

CHOOSING A SERVICE PROVIDER

Section 78 of the Systems Act

INTRODUCTION

Municipalities are under heavy pressure to extend and improve the delivery of municipal services. A wide range of policies, legislation, institutions and resources have been put in place to facilitate this process. Given the scale of service backlogs – relative to municipal capacity – national government has placed particular emphasis on the establishment of municipal service partnerships (MSPs), including public-private, public-public and public-community partnerships.

A large part of the framework is created by the three ugly sisters, otherwise known as the Municipal Demarcation Act, the Municipal

Structures Act (as amended), and the Municipal Systems Act, all operating within the context of the Constitution. This article examines one portion of

this framework, namely the Municipal Systems Act's *Chapter 8 Municipal Services*, and particularly *section 78*, which defines the decision-making process for municipal services.

HOW SHOULD MUNICIPAL SERVICES BE PROVIDED?

Section 76 of the Municipal Systems Act (hereafter 'the Act') states that a municipality may provide a municipal service in its area, or a part of its area, by means of either an 'internal' or 'external' mechanism. The two options are defined in Table 1 below.

Table 1

Internal mechanisms	External mechanisms
<ul style="list-style-type: none">• a department or other administrative unit within its administration;• any business unit devised by the municipality, provided it operates within the municipality's administration and under the control of the council in accordance with operational and performance criteria determined by the council; or• any other component of its administration.	<p>Effected by entering into a service delivery agreement with:</p> <ul style="list-style-type: none">• a municipal entity*;• another municipality;• an organ of state, including a water committee established in terms of the Water Services Act; a licensed service provider registered or recognised in terms of national legislation; and a traditional authority;• a community based organisation or other non-governmental organisation legally competent to enter into such an agreement; or• any other institution, entity or person legally competent to operate a business activity.
	<p>* The Act provides a detailed definition of municipal entities. In essence they are a company, co-operative, trust, fund or other corporate entity under the ownership/control of one or more municipalities. They can also be created by passing a by-law.</p>

THE "TRIGGER": WHEN TO DECIDE HOW TO PROVIDE MUNICIPAL SERVICES

Section 77 of the Act specifies when a municipality must review and decide on the appropriate mechanism to provide a municipal service, namely when:

- preparing or reviewing its integrated development plan (IDP);
- a new municipal service is to be provided;
- an existing municipal service is to be significantly upgraded, extended or improved;
- a performance evaluation in terms of the Act requires a review of the delivery mechanism;
- the municipality is restructured or reorganised;
- requested by the local community; or
- instructed to do so by the provincial executive.

It is worth noting that some of these 'triggers' will occur annually, such as the IDP process. Others are less predictable. Since municipalities were all effectively restructured in December 2000 they are consequently all obliged to review all their municipal service mechanisms.

PROCESS TO REVIEW A SERVICE DELIVERY MECHANISM?

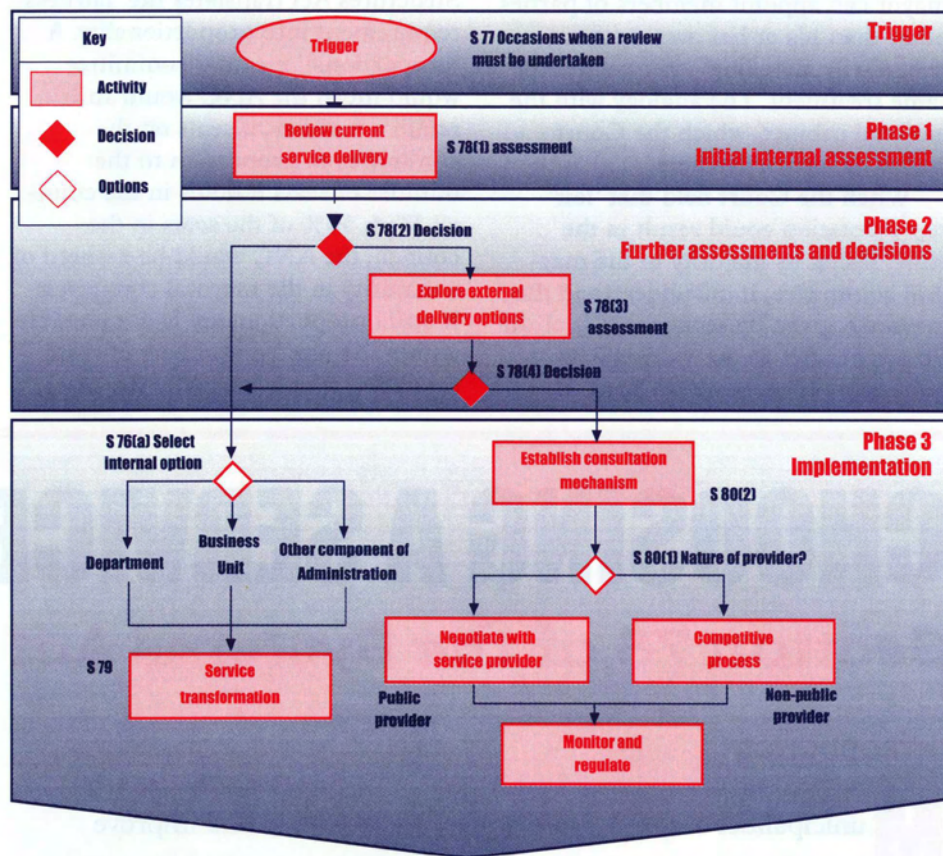
Section 78 of the Act specifies the criteria to be applied and the process to be followed when deciding on a mechanism to provide a municipal service in all or part of the municipality, or to review any existing mechanism. For convenience the process may be understood as taking place within three distinct phases, each separated by a council decision.

Phase 1 – Initial internal assessment

In this phase the Act requires municipalities to assess:

- the direct and indirect costs and benefits if the service is provided through an internal mechanism, including the expected effect on the environment and on human health, well-being and safety;
- the municipality's capacity and potential future capacity to furnish the skills, expertise and resources

Figure 1: Overview of section 78 decision process



- necessary for an internal mechanism;
- the extent to which the re-organisation of the municipality's administration and the development of its human resource capacity could be used to provide the service through an internal mechanism;
- the likely impact on development, job creation and employment patterns in the municipality;
- the views of organised labour; and
- any developing trends in the sustainable provision of municipal services (s 78(1)).

Following this review the council must take a decision to:

- decide on an appropriate internal mechanism to provide the service; or
- before it takes a decision on an appropriate mechanism, explore the possibility of providing the service through an external mechanism (s 78(2)).

Phase 2 – Further assessments

In the event that a decision is taken to explore external mechanisms notice must be given to the local community

of this decision, and the various service delivery options must be assessed in terms of the same criteria used in Phase 1 of the process (s 78(3)).

Following the review of external options the council must decide on an appropriate internal or external mechanism. Council's decision should take into account the criteria that municipal services must:

- be equitable and accessible;
- be provided in a manner that is conducive to the prudent, economic, efficient and effective use of available resources and the improvement of standards of quality over time;
- be financially sustainable;
- be environmentally sustainable; and
- be regularly reviewed with a view to upgrading, extension and improvement (s 78(4)).

Decisions must therefore be able to be defended in terms of both the process followed and the content of the arguments.

Phase 3 – Implementation

In the event that the council opts for an internal mechanism it is obliged to allocate sufficient human, financial

and other resources necessary for the proper provision of the service and to transform the provision of that service in accordance with the requirements of the Act (s 79).

Should the council elect to use an external mechanism it is obliged to establish a consultation mechanism, with which to consult with the community during the process of finalising the service delivery agreement (SDA) between the municipality and the final service provider. The nature of the process varies, depending on the nature of the selected service provider. Essentially, a decision to use a non-public service provider requires the council to follow a competitive selection approach in accordance with the Preferential Procurement Policy Framework Act 5 of 2000, while a decision to use a public service provider requires the Council to conclude the SDA through a less onerous negotiation process.

ASSESSMENT

Although the three phases of the process appear reasonably logical on paper, in practice municipalities are encountering major difficulties implementing this legislation.

For instance the Act defines community-based organisations and NGOs as external mechanisms. Consequently municipalities are obliged to follow onerous, competitive bidding processes before concluding SDAs with these service providers.

What is a municipal service?

Astonishingly, the Act fails to define the concept of a 'municipal service'. The closest definition relates to "basic municipal services" which mean "a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment".

In their Heads of Argument for the City of Cape Town in a matter between SAMWU and the City of Cape Town, Advocates Rose-Innes and Farlam found that there is no ordinary definition of the term

municipal services. The Municipal Ordinance 20 of 1974 (Cape) does, however, define a "Municipal service" as meaning "any system conducted by or on behalf of a municipality for the collection, conveyance, treatment or disposal of sewage or stormwater or for the manufacture, generation, impounding, storage, purification, distribution, conduction, transmission, conveyance, provision or supply of water, gas or electricity".

Interestingly, "Municipal Services", Chapter XI of the Municipal Ordinance, deals with "sewerage, drainage, water, gas and electricity" in Part 1 (ss 139-154) and "cemeteries" in Part 3 (ss 163-170). It also includes "fire services" under the repealed Part 2.

Schedules 4B and 5B of the Constitution list a series of "Local government matters", which inform Chapter 5 of the Municipal Structures Act's definition of the "Powers and Functions of Municipalities". Unfortunately neither Act uses nor defines municipal services. If one interprets municipal services as meaning the powers and functions of local government, then section 78 of the Act may apply to all of these powers and functions, and not just the sub-set defined in the Municipal Ordinance.

What is a service mechanism?

The Act uses the terms 'service mechanism' and 'project' interchangeable, but fails to define either term. The

Act does appear to imply that a service mechanism is a distinctly different concept from a municipal service.

Given that the section 78 process is triggered when "an existing municipal service is to be significantly upgraded, extended or improved" it is reasonable to conclude that service mechanisms are used in the process of upgrading, extending and improving services.

For instance, assuming municipal roads constitute a municipal service, a decision to 'significantly' upgrade or extend a road automatically triggers section 78. This would oblige the municipality to follow the entire process outlined above.

In other words, if the concept of 'service mechanisms' is interpreted broadly, virtually every municipal decision, whether capital or operating in

nature, could require a section 78 process.

Another possible complication arising from the undefined nature of the 'service mechanism' concept is that separate section 78 processes may be launched at different levels of a service. For instance a municipality may undertake a section 78 assessment of its entire water and sanitation service (as triggered by the annual IDP process), while simultaneously undertaking an assessment of an individual waste-water treatment works (as triggered by a decision to significantly expand that particular works). The first assessment may conclude that the water and sanitation service should be provided by means of an internal mechanism, while the second assessment may conclude that an external Build-Operate-Transfer scheme would be the 'best outcome' for the municipality.

Managing and funding all of these assessment processes could become a very difficult task for a municipality.

How long should a section 78 process take?

Although the Act is specific as to the events that trigger a section 78 process, it does not say how soon after the trigger event the process should be undertaken, or how rapidly the process should be undertaken.

How much effort is required to undertake a section 78 process?

The Act does not indicate the required level of effort to be applied in undertaking a section 78 process. One can therefore assume that a 'reasonable' level of effort – commensurate with the nature of the decision - should be applied. Factors worth considering include:

- the urgency of the decision;
- the importance of the service;
- the scale of the expenditure associated with the decision (including capital and operational expenditure);
- the complexity of the options under consideration;
- the existence of related processes and investigations;
- the level of risk associated with the decision (including financial, legal, technical, environmental and other risks); and

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- the potential for stakeholder conflict around the decision.

Stakeholder participation

Clearly, unions are important stakeholders, since the Act requires the municipality to take the views of organised labour into account in both phase 1 and phase 2 of the process. It is important to note that the Act does not require the municipality to ‘consult’ labour, but only to take labour’s ‘views into account’. Since the aim of the process is to gather information, rather than to bargain, it may be appropriate to use an alternative forum to the normal Municipal Bargaining Chamber.

At this stage only one legal challenge is known to have taken place around a council decision, taken in terms of the Systems Act, to outsource a municipal service. In that case SAMWU challenged a decision by Sedibeng District Council to ‘privatise’ six cemeteries on the grounds that the union had not been adequately consulted.

The arbitrator who ruled on the matter, declared that the union was “entitled to be consulted, and that the agreement between council and the contractor be suspended until the process of consultation [was] completed”. Since the suspension of contracts with private sector firms could have serious legal and financial implications it is clearly important that the correct process is followed.

In the event of council electing to use an external mechanism at the end of Phase 2, section 80(2) obliges it to “establish a mechanism and programme for community consultation and information dissemination regarding the service delivery agreement”.

Furthermore, “the contents of a service delivery agreement must be communicated to the local community through the media” (s 80(2)). Taking the hypothetical example of a municipal road upgrade a bit further, this clause could place a particularly onerous burden on the municipality, and may well hinder municipal decision-making to an unreasonable degree.

How should the various criteria be interpreted and applied?

The Act requires municipalities to apply numerous criteria in the course of the Phase 1 and Phase 2 assessments and in the course of making its decision. Some are complex and difficult to apply. Most are speculative, in that they are forward looking and require a level of judgement as to future possible outcomes. Municipalities may require the assistance of experts when applying these criteria, which will increase the costs and time taken to reach defensible decisions.

The various criteria will quite possibly return differing results. Some will point towards the use of internal mechanisms while others will indicate external mechanisms. Municipalities will have to weigh up the results from each criterion before reaching their decisions.

Which options should be explored, and when?

The Act contains a clear bias towards the use of internal mechanisms, in that municipalities are forced to consider these options first (s 78(1)). Only once the internal options have been assessed can the municipality decide (s 78(2)) to explore the external options (s 78(3)).

Unless the internal option clearly fails to meet the Act’s criteria it is difficult to see how a municipality could justify a decision to explore external options without first applying its mind as to what these options may be, and whether they hold any advantages over the internal options. From the point of view of rational, scientific enquiry it would make far more sense to explore internal and external options simultaneously using the same set of criteria to ensure a balanced and sensible result.

Other laws and regulations

Section 78(5) of the Act states that when a municipality is following the

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section 78 process it must comply with “any applicable legislation relating to the appointment of a service provider other than the municipality; and any additional requirements that may be prescribed by regulation”.

By implication, sectoral legislation and regulations, such as the requirement that municipalities produce annual water service development plans, must also be taken into

account when a section 78 process is followed.

CONCLUSION

The Systems Act is presently causing widespread uncertainty and confusion among municipalities, due to the lack of clarity on the scope and application of section 78 and related matters. The resulting legal fees have already cost municipalities millions of rands and many months of lost time. Despite the intention that this legislation should ‘enable’ decision making on municipal services, it has exactly the opposite effect.

This is not to suggest that the intentions behind section 78 were wrong. On the contrary, both the desire for a balanced perspective on internal and external service provision options and the inclusion of affected stakeholders in the decision-making process constitute good governance practice. However, until municipal powers and functions are clarified and workable definitions of ‘municipal services’ and ‘service mechanisms’ are provided, it is likely that section 78 will continue to impede service delivery.

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