

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 decided the matter as yet.

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 lose 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 loses 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

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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 Oorgangraad 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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