



**Western Cape  
Government**

Local Government

# **Roles and Responsibilities of Councillors within the ambits of the Municipal Systems Act, 32 of 2000**

Kamal Makan

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## **Foreword**

The Objective of this Good Governance Practice Note is to disseminate the constitutional and legislative roles and responsibilities of Councillors, in their role as elected representatives forming part of the Municipal Council and where applicable, in their capacity as political office bearers. The distinguished value of this Good Governance Practice Note is to illustrate the legislative provisions by way of case law, so as to improve Councillors understanding of their role and responsibilities, and guide them on their Executive and Legislative functions.

As we are fast approaching the Local Government Elections, there is a necessity for new councillors to familiarise themselves with their legislative functions, and the interpretations of essential legislative provisions, so as to encourage a clear understanding of the law. I hope this document will assist in the colossal task that councillors have in order that the objects of local government, as emanating from our Constitution, is realised for the benefit of our communities.

A handwritten signature in black ink, appearing to read 'Anton Bredell', written in a cursive style.

**Mr Anton Bredell**

Minister of Local Government – Western Cape

Date: 31/03/2016

## Legislative Framework

Local Government operates within a suite of legislations, which govern the powers, functions and responsibilities of the municipal administration, the municipal council and the political office bearers. For the purposes of this Good Governance Practice Note, reference will be made only to the legislative provisions within the ambits of the Municipal Systems Act, 32 of 2000 (Herein after referred to as the Municipal Systems Act), with application of its provisions by the Courts.

It is imperative to mention that one of the fundamental constitutional objects of local government is "to provide democratic and accountable government for local communities." Therefore the Council has the overall duty to exercise its executive and legislative authority and use the municipal resources "in the best interests of the local community."<sup>1</sup> Notwithstanding that the Municipal Systems Act contributes in ensuring that municipalities are accountable to its communities, it prescribes systems, processes and requirements which enables effective and efficient governance, which is essential in socially and economically uplifting its community.

## Executive and Legislative Duties of a Municipal Council

Essentially the role of the Municipal Council is *inter alia* to –

- (a) represent the local community;
- (b) ensure the well-being and interests of the municipality;
- (c) ensure the provision of services to the local community;
- (d) develop and evaluate the policies and programs of the municipality;
- (e) maintain the financial integrity of the municipality;
- (f) carry out the duties of council under the Constitution or any other act;
- (g) ensure that administrative policies, procedures and oversight policies, practices and procedures are in place to implement the decisions of council; and
- (h) ensure the accountability and transparency of the operations of the municipality.

The Municipal Council fulfils that role by *governing* as contemplated in the Constitution. The Constitution not only confers on a municipality the right to govern the affairs of the community within the municipal area, but also empowers the *Municipal Council* to make decisions concerning the exercise of all the powers and the performance of all the functions of the municipality. To this end the Municipal Council is clearly the principal political structure and the ultimate decision maker of the Municipality.

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<sup>1</sup> Local Government Law, Issue 8, October 2014 by Nico Steytler and Jaap de Visser, page 1-23.

Therefore by exercising its constitutionally conferred powers and functions, a municipality can strive to achieve the objects of local government by-

- (a) providing democratic and accountable government for local communities;
- (b) ensuring the provision of services to communities in a sustainable manner;
- (c) promoting social and economic development;
- (d) promoting a safe and healthy environment; and
- (e) encouraging the involvement of communities and community organisations in the matters of the municipality.<sup>2</sup>

As per section 4 of the Municipal Systems Act, the Municipal Council has **the right** to –

- (a) exercise the municipality's executive and legislative authority, and to do so without improper interference; and (b) finance the affairs of the municipality by-
  - (i) charging fees for services; and
  - (ii) imposing surcharges on fees, rates on property and other taxes, levies and duties where authorised.

The council also has **the duty** to-

- (a) exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community;
- (b) provide, without favour or prejudice, democratic and accountable government;
- (c) encourage the involvement of the local community;
- (d) strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner;
- (e) consult the local community about the level, quality, range and impact of municipal services and the available options for service delivery
- (f) give members of the local community equitable access to the municipal services;
- (g) promote and undertake development in the municipality;
- (h) promote gender equity;
- (i) promote a safe and healthy environment in the municipality; and
- (j) contribute to the progressive realisation of the fundamental rights.<sup>3</sup>

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<sup>2</sup> 'Roles and Responsibilities of Political Structures, Political Office Bearers and the Municipal Manager' Stellenbosch Municipality, pages 5-6, [www.stellenbosch.gov.za](http://www.stellenbosch.gov.za)

<sup>3</sup> 'Roles and Responsibilities of Political Structures, Political Office Bearers and the Municipal Manager' Supra, pages 6-7

In relation to the provision that the Council of a Municipality has the right to exercise the **municipality's executive and legislative authority and to do so without improper interference**, it is noteworthy to mention the judgment of **MC Manana v King Sabata Dalindyebo Municipality<sup>4</sup> (SCA judgment)**, where the caretaker Municipal Manager (MM) failed to carry out a resolution of Council, asserting that in terms of section 55(1)(e) of the Municipal Systems Act, the Municipal Manager is responsible for the appointment of staff other than those referred to in section 56(a). Council had previously resolved on positioning Mr. Manana as Manager: Legal Services and resolving that he receive a back payment for the period that he had not been compensated. According to the court, section 55(1) is no more than a statutory means of conferring such power upon municipal managers to attend to the affairs of the municipality on behalf of the council. The Court further held that there is no basis for construing the section as divesting the municipal council of any of its executive powers, as the Constitution vests all executive authority in the municipal council and legislation is not capable of lawfully divesting it of that power.

In terms of **section 4(2)(f)** of the Municipal Systems Act, the Council of a Municipality within the municipality's financial and administrative capacity and having regard to practical considerations has the duty to give **members of the local community equitable access to the municipal services** to which they are entitled.

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<sup>4</sup> (345/09)[2010] ZASCA 144 (25 November 2010)

In this instance, look at **Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee, Premier, North West Province & 6 Others**.<sup>5</sup>

- The Constitutional Court held that Municipalities are the face of government to the communities they are supposed to serve. If they fail in their executive obligation to provide services to the people, the Constitution provides that the Provincial Executive may step in to dissolve the Municipal Council and appoint an administrator.
- In this case, it was argued by the Administrator, that certain communities in the Municipality have not had water for years, even though the district received funding for water and sanitation. In addition, where water was being provided in certain areas, there were grave concerns regarding the quality of the water and sanitation services.
- The Municipality ironically on the other hand contended "as a municipality it is entitled to remain in office and not be dissolved...because councillors were elected by Communities."
- It further asserted that by this action of Province (dissolving of council), that certain rights have been affected, in this instance the right of access to water has been infringed as certain areas have not received water and sanitation. It was further alleged that councillors will suffer harm as a result of the dissolution, in the form of loss of earnings of salaries.
- The Constitutional Court quite harshly and critically stated that the harm that the Municipality and Councillors will suffer is not urgent and real, in contrast to the harm that the communities that have disruption of services will suffer. It is this failure to carry out its executive obligations that has led the Council to be dissolved.

## **Community Participation in the context of Local Government**

In terms of section 4(2)(e) of the Municipal Systems Act, the council of a municipality has the duty to consult the local community about the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider.

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<sup>5</sup> (CTT 186/14)[2014] ZACC31;2015(1) BCCR 72 (CC) (18 November 2014)

The judgments delivered by the Constitutional Court in the cases of **Doctors for Life International v Speaker of the National Assembly and Others**<sup>6</sup> and **Matatiele Municipality and Others v President of the Republic of South Africa and Others**<sup>7</sup>, are landmark decisions which should be used for the interpretation of the law on community participation in local government. In the case of *Doctors for Life*, the latter named organization argued before the Constitutional Court that Parliament had failed to facilitate public involvement in passing of four statutes pertaining to health related matters. It was contended that during the legislative process leading to the enactment of these statutes, the National Council of Provinces (NCOP) and the provincial legislatures did not comply with their constitutional obligations to facilitate public involvement in their legislative processes as required by the provisions of sections 72(1)(a) and 118(1)(a) of the Constitution respectively. The Constitutional Court adopted a reasonableness test to address the question, and decided that with respect to two of the four Statutes under consideration, the NCOP acted unreasonably in failing to conduct public hearings. The two statutes were adopted in a manner that was inconsistent with the Constitution and were therefore held to be invalid.<sup>8</sup>

In the case of **Matatiele Municipality and Others v President of the Republic of South Africa and Others**, dealt with whether the provincial legislatures of KwaZulu-Natal and Eastern Cape in adopting changes to their respective boundaries acted reasonably in discharging their duty to initiate public involvement. The Eastern Cape in this respect, complied with its duty by holding public hearings, whereas the failure of the KwaZulu-Natal legislature in conducting any hearings or invite written inputs, was held by the Constitutional Court to be a clear transgression of section 118(1)(a) of the Constitution. Therefore the Constitutional Court held that the Amendment Act was invalid.

It is contended that the principles emanating from these judgments of facilitating public involvement in their law-making processes applies with equal force to local government. It can be asserted that local government should even more stringently apply the principles arising from these latter-mentioned judgments, as there are numerous constitutional and statutory provisions that compel local government to embody public participation. This was re-affirmed in the case of **Democratic Alliance v eThekweni Municipality**<sup>9</sup>, where the Supreme Court of Appeal held that the principles of *Doctors for Life* apply to municipalities.<sup>10</sup>

<sup>6</sup> 2006 (12) BCLR 1399 (CC) as cited in Local Government Law, supra, at page 6-3.

<sup>7</sup> 2007 (1) BCLR 47 (CC) as cited in Local Government Law, supra, at page 6-3

<sup>8</sup> Local Government Law, Issue 8, October 2014 by Nico Steytler and Jaap de Visser, page 6-3

<sup>9</sup> (2012) 1 ALL SA (SCA)

<sup>10</sup> Nico Steytler and Jaap de Visser, supra at page 6-4



In terms of **section 5(1)(a) of the Municipal Systems Act**, members of the local community have the right through mechanisms and in accordance with processes and procedures provided for in the Municipal Systems Act **to contribute to the decision-making processes of the municipality** and submit written or oral recommendations, representations and complaints to the municipal council, political structure, political office bearer or administration of the municipality.

**In Borbet SA (Pty)Ltd & 4 Others v Nelson Mandela Bay Municipality (Eastern Cape Division of the High Court).<sup>11</sup>**

- The Court in this instance re-asserted the Constitutional Provision of section 152(1)(e) that the object of local government is to encourage the involvement of communities and community organisations in the matters of local government. The Court re-emphasized the provisions of section 4 of the Municipal Systems Act and section 5 being the rights and duties of members of the local community.
- The court held that the Municipality took very limited steps to ensure effective public engagement in the period between 31 March when the Budget for 2011/2012 was tabled and 31 May when the council considered the budget. The public consultation process was impeded by the campaigning of the local government elections.
- As a result of concerns raised as to the level consultations, a further consultative process was enacted after the elections however with specific target groups and stakeholders.
- The Court held that Public Participation is a necessary feature of the democratic process at local government level. According to the Court, the belated efforts to consult, does not mask the fact that there was a failure to comply with the Constitutional obligation to take reasonable steps to ensure that local communities participate in the decision-making of council, particularly in relation to the budget preparation.
- The Court however, did not want to undo the budget as it would have drastic consequences for the municipality but held that the Municipality failed to comply with its constitutional and statutory obligations to ensure meaningful and effective public participation in the preparation and adoption of the annual budget for the year 2011/2012.

Section 16 (1) of the Municipal Systems Act provides that a municipality must develop a culture of municipal governance that complements formal representative government with a system of participatory governance, and must for this purpose-

- (a) encourage, and create conditions for, the local community to participate in the affairs of the municipality, including in—
- the preparation, implementation and review of its integrated development plan.
  - the establishment, implementation and review of its performance management system.

<sup>11</sup> (3751/2011)[2014] ZAECPEHC 35; 2014(5) SA 256 (ECP) (3 June 2014)

- the monitoring and review of its performance, including the outcomes and impact of such performance;
- the preparation of its budget; and

**Refer to Borbet SA (Pty)Ltd & 4 Others v Nelson Mandela Bay Municipality (Eastern Cape Division of the High Court),**

- strategic decisions relating to the provision of municipal services

## Methods of Communication

According to Section 17(1) of the Municipal Systems Act-‘Participation by the local community in the affairs of the municipality must take place through—

- (a) Political structures for participation in terms of the Municipal Structures Act; eg. Ward Committees (s73 of the Municipal Structures Act, 117 of 1998)
- (b) the mechanisms, processes and procedures for participation in municipal governance established in terms of the Municipal Systems Act; eg. Processes for public comment, public meetings / hearings, consultative sessions, accessibility to ward councillor, electronic communication, newspapers, Notices, Publication in Provincial Gazettes and display at libraries/municipal offices.
- (c) other appropriate mechanisms, processes and procedures established by the municipality;
- (d) councillors; and
- (e) generally applying the provisions for participation as provided for in this Act.

Councillors need to communicate these activities to the public in the interests of increasing transparency and promoting public involvement in these activities.

## Scope and Power of a Municipal Council

In terms of section 12(1) of the Municipal Systems Act, only a member or committee of a municipal council may introduce a draft by-law in the council. According to section 12 (2) of the Municipal Systems Act, a by-law must be made by a decision taken by a municipal council-

- (a) in accordance with the rules and orders of the council; and
- (b) with a supporting vote of a majority of its members.

According to Section 13 of the Municipal Systems Act, a by-law passed by a municipal council-

- (a) must be published in the Provincial Gazette; and (Note: This provision is consistent with section 162 of the Constitution, which provides that a municipal by-law may be enforced only after it has been published in the official gazette of the relevant province.)
- (b) takes effect when published or on a future date determined in or in terms of the by-law.

### Only a municipal council may take decisions regarding the following matters:

- Adoption of By-Laws, approval of budgets, levying of property rates and other taxes, levies and duties, raising of loans, adoption and amendment of an IDP, dissolution of municipal councils (exception, s139 of Constitution & s34(3) of the Municipal Structures Act), election of speaker, removal of speaker, election of acting speaker, election of an executive mayor and deputy, removal of latter, establishment of committees, determining the salaries and allowances of councillors, determining the fines for non-attendances of meetings and impose sanctions for breaches.
- Appointment of Municipal Manager (MM) and Managers directly accountable to MM's.

## Responsibility of Adopting an IDP

Each municipal council must, within a prescribed period after the start of its elected term, **adopt** a single, inclusive and strategic plan for the development of the municipality which—

- (a) links, integrates and co-ordinates plans and takes into account proposals for the development of the municipality;
- (b) aligns the resources and capacity of the municipality with the implementation of the plan;
- (c) forms the policy framework and general basis on which annual budgets must be based;
- (d) complies with the provisions of the Municipal Systems Act; and
- (e) is compatible with national and provincial development plans.

Such plan, as described above, is known as the Integrated Development Plan (IDP), which must be adopted by a municipal council, which may be amended when reviewed annually in accordance with section 34 of the Municipal Systems Act. This IDP remains in force until an Integrated Development Plan is adopted by the next elected council.

A municipality must within 14 days of the adoption its Integrated Development Plan give notice to the public of the adoption and display copies or extracts from the plan at specified locations for public inspection and publicise a summary of the plan. An integrated development plan adopted by a municipal council must be reviewed annually as contemplated in **section 34** of the Municipal Systems Act.

Each district municipality within a prescribed period after the start of its elected term and after following a consultative process with the local municipalities within its area, must adopt a framework for integrated development planning in the area as a whole.

A framework binds both the District Municipality and the local municipality and must at least:-

- Identify the plans and planning requirements binding in terms of national and provincial legislation ;
- Identify the matters to be included in the integrated development plans of the district municipality and local municipalities that require alignment;
- Specify the principles to be applied and co-ordinate the approach to be adopted in respect of those matters; and
- Determine procedures for consultation and to effect amendments to the framework.

Each municipal council must within a prescribed period after the start of its elected term must adopt a process in writing to guide the planning, drafting, adoption and review of its Integrated Development Plan. The Municipality must consult the local community before adopting the process. It is imperative that a municipality must include in its process of drafting its IDP, consultative mechanisms, processes and procedures in engaging the local community and organs of state to be identified and consulted on the drafting of the integrated development plan.

The management of the drafting of the IDP is the responsibility of the executive mayor of the Municipality, and he/she may assign responsibilities in this regard to the Municipal Manager and submit the draft plan to the municipal council for adoption by the Council.

In terms of section 32 of the Municipal Systems Act, the Municipal Manager of a municipality must submit a copy of the integrated development plan as adopted by council and any subsequent amendment to the MEC for Local Government in the province within 10 days of the adoption or amendment of the plan. The MEC for Local Government may within 30 days of receiving a copy of the Integrated Development Plan or amendment of the plan, or within such reasonable longer period as may be approved by the Minister of Co-Operative Governance, request a municipal council to adjust the IDP or the amendment in accordance with the MEC's proposal, if the plan does not comply with a requirement of the Municipal Systems Act or is in conflict with or is not aligned with any of the development plans and strategies of other affected municipalities or organs of state or request the municipal council to comply with the process to draft its IDP, as iterated in section 29 of the Municipal Systems Act.

## **Establishment of a Performance Management System**

A municipality must establish a performance management system that is in line with the priorities, objectives, indicators and targets as contained in its Integrated Development Plan. It is furthermore required that the municipality promotes a culture of performance management among its political structures, political office bearers, councilors and within its administration.

The executive committee or executive mayor of a municipality or if neither is in present, then a committee of councilors appointed by the municipal council must manage the development of the municipality's performance management system, assign responsibilities to the municipal manager and submit the proposed system to the municipal council for adoption.

The Municipality must establish mechanisms to monitor and review its performance management system as well as establish a process of regular reporting to Council, other political structures, political office bearers and staff of the municipality and to the public and appropriate organs of state. It is prescribed that a municipality involve the local community in the development, implementation and review of the municipality's performance management system and allow the community to participate in the setting of appropriate key performance indicators and performance targets for the municipality.

The core components of the performance management system are primarily key performance indicators, which includes inter alia, outcomes and impact, and measurable performance targets.

The principal purpose of performance management is to ensure that the work of all political structures, political office-bearers and the municipal administration is linked to the IDP. A municipality must for each financial year prepare a performance report which illustrates the performance of the municipality and comparison of its performance in contrast to targets set for and performances in the previous financial year.

## **Basic Values governing local public administration**

According to section 50(1) of the Municipal Systems Act, local public administration is governed by the democratic values and principles as contained in section 195(1) of the Constitution. It is

Section 195 (1) of the Constitution provides that Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.

- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career-development practices, to maximize human potential, must be cultivated.
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to —

- (a) administration in every sphere of government;
- (b) organs of state; and
- (c) public enterprises.

The applicability of the provisions of section 195 of the Constitution was emphasized and re-iterated in the case of **City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & 6 Others**<sup>12</sup>, where Jafftha, J when asserting municipalities and tribunals Constitutional Obligations in terms of section 195(1)(e) stated that 'It must be remembered that the municipalities and the tribunals are part of the government which is under a constitutional obligation to respond promptly to the people's needs.'

The Municipal Systems Act requires the municipality to clarify the roles and responsibilities of the most important role players in the municipality. **Section 53 of the Municipal Systems Act**, requires that a Municipality must within a framework define the roles and areas of responsibilities of each political structure and political office bearer, together with that of the Municipal Manager.

## Appointment of Municipal Managers

According to section 54A. (1) The municipal council of a municipality must appoint—

- (a) a municipal manager as head of the administration of the municipality; or
- (b) an acting municipal manager under circumstances and for a period as Prescribed. The prescribed period is three months. In terms of section 54A(2A)(b) a municipal council may in exceptional circumstances apply in writing to the MEC for Local Government to extend the period of acting for a further three months (but not exceeding this period).

According to section 54A(2) person appointed as Municipal Manager must at least have the skills, expertise, competencies and qualifications as prescribed.

<sup>12</sup> CCT 89/09 [2010] ZACC 11 at page 46

### **Paulse vs Oudtshoorn Local Municipality and others**

The Western Cape High Court had to review the appointment of the municipal manager at Oudtshoorn Municipality, namely Mr. Mnyimba against the provisions of section 54A of the Municipal Systems Act, which provides that the appointment of a senior manager is null and void if the incumbent does not possess the prescribed skills, expertise, competencies or qualifications. The Municipal Systems Act provides that candidates for the post of municipal manager must possess specific skills, experience and qualifications as prescribed in the Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to the Municipal Manager of 2006 (Performance Regulations). These regulations predate the 2011 amendment to the Municipal Systems Act. The prescribed competencies include experience of at least five years at senior management level and a recognised Bachelor's degree in public administration or a relevant field. The dispute in this matter is about whether experience at 'senior management level' refers only to the second echelon of management or whether other management experience may also be taken into account. The Court furthermore had to decide on the role of the interview process and the competency, being a primary argument by the MEC for Local Government that the appointment was contrary to the Municipal Regulations on Minimum Competency Levels (GNR 493 in GG 29967 dated 15 June 2007) as contained in the Municipal Finance Management Regulations, and in particular that Mr. Mnyimba did not meet the minimum competency levels as prescribed.<sup>13</sup>

On the meaning of 'senior management level' in regulation 38 of the Performance Regulations, the Court combined the references in the MFMA Regulations and in the Municipal Systems Act to define the concept and held that 'senior management level' can be equated to a level at which the following categories of persons are employed: 'a manager directly accountable to the municipal manager' or 'a person who occupies a substantially similar position outside the local government sphere'.

The Court held that the results of the competency tests spoke for itself and indicated that Mr. Mnyimba clearly did not meet the minimum competencies.

With regard to Mr Mnyimba's experience, the Court said that it was absurd for the municipality to suggest that experience in a small consultancy on a part-time basis could be regarded as experience at a senior management level.

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<sup>13</sup> Testing the Metal of the Municipal Systems Amendment Act of 2011' Paulse vs Oudtshoorn Local Municipality & Others-Local Government Bulletin, Vol. 14(2) 18, <http://mlgi.org.za>

The Court further stated that Mr. Mnyimba's post at Eden District Municipality was not as the manager of performance management but as assistant director, which is below senior management level. Accordingly, he did not have the required experience.

On the basis of the above, the Court presided by Judge Blignaut ordered as follows: "The decision of the Municipal Council of the Oudtshoorn Local Municipality to appoint Mr. T. Mnyimba as municipal manager and any contract concluded in consequence of that decision, is declared to be null and void."

As correctly expressed by Phindile Ntliziywana in the Local Government Bulletin, "...the ruling in this case is an indication that the courts show appetite in reversing appointments contrary to the competency framework and will thus give effect to the professionalisation of the local sphere of government."<sup>14</sup>

In terms of section 54A(7)(a) the municipal council must within 14 days inform the MEC for Local Government of the appointment process and outcome.

*Councillors have to read the applicable provisions of the Municipal Systems Act with the "Regulations on Appointment and Conditions of Employment of Senior Managers" GNR 21 GG 37245 dated 17 January 2014. A separate Good Governance Practice note will be published in respect of these Regulations. Councillors should furthermore take cognizance of the Municipal Regulations on Minimum Competency Levels, published under GNR.493 in GG 29967 dated 15 June 2007.*

## **Appointment of Managers Accountable to Municipal Managers**

According to section 56. (1) (a) A municipal council, after consultation with the municipal manager, must appoint—

- (i) a manager directly accountable to the municipal manager; or
- (ii) an acting manager directly accountable to the municipal manager under circumstances and for a period as prescribed.

A person appointed as an acting manager may not act for a period exceeding three months, provided that a municipal council may in special circumstances and on good cause shown apply in writing to the MEC for Local Government to extend

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<sup>14</sup> 'Testing the Metal of the Municipal Systems Amendment Act of 2011' Pause vs Oudtshoorn Local Municipality & Others-Local Government Bulletin, Vol. 14(2) 18, at page 19 <http://mlqi.org.za>



the period of acting for a further period that does not exceed three months. (section 56(1)(c) of the Municipal Systems Act)

With regard to the appointment of an Acting manager as per section 56(1)(a)(ii) of the Municipal Systems Act, read with section 56(1)(c), it must be noted that the same person appointed in the acting post, cannot be appointed as acting Director in the same post beyond an extension granted by the MEC for Local Government. Based on the wording of the relevant provisions, it was the intention of the Legislature to ensure finalization of the filling of the Director post and to ensure that the same person is not appointed.<sup>15</sup>

In terms of section 56(4A)(a) the municipal council must within 14 days of the date of appointment inform the MEC for Local Government of the appointment process and outcome.

In terms of section 54A(2) and 56(1)(b) the person appointed must at least have the skills, expertise, competencies and qualifications as prescribed. These competencies are regulated by the prescribed Regulations published in terms of the MFMA and Systems Act.

If a person is appointed in contravention of the Act, then upon the MEC for Local Government becoming aware of such appointment the MEC must take appropriate steps to enforce compliance by the Municipal Council, which may include inter alia, a declaratory order that the appointment is null and void.

## **Role of Council: System of Delegation**

In terms of Section 59(1) of the Municipal Systems Act, 32 of 2000, a municipal council must develop a system of delegation that will maximise administration and operational efficiency and will provide for adequate checks and balances.

In terms of section 160(2) of the Constitution, 1996, the following powers may not be delegated by a municipal council, namely:

- (a) the passing of By-laws;
- (b) the approval of budgets;
- (c) the imposition of rates and other taxes, levies and duties; and
- (d) the raising of loans.

In addition to the aforementioned four powers the following three powers in terms of section 59 of the System Act, 2000 may also not be delegated by the Council:

- (i) the power to set tariffs;
- (ii) the power to decide to enter into a service delivery agreement in

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<sup>15</sup> Legal Opinion of Corporate Services Centre, Legal Services dated 21 January 2016, Department of the Premier, Western Cape Government

terms of section 76 (b) of the System Act 2000; and  
(iii) the power to approve or amend the integrated development plan (IDP) of the Council.

A municipal council in accordance with its rules and orders may or at the request of at least one quarter of the councillors must review any decision taken by such political structure, political office bearer, councillor or staff member in consequence of a delegation and either confirm, vary or revoke the decision.

A municipal council may require its executive mayor to review any decision taken by such political structure, political office bearer, councillor or staff member in consequence of a delegation.

Certain delegations restricted to Executive Mayors i.e. decisions to expropriate immovable property or rights in or to immovable property, the determination or alteration of the remuneration, benefits or other conditions of service of the Municipal Manager or Managers directly responsible to the Municipal Manager.

## **Code of Conduct for Councillors: Schedule 1 of the Municipal Systems Act**

By virtue of section 54 of the Municipal Systems Act, the Code of Conduct as contained in Schedule 1 to the Act applies to every member of a municipal council. In terms of section 119 of the Municipal Systems Act, a councillor who attempts to influence the Municipal Manager or any staff member of the municipality not to enforce an obligation in terms of this Act, any other applicable legislation or any by-law or a decision of the council of the municipality, then such councillor is guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding two years.

### *Code of Conduct for Councillors: Schedule 1*

Item 1: A councillor must: perform the functions of office in good faith, honestly and a transparent manner and at all times act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised.

### **Brummer NO v Mvimbi and Others<sup>16</sup>**

This case is an illustration of the principle emanating from Item 1 and affirmation hereof when Judge Cloete averred that "it seems to me that the time has arrived for all of the Council members to move beyond the in-fighting which is so clearly prevalent and to rather focus on fulfilling in good faith the mandate conferred on them by their electorate, which is to serve their constituents in a manner befitting our constitutional democracy in a spirit of co-operative governance".

Item 3: A municipal councillor must attend each council meeting and of a committee of which that councillor is a member, except when leave of absence has been granted or that Councillor is required to withdraw from a meeting.

Item 4(2): If a councillor is absent from three or more consecutive meetings of a municipal council or more consecutive meetings of a committee then such Councillor must be removed as a councillor.

According to Item 4(3) of the Code, proceedings for the imposition of a fine or the removal of a councillor must be conducted in accordance with a uniform standing procedure, which must comply with the rules of natural justice.

With reference to rules of natural justice, the court in the case of **Van Wyk v Uys NO<sup>17</sup>** enunciated in part what the rules of natural justice may entail, when it ruled that "...Any investigation by the Council or a special committee into a breach of the Code by a councillor or traditional leader should be in accordance with the rules of natural justice. That means that a fair hearing must take place. The councillor concerned should be notified of the intended action to be taken against him or her and should be given a proper opportunity to be heard."

Item 5(2): A councillor who acquired or stands to acquire any direct benefit from a contract concluded with the municipality must disclose full particulars of the benefit to the council. This must be done at the first council meeting at which it is possible to do so. The same obligation rests on a councillor whose spouse, partner, business associate or close family member acquired or stands to acquire any direct benefit from a contract concluded with the municipality.

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<sup>16</sup> (13535/2011) [2011] ZAWCHC 385 (2001) JOL 8976 (C)

<sup>17</sup> (2001) JOL 8976 (C)

Item 6(4): A councillor may not be a party to or a beneficiary under a contract for: the provision of goods or services to the municipality; or any municipal entity established by the municipality

Item 8: Full-time councillors are not permitted to engage in any other paid work without the consent of the council. Any reasonable requests for such consent should be honoured by the council.

Item 9: Councillors may not request, solicit or accept rewards, gifts or favours for:  
(a) (not) voting in a particular manner before a committee or before the council;  
(b) persuading the council or any committee in regard to the exercise of any power, function or duty;  
(c) making a representation to the council or any of its committees; or  
(d) disclosing privileged or confidential information.

Item 11: The Code of Conduct prohibits a councillor from interfering in the administration of the municipality, unless the council has given the councillor a mandate. The same applies to instructing any employee of the council without authorisation. Councillors may not obstruct the implementation of any council or committee decision or behave in such a way that would contribute to maladministration in the council. Exceptions to this rule can be formulated by law.

Item 12A: A councillor may not be in arrears to the municipality for rates and service charges for a period longer than three months.

Item 14:

A Municipal Council may investigate and make a finding on any alleged breach of a provision of this Code or establish a special committee: (i) to investigate and make a finding on any alleged breach of this Code and (ii) to make appropriate recommendations to the Council.

If the Council finds that a Councillor has breached a provision of the Code, the Council may:

- Issue a formal warning to the Councillor;
- Reprimand the Councillor;
- Request the MEC for Local Government to suspend the Councillor for a period;
- Fine the Councillor; or
- Request the MEC to remove the councillor from office

Any Councillor who has been warned, reprimanded or fined may within 14 days of having been notified of the decision of council appeal to the MEC for Local Government in writing setting out the reasons on which the appeal is based.

A copy of the appeal must be provided to the Council, wherein the Council may within 14 days of receipt thereof make representations pertaining to the appeal to the MEC.

In terms of Item 14(3)(d) of the Code, may after having considered the appeal, confirm, set aside or vary the decision of the council and inform the councillor and the council of the outcome of the appeal.

The forthcoming extract from the case of **DA v Oudtshoorn Municipality**<sup>18</sup> pertains to contentions raised by the applicant that the Disciplinary Committee was not constituted in accordance to section 160(8)(a) of the Constitution. It is important to refer to such instance as had occurred in *casu*, especially if municipal councils are confronted with such a situation. To this contention, the Court held at paragraph 115, that "the applicants alleged that the DC was not validly constituted because it lacked the representivity required by s 160(8)(a) of the Constitution. Whatever merit a contention of that kind might have in other contexts, it seems to me to be unrealistic to contend, on the facts of the present case, that the DC in this case should have included members of the DA coalition. In regard to the 11 removed councillors, they themselves could obviously not have served on the DC. The only other members of the DA coalition were Harmse and Roberts but both of them had been absent from two of the three meetings for the same reasons as their colleagues. If their colleagues were in breach, so were they, even though they did not face the mandatory sanction of removal if found guilty of the breach."

Item 14(6): If the MEC is of the opinion that the councillor has breached a provision of the Code, and that such contravention warrants a suspension or removal from office, then the MEC may: suspend the councillor or remove the councillor from office.

In **Kannaland Municipality v Minister for Local Government, Environmental Affairs & Development Planning in the Western Cape & Cllr AJ Rossouw**<sup>19</sup> the court was faced with ruling on the interpretation of Item 14(6) of the Code. *In casu*, the applicant contended that the legislature did not intend the MEC to reconsider the merits of the charges – all that he is required to do is implement the Council decision once he has been satisfied that the necessary jurisdictional requirements have been met. According to the Court, Item 14(6) requires the MEC to form an opinion on: whether the Code has been breached; and, if so, whether the breach warrants suspension or removal from office. At paragraph 39, Deputy Judge President Traverso held that the Municipal Systems Act granted the MEC the "sole and exclusive" function of determining whether or not the second respondent breached the Code, and, if so, whether his removal from office was warranted. Once the MEC had determined these jurisdictional facts, he was entitled to exercise his powers accordingly.

<sup>18</sup> 3517/2014, Western Cape High Court

<sup>19</sup> (20763/13) [2014] ZAWCHC 42

In ***Andile Lili v Independent Electoral Commission: Chief Electoral Officer & 6 Others***<sup>20</sup>, the applicant questioned the constitutionality of the powers conferred on the MEC for Local Government in the Code. With reference to Item 14, the applicant contended that the Item confers "unbridled powers of intervention" upon the MEC for Local Government. According to Judge Le Grange, the contention that Item 14 confers "unbridled powers of intervention" upon the MEC is flawed. According to the Court, on a proper reading of the provisions of Item 14 there is no unrestrained power that the MEC wields in the affairs of the local municipality. The powers granted to the MEC can only be regarded to constitute a safeguard and that form part of a system of checks and balances applied to disciplinary proceedings against councillors. The MEC has in fact no self-standing disciplinary powers over local councillors which can be exercised mero motu.

It is apparent from the judgments of Kannaland Municipality and *Andile Lili*, supra, that the provision of Item 14(6) confers the power on the MEC for Local Government to exercise the actions as provided in Item 14(6), if there is a breach of the provision of the Code and if such breach warrants a suspension or removal.

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<sup>20</sup> Case No.: 3671/2013,

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Western Cape | Local Government  
Directorate: Municipal Governance  
Sub-directorate: Legislation Support  
Private Bag x9076 | 80 St. George's Mall, Waldorf Building,  
Cape Town, 8000  
Provincial website: [www.westerncape.gov.za](http://www.westerncape.gov.za)

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