ISSN: 1561-901X

Local Government Law
BULLETIN
Vol. 1 No. 1 April 1999

Demarcating municipalities

the aim: viability, the problem: time

The Municipal Demarcation Board has been established and is working. It has very little time to fulfil the formidable task of demarcating municipalities. This article will outline the functions of the Board, its powers and procedures, and the challenges which face it.

'Apartheid boundaries'

One of the many problems South Africa inherited from apartheid is a structure of race-based municipal boundaries. They are based on a policy of spatial segregation at local level; through separation, influx control and a policy of 'own management for own areas', apartheid aimed to limit the extent to which affluent white municipalities would bear the financial burden for servicing disadvantaged black areas. Municipal boundaries need to be re-demarcated in order to enable redistribution and to achieve democratic, accountable local government that consists of financially viable municipalities.

Demarcation Act

South Africa's Constitution calls for the establishment of an independent authority that will demarcate municipal boundaries and for the establishment of criteria and procedures for the demarcation (s 155(3)(b) of the Constitution, Act 108 of 1996). The Municipal Demarcation Act 27 of 1998 provides for the establishment of a Demarcation Board that will execute the task of demarcating municipal boundaries. This Act, together with the Municipal Structures Act 117 of 1998, which defines the internal structures of municipalities, and the forthcoming Municipal Systems Bill form the three pillars of future local government.

On 1 February 1999 the Demarcation Board was established and the members appointed by the President.

The Demarcation Board

The Demarcation Board is an independent, juristic person that has to determine municipal boundaries in accordance with this Act, other appropriate legislation (for example the Municipal Structures Act) and the Constitution. The fact that the Board is a juristic person means that it can acquire property, hire people, insure itself, go to court etc (s 5). But the Board cannot borrow money and cannot buy immovable property without the consent of the Minister for Provincial

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COMMUNITY LAW CENTRE
University of the Western Cape

SALGA
South African Local Government Association

Local Government Law Bulletin is published by the Community Law Centre of the University of the Western Cape in association with SALGA.

This publication is sponsored by Austrian Development Co-operation.

Austrian Development Cooperation

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Subscription
The *Local Government Law Bulletin* is a quarterly publication with an annual subscription fee of R96,00. All subscription enquiries must be directed to Johann Mettler.

The Bulletin
This publication was produced with financial assistance from Austrian Development Cooperation. The views expressed herein do not necessarily reflect the views of Austrian Development Cooperation, the editorial board, the South African Local Government Association or any of its provincial affiliates.

Production
Design and DTP: Mega Design cc
Reproduction: Mega Pre-press cc
Printing: Mega Print cc

EDITORIAL

The objective of the *Local Government Law Bulletin* is to provide support and assistance to local government practitioners by informing them about the rapid and profound legal transformation of local government.

With the adoption of the 1996 Constitution a new constitutional status has been given to local government, namely as a distinctive, interdependent and interrelated sphere of government. A legal regime has to be established and developed to deal with the implications of this status. For many local government practitioners these legal developments may be new and inaccessible.

To achieve its objective the *Bulletin* will seek to pursue the following goals:

- to inform local government practitioners about new developments in law with reference to legislation, case law and policy documents by making such materials accessible;
- to evaluate the impact new legislation, court decisions and policy documents may have on local government;
- to analyse key issues relating to local government law; and
- to provide a forum for debate on legal aspects of local government.

The *Bulletin*, published quarterly, will focus on current developments in local government law. In particular, with regard to legislation, it will review -

- national legislation;
- provincial legislation;
- innovative local government by-laws;
- pending bills in Parliament and provincial legislatures.

The ever increasing number of court decisions affecting local government will be summarised and evaluated.

News of SALGA and provincial local authority associations' activities and initiatives in field of law reform will also be included. In particular, attention will be given to SALGA's role in the NCOP. Finally, the *Bulletin* will also endeavour to stimulate debate. Letters, comments and other contributions from local government practitioners on key legal issues will be published.

It is trusted that the *Bulletin* may contribute to local government occupying its rightful place as a distinctive sphere of government and meeting its constitutional objectives of providing democratic and accountable government, sustainable service delivery, and promoting social and economic development.

Demarc municip

Continued from page 1

Affairs and Constitutional Development. Members of the Board are not liable for anything they do in good faith when performing their duty.

The Act says that the Board must be representative of the South African society. Its members should come from all over the country and be knowledgeable and/or experienced in matters that are relevant to municipal demarcation (s 6). Those include, for example, development planning, community development, traditional leadership, municipal finance, town planning etc. Politicians in national, provincial or local government cannot be members of the Board, nor can office bearers of political parties (s 13(3)).

Who sits on the Board?

The following persons have been appointed to the Board by the President:

Dr Michael Oliver Sutcliffe (Chairperson)
Mrs Nkaro Aldefrida Mateta
Mr V Mlokoti
Ms R Hartslief
Mr Prince Duke Dludta
Mrs Rosemary Monyamane
Mr Abraham Petrus Marais
Mr Kaobitsa Maapa
Ms Jacqueline Marion Subban
Nkosi Tshililo Jeffrey Ramovha
Prof Robert Greg Cameron

The functions of the Board

The Board must determine the boundaries of municipalities in South Africa. The existing municipal boundaries continue to exist until they are replaced by the boundaries determined by the Board (s 44). The Board can determine a boundary on its own initiative or on the request of the Minister or an MEC for local government.

Municipalities can request demarcation

The Board can also act on the request of a municipality with the concurrence of any affected municipality (s 22). This opportunity might prove to be essential for municipalities who do not want to sit back and wait until the Board comes to revisit their boundaries and who want to be participants instead of 'victims'. Municipalities can be pro-active and present a proposal for demarcation in their request, provided that it takes place with the concurrence of all other affected municipalities. In that way

municipalities can have input in the process of demarcation, even though the Board will eventually decide on the demarcation.

Objectives of demarcation

The Board must pursue the following objectives when demarcating an area:

"...the objective must be to establish an area that would-

(a) enable the municipality for that area to fulfil its constitutional obligations, including-
  (i) the provision of democratic and accountable government for the local communities;
  (ii) the provision of services to the communities in an equitable and sustainable manner;
  (iii) the promotion of social and economic development; and
  (iv) the promotion of a safe and healthy environment;
(b) enable effective local government;
(c) enable integrated development; and
(d) have a tax base as inclusive as possible of users of municipal services in the municipality" (s 24).

In short, the Demarcation Board should demarcate *with the aim of establishing municipal areas that are democratic and accountable, financially sound, able to provide good services and able to develop the municipal area.*

The Demarcation Board should demarcate with the aim of establishing municipal areas that are democratic and accountable, financially sound, able to provide good services and able to develop the municipal area.

Factors that the Board must consider

The Act lists the factors that the Board should take into account when trying to attain those objectives through the demarcation of municipal boundaries (s 25). These factors, together with the aims set out above, carry the entire demarcation process.

The factors are -

- how people move in the area, where they go to work, spend leisure time and spend money, how goods and services move and who services whom in the area;
- the need for integrated areas and the need to avoid fragmentation – specific mention is made of the creation of metropolitan areas;
- the financial and administrative capability of a municipality to perform municipal functions;
- existing municipal and provincial boundaries (eg to what province has a municipality always belonged?) as well as areas of traditional rural communities (eg does the demarcation cut right through such an area?);
- functional boundaries, such as voting and magisterial districts, health, transport, police and census boundaries;
- how the land is being used and how it is expected to be used (industrial, agricultural, residential etc);
- the need for co-ordinated municipal, provincial and national programmes and services, including the needs of the administration of justice and health care;
- topographical, environmental and physical characteristics;
- the administrative consequences of demarcation on the municipality's creditworthiness (say a former 'rich' municipality merges with a 'poor' one), on existing municipalities and their council members and staff etc;
- the need to rationalise the total number of municipalities (the Minister can make regulations in which targets and objectives for the rationalisation of municipalities are prescribed).

Undoubtedly, the contentious nature of some of these factors will come out in the demarcation process. Discussions will be held over issues such as the need for decreasing the number of councillors, the demarcation of a metropolitan area, and which municipality will profit in its tax base from an industrial area.

Procedures of the Board

Demarcation procedure

The Board must announce its intention to consider a determination of boundaries in a newspaper and on the radio, and it must invite the public to submit written representations and views (s 26). The following persons and/or organs must also be notified and they can comment on the matter: the MEC, each municipality that will be affected, the magistrate, if a magisterial district is affected, and the provincial House of Traditional Leaders if a boundary of a traditional authority is affected.

The Board is obliged to consider all representations and views. Thereafter it can make a final decision. The Board can also decide to hold a public meeting where it allows the public to ask questions and air their views, or it can decide to conduct a formal investigation (s 27).

The formal investigation can be done by the Board itself or by an investigating committee, established by the Board. The Board (or an investigating committee) has the power to force a person, by means of a summons, to appear before the Board to give evidence or to hand over documents. It can also administer an oath, or solemn affirmation, to persons it is questioning (s 30).

Only the Board can make a final decision on a boundary determination; it cannot delegate that power to any of its committees or members. Questions before the Board are decided by a supporting vote of at least the majority of the members (s 17). When the Board has made a final decision it should send the particulars of the determination to the Electoral Commission. The Electoral Commission decides whether the new boundary affects the present representation of voters in the councils of any affected municipality. If it does, the determination will take effect only after the next municipal election. If it does not, the determination will take effect from a date determined by the MEC (s 23). A boundary determination must be published in the relevant *Provincial Gazette*. The notice should say when the determination takes effect (s 21(3)).

Appeal against a demarcation

Any person who is aggrieved by a demarcation, may, within 30 days after publication, submit written objections to the Board. The Board must consider these objections and can change or confirm its decision (s 21(4) and (5)).

Board members' independence and credibility

Members of the Board should perform their duties in good faith and without fear, favour or prejudice and should refrain from any acts that compromise the Board's credibility, impartiality, independence and integrity. They must disclose any private interests in matters before the Board and withdraw from the proceedings, unless the Board decides otherwise. Members should not use their position or privileges for private gain or to benefit another person. Full-time Board members are not permitted to engage in any other paid work, without the consent of both the Board and the Minister (s 12).

Assistance

The Board may establish committees to

assist it. Members of these committees are subject to the same rules pertaining to conduct, as those applicable to members of the Board. Those committee members are also subject to the same rules concerning the (dis)qualifications for being a member. The assisting committees can have advisory members.

The Board can ask municipalities who will be affected by demarcation to make facilities available for the holding of meetings.

Offences

To obstruct proceedings of the Board or a committee, to threaten or influence the Board or committee members or to fail to answer to a summons constitute offences, and can be punished by a fine or imprisonment (s 42).

Challenges

The Board has a huge task on its hands. It has to work towards a situation where there is a rationalised number of viable, democratic municipalities while, at the same time, it needs to be sensitive to the views of the communities that will be affected. But the greatest challenge for the Board might very well be the time factor. There will be pressure on the Board to demarcate as many municipalities as possible before the next local elections, to prevent the holding of local elections on the basis of 'apartheid boundaries'. In terms of the recent constitutional amendment (see page 7), elections will be held around 1 November 2000. The fact that the IEC will need 4 to 6 months for voter registration, the preparation of ballot papers etc, leaves the Board with less than one and a half year to finalise as many boundaries as possible. However, the issues and interests at stake do not permit the demarcation process to turn into a race against time.

Jaap de Visser
Local Government Project
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Municipal Demarcation Board

Chairperson reports

Dr. Michael Sutcliffe
Chairperson, Municipal Demarcation Board

Over the past two months the Municipal Demarcation Board has focused on the following:

- Developing a framework within which the demarcation process would occur before the 2000 elections;
- Building an institutional base for the Board; and
- Developing relationships with stakeholders and roleplayers.

This report briefly outlines key aspects of each of these areas.

Framework for demarcation

In order for municipal elections to be held around 1 November 2000, the Board has set a number of target dates for the completion of its work:

Phase 1: The Board focuses on developing policy statements on rationalising municipalities and drafts frameworks for demarcation. This will end in late June 1999.

Phase 2: Finalisation of metropolitan and district boundaries. This should be completed around 31 August 1999.

Phase 3: Finalisation of municipal boundaries. This should be completed around 31 January 2000.

Phase 4: Finalisation of ward boundaries. This must end around 31 May 2000 in order for the Independent Electoral Committee (IEC) to have enough time to prepare for the elections.

Phase 5: Finalisation of functional boundaries: health, transport, magisterial districts, etc. Discussions with departments have begun, but the actual alignment process will begin around August 1999 and will be ongoing.

These phases all run concurrently with different end-points. In addition, provision is being made for the Board to ensure its advisory roles are effectively provided for. At the same time, co-operative relationships with associated institutions (IEC, Statistics SA and National Spatial Information Framework) and all departments of government are being developed.

Policy development

The Board is presently undertaking research and policy work in the following areas:

- **Developing spatial and attribute bases.** On the spatial side, work will need to be undertaken to verify the IEC

boundaries and then develop the spatial data base to be used in the demarcation process. Additional data bases are also being developed.

- **Identifying areas of traditional rural communities,** linked also to land tenure and land restitution/claims processes.
- **Policy on factors and objectives** to be used in determining boundaries.
- **Metropolitan boundaries.** A strategic framework for assessing metropolitan and other urban conurbations is being developed in order to provide input into the Minister's process of determining nodal points.
- **District council boundaries.** A strategic framework for district councils is being developed which, for the first time, properly places the functions to be performed by district councils at the centre of the process of determining district council boundaries.
- **Cross boundary areas (CBAs).** The Board is preparing a framework for utilisation by national and provincial governments in assessing CBAs and identifying whether or not there should be cross boundary district councils/metropolitan councils or cross boundary municipalities.
- **Rationalisation of municipalities.** A framework outlining the approach of the Board to the process of rationalising municipalities is being developed.

The policy development process may be summarised as follows:

- **Development of draft frameworks.** This has already begun.
- **Presentation of draft frameworks to stakeholders and roleplayers.** A workshop is being arranged for 3 May at which the Board will present its preliminary assessments on each of the policy areas. Invited to this meeting will be: National Portfolio Sub-committee, the Minister for Local Government, MECs, SALGA, Houses of Traditional Leaders, NGOs, National Departments, IEC.
- **Development of draft frameworks.** This will be done during May 1999.
- **Publication of draft frameworks.** This will be done by early June 1999.
- **Finalisation of policy frameworks.** This will be done by early July 1999.

Ad hoc demarcations

The approach adopted by the Board to deal with requests from municipalities for demarcations is as follows:

- *Ad hoc* demarcations will only be considered if they are urgent, are minor, are for developmental reasons and are unlikely to be controversial.
- The following information must generally be provided: a map of the relevant area, a point-to-point description, if a traditional authority/magisterial district is affected, details of how it is affected, letters from affected municipalities indicating the concurrence of their councils with the proposed exclusions and/or inclusions and any other information which may be useful.

Presently, the following municipalities have requested relatively minor *ad hoc* demarcations which the Board is considering:

Rustenburg District Council
Scottburgh/Umzinto
Piet Retief
Witbank
Newcastle
Greytown
Highveld Ridge
Ashton
Balfour Representative Council
Dannhauser
Ermelo
Creighton
Greytown
Newcastle

The Board's institutional base

The Board is in the process of finalising its staff complement, with headquarters being in Pretoria.

Discussions are underway with the IEC on ensuring that a co-operative relationship is established between the Demarcation Board and the IEC. This relationship will primarily revolve around the use of the existing IEC boundary shapefiles and infrastructure for the establishment of a website, although some of the other infrastructure of the IEC (such as its communication network) might also be utilised.

The Demarcation Board has already developed information and data bases in excess of those available to the IEC which will allow the interrogation and interpretation of the factors and objectives stipulated in the Municipal Demarcation Act (ss 24 and 25).

Ad hoc demarcations will only be considered if they are urgent, are minor, are for developmental reasons and are unlikely to be controversial.

Municipalities have again been requested to provide the Board with all available data they may have describing the factors and objectives.

The Board is in the process of identifying between 20-40 consultants in each of the provinces who will assist the Board in acting as Investigation Committees during the demarcation process. Once the investigation process begins, teams of between 2-4 consultants will be drawn from these provincial lists and utilised for investigations.

Stakeholders and roleplayers

Very useful meetings have been held with most of the following stakeholders and roleplayers:

- National Portfolio Committee;
- Minister and officials of Department of Constitutional Development;
- MECs;
- SALGA and its affiliates;
- Houses of Traditional Leaders;
- National departments;
- Political parties in the legislatures;
- Key private sector agencies;
- Key NGOs.

In almost all cases, the stakeholders and roleplayers have agreed that they would support the process as detailed by the Board, and will not pre-empt the demarcation process by encouraging the development of demarcation options outside the agreed process.

The Board has respectfully requested all stakeholders and roleplayers not to finalise and submit any proposals for municipal demarcation before the relevant notice has been published.

The strategy envisaged by the Board will, in my view, assist in preventing unnecessary expectations and conflict, and will ensure that the demarcation process is managed in an orderly and smooth manner, in a co-operative spirit and within the limited timeframe available.

This request is all the more important given our need for a national approach to the determination of boundaries, whether it be metropolitan, district or municipal boundaries.

Constitutional Court affirms the status of local government

The Constitutional Court has affirmed that the new constitutional order confers on local government the status of an autonomous and distinct component of government. Local government is no longer merely exercising powers delegated to it by the national or provincial governments; instead municipal councils are legislative assemblies and their legislative acts, which include levying taxes and adopting budgets, are not subject to administrative review by the courts. Although decided under the interim Constitution, the decision in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) reinforces the new and increased status the 1996 Constitution accords local government.

The facts

The four transitional metropolitan substructures in the Johannesburg metropolitan area resolved to levy a general property rate of 6,45 cent in the rand throughout the whole area. This would generate a surplus in income for the affluent Eastern (EMS) and Northern Metropolitan Substructures (NMS) while a deficit would occur in the disadvantaged Southern (SMS) and Western Metropolitan Substructures (WMS). The EMS and NMS would pay their surplus income to the Johannesburg Transitional Metropolitan Council (JTMC) in terms of a levy imposed by the JTMC on them, whereupon the JTMC would pay a subsidy to the SMS and WMS to cover their deficits.

Fedsure and other EMS rate payers objected to the rate of 6,45 cents in the rand the EMS levied, the levy imposed by the JTMC on the EMS and the payment of the subsidy to the SMS and WMS. They contended that all powers of a municipal substructure, including the making of by-laws and the imposition of rates and levies, were delegated powers received from the provincial or national government, rendering the exercise of those powers administrative actions. Consequently, such actions could be reviewed in terms of administrative law, including the right to fair administrative action enshrined in section 24 of the interim Constitution. The crux of the argument was thus that the interim Constitution did not change the status of the local government as it was before April 1994. The focus of this note is restricted to the Court's view of the constitutional status of local government.

Bylaws not administrative acts

The Constitutional Court held that under the interim Constitution, and the 1996 Constitution, a local government is no longer a public body exercising delegated powers. A municipal council is "a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself." The council is a deliberative body whose members are elected, and whose legislative decisions are influenced by political considerations for which the council is politically accountable to the electorate. While legislative decisions should be lawful, they are, unlike executive acts of a municipality, not subject to the principles of administrative law, including the requirements of section 24 of the interim Constitution.

A municipal council is "a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself."

Taxing and spending are legislative acts

The question is, then, whether the resolutions of a municipal council of imposing taxes or approving appropriations out of its funds, are legislative or executive acts. The Court held that, in terms of the Constitution, when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it is exercising a power peculiar to elected legislative bodies. The power to tax and spend is exercised by democratically elected representatives after due deliberation. In this case, the Court concluded, the EMS exercised its taxing power by setting the rate. The resolution of the JTMC to raise the levy from two substructures, and to pay a subsidy to the other two, formed an integral part of the adoption of a budget and as such constituted the exercise of its spending power. Resolutions to adopt a municipal budget are legislative acts, and are not subject to review in terms of the principles of administrative law.

Constitutional control of municipal legislatures

The fact that by-laws, including the imposition of rates and levies, are proper legislative actions, and thus not subject to administrative review, does not make them immune from judicial review. The Court held that the principle of legality - that all legislative and executive actions should be taken within the four corners of the law, including the Constitution - is fundamental to the new constitutional dispensation. The principle of legality forms part of the rule of law which is now one of the founding values of the 1996 Constitution. Legislative and executive bodies created by the Constitution may thus not exercise

powers or perform functions that are not given to them by law.

Outcome

On the question whether the EMS in fixing the rates payable, acted lawfully, the Court was unanimous that it acted within its powers. However, on the question whether the JTMC in levying a contribution from the EMS and NMS, and paying a subsidy to the WMS and SMS, acted within the enabling legislation, the Court was evenly divided. Five judges held that the JTMC was acting within its powers while the other five disagreed. In the event of this even division, the decision of the High Court which upheld the lawfulness of the JTMC's actions, was thus not disturbed.

Significance

Although the decision was taken under the interim Constitution, the decision establishes authoritatively the position of local government. First, local government is an autonomous sphere of government; its powers are derived from the Constitution and are no longer delegated from the national or provincial government. Second, although municipal councils' legislative acts are not administrative acts and are therefore not reviewable in terms of administrative law, they remain nevertheless subject to the principle of legality and can be reviewed for compliance with the Constitution and other legislation. Third, the exercise of municipal taxing and spending powers constitutes a legislative act.

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and Jaap de Visser
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Local government elections

extending the interim phase

Recent amendments to the Constitution, read with certain provisions of the Municipal Structures Act, have the effect that the elections for local government, which were due to take place after October 1999, will now take place approximately one year later.

Prior to the abovementioned amendments, the terms of municipal councils were fixed at a period of four years so that elections in respect of local government had to take place at around November 1999. Furthermore, the provisions of the Local Government Transition Act(LGTA) would have remained in place until 30 April 1999 unless it was repealed sooner.

The amendments

Section 159 of the Constitution has been amended in terms of Act 65 of 1998 to extend the term of municipal councils to five years. The transitional arrangement in Schedule 6 item 26 now provides that the LGTA remains operative until after the local government elections and certain sections thereof may not be repealed before 30 April 2000. The Municipal Structures Act, in sections 24 and 93, now provides that the terms of the current municipal councils will run for 5 years until 1 November 2000 and that the election must take place within 90 days of the date of expiry, that is, before 30 January 2001.

The rationale

Why was it necessary to effectively postpone these elections? Was it just a matter of there not being enough time to do the necessary groundwork, or was it simply a case of the majority party buying extra time to effect delivery? The answer probably lies somewhere in between. In terms of the White Paper on Local Government, the Department of Constitutional Development set itself the target of seeing through three pieces of legislation which were considered crucial to the implementation of the final stage of local government. These were the Municipal Demarcation Act, the Municipal Structures Act and the forthcoming Municipal Systems Bill. The Systems Bill has not seen the light of day yet, although a number of working drafts have been discussed in several intergovernmental fora. A final draft can be expected either shortly before or after the national elections.

Few would argue that effective transformation in local government can occur without the apartheid boundaries having to be redrawn. Neither would there be a sustainable argument that there is little need for uniform structures of local government over the length and breadth of South Africa. Indeed, the Municipal Demarcation Act determines that should demarcation affect the representation of voters in a council, such demarcation will only take effect from the date of the next election for that area. Clearly, should an area not be demarcated in time for the 2000 local government elections, the apartheid boundaries would have to remain until the following elections. However, effective transformation does not only rely on redrawn boundaries and uniform structures. It is also dependent upon municipal systems and procedures which further the ends of democratic governance, developmental local government and the pursuit of social and economic development. The forthcoming Systems Bill aims to provide that basis for future local government.

Clearly, the stage has not yet been set for the ushering in of the final phase of local government as the processes to finalise these laws have proved to be long and arduous.

Johann Mettler
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Municipal St

The birth of a new generation of municipalities

The second pillar of new local government has been erected: on 18 December 1998 the President signed the Municipal Structures Act 117 of 1998 into law. This Act, which provides for the establishment of a new generation of municipalities, came into operation on 1 February 1999. Together with the Municipal Demarcation Act 27 of 1998 and the forthcoming Systems Bill, it aims to lay the foundation for future local government in South Africa. The Structures Act is a voluminous piece of legislation which gives flesh to the categories of municipalities, as identified in the Constitution, and defines the different types of municipalities that can be established within each category. The Act also divides the functions and powers between categories of municipalities. It regulates matters connected with local government and its internal systems and structures, including electoral systems.

In this first part of a series on the Municipal Structures Act, the different categories and types that the Act introduces will be presented as well as the procedure for establishing municipalities after demarcation by the Demarcation Board. The article will also deal with rural local government and with a controversial aspect of the Act, namely the concept of a 'megacity'.

Categories and types

The Constitution together with the Municipal Structures Act establishes a system of categories and types of municipalities. What is the difference between categories and types? A category is a constitutional 'brand' of municipality, dependent on the existing situation in that area (in other words, is it a big city, a desolate rural area or something in between?). A type is a way of structuring the municipality (for example, with or without a mayor, with or without ward committees, etc) which is introduced by provincial government.

Categories

There are three categories of municipalities:
Category A - the 'metropolitan area': one municipality that has the exclusive authority to administer and make rules in its area.
Category B - the 'local municipality': it shares that authority in its area with the 'district municipality' of the district in which it falls.
Category C - the 'district municipality': it has authority to administer and make rules in an area, which includes more than one local municipality (s 155(1) of the Constitution).

In what category does a certain municipality fall and who makes the decision about the category? The Minister of Constitutional Development decides on the categories. He or she decides whether a certain area will be a metropole, a rural ('district management') area or have the normal combination of district and local municipalities.

Types

The Structures Act lists a number of possible types for each category. It is up to each province to determine in provincial legislation which types can be established in the province. In the final instance, it is the MEC for Local Government who decides what type a certain municipality will be when he or she establishes the municipality after it has been demarcated by the Demarcation Board.

What types are there?

The Structures Act lists the types that are possible within each category (ss 8, 9 and 10). See table opposite.

The distinguishing aspects of the different types

There are five different aspects that distinguish the types from each other.

1. Some types have an 'executive committee', that collectively exercises the executive authority over the municipality. In other words, a small group of persons can be assigned to administer the municipality like a 'mini-cabinet'.
2. There are types that have an 'executive mayor': one person, in most instances assisted by a 'mayoral committee', is afforded executive authority.
3. In a 'plenary executive system', the municipal council is the only organ that has executive authority.
4. Big cities can have a 'subcouncil system', where subcouncils, linked to a certain urban area, can exercise powers delegated to them by the 'overall' metropolitan council.
5. A 'ward system' allows for matters of local concern to be dealt with by committees established for wards.

Some combinations between the five aspects are possible.

The municipality's 'birth-certificate': the section 12 notice

After the Demarcation Board has demarcated the boundary of a municipality, the MEC has to establish the municipality by notice in the *Provincial Gazette*, the so-

ructures Act

called 'section 12 notice' (s 12). This notice serves as a comprehensive 'birth certificate' for the new municipality. It must include the most important legal aspects of the municipality, such as the category (which has been decided upon by the Minister), type, boundary and number of councillors (in s 20, the criteria for the number of councillors are set out). Before he or she can establish a municipality, the MEC must consult organised local government in the province and also consider the views of the public and of any existing municipalities that are likely to be affected by the establishment of the new municipality.

With the establishment of the new municipality, the old municipality in that area will cease to exist. The MEC must regulate the consequences of a new municipality superseding an old municipality (s 14). He or she must deal in particular with the transfer/retrenchment of staff, what happens to the councillors, the transfer of assets and liabilities and the (extent of the) continued application of any by-laws, regulations and resolutions of the old municipality.

If the rules and regulations of the old municipality continue to apply in the new municipality, they must be reviewed, and where necessary, rationalised by the new municipality (s 15).

Municipal Types

Category A 'Metropolitan Municipality'	• *collective executive type* establishes an executive committee
	• *collective executive / subcouncil type* establishes an executive committee and metropolitan subcouncils
	• *collective executive / ward type* establishes an executive committee and ward committees
	• *collective executive / subcouncil / ward type* establishes an executive committee, metropolitan subcouncils and ward committees
	• *executive mayor type* elects an executive mayor
	• *executive mayor / subcouncil type* elects an executive mayor and establishes metropolitan subcouncils
	• *executive mayor / ward type* elects an executive mayor and establishes ward committees
	• *executive mayor / ward / subcouncil type* elects an executive mayor, establishes ward committees and establishes metropolitan subcouncils
Category B 'Local Municipality'	• *collective executive type* establishes executive committee
	• *collective executive / ward type* establishes executive committees and ward committees
	• *executive mayor type* elects an executive mayor
	• *executive mayor / ward type* elects an executive mayor and establishes ward committees
	• *plenary executive type* municipal council itself has all the executive authority
	• *plenary executive / ward type* municipal council has executive authority but can establish ward committees that deal with matters of local concern to wards
Category C 'District Municipality'	• *collective executive type* establishes an executive committee
	• *executive mayor type* elects an executive mayor
	• *plenary type* municipal council itself has all the executive authority

Rural local government

It does not always make sense to have local municipalities in rural areas where there is low population density and very little activity. In those areas, local municipalities are not conducive to the fulfilment of the objectives of local government. The Minister can declare these areas 'district management areas' (s 6). There are no local municipalities in a district management area. It is governed by a district municipality only. The Minister can only declare an area to be a district management area on recommendation of the Demarcation Board and after consulting the MEC in the province.

Urban local government

The megacity

The Structures Act introduces the concept of a megacity, and in so doing follows an international trend to transform multi-tiered structures of metropoles into single-tiered systems whereby the entire city is governed by one single local authority. This has caused a controversy in local government circles. There were heated debates in Parliament on the Bill: an IFP MP publicly tore up a page of the Bill in protest, and opposition parties repeatedly threatened to take the Bill to the Constitutional Court.

Metropolitan area

The Constitution foresaw the need for a special category of municipality in metropolitan areas (s 155(1)).

In a 'normal' situation, there would be both a local ('category B') and district ('category C') municipality existing in the same area. This is not the case when a certain area is designated as a 'metropolitan area'. The Minister decides whether a certain area is a 'metropolitan area' and whether it must therefore have a category A municipality only (s 4). The criteria, as set out in section 2, are:

"An area must have a single category A municipality if that area can reasonably be regarded as-

(a) a conurbation featuring -
  (i) areas of high population density;
  (ii) an intense movement of people, goods and services;
  (iii) extensive development; and
  (iv) multiple business districts and industrial areas;

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Municipal St

Continued from page 9

(b) a centre of economic activity with a complex and diverse economy;
(c) a single area for which integrated development planning is desirable; and
(d) having strong interdependent social and economic linkages between its constituent units."

Before deciding, the Minister must consult the MEC, the Demarcation Board, SALGA and organised local government in the province. The decision to identify an area as a metropolitan area must be published in the *Government Gazette*. The Minister identifies the core city of the metropole, the Demarcation Board determines the outer boundaries.

Metropolitan subcouncils

The metropolitan subcouncils replace the existing metropolitan substructures. A metropolitan municipality (of the 'subcouncil-type') can establish metropolitan subcouncils with their own names, by passing a by-law. Each subcouncil is linked to an area within the municipality consisting of a group of adjoining wards. Those wards are clustered into groups by the metro council (after consulting the Demarcation Board).

The metropolitan subcouncil will consist of the councillors representing the wards, that make up the 'subcouncil area', and an additional number of councillors determined by the metro council.

The difference between the new and the former system is that the metropolitan subcouncil does not have any 'original' powers or duties. It has only those duties and powers that are delegated to it by the metropolitan council (s 64). The only 'original' power that the subcouncil has is the power to make recommendations to the metropolitan council on any matter affecting its area.

Challenge

Presently, the Cape Metropolitan Council (CMC) is challenging the Act in the Cape High Court for its constitutionality. The CMC argues that the Act encroaches on the institutional integrity of local government because it introduces a fixed range of possible municipal types, from which provincial governments must choose, instead of providing criteria by which each municipal council can determine its own type.

Executive leaders

Apart from introducing the categories and types of municipalities, the Municipal Structures Act outlines the internal systems, structures and office-bearers of a municipality. The executive committee and the executive mayor will undoubtedly be central to those municipalities which allow for the establishment of those organs. This second part of the discussion on the Municipal Structures Act deals with the election, duties, powers and internal proceedings of the executive leadership of the municipality.

The executive committee

As can be seen in the table on page 9, some types of municipalities can have an executive committee. If an MEC establishes a type of municipality that has an executive committee, the municipal council elects the executive committee from members at the beginning of its term (s 45). Parties and interests represented in the municipal council must be represented in the executive committee in substantially the same proportion as they are represented in the municipal council (s 43). In other words, where 50 out of 90 councillors belong to Party A, the Act would not permit an executive committee with five out of six members belonging to Party A. Not more than 10 councillors or 20 per cent of the councillors can be elected to an executive committee.

Duties and powers of an executive committee

The executive committee is the principal committee of the municipal council (s 45). The Act contains a list of functions and powers of the executive committee (s 44(2) and (3)). In terms of that list, the executive committee must –

- identify and prioritise the needs of the municipality;
- recommend to the council on how to address those needs through the Integrated Development Plan (IDP) and estimates of revenue and expenditure;
- develop criteria for evaluation of these activities;
- evaluate progress in addressing the needs of the municipality;
- review the performance of the municipality in order to improve the municipality's -
  - (i) economy, efficiency and effectiveness;
  - (ii) credit control and revenue and debt collection; and
  - (iii) implementation of by-laws;
- monitor the municipality's management;
- oversee the provision of services in a sustainable manner;
- report on the involvement of communities in municipal affairs; and
- ensure public participation and consultation and report on the effects thereof on decisions taken by the council.

What the exact powers of the executive will be in each and every municipality, will depend on how the council is going to use its power to delegate functions and powers to other municipal organs.

Apart from the functions and powers listed above, the municipal council can delegate powers to the executive committee (s 32). Powers that can be delegated by the council exclude the power to approve the integrated development plan and any power mentioned in section 160(2) of the Constitution, that is, the passing of by-laws, the approval of budgets, the imposition of rates and other taxes, levies and duties and the raising of loans.

The executive committee will concern itself with the running of the municipality on a day-to-day basis. It can determine its own procedures, subject to directions and rules of the municipal council and must report on all its decisions to the municipal council.

The municipal council can remove one or more or all the members of its executive committee but it must notify the member concerned beforehand (s 53).

A majority of the members of an executive committee constitutes a quorum for a meeting. Committee decisions are taken on the basis of a majority of members present voting in favour of a proposal. The present

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requirement of consensus or at least a two-thirds majority in the executive committee (s 16(6) Local Government Transition Act) will be altered with this provision.

The mayor

One member of the executive committee must be elected by the municipal council as the mayor of the municipality. The election procedure of Schedule 3 to the Act applies. He or she can serve a maximum of two consecutive terms as mayor.

The mayor decides when and where the executive committee will meet. However, if a majority of the committee members requests a meeting in writing, the mayor must convene a meeting. The mayor presides over meetings of the executive committee and performs functions assigned to him or her by the municipal council or the executive committee. These duties include any ceremonial duties.

A mayor who is elected by an executive committee should not be confused with an executive mayor. Despite the existence of a mayor, the executive committee nevertheless exercises its powers collectively, in other words, as a committee. Even though the municipal council and the executive committee can delegate powers to the mayor (s 49(1)(b)), it seems that those powers cannot be of so substantial a nature that they deprive the executive committee of its role as the primary committee. This conclusion can be drawn firstly, from section 49(1)(b), which refers to ceremonial duties, secondly, from the fact that the Act gives a long list of powers and duties that is relative to the executive committee and thirdly, from the referral to that committee as the primary committee of the municipality.

Even though the role of executive mayor is still 'open' and will largely depend on what powers and functions the municipal council will delegate to him or her, it is clear that the executive mayor will be the 'executive leader' of the municipality.

The executive mayor

One can see from the table (page 9) which types of municipality have an executive mayor. At the beginning of its term, the municipal council elects the executive mayor (and, subject to the MEC's approval, a deputy executive mayor) from among its members (s 55). The election procedure of Schedule 3 to the Act applies. The executive mayor's term of office runs parallel to the term of office of the municipal council. It is not possible to serve more than two consecutive terms as an executive mayor.

Duties and powers of an executive mayor

The description of the duties and powers of the executive mayor is almost identical to the list of functions of the executive committee. The executive mayor is also under a duty to report on all its decisions to the municipal council.

In 'bigger' municipalities, that is municipalities with more than 9 council members, the executive mayor must appoint a 'mayoral committee' from among the councillors. This 'mayoral committee' is tasked with assisting the executive mayor, who can delegate specific responsibilities or powers to members of the mayoral committee.

The municipal council may remove the (deputy) executive mayor from office, subject to prior notice (s 58).

Even though the role of executive mayor is still 'open' and will therefore largely depend on what powers and functions the municipal council will delegate to him or her, it is clear that the executive mayor will be the 'executive leader' of the municipality. Section 7(b) speaks of "the exercise of executive authority through an executive mayor in whom the executive leadership of the municipality is vested and who is assisted by a mayoral committee". The executive mayor will be responsible for running the municipality on a day-to-day basis and he or she will be assisted in that by the mayoral committee (if there is any). The municipal council can designate some tasks of the executive mayor that he or she must exercise together with the mayoral committee. In this way, the council can bend the decision-making structure slightly towards a more 'collective' executive, bearing in mind that the mayoral committee is appointed by the executive mayor, whereas the executive committee (see above) is elected by the council.

Assessment

The Municipal Structures Act introduces a new system of executive leadership for a municipality. Important is the change in the required majority in the executive committee. But the key elements are the introduction of the executive mayor and the executive committee, both of which have been assigned a set of powers and duties in the Act. However, what the exact powers of the executive will be in each and every municipality, will depend on how the council is going to use its power to delegate functions and powers to other municipal organs. To that extent, the municipality has a choice in structuring its internal division of powers and functions.

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Grooming local government for the final phase

Gauteng one step ahead

Gauteng's Rationalisation of Local Government Affairs Act (RLGAA) 10 of 1998 came into effect on 19 March 1999 and brought local government in that province one step closer to the final phase of local government transformation. The stated purpose of the Act is to consolidate the existing legislative provisions regarding local government in Gauteng into one Act thereby creating a single legislative and administrative framework within which local government may conduct its affairs. The RLGAA further seeks to enhance the capacity of local government, improve standards of governance and service delivery, encourage public participation in local governance and foster a spirit of co-operation and shared responsibility between the local and the provincial spheres of government.

The context of the RLGAA

The RLGAA was promulgated in an environment where the Local Government Transition Act (LGTA), read together with various pieces of national legislation, provincial ordinances and regulations, and local government by-laws map out the terrain in which local government will exercise its powers and perform its functions. This phase of local government development is recognised, in terms of the White Paper on Local Government, as being the interim phase. It is during this phase that the formal restructuring of local government must be legislated upon. This has, to a large extent, taken place with the enactment of two key pieces of legislation, namely the Municipal Demarcation Act and the Municipal Structures Act discussed elsewhere in this issue. The RLGAA thus adds to the institutional framework within which local government in Gauteng operates. The Act is, to a significant degree, a transitional piece of legislation that repeals certain provincial legislation and assigns a host of powers to municipalities which were exercised by municipalities in terms of the local government ordinance relative to Gauteng.

There was clearly a need for the rationalisation of the body of inherited law in order to support the new vision and role identified for local government.

The importance of the RLGAA

The White Paper on Local Government recognised that many of the laws and regulations which supported the old system remained in effect and in one or other manner continued to impact on the operations of municipalities. The new democratic order requires a changed mandate for local government with additional developmental functions and new capacities, attitudes and approaches that are now emerging. There was thus clearly a need for the rationalisation of the body of inherited law in order to support the new vision and role identified for local government. The role of the provincial sphere of government in this endeavour is firstly, to support and strengthen local government by increasing its capacity to perform its functions and secondly, to regulate the exercise of municipal executive authority.

Specific features

Making by-laws

The procedure for making by-laws is fairly extensively prescribed with the emphasis being on adequate public notice and participation. In this regard, the Act prescribes that a municipal council must publish a notice in the *Provincial Gazette* and in at least one newspaper within the area, announcing its intention to make by-laws. This notice should specify:

- that comment is being sought on a draft by-law;
- a summary of what the draft by-law includes;
- to whom enquiries may be directed;
- where, when and how a copy of the draft may be obtained;
- the period for comment, which may be not less than one month from the notice date; and
- where comments on the draft may be lodged.

Furthermore, consultations with interest groups may precede the making of a by-law and, where consultations have taken place or comments have been received, those must be considered before the by-law is made. Should a council delay the making of a by-law for more than one year after the notice of its intention, the by-law cannot be made unless the entire procedure is repeated. Provision is, however, made for a situation where a by-law has to be made without delay – but this can only be done where public interest requires it. Amendments to, or the repeal of by-laws are subject to the same public participation procedures outlined above, except where an amendment to correct a mere textual error is required. The Act, very progressively, places a developmental duty on municipal councils to develop and implement policies and programmes to assist members of the public to comment on the draft by-law. Provision is also made for the review of by-laws, especially those promulgated before the advent of the RLGAA. Those promulgated in terms of the RLGAA must be reviewed at ten yearly intervals.

Standard by-laws

As part of provincial government's obligation to assist municipalities, the Act makes provision for the drafting of standard by-laws by the MEC responsible for local government. The making of a standard by-law by the MEC is subject to the same public participation procedures as described above. Such by-laws would become applicable to a municipal council only if it makes a by-law to that effect. This is a fairly innovative development and is designed to empower councils when the LGTA is repealed and provincial government ceases to operate in a prescriptive manner, as is

currently the case, in respect of local government competences.

Guidelines

It is further provided that the MEC may issue guidelines to assist councils in the exercise of their powers, functions or duties or to give effect to the purpose of the RLGAA.

Procurement

A municipal council has executive authority to, among other things, procure goods and services in the exercise of its powers and the performance of its functions. A provincial government has the right to regulate such an exercise of a council's executive authority. In that vein, the Act stipulates that a MEC must prescribe the tender value of goods or services in respect of which the contemplated procurement procedure would apply. This procedure would, however, not be applicable in the case where goods or services have to be procured as a matter of emergency, as a matter of necessity, or from a sole supplier. Goods or services falling outside the net must be dealt with in accordance with the applicable financial regulations of a municipality. When a municipality intends to procure prescribed goods or services, the procedure is as follows:

- the decision to procure must be contained in a notice that is published in a local newspaper and displayed in a prominent designated place;
- the notice must contain the requirements and specifications of the goods or services, an indication of where, when and how the official tender document will be displayed for inspection or acquisition, the cut-off time for applications and the procedure for submitting an application;
- all tender applications must be properly completed, failing which the application may be disqualified;
- after the cut-off time, the municipality must enter certain details of all applicants in a register;
- members of the public may be present to witness the registration process and to inspect the register at the council's convenience;
- when a council considers which tender to accept, it must have due regard to, among other things, factors specified in any other law, policy made by a competent organ of state, only those tender applicants referred to in the register, the promotion of small and medium sized enterprises, any affirmative action policy in respect of preferred categories of persons, bodies, organisations or corporations as the council may determine from time to time, employment generation or the transfer of skills, effective and efficient delivery of municipal services, the capacity and ability of applicants to perform as required and the cost-effectiveness of the application without necessarily favouring the lowest tender;
- the decision to accept, reject or disqualify an application rests with the municipal council unless this function is assigned or delegated to a committee;
- the decision of the council or the committee is final and binding;
- the decision of the council or the committee must be conveyed in writing to the relevant applicant and reasons must be provided in the event of a disqualification or rejection of an application.

To be commended is the shift away from *ad hoc* decisions on credit control, which has been exposed by many a court case, to an approach which is rules based, clear and predictable.

The Act makes further provision for an expedited procurement procedure in respect of prescribed goods or services where the municipal council takes a resolution to this effect. In this event, the council must publish and display the reasons for dispensing with the procurement procedure, a summary of the requirements of the prescribed goods or services, indicating where, when and how the document containing the requirements or specifications may be inspected or acquired, and the details of the person, body, organisation or corporation supplying the goods or services. This function may not be assigned or delegated by a council.

Provision is also made for extending or varying a tender agreement but, this may not be done more than once, or for a period exceeding the duration of the original agreement or for an amount exceeding twenty percent of the original tender value. Similar notification requirements apply as in the case of an expedited procurement procedure and similarly this function of the council may not be delegated or assigned.

As mentioned above, a council may establish a committee responsible for procurement or confer this responsibility onto any of its committees. This committee may, in addition, recommend policies, procedures and practices to enable the council to exercise its powers, functions or duties in an effective, efficient an transparent manner. It may also make recommendations concerning the criteria for determining the categories persons, bodies, organisations or corporations to be affirmed as contemplated in the Act.

Credit control

Regarding a council's credit control measures, it is provided that all municipalities must make by-laws to regulate its credit control measures. Furthermore, the MEC may prescribe requirements that must be incorporated in the council's by-laws on credit control. All credit control measures must make provision for:

- the listing of services and products in respect of which taxes, rates, levies, fees, charges or surcharges may be imposed, and on whom they may be imposed;
- the circumstances and manner of payment for the above taxes, etc;
- the consequences of non-payment including discontinuance of any service, the circumstances, manner and duration of such discontinuance, any recovery mechanism the municipality may employ and the steps a municipal council may take to protect its property in the event of a discontinuance; and
- the prevention and termination of all services or the recovery of all products which were acquired in an illegal or unauthorised manner.

To be commended is the shift away from *ad hoc* decisions on credit control, which have been the subject of many a court case, to an approach which is rule-based, clear and predictable.

Conclusion

The RLGAA comes at a time when provincial governments are on the verge of shedding their prescriptive role in respect of local government and replacing it with a regulatory one, where the distinctiveness of local government as a sphere of government will be respected. The Gauteng Legislature has taken the lead by creating the space for local government to come into its own. Just as much as this move is to be applauded, so too must local government in Gauteng be encouraged and supported to take this opportunity to carve for itself a place in the local government sphere.

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Elections for, and

In less than two years time, South African citizens will for the first time elect their municipal councils in a fully democratic manner. At present, local government is in a transitional period, and so is the law on elections for, and voting in, the municipal council. Many disputes, relating to this topic, found their way to court. It is important to look at how the courts see the transition, and how they resolved thorny issues such as the role of minority parties in executive committees, traditional leaders in the council and the problem of councillors who owe the municipality money. This article deals with some of the questions on this topic that were raised in court.

Can a councillor be removed from office when he or she owes the municipality money?

In terms of the LGTA, the principle has been adopted that a person who is indebted to his or her municipality cannot be elected as a councillor (Principle 6, Schedule 4 of LGTA). The question arises whether an already elected councillor can be removed from office as soon as he or she becomes a debtor of the municipality. In *Frans v Munisipaliteit van Groot Brakrivier en Andere* 1997 (3) BCLR 346 (C)), the Cape High Court decided that if a councillor is indebted, his or her term of office can be terminated without a hearing.

This could be inconsistent with the right to stand for election. The Constitutional Court has been called upon to decide this question. In *O'Meara NO v Padayachi and Others* 1997 (2) BCLR 258 (D), the High Court in Durban upheld the argument that this type of regulation is unconstitutional because it is too rigid (it applies to all debtors, irrespective of any mitigating circumstances). It referred the matter to the Constitutional Court, which has not decied the matter as yet.

If a councillor is indebted, his or her term of office can be terminated without a hearing.

It must be noted that these cases were dealt with in terms of the interim Constitution. The 1996 Constitution gives citizens not only the right to stand for election, but also to hold office, if elected (s 19(3)(b)). Even if the Constitutional Court were to decide that there is no inconsistency with section 21(2) of the interim Constitution, one could still argue that the 1996 Constitution changes matters.

Can a councillor be removed from office when he or she is suspended by the political party he or she represents?

In Beaufort West, one of the political parties in the council wanted one of its councillors to be removed from office because the councillor had contravened party-rules. The party suspended him, and the town clerk declared that there was a vacancy in the council. In *De Villiers v Munisipaliteit van Beaufort-Wes en Andere* 1998 (9) BCLR 1060 (C), the Cape High Court made it clear that it did not agree with this procedure. The fact that a councillor has to step down when he or she is no longer a member of his or her party does not mean that a political party can force a councillor to step down by suspending him. Voters are entitled to see the number of seats for a political party that they voted for maintained. Once elected, a person assumes rights and privileges attached to public office. The political party cannot interfere with these rights and privileges at will by suspending that person. It can only force a councillor to step down by expelling him or her entirely from the party.

Does a political party loose seats if its list appears to be too short?

In KwaZulu-Natal, the Local Government Election Regulations stipulated in regulation 75(4) that a political party looses the number of seats that it cannot fill from a party-list that is too short. In *Democratic Party v Miller NO and Others* 1997 (2) BCLR 223 (D), the High Court in Durban found this regulation to be inconsistent with the right to vote. According to the Court, it resulted in the will of the electorate being disregarded: one votes for a particular party but the votes are not being translated into seats. The party was entitled to the number of seats which resulted from the elections.

Electing an executive committee from the council

Many disputes on this issue found their way to court. How must an executive committee be composed relative to its council? Can the composition of the executive committee deviate from the composition of the council? Hidden behind these legal questions is the real issue, namely whether the law safeguards a role for minority parties in the executive committee.

The present situation

Section 16(6) of the LGTA provides that an executive committee must be elected according to a system of proportional representation. What does 'proportional representation' mean? In *Nasionale Party in die Oos-Kaap en 'n Ander v Port Elizabeth Oorgangsraad en Andere* 1998 (2) BCLR 141 (SE), the High Court was confronted with that question in a context where the ANC had a small majority in the council, but a two-thirds majority in the executive committee. The two-thirds majority was crucial, since it implied that no consensus was necessary in the executive committee. The Court held that this sort of situation

voting in, the council

recent decisions

was exactly what section 16(6) of the LGTA was supposed to prevent. It was of the opinion that the representation of parties in the executive committee should mirror the representation of parties in the council.

In the case of *Crowther en Andere v Plaaslike Oorgangsraad vir Bethlehem en Andere* 1997 (8) BCLR 1011 (O)), the executive committee members were elected by a simple majority vote in the council. This resulted in an executive committee that did not deviate all that much from the composition of the council itself. However, the Court was not convinced by this and neither was it convinced by the fact that the council called this a system of proportional representation. It amounted to a method of election, based on the will of the majority. The Court found that, as far as possible, an executive committee should reflect in its composition all the parties and groups of the council with an emphasis on the interests of minorities.

The conclusion is that at present, the composition of the executive committee must reflect the composition of the council. The law does not allow for majority rule in executive committees. Instead, all parties that are represented in the council, including minorities, should be represented in the executive committee as far as practically possible.

Will anything change under new legislation?

The 1996 Constitution says that parties and interests reflected in the council must be 'fairly represented'. The new Municipal Structures Act 117 of 1998 gives flesh to this by saying that the executive committee must be composed in such a way that parties must have substantially the same proportion of seats in the executive committee as they have in the council (s 43(2)). In other words, the composition of the executive committee must be a reflection of the composition of the council and minorities may not be excluded. The legislator has done away with the term 'proportional representation' and has followed the courts in providing for an executive committee where minorities can be fairly represented.

A confusing budget vote: two-thirds or simple majority?

The 1996 Constitution provides that a local authority's budget should be approved with a supporting vote of a *simple majority* of the members of the council (s 160 (2) and (3)). However, the LGTA instructs local authorities to pass their budgets with a two-thirds majority (s 16(5)). This is a confusing situation. Does it mean that section 16(5) of the LGTA is unconstitutional? In *MEC for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (7) BCLR 855 (CC), the Constitutional Court decided that it is not. The 1996 Constitution, the Court said, aims to establish a new order, which can only come into effect after a period of transition. Differences between the regimes in the transitional period and the new final order, are inevitable and do not necessarily conflict. The 1996 Constitution facilitates the transition. It stipulates that the LGTA will remain in force until the next elections and that section 16(5) of the LGTA is not to be repealed before then (item 26, Schedule 6). This implies that the provisions of the 1996 Constitution that are in conflict with the LGTA are not applicable in the transitional period. The simple majority requirement for a budget is an element of the new local government order which has not yet gained momentum. Until that day, budgets need a two-thirds majority.

Tension between democracy and traditional authorities

In the case of *ANC and Another v Minister of Local Government and Housing, KZN* 1998 (4) BCLR 399 (CC), the Constitutional Court was asked to give an opinion on the highly sensitive issue of traditional authorities in KwaZulu-Natal. After the first local government elections, KwaZulu-Natal established seven regional (or district) councils as local authorities in the province. The council consisted of both elected and nominated representatives, together with traditional leaders who had an *ex officio* status. The ANC argued that these regional councils were unlawfully established because their establishment was inconsistent with section 182 of the interim Constitution, which regulated the role of traditional authorities within the area of '*elected* local government'. Not all of the council members were 'elected', but some of them were 'nominated', which, according to the ANC, made their establishment unconstitutional . The Constitutional Court did not uphold such a limited meaning of the term 'elected'. The Court emphasised the historical context of section 182. Its purpose was to resolve the inevitable tension between democratically elected local government and traditional authorities that derived their authority from tradition and customary law. The role of traditional authorities could not simply be erased with the introduction of democratic local government. That is why section 182 entitled them to membership of local government bodies that had been established in their area. The meaning of the word 'elected' in section 182 was to make clear that the traditional authorities were not entitled to membership of the council until the first democratic elections. The fact that a limited amount of councillors could be nominated did not make the council 'not elected' in terms of section 182, since the majority of the councillors were to be elected democratically.

It can be concluded that the Constitutional Court acknowledges the delicacy and difficulty of the transitional phase in which local government finds itself. The Constitutional Court is not prepared to interpret constitutional provisions pertaining to local government in a legalistic and technical way, since the court would then be guilty of myopia as to the historical context and complexity of the transformation of local government.

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Legal and Constitutional Working Group

Kishore Harie
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Working Group

The South African Local Government Association (SALGA), the body representing the local government sphere nationally, as well as its provincial affiliates have recognised the need to ensure that organised local government plays a meaningful role in shaping legislation transforming local government.

Engaging the legislature

To this end, SALGA's Legal and Constitutional Working Group was formed, comprising of representatives from each of the nine provincial local government associations, and is chaired by Cllr Nazo, representing the SALGA Executive Committee. A technical team of local government practitioners, drawn from SALGA and the provincial associations, provide technical support to the Working Group. The Group, as such, is not a decision-making body but makes recommendations which are carried forward to the SALGA management committee which in turn makes appropriate recommendations to the executive committee of SALGA. The Working Group has played a pivotal role, both at a technical and political level, in ensuring that SALGA has, to a very large extent, been able to shape the Demarcation Act and the Structures Act.

The Working Group has entered into a co-operation agreement with the Local Government Project of the Community Law Centre, UWC. In terms of the agreement, the Project will provide legislative research assistance to SALGA, specific training to affiliates on key local government legislation and technical assistance on legislative drafting.

The Working Group is currently playing a similar role in respect of the draft Municipal Systems Bill and, as a result of regular interactions with the Department of Constitutional Development, a number of concerns raised by SALGA around the provisions of the Bill have been taken on board. The Working Group is also expanding its capacity to enable SALGA to put forward draft legislation on certain key issues and it is the intention of SALGA to exploit fully the constitutional space accorded to local government within Parliament, and more particularly the National Council of Provinces. An important workshop was arranged during March where certain crucial aspects of the provincial supervision of local government were debated and which enabled SALGA to reach certain well considered positions on provincial support, monitoring and intervention.

Building capacity

An important focus area of SALGA is capacity building and information dissemination. To this end, Technical Team members from the Working Group and the Department of Constitutional Development have joined forces and are presently conducting a series of workshops throughout the country to brief municipalities on recent legislation which will impact on local government. The target audience for these workshops include councillors and officials from municipalities, officials and staff from organised local government and officials from provincial government. The scope of the information disseminated ranges from recent constitutional amendments impacting on local government, to Acts of Parliament transforming local government such as the Structures Act, the Demarcation Act, the Skills Development Act and the Systems Bill. The object of these workshops is to provide summaries of the legislation, to ensure that participants gain an understanding of the legislation and to ensure that participants are armed with the ability to disseminate information regarding these pieces of legislation. The material provided at the workshops include copies of the Acts referred to, as well as user-friendly manuals on the Demarcation- and the Structures Act which have been developed in order to make such key legislation accessible to all those working within local government. The workshops have commenced on 7 April and sessions have already been held in the Free State, North West, Northern Province, Western Cape, Gauteng, Northern Cape, KwaZulu-Natal and Mpumalanga. The final workshops are scheduled to take place in the Eastern Cape and will take place on 21 and 28 May in East London and Umtata respectively.

A major challenge for all provincial affiliates of SALGA, is to devise effective and sustainable strategies to engage with provincial legislatures on matters affecting local government.

Challenges

A major challenge for all provincial affiliates of SALGA, and especially the Legal and Constitutional Working Groups within those affiliates, is to devise effective and sustainable strategies to engage provincial legislatures on matters affecting local government. MECs responsible for local government wield substantial powers of monitoring and regulating local government, and there is clearly a need to duplicate the national representation of local government in the provincial setting also. A practice of consultation between provincial legislatures and SALGA's provincial affiliates needs to be developed and sustained so that full effect can be given to the democratic values enshrined in the Constitution.

The Working Group sees itself as the technical think-tank within SALGA on legislative and constitutional matters and wants to encourage all provincial affiliates to participate more actively in the operations of the Group. There is an opportunity now to shape the future of local government and local governance to the advantage of millions of South Africans who have been denied access to, and the advantage of, dynamic and effective local decision-making. SALGA, through all of its Working Groups, will work tirelessly towards a better life for all.

Invitation for comments and contributions

We would like you to share with us any comments, suggestions and ideas you might have on the content, style, readability, relevance and accessibility of this first issue. Any contributions, either in the form of letters or articles, can be directed to the editors.