

Responsibilities of municipal managers

The Municipal Finance Management Act

The Municipal Finance Management Act (MFMA) is a very prescriptive piece of legislation and should not be read piecemeal, but worked through as a whole. Many chapters and sections are inter-related. For example, the duties of the municipal manager and the accounting officer of the municipality are not found in only one chapter, but are scattered throughout the Act.

Chief financial officers (CFOs), mayors and executive members in charge of finance must be aware of the duties that the Act sets out for all municipal office bearers. Among other reasons, this is because they may:

- have to monitor the execution of these duties by other office bearers;
- find that some or all of these duties are delegated to them;
- have to act as municipal manager; and
- be appointed to the position of municipal manager at some stage.

Office bearers may still ask why they should be aware of all this. The answer is simple: the penalties for not doing so are heavy. They could be disciplined, lose their job, go to prison for up to five years (without pay), have to pay fines from their own resources and even be held liable for any loss or damage caused by their deliberate and negligent unlawful actions. Only those who are not concerned by these penalties can afford to not be aware of the detail of the law.

Challenges facing municipal managers

System of delegation

The worst thing that can be done regarding the Act is to ignore it and simply do nothing. A

system must be devised by municipal managers to delegate certain duties, especially those of a technical nature. How this is done will not only depend on the individual organisational structures of different municipalities, but, even more importantly, on the capabilities of individual municipal managers and the managers reporting directly to them.

Section 79 of the Act explains the process regarding these delegations. It also makes provision for a regular review of delegated powers and duties. Section 79(3) gives the power to the accounting officer to confirm, vary or revoke any decision taken under a delegated power. A reporting system is therefore imperative.

This section *must* be read with sections 59–65 of the Systems Act. They contain similar types of provisions, in terms of which the sub-delegation of power conferred on a municipal manager to another official, or from that official lower down, must be approved by the municipal council. It must also be noted that section 59(4) of the Systems Act further implies that the duty or power may only be sub-delegated once.

Section 63 requires anyone to whom a duty or power has been delegated to report on decisions taken in respect of delegated powers. The whole of the section 62 system of internal appeals is applicable to the exercise of delegated decisions. As a result, it may compel the accounting officer

not to delegate many powers. Section 62 has a limiting effect on delegation because there is no section 62 appeal with regard to a power conferred by law on an official and performed by that official.

The power of the CFO to delegate must also be read in the above context (section 82 of the Act).

Building capacity

One of the most important challenges for municipal managers is that of capacitating and advising councillors, staff, the public and municipal entities. Proper advice can prevent not only personal liability but also, and even more importantly, unnecessary litigation.

The Act places a duty on the national government to define and set minimum standards of capabilities, as well as assist with training. Unfortunately these requirements are not always dealt with in an even-handed manner by national or provincial government. In cases of poor administration they are often not addressed until it is too late. On the other hand, effective administration is often subject to petty remarks, instructions or interference. It has been said in the local government provincial forum for the Western Cape that provincial and national government should not only stop rewarding poor administration through grants but should also reward good administration.

It is hoped that this Act will promote even-handed treatment by the other spheres of government regarding the local government sphere.

Relationships

The task of a municipal manager in managing relationships is often underestimated or not appreciated. This task may not appear in any performance contract but is nonetheless a factor that can make or break a municipality.

It has been said that it must be terrible to have a bad marriage, because having a good marriage is difficult enough. The same applies to the relationship between the mayor and municipal manager. Apart from the relationship with the public and

staff (especially the CFO), the relationship between the mayor and municipal manager is the one that will be most sorely tested by the Act.

Scrutiny of the law shows that rather than the municipal manager being assisted by the mayor, the reverse is true for some duties. At the same time, severe sanctions prevent the mayor from interfering in the administration.

If there is a good working relationship between the mayor and municipal manager and clarity on their respective roles, there will be few problems. Where this is not the case, the community may suffer as a result.

Section 32 of the Act creates a further challenge for this relationship, as well as the relationship of the municipal manager with the council. Where unauthorised, irregular or fruitless expenditure will be incurred as a result of a resolution, section 32(3) requires the municipal manager to inform the decision-maker of such an outcome, thereby preventing personal liability. Unfortunately this is action after the fact. Though some revel in this kind of interaction, requesting the

mayor or speaker to address the committee or council before they take the intended decision can be effective in preventing the situation from arising.

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Evaluation of municipalities

An important challenge is created by section 177 (1)(b), which provides that the Minister may allow exemptions from certain requirements of the Act. A careful assessment is needed so that a motivated application for exemptions

can be made. It is likely that most municipalities will have to lodge such applications, depending on the method used by Department of Finance for the implementation of the Act.

Concerns

Legality of decisions

There are numerous laws, including those mentioned already, which lay down requirements regarding the validity of decisions. Section 160(3)(b) of the Constitution, for example,

requires that a municipal budget may only be passed by a special majority of the council (a majority of the total number of councillors).

In the all-important Constitutional Court judgment in the *Fedsure v Greater Johannesburg Transitional Metropolitan Council* case 1998(12)BCLR 1458(CC) (see *LGB* Vol. 1 No. 1 p. 2), the Court ruled that the passing of local government budgets and the setting of rates are “legislative action”. This landmark judgment was very good news for local government because it means that the cumbersome requirements for compliance with administrative law principles, as encapsulated in the Promotion of Administrative Justice Act of 2000, are not applicable to these decisions.

However, the principle of legality entails that all formal (process) requirements must be

complied with and the MFMA increases these formal requirements to the nth degree. When it is read with the Systems Act, there is an increased possibility of municipalities becoming enmeshed in costly litigation.

Property tax is the most unpopular tax in the world and is also a tax where the ability to pay is largely not applicable. Couple this with the courts’ approach that they must be as accessible as possible (to the extent that they sometimes do not even award costs even if an applicant fails in an action against a local authority), and the risk of increased litigation as a result of the MFMA and the Systems Act becomes even greater.

A further concern is that many of the requirements in the Act should be in regulations rather than in the Act itself. Doing so would also have allowed the Minister an easier way of amending these cumbersome rules.

Costs

It is likely that, when implemented, the Act will vastly increase municipalities' administration costs. There is tremendous pressure to decrease these costs, as highlighted by the Minister of Finance in 2003. However, although staff costs may not increase much, many municipal managers may exercise the easy option of outsourcing these responsibilities.

Criminalisation

Local government functionaries who commit crimes such as theft, fraud or corruption deserve no sympathy. However, to criminalise the execution of certain of the requirements of the MFMA is undoubtedly a step in the wrong direction. This may be justified in the case of employees, who are supposed to have the necessary skills to perform their work, but to extend it to councillors is wrong, to say the least.

Whereas in the past there were few criminal offences that councillors could commit, this has been almost eradicated in the final phase of restructuring local government, which started on 5 December 2000. However, the criminalisation of local government administration in this way is disappointing.

Conclusion

It must be conceded that aspects of the MFMA are much needed to standardise and regularise local government. However, it is likely that it will require many amendments. The Act's detail makes a mockery of a municipality's right to govern, on its own initiative, the local government affairs of its community. It effectively places local government under administration by prescribing detailed processes.

It is ironic that the penalty clause in the MFMA amounts to a penalty of five years – the same period as the term of office of a councillor and a municipal manager. It seems that these functionaries in local government now have a choice: to serve their sentence in their municipality, or in jail.

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