairperson of an appeal board and of the valuer

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<sup>542</sup> See the MPRA s 64(1)-(3).

<sup>543</sup> It seems that the intention of the legislator is for the board to sit and convene within the municipal offices of the municipality concerned. See the MPRA s 65(2).

<sup>544</sup> Read the MPRA s 55(1)-(4).

<sup>545</sup> Refer to the MPRA s 66(1)-(2).

<sup>546</sup> The MPRA s 67.

<sup>547</sup> The MPRA is somewhat unclear on the aspect of decision making. There seem to be two possibilities. Since a majority (50% + 1) of members of a board forms a quorum, such a quorum must normally be present before a meeting and subsequent decision is taken. The Act s 68 determines that any matter before the board is decided by a supporting vote of a majority of the members of the board, however, and not a majority of the members present that formed a quorum. To illustrate the position, let us imagine an appeal board that consists of five members. Refer again to the Act s 58. A quorum would be three members. If the legislator intended that a majority (absolute majority) of the members of a board must support a matter before the board, then all three members must support a decision. If the intention was to refer to a supporting vote of a majority of members present that form a quorum, then only 2 (50% + 1 of the members present) would allow a

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of a municipality to ensure that that valuation roll is adjusted or added to in accordance with the decisions taken by the board.<sup>548</sup> When an appeal board gives a decision, it may issue an order with regard to costs, as it sees just and equitable. Persons whose appeals or opposition to an appeal were in bad faith or frivolous may be ordered to compensate the municipality concerned in full or in part for costs incurred by the municipality in the appeal.<sup>549</sup> It is also determined that the MEC may on request by an appeal board authorise the board to establish one or more committees to assist it in the performance of its duties. When appointing members of a committee, the board is not restricted to members of the appeal board. Furthermore, the board

- must determine the duties of a committee
- must appoint a chairperson and other members
- must authorise the committee to co-opt advisory members within the limits determined by the board
- may remove members
- may also determine a committee's procedure.

The board can also dissolve a committee at any time.<sup>550</sup>

Similarly to a municipal valuer, an appeal board may enter any property that is subject of an appeal and inspect the property. When entering a property, a member or assistant of the board must identify himself or herself and may be accompanied by an interpreter or other functionaries.<sup>551</sup> Members of appeal boards may require access to documents or information relevant to the appeal/review and may make extracts thereof. They can also require written or oral particulars regarding the property relevant to the appeal/review.<sup>552</sup> Information obtained may not be disclosed, except as authorised under the MPRA.<sup>553</sup>

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decision. The latter would seem the more likely interpretation, since the contrary would make the provision of s 68(1) rather meaningless.

<sup>548</sup> Refer to the MPRA s 69(1)-(3). Where an adjustment affects the amount due for rates, then s 55 must be applied.

<sup>549</sup> The MPRA s 70(1)-(2).

<sup>550</sup> See the MPRA s 71(1)-(5). Note also that ss 61-66(2)(b), read with the necessary changes, apply to the conditions of appointment of members of a committee who are not members of an appeal board.

<sup>551</sup> For the full details read the MPRA s 71(1)-(3). The MEC must issue all members of an appeal board an identity card with the photographs of that person for identification purposes.

<sup>552</sup> Refer to the MPRA s 73(a)-(c).

<sup>553</sup> Read the MPRA s 74(1)(a)-(d).

In order for an appeal board to function properly, the MPRA determines that an appeal board may by notice summon a person to appear before it in order to give evidence or to produce documents specified in the summons/notice. The board may also call a person present at a meeting, whether summoned or not, to give evidence or to produce a document in that person's custody. For evidential purposes, the board may administer an oath or solemn affirmation to a person and question or have a person questioned. Documents obtained may be retained by the board for a reasonable period.<sup>554</sup> It is further also provided that a person who is appearing before an appeal board, whether summoned or not, may at his/her own expense be assisted by a legal representative. When a person is summoned before a board, he/she is entitled to witness fees paid to state witnesses in criminal proceedings in a criminal court. Such fees are payable by the relevant municipality. It should be noted that the law regarding privilege to a witness in a criminal case applies before an appeal board.<sup>555</sup> In the last instance, it is provided that legal proceedings by or against an appeal board may be instituted in the name of the board, and any costs awarded in any legal proceedings against such a board must be borne by the municipality concerned.<sup>556</sup>

#### **18.5.6.11 Aspects regarding the updating of municipal valuation rolls**

All applicable municipalities must regularly, but at least once a year, update its valuation roll by preparing either a supplementary valuation roll or amending its current valuation roll.<sup>557</sup> In respect of supplementary valuations, a municipality must, whenever necessary, cause a supplementary valuation to be made in respect of all rateable property that

- was incorrectly omitted from the roll
- was included in a municipality after the last general valuation
- was subdivided or consolidated after the last general valuation of which the market value has substantially increased or decreased
- was substantially incorrectly valued during the last general valuation

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<sup>554</sup> See the MPRA s 75(1)(a)-(e).

<sup>555</sup> For more details refer to the MPRA s 75(2)-(4).

<sup>556</sup> It seems therefore that an appeal board is afforded legal personality, which can take legal action itself or against which legal action can be instituted. The MPRA is somewhat vague about this particular aspect. See the MPRA s 76(1)-(2).

<sup>557</sup> The MPRA s 77(a)-(b).



- must be revealed because of other exceptional reasons.<sup>558</sup>

A municipal valuer who prepared the valuation roll may be designated for the preparation and completion of the supplementary roll. A supplementary roll takes effect on the first day of the month following the completion of the public inspection period, and it remains valid for the duration of the municipality's current valuation roll.<sup>559</sup>

Supplementary valuations must reflect the market value of properties as determined in accordance with market conditions that prevailed at the date of the valuation determined for the purposes of the municipality's last general valuation and other provisions of the MPRA. Rates applicable to a supplementary valuation roll become payable with effect from:

- the effective date of the supplementary roll
- the date on which the property was included in the municipality
- the date on which the subdivision or consolidation of the property was registered in the deeds office or
- the date on which the market value has substantially increased or decreased.<sup>560</sup>

All municipalities must regularly amend their valuation roll to reflect any changes to the particular roll. Changes to the roll in circumstances under section 78 of the MPRA may be effected only through a supplementary roll, however.<sup>561</sup>

#### **18.5.6.12 Miscellaneous matters pertaining to the new property rates legislation**

The MPRA determines that, on good cause shown and on such conditions as the MEC may impose, the MEC for Local Government in a province may condone any non-compliance with a provision of the Act which requires any Act to be done within a specified period or pertaining to any Act to be done within a specified period. Any

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<sup>558</sup> See the MPRA s 78(1)(a)-(f). Note that the provisions of ch 4 Part 2 and also chs 5, 6 and 7 are applicable to the updating of valuation rolls.

<sup>559</sup> Read the MPRA s 78(2)(a)-(b) together with s 49.

<sup>560</sup> Refer to the MPRA s 78(3)-(4). It seems clear from the Act that not only increases in the value of property are provided for, but also decreases. When the valuation of a property is negatively impacted, eg, through fire or other natural disaster, then a property owner would be well advised to notify the relevant municipal manager of such an occurrence and request the municipal valuer to investigate the matter and to make an adjustment accordingly. It is submitted in this regard that unless an adjustment to the valuation roll by means of a supplementary roll has been made, a property owner will have to pay the rates due on that property as was valued in terms of the previous valuation. A possible refund could be applicable later when the supplementary valuation roll is in effect.

<sup>561</sup> The MPRA s 79.

non-compliance with sections 21, 31 or 32 of the Act may not be condoned.<sup>562</sup> The MEC must further monitor whether municipalities comply with the provisions of the Act. If municipalities fail to comply with the Act, the MEC may take any appropriate steps to ensure compliance, which steps could include a proposal to intervene in accordance with section 139 of the Constitution.<sup>563</sup> Even the minister may monitor or investigate and even issue a public report on the effectiveness, consistency, uniformity and application of municipal valuations. Such an investigation may include studies of the ratio of valuations to sale prices and also other appropriate statistical measures in order to determine the accuracy of valuations.<sup>564</sup> The minister is furthermore authorised to make regulations which are not inconsistent with the Act, and which concern:<sup>565</sup>

- (a) any matter that may be prescribed in the act;
- (b) matters that refer to the preparation, contents, adoption and enforcement of a municipal rates policy;
- (c) the manner in which rates referred to in section 21 of the MPRA must be phased in together with the criteria that municipalities must take into account;
- (d) the property register;
- (e) the form and content of any document referred to in the act, including a declaration, authorization, valuation roll, objection, appeal and notice;
- (f) the valuation and rating of public service infrastructure;
- (g) procedures to be followed in connection with appeals and reviews of decisions of municipal valuers;
- (h) aspects of condonement of non-compliance;
- (i) the giving of reasons by an appeal board;
- (j) the funding of appeal boards;
- (k) inquiries by investigating tribunals for appeal boards;
- (l) inquiries of alleged misconduct of valuers;
- (m) fees payable for information or issuing of documents;

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<sup>562</sup> The MPRA s 80(1)-(3). The power to condone may also only be exercised within a framework, as may be prescribed by regulation by the minister.

<sup>563</sup> Read the MPRA s 81(1)-(2).

<sup>564</sup> Investigations may be undertaken in respect of one, more or all municipalities. See the MPRA s 82(1)-(3).

<sup>565</sup> See the MPRA s 83(1)(a)-(n).

(n) any other matter in the opinion of the minister that is necessary for the effective carrying out or furtherance of the objects of the act.

Furthermore, the minister may declare by regulation a contravention of or failure to comply with any specific regulation to be an offence.<sup>566</sup> Before regulations are promulgated, the minister must consult with OLG on the substance of those regulations and must also publish the draft regulations in the *Government Gazette* for public comment.<sup>567</sup> It is also provided that the copyright of valuation rolls and other documents produced by municipal functionaries under the Act vests in the relevant municipality concerned.<sup>568</sup>

The MPRA determines that a person is guilty of an offence if that person:<sup>569</sup>

- (a) contravenes section 43(1)(a) or (b), 44, 62(1)(b) or (c) or section 74 of the act;
- (b) willfully obstructs, hinders or threatens a valuer or other authorized person when performing a duty or exercising a power in terms of the act;
- (c) willfully gives information in an objection in terms of section 50(1)(c) of the act or in an appeal which is false in any material aspect;
- (d) after having been summoned, fails to be present at a meeting, fails to remain present until excused or fails to produce a document specified in the summons;
- (e) after having been called under section 75 of the act, refuses to appear, answer any question, except where the answer might incriminate the person or to produce a document in the person's custody;
- (f) fails to comply with a request under section 29, 42 or 73 of the act or willfully supplies false or incorrect information in any material respect.

A valuer is guilty of an offence even if he/she is grossly negligent in the exercise of the functions of the office. For someone convicted of an offence, the penalty under the Act is the liability of imprisonment, which may not exceed two years, or a fine as may be prescribed in relevant national legislation. A person convicted of an offence in terms of section 83(2) of the Act is liable only for a fine or imprisonment not exceeding six months, however.<sup>570</sup> Finally, it is determined that the MPRA prevails in

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<sup>566</sup> See the MPRA s 83(2). It should be noted that regulations may treat different categories of property or different categories of owner of property differently.

<sup>567</sup> Reer to the MPRA s 84(a)-(b).

<sup>568</sup> The MPRA s 85.

<sup>569</sup> See the MPRA s 86(1)(a)-(f).

<sup>570</sup> Read the MPRA s 86(1)-(4).

the event of any inconsistency between it and any other legislation regulating the levying of municipal rates.<sup>571</sup>

#### **18.5.6.13 Aspects concerning transitional arrangements and the amendment and repeal of legislation**

According to the MPRA, municipal valuations and property rating conducted by a municipality in an area in terms of legislation which is repealed by the MPRA before the commencement of the Act may, despite such repeal, continue to be conducted in terms of that legislation until the date on which the valuation roll covering that particular area prepared in terms of the Act takes effect in terms of section 32(1).<sup>572</sup> Until a municipality prepares a valuation roll in terms of the MPRA, a municipality may continue to use a valuation roll and supplementary roll that was in force and may levy rates against property values as shown on that roll. Where valuation rolls were prepared by different predecessor municipalities, the current/new municipality may impose different rates based on the different rolls. The amounts payable on similarly situated properties should be more or less similar. The transitional requirements lapse within four years from the date of commencement of the MPRA, however.<sup>573</sup> Similar to valuation rolls, a rates policy adopted before the commencement of the Act continues to be of force until the date on which the first valuation roll prepared under the Act takes effect.<sup>574</sup> Transitional arrangements regarding section 21 applications, the liability of bodies corporate of sectional title schemes and special rating areas are also determined by the MPRA.<sup>575</sup> Finally, the MPRA amends and repeals various pieces of national and provincial legislation. For details on such legislation, refer to the schedule annexed to the Act.<sup>576</sup> In contrast with the levying of property taxes on privately owned land, the state is sometimes exempted from having to pay taxes to local authorities. According to the Rating of State Property Act,<sup>577</sup>

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<sup>571</sup> The enforcement of so-called "old-order" legislation, which is still in existence in the various provinces, is thus subjected to the MPRA. See the MPRA s 87.

<sup>572</sup> See the MPRA s 88(1)-(2).

<sup>573</sup> Read the MPRA s 89(2)-(3). When the old order laws lapse, then the old valuation rolls/supplementary rolls may not be used anymore.

<sup>574</sup> See the MPRA s 90(1)-(2). Any review of such an old rates policy after the commencement of the Act must take the aims of the MPRA s 3(3) into account.

<sup>575</sup> Refer to the MPRA ss 91, 92 and 93 respectively.

<sup>576</sup> See the Act s 95 together with the Sch. The Act comes into operation only on a date to be determined by the president by proclamation. The MPRA s 96. It should specifically be noted that the MPRA repeals the whole of the Rating of State Property Act 79 of 1984.

<sup>577</sup> 79 of 1984.

state property is also rateable. Exemptions are possible, however.<sup>578</sup> This Act was repealed by the MPRA, however.

### **18.5.7 Fees, service charges and tariffs**

Municipalities have always been very dependent on financial income derived from fees, service or user charges and various tariff obligations. All former provincial ordinances provided for such revenue arrangements. Section 10G(7) of the LGTA empowered municipalities to levy and recover levies, taxes, fees and tariffs and also prescribed the procedures for doing so. Unless repealed or contrary to the Constitution, such requirements are still applicable and enforceable. According to the new constitutional scheme, that is, section 229, municipalities are empowered to impose taxes, levies and duties apart from property rates and surcharges on fees if authorised by national legislation. Income tax, general sales tax, and value added tax are excluded, however.<sup>579</sup>

Generally speaking, a “charge” is regarded as a payment for something to be done, for example an electricity or water connection. The fee or charge is then a once-off payment. A “tariff”, on the other hand, refers to a continuing fee or charge for a service that is being rendered or for a function that is to be performed on a continuing basis. Examples of tariffs included tariffs for the supply of water or electricity, refuse removal or even public transport. In essence the purpose of fees, charges and tariffs is to recover the cost of providing such a service or to perform such a function.<sup>580</sup> Fees, tariffs and service charges are often divided into different categories. A distinction is made between *trading services*, *necessary services* and *social services*. Trading/utility services include water and electricity services. Normally it is expected that municipalities do not make a profit on such services, as it could be oppressive to poor households. In many instances in the past profits were indeed achieved on electricity and sometimes on water services. Necessary charges or fees relate mostly to sewerage, refuse removal and associated services. *Social services* refers to services such as clinics, building control, markets, halls, libraries,

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<sup>578</sup> See the Act s 3(3).

<sup>579</sup> The Constitution does not define what is meant by levies or taxes. Taxes must be levied and recovered according to the law, however.

<sup>580</sup> See Craythorne (1997) 360-361. The writer mentions that sometimes the amount charged will cover the entire cost of the service or function, and sometimes the cost will amount to only a contribution of the costs. The balance will then often be subsidised from other sources such as rate

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parks and other recreational facilities. Such services are regarded as important for the growth and development of a community. They are often very expensive and are subsidised from other sources.

It is evident that user charges form an important source of municipal own revenue and that the cost recovery of such charges is essential. Many municipalities under the new legal system contain several backlogs in respect of payment for these services. In an effort to assist municipalities in meeting the capital costs of bulk connector infrastructure, national government has provided for the Consolidated Municipal Infrastructure Programme (CMIP). There is a general obligation on municipalities to develop clear tariff policies and also to ensure that poor/indigent households have access to basic services. It is also important that tariff enforcement and credit control mechanisms should be improved. In an effort to guide tariff policies, government and other stakeholders have agreed on the following guidelines:<sup>581</sup>

- *Payment in proportion to the amount consumed* As far as is practically possible, consumers should pay in proportion to the number of services consumed.
- *Full payment of service costs* All households, with the exception of the indigent, should pay the full costs of the services consumed.
- *Ability to pay* Municipalities should develop a system of targeted subsidies to ensure that poor households have access to at least a minimum level of basic services.
- *Fairness* Tariff policies should be fair, in that all people should be treated equitably.
- *Transparency* Tariff policy should be transparent to all consumers and any subsidies and concessions which exist must be visible and understood by all consumers.
- *Local determination of tariff levels* Municipalities should have the flexibility to develop their own tariffs in keeping with the above principles.
- *Consistent tariff enforcement* A consistent policy for dealing with non-payment of tariffs needs to be developed. This must be targeted and enforced with sensitivity to local conditions.

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charges. If full cost were to be charged, ie for public swimming pool amenities, such facilities would be beyond the financial reach of many local residents.

<sup>581</sup> See the White Paper on Local Government (1998) at 137.

- *Ensure local economies are competitive* Local tariffs must not unduly burden local business through higher tariffs, as these costs affect the sustainability and competitiveness of such businesses and firms.

#### **18.5.8 Trading enterprises and subsidies**

It has always been customary for local governments to participate in trading enterprises. Trading enterprises are associated with activities such as the provision of water, electricity, transport and fresh produce. Trading enterprises should be balanced within the overall tariffs policy to enhance income, on one hand, but not to overburden consumers/residents on the other. In the past it was expected of local authorities to generate sufficient income to carry out their activities. Little financial or other assistance was received from the other spheres of government. Municipalities were exempted from revenue sources such as income tax, stamp duties and the taxation on gifts, however. Subsidies were also received from the central and provincial authorities. The provisions of section 214 of the Constitution, which requires the equitable division of revenue raised nationally, should significantly enhance the financial support from the two higher spheres of government to the lowest spheres. Both national and provincial governments are legally obligated to support municipalities from *inter alia* a financial point of view.

#### **18.5.9 RSC levies and intergovernmental transfers**

In the recent past, Regional Service Council levies have developed into an important source of revenue for especially metropolitan and district councils. Although often controversial, these taxes are important for municipal revenue and should be retained until a suitable alternative is found. Some of the general criticism levelled against RSC levies is the costs of collection and the fact that the tax is directed on staff or labour. This is often perceived to reinforce a bias against labour-intensive enterprises and could therefore negatively impact on development. It is submitted, however, that as long as such levies are restricted to low levels and are effectively controlled, the potentially negative effects should be minimised.<sup>582</sup>

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<sup>582</sup> See the Regional Services Act 109 of 1985, which provides for the payment to councils of a regional services levy by every employer and a so-called "regional establishment levy" payable by every person carrying on an enterprise in the area of a particular council. Refer also to the case of *Greater Johannesburg TMC v Eskom* 2000 (1) SA 866 (SCA). The dispute concerned the liability for regional establishment levies on the part of Eskom to the particular municipal council. According to the RSC Act s 12, every person carrying on an enterprise within a region/jurisdiction is subject to such a levy. Eskom Act 40 of 1987 s 24 exempted Eskom from payment of levies that would other-

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In light of the constitutional obligation that municipalities are entitled to an equitable share of national revenue as well as the obligation on national and provincial governments to support municipalities financially, the principle of intergovernmental transfers (IGT) has become very important. According to the White Paper on local government, three basic types of transfer were identified:<sup>583</sup>

- There are agency payments paid by provincial governments to municipalities for services rendered by the municipalities on behalf of the provinces.
- There are direct grants from higher spheres to municipalities to subsidise the capital costs of investment in municipal infrastructure.
- There are grants to support the operating budget of municipalities.

Municipalities must ensure that the agency payments they receive are sufficient to cover the full cost of the services which they deliver. The possibility of unfunded mandates should be guarded against. It is important that the new system of IGT should address not only the vertical division of revenue but also the horizontal division of revenue between municipalities *inter se*. The vertical division is decided via the national budgeting process. It is also important to note that the equitable share from national revenue covers only funds transferred to cover operating costs of municipalities. Capital grants are classified under so-called “additional grants”. From the horizontal divisional point of view, all municipalities must be able to provide a basic level of services and have at least an administrative infrastructure sufficient to govern its area effectively.

#### **18.5.10      *Municipal loans and capital funds***

It was mentioned above that the Constitution allows municipalities to raise loans for capital or current expenditure.<sup>584</sup> Such loan capacity refers to external loans such as bank overdrafts. Municipalities must be very cautious not to over-exceed their borrowing possibilities and end up having a negative credit rating, however. In order to ensure that a municipality does not fall into a trap of debts, strict requirements are set out before a loan can lawfully be obtained.<sup>585</sup> Loans for bridging finance may be raised only during a financial year and also only to finance current expenditure in

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wise have been payable to the state. Court held that the reference to “state” in the Act was to the state in all its manifestations, including local authorities such as RSC or TMC. Eskom was accordingly exempted from paying regional establishment levies.

<sup>583</sup> See White Paper on Local Government (1998) at 139.

<sup>584</sup> See the Constitution s 230.

<sup>585</sup> See the LGTA s 10G(8) and the various provisions under the LGMFMA discussed above.

anticipation of the receipt of revenue to be collected. Apart from raising loans, municipalities can also utilise internal capital funds as a resource for funding less expensive capital purchases such as equipment and minor building works.

#### **18.5.11      *Municipal stocks***

Another method used in the past in raising capital by municipalities was through the issuing of municipal stock. Stock refers to a fixed amount of money invested by an individual or institution. It is a form of loan. In return for the investment, a certificate is issued as evidence of ownership of a fixed amount of stock. Normally a stock certificate is transferable at a price determined by the prevailing money market. Craythorne identifies three types of stock.<sup>586</sup> These are *bearer stock*, *inscribed stock* and *registered stock*. Transfer of stock takes place through the transfer or surrender of the stock certificates. In South Africa this method of raising money is preferred because of security offered by the stocks and also easy accounting control. Finally, there are two methods of issuing stock: one is through the so-called “fixed price” system and the other is through the “tender” system. Under the tender system municipal stock is put up for public tender, and an issue is made to the highest bidder.<sup>587</sup>

#### **18.6 Conclusion**

It is obvious to conclude that the restructuring process of local government and the various constitutional demands placed on municipalities have introduced many financial challenges. These challenges include a dramatic increase in services responsibilities, escalation in municipal salaries, higher administrative costs and often a significant reduction in experienced personnel.<sup>588</sup> Most of these challenges have placed severe pressure on the cash flows and financial control mechanisms of all newly amalgamated municipalities.

There seems to be a strong need and indeed constitutional obligation for municipalities to restore and implement strict financial discipline and to take effective steps to recover outstanding debts and to fully utilise all local methods to generate the necessary revenue. Without sufficient revenue at their disposal, municipalities will not be able to fulfil and complete their constitutional obligations. It is further also

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<sup>586</sup> See Craythorne (1997) 364.

<sup>587</sup> Craythorne (1997) 364-365.

<sup>588</sup> Refer to the White Paper on Local Government (1998) at 147.

essential that municipalities are properly assisted and supported by both the national government and the provincial authorities. The success of municipal fiscal management lies in strict control and oversight, however. In this regard the higher spheres of government have important control functions to fulfil.

It is submitted that the new legislative provisions, within the basic framework of the Constitution, indeed create a legal dispensation that should allow all municipalities to enhance and secure sufficient financial revenue and thereby provide and sustain essential municipal services. Such support and financial entitlements are not unrestricted, and various measures of control and accountability over fiscal matters have been provided for. Clear and decisive provisions are also made to ensure higher-sphere involvement in municipal financial affairs and to provide for oversight and even national and provincial intervention in cases where municipal finances are inappropriately managed. The new legal framework also allows for much stronger public participation in financial affairs, which in turn should foster stronger relationships of trust and support between local residents and their respective municipal governments. However, the ultimate success of the new system lies in the way in which the new system is implemented and in the manner in which all roleplayers exercise and fulfil their distinctive legal obligations.

## **The principles of municipal public administration and the requirements of performance management, capacity building, accountability and public participation**

### **19.1 Introduction**

The importance of the relationship between municipalities and residents as well as between municipalities and the two higher spheres of government have been emphasised in many previous chapters of this work. These relationships have been given constitutional importance and significance under the new overall constitutional scheme. Especially since the Constitution is the supreme law of the state, all constitutional requirements dealing with the public administration and the relations between the public and government institutions must be strictly complied with. Under the previous local government system, many of these issues were not legally enforceable or were largely downplayed in mostly provincial ordinances. This position has now changed fundamentally under the new constitutional dispensation.

As a basic point of departure, the meaning of administration (ie municipal administration) refers to the overall management of the public affairs of a certain organisation.<sup>1</sup> On a municipal level, public administration encapsulates a special relationship between politics and administrative organs. The politicians are concerned with the uses of power, whilst the administration is concerned with translating the political decisions into practical implementation. Furthermore, the political dimension is subject to change, whereas the administration is characterised by stability and routine.

In terms of public administration, it must be remembered that the concept includes aspects such as policy, decisions, staffing matters, organising, planning and also resource allocations. The concept also differs widely from one administration to an-

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<sup>1</sup> Craythorne (1997) 65.

other. Municipal administration is undoubtedly part of public administration in general, but it also has a more distinctive importance; for example:<sup>2</sup>

- It operates in a political field.
- It operates within the context of democratic notions of an open, responsive and accountable government institution.
- It is decentralised and, to a certain degree, self-financing.
- It is the part of government which is closest to the citizens of a particular state.

### **19.2 Basic aspects concerning municipal public relations**

All forms of government accept in general that their actions have to be acceptable by their subjects. This realisation provides the basis for the development of a relationship of trust and support between the state and its people. In modern day governments this relationship is very important because a government is generally accountable to the people who have elected it to power. This position is particularly true for local governments. Because local authorities provide essential goods and services which affect people directly, it is acceptable that the public at large should be sensitive about the performance of both political office-bearers and administrative staff components.

In contrast to the public relations activities of private enterprises which are directed at sales and profits, public relations programmes of public institutions are usually approached from the point of view of promoting general welfare. Public institutions are mostly monopolistic enterprises with no real competitors. This position has changed somewhat under the new South African constitutional scheme as competitiveness, accountability and responsiveness in providing services and attracting investment have become familiar catch-phrases. Because of their prominent caretaker roles in society, public institutions such as municipalities are subjected to various legal requirements in respect of the exercise and fulfilment of their functions.<sup>3</sup> It is further also an established requirement that public functionaries maintain high ethical standards. This position is so because of the important public responsibilities which municipalities must perform.

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<sup>2</sup> See Craythorne (1997) 71.

<sup>3</sup> See Cloete (1997) 152. The writer mentions that the public does not always understand the reasons for administrative red tape. There are often very good reasons for such requirements, however. The introduction of Public/Private Partnerships (PPP) has also boosted municipal competitiveness and profit targeting.

Municipal public relations are affected by every action of a political or staff representative. The activities of municipalities will always be evaluated carefully by local residents and other stakeholders. If respect is to be achieved, officials and political representatives should foster an attitude of commitment to the general public. It is thus safe to say that the state of public relations is largely dependent upon the conduct and performance of every functionary involved in public administration. Because of its importance, every municipality should appoint officials that are charged exclusively with the handling of its public relations.<sup>4</sup> One of the many difficult tasks of a public relations officer is to determine public opinion and attitudes and to accommodate such opinions and attitudes. Quick and reliable information is very important here.

### **19.3 The constitutional requirements affecting municipal public administration**

In light of the importance and responsibilities of public administration at large, the new constitutional scheme specifically entrenches certain basic values and principles that govern it. These basic values and principles are important to not only the public administration *per se*, but also the public services throughout all three spheres of government. Unless the Constitution is amended, the basic values and principles have been afforded supreme legal status and must be complied with.

#### **19.3.1 *The basic values and principles governing public administration***

In section 195 of the Constitution, the following values and principles relevant to the overall public administration are mentioned as follows:<sup>5</sup>

- A high standard of professional ethics must be promoted and maintained.
- Efficient, economic and effective use of resources must be promoted.
- Public administration must be development-orientated.
- Services must be provided impartially, fairly, equitably and without bias.
- People's needs must be responded to and the public must be encouraged to participate in policy-making.
- Public administration must be accountable.
- Transparency must be fostered by providing the public with timely, accessible and accurate information.

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<sup>4</sup> Such personnel are usually known as "public relations officers" (PROs) and "publicity officers" (media liaison officers).

<sup>5</sup> See the Constitution s 195(1)(a)-(i).

- Good human-resource management and career-development practices must be cultivated to maximise human potential.
- Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress imbalances of the past to achieve broad representation.

All of the abovementioned values and principles are obligatory and must be complied with. The Constitution is clear on the fact that public administration must be governed by the democratic values and principles enshrined in the Constitution and not only those mentioned in section 195(1).<sup>6</sup> Apart from the values and principles mentioned, the Constitution confirms that the principles apply to the public administration in every sphere of government, organ of state and public enterprise. Without a doubt such principles are therefore relevant to all municipalities.<sup>7</sup> The Constitution further requires the enactment of national legislation which must ensure the promotion of the mentioned values and principles.<sup>8</sup> It is also permitted that the national legislation envisaged above may allow for differentiation between aspects regulating public administration between different sectors, administrations or institutions. In this regard the particular nature and functions of different sectors, institutions or administration should be taken into account when the legislation regulating the public administration is enacted. Furthermore, it seems clear from the Constitution that not all aspects concerning the public administration of all administrations or sectors should be precisely the same.<sup>9</sup> The national legislation envisaged in section 195 has been enacted as the Public Service Act.<sup>10</sup> *Inter alia*, the Act provides for the broad principles on the functioning of the public service in general, thereby also including various aspects important to municipal public administration. The Act must also be read in conjunction with section 197 of the Constitution, which in essence creates a public service for the entire Republic of South Africa. According to the Constitution, there is a public service within the overall public administration. Such public service must function

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<sup>6</sup> See the Constitution s 195(1).

<sup>7</sup> See the Constitution s 195(2)(a)-(c).

<sup>8</sup> See the Constitution s 195(3).

<sup>9</sup> See the Constitution s 195(4)-(6).

<sup>10</sup> 103 of 1994 as amended by Act 86 of 1998. Note that the Act is applicable to only the national and provincial spheres of government. Municipalities currently still determine their own conditions of service and determine their own salary scales.



and be structured in terms of national legislation, and the public service must execute the lawful policies of the government of the day loyally.<sup>11</sup> The terms and conditions in the public service must also be regulated by national legislation, and public service employees are entitled to a fair pension. No employee may be favoured or prejudiced because that person supports a particular political party or cause. Finally it is the responsibility of provincial governments to manage the public service in their administrations. They may do so only within a framework of uniform norms and standards applying to the public service.<sup>12</sup>

It was mentioned above that municipal administrations are clearly part of the public administration at large and that the principles and requirements mentioned in the Constitution and national legislation are equally applicable to them. Apart from the national legislative requirements for all administrations, certain specific aspects have also been included in selective laws dealing specifically with local government matters. Such legislative provisions will be discussed below. Finally, it must be pointed out that the Constitution also establishes a single Public Service Commission for the Republic of South Africa. The commission must be independent and impartial and must exercise and perform its functions in the interests of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The commission is regulated by national legislation and therefore it also plays an important role in overseeing and controlling aspects of public service and administration within the municipal public administrative domain.<sup>13</sup> The commission has various constitutionally entrenched powers and functions and also certain additional powers and functions prescribed by national legislation.<sup>14</sup>

### **19.3.2 Issues concerning municipal administration**

In follow-up of the constitutional requirements mentioned above, the new local government legislative framework also provides for aspects relevant to local public administration. According to the Local Government: Municipal Systems Act,<sup>15</sup> the local public administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution. It is further provided that in the administering of

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<sup>11</sup> See the Constitution s 197(1).

<sup>12</sup> Refer to the Constitution s 197(2)-(4).

<sup>13</sup> See the Constitution s 196(1)-(2).

<sup>14</sup> See the Constitution s 196(4)(a)-(g).

<sup>15</sup> 32 of 2000.

its affairs, municipalities must strive to achieve the objects of local government as set out in section 152 of the Constitution and also comply with the duties of local governments.<sup>16</sup> In furtherance of the developmental duties of municipalities, the Systems Act determines that, within their administrative and financial capacity, all municipalities must establish and organise their administration in a manner that would enable municipalities to comply with various administrative and financial requirements. These requirements are the following:<sup>17</sup>

- to be responsive to the needs of the local community
- to facilitate a culture of public service and accountability amongst its staff
- to be performance orientated and focused on the objects and developmental duties of local government
- to ensure that its political structures, political office bearers and managers and other staff members align their roles and responsibilities with the priorities and objectives of the municipality's integrated developmental plan
- to establish clear relationships and to facilitate co-operation, co-ordination and communication between its political structures and political office bearers and its administration; and between its political structures, political office bearers and administration and the local community
- to organise its political structures, political office bearers and administration in a flexible way in order to respond to the changing priorities and circumstances of the municipality
- to perform its functions through operationally effective and appropriate administrative units and mechanisms, including departments and other functional or business units and also, when necessary, to perform such functions on a decentralised basis
- to assign clear responsibilities for the management and co-ordination of the administrative units and mechanisms
- to hold the municipal manager accountable for the overall performance of the administration
- to maximise efficiency of communication and decision-making within the administration

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<sup>16</sup> See the Systems Act s 50(1)-(2).

<sup>17</sup> See the Systems Act s 51(a)-(m).

- to delegate responsibility to the most effective level within the administration
- to involve staff in management decisions as far as is practicable
- to provide an equitable, fair, open and non-discriminatory working environment.

The requirements mentioned above are subject to any applicable labour legislation, however. Applicable labour legislation will prevail if any inconsistencies arise.<sup>18</sup> It seems that the intention of the legislature was to allow municipalities considerable leeway in order to create an effective municipal administration, but not to do so at the expense of established and recognised labour interests.

#### **19.4 Principles of municipal accountability and public participation**

It is an historical fact that to a large extent community participation and municipal accountability were neglected under the former local government dispensation. One of the core elements of change was allowing people to have a say in the decisions that affected their lives. Participation and accountability of representatives are therefore not new concepts in South African public life. Under the new dispensation these concepts have been afforded significant recognition. The supreme law of the state now recognises that participation and accountability are core and crucial principles for ensuring sustainable, democratic and developmental local government. According to the founding provisions and the objectives of local government, the aim of the new constitutional dispensation is to establish a democratic government founded *inter alia* on the values of accountability, responsiveness and openness. These sentiments are echoed in the objectives of local government, which affirms the aim of providing democratic and accountable local governments for local communities and encouraging their involvement in local government matters.<sup>19</sup> With this new constitutional mandate, the principles of participation and accountability are central to the new local government dispensation and the final transformation of the previous system.

The process of ensuring participation and accountability in local government represents major challenges for all municipalities. The transition to the new system was long and difficult, and many adaptations were required in order to accommodate new structures and processes. Central to the success of establishing a new system has been the participation by citizens and the accountability of those in positions of

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<sup>18</sup> See the Systems Act s 52.

<sup>19</sup> See the Constitution ss 1 and 152.

power. There are many shortcomings in the new system, however, and constant development of participation and accountability is required.

#### **19.4.1 Participation, communication and partnerships**

The essence of the concept of participation is giving people, and more specifically local residents, a real say in decisions that affect their lives. In order to take part in such decision-making processes, people must have access to decision-making structures in order to make their voices heard. Real participation strengthens the legitimacy of municipal decision making. South African local governments face various challenges to ensure participation, however. Many members of society do not have the opportunities that others do to express themselves. The lack of resources and education often excludes people from participatory processes. There are two key ways in which participation can be facilitated. They are

- to improve and maintain existing channels of communication
- to form new and strong partnerships between municipalities and local stakeholders.

#### **19.4.2 Channels of communication**

It is a fact that in systems where there are open channels of communication meaningful participation usually occurs. The following different channels of communication should enhance participation between citizens and municipalities.<sup>20</sup>

- *As voters* One of the commonly known and important ways through which citizens can voice their opinions in terms of governmental decision making is through the process of voting. Every adult South African citizen has the right to vote and to take part in elections for any legislative body established in terms of the Constitution.<sup>21</sup> This constitutionally protected right is important not only to ensure a democratic society but also to allow the voters to have a direct say in the choice of their political leaders and their policies. As with all government structures, municipalities have an obligation to make voters aware of their right to vote and to motivate them to exercise such right.
- *As consumers of services* Most people have direct contact with their municipalities through the use of and payment for municipal services. Through this channel

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<sup>20</sup> See LGIS no 2 "Participation and Accountability" (1999) at 3-8.

<sup>21</sup> Read the Constitution s 19(3)(a).

of regular contact, many aspects of municipal decision making can be communicated.

- *As an organised interest group* People often organise themselves in different interest groups. Such groups include political parties, NGOs and a range of Community Based Organisations (CBOs) such as ratepayers associations, church groups etc. Business people also organise themselves into groups that look after their interests and the interests of the region. A local chamber of commerce is a good example of a business organisation that could have an important influence with the local authority and which could serve as an acknowledged and influential communication instrument.
- *Through specialised structures* Communication can also be significantly enhanced through specialised local structures. A ward committee is such a structure and could play a very important intermediary between local residents and their local municipality. Ward committees are best suited to detecting local problems and to communicating such problems quickly and effectively. Apart from ward committees, which interact with the specific ward representative, residents can also communicate and participate with their local municipality through their traditional leaders or other community organisations. The existence of traditional leadership in many regions in South Africa and its role and involvement with local municipalities should also provide a powerful mechanism for participating and communicating with their municipal structures.<sup>22</sup> It is essential that municipalities should ensure that the channels mentioned above are kept open and effective. To this end the new local government legislative framework provides specifically for a chapter on community participation.<sup>23</sup> A further example of a specialised structure is the existence of organised labour. Organised labour should also be consulted by municipalities when issues are considered that could have an impact on them. In the case of *SAMWU v City of Cape Town and Others*<sup>24</sup> the Supreme Court of Appeal stated that the provisions of sections 16-21 of the Systems Act foster

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<sup>22</sup> Municipalities can also ensure participation through the establishment of internal municipal committees, eg, an advisory committee. Such a committee is specifically formed to address the need for effective communication with the public and can act as a vital link between the municipality and its local community.

<sup>23</sup> See the Systems Act ch 4, which is discussed later in this ch.

<sup>24</sup> 2004 (1) SA 548 (SCA).

community participation in municipal decision-making processes. Such participation could include organised labour.<sup>25</sup>

#### **19.4.3 Participation through partnerships**

When channels of communication are open and effective, conditions are conducive for partnerships to be formed. Examples of these are partnerships between the municipality and the police in combating crime, and between local business enterprises to alleviate social upliftment. The new legal framework provides specifically for such programmes and partnerships.<sup>26</sup>

#### **19.4.4 The new legislative provisions regarding community participation**

Under the new local government legislative framework, specific provision has been made for ensuring and protecting the participation of local communities. Chapter 4 of the Municipal Systems Act features various legal obligations to which municipalities must comply. From the start the Act determines that municipalities develop a culture of municipal governance that complements formal representative government with a system of participatory governance. In an effort to achieve and develop such a culture, municipalities must encourage and create conditions for the local community to participate in the affairs of the municipality. Participation should include participation in:

- the preparation, implementation and review of the municipal integrated development plan
- the establishment, implementation and review of the performance management system
- the monitoring and review of performance in general, including outcomes and impact of performance
- the preparation of the municipal budget
- strategic decisions relating to the provision of municipal services.<sup>27</sup>

Municipalities must further contribute to building the capacity of the local community in order to enable it to participate, and to enable councillors and staff members to foster community participation. Municipal resources and funds that are allocated

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<sup>25</sup> Refer to the *SAMVU* case *supra* fn 24 at 551-555.

<sup>26</sup> See the Systems Act ch 4.

<sup>27</sup> Refer to the Systems Act s 16(1)(a)(i)-(v).

annually from the municipal budget should be provided in order to achieve the mentioned participatory objectives.<sup>28</sup>

Specific mechanisms, processes and procedures for community participation have also been provided for. The Systems Act determines that participation by the local community in the affairs of the municipality must take place through various mechanisms.<sup>29</sup> All municipalities must establish appropriate mechanisms, processes or procedures to enable the local community to participate in the affairs of the municipality. In this respect, municipalities must provide for

- the receipt, processing and consideration of petitions and complaints lodged by members of the local community
- notification and public comment procedures
- public meetings and hearings by the municipal council, other political structures and political office bearers, when appropriate
- consultative sessions with locally recognised community organisations and where appropriate, traditional authorities
- report-back mechanisms to the local community.<sup>30</sup>

When a municipality establishes mechanisms or processes of participation, it must take into account the special needs of people who cannot read or write, people who have disabilities, women and various disadvantaged groups. A municipal council may also establish one or more advisory committees to advise the council on any matter within the council's competence.<sup>31</sup>

A further important provision is that municipalities must communicate to their relevant communities information concerning *inter alia* the available mechanisms to encourage and facilitate community participation, the matters on which participation is encouraged and also the rights and duties of members of the local community.

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<sup>28</sup> See the Systems Act s 16(1)(b)-(c). It should be pointed out that the mechanisms to encourage participation must not be interpreted as permitting interference with a municipal council's rights to govern and to exercise executive and legislative authority. In instances where participatory schemes would interfere with municipal administration or the effective provision of services, such schemes must be overruled in favour of a municipality's right to govern and to exercise its functions and obligations. See the Act s 16(2).

<sup>29</sup> See the Systems Act s 17(1)(a)-(e). It is envisaged that participation must take place through (a) political structures; (b) other mechanisms, processes and procedures provided for in terms of the Systems Act; (c) other appropriate mechanisms, processes and procedures established by the municipality; (d) councillors; and (e) generally applying the provisions for participation as provided for in the Systems Act.

<sup>30</sup> See the Systems Act s 17(2)(a)-(e).

<sup>31</sup> See the Systems Act s 17(3)(a)-(d) and s 17(4).



When such information is being communicated by a municipality to its local community, it is obligatory for the municipality to take into account the language preferences and usage in the municipality and the special needs of people who cannot read or write.<sup>32</sup> Participation is also enhanced through giving notice to the public of municipal council meetings and giving them admission to these. It is now required by law that the municipal manager of a municipality give notice to the public of the time, date and venue of every ordinary meeting of the council and also special or urgent meetings, except when time constraints make such notice impossible.<sup>33</sup> As was stated elsewhere in this work, a municipal council must conduct its business in an open manner and may close its sittings only when it is reasonable to do so.<sup>34</sup> The constitutional requirement is reiterated in the new legislative framework. Meetings of a municipal council and of its committees are open to the public, including the media, and neither the public nor the media may be excluded from council or committee meetings except when:

- it is reasonable to do so because of the nature of the business being transacted *and*
- a by-law or resolution of the council specifying the circumstances in which the council/committee may close a meeting, authorises the council or committee to close the meeting to the public.<sup>35</sup> The public or media, may not be excluded, from a council or committee meeting when any of the following matters are being considered or being voted on:<sup>36</sup>
  - (a) a draft by-law tabled in council
  - (b) a budget tabled in council
  - (c) the municipality's draft IDP or amendments thereto, tabled in council
  - (d) the municipality's draft performance management system or amendments, tabled in council
  - (e) the decision to enter into a service delivery agreement in terms of section 76

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<sup>32</sup> Refer to the Systems Act s 18(1)-(2).

<sup>33</sup> See the Systems Act s 19(a)-(b). The manner in which the notice is to be given must be determined by the municipal council.

<sup>34</sup> See the Constitution s 160(7).

<sup>35</sup> See the Systems Act s 20(1)(a)-(b). Note that decisions by local governments are taken via specific resolutions or via the adoption of a by-law. Resolutions can however be *more easily amended* or changed than by-laws.

<sup>36</sup> See the Systems Act s 20(2)(a)-(f).

- (f) any other matter prescribed by regulation.

However, it is interesting to note that, subject to reasonability and the nature of the business being transacted, an executive committee and a mayoral committee may close any or all of its meetings to the public and media.<sup>37</sup> Finally, a municipal council, within its financial and administrative capacity, must provide space for the public in the chambers where the council or committees meet, and it may also take reasonable steps to regulate public access to and public conduct at such meetings.<sup>38</sup>

The new local government legislative framework also determines specific requirements in respect of communications to the local community. When a municipality needs to notify the community of anything through the media, it must do so in the local newspaper(s) of the area, in newspapers circulating in the area and in newspapers determined by the council to be newspapers of record; alternatively, notices can be sent by radio broadcasts covering the area of the municipality.<sup>39</sup> Any notification must be in the official language(s) determined by the council, with consideration of the language preference and usage within its area. Notices must also be displayed at the municipal offices. When a local community is invited to submit comments to the council, the invitation notice must state that municipal staff members will assist persons who cannot write. Similar provisions are set when members of the public are required to fill in forms. Persons who cannot read or write must be assisted.<sup>40</sup>

Specific provisions regarding the publicity of documents have also been included. According to the Systems Act, all documents that must be made public by a municipality in terms of a requirement of the Act, the Municipal Finance Management Act or any other applicable legislation must be conveyed to the local community by displaying the documents at the municipality's head and satellite offices and libraries, on the municipality's official website if available and by notifying the local community of the place and address where detailed particulars concerning the documents can be obtained.<sup>41</sup> Each municipality is also obligated to establish its own official website if it decides that it is affordable, and place on such website all information required under

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<sup>37</sup> The Systems Act s 20(3).

<sup>38</sup> The Systems Act s 20(4)(a)-(b).

<sup>39</sup> See the Systems Act s 21(1)(a)-(c).

<sup>40</sup> See the Systems Act s 21(2)-(5).

<sup>41</sup> See s 21A of the Systems Act as inserted by Act 44 of 2003 s 5. If appropriate, a notification mentioned above must invite the local community to submit written comments or representations to the municipality in respect of the relevant documents.

the Systems Act and the Municipal Finance Management Act. If no website is established, all relevant information should be displayed on an organised local government website sponsored or facilitated by the National Treasury. It is the overall responsibility of the municipal manager to ensure maintenance and regular updating of the electronic information of a municipality.<sup>42</sup>

Under the new legislative framework, the minister of local government is also authorised to make regulations or issue guidelines on various aspects concerning public participation in local municipal affairs. The minister should take into account whether municipalities have the capacity to fulfil extra regulatory or guiding requirements, however.<sup>43</sup>

#### **19.4.5 Local municipal accountability**

It was explained above that accountability is one of the founding values of the new South African constitutional state and is applicable to all spheres of government including the local government sphere. In essence, accountability refers to the need to explain or to defend certain actions or conduct. Accountability is needed to ensure that people in positions of power can be held accountable and responsible for their actions and conduct. Accountability therefore plays an important role in ensuring stability and acceptance of a particular democratic system. It ensures appropriate checks and balances for local residents with regard to their elective representatives. Accountability means not only taking responsibility, but also ensuring liability in certain instances. See, for example, the case of *Umzinto North Town Board v Moodley*.<sup>44</sup> In this case a duly appointed town treasurer, purporting to act under delegated authority, invested municipal funds contrary to the Local Authorities Ordinance<sup>45</sup>. The town treasurer/defendant argued that he was exempt from liability under the Ordinance. However, the court held *inter alia* that the defendant bore the onus of proving that he was entitled to an exemption, that he acted wilfully and knowingly that his investment decision was not covered by the ordinance and that his conduct

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<sup>42</sup> Read s 21B of the Systems Act as inserted by Act 44 of 2003 s 5.

<sup>43</sup> For more details refer to the Systems Act s 22(1)-(4). Note the difference between the words "responsible" and "accountable". Responsibility refers to the fulfilling of a duty, whilst accountability also includes the obligation to provide answers for specific actions/conduct. See also the LG: Municipal Planning and Performance Management Regulations published under GNR 796 in GG 22605 of 24 August 2001. Item 15 of the regulations deals with community participation in respect of IDP and performance management.

<sup>44</sup> 1996 (1) SA 539 (D).

<sup>45</sup> Ordinance 25 of 1974 (N).

was not excused by the ordinance. He was thus liable for the damage caused by his actions.<sup>46</sup> All three components of a municipality must be accountable in municipal matters.<sup>47</sup> There seems to be a stronger awareness of the importance of accountability and our courts should take bold action if accountability is not assured.<sup>48</sup> A system which encourages participation also deepens local democracy, as citizens feel more confident about participating when they know that their inputs count and that those responsible can be held accountable. Accountability in local government further ensures that the actions of the council also reflect the aspirations of the relevant community.

#### **19.4.6 Establishing paths of accountability**

In view of the importance of local accountability, it is essential for all local governments to establish all possible paths/methods to enhance and assure a truly accountable government. There are therefore various paths of accountability, some within the municipality itself and others between the municipality and the particular local community. The following diagram provides an overview of the various paths.<sup>49</sup>

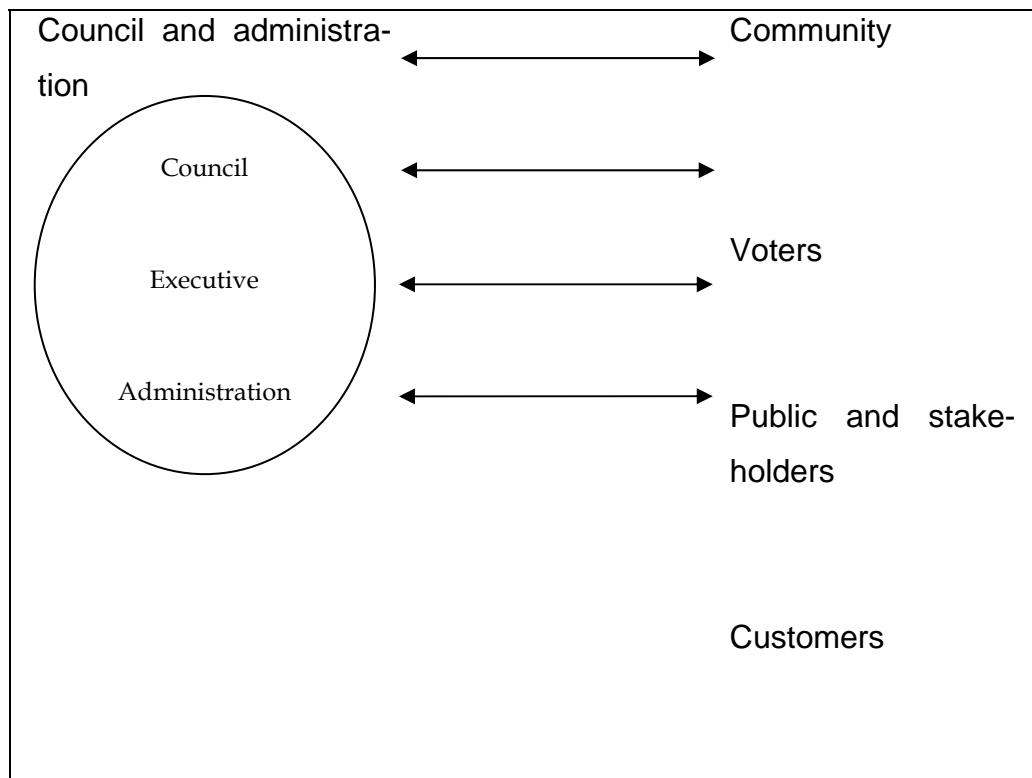
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<sup>46</sup> See the *Umzinto* case *supra* fn 44 at 543-545.

<sup>47</sup> The three components are the political office bearers, the municipal staff members and, to a lesser extent, the local community members.

<sup>48</sup> See in this regard the unreported case of *LR Brink and G Nieuwoudt v Die Speaker van die Munisipale Raad van Nala Plaaslike Munisipaliteit en een ander*, Free State High Court, December 10 2001 under case no 2125/2001. The case concerned mainly the suspension of two councillors from the municipal council. The court found on the facts that the grounds for suspension were frivolous and devoid of the rules of natural justice. The court held that the actions of certain councillors were so unreasonable and tainted by racism and maliciousness that it would be unfair to apply ratepayers' money to funding the action and that the costs of the matters should be paid by the relevant councillors out of their own pockets. The Constitution demands rational decision making, openness and fairness. Such features are essential to legitimacy, public confidence and acceptance of any administration. According to the Constitution, and more particularly s 152, municipal governments must be accountable governments. It is submitted by some legal experts that accountability can now be seen to extend further than the administrative organ itself and, in some extreme cases, can even mean personal accountability of those individuals who collectively make up the particular organ. See also Barrie G "Caveat town councillors" *Without Prejudice* (2001) 8. For a similar example of collective accountability, also refer to the Constitution ss 80(4) and 122(4), which allows the Constitutional Court to order unsuccessful applicants of the National Assembly or a provincial legislature to pay the legal costs of an application under the sections.

<sup>49</sup> Diagram taken from LGIS no 2 "Participation and Accountability" (1999) at 10.



As was mentioned above, a municipality is accountable to both institutions inside the municipality and to the public and other stakeholders outside the municipality. On the external level, municipalities are accountable to the public which they serve. External accountability manifests in different ways. There is, for example, the accountability of a ward councillor to the ward inhabitants. If the population of a ward is not satisfied with such a councillor, they should vote the person out of office in the next election. Non-ward councillors are also held accountable through pressure on the relevant political party that they represent. According to the new local government system, all councils must put an integrated development plan in place, which plan is linked with the five-year term of office of councillors. Councillors can thus be held accountable in respect of their performance relative to such an IDP. It is not only the political office-bearers that are accountable to the public, however; the municipal administration is also accountable. It must be emphasised that the relationship between the administration of a municipality and its local public is very important. Quality and professional service fosters public support and participation.<sup>50</sup> It is ultimately the

<sup>50</sup> Public accountability of municipal administrative staff has always been somewhat problematic, but in many municipalities it seems to have taken a turn for the worse. Both national and provincial governments have recognised the need for improvement in such regard. The *Batho Pele* (people first) programme is but one new initiative, which aims to ensure accountability through im-

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responsibility of each municipality to ensure that it has implemented effective mechanisms and procedures to ensure that accountability is achieved. It should further be pointed out that organised labour is also accountable to the broader community. Unions have a duty to encourage their members to serve their communities. Ultimately what is needed is a balance between the needs and aspirations of workers and the needs of the community towards affordable and accessible services.<sup>51</sup>

Accountability must also be provided for within a municipal administration. In such instances various forms of accountability can be distinguished. Firstly, there should be strong accountability between the executive authority and the municipal council. Under new policy directives and emerging legislation, the role of executive structures within the council has been enhanced. The introduction of a speaker particularly enhanced executive accountability to the council and public.<sup>52</sup> Apart from being accountable to the executive authority, the council and the administration are accountable to one another. The administration has to answer to the council's political leaders, but the leader must support the administration in doing its work. On this point it should be noted that the new developmental nature of local government, with its greater emphasis on participation and accountability, has resulted in many changes in the way in which municipalities function.<sup>53</sup> Accountability is also required between the municipality as employer and organised labour. Various strategies should be developed to ensure that workers have a say in the way in which a municipality is to function. Finally, municipalities are also accountable to the other spheres of government, which are reciprocally accountable to them. For example, municipalities are required to implement national and provincial development programmes, but both national and provincial governments have a supporting, co-ordinating and monitoring role with regard to municipalities. All in all, the three

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proved customer management and service provision. See LGIS no 2 "Participation and Accountability" (1999) at 11.

<sup>51</sup> According to the White Paper on Local Government, labourer' interests should not stand in the way of transformation or delivery objectives. It is envisaged that the new South African Local Government Bargaining Council must play a critical role in enhancing positive partnerships between labour, management, the council and, finally, the relevant local community.

<sup>52</sup> Refer to all the special functions that the speaker must perform and oversee. The speaker functions as a person who is charged with ensuring that the council and its structures are accountable for the way in which they function.

<sup>53</sup> The enforcement of party political idealism within a particular administration often does not encourage co-operation and can be very destructive. See LGIS no 2 "Participation and Accountability" (1999) at 14.

spheres of government have an overarching constitutional accountability to the new constitutional model and to the nation at large. Such accountability is founded on the Constitution itself, as it requires a system of democratic government founded on *inter alia* the values of accountability, responsiveness and openness.<sup>54</sup>

In an effort to ensure that accountability is achieved, many new initiatives have been implemented. It is submitted that these initiatives should go a long way towards enhancing and achieving accountability. Some of the new initiatives are summarised briefly as follows:<sup>55</sup>

- *Codes of conduct* Codes of conduct have been introduced for councillors, traditional leaders and officials. Such codes should ensure that those individuals act in the interest of the communities that they serve and that they are accountable for their actions.
- *Full-time appointed councillors* Full-time councillors will have more time to fulfil their functions, which should improve effectiveness and accountability.
- *New structures and functionaries* Under the new legislative system, new and enhanced structures and functionaries such as the office of the executive mayor and the new municipal manager have been created. These structures and functionaries have specifically allocated powers, responsibilities and functions and should also play an important role in ensuring municipal compliance to all its duties and objectives.
- *Performance management* Under the new system, municipal performance is measured against key performance indicators (KPI). The KPI should be set up in consultation with the public and other stakeholders and should encourage participation and accountability through regular monitoring.
- *Public rights and responsibilities* Residents in particular municipal jurisdictions have both rights and obligations. Such a system, which requires a balanced approach, should also enhance municipal accountability and effectiveness.

#### **19.4.7 Developing programmes for participation**

It was mentioned above, that all municipalities are now legally obliged to develop systems of public participation. Such development requires different phases. In the first phase, municipalities should build up a relationship with all the relevant stake-

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<sup>54</sup> Refer to the Constitution the Preamble and s 1(d).

<sup>55</sup> Refer to LGIS no 2 "Participation and Accountability" (1999) at 12.



holders in their communities and develop a shared vision for the area as a whole. All interest groups should be involved. This process can be initiated through various strategies such as publicity days and local media coverage. Care should be taken not to marginalise groups within communities. People must also see that the municipal initiative is genuine and that serious consideration is given to their involvement. The second phase should involve the internal restructuring of municipal administrations. Existing staff members and councillors should change their attitudes toward public participation and their own accountability. Once a new relationship has been established the new system of interaction and participation should be maintained.

From the discussion above it is clear that the new local government system is significantly different from the one that existed prior to the new constitutional dispensation. Municipalities are now constitutionally obliged to provide democratic and accountable governance for all local communities. New laws provide the basis for making the new system a reality. The key to the success lies in the capacity and willingness of all stakeholders to take the processes forward, however.

### **19.5 Aspects concerning municipal performance management and capacity building**

The new legislative framework for local government has also established new demands on the performance of municipal staff members to ensure that the objectives of local government are met. After the transformation process had been initiated, municipal administrations were faced with various new challenges and demands: municipal jurisdictions were enlarged, many service backlogs became evident, a new constitutional vision and place for local governments was created, new boundaries were drawn and finally a new legal framework for local governments was initiated. Special directives and assistance to municipal administrations are therefore essential in order to ensure a more efficient, customer-orientated and developmentally creative local government dispensation. In order to create such a system, proper performance management within all municipal administrations is generally regarded as a prerequisite; performance management is seen as a strategic tool that can encourage new attitudes, skills and competencies within the new local government dispensation.

In essence, performance management can be summarised as a process whereby municipalities seek to improve and monitor their functioning and accountability on an ongoing basis. Performance is then regularly assessed to determine whether plans

have been implemented, resources are being used effectively and whether the municipality is fulfilling its duties and responsibilities. If municipal performance management is implemented correctly, it should enable municipalities to deliver quality services in a cost-effective, efficient and accountable manner. In light of the fact that performance management is a new concept for local administrations, there is no uniform or general model available which municipalities can implement with guaranteed success. An effective and efficient performance management system must be developed to meet the unique circumstances that exist in modern local governments in South Africa.<sup>56</sup>

The previous local government dispensation never provided properly for a comprehensive performance management system. Consumers or the public at large never had the opportunity to measure the effectiveness of municipal service delivery and quality of services. Under the new constitutional requirements local governments are obliged to meet the basic needs of citizens, and especially provincial governments are tasked with monitoring the performance, capacity and effectiveness of municipalities within their respective jurisdictions. In follow-up on the constitutional provisions, the new legislative framework for local governments provides specifically for the enhancing of municipal performance management.<sup>57</sup> The need for a general performance management system for all municipal governments was already envisaged in the White Paper on Local Government. The White Paper confirmed that the aim of a new national performance management system is to:<sup>58</sup>

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<sup>56</sup> Under the new constitutional system, various systems have been proposed to establish an effective performance management system. One such proposal was the *Batho Pele* (people first) vision for managing performance in the broader public sector. The *Batho Pele* proposal is aimed at delivering the best service to the public. The proposal consisted of eight service delivery principles (ie consultation, service standards, access, courtesy, information, openness and transparency, redress and value for money). *Batho Pele* also aims at constantly improving the quality of services through the implementation of an eight-step process. Such steps, which could serve as an important guide for municipalities that embark on performance improvement programmes, are: identification of the customer; establishing customer needs and priorities; determining the current service baseline; identifying the improvement gap; setting service standards; gearing up for delivery; announcing service standards and finally monitoring delivery against standards and publishing the results. These principles should form the basis for any new local government performance management system. The overall aim is to make municipalities efficient, customer-orientated, developmentally creative institutions that enable citizens to obtain better service delivery. See LGIS no 2 "Performance Management" (1999) at 4-5.

<sup>57</sup> See the Local Government: Municipal Systems Act ch 6. The aim of the new legal framework is to: define goals and priorities; establish objectives, set indicators for performance, measure performance; review and adjust service delivery mechanism and finally to report on the progress made.

<sup>58</sup> Refer to the White Paper on Local Government (1998) at 51-52.

- assess the overall state of local government
- monitor the effectiveness of development and delivery strategies of municipalities and ensure that scarce resources are utilised efficiently
- provide early warning signals
- allow for performance comparison between municipalities across the country
- identify successful approaches or best practises
- provide a national set of performance indicators.

The envisaged system is not aimed at imposing additional burdens on municipalities but rather at seeking a change in the way in which municipalities perform and fulfil their duties and responsibilities.

#### ***19.5.1 The new legislative requirements regarding municipal performance management***

As was envisaged in the White Paper on Local Government, national legislation under the new local government dispensation specifically determines various aspects regarding municipal performance management. All municipalities are now legally obligated to establish and develop performance management systems (PMS) and to review such systems. The new legal requirements relevant to municipal performance management are briefly as follows:

- *The establishment and development of performance management systems* Each municipality established under the new local government dispensation must establish a performance management system that is commensurate with its resources, that is best suited to its circumstances and is in line with the priorities, objectives, indicators and targets contained in its integrated development plan. Municipalities must further promote a culture of performance management among their political structures, office bearers, councillors and municipal administrations. They must also ensure that their affairs are administered in an economical, effective, efficient and accountable manner.<sup>59</sup> Specific responsibility has been placed on the executive committee or executive mayor, whichever is applicable, or a committee of councillors appointed by the municipal council in the absence of an executive committee or executive mayor,

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<sup>59</sup> See the Systems Act s 38(a)-(c).

- (a) to manage the development of a municipality's performance management system
- (b) to assign certain responsibilities of the system to the municipal manager
- (c) to submit the proposed system to the municipal council for adoption.<sup>60</sup>

All municipalities must further establish mechanisms to monitor and review their performance management system.<sup>61</sup>

- *The core components and community involvement in municipal performance management systems* Every performance management system is required to include various core components. Accordingly, in terms of its performance management system and any other regulations and guidelines that may be prescribed, every municipality must incorporate and provide for the following.<sup>62</sup>

- (a) setting appropriate key performance indicators (KPIs) as a yardstick for measuring municipal performance, including outcomes and impact, with regard to the municipality's development priorities and objectives set out in its IDP
- (b) setting measurable performance targets for each of the development priorities and objectives
- (c) monitoring performance and measuring and reviewing performance at least once a year against the development priorities and KPIs
- (d) taking steps to improve performance where targets have not been met
- (e) establishing a process of regular reporting to the council, political structures, office bearers, staff, the public and appropriate organs of state.<sup>63</sup>

It is further also obligatory for a municipality to involve the local community in the development, implementation and review of the municipality's PMS and also to allow the community to participate in the setting of appropriate key performance indicators and performance targets.<sup>64</sup>

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<sup>60</sup> Refer to the Systems Act s 39(a)-(c).

<sup>61</sup> The new legal framework does not provide guidelines on what mechanisms should be employed. It seems that if it is left to each municipal council to decide on what mechanisms to employ to monitor and review performance. See the Systems Act s 40.

<sup>62</sup> See the Systems Act s 41(1)(a)-(e).

<sup>63</sup> In this regard, appropriate organs of state should include provincial governments which are tasked to oversee and monitor municipal performance. Ss 41(2) requires the PMS applied by a municipality to be so devised that it could serve as an early warning indicator of under-performance.

<sup>64</sup> See the Systems Act s 42. This section entrenches for the first time real and constructive public participation in respect of municipal performance control and oversight. It is submitted that

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- *The setting of key performance indicators and the audit of performance measurements* Under the new legal framework for local government, after consultation with the MEC for local government and organised local government nationally, the minister for local government may prescribe by regulation general key performance indicators that are appropriate and that can be applied to local government generally. The minister may also review and adjust those KPIs when necessary.<sup>65</sup> All municipalities are further required, in a manner determined by their council, to make known to the general public, both internally and externally, which KPI and performance targets are set by the municipality for purposes of its PMS. The results of such a PMS and performance measurements must be audited as part of the municipality's internal auditing processes and also annually by the auditor-general.<sup>66</sup>
- *Requirements regarding reports on the PMS and the making of regulations and guidelines* Apart from the establishment of a municipal performance management system, each municipality must prepare for each financial year an annual report consisting of *inter alia* a performance report. Such a performance report should reflect:
  - (a) the performance of the municipality and each external service provider during that financial year
  - (b) a comparison of the performances with the targets set for them and also the performances in the previous financial year
  - (c) measures taken to improve performance.<sup>67</sup>

It should be noted that an annual performance report must form part of a municipality's annual report as is determined in chapter 12 of the Municipal Finance Management Act.<sup>68</sup>

Apart from the reporting responsibility on the municipal manager, the newly enacted legislative requirements also place a similar responsibility on the MEC and the minister concerned. In this regard, the MEC for local government in a province is obliged

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this enhancement of public participation would significantly contribute to more active public involvement in municipal affairs.

<sup>65</sup> See the Systems Act s 43(1)(a)-(b). General KPIs must be included in a municipal PMS where applicable. See s 43(2).

<sup>66</sup> Refer to the Systems Act ss 44 and 45 respectively.

<sup>67</sup> Read s 46(1)(a)-(c) of the Systems Act as substituted by Act 44 of 2003 s 6.

<sup>68</sup> See s 46(2) of the Systems Act as amended.

annually to compile and submit to the provincial legislature and the national minister responsible for local government a consolidated report on the performance of municipalities in that province. The consolidated report must identify all municipalities that have underperformed during the year, as well as the proposed remedial action to be taken. The report must then be published in the *Provincial Gazette*.<sup>69</sup> Finally, the minister responsible for local government must annually compile and submit to parliament and the nine MECs for local government in the provinces a consolidated report of local government performance in general, in terms of general key performance indicators. Such a report must be published in the *National Gazette*.<sup>70</sup>

In confirmation of the fact that the new legislative requirements are not a complete legal system and in order to cater for the effectiveness of the system, the national minister is permitted to make regulations or to issue guidelines to provide or regulate certain issues. These are:<sup>71</sup>

- incentives to ensure municipalities establish PMSs within a prescribed period and comply to the Act
- the setting of KPIs by a municipality with regard to its development objectives
- the identification of appropriate general KPIs that can be applied to municipalities generally
- the regular review by a municipality of its KPIs
- the setting of a framework for performance targets by municipalities consistent with their development priorities, objectives and strategies set out in their IDPs
- mechanisms, systems and processes for the monitoring and measurement of performance by a municipality with regard to its development objectives
- the internal auditing of performance measurements
- the assessment of those performance measurements by a municipality;
- the assessment of progress by a municipality with the implementation of its IDP
- the improvement of performance
- any other matter that may facilitate the implementation by municipalities of an effective and efficient PMS or the application of chapter 6 of the Systems Act.

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<sup>69</sup> See the Systems Act s 47(1)-(2). The MEC is also tasked to submit a copy of the report to the NCoP S 47(3) of the Act.

<sup>70</sup> See the Systems Act s 48.

<sup>71</sup> See the Systems Act s 49(1)(a)-(k).

It is clear that the legislator's intention was to give the minister a wide authority to make regulations or to issue guidelines. When the minister makes regulations or issues guidelines he/she must take the capacity of municipalities into account and he/she must differentiate between different kinds of municipality.<sup>72</sup>

### **19.5.2 *Creating and maintaining an effective system of municipal performance management***

With reference to the abovementioned legislative requirements in relation to municipal performance management, two key elements seem to be significant. At first, each municipality will have to identify and prioritise those areas where performance improvement is most required. Such areas will include both external developmental priorities and internal transformation necessities. National government should assist municipalities by identifying common performance areas that are applicable to all municipalities, such as access to basic services such as water, sanitation, electricity and housing. Through national minimum standards, municipalities will be guided when defining their own goals within their unique circumstances and will consolidate existing fragmented approaches to services. The second key element is performance assessment. An objective performance assessment is crucial for the creation and maintenance of an economic, efficient and effective local government performance management system.<sup>73</sup>

Apart from the two key elements of an effective and efficient PMS, all performance management systems should contain six core elements. Each element is important to make the system work, and are discussed briefly as follows:

- *Performance measurement* Performance measurement requires a relatively objective framework for assessing performance. Measurement is achieved by setting

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<sup>72</sup> Refer to the Systems Act s 49(2)-(4). The minister is also permitted to phase in some or all of the applications of the provisions of the chapter on performance management, which provisions place a financial or administrative burden on municipalities.

<sup>73</sup> To illustrate the functioning of such an objective performance assessment system, imagine the following example: Two municipalities, A and B, with similar budgets, responsibilities and staff both decide to undertake similar-sized housing development projects. How would their respective performance with reference to the project be assessed? It is submitted that the first step would be to assess the economic factors of the project. Such measures look at the cost of resources. If one municipality spent more on materials, such a position would be one indication of performance. Cost measures alone can be misleading, as poorer quality material are cheaper. Quality is thus also important. The second phase of assessment should evaluate quantity and quality in relation to resources used. Finally the effectiveness should be evaluated. It is important to assess what effective contribution to the overall developmental objectives of a municipality has been achieved through the project. See also LGIS no 2 "Performance Management" (1999) at 11.



performance indicators and linking them to performance targets. Performance indicators indicate how performance will be measured; that is, the number of households to receive water connections. Performance targets again refer to the result to be achieved within a given timeframe (eg 5000 connections by yearend 2005). Performance indicators can be determined only once a municipality has identified the key objectives for development in its area and with the municipality's overall developmental goals and priorities in mind. Many municipalities have set various performance indicators through their development-planning processes. A distinction should be made between general performance indicators and local performance indicators. General performance indicators refer to such indicators that are applicable to all municipalities, while local indicators reflect particular local developmental priorities and objectives. Any KPI should ensure that the right area of performance is measured and that the quality of performance is also assessed. Part of any process of performance measurement involves the establishment of targets for each performance indicator. Performance is then measured within a given timeframe, according to whether targets for each indicator have been achieved. The setting of performance targets can be a somewhat complicated exercise and should ultimately result in realistic and achievable objectives. In determining proper targets it is suggested that certain guidelines be used and that a checklist be developed when targets are set for particular indicators.<sup>74</sup>

- *Performance monitoring and evaluation* The monitoring and assessment of the performance of municipalities is a crucial aspect of any successful PMS. Monitoring and evaluation are processes aimed at assessing the performance of municipalities and the people that work for them. It is important to note that the assessment of people refers not only to municipal staff members but also to external contractors that do work or provide services on behalf of a municipality. Generally speaking, performance monitoring is an ongoing process to determine whether targets are being met and whether development objectives are being

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<sup>74</sup> According to LGIS no 2 "Performance Management" (1999) at 14 the following guidelines and checklist questions should be useful in determining performance targets: Guidelines are preciseness and measurability, relevance to user, being demanding but realistic, approved by politicians and providing communication to the public. Checklist questions could include the number of each service provided, how many new services were provided in a year, what trends are impacting on the service, what customers expect, the municipality's realistic capacity and what other similar municipalities are achieving.

achieved. Performance management must be conducted very carefully, and information should not be manipulated to produce results that appear better than they really are. Uncompromising integrity of performance management is therefore essential. In contrast with the monitoring process, performance evaluation is a deeper and more detailed process of performance analysis. Such an evaluation process looks not only at whether a municipality is performing adequately but also at the areas of underperformance. All municipalities should make special arrangements to evaluate performance regularly. A further key element of the monitoring and evaluation process is so-called “performance auditing”. This process involves verifying that the measurement mechanisms and results are accurate and that proper procedures have been followed to evaluate and improve performance. The checks built into the new legislative framework should ensure objective verification of performance results and should ultimately enhance municipal service provision and compliance with the new constitutional demands.<sup>75</sup>

- *Performance reporting* Under the new legal framework, all municipalities are obliged to submit annual performance reports to the public and higher spheres of government. It is submitted that the reporting requirement should significantly enhance public participation and municipal accountability and should therefore be strictly enforced.
- *Capacity building* Without the necessary capacity, municipalities will not be able to perform and fulfil their duties and responsibilities. Municipal capacity building must therefore be a core element of a broader performance management strategy. Capacity building is a process of developing the ability for improved performance within municipalities and will be discussed in more detail elsewhere in this chapter.
- *Intervention* It was mentioned earlier that the Constitution allows and demands intervention into the affairs of local government when necessary. Especially the provinces are tasked with oversight and intervention powers into the affairs of municipalities when cases of non-performance are reported. Such interventions should be based on accurate diagnostic results, however, and should be undertaken on an objective basis. When intervention is allowed on subjective grounds

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<sup>75</sup> See LGIS no 2 “Performance Management” (1999) at 16-17. A further check on performance monitoring and evaluation is public participation. Public involvement and pressure for improved performance  
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or without proper justification, the new constitutionally entrenched status of local government as an independent sphere of government would be unnecessarily jeopardised. In this regard it should be emphasised that the ultimate aim of intervention is not to create a hierarchy of one sphere of government over another but to ensure that citizens receive the essential services that are promised under the new constitutional scheme.

- *Performance incentives* Ultimately the performance of any particular municipality and its staff depends on certain incentives within the PMS. Good performance should be rewarded whilst poor performance should be penalised. Various means of incentive are possible, such as fiscal and political motivators, rewards, competitions and individual motivational schemes.

### **19.5.3 Implementing performance management**

The implementation and maintenance of an effective PMS is in essence founded on the new constitutional foundation. All spheres of government are constitutionally obliged to fulfil their duties and responsibilities according to the constitutional prescriptions and to ensure a general system of democratic government that is accountable, responsive and open. Local governments are further tasked with specific developmental duties and the achievement of specified municipal objectives.<sup>76</sup> In order to determine whether such objects and duties are being met, a proper system of accountability and performance management is necessitated. Under the provisions of the Systems Act, a new legal framework for national performance management has been enacted. In essence, the new system will function as follows:

- *Step 1:* All municipalities must identify the areas that require performance measuring and improvement. This will be an integral part of the IDP process and the setting of development objectives.
- *Step 2:* Once the areas have been identified, a municipality will monitor and measure its performance by developing indicators and targets for each of the development priorities.
- *Step 3:* A municipality will then have to evaluate its performance and take steps to improve performance when targets are not being met.

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formance should be protected as an important part of the overall PMS of a municipal government.  
<sup>76</sup> See the Constitution ss 1, 152 and 153.

- *Step 4:* In addition to those areas identified by a municipality, some areas fundamental to the overall reconstruction and development of South Africa will be identified by national government, through consultation with key stakeholders such as SALGA and provincial governments.
- *Step 5:* Each municipality will be expected to report on these areas through the prescribed national indicators and targets.
- *Step 6:* A municipality will be able to exceed the targets set by national government, but it will not be able to perform below those targets.

To illustrate the practical application of the new PMS, the example is given of a municipality where 50% of the residents do not have access to clean drinking water. Water is arguably the single most essential municipal service, as it is needed for drinking, cooking, washing and cleaning. Without water, communities suffer severe discomfort and disease. As a first step, the particular municipality will identify water provision as an area that requires performance measuring and improvement. Water provision to all residents will be set as a priority with a correlating objective of giving all residents access to at least a certain number of litres of drinkable water per day. The objective will then translate into development strategies which could include major investment programmes in water schemes. Strategies could also include cross-subsidising between consumers if necessary.

As a second step, and once the area of performance have been identified, then a municipality will have to monitor and measure its performance. This is achieved through the development of KPIs and targets for each of the identified priorities. The following KPIs and targets could be relevant to the example mentioned above:

KPIs:

- the percentage of households that do not have access to water (measure growth)
- the bacterial count in water (measure quality of water)
- average time spent by community members (measure impact of scheme on community to bring water to their houses)
- percentage of residents paying for services (measure sustainability and financial impact).

Targets:

- to reduce households without water from 50% - 30% in two years
- to ensure quality of water is up to standard
- to reduce travel time for community to fetch water

- to ensure measures are taken to service payment collections better.

Under the third step, the municipality will have to evaluate its performance and will have to take steps to improve performance when targets are not met. Measurement mechanisms can include:

- keeping data of households with water
- testing water quality regularly
- surveying residents' activities and the implementation of a proper billing and credit control system.

Finally, the municipality must report on its performance management in each area as is required by law.

Although the many benefits of a proper PMS are very clear, the implementation of such a system does present various challenges. Challenges that are most common are limited financial resources, inadequate administrative capacity, poor public participation and a slow ability to adapt to the new legal order. In order for effective and efficient performance management to occur, it is suggested that all municipalities will have to commit themselves to this end and dedicate their energy to overcoming the different challenges and finding new ways to fulfil their duties and obligations. Other spheres of government must assist municipalities in this endeavour, but ultimately the responsibility lies with municipalities all over the country to start focusing on the new outcomes of municipal services and programmes.<sup>77</sup>

## **19.6 Aspects regarding municipal capacity building**

### **19.6.1 Introduction**

It is a general phenomenon all over the world that local governments are pushing for autonomy and decentralised decision making. More autonomy and decentralised powers often leave municipalities with many new performance demands, however. The position in South Africa under the new local government legislative framework is no different. The new local government dispensation has created strict legal demands on municipalities to comply and fulfil certain duties and responsibilities. Without a sufficient capacity, municipalities will not be able to fulfil such duties and

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<sup>77</sup> In order to enhance the new legislative requirements dealing with performance management the LG: Municipal Planning and Performance Management Regulations were promulgated. See GNR 796 in GG 22605 of 24 August 2001. The regulations provide for *inter alia* the nature of a performance management system, the adoption of a PMS, the setting of key performance indicators, general key performance indicators, the setting of performance targets and the monitoring review and internal auditing of performance measurements.

responsibilities, however. It is of paramount importance therefore that municipalities themselves, as well as the two higher spheres of government, ensure that municipal capacity is adequate to ensure compliance with their new constitutional and other legislative obligations. Municipal capacity building is thus regarded as one of the more important tools available to municipalities to ensure service delivery and the overall fulfilment of their duties and responsibilities. Capacity building should therefore form one of the strategic programmes that municipalities must put in place.

During the former local government dispensation, capacity building was often racially determined and did not support democratic municipal development. Under the new system municipalities have been afforded distinctive autonomy and powers and are supported to handle their own affairs in accordance with their own priorities. Capacity building should be a very important objective for all municipalities, as it will ensure various advantages. The following advantages will be secured through a solid municipal capacity:

- services are delivered as is legally required
- more powers can be delegated down to a municipal level
- better investment opportunities can be created.

Capacity building is therefore very important and should be done on the political, financial management and administrative levels. It speaks for itself that capacity building cannot be done without proper training.<sup>78</sup> With the restructuring of local government, the overall local government capacity building scheme had to be revisited and changed. It was especially envisaged that the new system should ensure the following results:<sup>79</sup>

- to respond to municipal needs
- to be acceptable and aimed at all people
- to offer capacity building that qualifies officials and frontline workers for promotion and further development

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<sup>78</sup> Under the former system two training bodies made up local government training. There was the Local Government Training Board (LGTB), established under the Local Government Training Act, and the Apprenticeship Training Board for Local Authorities (ATBLA), established under the Manpower Act. The two structures operated separately and addressed different fields in the training sector. Coordination was poor, and the absence of a common national vision on capacity building led to a lack of objectives, fragmentation of training programmes and poor staff development results. The two bodies later merged into the Local Government Education and Training Board (LGETB).

<sup>79</sup> See LGIS no 2 "Capacity building" (1999) at 5.

- to address the capacity building needs of rural municipalities
- to ensure the involvement of all role players to find solutions for municipal challenges.

### **19.6.2 Establishing a new local government training system**

In the White Paper on Local Government, a vision and framework was provided within which local government capacity building was to be developed. The previous system had to be changed to become a more flexible, decentralised and demand-driven system with continuous improvement of municipal staff members and political office bearers.<sup>80</sup> In response to the new changes and challenges of the new system, a new set of skills and competences had to be created to ensure an overall developmental local government. Various initiatives have thus been piloted in a variety of newly created capacity building programmes and schemes.<sup>81</sup>

In follow-up on the vision in the White Paper on Local Government, various laws have been passed or amended to give more meaning and substance to the new local government capacity-building system. See, for example, the Skills Development Act,<sup>82</sup> which Act requires a Sector Education Training Authority (SETA) to be established in every sector of the South African workforce in order to develop skills.

This LGSETA will be made up of representatives of both organised labour such as SAMWU and IMATU and organised employer's organisations, which are represented under SALGA. Specific functions have been envisaged for the new LGSETA to fulfil. Such functions include:<sup>83</sup>

- Preparing a Local Government Skills Plan.
- Implementing the Local Government Skills Plan by
  - (a) establishing learnerships
  - (b) approving workplace skills plans
  - (c) allocating grants to employers, education and training providers and workers

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<sup>80</sup> See the White Paper on Local Government (1998) at 115.

<sup>81</sup> Examples of some of the new competencies and capacity-building programmes are: councilors' code of conduct, falling under SALGA training; performance management, falling under the department of Constitutional Development; integrated development planning, falling under the department of Constitutional Development; local economic development, falling under the department of Constitutional Development and NGO's financial management; voter education, falling under the IEC and senior management development, falling under university-based training programmes. See LGIS no 2 "Capacity building" (1999) at 7.

<sup>82</sup> 97 of 1998.

<sup>83</sup> See LGIS no 2 "Capacity building" (1999) at 9.



- (d) monitoring local government education and training in the sector.
- Promoting learnerships by
  - (a) identifying work places for practical work experience
  - (b) supporting the development of learning materials
  - (c) improving the facilitation of learning
  - (d) assisting in the conclusion of learnership agreements.
- Registration of learnership agreements.
- Applying to SAQA for accreditation as an Education and Training Quality Authority (ETQA).
- Collecting Skills Development Levies and disbursing these to municipalities.
- Reporting on income and expenditure and the implementation of its sector skills plan to the Director-General of Labour.
- Appointing staff for the performance of its functions.

The Skills Development Act also introduces a new learnership approach to skills development. This approach requires a combination of institutional learning and workplace learning/experience. Skills development, which will require substantial financial resources, is financed largely through the Skills Development Levies Act.<sup>84</sup> The levies are not sufficient to meet the existing training needs, and it is clear that other funding sources such as private donors, business or even other spheres of government should be explored.

It was mentioned above that it is not only municipal staff members that are in need of new training, but also political office bearers. The new constitutional and other legislative requirements have placed important responsibilities on political representatives. In this regard SALGA has developed a so-called "councillor-training programme" for all councillors. In order to ensure quality in the new training programmes, the South African Qualifications Authority Act,<sup>85</sup> has established the South African Qualifications Authority (SAQA), which must oversee the implementation of a national qualifications framework (NQF). The NQF is seen as a new way of "grading" learning achievements by using eight NQF levels.<sup>86</sup> The new NQF ap-

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<sup>84</sup> 9 of 1999.

<sup>85</sup> 58 of 1995.

<sup>86</sup> The lowest NQF level is level 1, which is the equivalent of grades 7-9 of the traditional high school education grading system. Level 4 corresponds to grade 12. In future, most officials will be trained against the eight NQF levels.

proach towards learning is different from the past, as it is based on learning outcomes, which are measured by the ability of a learner after training to convert his/her learning into work performance. SAQA and the NQF also promote a system for the recognition of prior learning and so-called “life-long learning”. These initiatives should allow people gradually to qualify themselves and to help to develop the careers of staff members and ensure that local government becomes an attractive place of work.

### **19.6.3 Mechanisms to enhance municipal capacity building**

In light of the new legal requirements, it is obvious that all local governments will have to establish various training and development programmes. Such programmes and initiatives will necessarily be different for each of the different categories and types of municipality because of their diverse circumstances and responsibilities. In many instances, the new local government dispensation is characterised by various performance gaps, some of which can be filled only through the training of councillors, officials and other frontline workers. What municipalities need is a good training programme. In order to establish such a training programme municipalities need to determine which of the problems they encounter can be solved through building the capacity of staff and which cannot. In instances where internal capacity building cannot solve the problems, alternative approaches exist such as outsourcing or the conclusion of partnerships with other private or public institutions. It is also very important for municipalities to prioritise their capacity-building strategy as part of their integrated development plan. In this regard it is suggested that every IDP should incorporate a skills-development plan as a key component, which should facilitate capacity-building solutions within the municipality.<sup>87</sup> Under the new constitutional dispensation, all provinces are obliged to build the capacity of local governments. Various interactions and cooperation strategies must still be developed between municipalities and their respective provincial governments in order to fulfil the constitutional vision and obligations.

## **19.7 Conclusion**

In conclusion, it is submitted that the principles of public administration, performance management and municipal capacity building are currently in need of major trans

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<sup>87</sup> See LGIS no 2 “Capacity building” (1999) at 16.

formation. According to the new legal framework, an entirely new approach towards capacity building, performance management and public participation has been mandated. All municipalities will have to take and implement new initiatives to ensure compliance with the newly established legislative requirements. All in all one can conclude that the new vision for local government is to create an essentially customer-orientated public service. The codes of conduct for both councillors and staff members set out basic requirements for accountability and control. It is further submitted that the new legal framework indeed lays a sound foundation for a more people-orientated local government system, which should be able to meet the demands of all South African people and should ensure a better and brighter future for all.

## Municipal development planning

### 20.1 Introduction

According to the new legal framework for local governments, a significant measure of responsibility relating to municipal planning has been decentralised to local government structures. Although municipal planning is incorporated as a functional area of concurrent national and provincial legislative competence,<sup>1</sup> all municipalities are constitutionally obligated to structure and manage their administrations and budgeting and planning process in such a way as to give priority to the basic needs of their communities. All municipalities must also promote the social and economic development of their communities.<sup>2</sup> The new constitutional dispensation furthermore determines that one of the objects of local government in general is to promote social and economic development and to promote a safe and healthy environment.<sup>3</sup> Because of this new constitutional mandate, the new local government system is often referred to as a developmentally orientated local government system. It is obvious from the abovementioned requirements that local government planning processes must be structured and organised so as to achieve the objects of the new local government dispensation and also to give priority to the basic needs of their respective communities. If local governments are to achieve such a developmental system, they are to be thoroughly supported by the two higher spheres of government. Both national and provincial laws are therefore needed to ensure municipalities fulfil their developmental duties. Whereas provincial laws will often differ in content and approach, national legislation should provide an overarching set of regulatory provisions so as to enable municipalities to create a basic planning framework. In compliance with its responsibility in this regard, parliament has enacted the Local

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<sup>1</sup> See the Constitution Part B Sch 4.

<sup>2</sup> Refer to the Constitution s 153(a).

<sup>3</sup> See the Constitution s 152(c)-(d).

Government Municipal Systems Act.<sup>4</sup> The provisions of the Act relating to planning and environmental issues will be discussed below.

## **20.2 National principles concerning local government developmental planning**

### **20.2.1 General requirements relating to municipal development planning**

According to the Local Government: Municipal Systems Act, local government planning is to be developmentally orientated. In order to achieve this objective, all municipalities must undertake developmentally orientated planning so as to ensure three purposes:<sup>5</sup>

- that municipalities strive to achieve the objects of local government set out in the Constitution
- that municipalities give effect to their developmental duties set out in the Constitution and
- that municipalities with other organs of state contribute to the progressive realisation of the (socio-economic) fundamental rights contained in the Constitution.<sup>6</sup>

In order to achieve and undertake planning processes that are developmentally oriented, the Systems Act determines that its provisions in this regard must also be read in conjunction with chapter I of the Development Facilitation Act.<sup>7</sup>

A second important feature of the new local government planning framework is that the planning processes undertaken by a municipality must be aligned with and must complement the development plans and strategies of other affected municipalities and other organs of state. The purpose of such alignment and complementation of different development plans and strategies is aimed at giving effect to the principles of co-operative government as is contained in the Constitution.<sup>8</sup>

Apart from the requirements of co-operation in municipal planning processes, municipalities are also obligated to participate in national and provincial developmental programmes. Such participation is directly required by the Constitution and is also a

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<sup>4</sup> 32 of 2000 as amended. The Act aims *inter alia* to establish a simple and enabling framework for the core processes of planning, which process *should* underpin the notion of developmental local government. Refer also to the long title of the Act.

<sup>5</sup> See the Systems Act s 23(1)(a)-(c).

<sup>6</sup> Refer to the Constitution ch 2s 24, 25, 26, 27 and 29.

<sup>7</sup> See the Systems Act s 23(2) as well as the Development Facilitation Act 67 of 1995.

<sup>8</sup> Refer to the Systems Act s 24(1) read together with the Constitution ss 40 and 41. According to s 41, all three spheres of government and all organs of state within each sphere must adhere to the principles of co-operative government as are set out in the Constitution. The main objective of co-operative government is to ensure co-operation and co-ordination between the various role players.

national consequence of the fact that both national and provincial governments have concurrent legislative competence over municipal planning activities.<sup>9</sup> The new legal framework also determines that if municipalities are required to comply with planning requirements in terms of national or provincial legislation, then the responsible organ of state must

- align the implementation of that legislation with the provisions of chapter 5 of the Systems Act and
- consult with the affected municipality in such implementation and take reasonable steps to assist the municipality in meeting the legal requirements relevant to its IDP.<sup>10</sup>

Before either national or provincial legislation affecting municipal planning issues is introduced in parliament or a provincial legislator, the organ initiating the legislation must consult with OLG. Similar consultation is required in respect of subordinate legislation before such legislation is enacted.<sup>11</sup> Again the underlining principle of co-operation and co-ordination as part of a system of co-operative government is emphasised.

The new legal framework directed at municipal planning also requires specific requirements regulating the adoption of IDPs. According to the Systems Act, each municipal council must adopt a single, inclusive and strategic plan for the development of the municipality within a prescribed period after the start of its elected term. Such plan should have the following aims:<sup>12</sup>

- (a) to link, integrate and co-ordinate plans and to take into account proposals for the development of the municipality;
- (b) to align the resources and capacity of the municipality with the implementation of the plan;
- (c) to form the policy framework and general basis on which annual budgets must be based;
- (d) to comply with other provisions of the Systems Act;
- (e) to ensure compatibility with national and provincial development plans and planning requirements binding on the municipality in terms of legislation.

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<sup>9</sup> Refer to the Constitution s 153(b), which specifically requires this participation.

<sup>10</sup> See the Systems Act s 24(3)(a)-(b).

<sup>11</sup> See the Systems Act s 24(4).

<sup>12</sup> See the Systems Act s 25(1)(a)-(e).

An IDP adopted by a municipal council as mentioned above may be amended, but it remains in force until a new IDP is adopted by the next elected council.<sup>13</sup> A newly elected municipal council may adopt the IDP of its predecessor, but must comply with certain requirements.<sup>14</sup> Finally, it is required for all municipalities to give notice to the public of such adoption within 14 days of the adoption of its IDP and also to make copies or extracts from the plan available for public inspection. A summary of the plan must also be published.<sup>15</sup>

### **20.2.2 The contents and core components of Integrated Development Plans**

The new national regulatory legislation furthermore sets specific core components that IDP must incorporate. According to the Systems Act, an IDP must reflect the following:<sup>16</sup>

- (a) the municipal council's vision for the long term development of the municipality with special emphasis on the municipality's most critical development and internal transformation needs;
- (b) an assessment of the existing level of development in the municipality, which must include an identification of communities which do not have access to basic municipal services;
- (c) the council's development priorities and objectives for its elected term, including its local economic development aims and its internal transformation needs;
- (d) the council's development strategies which must be aligned with any national or provincial sectoral plans and planning requirements binding on the municipality in terms of legislation;
- (e) a spatial development framework which must include the provision of basic guidelines for a land use management system for the municipality;
- (f) the council's operational strategies;
- (g) applicable disaster management plans;
- (h) a financial plan, which must include a budget projection for at least the next three years; and
- (i) the key performance indicators and performance targets determined in terms of section 41.

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<sup>13</sup> See the Systems Act ss 34 and 25(2).

<sup>14</sup> Read the Systems Act ss 25(3)(a) and 29(1)(b)(i), (c) and (d) in conjunction with one another.

<sup>15</sup> See the Systems Act s 25(4)(a)-(b).

<sup>16</sup> See the Systems Act s 26(a)-(i).



It is quite clear that the IDP has a central and very important function within the new local government system. The IDP serves basically as a guiding document for the short term developmental needs and initiatives of every municipal government in South Africa. For this reason, special provision regarding the status of an IDP has been made and will be discussed later.<sup>17</sup>

### **20.2.3 Requirements regarding the process for planning, drafting, adopting and reviewing Integrated Development Plans**

The Systems Act also determines specific procedures regarding the framework for integrated development planning, for adoption and review procedures of IDP(s) and for the role players involved during the various processes.

In order to establish a framework for integrated development planning, each district municipality must adopt a framework for integrated development planning in its area as a whole. The adoption of this framework is to be effected within a prescribed period after the start of the elected term of the council and also after a consultative process with the other local municipalities in the area has been followed. After adoption, the IDP framework binds both the district municipality and local municipalities in the relevant area jurisdiction of the particular district.<sup>18</sup> At the very least, the framework must

- identify the plans and planning requirements binding in terms of national or provincial legislation on the district municipality, the local municipalities or even any specific municipality on its own within the area
- identify the matters to be included in the IDPs of the district and local municipalities that require alignment
- specify the principles to be applied and co-ordinate the approach to be adopted in respect of the alignment of IDP matters
- determine procedures for consultation between the district and local municipalities during the process of drafting their respective IDPs and also the procedures to be implemented in order to effect essential amendments to the framework.<sup>19</sup>

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<sup>17</sup> See the Systems Act s 35. Refer also to item 2 of the local government: Municipal planning and performance management regulations as published under GNR 796 in GG 22605 of 24 August 2001. Item 2 deals with the details of an IDP.

<sup>18</sup> See the Systems Act s 27(1)-(2).

<sup>19</sup> Refer to the Systems Act s 27(2)(a)-(d). It should be noted that these provisions are applicable only between a district municipality and its various local municipalities. In a metropolitan area,

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Through their municipal councils and within a prescribed period after the start of their elected term, all municipalities are obliged to adopt a process set out in writing to guide the planning, drafting, adoption and review of their IDPs, however.<sup>20</sup> Through the various mechanisms of public participation, a municipality must consult with its local community before adopting the process mentioned above and must give notice to the local community regarding the particulars of the process it intends to follow.<sup>21</sup>

With reference to the process to be followed by a municipality to draft its IDP, the municipality must ensure the following requirements:<sup>22</sup>

- that the process is in accordance with a predetermined programme which must specify timeframes for different steps
- that mechanisms of public participation allow for
  - (a) the local community to be consulted on its development needs and priorities
  - (b) local community participation in the drafting of the IDP
  - (c) organs of state, traditional authorities and other role players to be identified and consulted on the drafting of the IDP
- that the identification of all plans and planning requirements that are binding on the municipality in terms of national and provincial legislation are provide for
- that the IDP is consistent with any other matters that may be prescribed by regulation.

In areas outside metropolitan areas, all district municipalities must plan integrated development for the area as a whole but in close consultation with the local municipalities and must draft its IDP after having taken into account the integrated development processes of and proposals submitted to it by the local municipalities in its area. Simultaneously, all local municipalities must align their IDPs with the framework adopted by the district municipality and must draft their IDPs, after taking into account the IDP process and proposals from the district municipality.<sup>23</sup>

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no such co-operation and alignment is necessary, as the metro municipality is the only local government operating in the particular area of jurisdiction.

<sup>20</sup> The new requirements make it clear that each and every local government is legally required to draft and adopt an IDP for its area. See the Systems Act s 28(1).

<sup>21</sup> See the Systems Act s 28(2)-(3).

<sup>22</sup> See the Systems Act s 29(1)(a)-(d).

<sup>23</sup> See the Systems Act s 29(2)-(3). It is clear that in the new legal system a district council's responsibility for a district IDP is a statutory requirement. All district councils must formulate district wide IDPs, which must include a framework for the IDPs of local councils in their areas of jurisdiction.

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The management of the IDP drafting processes falls under the responsibility of the executive committee or executive mayor of a municipality or under a committee of councillors appointed by the municipal council if it is a municipality without an executive committee or an executive mayor. The responsible committee or person must manage the drafting of the IDP, must assign responsibilities to the municipal manager in the IDP process and must submit the draft plan to the municipal council for adoption by the council.<sup>24</sup> Further monitoring and support to the process of integrated development planning is provided for in that the MEC for local government in the province may:

- monitor the process followed by a municipality
- assist a municipality with the planning, drafting, adoption and review of its IDP
- facilitate co-ordination and alignment of the IDPs of different municipalities and the strategies and programmes of national and provincial organs of state.

The MEC may take any appropriate steps to resolve disputes or differences in connection with the IDP processes between a municipality and its local community or between municipalities.<sup>25</sup>

After an IDP has been adopted or amended, the municipal manager of a municipality must submit a copy of the IDP to the MEC for local government in the province within ten (10) days after such adoption/amendment. The copy of the IDP must further be accompanied by a summary of the pre-adoption process, a statement that the process has been complied with, together with explanations where necessary, and finally in the case of a district and local municipality, a copy of the framework adopted for integrated development planning between the municipalities.<sup>26</sup> The MEC may within 30 days of receiving a copy of an IDP or amendment thereto, or within such reasonable longer period as may be approved by the minister of local government, request the relevant municipal council to adjust the plan or the amendment, in

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tion. District IDPs should thus determine a strategy for promoting economic development in the entire district and ensure upliftment of all communities. Such IDPs should guide revenue-raising and service-delivery activities and promote interaction between citizens, councillors, officials and higher spheres of government. It is important that District and Local IDPs be drawn up parallel to each other and inform and reinforce one another. District councils are thus responsible for aligning and co-ordinating potentially contradictory municipal IDPs. District IDPs are an important tool for integrating service-delivery activities and municipal goals.

<sup>24</sup> See s 30(a)-(c) of the Systems Act.

<sup>25</sup> See s 31(a)-(d) of the Systems Act. The monitoring and provincial supervision is subject to any other law(s) enacted to regulate such supervision in local government spheres, however.

<sup>26</sup> Refer to the Systems Act s 32(1)(a)-(b)(i)-(iii).

accordance with the MEC's proposals, if the plan/amendment does not comply with a requirement of the Systems Act or is in conflict or not aligned with the development plans and strategies of other affected municipalities or organs of state. The MEC may then request a municipal council to comply with the provisions of the Systems Act.<sup>27</sup> A municipal council must consider the MEC's proposals and, within 30 days of receipt of such proposals, adjust its IDP accordingly, if it agrees with the proposals. If a municipality disagrees with the proposals, it must object thereto and must furnish the MEC with written reasons for disagreeing. On receipt of such an objection, the MEC may refer the objection to an *ad hoc* committee for a decision. If the MEC decides to refer the objection, it must be referred within 21 days of receipt of the objection.<sup>28</sup>

The *ad hoc* committee mentioned above must be appointed by the MEC, whenever necessary. The committee must consist of members representing local government, the provincial government and national government. The MEC appoints the members of an *ad hoc* committee with the concurrence of the municipality concerned, the provincial organ or organs involved and with the concurrence of the national organ or organs of state involved in the dispute or in whose functional area the disputed is located.<sup>29</sup> The procedure of the *ad hoc* committee must be dealt with in accordance with procedures prescribed by regulation.<sup>30</sup> A matter before an *ad hoc* committee is decided if at least two spheres of government agree on the matter. If the committee rejects the objection(s) of the municipality, the municipality must comply with the initial request by the MEC within 30 days of the decision and after having been informed of the decision.<sup>31</sup>

All municipalities are also obligated to review their IDPs annually in accordance with an assessment of their performance measurements under section 41 of the Systems Act and also to the extent that changing circumstances so demand. The amendment procedure should be in accordance with a prescribed process.<sup>32</sup>

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<sup>27</sup> See the Systems Act s 32(2)(a)-(b).

<sup>28</sup> It seems clear from the Act that the MEC has a discretion either to refer such a dispute to an *ad hoc* committee or not to. Should he decide not to refer it, it seems that his decision would be final. See the Systems Act s 32(3)-(4).

<sup>29</sup> See s 33(2)(a)-(c) for more details.

<sup>30</sup> See the Systems Act ss 33(3) and 37.

<sup>31</sup> See the Systems Act s 33(4)-(5).

<sup>32</sup> Refer to the Systems Act s 34(a)-(b).

#### **20.2.4 Miscellaneous aspects concerning municipal integrated development planning**

The new legislative framework also affords specific status to a particular IDP. The Systems Act determines that an IDP adopted by a municipal council has the following importance:

- It serves as the principal strategic planning instrument which guides and informs all planning and development and decisions relating thereto in a municipal area.
- It binds the municipality in the exercise of its executive authority, except to the extent of any inconsistency between a municipality's IDP and national or provincial legislation, in which case such legislation is to prevail.
- It binds all other persons to the extent that those parts of the IDP that impose duties or affect the rights of those persons have been passed as a by-law.<sup>33</sup> It should be noted that a spatial development framework contained in an IDP prevails over a plan as is defined in section 1 of the Physical Planning Act of 1991.<sup>34</sup>

Finally, the Systems Act determines that all municipalities must give effect to their IDPs and conduct their affairs in a manner which is consistent with their IDPs. The national minister is further authorised, for the purposes of municipal integrated development planning, to make regulations or to issue guidelines in terms of section 120 of the Act and to provide or to regulate certain matters. Such matters are the following.<sup>35</sup>

- (a) incentives to ensure that municipalities adopt their integrated development plans within the applicable prescribed period, and comply with the provisions of the Act concerning the planning, drafting, adoption and review of those plans;
- (b) the detail of integrated development plans taking into account the requirements of other applicable national legislation;
- (c) criteria municipalities must take into account when planning, drafting, adopting or reviewing their integrated development plans;

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<sup>33</sup> See the Systems Act s 35(a)-(c). Although an IDP has been given statutory recognition and status, if certain parts of an IDP impose duties or affect the rights of other persons, such as the local community, eg, then such aspects should have been incorporated in a by-law and should have been passed as such to have binding force over such persons. See s 35(1)(c).

<sup>34</sup> 125 of 1991 and the Systems Act s 35(2).

<sup>35</sup> See the Systems Act s 37(1)(a)-(i).

- (d) the detail of the process for the planning, drafting, adoption and review of integrated development plans;
- (e) a process for the amendment of integrated development plans;
- (f) the manner in which an objection must be referred to an *ad hoc* committee envisaged in section 33;
- (g) the manner in which written evidence or documents must be submitted to an *ad hoc* committee;
- (h) the proceedings of an *ad hoc* committee; and
- (i) any other matter that may facilitate –
  - (i) integrated development planning and the drafting of integrated development plans; or
  - (ii) the application of this chapter.

When the minister makes regulations or issues guidelines to regulate matters under subsection 37(1)(b)-(e), he/she must take into account the capacity of municipalities to comply with those matters and must differentiate between different kinds of municipality according to their respective capacities. Furthermore, the minister is authorised to phase in the application of the provisions of the chapter on integrated development planning where such provisions place a financial or administrative burden on such municipalities.<sup>36</sup>

### 20.3 Conclusion

It was demonstrated above that municipal development planning is not only a legal obligation for all municipalities but that without such planning municipalities will not be in a position to fulfil their obligations and responsibilities. The new local government dispensation is developmentally orientated, which in essence requires progress in the real realisation of developmental goals. Municipalities must therefore move forward and should enhance and create a better living environment for all South African citizens. Development planning is not something that can be done in isolation by individual municipalities. It requires constructive involvement of all three spheres of government on a vertical axis and also all relevant municipalities *inter se*, on a horizontal axis. The constitutional obligations and principles of co-operative govern-

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<sup>36</sup> See the Systems Act s 37(3)-(4). Refer again to the LG: Municipal Planning and Performance Management Regulations as published under GNR 796 of GG 22605 of 24 August 2001. Apart from the details of an IDP, the regulations also address the process for amending IDPs, referring of objections to IDPs to an *ad hoc* committee, as well as requirements giving effect to an IDP.

ment are therefore of significant importance in relation to developmental strategies and interaction between the various organs of state. Such co-operation will benefit not only municipalities but also both national and provincial policies and programmes.

Municipal development planning is incorporated mainly in a Municipal Integrated Development Plan (MIDP), which serves as a single, inclusive and strategic plan for the development of the municipal area. All MIDP must incorporate certain minimum core components as they guide the short-term development of local governments in South Africa. Because of its importance, an MIDP is strongly protected, and strict requirements for its adoption and amendment are determined by law. Such plans are flexible, living documents, however, and should be reviewed annually to keep up with the changing demands and circumstances in municipal jurisdictions. All in all, the new requirements and status of MIDP should go a long way towards helping the new local government structures to manage and achieve their important constitutional obligations.



## **Basic legal matters relevant to local government structures**

### **21.1 Introduction**

In light of the various aims and responsibilities of local governments, it is generally accepted that such governments are confronted with almost all aspects of the law. It was explained in chapter 10 that municipalities have been established throughout the whole territory of South Africa, and therefore there is no area that does not fall under the direct authority of a particular municipal council. The importance of legal knowledge regarding not only the composition and functioning of municipalities, but also other fields of law is of significant importance. No legal practitioner can practise law in a particular area in our country without a sound knowledge of the legal rules that are applicable to local governments. Every now and then a practitioner will be confronted with legal disputes that concern the particular local authority either directly or indirectly. In many areas, the local municipality is often the largest employer organisation and also the largest economically active entity. In short, one can say that a legal adviser for a local government or a practitioner advising clients on local government matters should have a sound legal knowledge of almost all the different fields of the South African law.

In order to be able to handle and address legal problems, it is important to know the law and where to find the law. As the law is constantly changing and developing, it is obvious that all role players in local government should be able to access and then apply the relevant legal rules that encompass the new local government dispensation. All role players must have a sound knowledge of the different sources of local government law. These sources are mentioned briefly below.

### **21.2 Sources of local government law**

In principle, there are three main sources of local government law. They are :

- legislation
- a combination of common law and customary law

- legal precedents.

It is only legislation and case law that are of importance to local government practitioners and legal scholars, however. Since local government law is part of the broader constitutional system of South Africa, customary and common law rules have very little or no influence or impact as a source of local government law.<sup>1</sup>

### **21.2.1 Legislation as a source of local government law**

Legislation is without a doubt the most important and influential source of local government law. It was discussed and explained above that the new local government dispensation was not only created in terms of legislation but that it also functions and operates according to various pieces of legislation. Such legislative requirements can be from either the national or a provincial government.<sup>2</sup> It should be pointed out that the term “legislation “ as referred to here, is a wide term and includes both national and provincial laws, as well as proclamations and regulations made by ministers or MECs.<sup>3</sup>

Within the ambit of legislation, it should be obvious and self-explanatory that the Constitution of the Republic of South Africa, which is a very unique and important legislative source of the country’s legal system, forms the basic legal framework on which the new local government system has been founded. The Constitution defines mainly the powers and functions of all three spheres of government and, in particular, the powers and functions of all local governments.<sup>4</sup>

Apart from the constitutional text itself, the Constitution further mandates the enactment of various other national and provincial laws, with the purpose of giving body to the basic legal framework of local governments. Such Acts, as was mentioned and discussed in the previous chapters of this work, then complete the legal framework within which local governments are operating.<sup>5</sup>

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<sup>1</sup> For more on this point see the cases of *In re: Certification of the Constitution of the RSA 1998*, 1996 (4) SA 744 (CC) and also *President of the RSA v Hugo* 1997 (4) SA 1 (CC).

<sup>2</sup> Because of the ever-changing needs of society, local government law is contained and regulated mainly by legislation.

<sup>3</sup> See the Constitution s 239 for a more exact definition of the term “legislation”.

<sup>4</sup> As the supreme law of the state, the provisions and requirements of the Constitution are non-negotiable. Non-compliance with the Constitution would result in invalidation. See the Constitution s 2.

<sup>5</sup> It was mentioned above that local government *per se* is not a concurrent legislative competence or exclusive legislative competence in terms of the Constitution Sch 4 and 5. This position seems to indicate that it is left for mostly the national government to legislate on local government matters, if so allowed by the Constitution. See the Constitution s 163. Only when the Constitution allows provincial laws over certain matters will it be possible for provincial governments to legislate

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### **21.2.2 The importance of customary and common law principles**

Basically there are two main reasons for both the common law and customary law not featuring as important sources of local government law. In the first instance, the new local government system is a totally new legal system which had its origins within the new constitutional legal foundation. The new system was totally overhauled to such an extent that common law rules are no longer of any importance. Secondly, the Constitution also does not contain a provision to the extent that the former common law or customary law principles still continue.<sup>6</sup> Apart from this position, the former local government system was regulated mainly by legislation under the then government of South Africa. The influence of common law or customary law under the former system was largely non-existent. Finally, it was held by the highest judicial authority in South Africa that even from a constitutional viewpoint there are no common law powers left that were derived from the former royal prerogatives. All such powers have now been enumerated within the text of the Constitution or other legislation.<sup>7</sup>

### **21.2.3 Judicial precedent as a source of local government law**

Apart from legislation, judicial precedents, or what are commonly referred to as “case law”, are the second most important source of local government law. The importance of legal jurisprudence is founded on two issues in particular. Firstly, South Africa follows the legal doctrine of *stare decisis*, which means that the lower courts in the hierarchy of judicial bodies are compelled to follow the decisions, in similar cases, handed down by the higher courts. Secondly, the Constitution clearly spells out the importance and role of the judicial authority in our legal system. According to the Constitution, the judicial authority of the Republic of South Africa is vested in the courts and the courts are subject to the Constitution and the law only. Any order or decision by a court binds all persons to whom it applies, including the state.<sup>8</sup> The importance of judicial precedents is therefore self-evident, and local government

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over such matters. See, eg, the Constitution s 139. Provincial laws relevant to local governments are therefore much less important than their national counterparts.

<sup>6</sup> Under the 1983 Constitution s 88 such conventions still continued to be in force. The 1996 Constitution does not provide for such continuation.

<sup>7</sup> See the *First Certification Judgment* 1996 1996 (1) SA 1 (CC); *President of the RSA v Hugo* 1997 (4) SA 1 (CC) and *President of the RSA v SARFU* 2000 (1) SA 1 (CC).

<sup>8</sup> See the Constitution s 165(1)-(5).

practitioners and scholars must ensure that they keep up to date with decisions of our courts regarding local government legal matters.

Apart from the sources mentioned above, there are no other real sources of local government law. Although the works and writings of legal scholars, the discussion and deliberations of politicians and the submissions of the concerned public at large are of importance to legal development, such aspects are not sources of local government law and should be regarded only as primary information sources from which the content of the law can sometimes be determined.

### **21.3 Important fields of law relevant to local government law**

It was mentioned above that local government administrations often face a large variety of legal issues. In order to cope with such issues, most municipal councils that can afford to do so have a specific legal section that advises and handles legal problems for both the political and administrative branches of the local authority. Municipal legal advisors are therefore responsible for both internal and external legal matters. Such a situation often demands broad legal and paralegal expertise. Local government matters are important not only to the political office bearers and administrative personnel, however. Such matters are also regularly of importance to the relevant local community. Of the three spheres of government, citizens of a state are most likely, at some stage, to be involved in a legal dispute with their local authority. Against this background it is obvious that local community members are in need of professional and expert legal advice and assistance regarding local government legal matters.

It falls way beyond the scope of this work to discuss or even try to explain the various legal fields that are of importance in municipal matters. What is of interest, however, is to highlight briefly some of the most common areas of legal dispute that involve local governments. While it is the task of lawyers and legal advisors to keep knowledgeable about the law in general, some of the specialised legal issues are also of value for both the political and administrative components of a municipality in order for them successfully to fulfil and maintain their duties and responsibilities.

#### **21.3.1 Common legal issues relevant to local governments**

- *The law of contract* The law of contract is particularly important to local government legal advisors. All municipalities are involved in various legal contractual re-

relationships on a regular basis. As a sphere of government and a legal entity, municipalities are legally empowered to enter and conclude contracts.<sup>9</sup>

- *Property law* The law concerning property and other related issues is also of regular importance to local governments. Property is regarded as of such importance in our modern democracy that it has been afforded direct protection under the Constitution.<sup>10</sup> Property law also includes issues regarding
  - (a) expropriation
  - (b) property leasing
  - (c) purchase, sale and acquisition
  - (d) transfer of property ownership
  - (e) other related land use rights such as the restitution of land rights, land reform measures, communal property associations, informal land rights issues and eviction requirements and procedures.<sup>11</sup>

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<sup>9</sup> See also *Keyser v Orkney Town Council* 2003 (4) SA 131 (T) with reference to lease agreements. In *Gordon v Pietermaritzburg-Msunduzi: TLC and Another* 2001 (4) SA 972 (N) it was mentioned that with the advent of SA's new constitutional dispensation, momentous changes were brought about to local government. The court held that the contract concluded between the parties was impossible to perform and, although it was true that the state was bound by ordinary commercial contracts concluded by it, in cases of impossible performance, the law of contract allows for the cancellation of the agreement. In the case certain regulations, which formed the basis of the contractual relationship between the parties, were repealed in the context of an entirely new constitutional dispensation, which included local government. See paras B-D at 978.

<sup>10</sup> According to the Constitution s 25, no *person* may be deprived of property except in terms of a law of general application. Arbitrary deprivation of property is specifically outlawed. Although property may be expropriated, there are specified requirements under which such expropriation must be done. Refer also to the case of *Modderfontein Squatters, Greater Benoni City Council v Modderklip boerdery (Pty) Ltd (Agri SA and Legal Resources Centre as amici curiae)*, also referred to as *President of the RSA v Modderklip boerdery* 2004 (6) SA 40 (SCA).

<sup>11</sup> Most of these issues are regulated in terms of specific Acts of parliament. For more on municipal property-related issues, refer to Nonyana MR "Communal Property Associations for convenience v townships for services and maintenance" *Property Law Digest* August 2000 Butterworths at 3. The writer refers to the Communal Property Association Act 28 of 1996 which has improved communal land ownership. See also the following cases: *De Villiers en 'n Ander v Stadsraad van Mamelodi en 'n Ander* 1995 (4) SA 347 (T) dealing with expropriation under the Expropriation Act 63 of 1975. See also *Cape Town Municipality v Table Mountain Aerial Cableway Co Ltd* 1996 (1) SA 909 (C). In *Southern Metropolitan Substructure v Thompson and Others* 1997 (2) SA 799 (W) it was held that a local authority's duty to provide and allocate housing cannot lawfully be fettered by contractual undertakings not to evict illegal occupiers of land. When land/property is sold, it must be described sufficiently in accordance with the Alienation of Land Act 68 of 1981. Faultless description is not required. See *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA). See also *M & J Morgan Investments (Pty) Ltd v Pinetown Municipality* 1997 (4) SA 427 (SCA), and *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) dealing with expropriation issues. Refer also to *Skinberg v South Peninsula Municipality* 2001 (4) SA 1144 (C). It was stated as a *semble* to the case that despite the clear distinction made in the Constitution s 25 between deprivation and expropriation of property, there may be room for the development of a doctrine akin to constructive expropriation in South Africa, particularly where a public body utilises a regulatory power in a manner which, taken in isolation, can be categorised as a deprivation of prop-

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An interesting aspect regarding land is the Subdivision of Agricultural Land Act,<sup>12</sup> which requires that agricultural land may not be subdivided unless the Minister of Agriculture has given his written consent thereto.<sup>13</sup> Section 12 of the Local Government: Municipal Structures Act<sup>14</sup> allowed for the establishment of new municipalities for the entire territory of South Africa, however.<sup>15</sup> Accordingly, it is argued by some that all land now falls within the jurisdiction of a municipality.<sup>16</sup> Since agricultural land also falls within the jurisdiction of a municipal council, it seems that section 3 of the Subdivision of Agricultural Land Act no longer has application.

- *The law of delict* The law of delict is an equally important field of law within the local government domain. All municipalities face delictual accountability on a daily basis. Delictual liability is confined not only to general delictual claims but also more specialised claims under the legal protection of vicarious liability, defamation and other unique forms of delictual accountability. The law of delict is a vast and often complex field of the law and should be studied carefully.<sup>17</sup>

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erty rights and not an expropriation, but which has the effect, albeit indirectly, of transferring those rights to the public body. Other issues dealing with property-related matters were decided in *Bailes v Town and Regional Planning Commission* 2002 (2) SA 589 (N), *Kotzé v Minister of Landbou en Andere* 2003 (1) SA 445 (T), *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn* 2003 (6) SA 140 (C) and *Baartman and Others v Port Elizabeth Municipality* 2003 (3) SA 560 (SCA). Refer also to Griffiths G "Not so fast – that's municipal land: A discourse on the acquisition of municipal property under the Cape Municipal Ordinance 20 of 1974" *Property Law Digest* (1999) Butterworths at 11.

<sup>12</sup> 70 of 1970.

<sup>13</sup> Refer to the Act s 3.

<sup>14</sup> 117 of 1998.

<sup>15</sup> Read also the Constitution s 151(1), which states that the local sphere of government consists of municipalities which must be established for the whole territory of the Republic.

<sup>16</sup> See the letter of MJ Meyer "Is Act 70 of 1970 still necessary?" *DR* December 2001 at 5.

<sup>17</sup> Judicial examples of recent delictual cases concerning local authorities are the following: *Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 (4) SA 745 (O), dealing with the responsibility of a municipal airstrip; *Gardner v Whitaker* 1995 (2) SA 672 (E), dealing with issues of defamation; *Cape Town Municipality v Butters* 1996 (1) SA 473 (C), dealing with public liability; *Cape Town Municipality v Bakkerud* 1997 (4) SA 356 (C), concerning municipal liability for damages resulting from an omission to repair streets and pavements; *Welkom Municipality v Masureik and Herman t/a Lotus Corp* 1997 (3) SA 363 (SCA); *Pretoria City Council v De Jager* 1997 (2) SA 46 (SCA), dealing with the liability when failing to take reasonable precautions to prevent foreseeable harm on municipal sidewalks; *Graham v Cape Metropolitan Council* 1999 (3) SA 356 (C); *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA); *Grootboom v Graaff-Reinet Municipality* 2001 (3) SA 373 (E); *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA); *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA), concerning liability for municipal council's water main bursting and *Minister of Safety and Security v Duivenboden* 2002 (6) SA 431 (SCA) relevant to municipal security/police services. See also the following academic research: Scott J "Grootboom v Graaff-Reinet Municipality" *De Jure* 2002 at 635; Scott J "Re-affirmation of the doctrine of immunity of municipalities against liability for wrongful omissions assessed and rejected – Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA) *THRHR* 2001 (64) at 502; Scott J "The Cape Metropolitan Council v Noel Raymond Graham case no 157/99 (C)" *De Jure* (2001) at 198; Scott J "Cape Town Municipality v Butters 1996 (1) SA 473 (C)" *De Jure* (1996) at 379 and Smith A "Mu-

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- *Constitutional law and administrative law* The importance of constitutional law, which includes not only formal constitutional law but also aspects of fundamental rights law, administrative law, environmental law, legal interpretation and even some aspects of public international law have been highlighted above. Apart from the obvious importance of the Constitution and its Bill of Rights, the legal rules regulating the field of administrative law are also of particular importance to all local government bodies. Many municipal actions form part of the executive authority of the state and therefore fall under the rules of administrative law. The importance of administrative law was specifically highlighted in the case of *Fed-sure Life Assurance v Greater Johannesburg TMC*.<sup>18</sup> In this case it was mentioned that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates or determines appropriations to be made out of public funds, such a power is peculiar to elected legislative bodies. Such powers are exercised by democratically elected representatives after due deliberation of the circumstances and cannot be classed as administrative action.<sup>19</sup> Not only the legal advisors of a municipality, but all municipal administrators, should have a basic understanding and knowledge of administrative law and its various related legal rules.<sup>20</sup>
- *Criminal law* Municipalities are also often involved within the ambit of criminal law. Such issues are confined not only to incidents where municipal personnel are implicated in criminal activity but can also relate to incidents where municipal employees or even councillors are held criminally liable for activities within a particular municipality. So, for example, is it possible for a municipal official, mostly the municipal manager, to be held liable for non-compliance with certain

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municipalities mend your ways" *The Quarterly Law Review* for people in business vol 8 part 2 (2000) at 40.

<sup>18</sup> 1999 (1) SA 374 (CC).

<sup>19</sup> Refer to para 45 at 396-397.

<sup>20</sup> For more on constitutional and administrative law see the cases of *Claude Neon Ltd v Germiston City Council and Another* 1995 (3) SA 710 (W), where the court held that an undertaking by a local authority official to notify a person is an administrative act that gives rise to a legitimate or reasonable expectation. See also *Tony Rahme Marketing Agencies SA (Pty) Ltd and another v Greater JHB TMC* 1997 (4) SA 213 (W); *Gencor SA Ltd v TC for Rustenburg and Environs and another* 1998 (2) SA 1052 (T); *Erf one six seven Orchards CC v Greater JHB Metro Council and Another* 1999 (1) SA 104 (SCA) and *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA). See *City of Cape Town v Rudolph and others* 2004 (5) SA 39 (CPD) regarding a housing dispute under s 26 of the Constitution.



legislative requirements.<sup>21</sup> The importance of criminal law within the new local government dispensation should not be underestimated, therefore.

- *Labour law* The importance of labour law for municipal governments is particularly highlighted by the fact that municipalities are often one of the larger employer organisations within a particular municipal area. Depending on the size of the municipality, municipal councils employ hundreds or even thousands of personnel. Labour law issues are thus part and parcel of a municipal administration, and a sound knowledge of labour law is essential. Apart from normal labour issues such as wage negotiations, promotions and disciplinary action against employees, local government administration also encounter more specialised labour issues such as disputes within essential services areas. Because of the importance of labour law in local government, most municipalities have established personnel and labour relations departments to handle such matters. There is even a specific bargaining council that was established to resolve and deal with municipal labour issues between municipalities as employers, and labour unions as representatives of municipal employees.<sup>22</sup>
- *Building regulations and town and regional planning law* All municipalities are required to be involved in local planning processes and developmental programmes. Each municipal government is therefore regularly involved in town planning activities, and municipalities must also ensure that minimum building standards are complied with.<sup>23</sup>

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<sup>21</sup> See the Occupational Health and Safety Act 85 of 1993 as an example.

<sup>22</sup> For typical examples of labour-related issues in local authorities see *Cape Local Authorities Employers Organisation v IMATU* 1997 (1) SA 656 (C) and *Mhlambi v Matjhabeng Municipality and another* 2003 (5) SA 89 (O). In the latter case the court held *inter alia* that a reasonable request for further particulars in a disciplinary action is an ingredient of the right to a fair hearing and that the principles of natural justice demanded that such information be furnished.

<sup>23</sup> For more on town planning and building requirements see the National Building Regulations and Building Standards Act 103 of 1977. Refer also to cases such as: *Sandton Town Council v Gourmet Property Investments CC* 1994 (4) SA 569 (A) dealing with national building regulations; *Diepsloot Residents and Landowners Association and Another v Administrator Tvl* 1994 (3) SA 336 (A); *Schapenrome Investments (Edms) Bpk v Sandtonse Stadsraad* 1994 (2) SA 34 (A); *Stands 5/1 Wierda Valley (Pty) Ltd and Another v Sandton Town Council* 1994 (1) SA 333 (A); *Knop v JHB City council* 1995 (2) SA 1 (A); *Huisman v Minister of Local Government, Housing and Works* 1996 (1) SA 836 (A); *East Zulu Motors v Empangeni/Ngwelezane TLC* 1998 (2) SA 61 (CC) and also *Paola v Jeeva and others* 2004 (1) SA 396 (SCA), concerning the value of a view of a property. Refer also to Van Wyk J and Van Wyk D "Planning law, administrative justice and the Constitution: *Van Juyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C)" *THRHR* 1996 (59) at 675 *et seq*; *Gildenhuys A "Omgewingsbewaring beperkings op grondgebruiksveranderingen"* *Butterworths Property Law Digest* (2000) at 13 and Van Wyk J "Planning Law – Will Cinderella emerge a princess?" *THRHR* 1996 (59) at 1. See also the case of *Humphrys NO v Barnes* 2004 (2) SA 577

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- *Environmental law* It was mentioned above that all three spheres of government must comply with the new constitutional requirements. One such requirement is the provision of a clean and healthy environment. Environmental laws are therefore of significant importance for all local authorities. It is essential for municipalities to determine their responsibilities under current legislative provisions and to ensure compliance with their obligations in that regard.<sup>24</sup>

#### **21.4 Special legal matters pertaining to local government**

Apart from the general legal fields that have an impact on local governments, the new local government legal framework also provides for specific legal matters that are of particular importance to local authorities.<sup>25</sup> These special provisions regarding municipal legal matters must be read in conjunction with the general provisions of the law.

##### **21.4.1 Legal proceedings**

According to the Systems Act, all municipalities are authorised to compromise or compound any action, claim or proceedings and may submit to arbitration any matter other than a matter involving a decision on its status, powers, duties or the validity of its actions or by-laws.<sup>26</sup> The particular subsection is somewhat dubious and unclear. As a legal person all municipalities have legal standing and may thus institute or defend any legal action in which they have a direct, or sometimes indirect, interest. However, this position is conditional to the extent that the particular legal action is indeed permissible under the law in general.

##### **21.4.2 Legal representation for employees or councillors of a municipality**

Under the new legal framework, it is permissible for a municipality, subject to such terms and conditions as it may determine, to provide an employee or a councillor of

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(CPD) regarding the collapsing of a boundary wall between two private property owners. Refer also to *Botha v White* 2004 (3) SA 184 (TPD) regarding the use of a property contrary to the applicable zoning. See also *Clark v Faraday and Another* 2004 (4) SA 564 (CPD) regarding the approval of building plans and a neighbour's view. The court held *inter alia* that an owner of land who uses his/her property in an ordinary and natural manner is not guilty of committing an *injuria* to other property owners.

<sup>24</sup> For more on environmental aspects see *Verstappen v Port Edward Town Board and Others* 1994 (3) SA 569 (D), the Environmental Conservation Act 73 of 1989 and Witbooi E "Obligations on property owners to control alien invasive vegetation on their land" *Butterworths Property Law Digest* March 2003 at 3.

<sup>25</sup> Refer to the Local Government: Municipal Systems Act 32 of 2000 ch 11 as amended by Act 40 of 2002 s 2(1).

<sup>26</sup> See the Systems Act s 109(2).

the municipality with legal representation where applicable. Such legal representation is limited to only two instances, however.<sup>27</sup>

- where legal proceedings have been instituted against the employee or councillor as a result of any act or omission by that person in the exercise of his or her powers or the performance of his or her duties or
- where the employee or councillor has been summoned to attend any inquest or inquiry arising from the exercise of his or her powers or the performance of his or her duties.

It should be noted that employees or councillors are not automatically entitled to the legal representation mentioned above. The decision to provide for such representation lies with the municipal council. All legal assistance not addressed in the two instances above should be for the employee's or councillor's own account and should not be funded from the municipal/public purse.

#### **21.4.3 Issues concerning evidence**

The Systems Act specifically provides that in legal proceedings against a municipality a certificate which purports to be signed by a staff member of the municipality and which claims that the municipality used the best known or only or most practicable and available methods in exercising any of its powers or performing its functions must, on its mere production by any person, be accepted by a court as evidence of that fact.<sup>28</sup> It is further provided that a copy of the *Provincial Gazette* in which a by-law was published may, on its mere production in a court by any person, be used as evidence that that by-law was passed by a municipality concerned.<sup>29</sup>

#### **21.4.4 Fines, bail and the prosecution of offences**

Under the new legal framework, a staff member of a municipality so authorised may institute criminal proceedings and conduct the prosecution in respect of a contravention of or failure to comply with a provision of

- a by-law or regulation of the municipality
- other legislation administered by the municipality or

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<sup>27</sup> See the Systems Act s 109A(a)-(b).

<sup>28</sup> The Systems Act s 110.

<sup>29</sup> Refer to the Systems Act s 111. It is submitted, however, that such a situation should prevail only in instances where no contrary evidence is presented to a particular court.

- other legislation as determined by the National Director of Public Prosecutions in terms of section 22(8)(b) of the National Prosecuting Act of 1998.<sup>30</sup>

It is also provided that fines and bails that were recovered in respect of offences or alleged offences referred to in item 2 of Schedule 4 to the Public Finance Management Act<sup>31</sup> must be paid into the revenue fund of the municipality concerned.<sup>32</sup>

#### **21.4.5 Time of notices, payments and the service of documents and process**

A payment may be made at a municipality only during the normal or extended office hours of a municipality, except when payment is made by electronic transfer or at an agency pay-point. These times also apply to when any notice or other document may be served on the municipality, including its council, other structures, functionaries or staff members in an official capacity. There are exceptions to this rule in urgent matters, however.<sup>33</sup> Any notice or other document that is served on a person in terms of the Systems Act or by a municipality in terms of any legislation is regarded as having been served when:

- it has been delivered to that person
- it has been left at that person's place of residence or business in the Republic of South Africa with a person apparently over the age of sixteen years
- it has been posted by registered or certified mail to that person's last known residential or business address in the Republic of South Africa and an acknowledgement of the posting thereof is obtained from the relevant postal service
- it has been served on a person's agent or representative in the Republic of South Africa in a manner provided for above if that person's address in the RSA is unknown
- it has been posted in a conspicuous place on the property or premises of the person to which it relates if that person's address or agent in the Republic of South Africa is unknown.<sup>34</sup>

It is also provided that when any notice or other document must be authorised or served on the owner, occupier or holder of any property or right in any property, that it is sufficient if that person is described in the notice or document as the owner,

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<sup>30</sup> A staff member may prosecute or conduct criminal proceedings only if so authorised in terms of the National Prosecuting Authority Act 32 of 1998 s 22(8)(f).

<sup>31</sup> 1 of 1999.

<sup>32</sup> See the Systems Act s 113.

<sup>33</sup> See the Systems Act s 114(a)-(b).

<sup>34</sup> See the Systems Act s 115(a)-(e) as amended by Act 6 of 2004 see 94.

occupier or holder of the property. In such cases it is not necessary to name the person specifically. Finally, any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a person in attendance at the municipal manager's office. Outside parties thus seeking to serve on a municipality documents of whatever nature should serve such documents on the office of the municipal manager.<sup>35</sup>

A further important practical aspect concerning the institution of legal proceedings against a municipal council is the provision of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act<sup>36</sup>. According to this Act a notice must be sent to a municipality informing it of a claim against the municipality. According to section 2 of the Act such a notice/letter of demand must be sent to the council within 90 days of the date of the cause of action. After such notice, no formal summons may be issued against the municipality concerned, unless the claim has been rejected or a further 90 day period has lapsed. It must also be noted that the Act also requires that a claim prescribes against a council unless summons has been issued within 24 months since the occurrence of liability. Several case law precedents have been developed over such matters. See for example *Ntanga v Butterworth Municipality and another*<sup>37</sup> and also *East London Municipality v Abrahamse*.<sup>38</sup> In many instances the requirements of the Act were strictly enforced. Refer to *De Klerk en 'n ander v Groter Kroonstad Plaaslike Oorgangsraad*.<sup>39</sup> In *Provinsie van die Vrystaat v Williams No*<sup>40</sup> the Appellate Division confirmed that the term/word "liability" in the context of the Act has a wide meaning. Finally, the Constitutional Court in 2001 held that the Limitation of Legal Proceedings Act, which requires the specific notice within a short period of time and with limited scope for condonation for non-compliance, constitutes a material limitation of an individual's right of access to a court under section 34 of the Constitution and that such limitation could not be justified under section 36 of the Constitution. Accordingly, the court held that section 2(1)(a) of the Act was unconstitutional and invalid. See *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre*

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<sup>35</sup> Refer to the Systems Act s 115(2)-(3).

<sup>36</sup> 94 of 1970.

<sup>37</sup> 1995 (4) SA 437 (Tks).

<sup>38</sup> 1997 (4) SA 613 (SCA).

<sup>39</sup> 1999 (2) SA 870 (O).

<sup>40</sup> 2000 (3) SA 65 (SCA).

as *Amicus Curiae*).<sup>41</sup> In a follow-up case, the Constitutional Court further held that the invalidation of section 2(1)(a) of the Act operated retrospectively to the moment the Constitution came into effect. Since the Constitution came into effect, the inconsistency of the Act has become evident and, as a matter of law, the provision of the Act has been a nullity since that date.<sup>42</sup>

#### **21.4.6 Public servitudes and the custody of documents**

Similar to the situation under some of the former ordinances that affected local governments, the Systems Act now confirms that all public servitudes in favour of a municipality are under the control of the municipality. A municipality must further protect and enforce the rights of the local community arising from those servitudes.<sup>43</sup> It is also the responsibility of the municipal manager to take custody and control of all of a municipality's records and documents, unless where otherwise provided.<sup>44</sup>

#### **21.4.7 Restraint on transfer of property**

All municipalities are directly involved in the process of transferring property (land) from one person or institution to another. Similarly to the South African Revenue Service, a municipality must provide a clearance certificate stating that all levies, duties or taxes payable to the municipality have been paid up to date before a particular property can be transferred. In order to protect a municipality, and thus also its public community, from losing valuable revenue for service already rendered, the Systems Act determines that a registrar of deeds may not register the transfer of property except on production to that Registrar of Deeds of a prescribed certificate which :

- was issued by the municipality or municipalities in which that property is situated and
- certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.<sup>45</sup>

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<sup>41</sup> 2001 (4) SA 491 (CC).

<sup>42</sup> Refer to *Ex parte Women's Legal Centre v Greater Germiston TLC* 2001 (4) SA 1288 (CC).

<sup>43</sup> See the Systems Act s 116.

<sup>44</sup> The Systems Act s 117.

<sup>45</sup> See the Systems Act s 118(1)(a)-(b). The certificate is valid for a period of 120 days from the date it was issued. The Act s 118(1A). This was also the position under some of the former provincial ordinance. Refer also to *Venter NO v Eastern Metro Substructure, Greater JHB TC* 1998 (3) SA

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In the case of a transfer of property by a trustee of an insolvent estate, the transfer and recovery of monies are subject to section 89 of the Insolvency Act.<sup>46</sup> To help secure municipal funds even more efficiently, it is specifically provided that an amount due for

- municipal service fees
- surcharges on fees
- property rates and other municipal taxes
- levies or duties

is a charge upon the property in connection with which the amount is owing and that such a claim enjoys preference over any mortgage bond registered against the property.<sup>47</sup> The requirement of a clearance certificate does not apply to a transfer from the national government, a provincial government or a municipality of a residential property which was financed with funds or loans made available by any of the three spheres of government, and when the vesting of ownership as a result of a conversion of land tenure rights into ownership in terms of the Upgrading of Land Tenure Rights Act of 1991.<sup>48</sup> However, municipalities are not precluded from collecting any amounts owed to them in respect of such a property at the time of the transfer or conversion.<sup>49</sup> Finally, the preference that is enjoyed over any mortgage bond does not apply to any amount referred to which became due before a transfer of a residential property or a conversion of land tenure rights into ownership.<sup>50</sup>

Although the protection of municipal service fees, surcharges, property rates and other taxes or levies is not something new, its new statutory protection has been the

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1076 (W). For an example of a certificate under s 118 see GN 686 as published in GG 24886 of 23 May 2003.

<sup>46</sup> 24 of 1936. S 89(4) provides that notwithstanding the provisions of any law which prohibited the transfer of any immovable property, unless any tax as defined in ss (5) due thereon had been paid, that law would not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate if he had paid the tax which might have been due on that property in respect of the periods mentioned in ss (1) and that no other preference would be accorded to any claim for such tax in respect of any other period. S 89(5) provided that, for the purposes of subss (1) and (4), 'tax' in relation to immovable property meant any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established under the authority of any law in discharge of a liability to make such periodical payments if that liability was an incident of the ownership of that property.

<sup>47</sup> See the Systems Act s 118(3).

<sup>48</sup> See Act 112 of 1991.

<sup>49</sup> The Systems Act s 118(4)(a)-(b).

<sup>50</sup> The Systems Act s 118(5).



focus of legal debate and even strong judicial challenge. In the matter between *Greater Johannesburg TMC v Galloway No and Others*<sup>51</sup> the first respondent, a liquidator of a company, had sold immovable property belonging to the company to the second respondent. In order to proceed with the transfer of the property, the first respondent applied to the municipality/applicant for clearance figures in order to pay such and to obtain a clearance certificate in accordance with section 50 of the Local Government Ordinance.<sup>52</sup> Upon receipt of the figures, the first respondent disputed certain amounts claimed by the council. The respondent also took the view that he was not required to pay the disputed levies/taxes by reason of section 89 of the Insolvency Act.<sup>53</sup> The court held that section 89(4) overrode the provisions of any other law which prohibited the transfer of any immovable property unless any tax defined under section 89(5) due on the property in question had been paid. The liquidator thus had to pay certain taxes. Any items prescribed by section 50 of the Ordinance which fell outside the definition of a tax set out in section 89(5) were not payable by the liquidator in order to obtain the clearance certificate.<sup>54</sup> The court further held that section 89(4) did not extend to water, electricity and refuse removal charges. Such items were not in respect of the property but were in respect of the agreements which had been entered into for the provision of such services and therefore in respect of the services themselves. Charges in respect of electricity, water and refuse removal were not in respect of the property and could not be recovered as a prerequisite before the clearance certificate was issued. The application by the council was accordingly dismissed.<sup>55</sup> A similar issue was decided in *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council v Venter NO*.<sup>56</sup> The case concerned a liquidator of a close corporation who had paid to the local authority under protest certain amounts for basic water and sewerage charges. The respondent argued that such charges did not constitute taxes under section 89(1) and 89(5) of the Insolvency Act and that he was not obligated to pay such amounts in order to obtain a clearance certificate under section 50 of Ordi-

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<sup>51</sup> 1997 (1) SA 348 (W).

<sup>52</sup> O 17 of 1939 (T) which provided that the transfer of land was not to be effected unless certain amounts due to the council had been paid.

<sup>53</sup> 24 of 1936.

<sup>54</sup> At 355-356.

<sup>55</sup> Refer to paras C-D at 360.

<sup>56</sup> 2001 (1) SA 360 (SCA).

nance 17 of 1939 (T). Rezoning fees under sections 48 and 63 of the Town Planning and Townships Ordinance 15 of 1986 (T) were also in issue. Contrary to the decision in *Greater JHB TMC v Galloway NO* above, the Supreme Court of Appeal held that there was no basis on which it could be contended that amounts not constituting taxes listed in section 50(1) of the Ordinance did not have to be paid by the respondent in order to obtain a clearance certificate. Although the amounts were not taxes, the council was entitled to withhold the clearance certificate until they were paid.<sup>57</sup> The court further held that once it had been accepted that the amounts were due and owing in terms of section 50, there was no legal basis for the amounts to be repaid to the respondent. Since the respondent wished to transfer the properties, he had to pay the amounts due in respect of the rezoning fee, and the basic water and sewerage charges so as to have the embargo created by section 50 lifted.<sup>58</sup> Section 118 of the Systems Act was also subjected to constitutional challenge. In *Geyser and another v Msunduzi Municipality and others*<sup>59</sup> it was argued by the applicant/owner of a property who was held liable by the respondent municipality for municipal service fees due on the property which the applicant leased to a tenant, that the charges were unconstitutional since they resulted in arbitrary destruction and deprivation of the property owner's rights under section 25 of the Constitution. The court held that although section 118 of the Act clearly envisaged deprivation of the property, the purpose of the deprivation was to facilitate debt recovery, which was a legitimate and important purpose essential for the economic viability and sustainability of municipalities in South Africa. There was thus a rational connection between the means employed and the desired result. The limitation on property owners' rights was reasonable and reflected a fair balance between public interest and the property owner's interest. Section 118 is thus not arbitrary and not inconsistent with the Constitution.<sup>60</sup> The court also held that municipal service fees were based on consumption and thus could not refer to rates on property. Such fees included charges for electricity and water consumption supplied to the owner/occupier of the property. The section also applied to all municipalities in the Republic, thus excluding incapacity in application. Notwithstanding the court's decision, some commentators have

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<sup>57</sup> See paras D-F at 369.

<sup>58</sup> At paras B-C at 370.

<sup>59</sup> 2003 (5) SA 18 (N).

<sup>60</sup> Refer to paras A-D at 38-39.

argued that the obligation on owners to pay all outstanding arrears is contrary to the Constitution.<sup>61</sup>

#### **21.4.8 Miscellaneous provisions**

The Systems Act also provides for a few miscellaneous legal aspects.<sup>62</sup> In the first place it is provided that a councillor who attempts to influence the municipal manager or any other staff member or even agent of a municipality not to enforce an obligation in terms of the law or a decision of the council is guilty of an offence and is on conviction liable to a fine or to imprisonment for a period not exceeding two years.<sup>63</sup> A person acceding to such an attempt is also guilty of an offence punishable with the same sanction. If a person is convicted of an offence and is subsequently sentenced to more than 12 months' imprisonment without the option of a fine, he/she is disqualified from remaining a councillor and cannot become a councillor of any municipality during a period of five years from the date of the conviction.<sup>64</sup>

The minister concerned with local government is also authorised to make regulations on certain matters and to issue guidelines that are not inconsistent with the Act.<sup>65</sup>

Finally, the Systems Act provides for certain transitional arrangements and the phasing in of the provisions of the Act itself. Under transitional arrangements, it is provided that any written agreement on the exercise of executive authority in an area of another municipality, which agreement existed immediately before the Act took effect, must be regarded as having been concluded in terms of the relevant provisions of the Systems Act.<sup>66</sup> The minister must also initiate steps for the rationalisation of existing national and provincial planning legislation applicable to municipalities in order to facilitate local development planning as an integrated concept within the system of co-operative government as is envisaged in section 41 of the Constitution. Mechanisms for facilitating co-ordination between sectoral regulation of local government matters must also be established.<sup>67</sup> In order to facilitate a smooth transition,

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<sup>61</sup> Refer to Kidson J "Rights of local government to collect service arrears" March (2002) *DR* at 8-9. The writer submits various arguments to explain why outstanding arrears are not payable.

<sup>62</sup> See the Systems Act ch 12.

<sup>63</sup> The Systems Act s 119.

<sup>64</sup> The Systems Act s 119(4).

<sup>65</sup> See the Act s 120(1)-(7) as amended for more full particulars on the procedures and requirements relevant to the making of regulations and guidelines.

<sup>66</sup> See the Systems Act s 122(1) read with s 11(2).

<sup>67</sup> See the Systems Act s 122(2)(a)-(b).

the minister is authorised to phase in the various applications of the provisions of the Systems Act which place a financial or administrative burden on municipalities.<sup>68</sup>

### **21.5 Conclusion**

It seems obvious that the application of the law is of significant importance to all local government structures. The law in general and, more particularly, the law relating to municipal affairs form not only the basis on which all municipalities must function, but also set the scene within which municipalities are to fulfil and perform their new constitutional role and obligations. It is clear in this respect that a sound knowledge of all the relevant legal principles relating to local government matters is an essential requirement for legal advisors, private practitioners, local administrators and political office bearers alike.

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<sup>68</sup> The Systems Act s 123.

## Concluding remarks

### 22.1 Introduction

It is clear from the above that the third sphere of government has changed drastically from the order that was in place prior to 1994. The new supreme Constitution with its comprehensive Bill of Rights has set a new legal paradigm for municipal government. It is especially the founding values and specific municipal objects of the new constitutional dispensation that had an unprecedented impact.<sup>1</sup> Compliance with the new constitutional provisions is imperative whether that relates to legislative or executive actions or even the conduct of bodies or institutions within the state. The Constitution however only provides a basic constitutional framework. In many instances the basic framework had to be completed through the enactment of various national or provincial laws.<sup>2</sup>

In chapter one of this research it was stated that the aim of the research is two-fold. The first objective was to provide a systematic and comprehensive exposition of the new constitutional and other national legislative provisions relevant to the new system of local government. In this respect it is submitted that the preceding chapters do indeed achieve such an objective. Almost all legislative provisions relevant to local government have been systematically subdivided into the various chapters and have been grouped together according to their topics and relevance. It is submitted that the compilation and systemisation of the many legal requirements should indeed contribute to making the legal dispensation regarding local government law more accessible which in turn could enhance more research and debate in this often neglected albeit important field of law.

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<sup>1</sup> Read s 1 of the Constitution. According to s 2 the Constitution is entrenched as the supreme law of the SA state and any law or conduct inconsistent with the Constitution is invalid. All the obligations imposed by the Constitution must be fulfilled.

<sup>2</sup> See again the provisions set out in ss 151(3), 154(1), 155(2) and (3), 157(2), 160(5) and 164 of the Constitution which specifically require either national or both national or provincial laws on issues directly relevant to local government matters.

The second aim was to evaluate the extent of compliance with the new local government legal system, to the key normative principles set out in the Constitution and which underpins the new legal government system. Such a evaluation can only be conducted after due regard to all the constitutional and subsequent national legislative requirements. In an effort to link the various preceding chapters together and to tie-up the research as a whole, a brief summary of the extent of compliance with the key constitutional requirements and prerequisites is provided in this conclusion. The summary follows the same chronological sequence as was provided for in the introductory chapter of this work.

## **22.2 Evaluating compliance with the key normative principles of the new local government legal dispensation**

### **22.2.1 *Is the new local government legal dispensation non-racial and truly democratic?***

The new dispensation has undoubtedly overturned the segregation and apartheid policies of the past and has provided a platform for a uniform democratic local sphere of governance where municipal services are rendered for the benefit of all people. The confirmation within the supreme law of the South African state of *inter alia* the founding values of equality, democracy, freedom, non-racialism and non-sexism has created a strong foundation to ensure that all spheres of government are constitutionally obligated to ensure a non-racial and democratic government.

### **22.2.2 *Does the new nature, rights and duties of municipalities comply with the new constitutional vision?***

It was indicated above that the new local government system does not only provide local government with a distinctive legal nature, but also sets down clear and precise rights and duties for all local government structures.<sup>3</sup> This is necessary to ensure local governments are empowered to fulfil their duties. The new system not only provides local authorities with the required foundation to act, but also incorporates constitutional values of accountability and public participation. These values are particularly promoted through legislative provisions which confirm that local government consists out of political, administrative and local community components. As such, the new legal framework should enhance and promote the underlying values

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<sup>3</sup> Read ss 4, 5 and 6 of the Municipal Structures Act together with s 156 of the Constitution.

that the Constitution demands.

### **22.2.3 *Municipal government and the principles of co-operative government***

The Constitution obligates all three spheres of government to comply with specific principles aimed at ensuring a system of co-operative federalism. All spheres have been allocated with specific functional activities. Although significant protection of such powers is provided for, many overlaps between the specified functions do occur. Such overlaps in turn again require proper co-operation between the spheres in order to fulfil their functions and responsibilities. In an effort to ensure such co-operation the Constitution determines various principles with which all spheres must comply.<sup>4</sup> The new legal framework, *via* the Municipal Systems Act, specifically expands on the basic constitutional provisions and thus enhances the envisaged constitutional scheme.

### **22.2.4 *The establishment of a new system and structure for local government***

It is a specific constitutional obligation, that all former local governments had to be restructured and that new institutional models for local government structures had to be provided for. Furthermore, the whole territory of the Republic had to be included in the jurisdiction of a specific municipal authority.<sup>5</sup> The new legal dispensation indeed complies with these constitutional requirements. In the first instance, the entire territory of the South African state falls within the jurisdiction of a demarcated municipal government. Even areas that are not viable to have their own direct local government, ie district management areas, fall under the control of a district municipality within that area. Secondly, the Municipal Structures Act provides for various new institutional models of local government. Apart from the constitutionally defined categories of municipalities the act provides for the establishment of various models of municipal types by combining various municipal systems.<sup>6</sup>

In total five systems have been created. Three are so-called executive systems whilst two are participatory systems. Since the powers, functions and circumstances of municipalities differ it is submitted that the various combination possibilities indeed should be able to cater for the different needs and responsibilities of all municipalities. The new legal framework further aims not only to achieve more effective execu

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<sup>4</sup> Refer to ss 40 and 41 of the Constitution.

<sup>5</sup> See s 151 of the Constitution.

<sup>6</sup> See s 7 of the Structures Act.



tive functioning but also to ensure public involvement and participation, which again should enhance the underlying values of the Constitution. Although a clear division of the roles and responsibilities of the various types of municipalities has been determined, there seems to be some uncertainty in practise. Uncertainty especially exists relating to the division of powers and functions between local municipalities and their relevant district municipalities. Notwithstanding such difficulties, the new legislative provisions have ensured that all municipal institutions have been re-established and all former municipal authorities have been replaced by newly transformed local authorities. Municipal boundaries were re-determined and many municipalities were amalgamated into new enlarged and supposedly more effective institutions.

A significant number of municipalities however still face enormous challenges relating to their new structures and boundaries and the amalgamation of municipal administrations and personnel. Further legal directions are needed to address some of these challenges more effectively.

#### **22.2.5 Confirmation of new municipal boundaries**

It is clear from the new constitutional framework, that municipal boundaries had to be re-determined. This requirement was specifically fulfilled *via* the Municipal Demarcation Act which established an independent Municipal Demarcation Board.<sup>7</sup> This board has demarcated all municipal boundaries and has fulfilled the requirement of creating a system of wall to wall municipal government in South Africa. Under the Constitution, national legislation had to determine the criteria and procedures to determine municipal boundaries by an independent authority.<sup>8</sup> Two national acts, the Local Government: Municipal Structures Act and the Local Government: Municipal Demarcation Act were enacted.<sup>9</sup> Together these two acts, address the overall constitutional obligations towards municipal boundaries.

Boundaries are important to ensure local governments can provide municipal services in an equitable and sustainable manner. It would seem that the new laws indeed comply and fulfil the constitutional demands. It should be noted however that the determination and internal delimitation of municipal boundaries are not once off

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<sup>7</sup> Read ss 151(1) and 155(3)(b) of the Constitution together with the provisions of Act 27 of 1998.

<sup>8</sup> S 155(3)(b) of the Constitution.

<sup>9</sup> 117 of 1998 and 27 of 1998.

exercises but are continuous in nature. Regular evaluation of municipal boundaries is thus required. It is also notable that after the demarcation process, the number of official local authorities were reduced from over 800 to 284.<sup>10</sup> The demarcation process thus significantly rationalized local government structures. Such rationalization was needed under the Constitution to create a system of local governance that is effective and efficient and that would ensure the achievement of the objects of local government as set out under the Constitution.

#### **22.2.6 Adhering to the founding values and the Bill of Rights**

The Constitution specifically requires radical changes to the composition and election of municipal councils. In essence the new local government system had to be redesigned to ensure and achieve compliance to the Constitution's founding values and a truly democratic state. In order to complete such a system, many new changes had to be affected. On a closer evaluation, it seems acceptable to conclude that the new legal framework, indeed completes the basic framework of the Constitution regarding the composition and election of municipal councils. Local governments are now truly democratic spheres of government.

The new system is unique in some instances. For example, although the term of local governments is now similar to national or provincial governments, local governments are composed according to a electoral system that provides for a combination of proportional representation and constituency based electoral systems.<sup>11</sup> The unique features have been included to enhance the unique features of local governments and to ensure better representation and accountability. It seems as if the new legal system is well equipped to fulfil the broad constitutional requirements.

#### **22.2.7 Recognising the role of traditional leadership**

One area where the new local government legal dispensation still seems to lack clear direction is with regards to the role and involvement of traditional leaders in local government structures. Although the institution of traditional leaders is constitutionally recognised and protected,<sup>12</sup> the precise role of traditional leaders, specially in local government, has not been properly defined. This problem is confirmed by na-

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<sup>10</sup> The number of 284 is composed out of 6 Metropolitan municipalities, 47 District municipalities and 231 Local municipalities. For more detail refer to [www.info.gov.za/localgovernment](http://www.info.gov.za/localgovernment) visited on 18/07/2005.

<sup>11</sup> Read ss 157(1) and (2)(a)-(b) of the Constitution.

<sup>12</sup> See ss 211 and 212 of the Constitution.

tional government, which has embarked on new policy and legislative initiatives aimed at clarifying the current uncertainties.<sup>13</sup> Traditional leaders form an important part of traditional African cultures and structures and they should not only be included in municipal decision-making processes, but they can play a positive role in ensuring the ultimate success of especially rural municipalities.

The Constitution however only creates three spheres of government and allocates powers or authority only to such spheres and not to traditional leaders. One can thus argue, that unless a constitutional amendment is carried through, traditional leaders will be subjected to the authority of the local governments in which area such leaders fall. Since traditional leaders play an important role in maintaining traditional African customs, their roles should thus be more clearly defined. In view of the fact that the Constitution is the supreme law of the state, the role and functions of traditional leaders must comply with the Constitution. Traditional leaders are thus not autonomous institutions but function within the broad constitutional system. A strong need exists for co-operation and consultation between traditional leaders and local government structures. Clear national guidelines on such issues should ensure positive co-operation between the two institutions. Such legislative requirements are urgently needed.

#### ***22.2.8 The division of the powers and functions between the three spheres of government***

Under the Constitution, local government is not only recognised as distinctive and autonomous sphere of government but the Constitution also determines the specific powers and functions of municipal governments. Such powers and functions are thus constitutionally entrenched and cannot be taken away unless constitutional amendments are executed.<sup>14</sup> Local government powers are however not absolute, and are subject to national and provincial laws. In essence municipal powers and functions must be exercised to fulfil constitutional objectives and developmental duties. Under the constitutional framework, both the Structures Act and the Systems Act expand upon municipal powers and functions. It is of interest to note that within the new constitutional dispensation, local government powers are regarded as original pow-

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<sup>13</sup> See the Traditional Leadership and Governance Framework Act 41 of 2003.

<sup>14</sup> Read s 156 together with parts B of Sch 4 and 5 of the Constitution.

ers.<sup>15</sup> The Constitution does however not directly distinguish between the powers and functions of the different categories of municipalities *inter se*. Although it is constitutionally envisaged that a proper division of municipal powers should be made, such division had to be conducted in terms of national legislation.<sup>16</sup> Since category A or Metropolitan councils have exclusive executive and legislative powers, the division is only relevant between Local Council and their relevant District Councils. This division is specifically provided under the Local Government: Municipal Structures Act.<sup>17</sup> Powers not specifically allocated to a district will vest in the local municipality.

It is thus submitted that the new legal framework indeed complies to the broad constitutional requirements regarding the identification of municipal powers and functions and the division of such powers and functions between category B and C municipalities. Assignment of powers or functions are also permitted, and it is regulated through provisions set out in the Systems Act.<sup>18</sup> The new system also provides for municipal financial powers. The current system however still faces problems relating to old order laws that are still applicable and new proposals that have not yet materialized. Although the national legislative framework has been enacted, both provincial and even municipal laws are needed to complete the overall legal framework.

### **22.2.9 Evaluating the new legal rules dealing with internal mechanisms and municipal leadership**

It is an obvious fact that municipal governments are becoming more and more complex in comparison with their predecessors from yester year. Such complexities and duties require an effective, committed and educated leadership. On evaluation of the new legal framework, it would seem as if the new legal rules indeed support and facilitate the creation of such internal procedures and functions. The new system provides for various leadership options depending on the circumstances relevant in each particular municipal jurisdiction. To enhance and regulate municipal leadership,

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<sup>15</sup> See *Fedsure Life Assurance v Greater JHB TMC* 1999 (1) SA 3741 (CC).

<sup>16</sup> According to s 155(3)(c) the Constitution determines the following: “[S]ubject to section 229, [National Legislation must] make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality”.

<sup>17</sup> See ss 83-84 of the Systems Act.

<sup>18</sup> See ss 8-9 of the Systems Act.

the Constitution directly regulates the internal procedures of municipal councils.<sup>19</sup> These requirements are indispensable for effective municipal decision-making and the achievement of municipal goals and duties.

Both the Systems and the Structures Acts specifically expand on the basic constitutional provisions and thereby support and enhance the constitutional vision. Since the functioning of a local government is largely dependant on the effective exercise of functions, the new legal dispensation provides for specific codes of conduct for both political office bearers and also municipal administrative personnel.<sup>20</sup> It is thus submitted that the new legal provisions indeed have a significant role in regulating and controlling internal municipal functioning. Although the framework is extensive, regular overview should be employed and swift legal changes could be enacted to rectify or expand on existing rules in order to enhance or comply with practical problems.

#### **22.2.10 Ensuring sustainable municipal service delivery**

The new legal dispensation for local government also addresses the important aspect of service delivery and identifies various basic municipal services and functional activities. It must be remembered that the main objective/reason for existence of local governments is to provide sustainable and effective municipal services to local residents. Without such service delivery, local settlements cannot be sustained and the overall governmental structure of the state will be placed in jeopardy. The new system demands a system for service delivery that is accessible, simple, affordable, of high quality with incorporation of the values of accountability, sustainability and value for money.<sup>21</sup>

In compliance with the constitutional prerequisites, the Systems Act determines specific duties and requirements for all local governments in respect of municipal service provision and related aspects.<sup>22</sup> The act is however silent on which mechanism municipal councils should use to achieve and comply with the abovementioned requirements. Municipal councils must put their own policies and programmes in place and should be monitored and controlled by the two higher spheres. Possible expansion on the current legal regulation could enhance better achievement of the

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<sup>19</sup> See s 160 of the Constitution.

<sup>20</sup> Refer to Sch's 1 and 2 of the Municipal Systems Act.

<sup>21</sup> Read again ss 1, 152 and 153 of the Constitution.

<sup>22</sup> See s 73 of the Systems Act.

mentioned goals. Municipal councils must also adopt tariff policies for the levying of fees for municipal services.<sup>23</sup> Services can be provided via internal mechanisms or external ones.<sup>24</sup> Although municipal services per se are not absolutely defined and other services can also be assigned to municipalities, the Constitution together with the new laws, determines what should be regarded as basic municipal services. The achievement and compliance with the constitutional demand on services, will largely depend on how local governments structure their policies and also to what extent effective oversight by national/provincial governments are provided.

#### **22.2.11 Establishing a new local government personnel corps**

In relation to municipal staff the Constitution determines that all municipal councils can employ personnel that are necessary for the effective performance of their functions.<sup>25</sup> Local governments are thus empowered to employ such staff members that are needed to fulfil their obligations and duties. The new requirements have specifically been incorporated to enhance the organisational efficiency of municipalities but vigorous training of personnel is required. Municipal personnel matters should not be seen in isolation but together with other labour related requirements that are set out in other laws.<sup>26</sup> The new dispensation determines that the municipal manager is the head of the municipal administration and as such has been given a wide range of duties and responsibilities. Such a person is also the highest accountable official.<sup>27</sup>

Employment, especially of senior staff is linked to new performance standards and evaluations. Senior staff are mostly employed for fix periods only<sup>28</sup> and a comprehensive code of conduct for staff members has been included.<sup>29</sup> Continuous training and support is however a prerequisite for effective local government administrations. It is submitted that old order bureaucracies should be avoided and regular evaluation of the organizational structures of municipalities must be undertaken. Municipal staff matters should further be linked to the requirements of the public administration and guidelines on financial management. All in all it appears as if the basic constitutional

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<sup>23</sup> S 74 of the Systems Act.

<sup>24</sup> Ss 26-81 of the Systems Act.

<sup>25</sup> S 160(1)(c) read with s 156(5) of the Constitution.

<sup>26</sup> Read for example acts such as the Labour Relations Act 66 of 1995 and also the Basic Conditions of Employment Act 75 of 1997.

<sup>27</sup> See s 55 of the Systems Act.

<sup>28</sup> See s 7 of the Systems Act.

<sup>29</sup> Refer to Sch 2 of the Systems Act.

demands are met and that local government administrations and personnel structures are adequately empowered to achieve and fulfil their important constitutional obligations.

#### **22.2.12 Regulation of municipal fiscal management and fiscal powers**

Mention was made above that municipal administrations and staff members are partly regulated in terms of a new and reformed legislative framework dealing with municipal finance and fiscal management. Without a proper financial system and effective control mechanisms, local governments will not be able to fulfil their obligations. Financial powers and proper fiscal management are essential in the new local government dispensation. From the chapter on municipal finance discussed above it becomes obvious that an entire new legal framework has been established. Not only does the Constitution determine basic fiscal requirements and obligations, but also that new national legislative provisions are authorized to create a uniform system for property tax assessments and recovery as well as a comprehensive system aimed at regulating municipal fiscal management.<sup>30</sup> It is suggested that the new dispensation indeed fulfils the constitutional demands but that the system should be constantly monitored to ensure effectiveness and efficiency. Swift amendments should be considered to better and regulate the new system should new financial challenges arise. Financial discipline is a key component for the success of local governments and careful and continuous oversight by national/provincial governments is essential. It is submitted that the new dispensation, if applied correctly, indeed should enhance and ensure effective municipal financial capacity and fiscal management.

#### **22.2.13 Compliance to new vision for public administration**

It was mentioned above that the Constitution sets various requirements dealing with the public administration and other related matters. The new legal system supports such requirements and seeks to adhere and advance to the supreme constitutional demands.<sup>31</sup> Apart from the provisions dealing with the public administration, various other requirements such as principles and provisions of performance management, capacity building, municipal accountability and public participation have been included in the new system. Such provisions are aimed at fulfilling the new constitu-

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<sup>30</sup> 56 of 2003.

<sup>31</sup> See ss 195, 196, 50 and 51 of the Systems Act.



tional values set out in the founding provisions of our supreme law.<sup>32</sup> The new dispensation aims at ensuring a more customer orientated public service with strict requirements of accountability and control. One can indeed argue that a sound foundation for a general people orientated local government system has been established, which system should not only ensure constitutional compliance but also a more brighter future for all South Africans.

**22.2.14 Adhering to the principles of municipal development, planning, performance management, capacity building and public participation**

The new legal dispensation also incorporates significant provisions relating to municipal development planning and the regulation of basic legal matters. Important aspects relating to municipal planning have been decentralized to municipal governments, and although municipal planning is a functional area of concurrent national and provincial legislative competence, all municipalities are constitutionally obligated to ensure proper and effective municipal development planning. Proper municipal planning is needed to structure and manage municipal administrations in such a way as to give priority to the basic needs of their communities. Municipalities are also obligated to promote the social and economic development of their communities and to ensure a safe and healthy environment. The Constitution specifically requires national laws to provide an overarching set of regulatory provisions to enable all municipalities to create and cater for basic planning needs. This requirement was partly met in the provisions of the Systems Act.<sup>33</sup> Integrated Development Planning is now a core component of the new legal framework and should significantly allow municipalities to fulfil their developmental responsibilities. Municipal Integrated Development Planning should however be continuously monitored and adjusted to keep abreast with local changes and circumstances.

Since municipalities are established throughout the territory of South Africa and since they have a large impact on local communities, many general legal rules are applicable to local government administrations. Apart from a general understanding and knowledge of the different legal fields relevant to the South African legal system, various unique legal provisions are also highlighted. Such unique legal matters pertaining to local government only have been identified in national legislation and is

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<sup>32</sup> See s 1 of the Constitution read together with ch 4 and 6 of the Systems Act.

<sup>33</sup> See ss 24-29 of the Systems Act.

directly regulated in terms of the Systems Act.<sup>34</sup> As a sphere of government, local governments are faced with general legal matters on a daily basis, and as such a complete understanding and compliance with the law of the state in general is a prerequisite for municipalities to be able to perform their functions and achieve their goals.

#### **22.2.15 *Evaluating the new status and autonomy of local government institutions***

One of the more distinct features of the new face of local government in South Africa is the fact that it now has a new enhanced and protected status and autonomy. All local government institutions have been confirmed as a distinct and interdependent sphere of government.<sup>35</sup> Notwithstanding the constitutional confirmation of the new status and subsequent autonomy of local governments, such autonomy is not absolute and is often subjected to the oversight and control of both the national and provincial spheres of government.<sup>36</sup> In light of the constitutional provisions, the autonomy of municipalities is regarded as a limited or restricted autonomy. The crux of the limitation lies in the confirmation within the Constitution itself in that municipalities are in some instances subjected to national and provincial legislation. Any encroachment on the autonomy of a local authority must be justified and permitted under the Constitution or else it would be unconstitutional and invalid. Since the Constitution itself entrenches only a limited autonomy for local government, any dispute relating to such an issue should be resolved with reference and interpretation of the overall constitutional scheme. Many aspects could have an impact in such cases, for example the Bill of Rights, the principles of co-operative government or even the requirements dealing with government finance. It is however submitted that the limited autonomy of local government should not detract from the new role local governments are to play in our new constitutional dispensation.

#### **22.2.16 *Achieving the five core objects of local government***

Arguably the most important function of a local authority, seen from a local community point view, is the provision of sustainable service delivery. This core function of all municipal governments has been at the forefront of municipal development, not

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<sup>34</sup> See ch 11 of the Act for more detail.

<sup>35</sup> Refer to s 40 of the Constitution.

<sup>36</sup> See s 151(3) and (4) of the Constitution.

only in the South African context, but all over the world. It was explained above that the main reason for the existence of local authorities was to ensure and secure sustainable provision of certain municipal services to local communities. The most common problem facing local governments today is the lack or insufficient provision of such services. Since the provision of services is such a fundamental function of a local government, the new constitutional dispensation has specifically incorporated such a function within the new legal framework.<sup>37</sup> The provision of municipal services however is not the only important municipal object and therefore the Constitution has identified and entrenched five core objects of the new local government dispensation.<sup>38</sup> All municipalities are obligated to strive, within their financial and administrative capacities, to achieve the five objects mentioned above. Although the new legal framework should facilitate and enhance the fulfilment of the core objects of local government, it is ultimately left to municipal governments themselves to ensure that they structure their finances and administrations in a manner that will achieve the objects. Many municipalities in South Africa are not complying with this important constitutional requirement and subsequently many are not providing sustainable services and are not achieving the lawful expectations of local communities. It is this writer's submission that the new legal framework indeed fosters and ensures a legal order within which municipalities should be able to achieve their goals and objects. One should however not lose sight of the important role both national and provincial governments must play to ensure through oversight and control measures, that municipalities are indeed making positive progress in the achievement of local government objectives.

#### ***22.2.17 The principle of creating a local government dispensation that is developmentally orientated***

Apart from the core objects of local government the new constitutional scheme also requires all municipalities to be developmentally orientated regarding their duties.<sup>39</sup> In essence, the developmental approach of local government entails the improvement of the quality of life of all municipal communities. In order to achieve the obliga-

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<sup>37</sup> S 152(1)(b) of the Constitution states that one of the objects of local government is to ensure the provision of services to *local* communities in a sustainable manner.

<sup>38</sup> Refer to s 152(1)(a)-(e) of the Constitution. The objects are: democratic and accountable governance, provision of services, promotion of social and economic development, promotion of a safe and healthy environment and lastly the encouragement of public participation in municipal matters.

<sup>39</sup> See s 153 of the Constitution.

tion of being developmental in nature, all municipalities are obligated to do two things: (a) they must structure and manage their administrations and budgeting/planning processes in such a way as to give priority to the basic needs of their respective communities and thereby help to promote the social and economic development of such communities; (b) they must participate in national and provincial development programmes.<sup>40</sup> In view of the new legal system for local government, which includes aspects such as co-operative government and the new internal municipal structures and procedures, it is again writers submission that the new legal dispensation indeed caters and fosters a local government system where developmental duties and objects can be realised. Success however will ultimately depend on the manner in which municipalities themselves structure and manage their institutions in order to achieve such duties at best.

### **22.3 Conclusion**

It is writer's overall conclusion that the new legal dispensation relevant to local government institutions of South Africa, as was created within the general constitutional framework, not only complies with the overall constitutional demands, but if correctly applied and if the envisaged support and oversight is provided, should indeed succeed in steering local government to be a more developmental and more people orientated sphere of local government. A broad and seemingly effective legal system has been created to allow and ensure that municipalities can achieve their specified constitutional duties and objects. The new dispensation not only seems to cover all necessary components of a successful legal dispensation but also provides for various mechanisms to ensure proper control and oversight. Many commentators have in the recent years suggested that both the two higher spheres of government were dragging their feet in completing the legal system for local government, and that especially national government has failed to timeously fulfil its constitutional obligations. In view of the extent and content of the new legal system and upon close evaluation of all the new laws that were enacted, one can however understand that the completion of the new system was not as elementary as many initially believed. It is this writers opinion that the new established legal system indeed signifies a monumental advancement in the creation of an effective and supported municipal government in the new South African constitutional state.

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<sup>40</sup> See s 153(a)-(b) of the Constitution.

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## **The principles of municipal public administration and the requirements of performance management, capacity building, accountability and public participation**

### **19.1 Introduction**

The importance of the relationship between municipalities and residents as well as between municipalities and the two higher spheres of government have been emphasised in many previous chapters of this work. These relationships have been given constitutional importance and significance under the new overall constitutional scheme. Especially since the Constitution is the supreme law of the state, all constitutional requirements dealing with the public administration and the relations between the public and government institutions must be strictly complied with. Under the previous local government system, many of these issues were not legally enforceable or were largely downplayed in mostly provincial ordinances. This position has now changed fundamentally under the new constitutional dispensation.

As a basic point of departure, the meaning of administration (ie municipal administration) refers to the overall management of the public affairs of a certain organisation.<sup>1</sup> On a municipal level, public administration encapsulates a special relationship between politics and administrative organs. The politicians are concerned with the uses of power, whilst the administration is concerned with translating the political decisions into practical implementation. Furthermore, the political dimension is subject to change, whereas the administration is characterised by stability and routine.

In terms of public administration, it must be remembered that the concept includes aspects such as policy, decisions, staffing matters, organising, planning and also resource allocations. The concept also differs widely from one administration to an-

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<sup>1</sup> Craythorne (1997) 65.

other. Municipal administration is undoubtedly part of public administration in general, but it also has a more distinctive importance; for example:<sup>2</sup>

- It operates in a political field.
- It operates within the context of democratic notions of an open, responsive and accountable government institution.
- It is decentralised and, to a certain degree, self-financing.
- It is the part of government which is closest to the citizens of a particular state.

### **19.2 Basic aspects concerning municipal public relations**

All forms of government accept in general that their actions have to be acceptable by their subjects. This realisation provides the basis for the development of a relationship of trust and support between the state and its people. In modern day governments this relationship is very important because a government is generally accountable to the people who have elected it to power. This position is particularly true for local governments. Because local authorities provide essential goods and services which affect people directly, it is acceptable that the public at large should be sensitive about the performance of both political office-bearers and administrative staff components.

In contrast to the public relations activities of private enterprises which are directed at sales and profits, public relations programmes of public institutions are usually approached from the point of view of promoting general welfare. Public institutions are mostly monopolistic enterprises with no real competitors. This position has changed somewhat under the new South African constitutional scheme as competitiveness, accountability and responsiveness in providing services and attracting investment have become familiar catch-phrases. Because of their prominent caretaker roles in society, public institutions such as municipalities are subjected to various legal requirements in respect of the exercise and fulfilment of their functions.<sup>3</sup> It is further also an established requirement that public functionaries maintain high ethical standards. This position is so because of the important public responsibilities which municipalities must perform.

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<sup>2</sup> See Craythorne (1997) 71.

<sup>3</sup> See Cloete (1997) 152. The writer mentions that the public does not always understand the reasons for administrative red tape. There are often very good reasons for such requirements, however. The introduction of Public/Private Partnerships (PPP) has also boosted municipal competitiveness and profit targeting.

Municipal public relations are affected by every action of a political or staff representative. The activities of municipalities will always be evaluated carefully by local residents and other stakeholders. If respect is to be achieved, officials and political representatives should foster an attitude of commitment to the general public. It is thus safe to say that the state of public relations is largely dependent upon the conduct and performance of every functionary involved in public administration. Because of its importance, every municipality should appoint officials that are charged exclusively with the handling of its public relations.<sup>4</sup> One of the many difficult tasks of a public relations officer is to determine public opinion and attitudes and to accommodate such opinions and attitudes. Quick and reliable information is very important here.

### **19.3 The constitutional requirements affecting municipal public administration**

In light of the importance and responsibilities of public administration at large, the new constitutional scheme specifically entrenches certain basic values and principles that govern it. These basic values and principles are important to not only the public administration *per se*, but also the public services throughout all three spheres of government. Unless the Constitution is amended, the basic values and principles have been afforded supreme legal status and must be complied with.

#### **19.3.1 *The basic values and principles governing public administration***

In section 195 of the Constitution, the following values and principles relevant to the overall public administration are mentioned as follows:<sup>5</sup>

- A high standard of professional ethics must be promoted and maintained.
- Efficient, economic and effective use of resources must be promoted.
- Public administration must be development-orientated.
- Services must be provided impartially, fairly, equitably and without bias.
- People's needs must be responded to and the public must be encouraged to participate in policy-making.
- Public administration must be accountable.
- Transparency must be fostered by providing the public with timely, accessible and accurate information.

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<sup>4</sup> Such personnel are usually known as "public relations officers" (PROs) and "publicity officers" (media liaison officers).

<sup>5</sup> See the Constitution s 195(1)(a)-(i).



- Good human-resource management and career-development practices must be cultivated to maximise human potential.
- Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress imbalances of the past to achieve broad representation.

All of the abovementioned values and principles are obligatory and must be complied with. The Constitution is clear on the fact that public administration must be governed by the democratic values and principles enshrined in the Constitution and not only those mentioned in section 195(1).<sup>6</sup> Apart from the values and principles mentioned, the Constitution confirms that the principles apply to the public administration in every sphere of government, organ of state and public enterprise. Without a doubt such principles are therefore relevant to all municipalities.<sup>7</sup> The Constitution further requires the enactment of national legislation which must ensure the promotion of the mentioned values and principles.<sup>8</sup> It is also permitted that the national legislation envisaged above may allow for differentiation between aspects regulating public administration between different sectors, administrations or institutions. In this regard the particular nature and functions of different sectors, institutions or administration should be taken into account when the legislation regulating the public administration is enacted. Furthermore, it seems clear from the Constitution that not all aspects concerning the public administration of all administrations or sectors should be precisely the same.<sup>9</sup> The national legislation envisaged in section 195 has been enacted as the Public Service Act.<sup>10</sup> *Inter alia*, the Act provides for the broad principles on the functioning of the public service in general, thereby also including various aspects important to municipal public administration. The Act must also be read in conjunction with section 197 of the Constitution, which in essence creates a public service for the entire Republic of South Africa. According to the Constitution, there is a public service within the overall public administration. Such public service must function

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<sup>6</sup> See the Constitution s 195(1).

<sup>7</sup> See the Constitution s 195(2)(a)-(c).

<sup>8</sup> See the Constitution s 195(3).

<sup>9</sup> See the Constitution s 195(4)-(6).

<sup>10</sup> 103 of 1994 as amended by Act 86 of 1998. Note that the Act is applicable to only the national and provincial spheres of government. Municipalities currently still determine their own conditions of service and determine their own salary scales.

and be structured in terms of national legislation, and the public service must execute the lawful policies of the government of the day loyally.<sup>11</sup> The terms and conditions in the public service must also be regulated by national legislation, and public service employees are entitled to a fair pension. No employee may be favoured or prejudiced because that person supports a particular political party or cause. Finally it is the responsibility of provincial governments to manage the public service in their administrations. They may do so only within a framework of uniform norms and standards applying to the public service.<sup>12</sup>

It was mentioned above that municipal administrations are clearly part of the public administration at large and that the principles and requirements mentioned in the Constitution and national legislation are equally applicable to them. Apart from the national legislative requirements for all administrations, certain specific aspects have also been included in selective laws dealing specifically with local government matters. Such legislative provisions will be discussed below. Finally, it must be pointed out that the Constitution also establishes a single Public Service Commission for the Republic of South Africa. The commission must be independent and impartial and must exercise and perform its functions in the interests of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The commission is regulated by national legislation and therefore it also plays an important role in overseeing and controlling aspects of public service and administration within the municipal public administrative domain.<sup>13</sup> The commission has various constitutionally entrenched powers and functions and also certain additional powers and functions prescribed by national legislation.<sup>14</sup>

### **19.3.2 Issues concerning municipal administration**

In follow-up of the constitutional requirements mentioned above, the new local government legislative framework also provides for aspects relevant to local public administration. According to the Local Government: Municipal Systems Act,<sup>15</sup> the local public administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution. It is further provided that in the administering of

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<sup>11</sup> See the Constitution s 197(1).

<sup>12</sup> Refer to the Constitution s 197(2)-(4).

<sup>13</sup> See the Constitution s 196(1)-(2).

<sup>14</sup> See the Constitution s 196(4)(a)-(g).

<sup>15</sup> 32 of 2000.

its affairs, municipalities must strive to achieve the objects of local government as set out in section 152 of the Constitution and also comply with the duties of local governments.<sup>16</sup> In furtherance of the developmental duties of municipalities, the Systems Act determines that, within their administrative and financial capacity, all municipalities must establish and organise their administration in a manner that would enable municipalities to comply with various administrative and financial requirements. These requirements are the following:<sup>17</sup>

- to be responsive to the needs of the local community
- to facilitate a culture of public service and accountability amongst its staff
- to be performance orientated and focused on the objects and developmental duties of local government
- to ensure that its political structures, political office bearers and managers and other staff members align their roles and responsibilities with the priorities and objectives of the municipality's integrated developmental plan
- to establish clear relationships and to facilitate co-operation, co-ordination and communication between its political structures and political office bearers and its administration; and between its political structures, political office bearers and administration and the local community
- to organise its political structures, political office bearers and administration in a flexible way in order to respond to the changing priorities and circumstances of the municipality
- to perform its functions through operationally effective and appropriate administrative units and mechanisms, including departments and other functional or business units and also, when necessary, to perform such functions on a decentralised basis
- to assign clear responsibilities for the management and co-ordination of the administrative units and mechanisms
- to hold the municipal manager accountable for the overall performance of the administration
- to maximise efficiency of communication and decision-making within the administration

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<sup>16</sup> See the Systems Act s 50(1)-(2).

<sup>17</sup> See the Systems Act s 51(a)-(m).

- to delegate responsibility to the most effective level within the administration
- to involve staff in management decisions as far as is practicable
- to provide an equitable, fair, open and non-discriminatory working environment.

The requirements mentioned above are subject to any applicable labour legislation, however. Applicable labour legislation will prevail if any inconsistencies arise.<sup>18</sup> It seems that the intention of the legislature was to allow municipalities considerable leeway in order to create an effective municipal administration, but not to do so at the expense of established and recognised labour interests.

#### **19.4 Principles of municipal accountability and public participation**

It is an historical fact that to a large extent community participation and municipal accountability were neglected under the former local government dispensation. One of the core elements of change was allowing people to have a say in the decisions that affected their lives. Participation and accountability of representatives are therefore not new concepts in South African public life. Under the new dispensation these concepts have been afforded significant recognition. The supreme law of the state now recognises that participation and accountability are core and crucial principles for ensuring sustainable, democratic and developmental local government. According to the founding provisions and the objectives of local government, the aim of the new constitutional dispensation is to establish a democratic government founded *inter alia* on the values of accountability, responsiveness and openness. These sentiments are echoed in the objectives of local government, which affirms the aim of providing democratic and accountable local governments for local communities and encouraging their involvement in local government matters.<sup>19</sup> With this new constitutional mandate, the principles of participation and accountability are central to the new local government dispensation and the final transformation of the previous system.

The process of ensuring participation and accountability in local government represents major challenges for all municipalities. The transition to the new system was long and difficult, and many adaptations were required in order to accommodate new structures and processes. Central to the success of establishing a new system has been the participation by citizens and the accountability of those in positions of

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<sup>18</sup> See the Systems Act s 52.

<sup>19</sup> See the Constitution ss 1 and 152.

power. There are many shortcomings in the new system, however, and constant development of participation and accountability is required.

#### **19.4.1 Participation, communication and partnerships**

The essence of the concept of participation is giving people, and more specifically local residents, a real say in decisions that affect their lives. In order to take part in such decision-making processes, people must have access to decision-making structures in order to make their voices heard. Real participation strengthens the legitimacy of municipal decision making. South African local governments face various challenges to ensure participation, however. Many members of society do not have the opportunities that others do to express themselves. The lack of resources and education often excludes people from participatory processes. There are two key ways in which participation can be facilitated. They are

- to improve and maintain existing channels of communication
- to form new and strong partnerships between municipalities and local stakeholders.

#### **19.4.2 Channels of communication**

It is a fact that in systems where there are open channels of communication meaningful participation usually occurs. The following different channels of communication should enhance participation between citizens and municipalities.<sup>20</sup>

- *As voters* One of the commonly known and important ways through which citizens can voice their opinions in terms of governmental decision making is through the process of voting. Every adult South African citizen has the right to vote and to take part in elections for any legislative body established in terms of the Constitution.<sup>21</sup> This constitutionally protected right is important not only to ensure a democratic society but also to allow the voters to have a direct say in the choice of their political leaders and their policies. As with all government structures, municipalities have an obligation to make voters aware of their right to vote and to motivate them to exercise such right.
- *As consumers of services* Most people have direct contact with their municipalities through the use of and payment for municipal services. Through this channel

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<sup>20</sup> See LGIS no 2 "Participation and Accountability" (1999) at 3-8.

<sup>21</sup> Read the Constitution s 19(3)(a).

of regular contact, many aspects of municipal decision making can be communicated.

- *As an organised interest group* People often organise themselves in different interest groups. Such groups include political parties, NGOs and a range of Community Based Organisations (CBOs) such as ratepayers associations, church groups etc. Business people also organise themselves into groups that look after their interests and the interests of the region. A local chamber of commerce is a good example of a business organisation that could have an important influence with the local authority and which could serve as an acknowledged and influential communication instrument.
- *Through specialised structures* Communication can also be significantly enhanced through specialised local structures. A ward committee is such a structure and could play a very important intermediary between local residents and their local municipality. Ward committees are best suited to detecting local problems and to communicating such problems quickly and effectively. Apart from ward committees, which interact with the specific ward representative, residents can also communicate and participate with their local municipality through their traditional leaders or other community organisations. The existence of traditional leadership in many regions in South Africa and its role and involvement with local municipalities should also provide a powerful mechanism for participating and communicating with their municipal structures.<sup>22</sup> It is essential that municipalities should ensure that the channels mentioned above are kept open and effective. To this end the new local government legislative framework provides specifically for a chapter on community participation.<sup>23</sup> A further example of a specialised structure is the existence of organised labour. Organised labour should also be consulted by municipalities when issues are considered that could have an impact on them. In the case of *SAMWU v City of Cape Town and Others*<sup>24</sup> the Supreme Court of Appeal stated that the provisions of sections 16-21 of the Systems Act foster

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<sup>22</sup> Municipalities can also ensure participation through the establishment of internal municipal committees, eg, an advisory committee. Such a committee is specifically formed to address the need for effective communication with the public and can act as a vital link between the municipality and its local community.

<sup>23</sup> See the Systems Act ch 4, which is discussed later in this ch.

<sup>24</sup> 2004 (1) SA 548 (SCA).

community participation in municipal decision-making processes. Such participation could include organised labour.<sup>25</sup>

#### **19.4.3 Participation through partnerships**

When channels of communication are open and effective, conditions are conducive for partnerships to be formed. Examples of these are partnerships between the municipality and the police in combating crime, and between local business enterprises to alleviate social upliftment. The new legal framework provides specifically for such programmes and partnerships.<sup>26</sup>

#### **19.4.4 The new legislative provisions regarding community participation**

Under the new local government legislative framework, specific provision has been made for ensuring and protecting the participation of local communities. Chapter 4 of the Municipal Systems Act features various legal obligations to which municipalities must comply. From the start the Act determines that municipalities develop a culture of municipal governance that complements formal representative government with a system of participatory governance. In an effort to achieve and develop such a culture, municipalities must encourage and create conditions for the local community to participate in the affairs of the municipality. Participation should include participation in:

- the preparation, implementation and review of the municipal integrated development plan
- the establishment, implementation and review of the performance management system
- the monitoring and review of performance in general, including outcomes and impact of performance
- the preparation of the municipal budget
- strategic decisions relating to the provision of municipal services.<sup>27</sup>

Municipalities must further contribute to building the capacity of the local community in order to enable it to participate, and to enable councillors and staff members to foster community participation. Municipal resources and funds that are allocated

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<sup>25</sup> Refer to the *SAMVU* case *supra* fn 24 at 551-555.

<sup>26</sup> See the Systems Act ch 4.

<sup>27</sup> Refer to the Systems Act s 16(1)(a)(i)-(v).



annually from the municipal budget should be provided in order to achieve the mentioned participatory objectives.<sup>28</sup>

Specific mechanisms, processes and procedures for community participation have also been provided for. The Systems Act determines that participation by the local community in the affairs of the municipality must take place through various mechanisms.<sup>29</sup> All municipalities must establish appropriate mechanisms, processes or procedures to enable the local community to participate in the affairs of the municipality. In this respect, municipalities must provide for

- the receipt, processing and consideration of petitions and complaints lodged by members of the local community
- notification and public comment procedures
- public meetings and hearings by the municipal council, other political structures and political office bearers, when appropriate
- consultative sessions with locally recognised community organisations and where appropriate, traditional authorities
- report-back mechanisms to the local community.<sup>30</sup>

When a municipality establishes mechanisms or processes of participation, it must take into account the special needs of people who cannot read or write, people who have disabilities, women and various disadvantaged groups. A municipal council may also establish one or more advisory committees to advise the council on any matter within the council's competence.<sup>31</sup>

A further important provision is that municipalities must communicate to their relevant communities information concerning *inter alia* the available mechanisms to encourage and facilitate community participation, the matters on which participation is encouraged and also the rights and duties of members of the local community.

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<sup>28</sup> See the Systems Act s 16(1)(b)-(c). It should be pointed out that the mechanisms to encourage participation must not be interpreted as permitting interference with a municipal council's rights to govern and to exercise executive and legislative authority. In instances where participatory schemes would interfere with municipal administration or the effective provision of services, such schemes must be overruled in favour of a municipality's right to govern and to exercise its functions and obligations. See the Act s 16(2).

<sup>29</sup> See the Systems Act s 17(1)(a)-(e). It is envisaged that participation must take place through (a) political structures; (b) other mechanisms, processes and procedures provided for in terms of the Systems Act; (c) other appropriate mechanisms, processes and procedures established by the municipality; (d) councillors; and (e) generally applying the provisions for participation as provided for in the Systems Act.

<sup>30</sup> See the Systems Act s 17(2)(a)-(e).

<sup>31</sup> See the Systems Act s 17(3)(a)-(d) and s 17(4).

When such information is being communicated by a municipality to its local community, it is obligatory for the municipality to take into account the language preferences and usage in the municipality and the special needs of people who cannot read or write.<sup>32</sup> Participation is also enhanced through giving notice to the public of municipal council meetings and giving them admission to these. It is now required by law that the municipal manager of a municipality give notice to the public of the time, date and venue of every ordinary meeting of the council and also special or urgent meetings, except when time constraints make such notice impossible.<sup>33</sup> As was stated elsewhere in this work, a municipal council must conduct its business in an open manner and may close its sittings only when it is reasonable to do so.<sup>34</sup> The constitutional requirement is reiterated in the new legislative framework. Meetings of a municipal council and of its committees are open to the public, including the media, and neither the public nor the media may be excluded from council or committee meetings except when:

- it is reasonable to do so because of the nature of the business being transacted *and*
- a by-law or resolution of the council specifying the circumstances in which the council/committee may close a meeting, authorises the council or committee to close the meeting to the public.<sup>35</sup> The public or media, may not be excluded, from a council or committee meeting when any of the following matters are being considered or being voted on:<sup>36</sup>
  - (a) a draft by-law tabled in council
  - (b) a budget tabled in council
  - (c) the municipality's draft IDP or amendments thereto, tabled in council
  - (d) the municipality's draft performance management system or amendments, tabled in council
  - (e) the decision to enter into a service delivery agreement in terms of section 76

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<sup>32</sup> Refer to the Systems Act s 18(1)-(2).

<sup>33</sup> See the Systems Act s 19(a)-(b). The manner in which the notice is to be given must be determined by the municipal council.

<sup>34</sup> See the Constitution s 160(7).

<sup>35</sup> See the Systems Act s 20(1)(a)-(b). Note that decisions by local governments are taken via specific resolutions or via the adoption of a by-law. Resolutions can however be *more easily amended* or changed than by-laws.

<sup>36</sup> See the Systems Act s 20(2)(a)-(f).

- (f) any other matter prescribed by regulation.

However, it is interesting to note that, subject to reasonability and the nature of the business being transacted, an executive committee and a mayoral committee may close any or all of its meetings to the public and media.<sup>37</sup> Finally, a municipal council, within its financial and administrative capacity, must provide space for the public in the chambers where the council or committees meet, and it may also take reasonable steps to regulate public access to and public conduct at such meetings.<sup>38</sup>

The new local government legislative framework also determines specific requirements in respect of communications to the local community. When a municipality needs to notify the community of anything through the media, it must do so in the local newspaper(s) of the area, in newspapers circulating in the area and in newspapers determined by the council to be newspapers of record; alternatively, notices can be sent by radio broadcasts covering the area of the municipality.<sup>39</sup> Any notification must be in the official language(s) determined by the council, with consideration of the language preference and usage within its area. Notices must also be displayed at the municipal offices. When a local community is invited to submit comments to the council, the invitation notice must state that municipal staff members will assist persons who cannot write. Similar provisions are set when members of the public are required to fill in forms. Persons who cannot read or write must be assisted.<sup>40</sup>

Specific provisions regarding the publicity of documents have also been included. According to the Systems Act, all documents that must be made public by a municipality in terms of a requirement of the Act, the Municipal Finance Management Act or any other applicable legislation must be conveyed to the local community by displaying the documents at the municipality's head and satellite offices and libraries, on the municipality's official website if available and by notifying the local community of the place and address where detailed particulars concerning the documents can be obtained.<sup>41</sup> Each municipality is also obligated to establish its own official website if it decides that it is affordable, and place on such website all information required under

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<sup>37</sup> The Systems Act s 20(3).

<sup>38</sup> The Systems Act s 20(4)(a)-(b).

<sup>39</sup> See the Systems Act s 21(1)(a)-(c).

<sup>40</sup> See the Systems Act s 21(2)-(5).

<sup>41</sup> See s 21A of the Systems Act as inserted by Act 44 of 2003 s 5. If appropriate, a notification mentioned above must invite the local community to submit written comments or representations to the municipality in respect of the relevant documents.

the Systems Act and the Municipal Finance Management Act. If no website is established, all relevant information should be displayed on an organised local government website sponsored or facilitated by the National Treasury. It is the overall responsibility of the municipal manager to ensure maintenance and regular updating of the electronic information of a municipality.<sup>42</sup>

Under the new legislative framework, the minister of local government is also authorised to make regulations or issue guidelines on various aspects concerning public participation in local municipal affairs. The minister should take into account whether municipalities have the capacity to fulfil extra regulatory or guiding requirements, however.<sup>43</sup>

#### **19.4.5 Local municipal accountability**

It was explained above that accountability is one of the founding values of the new South African constitutional state and is applicable to all spheres of government including the local government sphere. In essence, accountability refers to the need to explain or to defend certain actions or conduct. Accountability is needed to ensure that people in positions of power can be held accountable and responsible for their actions and conduct. Accountability therefore plays an important role in ensuring stability and acceptance of a particular democratic system. It ensures appropriate checks and balances for local residents with regard to their elective representatives. Accountability means not only taking responsibility, but also ensuring liability in certain instances. See, for example, the case of *Umzinto North Town Board v Moodley*.<sup>44</sup> In this case a duly appointed town treasurer, purporting to act under delegated authority, invested municipal funds contrary to the Local Authorities Ordinance<sup>45</sup>. The town treasurer/defendant argued that he was exempt from liability under the Ordinance. However, the court held *inter alia* that the defendant bore the onus of proving that he was entitled to an exemption, that he acted wilfully and knowingly that his investment decision was not covered by the ordinance and that his conduct

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<sup>42</sup> Read s 21B of the Systems Act as inserted by Act 44 of 2003 s 5.

<sup>43</sup> For more details refer to the Systems Act s 22(1)-(4). Note the difference between the words “responsible” and “accountable”. Responsibility refers to the fulfilling of a duty, whilst accountability also includes the obligation to provide answers for specific actions/conduct. See also the LG: Municipal Planning and Performance Management Regulations published under GNR 796 in GG 22605 of 24 August 2001. Item 15 of the regulations deals with community participation in respect of IDP and performance management.

<sup>44</sup> 1996 (1) SA 539 (D).

<sup>45</sup> Ordinance 25 of 1974 (N).

was not excused by the ordinance. He was thus liable for the damage caused by his actions.<sup>46</sup> All three components of a municipality must be accountable in municipal matters.<sup>47</sup> There seems to be a stronger awareness of the importance of accountability and our courts should take bold action if accountability is not assured.<sup>48</sup> A system which encourages participation also deepens local democracy, as citizens feel more confident about participating when they know that their inputs count and that those responsible can be held accountable. Accountability in local government further ensures that the actions of the council also reflect the aspirations of the relevant community.

#### **19.4.6 Establishing paths of accountability**

In view of the importance of local accountability, it is essential for all local governments to establish all possible paths/methods to enhance and assure a truly accountable government. There are therefore various paths of accountability, some within the municipality itself and others between the municipality and the particular local community. The following diagram provides an overview of the various paths.<sup>49</sup>

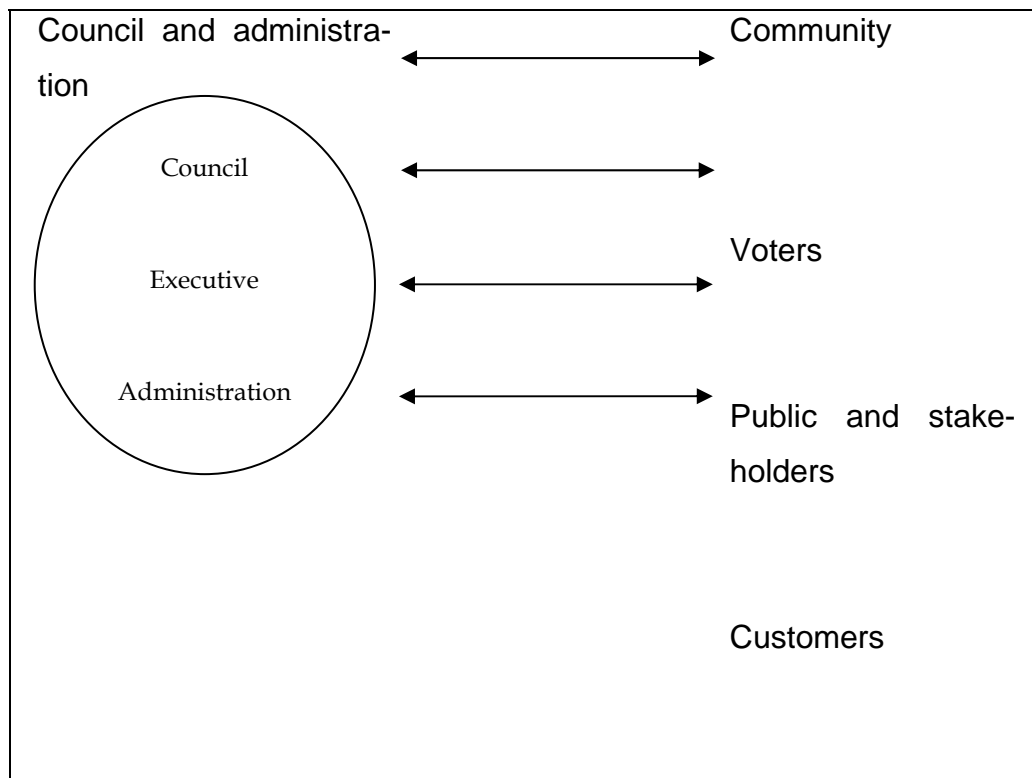
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<sup>46</sup> See the *Umzinto* case *supra* fn 44 at 543-545.

<sup>47</sup> The three components are the political office bearers, the municipal staff members and, to a lesser extent, the local community members.

<sup>48</sup> See in this regard the unreported case of *LR Brink and G Nieuwoudt v Die Speaker van die Munisipale Raad van Nala Plaaslike Munisipaliteit en een ander*, Free State High Court, December 10 2001 under case no 2125/2001. The case concerned mainly the suspension of two councillors from the municipal council. The court found on the facts that the grounds for suspension were frivolous and devoid of the rules of natural justice. The court held that the actions of certain councillors were so unreasonable and tainted by racism and maliciousness that it would be unfair to apply ratepayers' money to funding the action and that the costs of the matters should be paid by the relevant councillors out of their own pockets. The Constitution demands rational decision making, openness and fairness. Such features are essential to legitimacy, public confidence and acceptance of any administration. According to the Constitution, and more particularly s 152, municipal governments must be accountable governments. It is submitted by some legal experts that accountability can now be seen to extend further than the administrative organ itself and, in some extreme cases, can even mean personal accountability of those individuals who collectively make up the particular organ. See also Barrie G "Caveat town councillors" *Without Prejudice* (2001) 8. For a similar example of collective accountability, also refer to the Constitution ss 80(4) and 122(4), which allows the Constitutional Court to order unsuccessful applicants of the National Assembly or a provincial legislature to pay the legal costs of an application under the sections.

<sup>49</sup> Diagram taken from LGIS no 2 "Participation and Accountability" (1999) at 10.



As was mentioned above, a municipality is accountable to both institutions inside the municipality and to the public and other stakeholders outside the municipality. On the external level, municipalities are accountable to the public which they serve. External accountability manifests in different ways. There is, for example, the accountability of a ward councillor to the ward inhabitants. If the population of a ward is not satisfied with such a councillor, they should vote the person out of office in the next election. Non-ward councillors are also held accountable through pressure on the relevant political party that they represent. According to the new local government system, all councils must put an integrated development plan in place, which plan is linked with the five-year term of office of councillors. Councillors can thus be held accountable in respect of their performance relative to such an IDP. It is not only the political office-bearers that are accountable to the public, however; the municipal administration is also accountable. It must be emphasised that the relationship between the administration of a municipality and its local public is very important. Quality and professional service fosters public support and participation.<sup>50</sup> It is ultimately the

<sup>50</sup> Public accountability of municipal administrative staff has always been somewhat problematic, but in many municipalities it seems to have taken a turn for the worse. Both national and provincial governments have recognised the need for improvement in such regard. The *Batho Pele* (people first) programme is but one new initiative, which aims to ensure accountability through im-

*continued on next page*

responsibility of each municipality to ensure that it has implemented effective mechanisms and procedures to ensure that accountability is achieved. It should further be pointed out that organised labour is also accountable to the broader community. Unions have a duty to encourage their members to serve their communities. Ultimately what is needed is a balance between the needs and aspirations of workers and the needs of the community towards affordable and accessible services.<sup>51</sup>

Accountability must also be provided for within a municipal administration. In such instances various forms of accountability can be distinguished. Firstly, there should be strong accountability between the executive authority and the municipal council. Under new policy directives and emerging legislation, the role of executive structures within the council has been enhanced. The introduction of a speaker particularly enhanced executive accountability to the council and public.<sup>52</sup> Apart from being accountable to the executive authority, the council and the administration are accountable to one another. The administration has to answer to the council's political leaders, but the leader must support the administration in doing its work. On this point it should be noted that the new developmental nature of local government, with its greater emphasis on participation and accountability, has resulted in many changes in the way in which municipalities function.<sup>53</sup> Accountability is also required between the municipality as employer and organised labour. Various strategies should be developed to ensure that workers have a say in the way in which a municipality is to function. Finally, municipalities are also accountable to the other spheres of government, which are reciprocally accountable to them. For example, municipalities are required to implement national and provincial development programmes, but both national and provincial governments have a supporting, co-ordinating and monitoring role with regard to municipalities. All in all, the three

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proved customer management and service provision. See LGIS no 2 "Participation and Accountability" (1999) at 11.

<sup>51</sup> According to the White Paper on Local Government, labourer' interests should not stand in the way of transformation or delivery objectives. It is envisaged that the new South African Local Government Bargaining Council must play a critical role in enhancing positive partnerships between labour, management, the council and, finally, the relevant local community.

<sup>52</sup> Refer to all the special functions that the speaker must perform and oversee. The speaker functions as a person who is charged with ensuring that the council and its structures are accountable for the way in which they function.

<sup>53</sup> The enforcement of party political idealism within a particular administration often does not encourage co-operation and can be very destructive. See LGIS no 2 "Participation and Accountability" (1999) at 14.



spheres of government have an overarching constitutional accountability to the new constitutional model and to the nation at large. Such accountability is founded on the Constitution itself, as it requires a system of democratic government founded on *inter alia* the values of accountability, responsiveness and openness.<sup>54</sup>

In an effort to ensure that accountability is achieved, many new initiatives have been implemented. It is submitted that these initiatives should go a long way towards enhancing and achieving accountability. Some of the new initiatives are summarised briefly as follows:<sup>55</sup>

- *Codes of conduct* Codes of conduct have been introduced for councillors, traditional leaders and officials. Such codes should ensure that those individuals act in the interest of the communities that they serve and that they are accountable for their actions.
- *Full-time appointed councillors* Full-time councillors will have more time to fulfil their functions, which should improve effectiveness and accountability.
- *New structures and functionaries* Under the new legislative system, new and enhanced structures and functionaries such as the office of the executive mayor and the new municipal manager have been created. These structures and functionaries have specifically allocated powers, responsibilities and functions and should also play an important role in ensuring municipal compliance to all its duties and objectives.
- *Performance management* Under the new system, municipal performance is measured against key performance indicators (KPI). The KPI should be set up in consultation with the public and other stakeholders and should encourage participation and accountability through regular monitoring.
- *Public rights and responsibilities* Residents in particular municipal jurisdictions have both rights and obligations. Such a system, which requires a balanced approach, should also enhance municipal accountability and effectiveness.

#### **19.4.7 Developing programmes for participation**

It was mentioned above, that all municipalities are now legally obliged to develop systems of public participation. Such development requires different phases. In the first phase, municipalities should build up a relationship with all the relevant stake-

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<sup>54</sup> Refer to the Constitution the Preamble and s 1(d).

<sup>55</sup> Refer to LGIS no 2 "Participation and Accountability" (1999) at 12.

holders in their communities and develop a shared vision for the area as a whole. All interest groups should be involved. This process can be initiated through various strategies such as publicity days and local media coverage. Care should be taken not to marginalise groups within communities. People must also see that the municipal initiative is genuine and that serious consideration is given to their involvement. The second phase should involve the internal restructuring of municipal administrations. Existing staff members and councillors should change their attitudes toward public participation and their own accountability. Once a new relationship has been established the new system of interaction and participation should be maintained.

From the discussion above it is clear that the new local government system is significantly different from the one that existed prior to the new constitutional dispensation. Municipalities are now constitutionally obliged to provide democratic and accountable governance for all local communities. New laws provide the basis for making the new system a reality. The key to the success lies in the capacity and willingness of all stakeholders to take the processes forward, however.

### **19.5 Aspects concerning municipal performance management and capacity building**

The new legislative framework for local government has also established new demands on the performance of municipal staff members to ensure that the objectives of local government are met. After the transformation process had been initiated, municipal administrations were faced with various new challenges and demands: municipal jurisdictions were enlarged, many service backlogs became evident, a new constitutional vision and place for local governments was created, new boundaries were drawn and finally a new legal framework for local governments was initiated. Special directives and assistance to municipal administrations are therefore essential in order to ensure a more efficient, customer-orientated and developmentally creative local government dispensation. In order to create such a system, proper performance management within all municipal administrations is generally regarded as a prerequisite; performance management is seen as a strategic tool that can encourage new attitudes, skills and competencies within the new local government dispensation.

In essence, performance management can be summarised as a process whereby municipalities seek to improve and monitor their functioning and accountability on an ongoing basis. Performance is then regularly assessed to determine whether plans

have been implemented, resources are being used effectively and whether the municipality is fulfilling its duties and responsibilities. If municipal performance management is implemented correctly, it should enable municipalities to deliver quality services in a cost-effective, efficient and accountable manner. In light of the fact that performance management is a new concept for local administrations, there is no uniform or general model available which municipalities can implement with guaranteed success. An effective and efficient performance management system must be developed to meet the unique circumstances that exist in modern local governments in South Africa.<sup>56</sup>

The previous local government dispensation never provided properly for a comprehensive performance management system. Consumers or the public at large never had the opportunity to measure the effectiveness of municipal service delivery and quality of services. Under the new constitutional requirements local governments are obliged to meet the basic needs of citizens, and especially provincial governments are tasked with monitoring the performance, capacity and effectiveness of municipalities within their respective jurisdictions. In follow-up on the constitutional provisions, the new legislative framework for local governments provides specifically for the enhancing of municipal performance management.<sup>57</sup> The need for a general performance management system for all municipal governments was already envisaged in the White Paper on Local Government. The White Paper confirmed that the aim of a new national performance management system is to:<sup>58</sup>

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<sup>56</sup> Under the new constitutional system, various systems have been proposed to establish an effective performance management system. One such proposal was the *Batho Pele* (people first) vision for managing performance in the broader public sector. The *Batho Pele* proposal is aimed at delivering the best service to the public. The proposal consisted of eight service delivery principles (ie consultation, service standards, access, courtesy, information, openness and transparency, redress and value for money). *Batho Pele* also aims at constantly improving the quality of services through the implementation of an eight-step process. Such steps, which could serve as an important guide for municipalities that embark on performance improvement programmes, are: identification of the customer; establishing customer needs and priorities; determining the current service baseline; identifying the improvement gap; setting service standards; gearing up for delivery; announcing service standards and finally monitoring delivery against standards and publishing the results. These principles should form the basis for any new local government performance management system. The overall aim is to make municipalities efficient, customer-orientated, developmentally creative institutions that enable citizens to obtain better service delivery. See LGIS no 2 "Performance Management" (1999) at 4-5.

<sup>57</sup> See the Local Government: Municipal Systems Act ch 6. The aim of the new legal framework is to: define goals and priorities; establish objectives, set indicators for performance, measure performance; review and adjust service delivery mechanism and finally to report on the progress made.

<sup>58</sup> Refer to the White Paper on Local Government (1998) at 51-52.

- assess the overall state of local government
- monitor the effectiveness of development and delivery strategies of municipalities and ensure that scarce resources are utilised efficiently
- provide early warning signals
- allow for performance comparison between municipalities across the country
- identify successful approaches or best practises
- provide a national set of performance indicators.

The envisaged system is not aimed at imposing additional burdens on municipalities but rather at seeking a change in the way in which municipalities perform and fulfil their duties and responsibilities.

#### ***19.5.1 The new legislative requirements regarding municipal performance management***

As was envisaged in the White Paper on Local Government, national legislation under the new local government dispensation specifically determines various aspects regarding municipal performance management. All municipalities are now legally obligated to establish and develop performance management systems (PMS) and to review such systems. The new legal requirements relevant to municipal performance management are briefly as follows:

- *The establishment and development of performance management systems* Each municipality established under the new local government dispensation must establish a performance management system that is commensurate with its resources, that is best suited to its circumstances and is in line with the priorities, objectives, indicators and targets contained in its integrated development plan. Municipalities must further promote a culture of performance management among their political structures, office bearers, councillors and municipal administrations. They must also ensure that their affairs are administered in an economical, effective, efficient and accountable manner.<sup>59</sup> Specific responsibility has been placed on the executive committee or executive mayor, whichever is applicable, or a committee of councillors appointed by the municipal council in the absence of an executive committee or executive mayor,

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<sup>59</sup> See the Systems Act s 38(a)-(c).

- (a) to manage the development of a municipality's performance management system
- (b) to assign certain responsibilities of the system to the municipal manager
- (c) to submit the proposed system to the municipal council for adoption.<sup>60</sup>

All municipalities must further establish mechanisms to monitor and review their performance management system.<sup>61</sup>

- *The core components and community involvement in municipal performance management systems* Every performance management system is required to include various core components. Accordingly, in terms of its performance management system and any other regulations and guidelines that may be prescribed, every municipality must incorporate and provide for the following.<sup>62</sup>

- (a) setting appropriate key performance indicators (KPIs) as a yardstick for measuring municipal performance, including outcomes and impact, with regard to the municipality's development priorities and objectives set out in its IDP
- (b) setting measurable performance targets for each of the development priorities and objectives
- (c) monitoring performance and measuring and reviewing performance at least once a year against the development priorities and KPIs
- (d) taking steps to improve performance where targets have not been met
- (e) establishing a process of regular reporting to the council, political structures, office bearers, staff, the public and appropriate organs of state.<sup>63</sup>

It is further also obligatory for a municipality to involve the local community in the development, implementation and review of the municipality's PMS and also to allow the community to participate in the setting of appropriate key performance indicators and performance targets.<sup>64</sup>

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<sup>60</sup> Refer to the Systems Act s 39(a)-(c).

<sup>61</sup> The new legal framework does not provide guidelines on what mechanisms should be employed. It seems that if it is left to each municipal council to decide on what mechanisms to employ to monitor and review performance. See the Systems Act s 40.

<sup>62</sup> See the Systems Act s 41(1)(a)-(e).

<sup>63</sup> In this regard, appropriate organs of state should include provincial governments which are tasked to oversee and monitor municipal performance. Ss 41(2) requires the PMS applied by a municipality to be so devised that it could serve as an early warning indicator of under-performance.

<sup>64</sup> See the Systems Act s 42. This section entrenches for the first time real and constructive public participation in respect of municipal performance control and oversight. It is submitted that

*continued on next page*

- *The setting of key performance indicators and the audit of performance measurements* Under the new legal framework for local government, after consultation with the MEC for local government and organised local government nationally, the minister for local government may prescribe by regulation general key performance indicators that are appropriate and that can be applied to local government generally. The minister may also review and adjust those KPIs when necessary.<sup>65</sup> All municipalities are further required, in a manner determined by their council, to make known to the general public, both internally and externally, which KPI and performance targets are set by the municipality for purposes of its PMS. The results of such a PMS and performance measurements must be audited as part of the municipality's internal auditing processes and also annually by the auditor-general.<sup>66</sup>
- *Requirements regarding reports on the PMS and the making of regulations and guidelines* Apart from the establishment of a municipal performance management system, each municipality must prepare for each financial year an annual report consisting of *inter alia* a performance report. Such a performance report should reflect:
  - (a) the performance of the municipality and each external service provider during that financial year
  - (b) a comparison of the performances with the targets set for them and also the performances in the previous financial year
  - (c) measures taken to improve performance.<sup>67</sup>

It should be noted that an annual performance report must form part of a municipality's annual report as is determined in chapter 12 of the Municipal Finance Management Act.<sup>68</sup>

Apart from the reporting responsibility on the municipal manager, the newly enacted legislative requirements also place a similar responsibility on the MEC and the minister concerned. In this regard, the MEC for local government in a province is obliged

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this enhancement of public participation would significantly contribute to more active public involvement in municipal affairs.

<sup>65</sup> See the Systems Act s 43(1)(a)-(b). General KPIs must be included in a municipal PMS where applicable. See s 43(2).

<sup>66</sup> Refer to the Systems Act ss 44 and 45 respectively.

<sup>67</sup> Read s 46(1)(a)-(c) of the Systems Act as substituted by Act 44 of 2003 s 6.

<sup>68</sup> See s 46(2) of the Systems Act as amended.

annually to compile and submit to the provincial legislature and the national minister responsible for local government a consolidated report on the performance of municipalities in that province. The consolidated report must identify all municipalities that have underperformed during the year, as well as the proposed remedial action to be taken. The report must then be published in the *Provincial Gazette*.<sup>69</sup> Finally, the minister responsible for local government must annually compile and submit to parliament and the nine MECs for local government in the provinces a consolidated report of local government performance in general, in terms of general key performance indicators. Such a report must be published in the *National Gazette*.<sup>70</sup>

In confirmation of the fact that the new legislative requirements are not a complete legal system and in order to cater for the effectiveness of the system, the national minister is permitted to make regulations or to issue guidelines to provide or regulate certain issues. These are:<sup>71</sup>

- incentives to ensure municipalities establish PMSs within a prescribed period and comply to the Act
- the setting of KPIs by a municipality with regard to its development objectives
- the identification of appropriate general KPIs that can be applied to municipalities generally
- the regular review by a municipality of its KPIs
- the setting of a framework for performance targets by municipalities consistent with their development priorities, objectives and strategies set out in their IDPs
- mechanisms, systems and processes for the monitoring and measurement of performance by a municipality with regard to its development objectives
- the internal auditing of performance measurements
- the assessment of those performance measurements by a municipality;
- the assessment of progress by a municipality with the implementation of its IDP
- the improvement of performance
- any other matter that may facilitate the implementation by municipalities of an effective and efficient PMS or the application of chapter 6 of the Systems Act.

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<sup>69</sup> See the Systems Act s 47(1)-(2). The MEC is also tasked to submit a copy of the report to the NCoP S 47(3) of the Act.

<sup>70</sup> See the Systems Act s 48.

<sup>71</sup> See the Systems Act s 49(1)(a)-(k).



It is clear that the legislator's intention was to give the minister a wide authority to make regulations or to issue guidelines. When the minister makes regulations or issues guidelines he/she must take the capacity of municipalities into account and he/she must differentiate between different kinds of municipality.<sup>72</sup>

### **19.5.2 *Creating and maintaining an effective system of municipal performance management***

With reference to the abovementioned legislative requirements in relation to municipal performance management, two key elements seem to be significant. At first, each municipality will have to identify and prioritise those areas where performance improvement is most required. Such areas will include both external developmental priorities and internal transformation necessities. National government should assist municipalities by identifying common performance areas that are applicable to all municipalities, such as access to basic services such as water, sanitation, electricity and housing. Through national minimum standards, municipalities will be guided when defining their own goals within their unique circumstances and will consolidate existing fragmented approaches to services. The second key element is performance assessment. An objective performance assessment is crucial for the creation and maintenance of an economic, efficient and effective local government performance management system.<sup>73</sup>

Apart from the two key elements of an effective and efficient PMS, all performance management systems should contain six core elements. Each element is important to make the system work, and are discussed briefly as follows:

- *Performance measurement* Performance measurement requires a relatively objective framework for assessing performance. Measurement is achieved by setting

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<sup>72</sup> Refer to the Systems Act s 49(2)-(4). The minister is also permitted to phase in some or all of the applications of the provisions of the chapter on performance management, which provisions place a financial or administrative burden on municipalities.

<sup>73</sup> To illustrate the functioning of such an objective performance assessment system, imagine the following example: Two municipalities, A and B, with similar budgets, responsibilities and staff both decide to undertake similar-sized housing development projects. How would their respective performance with reference to the project be assessed? It is submitted that the first step would be to assess the economic factors of the project. Such measures look at the cost of resources. If one municipality spent more on materials, such a position would be one indication of performance. Cost measures alone can be misleading, as poorer quality material are cheaper. Quality is thus also important. The second phase of assessment should evaluate quantity and quality in relation to resources used. Finally the effectiveness should be evaluated. It is important to assess what effective contribution to the overall developmental objectives of a municipality has been achieved through the project. See also LGIS no 2 "Performance Management" (1999) at 11.

performance indicators and linking them to performance targets. Performance indicators indicate how performance will be measured; that is, the number of households to receive water connections. Performance targets again refer to the result to be achieved within a given timeframe (eg 5000 connections by yearend 2005). Performance indicators can be determined only once a municipality has identified the key objectives for development in its area and with the municipality's overall developmental goals and priorities in mind. Many municipalities have set various performance indicators through their development-planning processes. A distinction should be made between general performance indicators and local performance indicators. General performance indicators refer to such indicators that are applicable to all municipalities, while local indicators reflect particular local developmental priorities and objectives. Any KPI should ensure that the right area of performance is measured and that the quality of performance is also assessed. Part of any process of performance measurement involves the establishment of targets for each performance indicator. Performance is then measured within a given timeframe, according to whether targets for each indicator have been achieved. The setting of performance targets can be a somewhat complicated exercise and should ultimately result in realistic and achievable objectives. In determining proper targets it is suggested that certain guidelines be used and that a checklist be developed when targets are set for particular indicators.<sup>74</sup>

- *Performance monitoring and evaluation* The monitoring and assessment of the performance of municipalities is a crucial aspect of any successful PMS. Monitoring and evaluation are processes aimed at assessing the performance of municipalities and the people that work for them. It is important to note that the assessment of people refers not only to municipal staff members but also to external contractors that do work or provide services on behalf of a municipality. Generally speaking, performance monitoring is an ongoing process to determine whether targets are being met and whether development objectives are being

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<sup>74</sup> According to LGIS no 2 "Performance Management" (1999) at 14 the following guidelines and checklist questions should be useful in determining performance targets: Guidelines are preciseness and measurability, relevance to user, being demanding but realistic, approved by politicians and providing communication to the public. Checklist questions could include the number of each service provided, how many new services were provided in a year, what trends are impacting on the service, what customers expect, the municipality's realistic capacity and what other similar municipalities are achieving.

achieved. Performance management must be conducted very carefully, and information should not be manipulated to produce results that appear better than they really are. Uncompromising integrity of performance management is therefore essential. In contrast with the monitoring process, performance evaluation is a deeper and more detailed process of performance analysis. Such an evaluation process looks not only at whether a municipality is performing adequately but also at the areas of underperformance. All municipalities should make special arrangements to evaluate performance regularly. A further key element of the monitoring and evaluation process is so-called “performance auditing”. This process involves verifying that the measurement mechanisms and results are accurate and that proper procedures have been followed to evaluate and improve performance. The checks built into the new legislative framework should ensure objective verification of performance results and should ultimately enhance municipal service provision and compliance with the new constitutional demands.<sup>75</sup>

- *Performance reporting* Under the new legal framework, all municipalities are obliged to submit annual performance reports to the public and higher spheres of government. It is submitted that the reporting requirement should significantly enhance public participation and municipal accountability and should therefore be strictly enforced.
- *Capacity building* Without the necessary capacity, municipalities will not be able to perform and fulfil their duties and responsibilities. Municipal capacity building must therefore be a core element of a broader performance management strategy. Capacity building is a process of developing the ability for improved performance within municipalities and will be discussed in more detail elsewhere in this chapter.
- *Intervention* It was mentioned earlier that the Constitution allows and demands intervention into the affairs of local government when necessary. Especially the provinces are tasked with oversight and intervention powers into the affairs of municipalities when cases of non-performance are reported. Such interventions should be based on accurate diagnostic results, however, and should be undertaken on an objective basis. When intervention is allowed on subjective grounds

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<sup>75</sup> See LGIS no 2 “Performance Management” (1999) at 16-17. A further check on performance monitoring and evaluation is public participation. Public involvement and pressure for improved performance  
*continued on next page*

or without proper justification, the new constitutionally entrenched status of local government as an independent sphere of government would be unnecessarily jeopardised. In this regard it should be emphasised that the ultimate aim of intervention is not to create a hierarchy of one sphere of government over another but to ensure that citizens receive the essential services that are promised under the new constitutional scheme.

- *Performance incentives* Ultimately the performance of any particular municipality and its staff depends on certain incentives within the PMS. Good performance should be rewarded whilst poor performance should be penalised. Various means of incentive are possible, such as fiscal and political motivators, rewards, competitions and individual motivational schemes.

### **19.5.3 Implementing performance management**

The implementation and maintenance of an effective PMS is in essence founded on the new constitutional foundation. All spheres of government are constitutionally obliged to fulfil their duties and responsibilities according to the constitutional prescriptions and to ensure a general system of democratic government that is accountable, responsive and open. Local governments are further tasked with specific developmental duties and the achievement of specified municipal objectives.<sup>76</sup> In order to determine whether such objects and duties are being met, a proper system of accountability and performance management is necessitated. Under the provisions of the Systems Act, a new legal framework for national performance management has been enacted. In essence, the new system will function as follows:

- *Step 1:* All municipalities must identify the areas that require performance measuring and improvement. This will be an integral part of the IDP process and the setting of development objectives.
- *Step 2:* Once the areas have been identified, a municipality will monitor and measure its performance by developing indicators and targets for each of the development priorities.
- *Step 3:* A municipality will then have to evaluate its performance and take steps to improve performance when targets are not being met.

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formance should be protected as an important part of the overall PMS of a municipal government.  
<sup>76</sup> See the Constitution ss 1, 152 and 153.

- *Step 4:* In addition to those areas identified by a municipality, some areas fundamental to the overall reconstruction and development of South Africa will be identified by national government, through consultation with key stakeholders such as SALGA and provincial governments.
- *Step 5:* Each municipality will be expected to report on these areas through the prescribed national indicators and targets.
- *Step 6:* A municipality will be able to exceed the targets set by national government, but it will not be able to perform below those targets.

To illustrate the practical application of the new PMS, the example is given of a municipality where 50% of the residents do not have access to clean drinking water. Water is arguably the single most essential municipal service, as it is needed for drinking, cooking, washing and cleaning. Without water, communities suffer severe discomfort and disease. As a first step, the particular municipality will identify water provision as an area that requires performance measuring and improvement. Water provision to all residents will be set as a priority with a correlating objective of giving all residents access to at least a certain number of litres of drinkable water per day. The objective will then translate into development strategies which could include major investment programmes in water schemes. Strategies could also include cross-subsidising between consumers if necessary.

As a second step, and once the area of performance have been identified, then a municipality will have to monitor and measure its performance. This is achieved through the development of KPIs and targets for each of the identified priorities. The following KPIs and targets could be relevant to the example mentioned above:

KPIs:

- the percentage of households that do not have access to water (measure growth)
- the bacterial count in water (measure quality of water)
- average time spent by community members (measure impact of scheme on community to bring water to their houses)
- percentage of residents paying for services (measure sustainability and financial impact).

Targets:

- to reduce households without water from 50% - 30% in two years
- to ensure quality of water is up to standard
- to reduce travel time for community to fetch water

- to ensure measures are taken to service payment collections better.

Under the third step, the municipality will have to evaluate its performance and will have to take steps to improve performance when targets are not met. Measurement mechanisms can include:

- keeping data of households with water
- testing water quality regularly
- surveying residents' activities and the implementation of a proper billing and credit control system.

Finally, the municipality must report on its performance management in each area as is required by law.

Although the many benefits of a proper PMS are very clear, the implementation of such a system does present various challenges. Challenges that are most common are limited financial resources, inadequate administrative capacity, poor public participation and a slow ability to adapt to the new legal order. In order for effective and efficient performance management to occur, it is suggested that all municipalities will have to commit themselves to this end and dedicate their energy to overcoming the different challenges and finding new ways to fulfil their duties and obligations. Other spheres of government must assist municipalities in this endeavour, but ultimately the responsibility lies with municipalities all over the country to start focusing on the new outcomes of municipal services and programmes.<sup>77</sup>

## **19.6 Aspects regarding municipal capacity building**

### **19.6.1 Introduction**

It is a general phenomenon all over the world that local governments are pushing for autonomy and decentralised decision making. More autonomy and decentralised powers often leave municipalities with many new performance demands, however. The position in South Africa under the new local government legislative framework is no different. The new local government dispensation has created strict legal demands on municipalities to comply and fulfil certain duties and responsibilities. Without a sufficient capacity, municipalities will not be able to fulfil such duties and

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<sup>77</sup> In order to enhance the new legislative requirements dealing with performance management the LG: Municipal Planning and Performance Management Regulations were promulgated. See GNR 796 in GG 22605 of 24 August 2001. The regulations provide for *inter alia* the nature of a performance management system, the adoption of a PMS, the setting of key performance indicators, general key performance indicators, the setting of performance targets and the monitoring review and internal auditing of performance measurements.

responsibilities, however. It is of paramount importance therefore that municipalities themselves, as well as the two higher spheres of government, ensure that municipal capacity is adequate to ensure compliance with their new constitutional and other legislative obligations. Municipal capacity building is thus regarded as one of the more important tools available to municipalities to ensure service delivery and the overall fulfilment of their duties and responsibilities. Capacity building should therefore form one of the strategic programmes that municipalities must put in place.

During the former local government dispensation, capacity building was often racially determined and did not support democratic municipal development. Under the new system municipalities have been afforded distinctive autonomy and powers and are supported to handle their own affairs in accordance with their own priorities. Capacity building should be a very important objective for all municipalities, as it will ensure various advantages. The following advantages will be secured through a solid municipal capacity:

- services are delivered as is legally required
- more powers can be delegated down to a municipal level
- better investment opportunities can be created.

Capacity building is therefore very important and should be done on the political, financial management and administrative levels. It speaks for itself that capacity building cannot be done without proper training.<sup>78</sup> With the restructuring of local government, the overall local government capacity building scheme had to be revisited and changed. It was especially envisaged that the new system should ensure the following results:<sup>79</sup>

- to respond to municipal needs
- to be acceptable and aimed at all people
- to offer capacity building that qualifies officials and frontline workers for promotion and further development

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<sup>78</sup> Under the former system two training bodies made up local government training. There was the Local Government Training Board (LGTB), established under the Local Government Training Act, and the Apprenticeship Training Board for Local Authorities (ATBLA), established under the Manpower Act. The two structures operated separately and addressed different fields in the training sector. Coordination was poor, and the absence of a common national vision on capacity building led to a lack of objectives, fragmentation of training programmes and poor staff development results. The two bodies later merged into the Local Government Education and Training Board (LGETB).

<sup>79</sup> See LGIS no 2 "Capacity building" (1999) at 5.



- to address the capacity building needs of rural municipalities
- to ensure the involvement of all role players to find solutions for municipal challenges.

### **19.6.2 Establishing a new local government training system**

In the White Paper on Local Government, a vision and framework was provided within which local government capacity building was to be developed. The previous system had to be changed to become a more flexible, decentralised and demand-driven system with continuous improvement of municipal staff members and political office bearers.<sup>80</sup> In response to the new changes and challenges of the new system, a new set of skills and competences had to be created to ensure an overall developmental local government. Various initiatives have thus been piloted in a variety of newly created capacity building programmes and schemes.<sup>81</sup>

In follow-up on the vision in the White Paper on Local Government, various laws have been passed or amended to give more meaning and substance to the new local government capacity-building system. See, for example, the Skills Development Act,<sup>82</sup> which Act requires a Sector Education Training Authority (SETA) to be established in every sector of the South African workforce in order to develop skills.

This LGSETA will be made up of representatives of both organised labour such as SAMWU and IMATU and organised employer's organisations, which are represented under SALGA. Specific functions have been envisaged for the new LGSETA to fulfil. Such functions include:<sup>83</sup>

- Preparing a Local Government Skills Plan.
- Implementing the Local Government Skills Plan by
  - (a) establishing learnerships
  - (b) approving workplace skills plans
  - (c) allocating grants to employers, education and training providers and workers

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<sup>80</sup> See the White Paper on Local Government (1998) at 115.

<sup>81</sup> Examples of some of the new competencies and capacity-building programmes are: councilors' code of conduct, falling under SALGA training; performance management, falling under the department of Constitutional Development; integrated development planning, falling under the department of Constitutional Development; local economic development, falling under the department of Constitutional Development and NGO's financial management; voter education, falling under the IEC and senior management development, falling under university-based training programmes. See LGIS no 2 "Capacity building" (1999) at 7.

<sup>82</sup> 97 of 1998.

<sup>83</sup> See LGIS no 2 "Capacity building" (1999) at 9.

- (d) monitoring local government education and training in the sector.
- Promoting learnerships by
  - (a) identifying work places for practical work experience
  - (b) supporting the development of learning materials
  - (c) improving the facilitation of learning
  - (d) assisting in the conclusion of learnership agreements.
- Registration of learnership agreements.
- Applying to SAQA for accreditation as an Education and Training Quality Authority (ETQA).
- Collecting Skills Development Levies and disbursing these to municipalities.
- Reporting on income and expenditure and the implementation of its sector skills plan to the Director-General of Labour.
- Appointing staff for the performance of its functions.

The Skills Development Act also introduces a new learnership approach to skills development. This approach requires a combination of institutional learning and workplace learning/experience. Skills development, which will require substantial financial resources, is financed largely through the Skills Development Levies Act.<sup>84</sup> The levies are not sufficient to meet the existing training needs, and it is clear that other funding sources such as private donors, business or even other spheres of government should be explored.

It was mentioned above that it is not only municipal staff members that are in need of new training, but also political office bearers. The new constitutional and other legislative requirements have placed important responsibilities on political representatives. In this regard SALGA has developed a so-called "councillor-training programme" for all councillors. In order to ensure quality in the new training programmes, the South African Qualifications Authority Act,<sup>85</sup> has established the South African Qualifications Authority (SAQA), which must oversee the implementation of a national qualifications framework (NQF). The NQF is seen as a new way of "grading" learning achievements by using eight NQF levels.<sup>86</sup> The new NQF ap-

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<sup>84</sup> 9 of 1999.

<sup>85</sup> 58 of 1995.

<sup>86</sup> The lowest NQF level is level 1, which is the equivalent of grades 7-9 of the traditional high school education grading system. Level 4 corresponds to grade 12. In future, most officials will be trained against the eight NQF levels.

proach towards learning is different from the past, as it is based on learning outcomes, which are measured by the ability of a learner after training to convert his/her learning into work performance. SAQA and the NQF also promote a system for the recognition of prior learning and so-called “life-long learning”. These initiatives should allow people gradually to qualify themselves and to help to develop the careers of staff members and ensure that local government becomes an attractive place of work.

### **19.6.3 Mechanisms to enhance municipal capacity building**

In light of the new legal requirements, it is obvious that all local governments will have to establish various training and development programmes. Such programmes and initiatives will necessarily be different for each of the different categories and types of municipality because of their diverse circumstances and responsibilities. In many instances, the new local government dispensation is characterised by various performance gaps, some of which can be filled only through the training of councillors, officials and other frontline workers. What municipalities need is a good training programme. In order to establish such a training programme municipalities need to determine which of the problems they encounter can be solved through building the capacity of staff and which cannot. In instances where internal capacity building cannot solve the problems, alternative approaches exist such as outsourcing or the conclusion of partnerships with other private or public institutions. It is also very important for municipalities to prioritise their capacity-building strategy as part of their integrated development plan. In this regard it is suggested that every IDP should incorporate a skills-development plan as a key component, which should facilitate capacity-building solutions within the municipality.<sup>87</sup> Under the new constitutional dispensation, all provinces are obliged to build the capacity of local governments. Various interactions and cooperation strategies must still be developed between municipalities and their respective provincial governments in order to fulfil the constitutional vision and obligations.

## **19.7 Conclusion**

In conclusion, it is submitted that the principles of public administration, performance management and municipal capacity building are currently in need of major trans

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<sup>87</sup> See LGIS no 2 “Capacity building” (1999) at 16.

formation. According to the new legal framework, an entirely new approach towards capacity building, performance management and public participation has been mandated. All municipalities will have to take and implement new initiatives to ensure compliance with the newly established legislative requirements. All in all one can conclude that the new vision for local government is to create an essentially customer-orientated public service. The codes of conduct for both councillors and staff members set out basic requirements for accountability and control. It is further submitted that the new legal framework indeed lays a sound foundation for a more people-orientated local government system, which should be able to meet the demands of all South African people and should ensure a better and brighter future for all.

## Municipal development planning

### 20.1 Introduction

According to the new legal framework for local governments, a significant measure of responsibility relating to municipal planning has been decentralised to local government structures. Although municipal planning is incorporated as a functional area of concurrent national and provincial legislative competence,<sup>1</sup> all municipalities are constitutionally obligated to structure and manage their administrations and budgeting and planning process in such a way as to give priority to the basic needs of their communities. All municipalities must also promote the social and economic development of their communities.<sup>2</sup> The new constitutional dispensation furthermore determines that one of the objects of local government in general is to promote social and economic development and to promote a safe and healthy environment.<sup>3</sup> Because of this new constitutional mandate, the new local government system is often referred to as a developmentally orientated local government system. It is obvious from the abovementioned requirements that local government planning processes must be structured and organised so as to achieve the objects of the new local government dispensation and also to give priority to the basic needs of their respective communities. If local governments are to achieve such a developmental system, they are to be thoroughly supported by the two higher spheres of government. Both national and provincial laws are therefore needed to ensure municipalities fulfil their developmental duties. Whereas provincial laws will often differ in content and approach, national legislation should provide an overarching set of regulatory provisions so as to enable municipalities to create a basic planning framework. In compliance with its responsibility in this regard, parliament has enacted the Local

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<sup>1</sup> See the Constitution Part B Sch 4.

<sup>2</sup> Refer to the Constitution s 153(a).

<sup>3</sup> See the Constitution s 152(c)-(d).

Government Municipal Systems Act.<sup>4</sup> The provisions of the Act relating to planning and environmental issues will be discussed below.

## **20.2 National principles concerning local government developmental planning**

### **20.2.1 General requirements relating to municipal development planning**

According to the Local Government: Municipal Systems Act, local government planning is to be developmentally orientated. In order to achieve this objective, all municipalities must undertake developmentally orientated planning so as to ensure three purposes:<sup>5</sup>

- that municipalities strive to achieve the objects of local government set out in the Constitution
- that municipalities give effect to their developmental duties set out in the Constitution and
- that municipalities with other organs of state contribute to the progressive realisation of the (socio-economic) fundamental rights contained in the Constitution.<sup>6</sup>

In order to achieve and undertake planning processes that are developmentally oriented, the Systems Act determines that its provisions in this regard must also be read in conjunction with chapter I of the Development Facilitation Act.<sup>7</sup>

A second important feature of the new local government planning framework is that the planning processes undertaken by a municipality must be aligned with and must complement the development plans and strategies of other affected municipalities and other organs of state. The purpose of such alignment and complementation of different development plans and strategies is aimed at giving effect to the principles of co-operative government as is contained in the Constitution.<sup>8</sup>

Apart from the requirements of co-operation in municipal planning processes, municipalities are also obligated to participate in national and provincial developmental programmes. Such participation is directly required by the Constitution and is also a

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<sup>4</sup> 32 of 2000 as amended. The Act aims *inter alia* to establish a simple and enabling framework for the core processes of planning, which process *should* underpin the notion of developmental local government. Refer also to the long title of the Act.

<sup>5</sup> See the Systems Act s 23(1)(a)-(c).

<sup>6</sup> Refer to the Constitution ch 2s 24, 25, 26, 27 and 29.

<sup>7</sup> See the Systems Act s 23(2) as well as the Development Facilitation Act 67 of 1995.

<sup>8</sup> Refer to the Systems Act s 24(1) read together with the Constitution ss 40 and 41. According to s 41, all three spheres of government and all organs of state within each sphere must adhere to the principles of co-operative government as are set out in the Constitution. The main objective of co-operative government is to ensure co-operation and co-ordination between the various role players.

national consequence of the fact that both national and provincial governments have concurrent legislative competence over municipal planning activities.<sup>9</sup> The new legal framework also determines that if municipalities are required to comply with planning requirements in terms of national or provincial legislation, then the responsible organ of state must

- align the implementation of that legislation with the provisions of chapter 5 of the Systems Act and
- consult with the affected municipality in such implementation and take reasonable steps to assist the municipality in meeting the legal requirements relevant to its IDP.<sup>10</sup>

Before either national or provincial legislation affecting municipal planning issues is introduced in parliament or a provincial legislator, the organ initiating the legislation must consult with OLG. Similar consultation is required in respect of subordinate legislation before such legislation is enacted.<sup>11</sup> Again the underlining principle of co-operation and co-ordination as part of a system of co-operative government is emphasised.

The new legal framework directed at municipal planning also requires specific requirements regulating the adoption of IDPs. According to the Systems Act, each municipal council must adopt a single, inclusive and strategic plan for the development of the municipality within a prescribed period after the start of its elected term. Such plan should have the following aims:<sup>12</sup>

- (a) to link, integrate and co-ordinate plans and to take into account proposals for the development of the municipality;
- (b) to align the resources and capacity of the municipality with the implementation of the plan;
- (c) to form the policy framework and general basis on which annual budgets must be based;
- (d) to comply with other provisions of the Systems Act;
- (e) to ensure compatibility with national and provincial development plans and planning requirements binding on the municipality in terms of legislation.

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<sup>9</sup> Refer to the Constitution s 153(b), which specifically requires this participation.

<sup>10</sup> See the Systems Act s 24(3)(a)-(b).

<sup>11</sup> See the Systems Act s 24(4).

<sup>12</sup> See the Systems Act s 25(1)(a)-(e).



An IDP adopted by a municipal council as mentioned above may be amended, but it remains in force until a new IDP is adopted by the next elected council.<sup>13</sup> A newly elected municipal council may adopt the IDP of its predecessor, but must comply with certain requirements.<sup>14</sup> Finally, it is required for all municipalities to give notice to the public of such adoption within 14 days of the adoption of its IDP and also to make copies or extracts from the plan available for public inspection. A summary of the plan must also be published.<sup>15</sup>

### **20.2.2 The contents and core components of Integrated Development Plans**

The new national regulatory legislation furthermore sets specific core components that IDP must incorporate. According to the Systems Act, an IDP must reflect the following:<sup>16</sup>

- (a) the municipal council's vision for the long term development of the municipality with special emphasis on the municipality's most critical development and internal transformation needs;
- (b) an assessment of the existing level of development in the municipality, which must include an identification of communities which do not have access to basic municipal services;
- (c) the council's development priorities and objectives for its elected term, including its local economic development aims and its internal transformation needs;
- (d) the council's development strategies which must be aligned with any national or provincial sectoral plans and planning requirements binding on the municipality in terms of legislation;
- (e) a spatial development framework which must include the provision of basic guidelines for a land use management system for the municipality;
- (f) the council's operational strategies;
- (g) applicable disaster management plans;
- (h) a financial plan, which must include a budget projection for at least the next three years; and
- (i) the key performance indicators and performance targets determined in terms of section 41.

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<sup>13</sup> See the Systems Act ss 34 and 25(2).

<sup>14</sup> Read the Systems Act ss 25(3)(a) and 29(1)(b)(i), (c) and (d) in conjunction with one another.

<sup>15</sup> See the Systems Act s 25(4)(a)-(b).

<sup>16</sup> See the Systems Act s 26(a)-(i).

It is quite clear that the IDP has a central and very important function within the new local government system. The IDP serves basically as a guiding document for the short term developmental needs and initiatives of every municipal government in South Africa. For this reason, special provision regarding the status of an IDP has been made and will be discussed later.<sup>17</sup>

### **20.2.3 Requirements regarding the process for planning, drafting, adopting and reviewing Integrated Development Plans**

The Systems Act also determines specific procedures regarding the framework for integrated development planning, for adoption and review procedures of IDP(s) and for the role players involved during the various processes.

In order to establish a framework for integrated development planning, each district municipality must adopt a framework for integrated development planning in its area as a whole. The adoption of this framework is to be effected within a prescribed period after the start of the elected term of the council and also after a consultative process with the other local municipalities in the area has been followed. After adoption, the IDP framework binds both the district municipality and local municipalities in the relevant area jurisdiction of the particular district.<sup>18</sup> At the very least, the framework must

- identify the plans and planning requirements binding in terms of national or provincial legislation on the district municipality, the local municipalities or even any specific municipality on its own within the area
- identify the matters to be included in the IDPs of the district and local municipalities that require alignment
- specify the principles to be applied and co-ordinate the approach to be adopted in respect of the alignment of IDP matters
- determine procedures for consultation between the district and local municipalities during the process of drafting their respective IDPs and also the procedures to be implemented in order to effect essential amendments to the framework.<sup>19</sup>

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<sup>17</sup> See the Systems Act s 35. Refer also to item 2 of the local government: Municipal planning and performance management regulations as published under GNR 796 in GG 22605 of 24 August 2001. Item 2 deals with the details of an IDP.

<sup>18</sup> See the Systems Act s 27(1)-(2).

<sup>19</sup> Refer to the Systems Act s 27(2)(a)-(d). It should be noted that these provisions are applicable only between a district municipality and its various local municipalities. In a metropolitan area,

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Through their municipal councils and within a prescribed period after the start of their elected term, all municipalities are obliged to adopt a process set out in writing to guide the planning, drafting, adoption and review of their IDPs, however.<sup>20</sup> Through the various mechanisms of public participation, a municipality must consult with its local community before adopting the process mentioned above and must give notice to the local community regarding the particulars of the process it intends to follow.<sup>21</sup>

With reference to the process to be followed by a municipality to draft its IDP, the municipality must ensure the following requirements:<sup>22</sup>

- that the process is in accordance with a predetermined programme which must specify timeframes for different steps
- that mechanisms of public participation allow for
  - (a) the local community to be consulted on its development needs and priorities
  - (b) local community participation in the drafting of the IDP
  - (c) organs of state, traditional authorities and other role players to be identified and consulted on the drafting of the IDP
- that the identification of all plans and planning requirements that are binding on the municipality in terms of national and provincial legislation are provide for
- that the IDP is consistent with any other matters that may be prescribed by regulation.

In areas outside metropolitan areas, all district municipalities must plan integrated development for the area as a whole but in close consultation with the local municipalities and must draft its IDP after having taken into account the integrated development processes of and proposals submitted to it by the local municipalities in its area. Simultaneously, all local municipalities must align their IDPs with the framework adopted by the district municipality and must draft their IDPs, after taking into account the IDP process and proposals from the district municipality.<sup>23</sup>

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no such co-operation and alignment is necessary, as the metro municipality is the only local government operating in the particular area of jurisdiction.

<sup>20</sup> The new requirements make it clear that each and every local government is legally required to draft and adopt an IDP for its area. See the Systems Act s 28(1).

<sup>21</sup> See the Systems Act s 28(2)-(3).

<sup>22</sup> See the Systems Act s 29(1)(a)-(d).

<sup>23</sup> See the Systems Act s 29(2)-(3). It is clear that in the new legal system a district council's responsibility for a district IDP is a statutory requirement. All district councils must formulate district wide IDPs, which must include a framework for the IDPs of local councils in their areas of jurisdiction.

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The management of the IDP drafting processes falls under the responsibility of the executive committee or executive mayor of a municipality or under a committee of councillors appointed by the municipal council if it is a municipality without an executive committee or an executive mayor. The responsible committee or person must manage the drafting of the IDP, must assign responsibilities to the municipal manager in the IDP process and must submit the draft plan to the municipal council for adoption by the council.<sup>24</sup> Further monitoring and support to the process of integrated development planning is provided for in that the MEC for local government in the province may:

- monitor the process followed by a municipality
- assist a municipality with the planning, drafting, adoption and review of its IDP
- facilitate co-ordination and alignment of the IDPs of different municipalities and the strategies and programmes of national and provincial organs of state.

The MEC may take any appropriate steps to resolve disputes or differences in connection with the IDP processes between a municipality and its local community or between municipalities.<sup>25</sup>

After an IDP has been adopted or amended, the municipal manager of a municipality must submit a copy of the IDP to the MEC for local government in the province within ten (10) days after such adoption/amendment. The copy of the IDP must further be accompanied by a summary of the pre-adoption process, a statement that the process has been complied with, together with explanations where necessary, and finally in the case of a district and local municipality, a copy of the framework adopted for integrated development planning between the municipalities.<sup>26</sup> The MEC may within 30 days of receiving a copy of an IDP or amendment thereto, or within such reasonable longer period as may be approved by the minister of local government, request the relevant municipal council to adjust the plan or the amendment, in

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tion. District IDPs should thus determine a strategy for promoting economic development in the entire district and ensure upliftment of all communities. Such IDPs should guide revenue-raising and service-delivery activities and promote interaction between citizens, councillors, officials and higher spheres of government. It is important that District and Local IDPs be drawn up parallel to each other and inform and reinforce one another. District councils are thus responsible for aligning and co-ordinating potentially contradictory municipal IDPs. District IDPs are an important tool for integrating service-delivery activities and municipal goals.

<sup>24</sup> See s 30(a)-(c) of the Systems Act.

<sup>25</sup> See s 31(a)-(d) of the Systems Act. The monitoring and provincial supervision is subject to any other law(s) enacted to regulate such supervision in local government spheres, however.

<sup>26</sup> Refer to the Systems Act s 32(1)(a)-(b)(i)-(iii).

accordance with the MEC's proposals, if the plan/amendment does not comply with a requirement of the Systems Act or is in conflict or not aligned with the development plans and strategies of other affected municipalities or organs of state. The MEC may then request a municipal council to comply with the provisions of the Systems Act.<sup>27</sup> A municipal council must consider the MEC's proposals and, within 30 days of receipt of such proposals, adjust its IDP accordingly, if it agrees with the proposals. If a municipality disagrees with the proposals, it must object thereto and must furnish the MEC with written reasons for disagreeing. On receipt of such an objection, the MEC may refer the objection to an *ad hoc* committee for a decision. If the MEC decides to refer the objection, it must be referred within 21 days of receipt of the objection.<sup>28</sup>

The *ad hoc* committee mentioned above must be appointed by the MEC, whenever necessary. The committee must consist of members representing local government, the provincial government and national government. The MEC appoints the members of an *ad hoc* committee with the concurrence of the municipality concerned, the provincial organ or organs involved and with the concurrence of the national organ or organs of state involved in the dispute or in whose functional area the disputed is located.<sup>29</sup> The procedure of the *ad hoc* committee must be dealt with in accordance with procedures prescribed by regulation.<sup>30</sup> A matter before an *ad hoc* committee is decided if at least two spheres of government agree on the matter. If the committee rejects the objection(s) of the municipality, the municipality must comply with the initial request by the MEC within 30 days of the decision and after having been informed of the decision.<sup>31</sup>

All municipalities are also obligated to review their IDPs annually in accordance with an assessment of their performance measurements under section 41 of the Systems Act and also to the extent that changing circumstances so demand. The amendment procedure should be in accordance with a prescribed process.<sup>32</sup>

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<sup>27</sup> See the Systems Act s 32(2)(a)-(b).

<sup>28</sup> It seems clear from the Act that the MEC has a discretion either to refer such a dispute to an *ad hoc* committee or not to. Should he decide not to refer it, it seems that his decision would be final. See the Systems Act s 32(3)-(4).

<sup>29</sup> See s 33(2)(a)-(c) for more details.

<sup>30</sup> See the Systems Act ss 33(3) and 37.

<sup>31</sup> See the Systems Act s 33(4)-(5).

<sup>32</sup> Refer to the Systems Act s 34(a)-(b).

#### **20.2.4 Miscellaneous aspects concerning municipal integrated development planning**

The new legislative framework also affords specific status to a particular IDP. The Systems Act determines that an IDP adopted by a municipal council has the following importance:

- It serves as the principal strategic planning instrument which guides and informs all planning and development and decisions relating thereto in a municipal area.
- It binds the municipality in the exercise of its executive authority, except to the extent of any inconsistency between a municipality's IDP and national or provincial legislation, in which case such legislation is to prevail.
- It binds all other persons to the extent that those parts of the IDP that impose duties or affect the rights of those persons have been passed as a by-law.<sup>33</sup> It should be noted that a spatial development framework contained in an IDP prevails over a plan as is defined in section 1 of the Physical Planning Act of 1991.<sup>34</sup>

Finally, the Systems Act determines that all municipalities must give effect to their IDPs and conduct their affairs in a manner which is consistent with their IDPs. The national minister is further authorised, for the purposes of municipal integrated development planning, to make regulations or to issue guidelines in terms of section 120 of the Act and to provide or to regulate certain matters. Such matters are the following.<sup>35</sup>

- (a) incentives to ensure that municipalities adopt their integrated development plans within the applicable prescribed period, and comply with the provisions of the Act concerning the planning, drafting, adoption and review of those plans;
- (b) the detail of integrated development plans taking into account the requirements of other applicable national legislation;
- (c) criteria municipalities must take into account when planning, drafting, adopting or reviewing their integrated development plans;

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<sup>33</sup> See the Systems Act s 35(a)-(c). Although an IDP has been given statutory recognition and status, if certain parts of an IDP impose duties or affect the rights of other persons, such as the local community, eg, then such aspects should have been incorporated in a by-law and should have been passed as such to have binding force over such persons. See s 35(1)(c).

<sup>34</sup> 125 of 1991 and the Systems Act s 35(2).

<sup>35</sup> See the Systems Act s 37(1)(a)-(i).

- (d) the detail of the process for the planning, drafting, adoption and review of integrated development plans;
- (e) a process for the amendment of integrated development plans;
- (f) the manner in which an objection must be referred to an *ad hoc* committee envisaged in section 33;
- (g) the manner in which written evidence or documents must be submitted to an *ad hoc* committee;
- (h) the proceedings of an *ad hoc* committee; and
- (i) any other matter that may facilitate –
  - (i) integrated development planning and the drafting of integrated development plans; or
  - (ii) the application of this chapter.

When the minister makes regulations or issues guidelines to regulate matters under subsection 37(1)(b)-(e), he/she must take into account the capacity of municipalities to comply with those matters and must differentiate between different kinds of municipality according to their respective capacities. Furthermore, the minister is authorised to phase in the application of the provisions of the chapter on integrated development planning where such provisions place a financial or administrative burden on such municipalities.<sup>36</sup>

### **20.3 Conclusion**

It was demonstrated above that municipal development planning is not only a legal obligation for all municipalities but that without such planning municipalities will not be in a position to fulfil their obligations and responsibilities. The new local government dispensation is developmentally orientated, which in essence requires progress in the real realisation of developmental goals. Municipalities must therefore move forward and should enhance and create a better living environment for all South African citizens. Development planning is not something that can be done in isolation by individual municipalities. It requires constructive involvement of all three spheres of government on a vertical axis and also all relevant municipalities *inter se*, on a horizontal axis. The constitutional obligations and principles of co-operative govern-

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<sup>36</sup> See the Systems Act s 37(3)-(4). Refer again to the LG: Municipal Planning and Performance Management Regulations as published under GNR 796 of GG 22605 of 24 August 2001. Apart from the details of an IDP, the regulations also address the process for amending IDPs, referring of objections to IDPs to an *ad hoc* committee, as well as requirements giving effect to an IDP.



ment are therefore of significant importance in relation to developmental strategies and interaction between the various organs of state. Such co-operation will benefit not only municipalities but also both national and provincial policies and programmes.

Municipal development planning is incorporated mainly in a Municipal Integrated Development Plan (MIDP), which serves as a single, inclusive and strategic plan for the development of the municipal area. All MIDP must incorporate certain minimum core components as they guide the short-term development of local governments in South Africa. Because of its importance, an MIDP is strongly protected, and strict requirements for its adoption and amendment are determined by law. Such plans are flexible, living documents, however, and should be reviewed annually to keep up with the changing demands and circumstances in municipal jurisdictions. All in all, the new requirements and status of MIDP should go a long way towards helping the new local government structures to manage and achieve their important constitutional obligations.

## **Basic legal matters relevant to local government structures**

### **21.1 Introduction**

In light of the various aims and responsibilities of local governments, it is generally accepted that such governments are confronted with almost all aspects of the law. It was explained in chapter 10 that municipalities have been established throughout the whole territory of South Africa, and therefore there is no area that does not fall under the direct authority of a particular municipal council. The importance of legal knowledge regarding not only the composition and functioning of municipalities, but also other fields of law is of significant importance. No legal practitioner can practise law in a particular area in our country without a sound knowledge of the legal rules that are applicable to local governments. Every now and then a practitioner will be confronted with legal disputes that concern the particular local authority either directly or indirectly. In many areas, the local municipality is often the largest employer organisation and also the largest economically active entity. In short, one can say that a legal adviser for a local government or a practitioner advising clients on local government matters should have a sound legal knowledge of almost all the different fields of the South African law.

In order to be able to handle and address legal problems, it is important to know the law and where to find the law. As the law is constantly changing and developing, it is obvious that all role players in local government should be able to access and then apply the relevant legal rules that encompass the new local government dispensation. All role players must have a sound knowledge of the different sources of local government law. These sources are mentioned briefly below.

### **21.2 Sources of local government law**

In principle, there are three main sources of local government law. They are :

- legislation
- a combination of common law and customary law

- legal precedents.

It is only legislation and case law that are of importance to local government practitioners and legal scholars, however. Since local government law is part of the broader constitutional system of South Africa, customary and common law rules have very little or no influence or impact as a source of local government law.<sup>1</sup>

### **21.2.1 Legislation as a source of local government law**

Legislation is without a doubt the most important and influential source of local government law. It was discussed and explained above that the new local government dispensation was not only created in terms of legislation but that it also functions and operates according to various pieces of legislation. Such legislative requirements can be from either the national or a provincial government.<sup>2</sup> It should be pointed out that the term “legislation “ as referred to here, is a wide term and includes both national and provincial laws, as well as proclamations and regulations made by ministers or MECs.<sup>3</sup>

Within the ambit of legislation, it should be obvious and self-explanatory that the Constitution of the Republic of South Africa, which is a very unique and important legislative source of the country’s legal system, forms the basic legal framework on which the new local government system has been founded. The Constitution defines mainly the powers and functions of all three spheres of government and, in particular, the powers and functions of all local governments.<sup>4</sup>

Apart from the constitutional text itself, the Constitution further mandates the enactment of various other national and provincial laws, with the purpose of giving body to the basic legal framework of local governments. Such Acts, as was mentioned and discussed in the previous chapters of this work, then complete the legal framework within which local governments are operating.<sup>5</sup>

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<sup>1</sup> For more on this point see the cases of *In re: Certification of the Constitution of the RSA 1998*, 1996 (4) SA 744 (CC) and also *President of the RSA v Hugo* 1997 (4) SA 1 (CC).

<sup>2</sup> Because of the ever-changing needs of society, local government law is contained and regulated mainly by legislation.

<sup>3</sup> See the Constitution s 239 for a more exact definition of the term “legislation”.

<sup>4</sup> As the supreme law of the state, the provisions and requirements of the Constitution are non-negotiable. Non-compliance with the Constitution would result in invalidation. See the Constitution s 2.

<sup>5</sup> It was mentioned above that local government *per se* is not a concurrent legislative competence or exclusive legislative competence in terms of the Constitution Sch 4 and 5. This position seems to indicate that it is left for mostly the national government to legislate on local government matters, if so allowed by the Constitution. See the Constitution s 163. Only when the Constitution allows provincial laws over certain matters will it be possible for provincial governments to legislate

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### **21.2.2 The importance of customary and common law principles**

Basically there are two main reasons for both the common law and customary law not featuring as important sources of local government law. In the first instance, the new local government system is a totally new legal system which had its origins within the new constitutional legal foundation. The new system was totally overhauled to such an extent that common law rules are no longer of any importance. Secondly, the Constitution also does not contain a provision to the extent that the former common law or customary law principles still continue.<sup>6</sup> Apart from this position, the former local government system was regulated mainly by legislation under the then government of South Africa. The influence of common law or customary law under the former system was largely non-existent. Finally, it was held by the highest judicial authority in South Africa that even from a constitutional viewpoint there are no common law powers left that were derived from the former royal prerogatives. All such powers have now been enumerated within the text of the Constitution or other legislation.<sup>7</sup>

### **21.2.3 Judicial precedent as a source of local government law**

Apart from legislation, judicial precedents, or what are commonly referred to as “case law”, are the second most important source of local government law. The importance of legal jurisprudence is founded on two issues in particular. Firstly, South Africa follows the legal doctrine of *stare decisis*, which means that the lower courts in the hierarchy of judicial bodies are compelled to follow the decisions, in similar cases, handed down by the higher courts. Secondly, the Constitution clearly spells out the importance and role of the judicial authority in our legal system. According to the Constitution, the judicial authority of the Republic of South Africa is vested in the courts and the courts are subject to the Constitution and the law only. Any order or decision by a court binds all persons to whom it applies, including the state.<sup>8</sup> The importance of judicial precedents is therefore self-evident, and local government

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over such matters. See, eg, the Constitution s 139. Provincial laws relevant to local governments are therefore much less important than their national counterparts.

<sup>6</sup> Under the 1983 Constitution s 88 such conventions still continued to be in force. The 1996 Constitution does not provide for such continuation.

<sup>7</sup> See the *First Certification Judgment* 1996 1996 (1) SA 1 (CC); *President of the RSA v Hugo* 1997 (4) SA 1 (CC) and *President of the RSA v SARFU* 2000 (1) SA 1 (CC).

<sup>8</sup> See the Constitution s 165(1)-(5).

practitioners and scholars must ensure that they keep up to date with decisions of our courts regarding local government legal matters.

Apart from the sources mentioned above, there are no other real sources of local government law. Although the works and writings of legal scholars, the discussion and deliberations of politicians and the submissions of the concerned public at large are of importance to legal development, such aspects are not sources of local government law and should be regarded only as primary information sources from which the content of the law can sometimes be determined.

### **21.3 Important fields of law relevant to local government law**

It was mentioned above that local government administrations often face a large variety of legal issues. In order to cope with such issues, most municipal councils that can afford to do so have a specific legal section that advises and handles legal problems for both the political and administrative branches of the local authority. Municipal legal advisors are therefore responsible for both internal and external legal matters. Such a situation often demands broad legal and paralegal expertise. Local government matters are important not only to the political office bearers and administrative personnel, however. Such matters are also regularly of importance to the relevant local community. Of the three spheres of government, citizens of a state are most likely, at some stage, to be involved in a legal dispute with their local authority. Against this background it is obvious that local community members are in need of professional and expert legal advice and assistance regarding local government legal matters.

It falls way beyond the scope of this work to discuss or even try to explain the various legal fields that are of importance in municipal matters. What is of interest, however, is to highlight briefly some of the most common areas of legal dispute that involve local governments. While it is the task of lawyers and legal advisors to keep knowledgeable about the law in general, some of the specialised legal issues are also of value for both the political and administrative components of a municipality in order for them successfully to fulfil and maintain their duties and responsibilities.

#### **21.3.1 Common legal issues relevant to local governments**

- *The law of contract* The law of contract is particularly important to local government legal advisors. All municipalities are involved in various legal contractual re-

relationships on a regular basis. As a sphere of government and a legal entity, municipalities are legally empowered to enter and conclude contracts.<sup>9</sup>

- *Property law* The law concerning property and other related issues is also of regular importance to local governments. Property is regarded as of such importance in our modern democracy that it has been afforded direct protection under the Constitution.<sup>10</sup> Property law also includes issues regarding
  - (a) expropriation
  - (b) property leasing
  - (c) purchase, sale and acquisition
  - (d) transfer of property ownership
  - (e) other related land use rights such as the restitution of land rights, land reform measures, communal property associations, informal land rights issues and eviction requirements and procedures.<sup>11</sup>

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<sup>9</sup> See also *Keyser v Orkney Town Council* 2003 (4) SA 131 (T) with reference to lease agreements. In *Gordon v Pietermaritzburg-Msunduzi: TLC and Another* 2001 (4) SA 972 (N) it was mentioned that with the advent of SA's new constitutional dispensation, momentous changes were brought about to local government. The court held that the contract concluded between the parties was impossible to perform and, although it was true that the state was bound by ordinary commercial contracts concluded by it, in cases of impossible performance, the law of contract allows for the cancellation of the agreement. In the case certain regulations, which formed the basis of the contractual relationship between the parties, were repealed in the context of an entirely new constitutional dispensation, which included local government. See paras B-D at 978.

<sup>10</sup> According to the Constitution s 25, no *person* may be deprived of property except in terms of a law of general application. Arbitrary deprivation of property is specifically outlawed. Although property may be expropriated, there are specified requirements under which such expropriation must be done. Refer also to the case of *Modderfontein Squatters, Greater Benoni City Council v Modderklip boerdery (Pty) Ltd (Agri SA and Legal Resources Centre as amici curiae)*, also referred to as *President of the RSA v Modderklip boerdery* 2004 (6) SA 40 (SCA).

<sup>11</sup> Most of these issues are regulated in terms of specific Acts of parliament. For more on municipal property-related issues, refer to Nonyana MR "Communal Property Associations for convenience v townships for services and maintenance" *Property Law Digest* August 2000 Butterworths at 3. The writer refers to the Communal Property Association Act 28 of 1996 which has improved communal land ownership. See also the following cases: *De Villiers en 'n Ander v Stadsraad van Mamelodi en 'n Ander* 1995 (4) SA 347 (T) dealing with expropriation under the Expropriation Act 63 of 1975. See also *Cape Town Municipality v Table Mountain Aerial Cableway Co Ltd* 1996 (1) SA 909 (C). In *Southern Metropolitan Substructure v Thompson and Others* 1997 (2) SA 799 (W) it was held that a local authority's duty to provide and allocate housing cannot lawfully be fettered by contractual undertakings not to evict illegal occupiers of land. When land/property is sold, it must be described sufficiently in accordance with the Alienation of Land Act 68 of 1981. Faultless description is not required. See *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA). See also *M & J Morgan Investments (Pty) Ltd v Pinetown Municipality* 1997 (4) SA 427 (SCA), and *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) dealing with expropriation issues. Refer also to *Skinberg v South Peninsula Municipality* 2001 (4) SA 1144 (C). It was stated as a *semble* to the case that despite the clear distinction made in the Constitution s 25 between deprivation and expropriation of property, there may be room for the development of a doctrine akin to constructive expropriation in South Africa, particularly where a public body utilises a regulatory power in a manner which, taken in isolation, can be categorised as a deprivation of prop-

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An interesting aspect regarding land is the Subdivision of Agricultural Land Act,<sup>12</sup> which requires that agricultural land may not be subdivided unless the Minister of Agriculture has given his written consent thereto.<sup>13</sup> Section 12 of the Local Government: Municipal Structures Act<sup>14</sup> allowed for the establishment of new municipalities for the entire territory of South Africa, however.<sup>15</sup> Accordingly, it is argued by some that all land now falls within the jurisdiction of a municipality.<sup>16</sup> Since agricultural land also falls within the jurisdiction of a municipal council, it seems that section 3 of the Subdivision of Agricultural Land Act no longer has application.

- *The law of delict* The law of delict is an equally important field of law within the local government domain. All municipalities face delictual accountability on a daily basis. Delictual liability is confined not only to general delictual claims but also more specialised claims under the legal protection of vicarious liability, defamation and other unique forms of delictual accountability. The law of delict is a vast and often complex field of the law and should be studied carefully.<sup>17</sup>

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erty rights and not an expropriation, but which has the effect, albeit indirectly, of transferring those rights to the public body. Other issues dealing with property-related matters were decided in *Bailes v Town and Regional Planning Commission* 2002 (2) SA 589 (N), *Kotzé v Minister of Landbou en Andere* 2003 (1) SA 445 (T), *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn* 2003 (6) SA 140 (C) and *Baartman and Others v Port Elizabeth Municipality* 2003 (3) SA 560 (SCA). Refer also to Griffiths G "Not so fast – that's municipal land: A discourse on the acquisition of municipal property under the Cape Municipal Ordinance 20 of 1974" *Property Law Digest* (1999) Butterworths at 11.

<sup>12</sup> 70 of 1970.

<sup>13</sup> Refer to the Act s 3.

<sup>14</sup> 117 of 1998.

<sup>15</sup> Read also the Constitution s 151(1), which states that the local sphere of government consists of municipalities which must be established for the whole territory of the Republic.

<sup>16</sup> See the letter of MJ Meyer "Is Act 70 of 1970 still necessary?" *DR* December 2001 at 5.

<sup>17</sup> Judicial examples of recent delictual cases concerning local authorities are the following: *Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 (4) SA 745 (O), dealing with the responsibility of a municipal airstrip; *Gardner v Whitaker* 1995 (2) SA 672 (E), dealing with issues of defamation; *Cape Town Municipality v Butters* 1996 (1) SA 473 (C), dealing with public liability; *Cape Town Municipality v Bakkerud* 1997 (4) SA 356 (C), concerning municipal liability for damages resulting from an omission to repair streets and pavements; *Welkom Municipality v Masureik and Herman t/a Lotus Corp* 1997 (3) SA 363 (SCA); *Pretoria City Council v De Jager* 1997 (2) SA 46 (SCA), dealing with the liability when failing to take reasonable precautions to prevent foreseeable harm on municipal sidewalks; *Graham v Cape Metropolitan Council* 1999 (3) SA 356 (C); *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA); *Grootboom v Graaff-Reinet Municipality* 2001 (3) SA 373 (E); *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA); *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA), concerning liability for municipal council's water main bursting and *Minister of Safety and Security v Duivenboden* 2002 (6) SA 431 (SCA) relevant to municipal security/police services. See also the following academic research: Scott J "Grootboom v Graaff-Reinet Municipality" *De Jure* 2002 at 635; Scott J "Re-affirmation of the doctrine of immunity of municipalities against liability for wrongful omissions assessed and rejected – Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA) *THRHR* 2001 (64) at 502; Scott J "The Cape Metropolitan Council v Noel Raymond Graham case no 157/99 (C)" *De Jure* (2001) at 198; Scott J "Cape Town Municipality v Butters 1996 (1) SA 473 (C)" *De Jure* (1996) at 379 and Smith A "Mu-

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- *Constitutional law and administrative law* The importance of constitutional law, which includes not only formal constitutional law but also aspects of fundamental rights law, administrative law, environmental law, legal interpretation and even some aspects of public international law have been highlighted above. Apart from the obvious importance of the Constitution and its Bill of Rights, the legal rules regulating the field of administrative law are also of particular importance to all local government bodies. Many municipal actions form part of the executive authority of the state and therefore fall under the rules of administrative law. The importance of administrative law was specifically highlighted in the case of *Fed-sure Life Assurance v Greater Johannesburg TMC*.<sup>18</sup> In this case it was mentioned that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates or determines appropriations to be made out of public funds, such a power is peculiar to elected legislative bodies. Such powers are exercised by democratically elected representatives after due deliberation of the circumstances and cannot be classed as administrative action.<sup>19</sup> Not only the legal advisors of a municipality, but all municipal administrators, should have a basic understanding and knowledge of administrative law and its various related legal rules.<sup>20</sup>
- *Criminal law* Municipalities are also often involved within the ambit of criminal law. Such issues are confined not only to incidents where municipal personnel are implicated in criminal activity but can also relate to incidents where municipal employees or even councillors are held criminally liable for activities within a particular municipality. So, for example, is it possible for a municipal official, mostly the municipal manager, to be held liable for non-compliance with certain

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municipalities mend your ways" *The Quarterly Law Review* for people in business vol 8 part 2 (2000) at 40.

<sup>18</sup> 1999 (1) SA 374 (CC).

<sup>19</sup> Refer to para 45 at 396-397.

<sup>20</sup> For more on constitutional and administrative law see the cases of *Claude Neon Ltd v Germiston City Council and Another* 1995 (3) SA 710 (W), where the court held that an undertaking by a local authority official to notify a person is an administrative act that gives rise to a legitimate or reasonable expectation. See also *Tony Rahme Marketing Agencies SA (Pty) Ltd and another v Greater JHB TMC* 1997 (4) SA 213 (W); *Gencor SA Ltd v TC for Rustenburg and Environs and another* 1998 (2) SA 1052 (T); *Erf one six seven Orchards CC v Greater JHB Metro Council and Another* 1999 (1) SA 104 (SCA) and *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA). See *City of Cape Town v Rudolph and others* 2004 (5) SA 39 (CPD) regarding a housing dispute under s 26 of the Constitution.

legislative requirements.<sup>21</sup> The importance of criminal law within the new local government dispensation should not be underestimated, therefore.

- *Labour law* The importance of labour law for municipal governments is particularly highlighted by the fact that municipalities are often one of the larger employer organisations within a particular municipal area. Depending on the size of the municipality, municipal councils employ hundreds or even thousands of personnel. Labour law issues are thus part and parcel of a municipal administration, and a sound knowledge of labour law is essential. Apart from normal labour issues such as wage negotiations, promotions and disciplinary action against employees, local government administration also encounter more specialised labour issues such as disputes within essential services areas. Because of the importance of labour law in local government, most municipalities have established personnel and labour relations departments to handle such matters. There is even a specific bargaining council that was established to resolve and deal with municipal labour issues between municipalities as employers, and labour unions as representatives of municipal employees.<sup>22</sup>
- *Building regulations and town and regional planning law* All municipalities are required to be involved in local planning processes and developmental programmes. Each municipal government is therefore regularly involved in town planning activities, and municipalities must also ensure that minimum building standards are complied with.<sup>23</sup>

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<sup>21</sup> See the Occupational Health and Safety Act 85 of 1993 as an example.

<sup>22</sup> For typical examples of labour-related issues in local authorities see *Cape Local Authorities Employers Organisation v IMATU* 1997 (1) SA 656 (C) and *Mhlambi v Matjhabeng Municipality and another* 2003 (5) SA 89 (O). In the latter case the court held *inter alia* that a reasonable request for further particulars in a disciplinary action is an ingredient of the right to a fair hearing and that the principles of natural justice demanded that such information be furnished.

<sup>23</sup> For more on town planning and building requirements see the National Building Regulations and Building Standards Act 103 of 1977. Refer also to cases such as: *Sandton Town Council v Gourmet Property Investments CC* 1994 (4) SA 569 (A) dealing with national building regulations; *Diepsloot Residents and Landowners Association and Another v Administrator Tvl* 1994 (3) SA 336 (A); *Schapenrome Investments (Edms) Bpk v Sandtonse Stadsraad* 1994 (2) SA 34 (A); *Stands 5/1 Wierda Valley (Pty) Ltd and Another v Sandton Town Council* 1994 (1) SA 333 (A); *Knop v JHB City council* 1995 (2) SA 1 (A); *Huisman v Minister of Local Government, Housing and Works* 1996 (1) SA 836 (A); *East Zulu Motors v Empangeni/Ngwelezane TLC* 1998 (2) SA 61 (CC) and also *Paola v Jeeva and others* 2004 (1) SA 396 (SCA), concerning the value of a view of a property. Refer also to Van Wyk J and Van Wyk D "Planning law, administrative justice and the Constitution: *Van Juyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C)" *THRHR* 1996 (59) at 675 *et seq*; *Gildenhuys A "Omgewingsbewaring beperkings op grondgebruiksveranderingen"* *Butterworths Property Law Digest* (2000) at 13 and Van Wyk J "Planning Law – Will Cinderella emerge a princess?" *THRHR* 1996 (59) at 1. See also the case of *Humphrys NO v Barnes* 2004 (2) SA 577

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- *Environmental law* It was mentioned above that all three spheres of government must comply with the new constitutional requirements. One such requirement is the provision of a clean and healthy environment. Environmental laws are therefore of significant importance for all local authorities. It is essential for municipalities to determine their responsibilities under current legislative provisions and to ensure compliance with their obligations in that regard.<sup>24</sup>

#### **21.4 Special legal matters pertaining to local government**

Apart from the general legal fields that have an impact on local governments, the new local government legal framework also provides for specific legal matters that are of particular importance to local authorities.<sup>25</sup> These special provisions regarding municipal legal matters must be read in conjunction with the general provisions of the law.

##### **21.4.1 Legal proceedings**

According to the Systems Act, all municipalities are authorised to compromise or compound any action, claim or proceedings and may submit to arbitration any matter other than a matter involving a decision on its status, powers, duties or the validity of its actions or by-laws.<sup>26</sup> The particular subsection is somewhat dubious and unclear. As a legal person all municipalities have legal standing and may thus institute or defend any legal action in which they have a direct, or sometimes indirect, interest. However, this position is conditional to the extent that the particular legal action is indeed permissible under the law in general.

##### **21.4.2 Legal representation for employees or councillors of a municipality**

Under the new legal framework, it is permissible for a municipality, subject to such terms and conditions as it may determine, to provide an employee or a councillor of

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(CPD) regarding the collapsing of a boundary wall between two private property owners. Refer also to *Botha v White* 2004 (3) SA 184 (TPD) regarding the use of a property contrary to the applicable zoning. See also *Clark v Faraday and Another* 2004 (4) SA 564 (CPD) regarding the approval of building plans and a neighbour's view. The court held *inter alia* that an owner of land who uses his/her property in an ordinary and natural manner is not guilty of committing an *injuria* to other property owners.

<sup>24</sup> For more on environmental aspects see *Verstappen v Port Edward Town Board and Others* 1994 (3) SA 569 (D), the Environmental Conservation Act 73 of 1989 and Witbooi E "Obligations on property owners to control alien invasive vegetation on their land" *Butterworths Property Law Digest* March 2003 at 3.

<sup>25</sup> Refer to the Local Government: Municipal Systems Act 32 of 2000 ch 11 as amended by Act 40 of 2002 s 2(1).

<sup>26</sup> See the Systems Act s 109(2).

the municipality with legal representation where applicable. Such legal representation is limited to only two instances, however.<sup>27</sup>

- where legal proceedings have been instituted against the employee or councillor as a result of any act or omission by that person in the exercise of his or her powers or the performance of his or her duties or
- where the employee or councillor has been summoned to attend any inquest or inquiry arising from the exercise of his or her powers or the performance of his or her duties.

It should be noted that employees or councillors are not automatically entitled to the legal representation mentioned above. The decision to provide for such representation lies with the municipal council. All legal assistance not addressed in the two instances above should be for the employee's or councillor's own account and should not be funded from the municipal/public purse.

#### **21.4.3 Issues concerning evidence**

The Systems Act specifically provides that in legal proceedings against a municipality a certificate which purports to be signed by a staff member of the municipality and which claims that the municipality used the best known or only or most practicable and available methods in exercising any of its powers or performing its functions must, on its mere production by any person, be accepted by a court as evidence of that fact.<sup>28</sup> It is further provided that a copy of the *Provincial Gazette* in which a by-law was published may, on its mere production in a court by any person, be used as evidence that that by-law was passed by a municipality concerned.<sup>29</sup>

#### **21.4.4 Fines, bail and the prosecution of offences**

Under the new legal framework, a staff member of a municipality so authorised may institute criminal proceedings and conduct the prosecution in respect of a contravention of or failure to comply with a provision of

- a by-law or regulation of the municipality
- other legislation administered by the municipality or

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<sup>27</sup> See the Systems Act s 109A(a)-(b).

<sup>28</sup> The Systems Act s 110.

<sup>29</sup> Refer to the Systems Act s 111. It is submitted, however, that such a situation should prevail only in instances where no contrary evidence is presented to a particular court.

- other legislation as determined by the National Director of Public Prosecutions in terms of section 22(8)(b) of the National Prosecuting Act of 1998.<sup>30</sup>

It is also provided that fines and bails that were recovered in respect of offences or alleged offences referred to in item 2 of Schedule 4 to the Public Finance Management Act<sup>31</sup> must be paid into the revenue fund of the municipality concerned.<sup>32</sup>

#### **21.4.5 Time of notices, payments and the service of documents and process**

A payment may be made at a municipality only during the normal or extended office hours of a municipality, except when payment is made by electronic transfer or at an agency pay-point. These times also apply to when any notice or other document may be served on the municipality, including its council, other structures, functionaries or staff members in an official capacity. There are exceptions to this rule in urgent matters, however.<sup>33</sup> Any notice or other document that is served on a person in terms of the Systems Act or by a municipality in terms of any legislation is regarded as having been served when:

- it has been delivered to that person
- it has been left at that person's place of residence or business in the Republic of South Africa with a person apparently over the age of sixteen years
- it has been posted by registered or certified mail to that person's last known residential or business address in the Republic of South Africa and an acknowledgement of the posting thereof is obtained from the relevant postal service
- it has been served on a person's agent or representative in the Republic of South Africa in a manner provided for above if that person's address in the RSA is unknown
- it has been posted in a conspicuous place on the property or premises of the person to which it relates if that person's address or agent in the Republic of South Africa is unknown.<sup>34</sup>

It is also provided that when any notice or other document must be authorised or served on the owner, occupier or holder of any property or right in any property, that it is sufficient if that person is described in the notice or document as the owner,

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<sup>30</sup> A staff member may prosecute or conduct criminal proceedings only if so authorised in terms of the National Prosecuting Authority Act 32 of 1998 s 22(8)(f).

<sup>31</sup> 1 of 1999.

<sup>32</sup> See the Systems Act s 113.

<sup>33</sup> See the Systems Act s 114(a)-(b).

<sup>34</sup> See the Systems Act s 115(a)-(e) as amended by Act 6 of 2004 see 94.

occupier or holder of the property. In such cases it is not necessary to name the person specifically. Finally, any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a person in attendance at the municipal manager's office. Outside parties thus seeking to serve on a municipality documents of whatever nature should serve such documents on the office of the municipal manager.<sup>35</sup>

A further important practical aspect concerning the institution of legal proceedings against a municipal council is the provision of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act<sup>36</sup>. According to this Act a notice must be sent to a municipality informing it of a claim against the municipality. According to section 2 of the Act such a notice/letter of demand must be sent to the council within 90 days of the date of the cause of action. After such notice, no formal summons may be issued against the municipality concerned, unless the claim has been rejected or a further 90 day period has lapsed. It must also be noted that the Act also requires that a claim prescribes against a council unless summons has been issued within 24 months since the occurrence of liability. Several case law precedents have been developed over such matters. See for example *Ntanga v Butterworth Municipality and another*<sup>37</sup> and also *East London Municipality v Abrahamse*.<sup>38</sup> In many instances the requirements of the Act were strictly enforced. Refer to *De Klerk en 'n ander v Groter Kroonstad Plaaslike Oorgangsraad*.<sup>39</sup> In *Provinsie van die Vrystaat v Williams No*<sup>40</sup> the Appellate Division confirmed that the term/word "liability" in the context of the Act has a wide meaning. Finally, the Constitutional Court in 2001 held that the Limitation of Legal Proceedings Act, which requires the specific notice within a short period of time and with limited scope for condonation for non-compliance, constitutes a material limitation of an individual's right of access to a court under section 34 of the Constitution and that such limitation could not be justified under section 36 of the Constitution. Accordingly, the court held that section 2(1)(a) of the Act was unconstitutional and invalid. See *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre*

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<sup>35</sup> Refer to the Systems Act s 115(2)-(3).

<sup>36</sup> 94 of 1970.

<sup>37</sup> 1995 (4) SA 437 (Tks).

<sup>38</sup> 1997 (4) SA 613 (SCA).

<sup>39</sup> 1999 (2) SA 870 (O).

<sup>40</sup> 2000 (3) SA 65 (SCA).



as *Amicus Curiae*).<sup>41</sup> In a follow-up case, the Constitutional Court further held that the invalidation of section 2(1)(a) of the Act operated retrospectively to the moment the Constitution came into effect. Since the Constitution came into effect, the inconsistency of the Act has become evident and, as a matter of law, the provision of the Act has been a nullity since that date.<sup>42</sup>

#### **21.4.6 Public servitudes and the custody of documents**

Similar to the situation under some of the former ordinances that affected local governments, the Systems Act now confirms that all public servitudes in favour of a municipality are under the control of the municipality. A municipality must further protect and enforce the rights of the local community arising from those servitudes.<sup>43</sup> It is also the responsibility of the municipal manager to take custody and control of all of a municipality's records and documents, unless where otherwise provided.<sup>44</sup>

#### **21.4.7 Restraint on transfer of property**

All municipalities are directly involved in the process of transferring property (land) from one person or institution to another. Similarly to the South African Revenue Service, a municipality must provide a clearance certificate stating that all levies, duties or taxes payable to the municipality have been paid up to date before a particular property can be transferred. In order to protect a municipality, and thus also its public community, from losing valuable revenue for service already rendered, the Systems Act determines that a registrar of deeds may not register the transfer of property except on production to that Registrar of Deeds of a prescribed certificate which :

- was issued by the municipality or municipalities in which that property is situated and
- certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.<sup>45</sup>

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<sup>41</sup> 2001 (4) SA 491 (CC).

<sup>42</sup> Refer to *Ex parte Women's Legal Centre v Greater Germiston TLC* 2001 (4) SA 1288 (CC).

<sup>43</sup> See the Systems Act s 116.

<sup>44</sup> The Systems Act s 117.

<sup>45</sup> See the Systems Act s 118(1)(a)-(b). The certificate is valid for a period of 120 days from the date it was issued. The Act s 118(1A). This was also the position under some of the former provincial ordinance. Refer also to *Venter NO v Eastern Metro Substructure, Greater JHB TC* 1998 (3) SA

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In the case of a transfer of property by a trustee of an insolvent estate, the transfer and recovery of monies are subject to section 89 of the Insolvency Act.<sup>46</sup> To help secure municipal funds even more efficiently, it is specifically provided that an amount due for

- municipal service fees
- surcharges on fees
- property rates and other municipal taxes
- levies or duties

is a charge upon the property in connection with which the amount is owing and that such a claim enjoys preference over any mortgage bond registered against the property.<sup>47</sup> The requirement of a clearance certificate does not apply to a transfer from the national government, a provincial government or a municipality of a residential property which was financed with funds or loans made available by any of the three spheres of government, and when the vesting of ownership as a result of a conversion of land tenure rights into ownership in terms of the Upgrading of Land Tenure Rights Act of 1991.<sup>48</sup> However, municipalities are not precluded from collecting any amounts owed to them in respect of such a property at the time of the transfer or conversion.<sup>49</sup> Finally, the preference that is enjoyed over any mortgage bond does not apply to any amount referred to which became due before a transfer of a residential property or a conversion of land tenure rights into ownership.<sup>50</sup>

Although the protection of municipal service fees, surcharges, property rates and other taxes or levies is not something new, its new statutory protection has been the

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1076 (W). For an example of a certificate under s 118 see GN 686 as published in GG 24886 of 23 May 2003.

<sup>46</sup> 24 of 1936. S 89(4) provides that notwithstanding the provisions of any law which prohibited the transfer of any immovable property, unless any tax as defined in ss (5) due thereon had been paid, that law would not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate if he had paid the tax which might have been due on that property in respect of the periods mentioned in ss (1) and that no other preference would be accorded to any claim for such tax in respect of any other period. S 89(5) provided that, for the purposes of subss (1) and (4), 'tax' in relation to immovable property meant any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established under the authority of any law in discharge of a liability to make such periodical payments if that liability was an incident of the ownership of that property.

<sup>47</sup> See the Systems Act s 118(3).

<sup>48</sup> See Act 112 of 1991.

<sup>49</sup> The Systems Act s 118(4)(a)-(b).

<sup>50</sup> The Systems Act s 118(5).

focus of legal debate and even strong judicial challenge. In the matter between *Greater Johannesburg TMC v Galloway No and Others*<sup>51</sup> the first respondent, a liquidator of a company, had sold immovable property belonging to the company to the second respondent. In order to proceed with the transfer of the property, the first respondent applied to the municipality/applicant for clearance figures in order to pay such and to obtain a clearance certificate in accordance with section 50 of the Local Government Ordinance.<sup>52</sup> Upon receipt of the figures, the first respondent disputed certain amounts claimed by the council. The respondent also took the view that he was not required to pay the disputed levies/taxes by reason of section 89 of the Insolvency Act.<sup>53</sup> The court held that section 89(4) overrode the provisions of any other law which prohibited the transfer of any immovable property unless any tax defined under section 89(5) due on the property in question had been paid. The liquidator thus had to pay certain taxes. Any items prescribed by section 50 of the Ordinance which fell outside the definition of a tax set out in section 89(5) were not payable by the liquidator in order to obtain the clearance certificate.<sup>54</sup> The court further held that section 89(4) did not extend to water, electricity and refuse removal charges. Such items were not in respect of the property but were in respect of the agreements which had been entered into for the provision of such services and therefore in respect of the services themselves. Charges in respect of electricity, water and refuse removal were not in respect of the property and could not be recovered as a prerequisite before the clearance certificate was issued. The application by the council was accordingly dismissed.<sup>55</sup> A similar issue was decided in *Eastern Metropolitan Substructure of the Greater Johannesburg Transitional Council v Venter NO*.<sup>56</sup> The case concerned a liquidator of a close corporation who had paid to the local authority under protest certain amounts for basic water and sewerage charges. The respondent argued that such charges did not constitute taxes under section 89(1) and 89(5) of the Insolvency Act and that he was not obligated to pay such amounts in order to obtain a clearance certificate under section 50 of Ordi-

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<sup>51</sup> 1997 (1) SA 348 (W).

<sup>52</sup> O 17 of 1939 (T) which provided that the transfer of land was not to be effected unless certain amounts due to the council had been paid.

<sup>53</sup> 24 of 1936.

<sup>54</sup> At 355-356.

<sup>55</sup> Refer to paras C-D at 360.

<sup>56</sup> 2001 (1) SA 360 (SCA).

nance 17 of 1939 (T). Rezoning fees under sections 48 and 63 of the Town Planning and Townships Ordinance 15 of 1986 (T) were also in issue. Contrary to the decision in *Greater JHB TMC v Galloway NO* above, the Supreme Court of Appeal held that there was no basis on which it could be contended that amounts not constituting taxes listed in section 50(1) of the Ordinance did not have to be paid by the respondent in order to obtain a clearance certificate. Although the amounts were not taxes, the council was entitled to withhold the clearance certificate until they were paid.<sup>57</sup> The court further held that once it had been accepted that the amounts were due and owing in terms of section 50, there was no legal basis for the amounts to be repaid to the respondent. Since the respondent wished to transfer the properties, he had to pay the amounts due in respect of the rezoning fee, and the basic water and sewerage charges so as to have the embargo created by section 50 lifted.<sup>58</sup> Section 118 of the Systems Act was also subjected to constitutional challenge. In *Geyser and another v Msunduzi Municipality and others*<sup>59</sup> it was argued by the applicant/owner of a property who was held liable by the respondent municipality for municipal service fees due on the property which the applicant leased to a tenant, that the charges were unconstitutional since they resulted in arbitrary destruction and deprivation of the property owner's rights under section 25 of the Constitution. The court held that although section 118 of the Act clearly envisaged deprivation of the property, the purpose of the deprivation was to facilitate debt recovery, which was a legitimate and important purpose essential for the economic viability and sustainability of municipalities in South Africa. There was thus a rational connection between the means employed and the desired result. The limitation on property owners' rights was reasonable and reflected a fair balance between public interest and the property owner's interest. Section 118 is thus not arbitrary and not inconsistent with the Constitution.<sup>60</sup> The court also held that municipal service fees were based on consumption and thus could not refer to rates on property. Such fees included charges for electricity and water consumption supplied to the owner/occupier of the property. The section also applied to all municipalities in the Republic, thus excluding incapacity in application. Notwithstanding the court's decision, some commentators have

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<sup>57</sup> See paras D-F at 369.

<sup>58</sup> At paras B-C at 370.

<sup>59</sup> 2003 (5) SA 18 (N).

<sup>60</sup> Refer to paras A-D at 38-39.

argued that the obligation on owners to pay all outstanding arrears is contrary to the Constitution.<sup>61</sup>

#### **21.4.8 Miscellaneous provisions**

The Systems Act also provides for a few miscellaneous legal aspects.<sup>62</sup> In the first place it is provided that a councillor who attempts to influence the municipal manager or any other staff member or even agent of a municipality not to enforce an obligation in terms of the law or a decision of the council is guilty of an offence and is on conviction liable to a fine or to imprisonment for a period not exceeding two years.<sup>63</sup> A person acceding to such an attempt is also guilty of an offence punishable with the same sanction. If a person is convicted of an offence and is subsequently sentenced to more than 12 months' imprisonment without the option of a fine, he/she is disqualified from remaining a councillor and cannot become a councillor of any municipality during a period of five years from the date of the conviction.<sup>64</sup>

The minister concerned with local government is also authorised to make regulations on certain matters and to issue guidelines that are not inconsistent with the Act.<sup>65</sup>

Finally, the Systems Act provides for certain transitional arrangements and the phasing in of the provisions of the Act itself. Under transitional arrangements, it is provided that any written agreement on the exercise of executive authority in an area of another municipality, which agreement existed immediately before the Act took effect, must be regarded as having been concluded in terms of the relevant provisions of the Systems Act.<sup>66</sup> The minister must also initiate steps for the rationalisation of existing national and provincial planning legislation applicable to municipalities in order to facilitate local development planning as an integrated concept within the system of co-operative government as is envisaged in section 41 of the Constitution. Mechanisms for facilitating co-ordination between sectoral regulation of local government matters must also be established.<sup>67</sup> In order to facilitate a smooth transition,

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<sup>61</sup> Refer to Kidson J "Rights of local government to collect service arrears" March (2002) *DR* at 8-9. The writer submits various arguments to explain why outstanding arrears are not payable.

<sup>62</sup> See the Systems Act ch 12.

<sup>63</sup> The Systems Act s 119.

<sup>64</sup> The Systems Act s 119(4).

<sup>65</sup> See the Act s 120(1)-(7) as amended for more full particulars on the procedures and requirements relevant to the making of regulations and guidelines.

<sup>66</sup> See the Systems Act s 122(1) read with s 11(2).

<sup>67</sup> See the Systems Act s 122(2)(a)-(b).

the minister is authorised to phase in the various applications of the provisions of the Systems Act which place a financial or administrative burden on municipalities.<sup>68</sup>

### **21.5 Conclusion**

It seems obvious that the application of the law is of significant importance to all local government structures. The law in general and, more particularly, the law relating to municipal affairs form not only the basis on which all municipalities must function, but also set the scene within which municipalities are to fulfil and perform their new constitutional role and obligations. It is clear in this respect that a sound knowledge of all the relevant legal principles relating to local government matters is an essential requirement for legal advisors, private practitioners, local administrators and political office bearers alike.

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<sup>68</sup> The Systems Act s 123.

## Concluding remarks

### 22.1 Introduction

It is clear from the above that the third sphere of government has changed drastically from the order that was in place prior to 1994. The new supreme Constitution with its comprehensive Bill of Rights has set a new legal paradigm for municipal government. It is especially the founding values and specific municipal objects of the new constitutional dispensation that had an unprecedented impact.<sup>1</sup> Compliance with the new constitutional provisions is imperative whether that relates to legislative or executive actions or even the conduct of bodies or institutions within the state. The Constitution however only provides a basic constitutional framework. In many instances the basic framework had to be completed through the enactment of various national or provincial laws.<sup>2</sup>

In chapter one of this research it was stated that the aim of the research is two-fold. The first objective was to provide a systematic and comprehensive exposition of the new constitutional and other national legislative provisions relevant to the new system of local government. In this respect it is submitted that the preceding chapters do indeed achieve such an objective. Almost all legislative provisions relevant to local government have been systematically subdivided into the various chapters and have been grouped together according to their topics and relevance. It is submitted that the compilation and systemisation of the many legal requirements should indeed contribute to making the legal dispensation regarding local government law more accessible which in turn could enhance more research and debate in this often neglected albeit important field of law.

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<sup>1</sup> Read s 1 of the Constitution. According to s 2 the Constitution is entrenched as the supreme law of the SA state and any law or conduct inconsistent with the Constitution is invalid. All the obligations imposed by the Constitution must be fulfilled.

<sup>2</sup> See again the provisions set out in ss 151(3), 154(1), 155(2) and (3), 157(2), 160(5) and 164 of the Constitution which specifically require either national or both national or provincial laws on issues directly relevant to local government matters.

The second aim was to evaluate the extent of compliance with the new local government legal system, to the key normative principles set out in the Constitution and which underpins the new legal government system. Such a evaluation can only be conducted after due regard to all the constitutional and subsequent national legislative requirements. In an effort to link the various preceding chapters together and to tie-up the research as a whole, a brief summary of the extent of compliance with the key constitutional requirements and prerequisites is provided in this conclusion. The summary follows the same chronological sequence as was provided for in the introductory chapter of this work.

## **22.2 Evaluating compliance with the key normative principles of the new local government legal dispensation**

### **22.2.1 *Is the new local government legal dispensation non-racial and truly democratic?***

The new dispensation has undoubtedly overturned the segregation and apartheid policies of the past and has provided a platform for a uniform democratic local sphere of governance where municipal services are rendered for the benefit of all people. The confirmation within the supreme law of the South African state of *inter alia* the founding values of equality, democracy, freedom, non-racialism and non-sexism has created a strong foundation to ensure that all spheres of government are constitutionally obligated to ensure a non-racial and democratic government.

### **22.2.2 *Does the new nature, rights and duties of municipalities comply with the new constitutional vision?***

It was indicated above that the new local government system does not only provide local government with a distinctive legal nature, but also sets down clear and precise rights and duties for all local government structures.<sup>3</sup> This is necessary to ensure local governments are empowered to fulfil their duties. The new system not only provides local authorities with the required foundation to act, but also incorporates constitutional values of accountability and public participation. These values are particularly promoted through legislative provisions which confirm that local government consists out of political, administrative and local community components. As such, the new legal framework should enhance and promote the underlying values

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<sup>3</sup> Read ss 4, 5 and 6 of the Municipal Structures Act together with s 156 of the Constitution.



that the Constitution demands.

### **22.2.3 *Municipal government and the principles of co-operative government***

The Constitution obligates all three spheres of government to comply with specific principles aimed at ensuring a system of co-operative federalism. All spheres have been allocated with specific functional activities. Although significant protection of such powers is provided for, many overlaps between the specified functions do occur. Such overlaps in turn again require proper co-operation between the spheres in order to fulfil their functions and responsibilities. In an effort to ensure such co-operation the Constitution determines various principles with which all spheres must comply.<sup>4</sup> The new legal framework, *via* the Municipal Systems Act, specifically expands on the basic constitutional provisions and thus enhances the envisaged constitutional scheme.

### **22.2.4 *The establishment of a new system and structure for local government***

It is a specific constitutional obligation, that all former local governments had to be restructured and that new institutional models for local government structures had to be provided for. Furthermore, the whole territory of the Republic had to be included in the jurisdiction of a specific municipal authority.<sup>5</sup> The new legal dispensation indeed complies with these constitutional requirements. In the first instance, the entire territory of the South African state falls within the jurisdiction of a demarcated municipal government. Even areas that are not viable to have their own direct local government, ie district management areas, fall under the control of a district municipality within that area. Secondly, the Municipal Structures Act provides for various new institutional models of local government. Apart from the constitutionally defined categories of municipalities the act provides for the establishment of various models of municipal types by combining various municipal systems.<sup>6</sup>

In total five systems have been created. Three are so-called executive systems whilst two are participatory systems. Since the powers, functions and circumstances of municipalities differ it is submitted that the various combination possibilities indeed should be able to cater for the different needs and responsibilities of all municipalities. The new legal framework further aims not only to achieve more effective execu

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<sup>4</sup> Refer to ss 40 and 41 of the Constitution.

<sup>5</sup> See s 151 of the Constitution.

<sup>6</sup> See s 7 of the Structures Act.

tive functioning but also to ensure public involvement and participation, which again should enhance the underlying values of the Constitution. Although a clear division of the roles and responsibilities of the various types of municipalities has been determined, there seems to be some uncertainty in practise. Uncertainty especially exists relating to the division of powers and functions between local municipalities and their relevant district municipalities. Notwithstanding such difficulties, the new legislative provisions have ensured that all municipal institutions have been re-established and all former municipal authorities have been replaced by newly transformed local authorities. Municipal boundaries were re-determined and many municipalities were amalgamated into new enlarged and supposedly more effective institutions.

A significant number of municipalities however still face enormous challenges relating to their new structures and boundaries and the amalgamation of municipal administrations and personnel. Further legal directions are needed to address some of these challenges more effectively.

#### **22.2.5 Confirmation of new municipal boundaries**

It is clear from the new constitutional framework, that municipal boundaries had to be re-determined. This requirement was specifically fulfilled *via* the Municipal Demarcation Act which established an independent Municipal Demarcation Board.<sup>7</sup> This board has demarcated all municipal boundaries and has fulfilled the requirement of creating a system of wall to wall municipal government in South Africa. Under the Constitution, national legislation had to determine the criteria and procedures to determine municipal boundaries by an independent authority.<sup>8</sup> Two national acts, the Local Government: Municipal Structures Act and the Local Government: Municipal Demarcation Act were enacted.<sup>9</sup> Together these two acts, address the overall constitutional obligations towards municipal boundaries.

Boundaries are important to ensure local governments can provide municipal services in an equitable and sustainable manner. It would seem that the new laws indeed comply and fulfil the constitutional demands. It should be noted however that the determination and internal delimitation of municipal boundaries are not once off

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<sup>7</sup> Read ss 151(1) and 155(3)(b) of the Constitution together with the provisions of Act 27 of 1998.

<sup>8</sup> S 155(3)(b) of the Constitution.

<sup>9</sup> 117 of 1998 and 27 of 1998.

exercises but are continuous in nature. Regular evaluation of municipal boundaries is thus required. It is also notable that after the demarcation process, the number of official local authorities were reduced from over 800 to 284.<sup>10</sup> The demarcation process thus significantly rationalized local government structures. Such rationalization was needed under the Constitution to create a system of local governance that is effective and efficient and that would ensure the achievement of the objects of local government as set out under the Constitution.

#### **22.2.6 Adhering to the founding values and the Bill of Rights**

The Constitution specifically requires radical changes to the composition and election of municipal councils. In essence the new local government system had to be redesigned to ensure and achieve compliance to the Constitution's founding values and a truly democratic state. In order to complete such a system, many new changes had to be affected. On a closer evaluation, it seems acceptable to conclude that the new legal framework, indeed completes the basic framework of the Constitution regarding the composition and election of municipal councils. Local governments are now truly democratic spheres of government.

The new system is unique in some instances. For example, although the term of local governments is now similar to national or provincial governments, local governments are composed according to a electoral system that provides for a combination of proportional representation and constituency based electoral systems.<sup>11</sup> The unique features have been included to enhance the unique features of local governments and to ensure better representation and accountability. It seems as if the new legal system is well equipped to fulfil the broad constitutional requirements.

#### **22.2.7 Recognising the role of traditional leadership**

One area where the new local government legal dispensation still seems to lack clear direction is with regards to the role and involvement of traditional leaders in local government structures. Although the institution of traditional leaders is constitutionally recognised and protected,<sup>12</sup> the precise role of traditional leaders, specially in local government, has not been properly defined. This problem is confirmed by na-

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<sup>10</sup> The number of 284 is composed out of 6 Metropolitan municipalities, 47 District municipalities and 231 Local municipalities. For more detail refer to [www.info.gov.za/localgovernment](http://www.info.gov.za/localgovernment) visited on 18/07/2005.

<sup>11</sup> Read ss 157(1) and (2)(a)-(b) of the Constitution.

<sup>12</sup> See ss 211 and 212 of the Constitution.

tional government, which has embarked on new policy and legislative initiatives aimed at clarifying the current uncertainties.<sup>13</sup> Traditional leaders form an important part of traditional African cultures and structures and they should not only be included in municipal decision-making processes, but they can play a positive role in ensuring the ultimate success of especially rural municipalities.

The Constitution however only creates three spheres of government and allocates powers or authority only to such spheres and not to traditional leaders. One can thus argue, that unless a constitutional amendment is carried through, traditional leaders will be subjected to the authority of the local governments in which area such leaders fall. Since traditional leaders play an important role in maintaining traditional African customs, their roles should thus be more clearly defined. In view of the fact that the Constitution is the supreme law of the state, the role and functions of traditional leaders must comply with the Constitution. Traditional leaders are thus not autonomous institutions but function within the broad constitutional system. A strong need exists for co-operation and consultation between traditional leaders and local government structures. Clear national guidelines on such issues should ensure positive co-operation between the two institutions. Such legislative requirements are urgently needed.

#### ***22.2.8 The division of the powers and functions between the three spheres of government***

Under the Constitution, local government is not only recognised as distinctive and autonomous sphere of government but the Constitution also determines the specific powers and functions of municipal governments. Such powers and functions are thus constitutionally entrenched and cannot be taken away unless constitutional amendments are executed.<sup>14</sup> Local government powers are however not absolute, and are subject to national and provincial laws. In essence municipal powers and functions must be exercised to fulfil constitutional objectives and developmental duties. Under the constitutional framework, both the Structures Act and the Systems Act expand upon municipal powers and functions. It is of interest to note that within the new constitutional dispensation, local government powers are regarded as original pow-

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<sup>13</sup> See the Traditional Leadership and Governance Framework Act 41 of 2003.

<sup>14</sup> Read s 156 together with parts B of Sch 4 and 5 of the Constitution.

ers.<sup>15</sup> The Constitution does however not directly distinguish between the powers and functions of the different categories of municipalities *inter se*. Although it is constitutionally envisaged that a proper division of municipal powers should be made, such division had to be conducted in terms of national legislation.<sup>16</sup> Since category A or Metropolitan councils have exclusive executive and legislative powers, the division is only relevant between Local Council and their relevant District Councils. This division is specifically provided under the Local Government: Municipal Structures Act.<sup>17</sup> Powers not specifically allocated to a district will vest in the local municipality.

It is thus submitted that the new legal framework indeed complies to the broad constitutional requirements regarding the identification of municipal powers and functions and the division of such powers and functions between category B and C municipalities. Assignment of powers or functions are also permitted, and it is regulated through provisions set out in the Systems Act.<sup>18</sup> The new system also provides for municipal financial powers. The current system however still faces problems relating to old order laws that are still applicable and new proposals that have not yet materialized. Although the national legislative framework has been enacted, both provincial and even municipal laws are needed to complete the overall legal framework.

### **22.2.9 Evaluating the new legal rules dealing with internal mechanisms and municipal leadership**

It is an obvious fact that municipal governments are becoming more and more complex in comparison with their predecessors from yester year. Such complexities and duties require an effective, committed and educated leadership. On evaluation of the new legal framework, it would seem as if the new legal rules indeed support and facilitate the creation of such internal procedures and functions. The new system provides for various leadership options depending on the circumstances relevant in each particular municipal jurisdiction. To enhance and regulate municipal leadership,

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<sup>15</sup> See *Fedsure Life Assurance v Greater JHB TMC* 1999 (1) SA 3741 (CC).

<sup>16</sup> According to s 155(3)(c) the Constitution determines the following: “[S]ubject to section 229, [National Legislation must] make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality”.

<sup>17</sup> See ss 83-84 of the Systems Act.

<sup>18</sup> See ss 8-9 of the Systems Act.

the Constitution directly regulates the internal procedures of municipal councils.<sup>19</sup> These requirements are indispensable for effective municipal decision-making and the achievement of municipal goals and duties.

Both the Systems and the Structures Acts specifically expand on the basic constitutional provisions and thereby support and enhance the constitutional vision. Since the functioning of a local government is largely dependant on the effective exercise of functions, the new legal dispensation provides for specific codes of conduct for both political office bearers and also municipal administrative personnel.<sup>20</sup> It is thus submitted that the new legal provisions indeed have a significant role in regulating and controlling internal municipal functioning. Although the framework is extensive, regular overview should be employed and swift legal changes could be enacted to rectify or expand on existing rules in order to enhance or comply with practical problems.

#### **22.2.10 Ensuring sustainable municipal service delivery**

The new legal dispensation for local government also addresses the important aspect of service delivery and identifies various basic municipal services and functional activities. It must be remembered that the main objective/reason for existence of local governments is to provide sustainable and effective municipal services to local residents. Without such service delivery, local settlements cannot be sustained and the overall governmental structure of the state will be placed in jeopardy. The new system demands a system for service delivery that is accessible, simple, affordable, of high quality with incorporation of the values of accountability, sustainability and value for money.<sup>21</sup>

In compliance with the constitutional prerequisites, the Systems Act determines specific duties and requirements for all local governments in respect of municipal service provision and related aspects.<sup>22</sup> The act is however silent on which mechanism municipal councils should use to achieve and comply with the abovementioned requirements. Municipal councils must put their own policies and programmes in place and should be monitored and controlled by the two higher spheres. Possible expansion on the current legal regulation could enhance better achievement of the

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<sup>19</sup> See s 160 of the Constitution.

<sup>20</sup> Refer to Sch's 1 and 2 of the Municipal Systems Act.

<sup>21</sup> Read again ss 1, 152 and 153 of the Constitution.

<sup>22</sup> See s 73 of the Systems Act.

mentioned goals. Municipal councils must also adopt tariff policies for the levying of fees for municipal services.<sup>23</sup> Services can be provided via internal mechanisms or external ones.<sup>24</sup> Although municipal services per se are not absolutely defined and other services can also be assigned to municipalities, the Constitution together with the new laws, determines what should be regarded as basic municipal services. The achievement and compliance with the constitutional demand on services, will largely depend on how local governments structure their policies and also to what extent effective oversight by national/provincial governments are provided.

#### **22.2.11 Establishing a new local government personnel corps**

In relation to municipal staff the Constitution determines that all municipal councils can employ personnel that are necessary for the effective performance of their functions.<sup>25</sup> Local governments are thus empowered to employ such staff members that are needed to fulfil their obligations and duties. The new requirements have specifically been incorporated to enhance the organisational efficiency of municipalities but vigorous training of personnel is required. Municipal personnel matters should not be seen in isolation but together with other labour related requirements that are set out in other laws.<sup>26</sup> The new dispensation determines that the municipal manager is the head of the municipal administration and as such has been given a wide range of duties and responsibilities. Such a person is also the highest accountable official.<sup>27</sup>

Employment, especially of senior staff is linked to new performance standards and evaluations. Senior staff are mostly employed for fix periods only<sup>28</sup> and a comprehensive code of conduct for staff members has been included.<sup>29</sup> Continuous training and support is however a prerequisite for effective local government administrations. It is submitted that old order bureaucracies should be avoided and regular evaluation of the organizational structures of municipalities must be undertaken. Municipal staff matters should further be linked to the requirements of the public administration and guidelines on financial management. All in all it appears as if the basic constitutional

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<sup>23</sup> S 74 of the Systems Act.

<sup>24</sup> Ss 26-81 of the Systems Act.

<sup>25</sup> S 160(1)(c) read with s 156(5) of the Constitution.

<sup>26</sup> Read for example acts such as the Labour Relations Act 66 of 1995 and also the Basic Conditions of Employment Act 75 of 1997.

<sup>27</sup> See s 55 of the Systems Act.

<sup>28</sup> See s 7 of the Systems Act.

<sup>29</sup> Refer to Sch 2 of the Systems Act.



demands are met and that local government administrations and personnel structures are adequately empowered to achieve and fulfil their important constitutional obligations.

#### **22.2.12 Regulation of municipal fiscal management and fiscal powers**

Mention was made above that municipal administrations and staff members are partly regulated in terms of a new and reformed legislative framework dealing with municipal finance and fiscal management. Without a proper financial system and effective control mechanisms, local governments will not be able to fulfil their obligations. Financial powers and proper fiscal management are essential in the new local government dispensation. From the chapter on municipal finance discussed above it becomes obvious that an entire new legal framework has been established. Not only does the Constitution determine basic fiscal requirements and obligations, but also that new national legislative provisions are authorized to create a uniform system for property tax assessments and recovery as well as a comprehensive system aimed at regulating municipal fiscal management.<sup>30</sup> It is suggested that the new dispensation indeed fulfils the constitutional demands but that the system should be constantly monitored to ensure effectiveness and efficiency. Swift amendments should be considered to better and regulate the new system should new financial challenges arise. Financial discipline is a key component for the success of local governments and careful and continuous oversight by national/provincial governments is essential. It is submitted that the new dispensation, if applied correctly, indeed should enhance and ensure effective municipal financial capacity and fiscal management.

#### **22.2.13 Compliance to new vision for public administration**

It was mentioned above that the Constitution sets various requirements dealing with the public administration and other related matters. The new legal system supports such requirements and seeks to adhere and advance to the supreme constitutional demands.<sup>31</sup> Apart from the provisions dealing with the public administration, various other requirements such as principles and provisions of performance management, capacity building, municipal accountability and public participation have been included in the new system. Such provisions are aimed at fulfilling the new constitu-

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<sup>30</sup> 56 of 2003.

<sup>31</sup> See ss 195, 196, 50 and 51 of the Systems Act.

tional values set out in the founding provisions of our supreme law.<sup>32</sup> The new dispensation aims at ensuring a more customer orientated public service with strict requirements of accountability and control. One can indeed argue that a sound foundation for a general people orientated local government system has been established, which system should not only ensure constitutional compliance but also a more brighter future for all South Africans.

**22.2.14 Adhering to the principles of municipal development, planning, performance management, capacity building and public participation**

The new legal dispensation also incorporates significant provisions relating to municipal development planning and the regulation of basic legal matters. Important aspects relating to municipal planning have been decentralized to municipal governments, and although municipal planning is a functional area of concurrent national and provincial legislative competence, all municipalities are constitutionally obligated to ensure proper and effective municipal development planning. Proper municipal planning is needed to structure and manage municipal administrations in such a way as to give priority to the basic needs of their communities. Municipalities are also obligated to promote the social and economic development of their communities and to ensure a safe and healthy environment. The Constitution specifically requires national laws to provide an overarching set of regulatory provisions to enable all municipalities to create and cater for basic planning needs. This requirement was partly met in the provisions of the Systems Act.<sup>33</sup> Integrated Development Planning is now a core component of the new legal framework and should significantly allow municipalities to fulfil their developmental responsibilities. Municipal Integrated Development Planning should however be continuously monitored and adjusted to keep abreast with local changes and circumstances.

Since municipalities are established throughout the territory of South Africa and since they have a large impact on local communities, many general legal rules are applicable to local government administrations. Apart from a general understanding and knowledge of the different legal fields relevant to the South African legal system, various unique legal provisions are also highlighted. Such unique legal matters pertaining to local government only have been identified in national legislation and is

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<sup>32</sup> See s 1 of the Constitution read together with ch 4 and 6 of the Systems Act.

<sup>33</sup> See ss 24-29 of the Systems Act.

directly regulated in terms of the Systems Act.<sup>34</sup> As a sphere of government, local governments are faced with general legal matters on a daily basis, and as such a complete understanding and compliance with the law of the state in general is a prerequisite for municipalities to be able to perform their functions and achieve their goals.

#### **22.2.15 *Evaluating the new status and autonomy of local government institutions***

One of the more distinct features of the new face of local government in South Africa is the fact that it now has a new enhanced and protected status and autonomy. All local government institutions have been confirmed as a distinct and interdependent sphere of government.<sup>35</sup> Notwithstanding the constitutional confirmation of the new status and subsequent autonomy of local governments, such autonomy is not absolute and is often subjected to the oversight and control of both the national and provincial spheres of government.<sup>36</sup> In light of the constitutional provisions, the autonomy of municipalities is regarded as a limited or restricted autonomy. The crux of the limitation lies in the confirmation within the Constitution itself in that municipalities are in some instances subjected to national and provincial legislation. Any encroachment on the autonomy of a local authority must be justified and permitted under the Constitution or else it would be unconstitutional and invalid. Since the Constitution itself entrenches only a limited autonomy for local government, any dispute relating to such an issue should be resolved with reference and interpretation of the overall constitutional scheme. Many aspects could have an impact in such cases, for example the Bill of Rights, the principles of co-operative government or even the requirements dealing with government finance. It is however submitted that the limited autonomy of local government should not detract from the new role local governments are to play in our new constitutional dispensation.

#### **22.2.16 *Achieving the five core objects of local government***

Arguably the most important function of a local authority, seen from a local community point view, is the provision of sustainable service delivery. This core function of all municipal governments has been at the forefront of municipal development, not

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<sup>34</sup> See ch 11 of the Act for more detail.

<sup>35</sup> Refer to s 40 of the Constitution.

<sup>36</sup> See s 151(3) and (4) of the Constitution.

only in the South African context, but all over the world. It was explained above that the main reason for the existence of local authorities was to ensure and secure sustainable provision of certain municipal services to local communities. The most common problem facing local governments today is the lack or insufficient provision of such services. Since the provision of services is such a fundamental function of a local government, the new constitutional dispensation has specifically incorporated such a function within the new legal framework.<sup>37</sup> The provision of municipal services however is not the only important municipal object and therefore the Constitution has identified and entrenched five core objects of the new local government dispensation.<sup>38</sup> All municipalities are obligated to strive, within their financial and administrative capacities, to achieve the five objects mentioned above. Although the new legal framework should facilitate and enhance the fulfilment of the core objects of local government, it is ultimately left to municipal governments themselves to ensure that they structure their finances and administrations in a manner that will achieve the objects. Many municipalities in South Africa are not complying with this important constitutional requirement and subsequently many are not providing sustainable services and are not achieving the lawful expectations of local communities. It is this writer's submission that the new legal framework indeed fosters and ensures a legal order within which municipalities should be able to achieve their goals and objects. One should however not lose sight of the important role both national and provincial governments must play to ensure through oversight and control measures, that municipalities are indeed making positive progress in the achievement of local government objectives.

#### ***22.2.17 The principle of creating a local government dispensation that is developmentally orientated***

Apart from the core objects of local government the new constitutional scheme also requires all municipalities to be developmentally orientated regarding their duties.<sup>39</sup> In essence, the developmental approach of local government entails the improvement of the quality of life of all municipal communities. In order to achieve the obliga-

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<sup>37</sup> S 152(1)(b) of the Constitution states that one of the objects of local government is to ensure the provision of services to *local* communities in a sustainable manner.

<sup>38</sup> Refer to s 152(1)(a)-(e) of the Constitution. The objects are: democratic and accountable governance, provision of services, promotion of social and economic development, promotion of a safe and healthy environment and lastly the encouragement of public participation in municipal matters.

<sup>39</sup> See s 153 of the Constitution.

tion of being developmental in nature, all municipalities are obligated to do two things: (a) they must structure and manage their administrations and budgeting/planning processes in such a way as to give priority to the basic needs of their respective communities and thereby help to promote the social and economic development of such communities; (b) they must participate in national and provincial development programmes.<sup>40</sup> In view of the new legal system for local government, which includes aspects such as co-operative government and the new internal municipal structures and procedures, it is again writers submission that the new legal dispensation indeed caters and fosters a local government system where developmental duties and objects can be realised. Success however will ultimately depend on the manner in which municipalities themselves structure and manage their institutions in order to achieve such duties at best.

### **22.3 Conclusion**

It is writer's overall conclusion that the new legal dispensation relevant to local government institutions of South Africa, as was created within the general constitutional framework, not only complies with the overall constitutional demands, but if correctly applied and if the envisaged support and oversight is provided, should indeed succeed in steering local government to be a more developmental and more people orientated sphere of local government. A broad and seemingly effective legal system has been created to allow and ensure that municipalities can achieve their specified constitutional duties and objects. The new dispensation not only seems to cover all necessary components of a successful legal dispensation but also provides for various mechanisms to ensure proper control and oversight. Many commentators have in the recent years suggested that both the two higher spheres of government were dragging their feet in completing the legal system for local government, and that especially national government has failed to timeously fulfil its constitutional obligations. In view of the extent and content of the new legal system and upon close evaluation of all the new laws that were enacted, one can however understand that the completion of the new system was not as elementary as many initially believed. It is this writers opinion that the new established legal system indeed signifies a monumental advancement in the creation of an effective and supported municipal government in the new South African constitutional state.

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<sup>40</sup> See s 153(a)-(b) of the Constitution.

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## Concluding remarks

### 22.1 Introduction

It is clear from the above that the third sphere of government has changed drastically from the order that was in place prior to 1994. The new supreme Constitution with its comprehensive Bill of Rights has set a new legal paradigm for municipal government. It is especially the founding values and specific municipal objects of the new constitutional dispensation that had an unprecedented impact.<sup>1</sup> Compliance with the new constitutional provisions is imperative whether that relates to legislative or executive actions or even the conduct of bodies or institutions within the state. The Constitution however only provides a basic constitutional framework. In many instances the basic framework had to be completed through the enactment of various national or provincial laws.<sup>2</sup>

In chapter one of this research it was stated that the aim of the research is two-fold. The first objective was to provide a systematic and comprehensive exposition of the new constitutional and other national legislative provisions relevant to the new system of local government. In this respect it is submitted that the preceding chapters do indeed achieve such an objective. Almost all legislative provisions relevant to local government have been systematically subdivided into the various chapters and have been grouped together according to their topics and relevance. It is submitted that the compilation and systemisation of the many legal requirements should indeed contribute to making the legal dispensation regarding local government law more accessible which in turn could enhance more research and debate in this often neglected albeit important field of law.

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<sup>1</sup> Read s 1 of the Constitution. According to s 2 the Constitution is entrenched as the supreme law of the SA state and any law or conduct inconsistent with the Constitution is invalid. All the obligations imposed by the Constitution must be fulfilled.

<sup>2</sup> See again the provisions set out in ss 151(3), 154(1), 155(2) and (3), 157(2), 160(5) and 164 of the Constitution which specifically require either national or both national or provincial laws on issues directly relevant to local government matters.

The second aim was to evaluate the extent of compliance with the new local government legal system, to the key normative principles set out in the Constitution and which underpins the new legal government system. Such a evaluation can only be conducted after due regard to all the constitutional and subsequent national legislative requirements. In an effort to link the various preceding chapters together and to tie-up the research as a whole, a brief summary of the extent of compliance with the key constitutional requirements and prerequisites is provided in this conclusion. The summary follows the same chronological sequence as was provided for in the introductory chapter of this work.

## **22.2 Evaluating compliance with the key normative principles of the new local government legal dispensation**

### ***22.2.1 Is the new local government legal dispensation non-racial and truly democratic?***

The new dispensation has undoubtedly overturned the segregation and apartheid policies of the past and has provided a platform for a uniform democratic local sphere of governance where municipal services are rendered for the benefit of all people. The confirmation within the supreme law of the South African state of *inter alia* the founding values of equality, democracy, freedom, non-racialism and non-sexism has created a strong foundation to ensure that all spheres of government are constitutionally obligated to ensure a non-racial and democratic government.

### ***22.2.2 Does the new nature, rights and duties of municipalities comply with the new constitutional vision?***

It was indicated above that the new local government system does not only provide local government with a distinctive legal nature, but also sets down clear and precise rights and duties for all local government structures.<sup>3</sup> This is necessary to ensure local governments are empowered to fulfil their duties. The new system not only provides local authorities with the required foundation to act, but also incorporates constitutional values of accountability and public participation. These values are particularly promoted through legislative provisions which confirm that local government consists out of political, administrative and local community components. As such, the new legal framework should enhance and promote the underlying values

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<sup>3</sup> Read ss 4, 5 and 6 of the Municipal Structures Act together with s 156 of the Constitution.



that the Constitution demands.

### **22.2.3 *Municipal government and the principles of co-operative government***

The Constitution obligates all three spheres of government to comply with specific principles aimed at ensuring a system of co-operative federalism. All spheres have been allocated with specific functional activities. Although significant protection of such powers is provided for, many overlaps between the specified functions do occur. Such overlaps in turn again require proper co-operation between the spheres in order to fulfil their functions and responsibilities. In an effort to ensure such co-operation the Constitution determines various principles with which all spheres must comply.<sup>4</sup> The new legal framework, *via* the Municipal Systems Act, specifically expands on the basic constitutional provisions and thus enhances the envisaged constitutional scheme.

### **22.2.4 *The establishment of a new system and structure for local government***

It is a specific constitutional obligation, that all former local governments had to be restructured and that new institutional models for local government structures had to be provided for. Furthermore, the whole territory of the Republic had to be included in the jurisdiction of a specific municipal authority.<sup>5</sup> The new legal dispensation indeed complies with these constitutional requirements. In the first instance, the entire territory of the South African state falls within the jurisdiction of a demarcated municipal government. Even areas that are not viable to have their own direct local government, ie district management areas, fall under the control of a district municipality within that area. Secondly, the Municipal Structures Act provides for various new institutional models of local government. Apart from the constitutionally defined categories of municipalities the act provides for the establishment of various models of municipal types by combining various municipal systems.<sup>6</sup>

In total five systems have been created. Three are so-called executive systems whilst two are participatory systems. Since the powers, functions and circumstances of municipalities differ it is submitted that the various combination possibilities indeed should be able to cater for the different needs and responsibilities of all municipalities. The new legal framework further aims not only to achieve more effective execu

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<sup>4</sup> Refer to ss 40 and 41 of the Constitution.

<sup>5</sup> See s 151 of the Constitution.

<sup>6</sup> See s 7 of the Structures Act.

tive functioning but also to ensure public involvement and participation, which again should enhance the underlying values of the Constitution. Although a clear division of the roles and responsibilities of the various types of municipalities has been determined, there seems to be some uncertainty in practise. Uncertainty especially exists relating to the division of powers and functions between local municipalities and their relevant district municipalities. Notwithstanding such difficulties, the new legislative provisions have ensured that all municipal institutions have been re-established and all former municipal authorities have been replaced by newly transformed local authorities. Municipal boundaries were re-determined and many municipalities were amalgamated into new enlarged and supposedly more effective institutions.

A significant number of municipalities however still face enormous challenges relating to their new structures and boundaries and the amalgamation of municipal administrations and personnel. Further legal directions are needed to address some of these challenges more effectively.

#### **22.2.5 Confirmation of new municipal boundaries**

It is clear from the new constitutional framework, that municipal boundaries had to be re-determined. This requirement was specifically fulfilled *via* the Municipal Demarcation Act which established an independent Municipal Demarcation Board.<sup>7</sup> This board has demarcated all municipal boundaries and has fulfilled the requirement of creating a system of wall to wall municipal government in South Africa. Under the Constitution, national legislation had to determine the criteria and procedures to determine municipal boundaries by an independent authority.<sup>8</sup> Two national acts, the Local Government: Municipal Structures Act and the Local Government: Municipal Demarcation Act were enacted.<sup>9</sup> Together these two acts, address the overall constitutional obligations towards municipal boundaries.

Boundaries are important to ensure local governments can provide municipal services in an equitable and sustainable manner. It would seem that the new laws indeed comply and fulfil the constitutional demands. It should be noted however that the determination and internal delimitation of municipal boundaries are not once off

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<sup>7</sup> Read ss 151(1) and 155(3)(b) of the Constitution together with the provisions of Act 27 of 1998.

<sup>8</sup> S 155(3)(b) of the Constitution.

<sup>9</sup> 117 of 1998 and 27 of 1998.

exercises but are continuous in nature. Regular evaluation of municipal boundaries is thus required. It is also notable that after the demarcation process, the number of official local authorities were reduced from over 800 to 284.<sup>10</sup> The demarcation process thus significantly rationalized local government structures. Such rationalization was needed under the Constitution to create a system of local governance that is effective and efficient and that would ensure the achievement of the objects of local government as set out under the Constitution.

#### **22.2.6 Adhering to the founding values and the Bill of Rights**

The Constitution specifically requires radical changes to the composition and election of municipal councils. In essence the new local government system had to be redesigned to ensure and achieve compliance to the Constitution's founding values and a truly democratic state. In order to complete such a system, many new changes had to be affected. On a closer evaluation, it seems acceptable to conclude that the new legal framework, indeed completes the basic framework of the Constitution regarding the composition and election of municipal councils. Local governments are now truly democratic spheres of government.

The new system is unique in some instances. For example, although the term of local governments is now similar to national or provincial governments, local governments are composed according to a electoral system that provides for a combination of proportional representation and constituency based electoral systems.<sup>11</sup> The unique features have been included to enhance the unique features of local governments and to ensure better representation and accountability. It seems as if the new legal system is well equipped to fulfil the broad constitutional requirements.

#### **22.2.7 Recognising the role of traditional leadership**

One area where the new local government legal dispensation still seems to lack clear direction is with regards to the role and involvement of traditional leaders in local government structures. Although the institution of traditional leaders is constitutionally recognised and protected,<sup>12</sup> the precise role of traditional leaders, specially in local government, has not been properly defined. This problem is confirmed by na-

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<sup>10</sup> The number of 284 is composed out of 6 Metropolitan municipalities, 47 District municipalities and 231 Local municipalities. For more detail refer to [www.info.gov.za/localgovernment](http://www.info.gov.za/localgovernment) visited on 18/07/2005.

<sup>11</sup> Read ss 157(1) and (2)(a)-(b) of the Constitution.

<sup>12</sup> See ss 211 and 212 of the Constitution.

tional government, which has embarked on new policy and legislative initiatives aimed at clarifying the current uncertainties.<sup>13</sup> Traditional leaders form an important part of traditional African cultures and structures and they should not only be included in municipal decision-making processes, but they can play a positive role in ensuring the ultimate success of especially rural municipalities.

The Constitution however only creates three spheres of government and allocates powers or authority only to such spheres and not to traditional leaders. One can thus argue, that unless a constitutional amendment is carried through, traditional leaders will be subjected to the authority of the local governments in which area such leaders fall. Since traditional leaders play an important role in maintaining traditional African customs, their roles should thus be more clearly defined. In view of the fact that the Constitution is the supreme law of the state, the role and functions of traditional leaders must comply with the Constitution. Traditional leaders are thus not autonomous institutions but function within the broad constitutional system. A strong need exists for co-operation and consultation between traditional leaders and local government structures. Clear national guidelines on such issues should ensure positive co-operation between the two institutions. Such legislative requirements are urgently needed.

#### ***22.2.8 The division of the powers and functions between the three spheres of government***

Under the Constitution, local government is not only recognised as distinctive and autonomous sphere of government but the Constitution also determines the specific powers and functions of municipal governments. Such powers and functions are thus constitutionally entrenched and cannot be taken away unless constitutional amendments are executed.<sup>14</sup> Local government powers are however not absolute, and are subject to national and provincial laws. In essence municipal powers and functions must be exercised to fulfil constitutional objectives and developmental duties. Under the constitutional framework, both the Structures Act and the Systems Act expand upon municipal powers and functions. It is of interest to note that within the new constitutional dispensation, local government powers are regarded as original pow-

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<sup>13</sup> See the Traditional Leadership and Governance Framework Act 41 of 2003.

<sup>14</sup> Read s 156 together with parts B of Sch 4 and 5 of the Constitution.

ers.<sup>15</sup> The Constitution does however not directly distinguish between the powers and functions of the different categories of municipalities *inter se*. Although it is constitutionally envisaged that a proper division of municipal powers should be made, such division had to be conducted in terms of national legislation.<sup>16</sup> Since category A or Metropolitan councils have exclusive executive and legislative powers, the division is only relevant between Local Council and their relevant District Councils. This division is specifically provided under the Local Government: Municipal Structures Act.<sup>17</sup> Powers not specifically allocated to a district will vest in the local municipality.

It is thus submitted that the new legal framework indeed complies to the broad constitutional requirements regarding the identification of municipal powers and functions and the division of such powers and functions between category B and C municipalities. Assignment of powers or functions are also permitted, and it is regulated through provisions set out in the Systems Act.<sup>18</sup> The new system also provides for municipal financial powers. The current system however still faces problems relating to old order laws that are still applicable and new proposals that have not yet materialized. Although the national legislative framework has been enacted, both provincial and even municipal laws are needed to complete the overall legal framework.

### **22.2.9 Evaluating the new legal rules dealing with internal mechanisms and municipal leadership**

It is an obvious fact that municipal governments are becoming more and more complex in comparison with their predecessors from yester year. Such complexities and duties require an effective, committed and educated leadership. On evaluation of the new legal framework, it would seem as if the new legal rules indeed support and facilitate the creation of such internal procedures and functions. The new system provides for various leadership options depending on the circumstances relevant in each particular municipal jurisdiction. To enhance and regulate municipal leadership,

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<sup>15</sup> See *Fedsure Life Assurance v Greater JHB TMC* 1999 (1) SA 3741 (CC).

<sup>16</sup> According to s 155(3)(c) the Constitution determines the following: “[S]ubject to section 229, [National Legislation must] make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality”.

<sup>17</sup> See ss 83-84 of the Systems Act.

<sup>18</sup> See ss 8-9 of the Systems Act.

the Constitution directly regulates the internal procedures of municipal councils.<sup>19</sup> These requirements are indispensable for effective municipal decision-making and the achievement of municipal goals and duties.

Both the Systems and the Structures Acts specifically expand on the basic constitutional provisions and thereby support and enhance the constitutional vision. Since the functioning of a local government is largely dependant on the effective exercise of functions, the new legal dispensation provides for specific codes of conduct for both political office bearers and also municipal administrative personnel.<sup>20</sup> It is thus submitted that the new legal provisions indeed have a significant role in regulating and controlling internal municipal functioning. Although the framework is extensive, regular overview should be employed and swift legal changes could be enacted to rectify or expand on existing rules in order to enhance or comply with practical problems.

#### **22.2.10 Ensuring sustainable municipal service delivery**

The new legal dispensation for local government also addresses the important aspect of service delivery and identifies various basic municipal services and functional activities. It must be remembered that the main objective/reason for existence of local governments is to provide sustainable and effective municipal services to local residents. Without such service delivery, local settlements cannot be sustained and the overall governmental structure of the state will be placed in jeopardy. The new system demands a system for service delivery that is accessible, simple, affordable, of high quality with incorporation of the values of accountability, sustainability and value for money.<sup>21</sup>

In compliance with the constitutional prerequisites, the Systems Act determines specific duties and requirements for all local governments in respect of municipal service provision and related aspects.<sup>22</sup> The act is however silent on which mechanism municipal councils should use to achieve and comply with the abovementioned requirements. Municipal councils must put their own policies and programmes in place and should be monitored and controlled by the two higher spheres. Possible expansion on the current legal regulation could enhance better achievement of the

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<sup>19</sup> See s 160 of the Constitution.

<sup>20</sup> Refer to Sch's 1 and 2 of the Municipal Systems Act.

<sup>21</sup> Read again ss 1, 152 and 153 of the Constitution.

<sup>22</sup> See s 73 of the Systems Act.

mentioned goals. Municipal councils must also adopt tariff policies for the levying of fees for municipal services.<sup>23</sup> Services can be provided via internal mechanisms or external ones.<sup>24</sup> Although municipal services per se are not absolutely defined and other services can also be assigned to municipalities, the Constitution together with the new laws, determines what should be regarded as basic municipal services. The achievement and compliance with the constitutional demand on services, will largely depend on how local governments structure their policies and also to what extent effective oversight by national/provincial governments are provided.

#### **22.2.11 Establishing a new local government personnel corps**

In relation to municipal staff the Constitution determines that all municipal councils can employ personnel that are necessary for the effective performance of their functions.<sup>25</sup> Local governments are thus empowered to employ such staff members that are needed to fulfil their obligations and duties. The new requirements have specifically been incorporated to enhance the organisational efficiency of municipalities but vigorous training of personnel is required. Municipal personnel matters should not be seen in isolation but together with other labour related requirements that are set out in other laws.<sup>26</sup> The new dispensation determines that the municipal manager is the head of the municipal administration and as such has been given a wide range of duties and responsibilities. Such a person is also the highest accountable official.<sup>27</sup>

Employment, especially of senior staff is linked to new performance standards and evaluations. Senior staff are mostly employed for fix periods only<sup>28</sup> and a comprehensive code of conduct for staff members has been included.<sup>29</sup> Continuous training and support is however a prerequisite for effective local government administrations. It is submitted that old order bureaucracies should be avoided and regular evaluation of the organizational structures of municipalities must be undertaken. Municipal staff matters should further be linked to the requirements of the public administration and guidelines on financial management. All in all it appears as if the basic constitutional

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<sup>23</sup> S 74 of the Systems Act.

<sup>24</sup> Ss 26-81 of the Systems Act.

<sup>25</sup> S 160(1)(c) read with s 156(5) of the Constitution.

<sup>26</sup> Read for example acts such as the Labour Relations Act 66 of 1995 and also the Basic Conditions of Employment Act 75 of 1997.

<sup>27</sup> See s 55 of the Systems Act.

<sup>28</sup> See s 7 of the Systems Act.

<sup>29</sup> Refer to Sch 2 of the Systems Act.



demands are met and that local government administrations and personnel structures are adequately empowered to achieve and fulfil their important constitutional obligations.

#### **22.2.12 Regulation of municipal fiscal management and fiscal powers**

Mention was made above that municipal administrations and staff members are partly regulated in terms of a new and reformed legislative framework dealing with municipal finance and fiscal management. Without a proper financial system and effective control mechanisms, local governments will not be able to fulfil their obligations. Financial powers and proper fiscal management are essential in the new local government dispensation. From the chapter on municipal finance discussed above it becomes obvious that an entire new legal framework has been established. Not only does the Constitution determine basic fiscal requirements and obligations, but also that new national legislative provisions are authorized to create a uniform system for property tax assessments and recovery as well as a comprehensive system aimed at regulating municipal fiscal management.<sup>30</sup> It is suggested that the new dispensation indeed fulfils the constitutional demands but that the system should be constantly monitored to ensure effectiveness and efficiency. Swift amendments should be considered to better and regulate the new system should new financial challenges arise. Financial discipline is a key component for the success of local governments and careful and continuous oversight by national/provincial governments is essential. It is submitted that the new dispensation, if applied correctly, indeed should enhance and ensure effective municipal financial capacity and fiscal management.

#### **22.2.13 Compliance to new vision for public administration**

It was mentioned above that the Constitution sets various requirements dealing with the public administration and other related matters. The new legal system supports such requirements and seeks to adhere and advance to the supreme constitutional demands.<sup>31</sup> Apart from the provisions dealing with the public administration, various other requirements such as principles and provisions of performance management, capacity building, municipal accountability and public participation have been included in the new system. Such provisions are aimed at fulfilling the new constitu-

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<sup>30</sup> 56 of 2003.

<sup>31</sup> See ss 195, 196, 50 and 51 of the Systems Act.

tional values set out in the founding provisions of our supreme law.<sup>32</sup> The new dispensation aims at ensuring a more customer orientated public service with strict requirements of accountability and control. One can indeed argue that a sound foundation for a general people orientated local government system has been established, which system should not only ensure constitutional compliance but also a more brighter future for all South Africans.

**22.2.14 Adhering to the principles of municipal development, planning, performance management, capacity building and public participation**

The new legal dispensation also incorporates significant provisions relating to municipal development planning and the regulation of basic legal matters. Important aspects relating to municipal planning have been decentralized to municipal governments, and although municipal planning is a functional area of concurrent national and provincial legislative competence, all municipalities are constitutionally obligated to ensure proper and effective municipal development planning. Proper municipal planning is needed to structure and manage municipal administrations in such a way as to give priority to the basic needs of their communities. Municipalities are also obligated to promote the social and economic development of their communities and to ensure a safe and healthy environment. The Constitution specifically requires national laws to provide an overarching set of regulatory provisions to enable all municipalities to create and cater for basic planning needs. This requirement was partly met in the provisions of the Systems Act.<sup>33</sup> Integrated Development Planning is now a core component of the new legal framework and should significantly allow municipalities to fulfil their developmental responsibilities. Municipal Integrated Development Planning should however be continuously monitored and adjusted to keep abreast with local changes and circumstances.

Since municipalities are established throughout the territory of South Africa and since they have a large impact on local communities, many general legal rules are applicable to local government administrations. Apart from a general understanding and knowledge of the different legal fields relevant to the South African legal system, various unique legal provisions are also highlighted. Such unique legal matters pertaining to local government only have been identified in national legislation and is

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<sup>32</sup> See s 1 of the Constitution read together with ch 4 and 6 of the Systems Act.

<sup>33</sup> See ss 24-29 of the Systems Act.

directly regulated in terms of the Systems Act.<sup>34</sup> As a sphere of government, local governments are faced with general legal matters on a daily basis, and as such a complete understanding and compliance with the law of the state in general is a prerequisite for municipalities to be able to perform their functions and achieve their goals.

#### **22.2.15 *Evaluating the new status and autonomy of local government institutions***

One of the more distinct features of the new face of local government in South Africa is the fact that it now has a new enhanced and protected status and autonomy. All local government institutions have been confirmed as a distinct and interdependent sphere of government.<sup>35</sup> Notwithstanding the constitutional confirmation of the new status and subsequent autonomy of local governments, such autonomy is not absolute and is often subjected to the oversight and control of both the national and provincial spheres of government.<sup>36</sup> In light of the constitutional provisions, the autonomy of municipalities is regarded as a limited or restricted autonomy. The crux of the limitation lies in the confirmation within the Constitution itself in that municipalities are in some instances subjected to national and provincial legislation. Any encroachment on the autonomy of a local authority must be justified and permitted under the Constitution or else it would be unconstitutional and invalid. Since the Constitution itself entrenches only a limited autonomy for local government, any dispute relating to such an issue should be resolved with reference and interpretation of the overall constitutional scheme. Many aspects could have an impact in such cases, for example the Bill of Rights, the principles of co-operative government or even the requirements dealing with government finance. It is however submitted that the limited autonomy of local government should not detract from the new role local governments are to play in our new constitutional dispensation.

#### **22.2.16 *Achieving the five core objects of local government***

Arguably the most important function of a local authority, seen from a local community point view, is the provision of sustainable service delivery. This core function of all municipal governments has been at the forefront of municipal development, not

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<sup>34</sup> See ch 11 of the Act for more detail.

<sup>35</sup> Refer to s 40 of the Constitution.

<sup>36</sup> See s 151(3) and (4) of the Constitution.

only in the South African context, but all over the world. It was explained above that the main reason for the existence of local authorities was to ensure and secure sustainable provision of certain municipal services to local communities. The most common problem facing local governments today is the lack or insufficient provision of such services. Since the provision of services is such a fundamental function of a local government, the new constitutional dispensation has specifically incorporated such a function within the new legal framework.<sup>37</sup> The provision of municipal services however is not the only important municipal object and therefore the Constitution has identified and entrenched five core objects of the new local government dispensation.<sup>38</sup> All municipalities are obligated to strive, within their financial and administrative capacities, to achieve the five objects mentioned above. Although the new legal framework should facilitate and enhance the fulfilment of the core objects of local government, it is ultimately left to municipal governments themselves to ensure that they structure their finances and administrations in a manner that will achieve the objects. Many municipalities in South Africa are not complying with this important constitutional requirement and subsequently many are not providing sustainable services and are not achieving the lawful expectations of local communities. It is this writer's submission that the new legal framework indeed fosters and ensures a legal order within which municipalities should be able to achieve their goals and objects. One should however not lose sight of the important role both national and provincial governments must play to ensure through oversight and control measures, that municipalities are indeed making positive progress in the achievement of local government objectives.

#### ***22.2.17 The principle of creating a local government dispensation that is developmentally orientated***

Apart from the core objects of local government the new constitutional scheme also requires all municipalities to be developmentally orientated regarding their duties.<sup>39</sup> In essence, the developmental approach of local government entails the improvement of the quality of life of all municipal communities. In order to achieve the obliga-

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<sup>37</sup> S 152(1)(b) of the Constitution states that one of the objects of local government is to ensure the provision of services to *local* communities in a sustainable manner.

<sup>38</sup> Refer to s 152(1)(a)-(e) of the Constitution. The objects are: democratic and accountable governance, provision of services, promotion of social and economic development, promotion of a safe and healthy environment and lastly the encouragement of public participation in municipal matters.

<sup>39</sup> See s 153 of the Constitution.

tion of being developmental in nature, all municipalities are obligated to do two things: (a) they must structure and manage their administrations and budgeting/planning processes in such a way as to give priority to the basic needs of their respective communities and thereby help to promote the social and economic development of such communities; (b) they must participate in national and provincial development programmes.<sup>40</sup> In view of the new legal system for local government, which includes aspects such as co-operative government and the new internal municipal structures and procedures, it is again writers submission that the new legal dispensation indeed caters and fosters a local government system where developmental duties and objects can be realised. Success however will ultimately depend on the manner in which municipalities themselves structure and manage their institutions in order to achieve such duties at best.

### **22.3 Conclusion**

It is writer's overall conclusion that the new legal dispensation relevant to local government institutions of South Africa, as was created within the general constitutional framework, not only complies with the overall constitutional demands, but if correctly applied and if the envisaged support and oversight is provided, should indeed succeed in steering local government to be a more developmental and more people orientated sphere of local government. A broad and seemingly effective legal system has been created to allow and ensure that municipalities can achieve their specified constitutional duties and objects. The new dispensation not only seems to cover all necessary components of a successful legal dispensation but also provides for various mechanisms to ensure proper control and oversight. Many commentators have in the recent years suggested that both the two higher spheres of government were dragging their feet in completing the legal system for local government, and that especially national government has failed to timeously fulfil its constitutional obligations. In view of the extent and content of the new legal system and upon close evaluation of all the new laws that were enacted, one can however understand that the completion of the new system was not as elementary as many initially believed. It is this writers opinion that the new established legal system indeed signifies a monumental advancement in the creation of an effective and supported municipal government in the new South African constitutional state.

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<sup>40</sup> See s 153(a)-(b) of the Constitution.

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