

MAYORAL COMMITTEES OFF THE HOOK?

High Court rules against proportionality

After taking office in December 2000, the executive mayor of Johannesburg Metropolitan municipality appointed a mayoral committee in terms of section 60 of the Municipal Structures Act (hereafter the Structures Act). Only African National Congress (ANC) members were appointed. The ANC holds 59% of the seats in the council.

The opposition party in the council, the Democratic Alliance (DA), launched proceedings against the executive mayor arguing that the

mayoral committee had been constituted unlawfully. The DA holds 33% of the council's seats.

Section 160(8) of the Constitution prescribes that:

'Members of a municipal council are entitled to participate in its proceedings and those of its committees in a manner that -

- (a) allows parties and interests reflected in the council to be fairly represented;
- (b) is consistent with democracy (...)'.

The DA asked the Court to declare that the executive mayor's exclusion of minority parties from the mayoral committee was in conflict with section 160(8) of the Constitution. Alternatively, the DA wanted the Court to declare section 60 of the Structures Act unconstitutional.

In defence, the executive mayor argued that as the mayoral committee is not 'a committee of the municipal council' it therefore fell outside of the scope of section 160(8) of the Constitution.

Mayoral Committees

THE JUDGEMENT

The High Court of Witwatersrand, in *Democratic Alliance v Masondo Amos* Case No. 01/9260, agreed that the mayoral committee is not a committee of council for the purposes of section 160(8). It is appointed by the executive mayor and automatically terminates when the executive mayor ceases to hold office. It is there to assist the executive mayor in the execution of his or her functions. The executive mayor can dismiss the members of the mayoral committee, which is directly accountable to the executive mayor, not to the council. The Court said that, if the idea had been for mayoral committees to be representative of all parties in the council, the Structures Act would have stated that clearly because that is what it does for executive committees. Section 43(2) of the Structures Act requires executive committees to proportionally represent parties and interests in the council. The absence of the same requirement for mayoral committees is, according to the Court, a clear indication that minority party representation is not a requirement in terms of section 60(1) of the Structures Act. In fact, if the same requirement did apply, the executive committee and the mayoral committee would no longer differ that much from one another, thus undermining the scheme and purpose of the Structures Act.

In dealing with the question whether or not section 60 of the Structures Act is in conflict with 160(8) of the Constitution, the Court considered that section 60 enables the executive mayor to establish a mayoral committee to assist him or her with the ongoing management of the municipality. The executive mayor acts under the auspices of the council, the mayoral committee does not. It can be regarded as 'an extension of the office of the executive mayor' and falls outside of the reach of section 160(8) that deals with committees of the council.

The right to appoint members of the mayoral committee, the Court said, is part of the privilege of majority rule, which is the cornerstone of any democratic dispensation. The Court held that, to insist that minority

parties have to be represented could mean that their representation would exceed that of the ANC, the majority party. This would militate against the principles of democracy.

Interestingly, the Court said that, if the executive mayor had decided to allow minority representation on the mayoral committee, it could be argued that the seats would have to be distributed fairly among the minority parties.

ASSESSMENT

Mayoral committees comprising only members of the ruling party appear to be 'off the hook' for now. This judgement has set an important precedent in clearly separating the mayoral committee from other committees by stating that it is not a committee of council for the purposes of section 160(8) of the Constitution. The Court makes out a strong argument in saying that the distinction between the executive committee system and the executive mayor system would be eroded if both were to fall under the reins of the proportionality requirement in section 160(8). It respected the choice made in the Structures Act for giving certain municipalities the option of having an individual executive with increased public visibility and decisive governance possibilities.

Inasmuch as the general tenet of the judgement holds water, some of the Court's remarks are puzzling. In the judgement's line of argument, the Court's remark that the executive mayor would have to distribute seats 'fairly to all minority parties' if he or she 'allowed' one minority party in the mayoral committee, sounds contradictory. This would appear to outlaw a coalition between the ruling party and one or more other parties in the mayoral committee. If one additional party were allowed in, the 'floodgates' would have to be opened, according to this stance. It would present an interesting, but untenable situation, especially if one considers recent political developments.

The Court's remark is hard to reconcile with its view that the committee is a committee of the executive mayor and that he or she has full control over it. It is suggested that this

view must mean that the executive mayor can appoint members of parties other than his or her own, without necessarily affording other parties the same treatment. The analogy with the national cabinet, which the Court makes, is instructive here.

When the Court held that 'fair' representation could result in the ANC losing its majority in the mayoral committee, it misunderstood the meaning, given by section 43(2) of the Structures Act to the 'fairness' requirement of section 160(8) of the

Constitution. Section 43(2) of the Structures Act translates the 'fairness' requirement into proportionality. A 'proportional' mayoral committee would mean the ANC would still retain a number of seats on the committee in proportion to the number of seats it holds in the council. With 59% of the seats in the council, the ANC would be assured of a majority in the mayoral committee. If strict proportionality is not possible within the limited numbers of seats available (which is usually the case),

the first principle to perish is not the principle of majority rule but the principle that says that *all* parties must be represented. The smallest parties forfeit representation to ensure overall proportionality.

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