LOGOV

Local Government in South Africa

Responses to Urban-Rural Challenges

edited by

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with the support of SALGA - South African Local Government Association

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The H2020-MSCA-RISE-2018 project aims to provide solutions for local governments that address the fundamental challenges resulting from urbanisation. To address these complex issues, 18 partners from 17 countries and six continents share their expertise and knowledge in the realms of public law, political science, and public administration. LoGov identifies, evaluates, compares, and shares innovative practices that cope with the impact of changing urban-rural relations in major local government areas (WP 1-5).

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1. The System of Local Government in South Africa

Tinashe Carlton Chigwata, *Dullah Omar Institute, University of the Western Cape*

Types of Local Governments

South Africa has a multilevel system of government organised at national, provincial and local level. There are nine provincial governments while the local sphere of government is constituted by 257 municipalities. The 1996 Constitution of South Africa recognises three categories of municipalities – Category A, B and C.[1] Metropolitan municipalities (Category A) have exclusive municipal executive and legislative authority in their respective areas of jurisdiction. Local municipalities (Category B), which currently total 205, share their municipal executive and legislative authority with district municipalities (Category C) within the relevant area they fall. District municipalities exercise their municipal executive and legislative authority in an area that covers more than one local municipality. These umbrella municipalities (currently 44) were established, among other reasons, to provide support and maximise on economies of scale in areas where there are low capacity municipalities. At policy level, the three broad categories of municipalities (A, B and C) are further broken down into seven sub-categories namely:

- A - metropolitan municipalities;
- B1 - secondary cities, local municipalities with the largest budgets;
- B2 - local municipalities with a large town as core;
- B3 - local municipalities with small towns, with relatively small population and significant proportion of urban population but with no large town as core;
- B4 - local municipalities which are mainly rural with communal tenure and with, at most, one or two small towns in their area;
- C1 - district municipalities which are not water services authorities; and
- C2 - district municipalities which are water services authorities.

National departments often make use of this sub-classification when dealing with municipalities.

The Constitution assigns to local government service delivery responsibilities and a development mandate. It equips local government with a variety of powers – legislative (the power to adopt by-laws), executive, fiscal, budget and administrative powers - to enable the delivery of these responsibilities and obligations. The functional areas of local government are enumerated in Schedule 4 (part B) and Schedule 5 (part B) of the Constitution. These schedules

[1] See Sec 155(1) of the Constitution.

list matters, such as water supply, and electricity reticulation, land use planning, municipal health, local roads, and refuse removal. The principles of subsidiarity and assignment recognised in the Constitution provide opportunities for municipalities to exercise additional functions.

Legal Status of Local Governments

Unlike in many countries, local government is recognised in the Constitution of South Africa as a sphere of government.[2] Thus, the existence of the institution of local government is not dependent on the goodwill of the national and provincial governments. This security of existence is extended to individual municipalities which may not be arbitrarily abolished or merged. Such abolishment or merger can only take place in terms of law and subject to oversight procedures that include the role of an independent body, the Municipal Demarcation Board.

The autonomy of municipalities is constitutionally recognised and can be enforced through the courts. Municipalities have a right to govern their respective areas and this right is only limited by the Constitution. The national and provincial governments may, however, regulate the exercise of this right but subject to limitations imposed by the Constitution. For instance, such regulation mainly takes the form of framework legislation that may not go to the 'core' of municipal functions as that is reserved for the legislative authority of municipal councils. National and provincial governments are further prohibited from impeding or compromising a municipality's ability to exercise this right whether by legislative or other means (Section 151(4) of the Constitution). Thus, it can be observed that unlike in many other countries, the Constitution of South Africa entrenches the existence and autonomy of local government that is jealously guarded by the courts in practice.

(A)Symmetry of the Local Government System

As explained above, there are three categories of municipalities in South Africa – metropolitan, local and district. The Constitution allocates to all metropolitan municipalities equal powers and functions. As opposed to metropolitan municipalities that have exclusive executive and legislative authority in their areas of jurisdiction, legislation and policy defines the division of responsibilities between district and local municipalities. As stated above, within the category of district municipalities there are those that have been designated as water services authorities and those that are not.

[2] See Sec 40(1) of the Constitution.

The Constitution entrenches the principles of subsidiarity and assignment which if implemented can also result in municipalities within and across categories exercising varying powers. Section 156(4) of the Constitution requires the national and provincial governments to assign to a municipality any of their functions if the function can 'most effectively be administered locally and the municipality has the capacity to administer it'. This provision is being implemented with respect to some functional areas of the national and provincial governments. For example, metropolitan municipalities, which tend to have significant capacity, are already involved in the delivery of housing even though it is a national and provincial competence. Thus, there is a fair degree of asymmetry in the South African system of local government.

However, the Constitution does not explicitly state that the asymmetry at local level is strictly there to respond to the urban-rural distinction. In practice, nonetheless, district municipalities generally operate in rural and semi-rural areas while metropolitan municipalities and secondary cities (B1) govern in mostly urban areas. Thus, it can be concluded that the local government system is designed in such a way that enables it to respond or adjust to the urban-rural interplay, among other differences present at the local level.

Political and Social Context in South Africa

The ushering of a democratic era in 1994 brought hope to a country that had been ravaged by years of apartheid. Under apartheid, the state, economy and society were organised strictly on the basis of race.[3] The system benefited whites while the majority black population, as well as the minority Indian/Asian and coloured minority groups, were marginalised, deprived of equal economic opportunities and political representation to a different degree, and the former relegated to third class citizens. Since coming to power in 1994, under the leadership of Nelson Mandela, the majority led government of the African National Congress (ANC) has been confronted with a major challenge of undoing or redressing the injustices and legacy of apartheid. A variety of transformation interventions have been adopted in line with the demands of one of the most transformative constitutions in the world, the 1996 Constitution.

These interventions have recorded successes in some areas while failures are common in a number of areas, such as spatial transformation, with apartheid spatial landscape largely remaining intact 27 years after the end of apartheid.[4] Corruption and skills deficit, among other problems, continue to undermine the capability of the state to meet its obligation and development priorities at all levels of government.[5] The slow growth of one of Africa's largest

[3] See Nico Steytler and Jaap de Visser, *Local Government Law of South Africa* (LexisNexis 2009) 1-3 to 1-9.
[4] Tinashe C Chigwata, Jaap de Visser and Lungelwa Kaywood, 'Introduction' in Tinashe C Chigwata, Jaap de Visser and Lungelwa Kaywood (eds), *The Journey to Transform Local Government* (Juta 2019) 1.
[5] See Patricia Ntliziywana, 'Professionalisation of Local Government in South Africa' in Tinashe C Chigwata, Jaap de Visser and Lungelwa Kaywood (eds), *The Journey to Transform Local Government* (Juta 2019) 59.

economies has not made the situation any better. South Africa's GDP is estimated to grow by merely 1.5, 1,7 and 2,1 per cent in 2019, 2020 and 2021, respectively.[6] The unemployment rate, which in the second quarter of 2019 stood at 29 per cent, is another indicator of an economy in trouble.[7] It is thus without doubt that the economy is failing to generate sufficient resources, at a faster rate, for the state to cater for the needs of its estimated 58,78 million population (mid 2019 estimate).[8] This partially explains why poverty remains widespread, inequalities continue to deepen and universal access to basic services remains a dream for many South Africans.

The citizens have been impatient with the ANC government's performance in the last few years.[9] The political dominance of the ANC, reflected by, among other things, its two-thirds majority in the National Assembly in the early years of the democratic era, has slowly been eroded. In the 2019 elections, the ruling party won by 56 per cent of the national vote and narrowly won Gauteng province while the opposition, Democratic Alliance, kept its majority in the Western Cape province. At local government level, after the 2016 local government elections, the ruling party is no longer in control of four key metropolitan municipalities. Of the four, one is the legislative capital (City of Cape Town), the other is the administrative capital (Tshwane) while the City of Johannesburg is the economic hub of the country. Some form of coalition governments were formed in Johannesburg, Tshwane and Nelson Mandela Bay following the failure by any of the political parties to acquire a majority in these municipalities.

The metropolitan regions and cities remain key attraction points for people from rural areas in search for better economic opportunities. By 2017, over 67 per cent of the total population of South Africa was already residing in urban areas, including cities.[10] Consequently, rural areas have been left with a thin base to tap resources such as skilled manpower, a development which undermines their capacity to deliver. On the other hand, the infrastructure in these metropolitan areas is overwhelmed by the large-scale inward emigration and is failing to cope, as a result. For instance, a significant number of the population in these metropolitan regions still resides in informal settlements with no or limited access to basic public services. Even if such services were to be provided, a large portion of people in these areas are not able to pay due to incapacity. Thus, local government, which is positioned at the heart of state public service delivery in South Africa,[11] continues to face a variety of challenges, which are both within and outside of its control.

[6] National Treasury, 'Municipal Budget Circular for the 2019/20 MTREF' (MFMA Circular no 94, Municipal Finance Management Act No 56 of 2003, May 2019) 2.
[7] Statistics South Africa (2019) <http://www.statssa.gov.za/> accessed 30 July 2019.
[8] ibid.
[9] See Ntliziywana, 'Professionalisation of Local Government in South Africa', above, 59, 61, 63.
[10] See Statista, 'South Africa: Urbanization from 2009 to 2019' (*Statista*, 2020) <https://www.statista.com/statistics/455931/urbanization-in-south-africa/ > accessed 9 December 2019.
[11] See Steytler and De Visser, *Local Government Law of South Africa*, above, 1-3.

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Local Responsibilities and Public Services

2.1. Local Responsibilities and Public Services in South Africa: An Introduction

Thabile Chonco, *Dullah Omar Institute, University of the Western Cape*
Lungelwa Kaywood, *SALGA – South African Local Government Association*

Local government is the provider of primary services, which are essential to the dignity of all who live in its area of jurisdiction. Ensuring the sustainable provision of services and encouraging the involvement of communities in the matters of local government are some of the main objects of local government.[12] In this regard, the Constitution calls for municipalities to strive within their financial and administrative capacity to achieve their constitutional mandate set out in Section 152. These objects are crucial in a country that seeks to rectify injustices of the previous apartheid local government- a local government system that deliberately excluded the majority of black citizens from accessing essential services. As such, both urban and rural local municipalities of the democratic local government are responsible mainly for essential services and infrastructure vital to communities' wellbeing.

The Constitution further sets out the framework for local government responsibilities. Section 156(1) of the Constitution provides that a municipality has executive authority, and the right to administer, the local government matters set out in Schedules 4B and 5B of the Constitution and any other matter assigned to a municipality by national or provincial legislation. Schedules 4B and 5B grant original powers to local government. Local government's functions must be observed in relation to the developmental mandate given to municipalities by the Constitution (Section 153).

Although at first glance the constitutional provision of local government powers and functions seems symmetrical, Section 156(1)(b),[13] Section 155(3)(c)[14] and the compulsory assignment per Section 156(4)[15] of the Constitution show that there is a system of differentiation of powers and functions.

[12] Sec 152 of the Constitution of the Republic of South Africa, 1996, states additional objects of local government as providing for a democratic and accountable government to local communities, promoting social and economic development, and promoting a safe and healthy environment.
[13] Sec 156(1)(b) of the Constitution provides that '[a] municipality has executive authority in respect of, and has the right to administer any other matter assigned to it by national and provincial legislation'.
[14] Sec 155(3)(c) of the Constitution provides that '[n]ational legislation must subject to Sec 229, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality'.
[15] Sec 156(4) of the Constitution states that '[t]he national and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of

Division of Functions and Powers Between District and Local Municipalities

The relevant national legislation is the Municipal Structures Act 117 of 1998 and it must take into account the need to provide municipal services equitably and sustainably. The constitutional and legislative division of powers and provision of public services is not based on the urban-rural distinction. Legally, metropolitan, district and local municipalities have authority over urban areas. In practice, however, metropolitan and local municipalities govern in mostly urban areas while district municipalities generally govern in rural and semi-rural areas.

Section 83(3) of the Structures Act provides that a district municipality must seek to achieve the integrated, sustainable and equitable social and economic development of its area as a whole.[16] This means that districts are to play a supportive role and must do so by providing the bulk services and district-wide functions set out in Section 84(1) of the Structures Act,[17] and cater for both the district and local municipalities within the district's jurisdiction. Local municipalities have the powers provided in Sections 156 and 229 of the Constitution,[18] excluding the district powers listed in Section 84(1) of the Structures Act.[19] This division grants local municipalities most day-to-day service delivery functions. The division of powers has not been without problems due to poorly executed mandates as a result of capacity constraints, finances, as well as duplication of services, uneven development and poor relations between the district and local municipalities.

Further, the provision of municipal services must be done in a manner that ensures community participation and accountability. Therefore, integrated development planning (IDP) was introduced through the Municipal Systems Act of 2001 as a key strategic planning instrument for service delivery in local government. The emergence of IDP is strongly linked to the early 1990s drive towards addressing the legacy of apartheid through an integrated and participatory approach to planning.[20] Each municipality prepares an IDP in consultation and cooperation with the local community and other organs of state.[21] This is in realisation of the fact that some municipal services must be delivered in a coordinated manner, for example,

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Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if that matter would most effectively be administered locally and the municipality has the capacity to administer it'.

[16] Act 117 of 1998.

[17] The functions and powers of a district municipality include integrated development planning, portable water supply systems, bulk supply of electricity (transmission, distribution and where applicable, generation), domestic waste-water and sewage disposal systems, solid waste disposal sites, municipal roads, regulation of passenger transport services, municipal airports, municipal health services, firefighting services, fresh produce markets and abattoirs, cemeteries and crematoria, local tourism, municipal public works, grants given to the district (receipt, allocation and if applicable distribution) and taxes, levies and duties (imposition and collection).

[18] These are Schedule 4B and 5B original powers, assigned powers and fiscal powers.

[19] Sec 84(2) of the Structures Act.

[20] Anél du Plessis (ed), *Environmental Law and Local Government in South Africa* (Juta 2017) 168. For further discussion on the people's participation, see report section 6 on People's Participation in Local Decision-Making.

[21] Sec 29 of the Municipal Systems Act 32 of 2000.

when planning for human settlement (housing), other related essential services such as roads, water, and electricity, waste removal, streetlights, public transport, and municipal health services must also be considered. Twenty-five years post-democracy, access to these municipal services has been expanded to previously marginalised communities. However, secondary data suggests an increasing trend of community protests in South Africa since the year 2010, with the highest manifesting in the Gauteng province, a province that is mainly comprised of urban local government (ULG) and deemed to be the economic hub. The reality is that of a local government battling to meet the communities' expectations as communities often exhibit signs of anger and dissatisfaction with the quality and quantity of services offered by the local government sphere. Based on the Constitution, the communities' expectations for municipal services are legitimate.

The Structures Act, on the other hand, provides a framework for authorisations and adjustments of functions between the district and local municipalities. The Minister of Local Government may authorise a local municipality to perform or exercise a power in respect of the water, electricity, sanitation and municipal health functions that ordinarily reside with district municipalities.[22] Provincial MECs, on the other hand, are empowered to adjust the powers and functions from a local municipality to a district municipality or vice versa, except for integrated development planning, water, electricity, sanitation and municipal health functions, as well as grants made to district municipalities and collection of taxes or levies in respect of these functions.[23] The adjustment can only take place after a capacity assessment has been undertaken, and the Municipal Demarcation Board endorses the adjustment. Graph 1 shows the number of authorisations that have been made and that a large number of local municipalities are performing functions that are, according to Section 84(1) of the Structures Act, redistributive in nature and are district municipality functions.

Table 19: Ministerial Authorised functions performed by Local or District municipalities

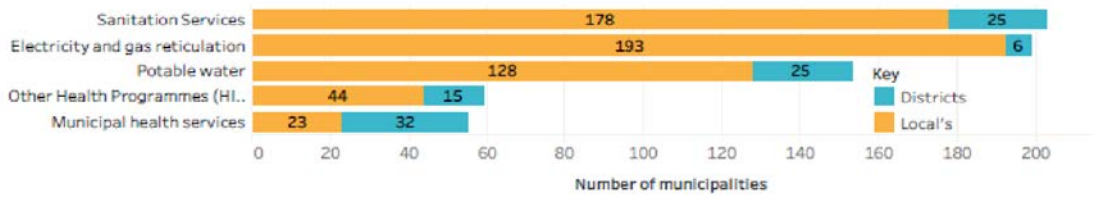

Figure 1: Authorisations made by the Minister per Section 84(3) of the Structures Act.[24]

[22] Sec 84(3) of the Structures Act. The Minister must comply with the consultation requirements set out in this provision.
[23] Sec 85(1) of the Structures Act.
[24] Municipal Demarcation Board (MDB), 'Assessment of Municipal Powers and Function' (National Report, MDB 2018).

Additional Powers and Functions

The Constitution mandates the national and provincial government to assign the administration of a Schedule 4A or 5A matter to a municipality if the matter would be most effectively administered locally and the municipality has the capacity to administer the matter (Section 156(4) of the Constitution). A function can be assigned to a specific municipality or to all municipalities in general. An assignment is the secondary source of power for local government. The Constitution (Sections 99, 126 and 156(4)), and the Municipal Systems Act 32 of 2000,[25] set out the appropriate procedures for transferring functions to municipalities. The procedures are designed to warrant that the assignment of powers outside of the competencies set out in Schedule 4B and 5B are well placed, that municipalities are protected from unfunded mandates and that legislative and executive capacity is transferred to the assignee municipality.[26] Graphs 2 and 3 below show the Municipal Demarcation Board's assessment of the number of municipalities performing functions that are originally national and provincial government functions. According to the graphs, a large number of these provincial and national functions are performed by local municipalities.

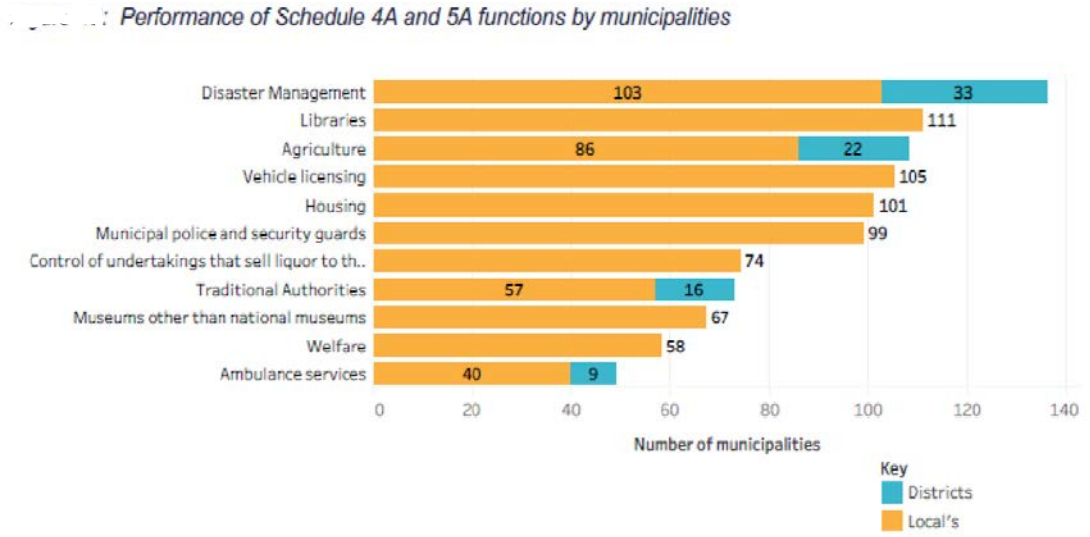

Figure 2: MDB's assessment of the number of district and local municipalities that currently perform functions that are not local government's original functions.[27]

[25] Secs 10 and 10A of the Municipal Systems Act.

[26] Jaap de Visser and Annette Christmas, 'Reviewing Local Government Functions' (2007) 9 Local Government Bulletin 13.

[27] MDB, 'Assessment of Municipal Powers and Function', above.

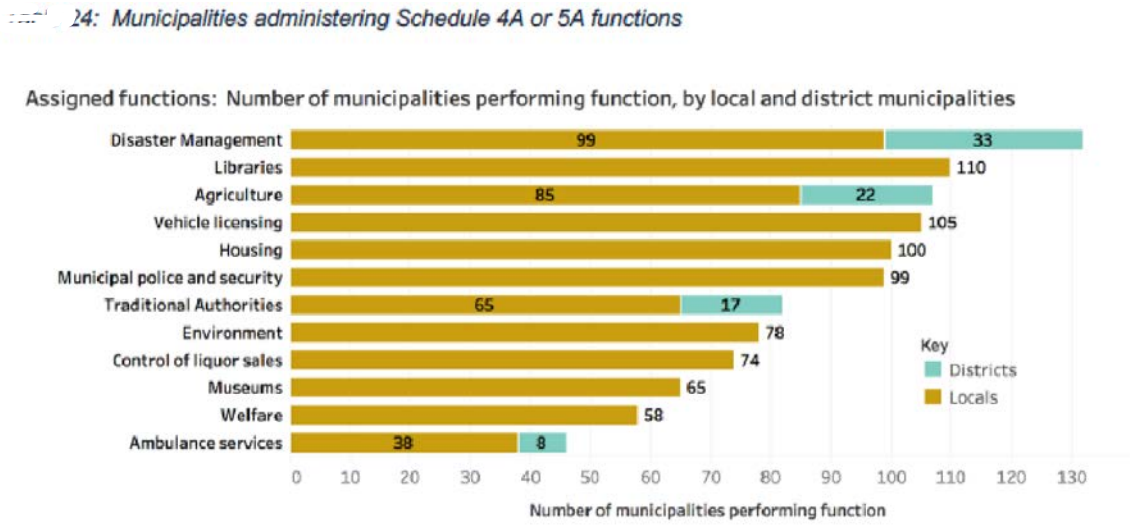

Figure 3: District and local municipalities that currently administer functions that are not local government's original functions.[28]

Adjustments to Adapt to Changes

Metropolitan municipalities exercise all the original powers of local government enumerated in the Constitution. At present, they cannot adapt their provision of public services to demographic changes in their jurisdiction because there is no framework governing adjustments in metropolitan municipalities. The process of assignment provided in the Constitution could, however, be used to empower municipalities to adapt to changes. For example, municipalities want to perform more housing, public transport and health responsibilities. All these functions fall under Schedules 4A and 5A of the Constitution, making them national and provincial government functions but they could be assigned to municipalities.

Alternative Service Delivery Mechanisms

Municipalities in South Africa have the discretion to use alternative service delivery mechanisms to provide various municipal services that were previously performed internally. The section below outlines two such mechanisms that may be employed.

Use of Municipal Entities as Service Providers

Municipal entities can be established for this purpose.[29] A municipal entity is an 'organ of state' and must comply with the legislative framework that applies to its parent municipality to

[28] ibid.

[29] Centre for Applied Legal Studies (CALS), 'Evaluating the Efficiency and Effectiveness of Municipal Entities as Municipal Service Delivery Mechanisms – A Legal Assessment' (CALS 2010) 23. The following types of municipal

ensure accountability, transparency and consultative processes. Municipal entities are accountable to the municipality or municipalities that established them. The municipal entity enters into a service delivery agreement with its parent municipality and must perform its duties according to the objectives set by the parent municipality. Municipal entities, unlike municipalities, function on business principles and are expected to be free from municipal problems such as inefficiency, slowness and unresponsiveness.[30]

Municipal entities are mainly used by metropolitan municipalities, some district municipalities and some local municipalities that have the capacity. The 2017-18 Auditor General's Audit Report for Local Government shows that in the 2017-18 financial year, 57 municipal entities were operating across both urban and rural municipalities.[31] This could be due to the scope and variety of services they have to provide, as well as the demographical make-up of the area(s) they have to provide the services in. Key issues to be considered in comparing the performance of entities with that of internal service delivery by the municipality include management capacity, the specific context of the municipality, political and community accountability, and performance monitoring and reporting. While municipal entities cannot be seen as a solution for service delivery, in certain contexts they may be more effective than internal delivery. For example, in the City of Johannesburg Metropolitan Municipality, the water and sanitation services are provided by the municipal entity Johannesburg Water.[32] In uThungulu District Municipality, the fresh produce market function is performed by the UThungulu Fresh Produce Market.[33]

Contracting with Private Parties

Section 217 of the Constitution states the constitutional framework for procurement by an organ of state in the national, provincial or local sphere of government.[34] When procuring goods and services at a municipal level, Chapter 11 of the Municipal Finance Management Act (MFMA) comes into operation and it must be read together with the Preferential Public Policy Framework Act, as well as Chapter 8 of the Municipal Systems Act. Section 111 of the MFMA mandates every municipality and municipal entity to have and implement Supply Chain Management (SCM).[35] The SCM Regulations issued in terms of the MFMA lay down the

entities are recognised in the Systems Act – private company (subject to restrictions), a service utility (established by a municipality) and a multi-jurisdictional service utility (established by two or more municipalities).

[30] Felicity Kitchin, 'Consolidation of Research Conducted on Municipal Entities in South Africa' (2010) 4-5.

[31] Kimi Makwetu, 'Local Government Audit Report 2017/18' (Auditor General 2019) Annexure 1.

[32] City of Johannesburg, 'City of Johannesburg Annual Report 2017/18' 60-71.

[33] uThungulu District Municipality, 'uThungulu District Municipality Annual Report 2017/18'.

[34] Sec 217(1) of the Constitution requires the contracting of goods or services to take place in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Sec 217(3) of the Constitution requires that national legislation prescribe a framework within which the preferential procurement policy referred to in Sec 217(2) must be implemented. The Preferential Public Policy Framework Act (PPPFA) was promulgated as a response to this constitutional imperative.

[35] Sec 112 of the MFMA.

requirements for the governance of procurement processes. Municipalities have to determine their own procedures and policies, which must be consistent with the legislative framework. If the contract imposes financial obligations on the municipality beyond three years, Section 33 of the MFMA comes into operation and mandates the municipality to consult the local community,[36] National Treasury and the responsible national department if the contract involves the provision of water, sanitation and electricity. Both urban and rural municipalities have to follow this legislative framework when awarding business to private companies.

Municipalities also have the discretion to enter into Public-Private Partnerships (PPPs) for the provision of services[37] and infrastructure. This discretion is, however, heavily regulated by the National Treasury and in terms of the Municipal Systems Act.[38] At local government level, PPPs are regulated under the MFMA and its regulations,[39] which provides a framework for municipalities and private sector partners to enter into mutually beneficial commercial transactions, for the public good. PPPs are often used for procuring capital projects and as such the process followed is intensive and requires competitive and transparent bidding, as well as the capacity for the municipality to carry out the projects. While legislation and policy do not differentiate between PPPs for urban or rural areas/government, the procedural requirements of a PPP suggest that a municipality must have the capacity to undertake the strenuous procedure before engaging in the actual substance of the partnership.[40] A PPP has to be strongly motivated, especially with regards to the long term nature of the contract, as well as a municipality's financial viability before, during and after the PPP has been completed.

One of the PPPs that have improved the lives of the citizens in the City of Tshwane was a partnership between the municipality and the South African Breweries (SAB) in 2018, where SAB rehabilitated two water pump stations – Groenkloof springs and Kentron borehole to increase the municipality's water supply. The partnership resulted in an additional 7.5 million litres of water for residents per day.[41]

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[36] See report section 6 on People's Participation in Local Decision-Making.

[37] If the PPP involves the provision of a municipal service, chapter 8 of the Systems Act must also be complied with.

[38] See Secs 76-78 and 80-81 of the Municipal Systems Act.

[39] Sec 120 of the MFMA. Read together with the Municipal PPP Regulations (2005), the Local Government SCM Regulations (2005) and National Treasury's Municipal Services and PPP Guidelines.

[40] See Sec 120(2), (4) and (6) of the MFMA.

[41] '2025 Sustainability Goals' (*Greenovation*, 16 May 2018) <http://greenovationsa.co.za/2018/05/16/sab-and-ab-inbev-africa-commit-to-2025-sustainability-goals-to-help-grow-local-sa-communities-issues-challenge-to-entrepreneurs-to-solve-sustainability-issues/#:~:text=The%20South%20African%20Breweries%20(SAB,Action%2C%20Circular%20Packaging%20and%20Entrepreneurship.> accessed 20 October 2020. See also Tamsin Oxford, 'The Success of the Public-Private Partnership' (*Mail & Guardian*, 26 July 2019) <https://mg.co.za/article/2019-07-26-00-the-success-of-the-public-private-partnership/>.

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2.2. ‘A Re Yeng’ Bus Rapid Transit Project: City of Tshwane

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Relevance of the Practice

Twenty-five years post democracy, South African cities are still characterized by dysfunctional, inefficient, and spatially unjust settlement patterns. This places a costly transport burden on the poor communities that are settled far away from job opportunities. Therefore, the country had to explore initiatives such as Transit Oriented Development (TOD) and Bus Rapid Transport (BRT) which have proven successful in trying to create more inclusive cities and more efficient settlement patterns. Selected as the preferred practice, the BRT model has evolved from an emerging mode used mainly in developing countries to an established transportation mode providing sustainable mobility in cities throughout the world.[42] A developing country, South Africa was not to be left behind as transport is deemed to be one of the critical success factors for the country’s developing economy. As such, this project was important to the country and received the required support from various organs of state such as the National Treasury, Department of Transport, the private sector as well as the Development Bank of Southern Africa (DBSA). The practice is related to all the report sections in that it addresses the role of local government in service provision beyond basic services such as water and electricity.

The National Land Transportation Act (NLTA) provides the legal framework for the development and implementation of the Integrated Rapid Public Transport Networks (IRPTN) by the metropolitan cities in South Africa. Using the case of Tshwane City, their IRPTN strategy set out the network plan for BRT corridors and integration with rail services such as the Gautrain and PRASA commuter rail links in the short, medium and long term. The government support (in whole) was key to the success of this project. The City of Tshwane was allowed to use a portion of its grant income to cover some of the funding requirements. The project also received support from the traditional ‘affected operators’ in that a number of taxi drivers were trained to operate the new BRT buses which resulted in better working conditions.

Description of the Practice

Loosely translated, *A Re Yeng* means ’Let’s Go’, it has been operating since 2014 around the Pretoria centre and surrounding suburbs. The *A Re Yeng* buses are equipped with free Wi-Fi on

[42] National BRT Institute, <https://nbrti.org/>.

board and are operated by qualified former taxi drivers recruited from the various taxi associations in the City. The bus project was rolled out in phases, culminating in the construction of 80-kilometre long dedicated lanes. Comprising of 51 bus stations that stretch from poor townships, the buses pass through the city centre and surrounding suburbs. The project provides communities with improved public transport in terms of quality, reliability and safety as well as better mobility and accessibility. The project was funded using public revenue and loans from the Development Bank of Southern Africa (DBSA). This project is relevant to report section 3 on local finances in that it had a direct impact on the local financial arrangements. The involvement of the multiple state organs as part of the project team speaks to the intergovernmental fiscal relations (report section 5) and lastly, communities have to be involved as part of the planning and budgeting processes (report section 6 on people's participation). However, the project does not adequately respond to some of the problematic realities connected with the urban-rural divide and interplay. For example, although *A Re Yeng* buses have provided better connectivity between poor townships, cities, and rich suburbs, the buses do not travel beyond the city limits, and this excludes rural communities from using them, unless they are visiting the city. Despite the need for public transport in rural areas, so far, there are few cities that are incorporating rural areas in their roll out of bus rapid transport. This is could be because cities have a greater need for mobility due to the large populations (2.921 million in Tshwane) and the huge difficulty of traffic congestion. These challenges do not exist in most rural areas. The buses would also have to operate at a profit, or at least break even, which would be difficult in rural areas having significantly lower populations, and economic activity, compared to cities. Moreover, many rural areas do not have adequate road infrastructure to service some remote areas.

Assessment of the Practice

The BRT system has been successfully implemented by 5 of the 8 metropolitan cities in South Africa and seems to have addressed the spatially unjust settlement patterns by offering accessible, affordable and attractive means of transport to a broad range of people across communities. The BRT has further offered accessible public transport for vulnerable groups such as people with disabilities and mothers with children. With dedicated bus lanes, traffic congestion was meant to reduce though the jury is still out on whether this has been realized. However, it has not been without its problems, particularly for the City of Tshwane's (Tshwane) 'A Re Yeng' BRT. It appears as though the BRT systems were seen as a panacea to public transport in South Africa as opposed to a mode that forms part of an integrated system of different modes. Van Ryneveld[43] notes that 'public transport systems like 'A Re Yeng' are not primarily about the urban/rural linkage', which is the problem that the national government sought to address when it introduced the BRT system. He further states that 'the BRT system

[43] Interview with Philip Van Ryneveld, independent consultant, Hunter Can Ryneveld (26 March 2021).

is about moving large numbers of people quickly through densely populated or densely trafficked areas/corridors, and by moving quickly this also reduces operating costs'. What has happened in reality is that the technology that was chosen for the BRT system was not suitable for the transport challenge that Tshwane faces, which is to transport large numbers of people from its rural spaces/sections into the urban centre. Furthermore, the fare system of BRT was too complicated and costly. As such, the BRT system has ended up not being suited to Tshwane. The City of Tshwane could have drawn far more lessons from the City of Johannesburg's BRT system which recognized the non-motorised transport system as modes to be further developed as part of this integrated system.

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2.3. The Accreditation of Municipalities to Administer Housing Programmes

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Relevance of the Practice

In terms of the Constitution, housing is a concurrent national and provincial government function (Part A of Schedule 5). This placement is rather odd and impractical considering that local government's service delivery functions are centred on the built environment, yet housing falls out of local government's competencies.[44] Communities lay their housing delivery grievances at the local government's doorsteps.[45] The concentration of both the economy and South Africa's population in urban areas reinforces the focus on speeding up the development of cities through housing, amongst other factors/functions.[46] It is, therefore, hard to imagine how local government can carry out its developmental mandate without housing as a function, especially when housing lies at the heart of development.[47]

A portion of the housing function has partly devolved to local government through a rich body of Constitutional Court judgments (municipalities responsible for providing shelter to the homeless).[48] In practice, however, the devolution of the full housing function has not been undertaken with an equal amount of haste or resources because municipalities cannot regulate, set priorities and determine their housing delivery strategies, as well as issues surrounding the funding of the housing function. This is because they lack the necessary legislative powers and they do not receive the housing grant directly from the national government. The housing delivery function remains an unfunded mandate for municipalities, except in the context of accreditation.

[44] Schedules 4B and 5B – electricity and gas reticulation, municipal planning, municipal public transport, water and sanitation services, refuse removal, street lighting are services that are pertinent to and attached to housing.
[45] Dullah Omar Institute, 'Civic Protest Barometer' (2018).
[46] Department of Human Settlements (DHS), 'Revised Draft Accreditation and Assignment Frameworks for Municipalities to Administer National Human Settlements Programmes' (2017) <https://www.salga.org.za/Documents/Municipalities/Guidelines%20for%20Municipalities/Revised_Accreditation_and_Assignment_Frameworks_for_Municipalities_to_Administer_National_Human_Settlements_Programmes_(March%202017).pdf> accessed 20 January 2020.
[47] Sec 153 of the Constitution provides for the developmental duties of municipalities. See also Sec 4(2)(j) of the Municipal Systems Act.
[48] *Government of RSA v Grootboom* 2001 (1) SA 46(CC); *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 (3) SA 208 (CC); *City of Johannesburg v Blue Moonlight Properties* 2012 (2) SA 104 (CC).

Description of the Practice

The Housing Act enables municipalities to apply for and attain accreditation to administer housing programmes.[49] Applying for accreditation is voluntary, based on a municipality's capacity to undertake the housing function, which is not a local government function as per the Constitution. The consequence of not applying for and attaining accreditation is that the housing function, if carried out, will not be funded - so it remains an unfunded mandate. The accreditation can only take place once the Member of (provincial) Executive Council (MEC) responsible for housing in the relevant province is satisfied that the municipality concerned complies with the criteria for the accreditation determined by the Minister of Human Settlements. Once a municipality is accredited, it can administer the housing programme and may exercise powers and duties relevant to the housing programme that would otherwise be performed by the national and provincial government.[50] The MEC allocates money to the accredited municipality and the municipality remains accountable and subject to the MEC's directions. The MEC must review the accredited municipality's performance regularly and can intervene if the municipality performs poorly or does not perform at all.[51]

The rationale for the Accreditation and Assignment Framework for Municipalities to Administer National Human Settlements Programmes (2012) was the subsidiarity principle, as provided in Section 156(4) of the Constitution. The aim of the framework was 'to address various policy, constitutional and legislative aspects in order to enable municipalities to manage the full range of housing instruments within their areas of jurisdiction' and expand the role of local government.[52] The framework targeted metropolitan municipalities mainly. To be accredited and ultimately assigned the housing functions, municipalities have to show their capacity to plan, implement and maintain the projects and programmes that are included within their Integrated Development Plans, within the three years mandated by the MFMA.

The 2012 Accreditation and Assignment Framework addresses certain legal difficulties associated with the framework for accreditation as set out in the National Housing Code.[53] A distinction was made between accreditation and assignment and the processes to be followed are differentiated. Accreditation is formalised by way of an Implementation Protocol in terms of Section 35 of the Intergovernmental Relations Framework Act, 2005 and assignment by means of an Executive Assignment Agreement in terms of the Constitution.

Accreditation recognises that whilst a municipality has met certain criteria and standards, it still requires additional support and capacity before assuming full accountability for the

[49] Sec 10 of the Housing Act 107 of 1997.
[50] Sec 10(2) and (3) of the Housing Act.
[51] Sec 10(3) and (4) of the Housing Act.
[52] Department of Human Settlements, 'Breaking New Ground – A Comprehensive Plan for the Development of Integrated Sustainable Human Settlements' (2004) Part B, Sec 5.2.
[53] DHS, 'Revised Draft Accreditation and Assignment Frameworks', above.

administration of national housing programmes. Accreditation allows the exercise of functions by a municipality on behalf of the MEC while further capacity is being developed. The financial accountability for these functions remains with the responsible provincial accounting officer.

Assignment involves the formal transfer of the functions related to the administration of national housing programmes from the provincial MEC responsible for housing to a municipality through the existing constitutional and legal framework for assignment.[54] Assignment moves the planning, financial and legal accountability from the assigning authority to the receiving authority. Assuming financial accountability for the housing function includes the right to directly receive the funds and the assets necessary to perform the function.

In 2017, a Revised Accreditation and Assignment Framework for Municipalities was drafted to provide the guidelines for enabling the administration of housing programmes by municipalities. The 2017 Revised Accreditation and Assignment Framework takes into account the legislative and policy shifts within the housing and broader human settlements and local government context; clarifies the roles of provinces in the accreditation process; and addresses lessons from the implementation of the 2012 Accreditation Framework.[55] It envisages a dual process where an accreditation eventually leads to the assignment of the housing function.

The accreditation will apply to metropolitan, local and district municipalities across South Africa; however, the focus will be on larger urban and metro municipalities due to the urgency caused by the urban sprawl. If a district municipality requests accreditation, the municipality must show that it is authorised by all or a majority of the local municipalities within its jurisdiction to act on behalf of all or some of the local councils and that it has the necessary powers and functions and financial responsibilities to ensure integrated and efficient service delivery.[56]

From an intergovernmental relations (IGR) point of view (report section 5), the Accreditation and Assignment Programme requires the three spheres of government to work together in the spirit of IGR. The Programme also obliges the housing sector within the spheres to liaise with various sector departments and with various organs of states as key stakeholders. The National Department of Human Settlements as the policy custodian of the Programme works with all the provinces, selected municipalities, SALGA, National Treasury, Department of Cooperative Governance and Traditional Affairs (CoGTA), as well as the Finance and Fiscal Commission (FFC) on all policy issues regarding accreditation and assignment of municipalities.

[54] ibid.
[55] ibid.
[56] ibid 20 (Principles of Accreditation, Principle 8).

Assessment of the Practice

The Accreditation and Assignment programme is about building additional capacity in qualifying municipalities to enable municipalities to manage the housing programme. The legal and policy framework governing the accreditation and assignment of municipalities to administer housing programmes is quite detailed and technical in nature, which could have the negative effect of frustrating the entire process. Several challenges stand in the way of effectively assigning (frustrate the desire to effectively assign) legislative and administrative [housing] functions to municipalities. The most pertinent of these challenges is the lack of requisite capacity in municipalities and the subtle reluctance of provincial and national government to surrender their [housing] powers and functions to municipalities.

It is, however, encouraging to see how the framework links the instrument of accreditation with assignment as provided for in the Constitution. The accreditation, as set out in Section 10 of the Housing Act, starts as a delegation and ultimately leads to an assignment. The framework provides for continuous strengthening of local government through the delegation of the housing function and authority, and ultimate transfer of those functions to municipalities. The framework also acknowledges the need to tailor the terms and conditions of the assignment to individual circumstances and the varying capacities of municipalities, and in so doing takes into account the principle of subsidiarity by endorsing the use of an agreement as an appropriate manner of the assignment. While the above is encouraging, rural municipalities have high levels of backlogs in electricity, water and sanitation which are the priority of the current government; while lack of housing is a significant challenge in urban municipalities hence prioritisation of urban municipalities for the Accreditation and Assignment Programme. Furthermore, unlike their urban counterparts who face urban sprawl issues, an ever-increasing need for housing which they can generate property rates from and capacity building to strengthen their somewhat solid capacity further, rural local government will require more capacity building initiatives (in comparison to urban areas) to be implemented before they can take up the Section 10 route. This will mean their uptake of the accreditation and assignment programme will take place at a much later period, lagging behind their urban counterparts.

At present, it is difficult to assess the practice as there has not been sustainable implementation of accreditation and delegation programmes to serve as a precursor to the assignment or formal transfer of the housing function to local government. It is only fair and rational to give the (revised) Accreditation and Assignment programme an opportunity for implementation. There is a desire to move towards a time where municipalities are empowered to carry out the housing function and deliver houses to communities on a sustainable basis. Steytler revealed that 'initially national government was keen to undertake the accreditation and assignment of housing to municipalities, however, provincial government was not as keen due mainly to political resistance and the loss of funding attached

to the housing function.'[57] Harrison noted that 'provinces were responsible for housing, but now most of the responsibility seems to be shifting to local government. Provinces are now putting mega housing projects in the city peripheries, which have cheaper land, but in doing so, provinces are pushing cities into a corner to expand service delivery to the periphery. If cities were in control, this would enable them to plan land use and spatial planning much better. Accreditation is not in the Constitution, so to avoid assignment, there is level one and level two accreditation.'[58] Taking the above into account, for the successful implementation of the Accreditation and Assignment Framework to take place the national and provincial departments responsible for housing will have to ensure that there is continued strengthening of municipal capacity; that the national and provincial departments warm up to transferring functions to local government; and that poor governance is removed.

In light of the above, some municipalities list 'housing – top structure subsidies' in their MFMA Medium Term Revenue Expenditure Framework Report Table A10, indicating that they administer the housing function. This table records a municipality's basic service delivery measurement. It should be noted, though, that this may not mean that the function has been formally assigned. Along with listing the function, municipalities indicated that they had spent monies on housing top structures over and above what provinces had allocated as subsidies.[59]

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[57] Interview with Nico Steytler, Professor, Dullah Omar Institute, University of the Western Cape (15 April 2021).
[58] Interview with Karen Harrison, City Support Programme, National Treasury (12 April 2021).
[59] For example, City of Johannesburg, 'Medium-Term Budget 2018/18 to 2020/21' (May 2018) 39; Overstrand Municipality, 'Budget Report 2018/19' 45; Stellenbosch Municipality, 'Medium Term Revenue and Expenditure Framework 2018/19 to 2020/21' 41.

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2.4. eThekwini Metropolitan Municipality: Expanded Public Services during the Covid-19 Emergency

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Relevance of the Practice

Since the declaration of the state of national disaster by the Minister of Cooperative Government on 18 March 2020, and the subsequent announcement of a lockdown by the President on 26 March, municipalities have implemented various measures in response to the Covid-19 pandemic. This practice note analyses some of the measures taken by eThekwini metropolitan municipality (metro) during the Covid-19 pandemic. The words 'disaster' and 'emergency' are used interchangeably. While disaster management is a shared national and provincial government competence (Schedule 4A of the Constitution), municipalities play a crucial role during emergencies in terms of their constitutional functions (listed under Schedule 4B and 5B) such as water, sanitation, and markets. In South Africa, it is common for the younger generation to seek employment in urban centres, especially in metropolitan municipalities, in order to work and raise money, which is transferred to parents, siblings, children or the extended family in rural areas. The economic impact of Covid-19 in metropolitan municipalities will therefore have some ripple effects on the rural economy. This practice note considers the question 'what are the criteria for the allocation of responsibilities in the provision of public services during the Covid-19 pandemic' and 'how the eThekwini metropolitan municipality has adapted to the Covid-19 emergency'.

Description of the Practice

Municipal powers and functions are set out in Schedule 4B and Schedule 5B of the Constitution, where Schedule 4 consists of matters of concurrent national and provincial competence, and Schedule 5 consists of matters of exclusive provincial competence. During the Covid-19 pandemic, municipalities have had to perform a mixture of functions within their powers and assigned functions.

The Expanded Local Government Mandate under Covid-19

On 25 March 2020, the Minister of Cooperative Government and Traditional Affairs (COGTA) issued directions to municipalities, which required them to perform various functions, some falling within their existing mandate, and others being new or expanded mandates. This did not necessarily follow the normal procedure for assignments set out in Section 156(4) of the

Constitution, which allows the assignment (by agreement) of functions by national or provincial government to local government, in situations where the matter would be most effectively administered locally and that the local government in question had the capacity to administer it. However, the Minister of CoGTA imposed new obligations, some of which were unfunded mandates, and not necessarily agreed to by local governments.

Water

Municipalities are required to provide potable water to all communities in order to increase personal hygiene and thereby reduce transmission of Covid-19. It must be noted that while the supply of potable water is ordinarily a municipal function, prior to Covid-19 hitting the shores of South Africa, not all communities had access to water and sanitation. For example, although nationally, 92.5 per cent of households have access to improved drinking water sources, 4 per cent of households still practice open defecation, with higher figures (12.1 per cent) in traditional dwellings and (10.3 per cent) in informal dwellings, while 1.2 per cent use the bucket system.[60] The eThekwini metropolitan municipality (metro) has ramped up the provision of water and sanitation services to high population density settlements, rural communities, informal settlements, and public facilities. While this is a mammoth task, the metro has hastened its efforts by providing potable water sources, such as static tanks and standpipes, to help with sanitation efforts to underserviced areas in eThekwini.

Food Distribution

The metro has tasked its ward councillors to distribute food parcels/vouchers to help the indigent in all its wards, with each ward receiving 1000 food parcels. However, the distribution programme is characterised by some challenges. There are allegations that the food parcels are being politicised, and are only being distributed to African National Congress (ANC) members (ANC is the ruling party) in eThekwini. Although the Mayor of eThekwini, Mxolisi Kaunda, vehemently rebutted these allegations when he accounted before the National Assembly,[61] it may be difficult to determine what is actually happening on the ground. The second challenge is that while it is noble that the metro is providing food parcels to each of the wards, the wards do not have the same population sizes; therefore, giving each ward 1000 food parcels may not take into account the wards that have a larger number of households facing food insecurity. Last, the rolling out of the food assistance programme was delayed, leaving many households hungry. In addition to municipal ward councillors helping to identify the beneficiaries of food aid paid for by the Department of Social Development, eThekwini also paid for food aid from its own resources. The provision of food relief is generally not seen as a

[60] Statistics South Africa (StatsSA), 'GHS Series Volume VIII: Water and Sanitation, in-depth Analysis of the General Household Survey 2002–2015 and Community Survey 2016 Data' (StatsSA 2016) <http://www.statssa.gov.za/?p=9145> accessed 30 October 2020.

[61] Mxolisi Kaunda in 'JM: PC on CoGTA and Select Committee on COGTA, Water and Sanitation and Human Settlements' (*YouTube*, 14 May 2020, at 1:32:50) <https://www.youtube.com/watch?v=68Pcindzx5Y&t=5570s>.

local government function. Social relief is rather something that can be categorised under 'Social Welfare' (Schedule 4A). However, quite a few municipalities provided food assistance in response to the need. This raises the question whether this amounts to exceeding the municipal mandate, or responding to a human rights need, but this is yet to be determined in the context of South African metropolitan municipalities.

Shelters for the Homeless

The metro has a responsibility to provide temporary shelter to the homeless at least insofar as it relates to evicted homeless persons, as decided by the Constitutional Court.[62] During the lockdown, the metro has gone beyond this duty by providing meals and psychosocial support to the homeless, including managing withdrawal symptoms for substance abuse. The metro has also prioritised the protection of vulnerable groups having set up twelve shelters accommodating 1,704 homeless people, including women and children.

Health

Regarding health, it could be argued that eThekwini metro is exceeding its 'municipal health' mandate. On one hand, it can be argued that the sanitisation of public transportation facilities and local markets amounts to municipal health, as it constitutes 'preventing communicable diseases' as per the definition of municipal health in Section 1 of the National Health Act of 2003. It can also be argued that it forms part of the public transport and markets functions set out in Schedules 4B and 5B respectively, which are local government competencies. However, other health functions being performed by the metro exceed its municipal health mandate, for example, developing disease control systems, geo-mapping, working with epidemiologists, mobilising clinical expertise, and implementing National Institute for Communicable Diseases (NICD) guidelines through contact tracing and testing, community screening and mass testing.

Sanitation and Waste

The metro is also going beyond its regular functions of cleaning of public ablution facilities and refuse collection, and has taken on a new function of sanitising public facilities. It has increased its efforts to improve sanitation by sanitising and providing soap and sanitiser dispensers in informal settlements and public places, such as markets and taxi ranks. The metro has also distributed bar soaps and sanitisers to about 21,000 of its formal housing units.

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[62] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC); Jaap De Visser, 'The Enforcement of Socio-Economic Rights against Local Governments in South Africa' in Conrad M Bosire and Wanjiru Gikonyo (eds), *Animating Devolution in Kenya: The Role of the Judiciary* (International Development Law Organization (IDLO), Judicial Training Institute (JTI) and Katiba Institute 2015) 193-207.

Economic Relief/Local Economic Development

Economic relief is one of the mechanisms for local economic development, which is one of the objects of local government stipulated in Section 152 of the Constitution. Section 229 of the Constitution gives municipalities the power to levy taxes. With that comes the power to have a policy on what to levy taxes on. This then allows municipalities to decide whether to give tax holidays or not. Municipalities are permitted to levy property rates and surcharges on user fees or allow tax holidays in terms of Section 229(1) of the Constitution. The closure of national borders and the lockdown restrictions on business operations have negatively affected businesses. Tourism has been one of the hardest-hit sectors in eThekwini, which is one of the top tourist destinations in South Africa. In order to assist this sector, the eThekwini metro has made provision for owners of Bed and Breakfasts and guesthouses to apply to pay residential property rates, which are lower than commercial rates, as from 18 May 2020. However, there seem to be no rates holidays for residential or other commercial property owners. For informal traders, the relief comes in the form of a six-month rental holiday and a zero cost of business licencing fees for 2020/2021 financial year. It is not yet clear how the rental holiday will apply to informal traders. The metro is also moving to collaborate with online platforms, through Innovate Durban, a special purpose vehicle (municipal agency) to help township businesses deliver goods to local consumers.

The metro had initially anticipated that it was going to provide economic relief for local communities during the lockdown by reconnecting consumers whose accounts were in arrears and whose services were disconnected for being long overdue during the lockdown. However, the protracted lockdown at different alert levels, the financial pressure on the municipality, and the long wait for national support forced the metro to reconsider its benevolence, and to introduce a cut-off date (30 June) for consumers to negotiate a payment plan under debt agreement.

Assessment of the Practice

The metro has taken bold, but necessary steps in its efforts to curb the further transmission of Covid-19. It is performing various functions that exceed its mandate, such as providing food to the indigent, and public health services (beyond municipal health) using its own resources. However, it is still to be seen how the national and provincial governments will assist municipalities, such as eThekwini, to cover shortfalls in their budgets attributed to the expanded municipal functions, and to deal with economic recovery and the loss of revenue due to reduced payment of user fees and property rates. Although financial support has been promised, it may take long for it to be realised, and the real impact is starting to be seen. For example, Amathole Local Municipality in the Eastern Cape declared in January 2020 that it is unable to pay its employees, and it has since been placed under administration in terms of an intervention under Section 139 of the Constitution. While bigger metropolitan cities are more

likely to weather the storm, the situation is dire for smaller local municipalities, and especially so for rural municipalities as national government is redirecting resources to other matters such as the procurement of Covid vaccines.

The Covid-19 pandemic has had an indelible impact on the revenue base of municipalities as most economic activities ground to a halt during level 5 and 4 lockdown, save for listed essential services. The closure of non-essential businesses and the restriction of movement of people, tied with job and wage losses, has tied the hands of businesses and individuals, making it difficult for municipalities to raise revenue from their own sources in order to provide municipal services. Local revenue from tourism-related activities (including from museums and art galleries) have also dried up, worsening the financial position of municipalities. According to the Mayor Kaunda's submission to National Assembly on 14 May 2020,[63] the lockdown had cost eThekwini R1.5 billion in lost revenue as of 30 April, and R565 million in unfunded mandates. Like other municipalities, the metro is performing additional functions without receiving concomitant financial resources from the national and provincial governments. For example, the metro has expended financial resources from its own pocket towards the provision of food parcels to community members, which ordinarily is not a municipal function. This illustrates the severe impact of the performance of such unfunded mandates, especially on urban local governments, which seem to be more affected by the pandemic financially. Moreover, it is clear that shouldering the costs of additional services during the height of the pandemic was easier for eThekwini metro because it has extensive resources, as well as a broad revenue base. The situation would be much different in many local municipalities, and especially rural municipalities as noted above.

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[63] Mxolisi Kaunda in 'JM: PC on CoGTA and Select Committee on CoGTA, Water and Sanitation and Human Settlements' (*YouTube*, 14 May 2020, at 21:00) <https://www.youtube.com/watch?v=68Pcindzx5Y&t=1260s>.

2.5. Procurement

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Relevance of the Practice

Municipalities procure goods and services from private entities almost daily. These goods and services are often essential for ensuring the provision of basic amenities such as water, sanitation, electricity, and refuse removal. Far too often, there are problems in the way projects are designed and in the way service providers are appointed, or there are problems with the content of the agreement and transparency of the agreement. Failure to make procurement information publicly available reduces transparency and accountability. Similarly, service providers are often paid for substandard delivery, or even for delivery that did not take place at all. This has a direct impact on basic services, because municipalities enter into contracts with private entities for the provision of services such as the resurfacing of a road, delivery of water tanks, regular cleaning of toilets, or street lighting, and sometimes these services are not in fact provided. The municipalities seem not to have adequate systems in place to prevent and address these problems. However, communities are equally important here as they are well placed to assess whether a service is being delivered or not.[65] This practice note discusses the practice of procurement and focuses on the role of local governments in entering into contracts with private companies.

Description of the Practice

To procure from a private entity, municipalities (both urban and rural) must: (1) design and advertise a project, (2) select a service provider through a fair bidding process, (3) conclude an agreement with the successful bidder which includes the details of what must be delivered, (4) monitor the actual delivery as specified in the contract, and (5) only pay when the goods or services are delivered as per the contract. The key players in the procurement process are municipalities, private business entities, communities and the national treasury. The role of the national treasury is essentially regulatory, whereas communities' role is one of monitoring and ensuring good governance through accountability and transparency.[66] Local government's

[64] We wish to acknowledge the valuable inputs and insights from Carlene van der Westhuizen.
[65] This is discussed in report section 6.4. in relation to public participation and transparency of Covid-19 emergency procurement.
[66] Discussed further in report section 6 on People's Participation in Local Decision-Making.

role is in procuring services mainly from private entities and following the regulatory legal framework as discussed below.

Municipal Procurement: Laws and Regulations

The Constitution provides the basic framework for procurement as follows: 'When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective' (Section 217). Organs of state are required to implement procurement policies, and such policies may take into account the need for affirmative action and preferential allocation of contracts (Section 217(2) of the Constitution). The Broad Based Black Economic Empowerment (BB-BEE) Act 53 of 2003 regulates affirmative action. The Municipal Finance Management Act of 2003 (MFMA) and the Preferential Procurement Policy Framework Act 5 of 2000 have provided a statutory framework for procurement (including preferential procurement) for all organs of state and guide procurement at the local government level. These regulations require municipalities and municipal entities to implement a supply chain management policy that is 'fair, equitable, transparent, competitive and cost effective' (see Regulation 2(1)(b)). Regulation 36 (1) states that such a policy 'may allow the accounting officer' to 'dispense with the official procurement processes established by the policy' in a number of instances including 'an emergency', although the regulations do not define an emergency. Moreover, it is silent on what procurement information must be made publicly available during 'an emergency'. However, after the introduction of the eTender Publication Portal in 2016, the National Treasury publishedMFMA Circular no 83, which sets out the requirements for the publication of procurement information by municipalities and municipal entities on the portal. This circular provides detailed guidelines regarding the advertisement of tenders and the publication of awards, cancellations, deviations, and extensions to contracts on the portal.

Procurement Regulations during the Covid-19 Emergency

Since the declaration of the national state of disaster on 15 March 2020, the National Treasury has issued a number of MFMA circulars to guide emergency procurement. These circulars apply to both urban and rural municipalities in the same manner. A recent circular is MFMA Circular no 102, which requires municipalities and municipal entities to put in place additional procurement and expenditure measures to monitor interventions taken to combat the spread of Covid-19. In particular, they must undertake to:

- establish an internal system for financial control, risk management, and reporting in order to account for the funds used for the Covid-19 disaster;
- ensure that officials committing any expenditure are duly authorised or properly delegated;
- avail internal audit functions to conduct audit checks in order to pick up and prevent irregularities pro-actively; and

- monitor expenditure regularly and generate frequent expenditure reports (at least weekly) including monitoring any risks that may arise.

In normal times, procurement has to be conducted in terms of the MFMA and Preferential Procurement Policy Framework Act, and follow the relevant municipality's Supply Chain Management Policy. The normal procurement process is embedded with checks and balances to ensure transparency and accountability, and as such the process takes longer to complete. This long process was therefore replaced with a shorter process in terms of the 'emergency procurement' process which allows certain checks to be by-passed, and reporting to follow long after the procurement has been completed. Some of the processes by-passed include the requirement to comply with preferential procurement which favours procurement from historically disadvantaged groups as part of its points system used when comparing service providers, for example.

These measures relate mainly to the internal control and monitoring of Covid-19 expenditure, and not to transparency in the expenditure of Covid-19 funds, thereby limiting communities' capacity to track the use of these funds.[67]

Circular no 102 also deals with the procurement of PPE items and face masks. It provides maximum prices for these items in bids to ensure that municipalities achieve value for money. The circular reiterates that municipalities may deviate from the competitive bidding process for goods and services not covered by the circular but are necessary to combat Covid-19, and this must be done in terms of Section 36 of the Municipal Supply Chain Management Regulations. It states specifically that 'the Covid-19 pandemic is a situation that justifies the use of emergency procurement provisions'. MFMA Circular no 62 allows for municipalities to expand contracts for goods by up to 15 per cent. Circular no 102 increases the threshold to 30 per cent or R30 million for construction-related contracts, and 25 per cent or R25 million for the period of the pandemic to prevent or minimise the effects of Covid-19. Section 166(3) of the MFMA states that a contract can only be amended if the reasons for the proposed amendment have been tabled in council, and if the local community has been given notice of the intention to amend the contract and invited communities to submit representations to the municipality. It is not yet clear whether communities are being invited to make such representations in practice.

Circular no 102 (as well as the previous two circulars 100 and 101) does not make any specific mention of the publication of tender notices and bid specifications for emergency procurement. This circular does however, require municipalities to upload a schedule of questions and answers related to specific tenders on their website to ensure that all bidders receive the same information. Finally, Circular no 102 states that any public bid openings must comply with the regulations published in March 2020, under the Disaster Management Act of 2002.

[67] See report section 6 on People's Participation in Local Decision-Making.

On 27 May, the National Treasury released MFMA Circular no 103, which deals more broadly with preventive financial measures and internal financial controls. Section 7 of the circular focuses on emergency procurement control measures. While the section highlights that the principles of fairness, equity, transparency, competitiveness, and cost-effectiveness must be maintained, no specific reference is made to ensuring the public availability of procurement information such as bid specifications.

Finally, the directions issued by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27(2) of the Disaster Management Act contain an important provision that may assist in holding municipalities accountable, but only *after* the end of the state of disaster (which has been extended several times). Direction 6.7.3(h) provides that municipalities must 'report all procurement undertaken during the period of the state of disaster to the first council meeting after the lapsing or the termination of the state of disaster'. Reporting to the council will ensure that the information is publicly available. It is not clear what type of information must be included in the report, but communities and councillors can insist that it contains the full and detailed information, including the expansion of contracts.

Assessment of the Practice

The main object of procurement is for local government to be able to perform its constitutional obligations through contractual agreements with private entities. This object has only been partly met for various reasons, the most glaring being the absence of transparency and accountability. This has been the case in the broader procurement process prior to the Covid-19 pandemic and has only worsened during the pandemic. Prior to the pandemic, there have been numerous instances of corruption allegations, fraud and poor audit outcomes in both urban and rural municipalities.[68] It is difficult for rural communities to insist on transparency in procurement processes due to factors such as illiteracy, and even where communities are literate, bid documentation uses technical language and budget proposals that are not easily understood. There are also fewer civil society organisations to assist rural communities in this regard, in comparison to urban centres.

Additionally, although it has been imperative to use emergency procurement processes during the Covid-19 pandemic in order to facilitate an efficient and prompt response to the nationwide emergency, several challenges have come out of the Covid-19 emergency procurement processes. For example, there have been several reports of inflation of prices in

[68] Janine Erasmus (ed), 'Understanding Corruption in Tenders' (corruption watch 2015) <https://www.corruptionwatch.org.za/wp-content/uploads/2015/06/Corruption-Watch-Understanding-tender-corruption.pdf>.

contracts,[69] and corruption,[70] failure of contractors to provide services already paid for such as delivery of water into water tanks in both urban and rural areas, as well as reduced public participation due to lack of transparency and lack of access to procurement information.[71]

Finally, preferential procurement presents a great opportunity for redressing the legacy of apartheid as envisaged under Section 9 of the Constitution. There has been significant uptake of this opportunity, however, there have been challenges concerning the Broad Based Black Economic Empowerment (BB-BEE), such as reports of manipulating the system by fronting previously disadvantaged persons as being part of business leadership/ownership in order to benefit from preferential procurement, without them actually being substantially involved in the running of the business. Additionally, there has also been skewed benefits to a few elites among the previously disadvantaged persons, the so-called 'black diamonds'.

References to Scientific and Non-Scientific Publications

Constitution of the Republic of South Africa, 1996

Preferential Procurement Policy Framework Act 5 of 2000

Broad Based Black Economic Empowerment Act 53 of 2003

Municipal Finance Management Act of 2003 (MFMA)

MFMA Circular no 83 on the Advertisement of Bids and the Publication of Notices in respect of Awarded Bids, Cancelled Bids, Variations and Extensions of Existing Contracts on the eTender Publication Portal

MFMA Circular no 100, Emergency Procurement in Response to the Covid-19 Pandemic

MFMA Circular no 101, Covid-19 Bulk Central Procurement Strategy for Government Institutions

MFMA Circular no 102 (with amendments), Emergency Procurement in response to the National State of Disaster

MFMA Circular no 103, Preventative Measures in response to the Covid-19 Pandemic that resulted in the National State of Disaster

[69] Paddy Harper, 'Blanket Scandal Exposes Potential for Covid-19 Corruption' (*Mail & Guardian*, 16 April 2020) <https://mg.co.za/article/2020-04-16-blanket-scandal-exposes-potential-for-covid-19-corruption/>.
[70] Erasmus (ed), 'Understanding Corruption in Tenders', above.
[71] This is addressed in report section 6.4. on Transparency in Local Government Procurement during Covid-19.

Local Financial Arrangements

3.1. Local Financial Arrangements in South Africa: An Introduction

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South Africa has a uniform system of public finance for local government. The framework for local government finance (revenue-raising, expenditure of revenue and financial management) is provided for by the Constitution. The Local Government: Municipal Finance Management Act of 2003 (MFMA) is the main piece of legislation that gives effect to this framework. There are also several other pieces of legislation that have been enacted to implement the constitutional framework on municipal finance. This section provides an overview of the sources of revenue for municipalities and the expenditure of revenue.

Taxing Powers

Section 229(1) of the Constitution empowers municipalities to impose property rates and user charges on fees for services provided. In addition, the Constitution permits the national government to decentralise other taxes, levies and duties with the exception of income tax, value-added tax, general sales tax and customs duty. The Municipal Property Rates Act of 2004 and the Municipal Fiscal Powers and Functions Act of 2007 have been enacted to give effect to the municipal fiscal powers. The latter introduces additional revenue streams for municipalities. In practice, the exploitation of taxing powers varies within and across categories of municipalities. However, a big difference exists between urban and rural municipalities. Urban municipalities, particularly metropolitan municipalities, get most of their revenue from property rates and surcharges on fees for services. Metropolitan municipalities raise about 75 per cent of their budget from their own sources, thus are largely self-financing. On the other hand, rural municipalities, which are often poor, rely heavily on intergovernmental grants for operations. As a sector, local government raises 70 per cent of its own revenue,[72] which is high in comparison to local governments in the region.

Intergovernmental Grants

Various forms of intergovernmental grants complement municipalities' own sources of revenue. Section 214(1)(a) of the Constitution provides for the equitable sharing of revenue raised nationally among the national, provincial and local spheres of government in each financial year. The allocation takes place through an annual enactment which determines the share of each sphere, provincial government and municipality – the Division of Revenue Act (DORA). The DORA may only be enacted after organised local government (which is the South African Local Government Association - SALGA) and the Finance and Fiscal Commission (FFC)

[72] National Treasury, 'Municipal Budget Circular for the 2019/20 MTREF' (MFMA Circular no 94, Municipal Finance Management Act No 56 of 2003, May 2019) 3.

have been consulted and any recommendations of the latter considered. The equitable share is an unconditional grant designed to enable every municipality to provide basic services and perform its constitutional and legislative mandates in its area (Section 227(1)(a) of the Constitution). Its allocation is based on an objective formula that takes into account factors such as population, fiscal capacity and disparities. In addition, metropolitan municipalities also get a share of the general fuel levy as an unconditional grant. Besides these unconditional grants, there are various forms of conditional grants that are allocated to municipalities. Such '[c]onditional grant funding targets delivery of national government's service delivery priorities' in areas such as infrastructure development.[73]

Borrowing

Section 230A of the Constitution permits municipalities to borrow money to finance current and capital expenditure. Borrowing to finance current expenditure is however restricted for bridging purposes during a fiscal year. These borrowing powers can only be exercised in accordance with national legislation, which is the MFMA. When borrowing money, the Constitution states that a municipal council binds itself and future councils in the exercise of securing loans or investments for the relevant municipality. Section 218(1) of the Constitution provides that the 'national government, a provincial government or a municipality may guarantee a loan only if the guarantee complies with any conditions set out in national legislation'. In practice, the national and provincial governments are reluctant to guarantee municipal loans. As a result, municipal borrowing largely depends on the creditworthiness of a municipality, which is often determined by the private sector actors. When municipalities borrow from the private sector, they often render their assets and revenue streams as surety. This means that high category municipalities, such as metropolitan municipalities, which tend to have a variety of assets and high fiscal capacity, often exercise borrowing powers relative to poor and often rural municipalities because of their financial position.

Expenditure of Revenue

In general, municipalities have the discretion to spend their own revenue and non-conditional grants. There are, however, rules on how municipalities should spend certain funds. For instance, as stated above, the equitable share is there to finance the delivery of basic services to the poor. Municipalities are also required to budget sufficiently for operating expenditure to avoid having a deficit. The repairs and maintenance budget in each financial year should be at least 8 per cent of the value of property, plant and equipment. The consequence of non-compliance with some of the spending requirements can be severe. The national treasury can, for instance, suspend the transfer of intergovernmental grants to the relevant municipality.[74]

[73] ibid 4.

[74] See Sec 216(2) of the Constitution.

Municipal officials, who have key responsibilities in budget formulation and implementation, can also be held individually liable for non-compliance.

References to Scientific and Non-Scientific Publications

Constitution of the Republic of South Africa, 1996

Municipal Finance Management Act 56 of 2003

Municipal Property Rates Act 6 of 2004

Municipal Fiscal Powers and Functions Act 12 of 2007

National Treasury, 'Municipal Budget Circular for the 2019/20 MTREF' (MFMA Circular no 94, Municipal Finance Management Act No 56 of 2003, May 2019)

3.2. The Amalgamation of Municipalities in 2016

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Relevance of the Practice

Rural municipalities throughout the world often face a different set of challenges than their urban counterparts. In South Africa, the government has adopted and implemented many interventions to improve the state of local government. In 2016, some of the municipalities were disestablished and/or amalgamated to address challenges related to financial viability and functionality. The 2016 amalgamation process is an interesting practice that is relevant for the LoGov-project in many ways. It has implications on all the report sections from structures, finance, responsibilities, intergovernmental relations and citizen participation. It is therefore likely to be useful for comparative purposes relating to the urban-rural interplay in the participating member countries in the LoGov-project.

Description of the Practice

The number of municipalities in South Africa has gradually decreased since the ushering in of the democratic era in 1994. There were 1262 racially segregated municipalities in 1994, which were reduced to 843 transitional municipalities by 1996. The 843 transitional municipalities were consolidated to 284 municipalities ahead of the 2000 local government elections. After the elections, the 284 wall-to-wall municipalities became the first democratic local government units in the history of South Africa. Of the 284, 16 were cross border municipalities designed to integrate linked communities and economies on different sides of a provincial boundary. The 1994 to 2000 establishment, disestablishment and amalgamation processes were primarily aimed at democratising municipalities by, among other ways, bringing to an end racial division as the basis for the establishment and functioning of municipalities.[75]

The 284 municipalities were reduced to 283 ahead of the 2006 local government elections primarily to do away with the notion of cross border municipalities.[76] Provincial boundaries had to be amended to realise this objective. The 283 municipalities were further reduced to 278 ahead of the 2011 local government elections. A municipal boundary review process ahead of the 2016 local government elections culminated in the disestablishment and/or amalgamation of 21 municipalities resulting in the number of municipalities going down to the

[75] Municipal Demarcation Board (MDB), 'Twenty Years Later: The Municipal Demarcation Board Reflects on its Contributions, Experience and Lessons Learnt' (MDB 2019) 8-9.
[76] ibid 15.

current 257. The process of disestablishing and/or amalgamating municipalities in 2016 was initiated by the national Minister responsible for Cooperative Governance and Traditional Affairs in 2015.

A government review of the state of local government in 2014 had revealed that only 37 per cent of the municipalities were functional and viable.[77] The other 32 per cent were almost dysfunctional and required support to get the basics right whereas the remaining 31 per cent were dysfunctional and required significant work before they could get the basics right.[78] Some of the worst performing municipalities faced viability and functionality problems. The Minister, relying on his powers under Section 22(2) of the Municipal Demarcation Act, requested the Municipal Demarcation Board (MDB) to re-determine the boundaries of about 93 municipalities to address these and other problems.[79] This request attracted 'much criticism, protest and litigation, with opposition parties arguing that it was gerrymandering (ANC using demarcation to influence the outcome of the 2016 local government elections) and that the board was dancing to the Minister's tune'.[80] This is against the background that the proposed re-demarcation exercise was to take place outside the ordinary boundary redetermination cycle of the MDB.

After considering views from the public and other stakeholders, the MDB proceeded with 21 out of 34 requests/proposals from the Minister.[81] The main reasons for pursuing the 21 requests was to define boundaries so as to improve financial viability.[82] As has been the case over the years, the process of re-demarcating municipal boundaries involved a number of actors as required by the Constitution and the Municipal Demarcation Act 27 of 1998. The key actors included: the MDB, the relevant municipal councils, Member of the Executive Council responsible for local government in the relevant province, Minister responsible for COGTA, affected communities, organised local government, and traditional authorities, where applicable. While several actors were involved, it is the MDB that had/has the final authority pertaining to matters to do with the demarcation process. The process culminated in the disestablishment and/or amalgamation of the 27 municipalities in 2016.

Assessment of the Practice

One of the pertinent challenges that have confronted the South African local government system in the past two decades is that a significant number of municipalities are not financially

[77] Department of Cooperative Governance and Traditional Affairs (COGTA), 'Local Government Back to Basics: Serving Our Communities Better' (COGTA 2014) 6.
[78] ibid 6.
[79] MDB, 'Twenty Years Later', above, 34.
[80] ibid.
[81] ibid 37.
[82] ibid 38.

viable and not functional. Despite being empowered by various resource-raising powers, they are not in a position to raise revenue sufficient enough to meet the majority of their needs and obligations. As a result, service delivery in these municipalities, which are generally in rural areas, semi-rural areas and in poor towns, is mostly substandard or non-existent. Some of these municipalities are located in the former homelands, which were reserved for the black population under the apartheid era.

The (re)demarcation of municipal boundaries ahead of the 2016 local government elections was aimed at improving the financial viability of municipalities and ultimately, functionality. Yet, more than five years later most of the newly created or amalgamated municipalities remain financially unsound and dysfunctional. This can be attributed to the fact that these municipalities inherited poor tax bases. The amalgamation process brought together a large number of poor households, most of whom are unable to pay for the services provided, under the same municipal jurisdiction. The implication is that most of these municipalities have to provide services to a wider geographical area but to people who cannot pay for those services. The amalgamation process could also have impacted negatively on democratic participation in some municipalities given the expanded boundaries and largely dispersed communities, which may make democratic participation and accountability difficult to attain. The South African experience may suggest that the amalgamation of municipalities is not necessarily a panacea for addressing municipal viability and functionality concerns.

References to Scientific and Non-Scientific Publications

Legal Documents:

National Treasury, 'Municipal Budget Circular for the 2019/20 MTREF' (MFMA Circular no 94, Municipal Finance Management Act No 56 of 2003, May 2019)

Scientific and Non-Scientific Publications:

Department of Cooperative Governance and Traditional Affairs (COGTA), 'Local Government Back to Basics: Serving Our Communities Better' (COGTA 2014)

Municipal Demarcation Board (MDB), 'Twenty Years Later: The Municipal Demarcation Board Reflects on its Contributions, Experience and Lessons Learnt' (Pretoria 2019)

Steytler N and De Visser J, *Local Government Law of South Africa* (LexisNexis 2009)

3.3. Metro Open Budget Survey

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Relevance of the Practice

As local governments go about implementing their service delivery duties, budget accountability has emerged as one of the key issues. Budget accountability stands on the three pillars of public participation, oversight, and transparency. Although formal oversight of the budget by elected representatives is essential, it is not enough. It needs to be supplemented with direct public participation throughout the budget process. While councillors are elected formally to represent their wards in the budget process, it is also important that local government tap directly into the preferences of ordinary citizens when planning, implementing and evaluating the budget process. Equally important is also that the budget process is transparent. Literature suggests the existence of a strong connection between budget decision-making that involves the public and is subject to systematic oversight, on the one hand, and enhanced public trust in government and a deepening commitment to accountability in the use of public resources to provide basic services on the ground, on the other. The findings of the Metro Open Budget Survey (Metro OBS) for 2019 shed light on accountability and the budgeting process in South Africa's five metropolitan municipalities.

Description of the Practice

The Metro OBS is modelled on the global Open Budget Survey (OBS), an independent, comparative assessment of budget accountability, initiated by the International Budget Partnership in 2006. To date, the International Open Budget Survey has been conducted six times to evaluate national government budget processes in 115 countries across six continents. In 2019, IBP South Africa, in partnership with the Dullah Omar Institute (DOI) at the University of Western Cape, applied the OBS methodology to objectively assesses the availability of budget information, public participation opportunities, and strength of oversight in five of the eight metropolitan municipalities (metros) in South Africa: City of Cape Town, City of Johannesburg, City of Ekurhuleni, eThekwini Municipality, and Nelson Mandela Bay Municipality. Budget information, transparency and oversight was assessed based on generally accepted good practice for public financial management. The survey sought to determine whether budget accountability is reflected in all the four phases of the budget process (i.e. budget formulation, budget approval, budget implementation and audit/oversight).

In so far as transparency is concerned, most metros, according to the findings of the survey, perform better in the approval and audit phases of the budget process. It must be noted that

none of the metros fully complied with transparency in budget formulation. A key finding is that the metropolitan cities of Cape Town and eThekwini performed well in the approval phase. Not only were the documents of the two metros relatively comprehensive, they published their Medium Term Revenue and Expenditure Frameworks (MTREFs) on time, thus facilitating transparency in the budget approval phase. Although all metros, with the exception of the City of Johannesburg, published their monthly budget statements on their websites, it is only the City of Cape Town that fully facilitated transparency during the implementation phase. This is because it is the only metro that published all of its monthly budget statements on time for the twelve months preceding the assessment. The City of Cape Town has not, however, performed as well as the metropolitan cities of Ekurhuleni and Nelson Mandela Bay in the audit phase. The latter two 'provided more budget information (comparing budgeted estimates and actual outcomes) than what the audited financial statements require'. [83] The Metro OBS also ranked the Nelson Mandela Bay top of the group for a transparent public procurement process that published information on awards of contracts and on procurement deviations and extensions timely. Unlike the other metros that limited the information available about their Bid Adjudication Committee meetings to the time, date and venue for the meetings, Nelson Mandela Bay metro published the full agenda as well as all documents.

On the issue of oversight, a key finding was that metros performed strongest during the audit phase, when council and Section 79 committees of the council,[84] the principal oversight structures in the metro, were assessing the annual report and audited financial statements. All five metropolitan councils did not take more than two months to consider the Annual Report after its tabling. It also took most of the metros the same amount of time to adopt the Oversight Report on the Annual Report. An examination of the oversight reports reveals that the councils do not simply endorse the report. The same cannot be said of the oversight during the budget formulation, approval and implementation, which was weak. In particular, the findings underscore that oversight structures are not really visible during budget formulation phase, which is evidently dominated by the executive and the administration. It is pertinent to note that the City of Cape Town is a leader when it comes to the budget formulation, approval and implementation stage. It out-performs Johannesburg, Ekurhuleni, eThekwini and Nelson Mandela Bay metros. The poor performance of the metros is attributed to the fact that there was no indication that the council or the council committee(s) 'considered certain documents'[85] or, if they had, the deliberations on the same were not made publicly available.

[83] 'Measuring Transparency, Public Participation and Oversight in the Budget Process of South Africa's Metropolitan Municipalities: Findings from the 2019 Metro Open Budget Survey' (IBP South Africa and Dullah Omar Institute 2019) 9 <https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/volume-14-issue-2-december-2019/metro-obs-report-digital-version.pdf/view>.

[84] According to section 79 of the Municipal Structures Act, 'a municipal council may establish one or more committees necessary for the effective and efficient performance of its functions or the exercise of any of its powers'.

[85] —— 'Findings from the 2019 Metro Open Budget Survey', above, 11.

On the issue of participation, a major finding is that generally the metros perform better when the budget is approved and audited. They complied with the duty of facilitating pubic participation during those phases. The same cannot be said with respect to the level of public participation during the formulation and implementation phases of the budget process. Of the five metros, Nelson Mandela Bay and Ekurhuleni performed better in facilitating public participation during the budget formulation phase. The former used a combination of the traditional method of engaging the public through public meetings and innovative mechanisms that include an Integrated Development Plan (IDP) App and an IDP Input Form that can be completed online. The latter engages directly with communities through its ward councillors. The City of Cape Town outperformed the others during the implementation of the budget by announcing in advance all council meetings that deliberate on budget implementation 'as well publishing relevant reports and minutes'. [86]

Assessment of the Practice

The Metro OBS 2019 is a good initiative that appears to facilitate greater budget accountability in metropolitan municipalities in South Africa. Arguably, it inspires improvements by highlighting both the challenges and opportunities for achieving greater budget accountability, transparency, oversight, and public participation in the budgeting process of metropolitan municipalities. It has the potential to nudge metro governments to become more responsive and accountable.

As the findings of the 2019 Metro OBS reveals, however, metro governments appear to be grappling with the challenges of facilitating greater budget accountability. Seemingly this is indicated by the fact that there is mixed performance on budget transparency, oversight, and participation in the five metros that were assessed. Each of the five metros assessed appears to be placing more emphasis on various aspects of the budget process, making compliance somewhat erratic. Nevertheless, all hope is not lost as these are early days in implementing the tenets of the budget process fully. If anything, there is a lot of room for improvement. Better performance is possible.

Although the 2019 Metros OBS focused on metropolitan areas, one can confidently predict that rural municipalities face a much harder challenge of facilitating budget accountability. This is particularly true with regard to the aspect of the budgeting process that requires prudent financial management. There is, however no reason why rural municipalities should not be expected to adhere to an open and visible municipal budgetary process. Perhaps, it might be a good idea to build on the success achieved by the metro governments by implementing the reforms that are recommended by the team of independent researchers and reviewers. For the purposes of promoting transparency, the survey encourages the publication of a pre-

[86] —— 'Findings from the 2019 Metro Open Budget Survey', above, 15.

budget statement as well as producing and publishing more disaggregated monthly budget statements timely. The inclusion of rather detailed and specific capital project information in the Medium Term Revenue and Expenditure Framework (MTREF) and a timely publication of information on award of contracts and on procurement deviations and extensions of contracts might also go a long way in improving transparency. Municipalities, both rural and urban, can also do a better job of facilitating public participation in the budgeting process. They can do so by ensuring that Section 79 council committees examine the draft MTREF and submit their recommendations to council. They should also encourage the public to attend not only council meetings but also Section 79 committee meetings where budget implementation is discussed.

References to Scientific and Non-Scientific Publications

Legal Documents:

Constitution of South Africa, 1996

Municipal Financial Management Act 56 of 2003

Scientific and Non-Scientific Publications:

—— 'Measuring Transparency, Public Participation and Oversight in the Budget Process of South Africa's Metropolitan Municipalities: Findings from the 2019 Metro Open Budget Survey' (IBP South Africa and Dullah Omar Institute 2019) <https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/volume-14-issue-2-december-2019/metro-obs-report-digital-version.pdf/view>

3.4. The Formalisation of Development Charges in South African Municipalities

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Relevance of the Practice

Municipalities are obliged to 'ensure the provision of services to communities in a sustainable manner', to 'promote social and economic development' and to carry out developmental duties in terms of Section 153 of the Constitution.[87] There is a huge demand for municipalities to prioritise economic infrastructure so as to promote economic growth, create employment and reduce poverty. With new growth and plunging traditional municipal revenue sources, there is an increased need for new infrastructure and municipalities are required to find other means to finance the demands for bigger and better infrastructure.[88] One such measure is for municipalities to require contributions towards infrastructure costs as a precondition for the approval of a proposed development, known commonly as development charges.

Description of the Practice

Development charges are not a new revenue source for municipalities.[89] They are existing charges some municipalities have been levying to recover costs incurred when providing infrastructure services, albeit inconsistently, while some municipalities have avoided doing so because of uncertainties and risks.[90] Development charges are also not a municipal tax, unlike

[87] See Secs 152(1)(b) and 153(a) of the Constitution.

[88] See Colin Crawford and Julian Juergensmeyer, 'A Comparative Consideration of Development Charges in Cape Town' (2017) 1 Journal of Comparative Urban Law and Policy, 10; South African Cities Network, 'Assessing the Fiscal Impacts of Development: Study Report' (National Treasury 2015) <http://sacitiesnetwork.co.za/wp-content/uploads/2015/05/Fiscal-Impact-of-Development-Report-Final.pdf> accessed 14 February 2021. See also Business Insider SA, 'Municipalities Advised to Consider New Taxes, Including on Parking Lots and Fires' (*Business Insider*, 29 July 2020) <https://www.businessinsider.co.za/municipalities-advised-to-consider-new-taxes-including-for-fires-and-entertainment-2020-7> accessed 14 February 2021.

[89] See Nick Graham and Stephen Berrisford, 'Development Charges in South Africa: Current Thinking and Areas of Contestation' (undated) <http://www.imesa.org.za/wp-content/uploads/2015/11/Paper-1-Development-charges-in-South-Africa-Current-thinking-and-areas-of-contestation-Nick-Graham.pdf> accessed 14 February 2021; David Savage, 'Evaluating the Performance of Development Charges in Financing Municipal Infrastructure Investment' (discussion paper, second draft, 23 March 2009).

[90] Barbara Cole, 'Anger Over New Metro Charges' (*IOL News*, 15 November 2011) <https://www.iol.co.za/dailynews/news/anger-over-new-metro-charges-1178498> accessed 15 February 2021;

property rates and taxes levied under Section 229(1)(b) of the Constitution, but do form part of municipal infrastructure finance instruments.

A development charge is a once-off charge that is levied to recover the actual cost of external infrastructure needed to accommodate the additional impact of new development on a municipality's existing engineering services. It is meant to cover the costs incurred by a municipality when installing new infrastructure or upgrading existing infrastructure that is needed to service a proposed new development. This charge is levied against the developer as a condition for approving a land development application.

The Municipal Systems Act offers a legal basis for a municipality to recover costs associated with municipal services or functions from third-parties such as developers.[91] On the backdrop of the abovementioned, the National Treasury published, for comment, the Municipal Fiscal Powers and Functions Amendment Bill.[92] The proposed law seeks to address the uncertainties concerning the levying of development charges by municipalities. The bill provides for the uniform regulation of development charges, thus catering for a transparent, consistent and equitable basis on which municipalities may calculate and levy development charges from landowners. Charging development charges, in a standardised, consistent and transparent manner, will enhance the revenue streams for financing strategic municipal infrastructure and give municipalities the opportunity to use development charges to guide municipal planning so as to support urban spatial transformation.

A municipality may levy development charges on the engineering services covered in the definition of engineering services provided in the Spatial Planning and Land Use Management Act (SPLUMA),[93] as well as bulk external engineering services, the provision and operation of which lies with the municipality. These are engineering services that provide water, sewerage, electricity, municipal roads, storm water drainage, gas, and solid waste collection and removal, required for the purpose of land development. The bill permits a municipality to apply to the Minister of Finance for an extension of engineering services to be included in the calculation of development charges. This provides some flexibility for municipalities to levy development charges on other engineering services not set out in SPLUMA. The bBill will have implications for various actors including municipalities, developers/landowners, as well as national and provincial departments, state agencies and state-owned enterprises as described below:

Ayanda Mthethwa, 'Developers Protest Mogale City's New Bulk Services Plan' (*Daily Maverick*, 2 November 2020) <https://www.dailymaverick.co.za/article/2020-11-02-developers-protest-mogale-citys-new-bulk-services-plan/> accessed 16 February 2021; SA Commercial Prop News - SAPOA, 'Fictitious Tax on Property Developers' (*SA Commercial Prop News*, 30 November 2011) <http://www.sacommercialpropnews.co.za/south-africa-provincial-news/kwazulu-natal/3954-fictitious-tax-on-property-developers.html> accessed 15 February 2021.

[91] Sec 75A of the Municipal Systems Act 32 of 2000.

[92] The Municipal Fiscal Powers and Functions Amendment Bill was published, for comment, on 8 January 2020 <http://www.treasury.gov.za/legislation/draft_bills/Draft%20Municipal%20Fiscal%20Powers%20and%20Functions%20Amendment%20Bill%20-%20published%20for%20comment.pdf> accessed 14 February 2021.

[93] Spatial Planning and Land Use Management Act 16 of 2013.

The Municipality

Municipalities will have the power to levy development charges in terms of the bill. Upon receipt of a land development application, a municipality has a choice of whether or not to levy a development charge against the proposed land development.[94] Should a municipality decide to levy a development charge, its decision will now be followed by an adoption of a resolution, by its municipal council, to that effect. Once this resolution is adopted, the municipality will have to comply with the Municipal Fiscal Powers and Functions Act. Where a municipality supports the levying of development charges, it will have to adopt a policy that addresses the methodology for the calculation of various costs; ensures the non-duplication of costs when development charges are calculated; sets out the criteria to be used when development charges are based on municipal engineering service zones; and determines the criteria applicable when a subsidy, reduction or exemption is granted to a developer or certain land developments.[95] The policy must also provide for the methods of payment that may be employed, taking into account the principles of equity, transparency and fairness. Whatever shape or form the policy takes, it must be consistent with the Municipal Fiscal Powers and Functions Act on the levying of development charges.

Once the policy on development charges is adopted, a municipality must adopt and publish by-laws for the implementation of this policy. A differentiated approach of the development charges payable may be used for categories of landowners, land developments and municipal engineering services.[96]

The Developer/Landowner

The developer will be liable to pay development charges as a condition of getting their land development application approved. A national, standardised legislation and policy framework on development charges will ensure that the variables used to calculate development charges are the same across all municipalities, irrespective of whether the municipality is a metropolitan, local or district municipality. The legislation and policy framework will also minimise the confusion experienced by landowners, as landowners will be able to estimate their liabilities and hold municipalities to account for the delivery of required infrastructure. The payment can be made either as a payment in-kind or as a monetary contribution. For the purpose of this practice note, the latter is applicable: As a monetary contribution that must be paid in full prior to the developer exercising the rights approved by the Municipal Planning Tribunal (residential, commercial, industrial, agricultural and various other land-use rights exist for certain properties and areas. For example, if a developer is granted commercial land use rights, they may only use the land for commercial purposes by installing infrastructure and constructing commercial properties according to the land specifications given by the municipality). The developer will not only pay for the infrastructure which they benefit from,

[94] Sec 9A(1) of the Municipal Fiscal Powers and Functions Amendment Bill.
[95] Sec 9B of the Municipal Fiscal Powers and Functions Amendment Bill.
[96] Secs 9B and 9D of the Municipal Fiscal Powers and Functions Amendment Bill.

but will also be informed on how the costs are determined, as well as the quality and quantity of the infrastructure installed.

National and Provincial Departments, State Agencies and State-Owned Enterprises

In 2007, Eskom began the construction of Medupi power station in Lephalala Local Municipality, Limpopo, in order to meet the growing demand for electricity in South Africa.[97] In the following year, Eskom began the construction of Kusile power station in Witbank, Mpumalanga (eMalahleni Local Municipality), also intended to meet the growing demand for electricity in the country.[98] In 2018, President Cyril Ramaphosa launched a multi-billion rand train manufacturing factory in the City of Ekurhuleni 'as an essential part of government's rolling stock fleet renewal programme' to transform passenger rail services and public transport.[99] These projects are tied to the national sphere of government, as well as a state-owned entity and they require land – municipal land to be specific. These projects also require infrastructure – municipal infrastructure to be specific. The involvement of the national government does not excuse it from abiding by municipal planning laws when building the said infrastructure in the various municipalities mentioned. In light of the above examples, national and provincial departments, state agencies and state-owned enterprises that may not have paid any form of development charges previously will now have to do so. This is to ensure that municipalities are not left sitting with infrastructure costs stemming from projects such as those mentioned above. Also, the fact that the bill has not provided for the subsidisation or exemption of land use applications for government purposes (land use by the national government, provincial government or a municipality to give effect to its governance role),[100] supports the view that national and provincial departments instituting land use applications are not eligible for subsidisation and must cough up development charges.

What Can a Municipality Use the Income from Development Charges for?

Development charges must be spent for the infrastructure for which they are collected. The money received must be used to cover the actual costs associated with the provision of essential engineering service(s) to a proposed land development.[101] National Treasury has advised that development charges should not be used for operating costs or costs associated with repairs, maintenance or rehabilitation of infrastructure, as development charges are

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[97] 'Medupi Power Station Project' (*Eskom*) <https://www.eskom.co.za/Whatweredoing/NewBuild/MedupiPowerStation/Pages/Medupi_Power_Station_Project.aspx> accessed 17 February 2021.

[98] 'Kusile Power Station Project' (*Eskom*) <https://www.eskom.co.za/Whatweredoing/NewBuild/Pages/Kusile_Power_Station.aspx> accessed 17 February 2021.

[99] Address by President Cyril Ramaphosa at the inauguration of the Dunnottar Train Factory (Ekurhuleni, 25 October 2018) <http://www.thepresidency.gov.za/speeches/address-president-cyril-ramaphosa-inauguration-dunnottar-train-factory%2C-dunnottar%2C> accessed 16 February 2021.

[100] Proposed Sec 9E read together with Schedule 2 of SPLUMA.

[101] Sec 9A(3) of the Municipal Fiscal Powers and Functions Amendment Bill.

limited to capital costs for new infrastructure.[102] As such, development charges must be recorded as a liability in a municipality's financial statements. Only when the municipality uses the development charges for the provision of external engineering infrastructure, it is then recognised as revenue. Development charges should also not be used to address historical backlogs in service delivery created by the neglect of service provision and apartheid-era inequity.

However, National Treasury has also advised that where a municipality has borrowed to provide infrastructure in advance of a development, development charges can be used to repay this debt.[103] This will reduce the finance charges in rates and tariffs and reduce the cost burden on existing residents.

Assessment of the Practice

As already mentioned above, development charges are not a new municipal revenue source and as such, some municipalities currently have development charges policies in existence. This is because the levying of development charges is a power that is incidental to the municipal planning power already exercised by municipalities. The national government may, therefore, regulate minimum standards, norms and guidelines on the levying of development charges. Due to the fact that the Municipal Fiscal Powers and Functions Amendment Bill is yet to sit in Parliament, it is difficult to assess the practice as the bill has not been passed. This also means the bill cannot override any pre-existing policies or by-laws currently used by municipalities to levy development charges. Once the bill becomes law, municipalities relying on pre-existing policies or by-laws will have to ensure that they comply with the new Act. This section will, therefore, rely on two examples of current municipal development charges policies, one policy being from an urban municipality and the other from a semi-rural municipality, to assess how municipalities presently deal with the levying of development charges.

City of Johannesburg Metropolitan Municipality Draft Development Contributions Policy 2020

City of Johannesburg is a metropolitan municipality situated in Gauteng province. It is the economic hub of South Africa and as such, would naturally attract development, particularly

[102] 'Municipal Fiscal Powers and Functions Amendment Bill' (National Treasury Development Charges Pamphlet) <http://www.treasury.gov.za/legislation/draft_bills/Development%20Charges%20Pamphlet%20V1.pdf> accessed 16 February 2021.

[103] National Treasury, 'Media Statement on the Municipal Fiscal Powers and Functions Amendment Bill' (National Treasury, 8 January 2020) <http://www.treasury.gov.za/comm_media/press/2020/2020010801%20Media%20Statement-%20%20Municipal%20Fiscal%20Powers%20and%20Functions%20Amendment%20(MFPFA)%20Bill.pdf> accessed 16 February 2021.

through economic infrastructure. The municipality is also equipped to take on mega developments and has the capacity, skills and knowledge to work with multi-billion rand developments. In June 2020, the City completed its Draft Development Contributions Policy, which aligns in many respects with the Municipal Fiscal Powers and Functions Amendment Bill. The Draft Policy requires 'the payment of development contributions to cover the costs of municipal external engineering services needed to accommodate increased demand for such infrastructure that arises from intensified land use'. The Draft Policy also permits the use of development charges to pay off loans taken to fund existing infrastructure for a service. Where adequate external engineering services already exist to service a development, the Draft Policy states that the development charges collected may be used to provide infrastructure to support development elsewhere in the municipal area and that the revenue may not be used for other purposes.[104] These 'other purposes' are not specified but one would imagine that it refers to the exclusions provided in National Treasury's Development Charges pamphlet.[105]

With regards to the scope of development contributions, the Draft Policy provides that the City's development contributions calculations will not include the costs of engineering services provided by other spheres of government or by state-owned entities. For example, the costs of a designated provincial road cannot be included in the calculation but where a development is next to a provincial road, that development will be required to pay a development contribution for use of the municipal road network. Another interesting provision in the Draft Policy states that 'where a new development straddles the boundary with another municipality, the City may agree with that municipality that a portion of the development charge revenue [be] transferred to that municipality'.[106] Such a provision is great for instances where the neighbouring municipality is not as financially strong as the City and also has less development happening in its area, this way both the primary and neighbouring municipalities would benefit from the development. This, of course, is subject to municipalities working together harmoniously.

Calculating Development Contributions: the charge for each service is calculated as the total impact of the service, multiplied by the unit cost for that service applicable in the current financial year. The calculation is done for each engineering service covered by the Draft Policy and is done through the following formula:

$$Development\ charge = \sum_{i=1}^{N} total\ impact\ on\ service_i \times unit\ cost\ of\ service_i$$

Where: N is the total number of services covered by this policy.

Figure 4: Equation for the City of Johannesburg's Development Charge calculation.[107]

[104] City of Johannesburg, 'Draft Development Contributions Policy' (2020) para 4.2.
[105] See National Treasury, 'Municipal Fiscal Powers and Functions Amendment Bill'.
[106] City of Johannesburg, 'Draft Development Contributions Policy' (2020) para 7.
[107] ibid para 10(1)(3).

The total impact that a development will have on demand for municipal bulk services is calculated as follows:

$$Total\ impact\ on\ service = \sum_{i=1}^{N} unit\ impact\ for\ land\ use_i \times (proposed\ units - existing\ units)$$

Where: N is the total number of land uses in the proposed development.

Figure 5: Equation for the calculation of the Total Impact on Service.[108]

The municipality relies on the proposed land use changes, the unit impact and the unit cost as data inputs to calculate development charges. The policy states that the calculation of development charges is premised on the principles of reasonableness, equity, fairness, predictability, certainty, administrative efficiency and justification, which more or less mimic the principles set out in the bill. So long as the principles can be quantified and justified, then one cannot fault the City for adopting its said formula, absent a standardised formula from the bill and supporting Implementation Guide.

Mogalakwena Local Municipality Draft Development Charges Policy 2020

Mogalakwena Local Municipality is a semi-rural municipality situated in the Waterberg District Municipality in Limpopo province. In December 2020, the City published its Draft Development Charges Policy, which also aligns in many respects with the Municipal Fiscal Powers and Functions Amendment Bill. The Draft Policy states that money collected as development charges must be used for purposes of funding or acquiring capital infrastructure assets in a timely and sufficient manner to support current and projected future land development in the municipal area, and where calculated with reference to a particular impact zone, must be used for capital infrastructure assets in that impact zone. The Draft Policy prohibits the use of development charges as a general revenue source and provides that money collected in respect of development charges may not be used to fund the operating or maintenance costs incurred by the municipality in respect of municipal infrastructure services.[109]

The policy also caters to the semi-rural make-up of the municipality with a provision that addresses the levying of development charges in rural areas/farms.[110] The provision states that development charges will be determined in terms of paragraph 9(1) for buildings or development related to the primary farming activities and can be classified as agricultural industry. This means that the municipality may, of its own accord or if requested by a developer, reduce or increase the amount of bulk services component for a development on a farm or rural area to reflect the actual costs of installation, if exceptional circumstances permit

[108] ibid para 10(1)(4).
[109] Mogalakwena Local Municipality, 'Draft Development Charges Policy' (2020) para 7.
[110] ibid para 14(2) read with para 9(1).

the reduction or increase. Assuming that there will not be significant additional demand on the bulk services on a farm because the workers already working on the farm will continue working in the new buildings, the municipality will levy development charges for any other development on the farm, for example function venues, tourist accommodation facilities, conference facilities or other commercial activities such as wine tasting as these land-uses attract outsiders who place additional demand on the bulk infrastructure.

Calculating Development Charges: the municipality relied on available service master plans and future development/town-planning scenarios to develop their formula. The municipality first calculated the cost per unit-consumption of water, sewer, storm water, solid waste, roads and community facilities. The calculation is meant to be an assessment of what to multiply the developer's required consumption by. Outstanding loans, as well as grants and subsidies given to the municipality were also taken into account to develop the formula.[111]

$$W = \frac{Ktot}{Etot} - \frac{Lex}{Eex}$$

Where:

W = cost per unit consumption factor

$K_{tot} = K_{ex} + E_{fut}$

= Cost of existing infrastructure + Cost of Future Infrastructure

$E_{tot} = E_{ex} + E_{fut}$

= existing consumption + future consumption

L_{ex} = Outstanding existing loans

Figure 6: Formula to calculate the cost per unit consumption factor.[112]

Similar to City of Johannesburg's policy, Mogalakwena Local Municipality's policy states that the calculation of development charges is based on the principles of fairness and equity, predictability, spatial and economic neutrality, and administrative ease and uniformity. Interestingly, annexed to its draft development charges policy is a document titled 'Development Charge Calculation Report' where the municipality states the following:

> '[p]reviously DCs were not applicable in Mogalakwena Local Municipality. However, master planning and DC calculations are based on new infrastructure being required for increased usage or consumption of services. Even though a certain area has always had certain zoning rights, it could be that historically the services were designed for an

[111] ibid Annexure A at paras 5(2)-(3).
[112] ibid Annexure A at para 4.

average lesser take-up of those rights, as it was the norm at that time and as such, the original developers did not pay for the new infrastructure required.'

The above paragraph highlights the disparities between semi-rural and urban municipalities. Mogalakwena Local Municipality, unlike City of Johannesburg, previously did not levy development charges but now has a development charges policy because of new infrastructure demands. This means this municipality has much more ground to cover with regards to learning how to levy development charges and also pressuring developers to actually pay as they previously did not and also the municipality was probably one of the 'friendlier' municipalities that developers moved to in order to avert paying development charges in the bigger cities.

The following observations can thus be made with regards to the current practice. First, at present, most municipalities' development charges policies seem to mirror each other, as well as to mirror the Policy Framework for Municipal Development Charges issued by the National Treasury in 2011. This Policy Framework encompassed a broad understanding of the role, purpose and legal nature of development charges across South African municipalities but municipal policies will have to be amended once the act is passed (something the City of Johannesburg has already proactively done) and the guidelines for the implementation of municipal charges become final.

Secondly, until the bill becomes law and National Treasury develops and implements guidelines for the calculation of development charges, municipalities will continue to levy development charges on the basis that they currently do, be it as part of Development Charges policies adopted under Section 75A of the Municipal Systems Act, through municipal planning by-laws or through policies adopted by the council of the municipality concerned. This means a municipality will have wide discretion as to the levying of development charges and, more specifically, the calculation of said development charges, provided that the arrangement is set out in a duly sanctioned policy as shown in the two examples above.

With regards to the bill, the following observations can be made. First, the bill is not too concerned with the type of applicant or the proposed land use, as the principle is that development charges should be calculated for all land use applications so that the infrastructure costs of the development are known irrespective of the municipality levying the development charges or not. Instead, the bill focuses on the impact of the proposed development on infrastructure, and the cost incurred by the municipality in addressing that impact and not on whether the developer should pay for the particular type of land use. If the municipality opts not to levy a development charge, then an alternative source of funding should be identified.

Secondly, although the systematised regulation of development charges should be welcomed, this does not remove the fact that the levying of development charges will remain a complex process. Whereas metros and big cities may be better placed to implement the act, other municipalities may experience challenges in implementing the act. Thus, once the act is

enacted, there may be a need for regulations and implementation guidelines that will give more explanation and guidance on the purpose and implementation of development charges. On the other hand, despite all municipalities being asked to implement development charges (with some municipalities doing so and others not doing so), the standardisation of development charges and the calculation therefore raises two issues: the first is the issue of developers who may have decided to move to smaller municipalities to avoid paying development charges and the second issue is that of potentially keeping developers away from smaller, rural municipalities due to a lack of incentives. The first issue is addressed through uniformity presented by the bill, which has the potential to curb the abuse of rural/semi-rural and smaller municipalities, to whom developers would flock in order to escape development charges imposed by bigger municipalities, and provide these municipalities with much needed revenue to provide the necessary infrastructure to support the development. This uniformity, however, lends itself to the second issue pertaining to standardisation across municipalities. Matsie avers that standardisation/uniformity brings to bear the missed 'opportunity to incentivise developers to develop in smaller or rural municipalities. So even though the revenue is needed in the smaller or rural municipalities, the standardised approach does not attract development and developers, who are already more inclined to develop in urban areas.' According to Matsie, 'it would be helpful for the bill to include an approach that regulates development charges in a scale or proportional approach just to give more incentives to developments in rural municipalities'.[113]

Thirdly, in a bid to revive the local economy post the Covid-19 pandemic, and fulfil the obligation to promote social and economic development as required by Section 152(1)(b) of the Constitution, municipalities may be eager to increase economic infrastructure and, thus, approve land development projects subject to levying development charges. Once the bill is enacted, supporting regulations and implementation guidelines may also be helpful in providing certainty on the calculation of development charges. This is necessary to eliminate the negative financial impact municipalities may face when they approve land use applications that do not take sufficient account of the impact of the proposed land developments on the municipal fiscus.

In ending, development charges and the levying thereof is a complex space to navigate. The introduction of a legal framework for the levying of development charges is thus a good starting point as it can be used widely across all municipalities. While the bill goes a long way in providing consistency and uniformity in the levying of development charges, it is clear that metropolitan municipalities, as well as cities will have an upper hand as they have long been levying development charges and are also magnets for development, unlike their rural counterparts.

[113] Statement by Rebekah Matsie, Senior Researcher, SALGA (LoGov Country Workshop, Local Financial Arrangements, 2 July 2021).

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Structure of Local Government

4.1. The Structure of Local Government in South Africa: An Introduction

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Section 40(1) of the South African Constitution entrenches the three levels of government, namely, national, provincial and local government. The local government as already discussed in South Africa's report section 2 (local responsibilities) is made up of category A, B and C municipalities. The type of categories is determined by the Municipal Demarcation Board based on the factors set out in Section 155 of the Constitution, and Section 2 of the Municipal Structures Act (MSA). Essentially, areas that comply with the criteria in Section 2 MSA are categorised as metropolitan municipalities and the rest of the country as district and local municipalities.

However, under apartheid, local government institutions were race-based. Racial segregation in South Africa ensured that there were community councils, advisory boards and local authorities appointed for black urban areas. These institutions lacked legitimacy, had little authority, were inadequately funded and often comprised of national government appointees. Black rural areas known as homelands had tribal authorities administering local government matters. Indian and coloured communities were governed by separate local government structures that were subordinate to the national and provincial governments. Lastly, fully-fledged local authorities governed exclusively white communities or areas. Apartheid aimed to limit the extent to which affluent white local municipalities would have to shoulder the financial burden for servicing the disadvantaged black communities. Therefore, when South Africa became a democracy there was dire need to integrate these fragmented local institutions. The amalgamation of municipalities was inevitable to achieve non-racial municipalities.

The main reasons behind the amalgamations between 1994 and 2000 were to integrate racially based local government institutions. However, after 2000, amalgamations were done mainly to ensure the financial viability of municipalities. The Municipal Demarcation Act provides the legal framework for the amalgamation of municipalities. This Act provides a firm guideline as to how amalgamations are planned and implemented. This section will elaborate more on how the amalgamation of municipalities is planned and implemented in the thematic practice below.

The three categories of local government (category A, B and C), are metropolitan municipalities (single-tier), district municipalities and local municipalities (multi-tier). South Africa has eight metropolitan municipalities. On one hand, metropolitan municipalities are stand-alone or single-tiered municipalities with a single council at the helm. The metropolitan council executes all the functions of local government for a city or conurbation. On the other hand, district municipalities comprise of two or more local municipalities. While some local

municipalities are secondary cities, or small towns, other local municipalities are rural. The local municipalities are represented on the district municipal council. District municipalities act as umbrella entities over local municipalities giving local municipalities support and assisting with coordination, planning and service delivery. This setup enables coordinated governance throughout the country.

In order to bring urban government closer to the people and improve service delivery, there are ward committees in all local municipalities and metropolitan municipalities. Section 72 (1) of the Structures Act establishes a legal framework for ward committees. The primary objective of ward committees is to enhance participatory democracy. Functions of the ward committee include making recommendations on matters affecting the ward to the ward councillor, through the ward councillor, to the metro or local council, the executive committee, the executive mayor or the relevant metropolitan subcouncil. Therefore, the ward committee serves as a formal communication channel between the ward community and the council and its political structures. Subcouncils in metropolitan areas also serve the purpose of bringing urban governance closer to the people. However, in terms of the Municipal Structures Act, only certain types of metropolitan municipalities may establish metropolitan subcouncils. To date only Cape Town Metropolitan Municipality has a subcouncil. In order to establish the subcouncil, the municipality must adopt a by-law determining the number of subcouncils that are to be established. In addition to that, the municipality must designate a cluster of adjoining wards to the subcouncil. Among the powers and functions of subcouncils is the ability to make recommendations to the metro council on matters affecting its area. Such functions of subcouncils bring urban government closer to the people thus facilitating improvement in services.

The legal framework for horizontal inter-municipal cooperation is the Intergovernmental Relations Framework Act (IGRFA), which provides for vertical and horizontal intergovernmental relations (report section 4). This Act is a manifestation of Chapter 3 of the Constitution, which discusses co-operative government. Section 16 of the IGRFA provides for the Premier's Intergovernmental Forum (PIF) to promote and facilitate intergovernmental relations between the province and local governments in the province. In Section 24, the IGRFA also provides for district intergovernmental forums, which facilitate intergovernmental relations between district municipalities and local municipalities within the district. The IGRFA also provides for the establishment of inter-municipality forums in Section 28. These platforms serve as a consultative forum for participating municipalities to discuss and consult each other on matters of mutual interest.

In the South African case, several factors can facilitate or impede effective inter-municipal cooperation. The Gauteng City Region is an example of the challenge in managing large interconnected urbanised spaces that are governed by multiple local government structures. For instance, spatial and institutional fragmentation hampers development in the Gauteng City Region. Government institutions fail to align their programmes and projects, particularly with respect to infrastructure development. In certain instances, subsidies are transferred from the

national government to provincial governments. The latter in turn transfer those subsidies to municipalities. Delays and bureaucracy often hinder this, particularly if the provincial political party is different from the local government municipalities. This is also precipitated by the lack of shared vision among the municipalities. Previously when one political party governed both provinces and municipalities, it was possible for intergovernmental disputes to be resolved informally at the political party headquarters. Now with different political parties at the helm, this is no longer possible. On the other hand, legislation such as the National Land Transport Act 5 of 2009 facilitates inter-municipal cooperation. The act allows for the creation of a special purpose authority that brings together national, provincial and municipal transport functions into one jointly controlled entity.

References to Scientific and Non-Scientific Publications

Constitution of the Republic of South Africa, 1996

Municipal Structures Act 117 of 1998

National Land Transport Act 5 of 2009

4.2. How Amalgamations Are Planned and Implemented

Melissa NS Ziswa, *Dullah Omar Institute, University of the Western Cape*

Relevance of the Practice

The South African amalgamation process of 2016 was kick started by the 'Back-to-Basics' programme, which analysed municipalities across the country, and concluded that approximately one-third of all municipalities were not doing well and some were not sustainable financially. To address the challenges being experienced by municipalities around sustainability or viability, several options were considered. These included direct interventions, strengthening district municipalities, or disestablishing and amalgamating some of the local municipalities to become larger local governments. The amalgamation of municipalities in South Africa in 2016 played a significant role in enhancing the economic viability of local governments, without necessarily targeting urban or rural municipalities. Although the amalgamations did not target rural municipalities per se (as other urban municipalities had poor economies). Nevertheless, the reality is that rural areas ended up more likely to be amalgamated as they were not as financially sound as their urban counterparts. This practice is closely linked to report section 3 on local financial arrangements because the amalgamation of local municipalities affects the tax base. For example, where municipalities that previously had a lower tax base were amalgamated with municipalities that had a higher tax base.

Description of the Practice

The practice of amalgamation is implemented in the same way in both urban and rural municipalities; in other words, the same laws apply to both urban and rural areas. Section 155(3) (b) of the Constitution states that before the amalgamation of local municipalities can occur, national legislation must establish criteria and procedures for the determination of municipal boundaries by an independent authority. In compliance with this obligation, Parliament enacted the Local Government: Municipal Demarcation Board Act, 27 of 1998, in terms of which the Municipal Demarcation Board was established to function as the independent authority to demarcate municipal boundaries, as required by the Constitution. The Municipal Demarcation Board comprises of members appointed by the President from a selection panel consisting of the following:

- the President of the Constitutional Court (or another member of the Constitutional Court designated by the President of that court), who must also be the convenor of the panel;
- a judge designated by the Chief Justice;

- one member of the Commission for Gender Equality, established by the Constitution, designated by that commission;
- two persons with specific knowledge of boundary demarcation (one must be designated by the Minister in consultation with the Members of (provincial) Executive Council (MECs) responsible for Local Government and the other person by the South African Local Government Association (SALGA); and
- the Chairperson of the Select Committee of the National Council of Provinces responsible for local government matters.

In *Matatiele Municipality and Others v President of the RSA and Others*, the Constitutional Court emphasised the rationale for an independent body so as to guard against political interference in the process of creating new municipalities. The Court held that 'if municipalities were to be established along party lines or if there was to be political interference in their establishment, this would undermine our multi-party system of democratic government. A deliberate decision was therefore made to confer the power to establish municipal areas upon an independent authority'.

According to Section 22(1) of the Demarcation Act, the Municipal Demarcation Board could perform its functions on its own initiative; on request of the Minister or a Member of the (provincial) Executive Council (MEC) responsible for local government; or on request by a municipality with the concurrence of any other municipality affected by the proposed determination or redetermination.

Therefore, based on the challenges being experienced by municipalities around sustainability or viability, the Minister responsible for Local Government requested the Municipal Demarcation Board in terms of Section 22(2) of the Demarcation Act to determine or re-determine the boundaries of various local municipalities. When the Municipal Demarcation Board is considering whether to determine or re-determine a municipal boundary, it must have an overall objective in mind to establish an area that would adhere to a particular set of requirements.

In order for the Municipal Demarcation Board to attain the overall objective and to comply with the required criteria outlined above, the Municipal Demarcation Board must also take specific factors (as provided in the Municipal Demarcation Act) into account when determining a municipal boundary. Among these factors are:

- the interdependence of people, communities and economies;
- the need for cohesive, integrated and un-fragmented areas;
- the financial viability and administrative capacity of the municipality to perform municipal functions efficiently and effectively;
- provincial and municipal boundaries;
- areas of traditional rural communities; existing and expected land use, social, economic and transport planning; and

- the need for coordinated municipal, provincial and national programmes and services (including the needs for the administration of justice and health care and the topographical, environmental and physical characteristics of the area).

Apart from the Municipal Demarcation Board, it should be noted that the demarcation process involves a number of other role-players. These are municipal managers (these are appointed by the council), MECs responsible for local government affairs, Minister of Cooperative Governance and Traditional Affairs, traditional authorities especially the Provincial House of Traditional Leaders, SALGA and any key stakeholders such as affected municipalities, thus ensuring that there is participatory democracy. It is important to note that the participatory democracy does not extend to a popular vote of the affected communities. According to Section 152 (1) (e) of the Constitution, one of the objects of local government is to encourage the involvement of communities and community organisations in local government. People's participation in local decision-making is discussed in more detail in report section 6. Constitutional Court judgments such as *Doctors for Life International v Speaker of the National Assembly and Others* affirm this position. The public consultative process requires members of communities to furnish written submissions either rejecting or supporting the proposals for redetermination and rationalisation of municipal boundaries and furthermore, attend the public hearings convened by the Municipal Demarcation Board. Before the board has a public meeting, it should first publish a notice in the newspaper circulating in the area concerned, stating the date, time and place of meeting and inviting the public. The purpose of this is to make the people aware of such a meeting and to give them the opportunity to attend it if they wish. The Municipal Demarcation Board must also consider all representations and views submitted and may then take a decision on the determination or, before it takes such a decision to hold a public meeting, conduct a formal investigation or to do both. What this essentially means is that the Municipal Demarcation Board is the decision maker in respect of the amalgamation of local governments.

Assessment of the Practice

Literature suggests that when local government structures are large (among other reasons due to amalgamation), access through public hearings, meetings, elections or direct contact is difficult as political representatives become far removed from the electorate which in turn weakens citizen participation. However, this is not the case in South Africa. South Africa put in place structures such as wards and subcouncils to curb against this result. The former has helped bring people closer to their government in both urban and rural areas by creating channels through which people can communicate with their local government. However, subcouncils have not achieved the same goal since only specific metropolitan cities can set up subcouncils. This in turn excludes some metropolitan cities and all rural municipalities from a structure that brings people closer to their local government. Nevertheless, it is important to note that for the metropolitan municipalities that qualify to establish subcouncils, their local

councils have the discretion to decide whether or not to exercise the right to establish metropolitan subcouncils. To date it is not clear why the metropolitan municipalities other than Cape Town have decided not to establish subcouncils. It could be because they are content with just having wards as a means of enhancing citizen participation.

The aim of amalgamations post-2000 has been primarily to make municipalities more financially viable. However, a study conducted by Ncube and Vacu in 2014 indicated that the amalgamation processes in South Africa resulted in unintended economic consequences and significant transaction costs, especially during the transition process. Costs which the amalgamated municipalities have to bear. It is assumed that merging administrations reduces costs. However, while the Municipal Demarcation Board decides on the merger, it has no control over whether the merged administrations will actually reduce costs after they have been merged. The Municipal Demarcation Board can merge two municipalities with the aim of reducing administration costs. In this instance, the two municipalities can merge their administration and trade unions to ensure that there are no retrenchments. Therefore, the total staffing numbers remain the same. Furthermore, the merged staff may demand salary parity such that the lower paid staff members must be upgraded to match their higher paid equivalent that came from the other municipality. What that means is that the whole exercise may end up costing more instead of being an exercise to improve the financial viability of local government. Further, rural municipalities end up being affected the most since a majority of unviable municipalities are in the rural areas.

References to Scientific and Non-Scientific Publications

Legal Documents:

Constitution of the Republic of South Africa, 1996

Local Government: Municipal Demarcation Act 27 of 1998

Local Government: Municipal Structures Act 117 of 1998

Intergovernmental Relations Framework Act 13 of 2005

Doctors for Life International v Speaker of the National Assembly and Others (12) BCLR 1399 (CC)

Matatiele Municipality and Others v President of the RSA and Others 2007 (1) BCLR 47 (CC)

Scientific and Non-Scientific Publications:

De Visser J, 'City Regions in Pursuit of SDG 11 Institutionalising Multilevel Cooperation in Gauteng, South Africa' in Helmut P Aust and Anél du Plessis (eds), *The Globalisation of Urban Governance* (Routledge 2019)

Do Vale HF and Cameron R, 'The Mosaic of Local Governments in Post-Apartheid South Africa: Municipal Asymmetries and Spatial Inequality' in Jeffrey M Sellers and others (eds), *Inequality and Governance in the Metropolis* (Palgrave McMillan 2017)

Ncube M and Monnakgotla J, 'Amalgamation of South Africa's Rural Municipalities: Is it a Good Idea?' (2016) 19 Commonwealth Journal of Local Governance 75

Steytler N and De Visser J, *Local Government Law of South Africa* (LexisNexis 2009)

—— 'Implications of Amalgamation of Municipalities of Municipalities and Post 2016 Local Government Coalition Led Municipalities' (presented to the Municipal Managers' Forum, George, August 2017) <https://www.salga.org.za/SALGA%20Municipal%20Managers%20Forum/Presentations/IMPLICATIONS%20OF%20AMALGAMATION%20OF%20MUNICIPALITIES%20AND%20POST%202016%20LOCAL%20GOVERNMENT%20COALITION%20LED%20MUNICIPALITIES.pdf> accessed 23 November 2019

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4.3. Local Boundary Changes and Public Participation

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Relevance of the Practice

The act of demarcating boundaries does not have a pleasant history in South Africa. Boundary making was part of the series of instruments that the apartheid government used to disadvantage the black majority while advantaging the white minority. The reasons for boundary changes have evolved over time in South Africa: 'For much of the period between 1948 and 1994, South Africa's experimentation with decentralisation focused on demarcating jurisdictions and organising governance on the basis of race, rather than on the basis of functional linkages or similar criteria'.[114] Probably it is that history of abusing boundary making for partisan purposes that convinced the negotiator of the current Constitution to agree on the establishment of an independent institution that is responsible for demarcating municipal boundaries. That saw the establishment of the Municipal Demarcation Board (MDB). The Municipal Demarcation Act of 1998 gives the board the power to determine or re-determine municipal boundaries in South Africa. The act provides not only the criteria that the MDB must use when demarcating municipal boundaries, as mentioned in the preceding entry, but also the procedure that must be followed when demarcating boundaries. At the centre of that is the duty to facilitate public involvement.

Description of the Practice

The Constitution of South Africa provides for both representative and participatory forms of democracy, making the involvement of the local community in key decision-making processes mandatory.[115] Based on this constitutional imperative, the Municipal Demarcation Act requires the process of demarcation to be both participatory and inclusive. There is one board only which is responsible for all municipal demarcations, that is both urban and rural municipalities, and it applies the same rules across both types of municipalities as determined by the act. According to the act, the MDB begins the process of determining a municipal boundary by notifying stakeholders and the public in general of the board's intention to consider the matter,

[114] Philip Van Ryneveld, 'The Making of a New Structure of Fiscal Decentralization' in Bert Helmsing, Thomas Mogale and Roland Hunter (eds), *Restructuring the State and Intergovernmental Fiscal Relations in South Africa* (Friedrich-Ebert-Stiftung and Graduate School of Public and Development Management, University of Witwatersrand 1996).

[115] For more, see the Introduction to People's Participation in Local Decision-Making in South Africa, report section 6.2.

and inviting members of the public to submit their views on the matter (Section 26 of the Municipal Demarcation Act). The board can also hold a public hearing. It can also conduct 'a formal investigation'. The board must also make sure that its engagement with the public is 'as inclusive as possible'. This often takes the form of ad hoc meetings with relevant interested parties (i.e. business organizations, residents' associations, traditional leaders in rural areas, etc.), including the organisation of stakeholders' workshops.

Although the board has the obligation to consider all submissions and views expressed during public hearing, it is not bound by those submissions and views. The consent of the affected municipality is not required. In fact, the board is not specifically required to obtain the view of the relevant municipality. Neither is the approval of the residents of the affected municipality necessary for alteration of local boundaries. The final power of making determinations rests with the board. That is why the board, on a number of occasions, made decisions that went against the clearly expressed wishes of communities demanding or opposing local boundary changes. There are, however, cases where persistent community protests forced the MDB to look further into the demand and conduct further feasibility studies though those did not always result in changing the decisions of the board.

Sometimes, local boundary changes happen as a result of a change in provincial boundaries. According to the Constitution, a constitutional amendment that affects a particular province cannot pass 'unless it has been approved by the legislature or the legislatures of the province or provinces concerned' (Section 74(8)). The validity of provincial support to pass the amendment, in turn, depends on the provincial legislature effectively discharging its duty of facilitating public involvement (Section 118 of the Constitution). From this, it is clear that, first, the consent of the affected municipality is not a requirement even if the proposed changes may result in a municipality or part of a municipality moving from one province to another. Second, the public must be consulted. Again, although the provincial legislature has the duty to facilitate public involvement, the public does not have the power to veto the proposed changes.

In 2006, the Constitutional Court invalidated the constitutional amendment that enabled the transfer of the Matatiele Municipality (predominantly rural) from the KwaZulu-Natal province to the Eastern Cape province on the ground that the KwaZulu-Natal legislature had not consulted with the people of Matatiele. The Court suspended the declaration of invalidity for a period of 18 months to give the government time to rectify the procedural irregularities. In 2007, the Government and Parliament invited the public to make written submissions in relation to the proposed amendment. In that same year, the KwaZulu-Natal legislature held a number of town-hall meetings and hearings. Once the government was convinced that it had addressed the procedural defects, it enacted the Thirteenth Amendment transferring again Matatiele to the Eastern Cape. Members of the Matatiele community objected to the decision and brought a case again before the Constitutional Court. Although they admit that both national and provincial legislatures had facilitated public involvement this time, they argued that the submissions of the residents of the Matatiele Municipality and their representatives

were not properly considered. They argued that the national and provincial authorities 'merely went through the motions in inviting submissions and arranging public meetings so as to secure constitutional compliance of the outcome of the process'.[116]

In its ruling, the Constitutional Court cautioned against conflating the duty to engage the public and duly consider their views with the duty to be bound by the views of the public. Compliance of the legislature with the duty to consult the public does not depend on the extent to which the views of the public are reflected in the final decision. Although the Court acknowledges that the views of the public must be taken into account, it insisted that public opinion does not have a binding impact on Parliament and the decisions it takes. In the words of the Court, 'public involvement and what it advocates do not necessarily have to determine the ultimate legislation itself'.[117]

In another case on local boundary changes, involving the City of Merafong in Gauteng, discussed below, the Court has emphasised the non-binding nature of public views.

'[B]eing involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them.[118]

In Merafong, the Court had to deal with another issue pertaining to the extent of public consultation that has to take place. Unlike KwaZulu-Natal that initially failed to involve the public in the decision-making process affecting Matatiele, the Gauteng provincial legislature ensured that the public was consulted regarding the decision to transfer part of the Merafong City Local Municipality from Gauteng to North West, where the other part of the same municipality was located before the passing of the Twelfth Amendment. This public consultation included an opportunity to submit both oral and written submissions. The general observation from the public consultation was that the public was opposed to the transfer. Based on this, the Gauteng delegation to the National Council of Provinces, South Africa's second chamber of Parliament, was instructed by the provincial legislature to oppose the transfer of Merafong to North West. When it was told that the bill, which included the proposal to place not only Merafong but also a number of other cross-border municipalities within a single province, had to either be supported or opposed in its entirety, the Gauteng delegation

[116] *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (1) (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC).
[117] *Poverty Alleviation Network & Ors v President of the Republic of South Africa & Ors* [2010] ZACC 5, para 62.
[118] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC), para 50.

made a U-turn and, without further engagement with the residents of the municipality, withdrew its objection to the transfer of Merafong. The decision of Gauteng raised the procedural issue of whether the provincial legislature was 'required to engage in a second consultation'. The Court held that the omission to consult again does not amount to a failure to facilitate public involvement in the processes of the Gauteng Provincial Legislature.

It goes without saying that residents of urban and rural areas do not have equal access to public hearings. However, the rural areas, which are often under-serviced and under-resourced, are home to a population that is characterised by low levels of literacy and poor education. They are also far from the urban centres where most hearings are often held. This means that any effort to engage the public, including in processes of demarcation of boundaries, must take into account the particular challenges that a rural population faces. This may require preparing the rural population in advance to make sure that they engage meaningfully. It may also involve providing transport to members of rural communities to ensure that they attend hearings.

Assessment of the Practice

From the foregoing, it is clear that public consultation is an indispensable element of the process of local boundary changes. The views of the affected communities must be taken seriously. Failure to comply with the duty of facilitating public involvement has the effect of invalidating the decision. At the same time, the views and sentiments of the public are not binding. This clearly shows that the process of local boundary changes in South Africa is not only top-down (in so far as the initiation does not come from the local level) but also coercive. Neither the local government nor the local population has the final say on local boundary changes. Finally, although there are encouraging developments that aim at improving the participation of rural communities in key decision-making processes, they are not implemented consistently. More needs to be done to facilitate the involvement of rural communities in the processes of the MDB.

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Constitution of the Republic of South Africa, 1996

Local Government: The Municipal Demarcation Act 27 of 1998

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4.4. A District Coordinated Development Model

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Relevance of the Practice

Identifying the effective way to deliver services is something that South African policy-makers continue to grapple with. This is crucial for a number of reasons. Past models for public service delivery have not performed as well as anticipated. They have been blamed for stagnated socio-economic development, incomplete projects and wasteful expenditure. They have also failed to prevent violent service delivery protests that have actually been markedly increasing in magnitude and intensity over the past few years. Officially launched by President Cyril Ramaphosa at a Presidential Imbizo in OR Tambo District Municipality in the Eastern Cape in early September 2019, the district-based coordination model seeks to overcome the challenges of inadequate service delivery that are traced back to the problem of the different spheres of government operating in silos.

Description of the Practice

The horizontal and vertical silos that characterize the workings of the three spheres of government are often blamed for the lack of integrated planning and implementation. This, according to President Ramaphosa, 'has made monitoring and oversight of government programmes and projects difficult'.[119] This state of affairs has been blamed for the non-optimal delivery of services and diminished impact on the triple challenges of poverty, inequality and unemployment.

The district coordinated development model presents a fresh perspective by seeking to move away from a system of service delivery that is dependent on each sphere aligning their plans with the other spheres towards a system that is based on joint planning.[120] As mentioned in the Introduction to the System of Local Government in South Africa, South Africa has a two-tiered system of local government, in which districts and local municipalities share legislative and executive authority, and there is a hierarchy between districts and local municipalities. Districts comprise of both urban and rural areas, but exclude metropolitan municipalities. The argument is that the multiple demands for spatially integrated planning and better public

[119] Address by President Cyril Ramaphosa on The Presidency Budget Vote 2019/2010 (National Assembly, 17 July 2019) <http://www.thepresidency.gov.za/speeches/address-president-cyril-ramaphosa-presidency-budget-vote-2019-2010%2C-national-assembly%C2%A0>.

[120] See report section 5.4. on Intergovernmental Relations in Integrated Development Planning.

service delivery in the context of multi-level government can be best addressed through a system in which 'all three spheres of government work off a common strategic alignment platform'.[121] The district-based coordination model is presented as a vehicle for joint planning which can aid both rural and urban municipalities to fulfil their constitutional development mandate (Section 152 of the Constitution) and by so doing support local municipalities, and especially rural municipalities which tend to struggle in terms of capacity and infrastructure planning and implementation. At the centre of the District Level Model is the single Joined-Up One Plan through which policies and programmes are implemented by each sphere of government. Each of the 44 districts is regarded as a centre of service delivery and economic development, the space in which each sphere of government uses its development plans to address strategic government priorities. The same applies to the 8 metros.

As a model of service delivery that operates within the existing constitutional framework for cooperative governance and intergovernmental relations, it requires national, provincial and local government to focus on their mandate areas when putting together a plan for each district. That is why the model is seen as 'practical Intergovernmental Relations (IGR) mechanism'.[122] The expected end product is one plan for each of the 44 districts and 8 metros.

A critical role of government is ensuring that the local, provincial and national spheres have a spatially integrated single government plan to drive development in the districts, which is especially important for rural municipalities within the districts as a new avenue for their development. Localized procurement and job creation are key components of the model. It is envisaged that local businesses will participate in and benefit from the development, and that citizens in the district concerned will be prioritized for employment on local projects. Government consultation of social partners is viewed as a key component of ensuring that development addresses the basic needs of stakeholders and local communities.

Assessment of the Practice

Through pursuing single, integrated district plans enabled by the vision of 'One District; One Plan; One Budget; One Approach', the model breaks with a past in which development was variegated, differentiated and discerned. Important is the fact that the model was endorsed by Cabinet, local government structures, traditional (rural) authorities and the President's Coordinating Council (PCC), seemingly bolstering the prospects for success, diminishing

[121] Department of Cooperative Governance and Traditional Affairs, 'Concept Note: New District Coordination Model to Improve the Coherence and Impact of Government Service Delivery and Development' (2019) <https://edse.org.za/wp-content/uploads/2020/12/New-District-Metro-Coordination-Model-Concept-Note.pdf>.

[122] Department of Cooperative Governance and Traditional Affairs, 'About us' (*The District Development Model*, 3 July 2020) <https://www.cogta.gov.za/ddm/index.php/about-us/>.

chances of competition and friction among the various arms of government assigned public service delivery functions.

The prospects for success appear to exponentially surge given that with effect from the 2020/21 budget cycle, national budgets and programmes will be spatially referenced across the 44 districts and 8 metros. In the same vein, provincial government budgets and programmes will be spatially referenced to districts and metros in the respective provinces. Similarly, municipalities will express the needs and aspirations of communities in integrated development plans for the 44 districts and 8 metros.

However, despite the best intentions of the model, there are seemingly a number of impediments in its way. Coordination will be a mammoth task. The model brings together national, provincial, district and local municipalities. These are institutions that are often grappling with facilitating a common understanding of the service delivery challenges besetting local communities and how best they can be addressed. This is a challenge that seemingly requires energy sapping negotiations, mediation and consultation. A related challenge is the issue of how quickly district coordinating officers can be appointed, trained and facilitated to lead development planning under the new model.

The district development service delivery model claims to 'implement a balanced approach towards development between urban and rural areas'.[123] The fact that the joint planning approach takes place within the existing framework of division of powers suggests that the new model does not represent the formulation of service delivery planning by a higher level of government that is not in touch with the realities of rural municipalities. Each government retains their constitutionally assigned responsibilities. Arguably, the fact that they are now required to work together gives them an opportunity to have a universal view of the district in question, including the urban-rural divide. After all, each municipal district is regarded as a single space for joint planning in terms of this model.

It is also important to address the funding dimensions to the district coordinated development model given that this is an exercise that requires huge amounts of money, coordination effort and goodwill to roll out and realize. In the literature, uncertainties and misgivings have often been expressed about the role of districts in facilitating local development, with some suggesting the abolition of district councils and conferring their responsibilities on local municipalities. A common proposition in this contention is that local municipalities are better placed to champion better service delivery given that they are the closest sphere of government in touch with communities. It is, however, too early to determine whether the envisaged model will put an end to these reservations. Only time will tell.

[123] Department of Cooperative Governance and Traditional Affairs, 'Towards a District Coordinated Development Model: Concept Note' (2019).

References to Scientific and Non-Scientific Publications

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Intergovernmental Relations of Local Governments

5.1. Intergovernmental Relations of Local Governments in South Africa: An Introduction

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The Intergovernmental Relations Framework Act (IGRFA) establishes lines of communication and provides the institutional framework for interaction between national, provincial, and local spheres of government and all other organs of state.[124] The IGRFA aims to provide certainty, coherence, transparency and stability and to facilitate effective and coherent developmental outcomes as envisaged by the Constitution of the Republic of South Africa, 1996. Section 40(1) describes the three spheres of government as 'distinctive, interdependent and interrelated'. Each sphere has autonomy to make final decisions within its areas of competence and there is a two-way relationship of regulation and oversight in order to be a coherent government.[125] The two main approaches to IGR are supervision and cooperation (Sections 100 and 139 of the Constitution).

Supervision

Section 151(3) of the Constitution stipulates that 'a municipality has a right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation'. Further, Section 156 (1) grants exclusive legislative and executive authority to pass by-laws and administer local government matters listed in Schedules 4B and 5B, and any matters assigned by national or provincial government. However, National and provincial governments have legislative and executive authority to ensure that local governments perform their functions effectively in relation to matters listed in Schedules 4 and 5 (Sections 156(1) and 155(7) of the Constitution). This includes first, the power to 'regulate', which in the context of local government was interpreted by the Constitutional Court in the *Habitat* as follows: 'It follows that "regulating" in Section 155(7) means creating norms and guidelines for the exercise of a power or the performance of a function. It does not mean the usurpation of the power or the performance of the function itself. This is because the power of regulation is afforded to national and provincial government in order "to see to the effective performance by municipalities of their functions". The constitutional scheme does not envisage the province employing appellate power over municipalities' exercise of their planning functions. This is so

[124] Act 13 of 2005.
[125] Nico Steytler, Yonatan Fessha and Coel Kirkby, 'Status Quo Report on Intergovernmental Relations Regarding Local Government' (Community Law Center CAGE Project, now Dullah Omar Institute 2006) <https://dullahomarinstitute.org.za/multilevel-govt/publications/status-quo-report-on-provincial-local-igr.pdf> accessed 30 July 2019.

even where the zoning, subdivision or land-use permission has province-wide implications.'[126] Secondly, the national and provincial governments 'monitor' municipalities, which includes promoting the development of local capacity in order for local governments to perform their functions and to manage their affairs (Section 155(6)(a) of the Constitution).[127] Thirdly, national and provincial governments have powers to 'intervene' in municipalities that fail to fulfil their constitutional or legislative obligations. There are four types of interventions: regular, discretionary 'serious financial problems', mandatory budgetary interventions, and mandatory 'financial crisis' interventions (Section 139 of the Constitution). The Municipal Systems Act (MSA) and Municipal Finance Management Act (MFMA) contain further provisions pertaining to the monitoring powers of provincial and national government over local government.[128]

Cooperation

Chapter 3 of the Constitution sets out general values and principles for cooperation such as mutual trust and good faith (Section 41 (1)(h)). All three spheres are required to build friendly relations, assist and support each other, coordinate actions and legislation, adhere to procedures, avoid legal proceedings against each other, and inform and consult each other on matters of common interest (Section 41(1)(h) of the Constitution). IGRFA established IGR forums and institutions that facilitate the realisation of these normative principles, for example, through compulsory IGR procedures such as the Division of Revenue Act which must go through each sphere of government (through participatory processes for local government, and legislative processes for provincial and national government) before it becomes law. Although Section 4 IGRFA stipulates that the objects of the act are to create a coherent government, the act focuses on IGR structures as opposed to principles; hierarchies are embedded in some of the IGR structures and national government is dominant in steering IGR, making IGR an object of the centre, and not a collaboration of equal partners.[129] Further, the principles are normative, and in certain instances, such as in *Ngwathe Local Municipality v Eskom Holdings SoC Ltd and Others*,[130] perceived failure to implement the principles of cooperation may lead to litigation. In this case, the local Municipality of Ngwathe failed to pay its electricity bill to Eskom, and when Eskom threatened to disconnect the electricity supply, Ngwathe local municipality instituted legal action on the basis that Eskom, as an organ of state,

[126] Nico Steytler and Jaap de Visser, *Local Government Law of South Africa* (LexisNexis 2018) 5-24 (12A); *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (5) BCLR 591 (CC) (Habitat CC) [22].

[127] See also Secs 105 and 106 of the Municipal Systems Act (MSA) 32 of 2000.

[128] MSA Act 32 of 2000; Municipal Finance Management Act (MFMA) 56 of 2003.

[129] Nico Steytler; 'Cooperative and Coercive Models of Intergovernmental Relations: A South African Case Study' in Thomas J Courchene and others (eds), *The Federal Idea: Essays in Honour of Ronald L. Watts* (1 ed, Queen's School of Policy Studies 2011).

[130] [2015] ZAFSHC 104 (28 May 2015).

had a legal obligation to respect the functional or institutional integrity of Ngwathe local municipality.

Intergovernmental Forums and Institutions

The IGRFA creates intergovernmental forums, where executives of the three spheres of government meet (Section 41(2) of the Constitution). Deemed as the main coordinating body at national level, the President's Coordinating Council (PCC) consists of the President, the Deputy President, relevant Ministers in the Presidency, Finance and Public Service respectively, Premiers from each of the nine provinces and a municipal councillor designated by SALGA. The PCC is a consultative forum for the President to raise matters of national interest with provinces and organised local government, to consult them on the implementation of national policy, co-ordination and alignment of priorities, and to discuss strategic priorities inter alia. Because the PCC is hierarchical, it tends to be a forum for the President to tell provinces and municipalities what to do, and to detect failures by provinces and municipalities. This leaves very little room for SALGA to make substantial contributions, and if it does, it is difficult to see these translated into policy reform as the agenda is set by the President in terms of Section 8(1)b IGRFA. However, proposals for the agenda can be submitted to the Minister in the Presidency. The IGRFA requires only one member of SALGA to be in attendance- the municipal councillor. The municipal councillor is selected from among SALGA members (as SALGA is organised local government and represents all municipalities in South Africa). The IGRFA does not specify the frequency of meetings of the PCC, but it simply requires that the PCC meets, at the behest of the President of the Republic (Section 8(1)(a)), to oversee and ensure alignment between the spheres and implementation of national policies and legislation.

Further, each national department has a national IGR forum where Ministers meet with Members of the (Provincial) Executive (MinMECs) and a national councillor from SALGA, provided the subject matter of the specific MinMec deals with a matter assigned to local governments in terms of Schedule 4B or 5B. Section 18 IGRFA stipulates that MinMECs are a consultative forum 'for' the relevant cabinet member to facilitate alignment between the national and provincial spheres on topical or sectoral issues. MinMECs are hierarchical and can become 'instruments of centralised control' and 'vehicles of command'.[131] There is also a variation called the Local Government Ministerial and Member of the (provincial) Executive forum (LGMinMEC), which invites local government into joint sessions with the provincial and national executive.[132] The reports of the MinMEC must be submitted to the President's Coordinating Council. In this way, issues raised by provincial MEC and SALGA will be presented to the President through the PCC.

[131] Nico Steytler, 'National Cohesion and Intergovernmental Relations in South Africa' in Nico Steytler and Yash Pal-Ghai (eds), *Kenyan-South African Dialogue on Devolution* (Juta 2016) 313.

[132] Derek Powell, 'Constructing a Developmental State in South Africa: The Corporatisation of Intergovernmental Relations' in Johanne Poirier, Cheryl Saunders and John Kincaid (eds), *Intergovernmental Relations in Federal Systems* (Oxford University Press 2015) 327.

The Premier's IGR Forum (PIF) is a horizontal forum for the Premier and mayors of district and metropolitan municipalities. The PIF comprises of the Premier of a specific province, provincial cabinet members, mayors of metropolitan and district municipalities, and a representative of SALGA. Unlike the PCC and MinMECs, the PIF is a forum for the premier 'and' local government in the relevant province, and the PIF is inherently and in practice, consultative and egalitarian. One of the crucial ways in which SALGA's voice can influence law and policy is that the PIF may discuss draft legislation and draft national policies relating to matters that affect provinces and/or local governments. The Premier sets the agenda, and meeting dates, but proposals for the agenda can be submitted to Premier ahead of the PIF. In practice, each province sets its own frequency of meetings, some meeting twice a year and other four times a year or as the need arises.

The District Intergovernmental Forum (DIF) is a forum for the district mayor and local mayors in his/her jurisdiction. Intergovernmental institutions such as the Budget Council (which is part of the finance MinMEC), the Budget Forum of Local Government, the National Council of Provinces and the Financial and Fiscal Commission (FFC) also bring the three spheres of government together.

Organised Local Government

South African Local Government Association (SALGA) and its provincial affiliates are recognised as organised local government and represent all 257 municipalities in the country in terms of the Organised Local Government Act.[133] SALGA plays a crucial role of representing local government in IGR forums.[134] However, SALGA has the difficult task of representing the interests of both urban and rural municipalities, which are often different, and are sometimes at odds with each other. Decision-making at national level in SALGA is done by SALGA's national executive, elected by the SALGA national conference. SALGA executive committee comprises of the chairperson of SALGA, 3 deputies, 6 additional members, provincial chairpersons of SALGA (ex officio), and the head of the administration (who has no vote) and optionally, three additional members. The meetings of SALGA national executive are once every three months, and when the need arises (clause 12.4.2 SALGA Constitution). The Constitution of SALGA empowers the national executive to make representations to provincial and national government (clause 12.7.5) and to determine the representation of SALGA in all national IGR structures and other national forums and such representatives have power to make decisions in these structures and forums, but they must report back to the national executive quarterly (clause 12.7.14).

At the provincial level, decision-making is done by the SALGA provincial executive committee elected by the provincial members' assembly. The SALGA provincial executive committee comprises of the Chairperson, three deputies and six additional members (it may co-opt three

[133] Act 52 of 1997.

[134] National Treasury: Budget Technical Forum and Winter Budget Forum; Department of Works: Technical and Political MINMEC; Department of Safety and Security: Safety and Security Technical and Political MINMEC.

additional members). Similarly, the SALGA provincial executive committee meets once every three months, and when the need arises. All municipalities in the province must be represented on the provincial executive committee. The SALGA Constitution empowers SALGA provincial executive committee to make representations to provincial government (clause 21.6.3), and to determine SALGA representation in provincial IGR structures and other forums, and such representatives have power to make decisions, but must report back to the provincial executive committee (clause 21.6.2). SALGA engages and lobbies for local government in Parliament through the portfolio committees of National Assembly (NA) (Section 163 of the Constitution). Section 163 of the Constitution enables SALGA to participate in all meetings of the National Council of Provinces (NCOP) Select Committees, NCOP plenary debates, joint sittings of NCOP and NA, NCOP Local Government Week and SALGA can designate 10 councillors to hold part-time seats in the NCOP. Although legislation does not invite SALGA into provincial legislatures, some provincial legislatures accommodate the participation of SALGA.[135] Thus SALGA gives local governments a voice in the NCOP and in some provincial legislatures.

Intergovernmental Relations Mechanisms

There are IGR mechanisms for budgeting, planning and implementation, such as implementation protocols and integrated development planning (IDP). Each municipality is required to develop an IDP in consultation with local communities, and in alignment with national and provincial strategic development plans.[136] The MFMA and the Constitution further regulate intergovernmental fiscal relations (IGFR). SALGA participates in fiscal IGR in its role as organised local government.[137]

Dispute Resolution

There are mechanisms for intergovernmental dispute resolution. Section 41 requires all three spheres of government to take 'every reasonable effort' to settle disputes out of court and to use litigation only as a last resort. Furthermore, courts may refer matters back to allow alternative dispute resolution (ADR) through political processes if litigation was instituted prematurely. There are also mechanisms to resolve conflicting legislation in order to ensure coherence in the legislative framework.

[135] SALGA, 'Organised Local Government in Parliament and Provincial Legislatures' (unpublished paper 2013) 9.
[136] Secs 24 and 26 MSA 32 of 2000; Department of Provincial and Local Government, 'The Implementation of the Intergovernmental Relations Framework Act: An Inaugural Report 2005/6-2006/7' (Government of South Africa 2007) 38.
[137] Secs 9 and 10 of the MSA Act 32 of 2000; Sec 35 Public Finance Management Act 1 of 1999.

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Constitution of the Republic of South Africa, 1996

Municipal Systems Act 32 of 2000

Municipal Finance and Management Act 56 of 2003

Intergovernmental Relations Framework Act (IGRFA) 13 of 2005

5.2. Intergovernmental Cooperation in Fiscal and Financial Management: Bulk Resources for Municipal Services

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Relevance of the Practice

The Municipal Finance Management Act (MFMA) requires extensive consultation before an organ of state can increase the price of a bulk resource supplied to a municipality or municipal entity. This forms part of government's effort to ensure consistent policy implementation and achievement of macro-economic objectives. This process is comprehensive and must be completed timely and contain motivations to be tabled in Parliament or the relevant provincial legislature. Careful planning is required to meet the obligations of the MFMA before the pricing amendments can take effect.

Local government is generally the major provider of essential services to communities and so their ongoing financial sustainability is important in meeting national objectives. All municipal budgets must be introduced and put forward for debate and approval in council no later than 31 March each year and adopted before 1 July which provides improved certainty in the process. As the purchase of bulk services makes up a significant component of municipal expenditure (roughly 25 per cent) and will impact directly on the tariff policies adopted by council, it is imperative to coordinate and finalise the pricing from bulk resource providers in a timely manner. Municipalities and bulk service providers are encouraged to take into account the government's broad economic objectives and adhere to the inflation targets when concluding their bulk and retail tariffs. Related mainly to report section 2 on local responsibilities, section 3 on local finances, section 5 on intergovernmental relations and section 6 on people's participation, this practice note is relevant for the LoGov-project to the extent that it affects bulk municipal services, municipal budgeting and consultation with communities as well as how other organs of state plan and cooperate with one another on matters of national interest.

Description of the Practice

According to Circular no 23 of the MFMA, the water boards should demonstrate how they have taken into consideration SALGA and National Treasury comments before the proposed tariffs

can be passed. In response to this requirement, SALGA annually undertakes the review of the water boards' proposed tariffs. The 2019/20 review included analysis of documents submitted by water boards consisting of the proposed tariff submission to SALGA and business plans. The MFMA provides two significant features in relation to the provision of electricity, water and other bulk resources to municipalities and municipal entities. Firstly, if an organ of state intends to increase the price of such resources, it must undertake a comprehensive consultation process, which must be completed on or before 15 March in any year. Secondly and to complement the consultation process, National Treasury is required to monitor the pricing structures and payments made by municipalities and municipal entities to organs of state for the supply of bulk resources. To do this, organs of state are required to submit monthly statements to National Treasury setting out payments received, arrears and any action taken to recover arrears from municipalities and municipal entities (Section 41). Table 1 describes the practice regarding the approvals for bulk water service providers' tariffs.

Table 1: Description of the practice- bulk resources for municipal services (Water)[138]

Action	Date
Department of Water Services (DWS) provides resources for 3 consecutive years to water service providers	Prior 15 September
Bulk water service provider calculates tariff	Prior 30 September
Consultation with water services authorities	Oct & November
DWS preliminary review meeting of bulk water service provider's tariffs	November
Bulk water service provider's submission to the National Treasury (NT) & SALGA requesting written comments	Prior 7 December
SALGA and NT to provide comments	Prior 25 January
Formal submission to DWS including comments by SALGA, municipalities & NT	After 25 January
Bulk water service provider's tariffs tabled in Parliament	15 February
Any amendments to tariffs are tabled in Parliament	1 March
Water service providers are notified of tariff increase in writing	15 March
Water services authority tariff determination process:	
Water services authorities to comply with other regulatory processes	After 15 March
Water services authorities to table draft budget before municipal council	Prior 31 March
Implementation by water services authorities	1 July
Water services authorities submit pro-forma statements on water and sanitation tariff determination to DWS as reflected in norms and standards	Immediately after 1 July

[138] National Treasury, 'Schedule 3: Norms and Standards in Respect of Tariffs for Bulk Water Services Supplied by Bulk Water Services Providers or Regional Bulk Water Utilities to other Water Services Institutions' (Government Gazette No 39411, Republic of South Africa, 13 November 2015) 123.

Assessment of the Practice

From SALGA's perspective, the main objective of the analysis was to assess applications received from water boards for tariff increases for the 2019/20 financial year. SALGA undertook to comment on these applications with a view to protect the interests of the municipalities that are served by water boards. In undertaking this analysis, SALGA took into consideration that bulk water tariff increases are required in order to ensure that water boards remain financially sustainable, but this must be balanced with the need to ensure that water remains affordable to municipalities and, ultimately, the end users. The main historic challenge with regards to SALGA's participation in bulk water IGR processes (specifically, in the tariff increase consultations with local government, by the water boards as regulated through the MFMA) has been the lack of consultation with municipalities which made the submissions and comments weak. The challenge of SALGA to fully represent local governments often resulted in unaffordable tariffs being imposed on local governments, which in turn, passed on the costs to consumers through service charges. From the Treasury perspective, SALGA's involvement in the tariff consultations for bulk water services allows for the monitoring of the pricing structure of the organs of state for the supply of electricity, water or any other bulk resources to municipalities and municipal entities as well as payments made for such bulk resources. Another challenge more broadly is that there seems to be no 'board' as such that is formally responsible for regulating water boards, unlike electricity which has a clear regulator. It is therefore especially important to ensure that submissions by SALGA are taken into account as SALGA is in a way playing a monitoring role although it is also representing local governments in the budget forum.

The practice is one of the useful means to ensure local government budgets are credible to the extent that they are based on realistically anticipated revenues and expenditures. For example, following the review, SALGA rejected eight out of nine tariff submissions from the water boards and urged them to take into consideration the points of reservation SALGA made against their tariff proposals for the 2019/20 financial year. This was premised on the review which revealed that overall, the tariff increases requested by water boards were extremely high and unaffordable to the local government sphere. Largely, the high tariffs were attributable to high input costs, unrealistic demand projections that did not match historical actual consumption of the service etc.[139] There is differentiation in terms of how the practice works in urban and rural settings in that, rural municipalities pay higher tariffs due to higher costs of service provision (topography is the main cost driver). This further exacerbates the financial constraints affecting most rural municipalities characterised by poor or no revenue base and places an additional burden on the national fiscus.

[139] This is based on SALGA's own assessment reports which are not published, but are presented to Parliament and water boards as part of the consultation process.

While SALGA made input, the extent to which its recommendations (as the voice of local government) have been taken into consideration reveals a loophole in the IGR system which in turn affects both rural local governments (RLG) and urban local governments (ULG) negatively. The water boards do not always implement the comments / inputs from both SALGA and National Treasury, and consultation is a compliance driven exercise that is often not done in good faith and consultation from SALGA's view.[140]

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Constitution of the Republic of South Africa 1996

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Public Finance Management Act 1 of 1999

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[140] This is based on SALGA's own assessment reports which are not published, but are presented to Parliament and water boards as part of the consultation process.

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5.3. Intergovernmental Relations through the Lenses of the Intergovernmental Division of Revenue

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Relevance of the Practice

Division of revenue (DOR) in South Africa is an intergovernmental (IGR) fiscal process in which the national, provincial and organized local government – the South African Local Government Association (SALGA) - as well as the Financial and Fiscal Commission (FFC) play important roles. The Division of Revenue is guided by Section 214 read with Section 227 of the Constitution, which require national government to allocate an equitable share of revenue to provinces and local government from the National Revenue Fund. This allocation of revenue must be done by way of an Act of Parliament – he Division of Revenue Act (DORA). DORA is a money bill, meaning it deals with financial matters and therefore must be approved by both the National Assembly and the National Council of Provinces in terms of Sections 75 and 77 of the Constitution. However, the DORA may not be passed without undergoing a consultative IGR process, wherein the provincial government, organized local government (representing all municipalities, urban and rural) and the Financial and Fiscal Commission are consulted and their recommendations considered (Section 214(2) of the Constitution). The Intergovernmental Fiscal Relations Act establishes the Local Budget Forum for the purpose of consultation with organized local government, and the Budget Council for consultation with the provinces. The division of revenue is an important process which determines the resources that will be made available to local governments in the following year for the fulfilment of their constitutional mandates. The local and provincial equitable share are determined through a formula. This section will now turn its focus to the local sphere of government. The local equitable share varies from municipality to municipality, and ranges from about 10 to 80 per cent of municipal revenue depending on the municipality, and constitutes about 5 per cent of national revenue. Municipalities raise about 60-90 per cent of their own revenue depending on the municipality's capacity, such that metropolitan municipalities often raise the bulk of their revenue, whereas smaller, and especially rural municipalities tend to rely quite heavily on national transfers as they have fewer opportunities for sourcing own revenue and less diversified revenue collection avenues.

Description of the Practice

The Division of Revenue in terms of Section 214 of the Constitution is an interesting feature of the post-Apartheid dispensation in that it marks more clearly, the recognition of local

government as a separate sphere of government, having original powers, and fiscal autonomy to enable it to exercise those powers and perform its listed functions. Whereas in the previous dispensation local governments where creatures of statute, subsidiary to provincial governments, in the new (final 1996) Constitution, local government receives national transfers directly from national government, and also has authority to raise its own revenue through various taxes. It also highlights the distinction between types of local government, as in the first cycle of the DORA metropolitan municipalities and local municipalities received an equitable share allocation, but districts were excluded, until it was rectified in the following year, in response to litigation instituted by district governments.

The Intergovernmental Fiscal Relations Act 97 of 1997 establishes the Local Government Budget Forum as a consultative forum in which local government issues are discussed, and it sets out the process for the division of revenue. Section 8 of the IGR Fiscal Relations Act requires the Division of Revenue Bill to be tabled annually, setting out the allocations to local government (including the equitable share as well as conditional and unconditional grants). The Budget Forum is composed of the Minister of Finance, members of the provincial executive councils (MECs) responsible for finance and organized local government, which is the South African Local Government Association (SALGA). SALGA national branch nominates five representatives, while SALGA provincial branches nominate one representative per province to the Budget Forum. These representatives from SALGA represent both urban and rural municipalities, and they represent all categories of municipalities, that is metropolitan cities, secondary cities, small towns and rural areas. In other words, there is no separate forum for different categories of municipalities, the same IGR forum accommodates all 257 municipalities, and SALGA must find a way to represent their interests. This is obviously not an easy task as the municipalities are diverse and asymmetric in terms of their constitutional and legislative powers and functions. On one hand, the fact that SALGA represents urban and rural municipalities alike in the Budget Forum is an equalizer in the sense that it can place less capacitated municipalities such as rural areas on an equal footing to have their concerns heard, and it can increase their bargaining power in consultations with the national minister, and provincial executive through economies of scale. The Budget Forum is a cooperation forum, and therefore no issues of supervision are likely to arise in the Budget Forum, although it can play a dispute settlement function. Although the Budget Forum is not a decision-making forum as such, and cannot make binding legal decisions, Parliament has an obligation to consider the recommendations of the FFC. Which makes the FFC an additional tool to amplify the voices of organized local government, and present a balanced objective view, devoid of party politics in principle.

The FFC, which is an independent constitutional body is required to make submissions and Parliament is required to take into account various considerations including developmental and other needs of local government and municipalities (Section 214 of the Constitution). However, after the consultations, the final decision-making on the division of revenue lies with Parliament, which consists of the National Assembly and the National Council of Provinces.

Further, although organized local government is permitted to attend the NCOP, it does not have any vote. It is argued that it would be better if capable municipalities, such as metropolitan municipalities were able to participate in the Budget Forum directly, and represent their own interests because they have very large budgets and typically have the capacity to represent their own interests well. Moreover, the concerns of metropolitan municipalities are likely to be different from those of local or district municipalities, especially those districts and local municipalities in rural areas. The main difference between the urban and rural municipalities in this process lies in the categories used in the calculation of the equitable share, which takes into account various factors such as basic services that the municipality is to provide, capacity to raise own revenue, and predictability of division of revenue. Based on these considerations, the allocations to urban and rural municipalities are likely to differ significantly, and it is SALGA's role to flag revenue concerns on behalf of all its members.

The DORA is based on the ability to raise revenue and the nature of spending required to fulfil constitutional obligations. This means in practice that metropolitan cities and some secondary cities are more likely to get a bigger piece of the cake than other smaller and rural municipalities. Secondly, the local equitable share (LES) formula enables municipalities to provide basic services to indigent persons in their municipalities, and enables municipalities with low own revenue, such as category B3 and B4 (rural) municipalities to afford administrative costs and exercise core functions through the institutional and community services components.[141] For example, while rural municipalities have taxing powers in relation to property tax, most rural property is communally owned and tax exempt, so rural municipalities have a smaller tax base and are unable to generate significant own source revenue. This financial autonomy comes with a responsibility because it makes municipalities more directly accountable to their communities. Further, although the DORA is based on anticipated national revenue, the amounts allocated to local government are fixed, such that if the national government fails to raise the anticipated revenue, it bears the shortfall and not the local governments. Thus, this process is crucial to local governments.

Revenue allocation affects several report sections as revenue determines the resources that will be available for the implementation of service delivery (section 2 on local responsibilities),

[141] The Municipal Demarcation Board defines municipal categories as follows: 'B1: Secondary cities: the 19 (9%) local municipalities with the largest budgets. B2: 26 (12%) municipalities with a large town as core. B3: 101 (49%) municipalities with relatively small populations and a significant proportion of urban population but with no large town as core. B4: 59 (29%) Municipalities which are mainly rural with, at most, one or two small towns in their area. C1: 23 (52%) of the district municipalities that are not water services providers and generally have few service delivery functions. C2: 21 (38%) of the district municipalities that are water services providers and often have substantial obligations'. Municipal Demarcation Board, 'Municipal Powers and Functions Capacity Assessment' (2018) <http://www.demarcation.org.za/site/wp-content/uploads/2019/01/MDB-capacity-assessment-Executive-Summary-FINAL-1.pdf> accessed 30 October 2020.

implementation of integrated development plans (section 6 on people's participation), and it deals with finances (section 3 on local finances).

Assessment of the Practice

The objectives of the Budget Forum are to create an IGR forum in which national, provincial and organized local government can consult on fiscal, budgetary and financial matters affecting the local sphere of government, and any proposed legislation or policy with financial implications on local government (Section 6 IGR Fiscal Relations Act).

While the Budget Forum broadly meets its objectives as noted above, the fact that the outcomes of the Budget Forum are not binding, and the FFC can only make recommendations, tends to leave most of the power to the national and provincial government, which sit in the two houses of Parliament. The fact that SALGA does not have a vote in the NCOP further weakens the position of both urban and rural local governments alike in terms of Section 163(b). SALGA is mandated to represent all 257 municipalities, however, the vast differences and inequality between rural and urban municipalities make it difficult for SALGA to represent their unique interests adequately. One of the reasons for this is that SALGA's elected executive committee members (which are the national and provincial representatives) who participate in the Budget Forum, sometimes have difficulty obtaining their members' full mandate if municipalities fail to participate in scheduled meetings and workshops to voice their concerns ahead of the Budget Forum. In instances where SALGA is unable to obtain the mandate from some of its members, this may undermine the aims of the fiscal IGR process that culminates in the division of revenue. Additionally, it presents an opportunity for larger municipalities to assert their interests as they are more likely to submit their mandates to SALGA than smaller, and rural or otherwise less resourced municipalities.

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Constitution of the Republic of South Africa, 1996

Municipal Finance Management Act 56 of 2003

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5.4. Intergovernmental Relations in Integrated Development Planning

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Relevance of the Practice

This practice deals with integrated development planning which is an intergovernmental process involving all three spheres of government – national, provincial and local. Municipal planning is done through a document called the Integrated Development Plan (IDP). Each municipality is required to prepare and adopt its IDP through a process that allows for public participation and this applies uniformly across urban and rural municipalities.[142] The purpose of the IDP is to prepare a strategy for long-term development of the municipality and align this strategy with the resources available to that municipality and to align local municipality's development plans with those of the districts within which the local municipality falls, as well as to align the development plans of all three spheres of government. The IDP is particularly important in the context of South Africa because it seeks to advance socio-economic development and achieve transformation at the local level. First, it pays attention to the municipalities that are lagging behind in terms of service delivery; therefore, in this sense the IDP process is important because it places rural municipalities in the limelight as most rural municipalities have infrastructure backlogs. Secondly, the IDP facilitates the fulfilment of constitutional imperatives of the 'developmental local government' in terms of Section 152 of the Constitution. It also enables municipalities to 'structure and manage [their] administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community' and to 'participate in national and provincial development programmes'. The IDP thus brings to life the development mandate of local governments as set out in Section 152 of the Constitution, and is especially important in the relationship between a district municipality and the local municipalities within the area of the district.

Additionally, the IDP is a process through which the monitoring and support role of provinces with regard to municipalities is highlighted. Section 154(1) of the Constitution requires the national and provincial governments to 'support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their functions'. Although the province cannot change the municipal IDPs, it is required to provide guidance by submitting comments to the municipalities and the municipalities have an obligation to consider those comments. This is in line with the principles of cooperative governments set out in Section 41

[142] See report section 6.3. on Municipal Budgeting and Planning during Covid-19.

of the Constitution. The IDP process also highlights the supervisory role of provincial and national governments in that the municipalities are obligated to report on their performance to the member of the provincial executive responsible for local government, and submit their reports to the (national) Auditor General. The key legislative instruments are the Constitution and the Municipal Systems Act 32 of 2000 (MSA). The White Paper on Local Government, 1998 is the key policy document on the IDP, and it is supported by policies on spatial planning, integrated transport and housing. Practitioners in the field suggest that there is inconsistency and a disconnect between development planning by local, provincial and national government, which undermines national efforts towards coordinated development. This is one of the reasons that support the shift towards a district-led development model (explained in report section 4.4).

What Goes into the IDP?

Section 23 of the Local Government: Municipal Systems Act 32 of 2000 (MSA) requires municipal planning to be development-oriented. The IDP must contain the municipal council's long-term vision for 'critical development and internal transformation needs'. The IDP must align with the provincial and national sectoral plans and all legislation that is binding on municipalities (legislation must be enacted within the functional areas set out in Schedules 4 and 5 of the Constitution). The IDP must also set out the municipality's spatial development framework together with basic guidelines for the land use management system of the municipality (spatial planning is a crucial issue and is discussed under the preliminary assessment of the practice).

Description of the Practice

Section 25 MSA sets out the procedure for the adoption of IDPs. First, every municipal council must adopt an IDP for its municipality within the prescribed period. The IDP must link, integrate and coordinate the strategic plans of the municipality, align the strategic plan with resources, constitute the basis of the municipal budget, and align with national and provincial legislation and development plans. If a municipal council is dissolved, the new council may adopt the existing IDP or adopt a new IDP. National and provincial development plans must holistically align with the IDPs and vice versa. It facilitates community participation in the creation of the IDP, and they can use the same IDP to hold the municipality to account. The IDPs are thus political and transformative in their nature. Rural municipalities typically fall within the area of a district municipality, together with other local municipalities, which may be urban or rural. Section 155(1) of the Constitution stipulates that districts have legislative and executive authority in an area that includes more than one municipality and that local municipalities share their executive and legislative authority with the district municipality in whose area they fall under. This is a two-tiered hierarchical relationship between two types of local government, one with more powers than the other.

Process Flow

Politically, the constitutional negotiations of 1993 did not necessarily give local governments much power, but they did set constitutional principles which then led to the entrenched devolution of powers to local government. The IDP came because of significant transformative policy developments at the end of apartheid. The first policy being the Reconstruction and Development Programme (RDP), which was the African National Congress' manifesto in 1994. Its aim was to dismantle the institutional apartheid frameworks to create racially and economically integrated cities (and municipalities). The Development Facilitation Act 67 of 1995 and policy document- Urban Development Framework, 1997 framed the beginnings of development policy for local government. The White Paper on Local Government, 1998 introduced the IDP, and finally placed local governments at the epicentre of development, and provided for development that is integrated not only in terms of persons – i.e. race, but also in terms of accessibility of economic activity and multi-sectoral development planning, across the three spheres of government.

The Municipal Systems Act 32 of 2000 which followed, furthered the agenda of the White Paper by placing municipal development needs at the centre, and enabling local governments to be the drivers of local economic development, such that sectoral budgetary allocations should reflect the strategic priority areas of the specific municipality as opposed to sector priorities. However, these local priorities are supposed to not only co-exist, but also be in alignment with the national and provincial priorities and development plans and they must be in line with the principles of cooperative government set out in Section 41 of the Constitution and 'cooperation' as required in Section 24 of the Municipal Systems Act. Unfortunately, one of the criticisms of the IDP process is that local and provincial development plans tend to be a cross purposes, and are not often aligned, and that there is no formal IGR structure for consultations on development planning among the three spheres, or even among two, such as between the local and provincial government. Further, Wright argues that South Africa has an 'overlapping-authority' model of IGR in which substantial areas of government functions involve all three spheres of government partly due to concurrent powers, there are few areas of independent autonomy, the overarching principles of cooperation and coordination tend to

limit the power and influence available to each sphere of government.[143] When development priorities at different levels of government are mismatched, this can create challenges.

The case of *Macsand (Pty) Ltd v City of Cape Town and Others* illustrates the divergent priorities of governments at different levels. In this case, Macsand sought to conduct mining operations in terms of a mining permit issued by the national government. However, Macsand did not apply for a local permit to conduct the operations before it began operating. The City of Cape Town then sought an interdict from the High Court of Cape Town to prevent Macsand from mining without a land use permit from the City of Cape Town, and doing so in an area designated by the City as a residential area. The lack of coordination and alignment between the national and local government created legal costs which could have been avoided through consultations ahead of issuing the permit. It also shows that the 'previous' hierarchy between the three spheres is still quite visible and often national or provincial government will try to assert their powers over local governments' development plans. The City of Cape Town is a metropolitan city, with a vibrant economy, well resourced, and raises most of its revenue from own sources. It therefore had the muscle to reject a decision made by the national government that affected a local competence. The situation could have been very different for a rural municipality, with little or no own source revenue, and reliant on transfers from the national government.

The success of the IDP is highly dependent on the collaboration, coordination, cooperation and full participation of each sphere of government, and the meaningful involvement/engagement with local communities (meaning residents, rates payers, civil society organisations and visitors).[144] However, metropolitan cities and urban cities and towns may have more economic or political power than smaller towns and rural areas to assert their local priorities in the face of national and provincial development plans. Moreover, the issue of local government capacity is pervasive as there are often skills and capacity shortages in rural areas to develop the IDP and implement it.

The process of adopting the IDP requires intergovernmental supervision and cooperation. The process is designed to allow on one hand, bottom up community-inclusive local development strategies integrated into provincial and national development strategies, and on the other hand, a top-down monitoring and supervision process. The mechanisms for supervision and cooperation generally apply to urban and rural municipalities in the same manner because the law is framed in terms of the spheres of government and not in terms of categories of local government.

In terms of decision-making, although the municipal council has the responsibility to adopt the IDP, the Member of the (provincial) Executive Committee for Local Government (MEC) has a

[143] P Mbecke and SK Mokoena, 'Fixing the Nexus between Intergovernmental Relations and Integrated Development Plans for Socio-Economic Development: Case of South Africa' (2016) 9(3) African Journal of Public Affairs 99.
[144] ibid.

duty to review the IDP procedurally and substantively at different intervals. The role of the MEC is not to amend the IDP, but to assess the performance of the municipality and compliance with its own IDP by reviewing the key performance indicators, and key performance areas in the IDP and then the MEC can make recommendations. However, in some places, the framing of the law acknowledges asymmetry. For example, provinces are required to take into account the capacity of the municipalities within their province when reviewing municipal IDPs. This implies that an MEC might review a secondary city, which has big budgets and robust economic activity more strictly than a local rural municipality if the MEC takes into account the lack of technical capacity and resources at the rural level.

Assessment of the Practice

Despite this noble approach to planning and gains thus far experienced, several municipalities have struggled with developing meaningful strategic IDPs, and instead many simply have wish lists as opposed to multi-year financial strategies. Success can perhaps be noted from the perspective of municipal staff whose performance is annually reviewed in terms of IDP key performance areas. The IDP improves on the Urban Development Framework because it does not focus on urban municipalities alone; it also applies to rural municipalities. This means rural municipalities have an opportunity to advance and indeed prioritise their own key strategic issues. However, lack of capacity to prepare and implement the IDP continues to be a strain at rural municipalities. Organized local government is not involved in this process. Although the municipal council makes the final decision on the content of the IDP, community members hold the power to influence the content of the IDP through statutory public participation processes. The IDP is theoretically not influenced by the national or provincial government in terms of drafting it. However, because there has to be coherence and alignment across all spheres and across various sectors, the national and provincial spheres do in fact influence or at least set the parameters within which local governments IDPs can be framed. Moreover, rural municipalities have little muscle to push back if national and provincial priorities undermine rural municipality development strategies. For example, in *Maccsand (Pty) Ltd v City of Cape Town and Others* (CCT103/11) (CC) [2012], noted above, the City of Cape Town was able to put its foot down on land use planning permits. In the case a mining investor had been granted a mining permit in Cape Town in an area planned for residential use by the local government. The Court held that where the national government grants mining permits (a national competence) this does not do away with the requirement to comply with municipal land use permits, and thus the mining operations by Maccsand (Pty) Ltd could not proceed pending the said municipal permit. It would be very unlikely that a rural municipality in the same situation would have had the same 'muscle' to challenge the national government, and the outcome would likely have been different. One of criticisms of the IDP is that there is no formalized IGR structure for provinces and municipalities to engage on IDPs and align their

priorities and efforts.[145] This tends to support the calls for a district development model as an alternative which can facilitate coordinated or joint development planning at the district level.[146]

References to Scientific and Non-Scientific Publications

Legal Documents:

Constitution of the Republic of South Africa, 1996

Municipal Systems Act 32 of 2000

Maccsand (Pty) Ltd v City of Cape Town and Others (CCT103/11) (CC) [2012]

Scientific and Non-Scientific Publications:

Mbecke P and Mokoena SK, 'Fixing the Nexus between Intergovernmental Relations and Integrated Development Plans for Socio-Economic Development: Case of South Africa' (2016) 9(3) African Journal of Public Affairs 99

Steytler N and de Visser J, Local Government Law of South Africa (issue 11, LexisNexis 2018)

[145] Mbecke and Mokoena, 'Fixing the Nexus between Intergovernmental Relations and Integrated Development Plans for Socio-Economic Development', above.
[146] See report section 4.4. on a District Coordinated Development Model.

People's Participation in Local Decision-Making

6.1. People's Participation in Local Decision-Making in South Africa: An Introduction

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In South Africa, both representative and participatory forms of democracy are protected at all levels of government. With respect to representative democracy at the local level, local communities have a constitutional right to elect members of municipal councils.[147] Participatory democracy is emphasized in South Africa's system of local governance and is aimed at ensuring accountability, responsiveness and openness.[148] One of the core constitutional objectives for the establishment of local government is to encourage the involvement of communities and community organisations in matters of local governance (Section 152(1)(e) of the Constitution). Municipal governments are therefore required to develop a governance culture that accommodates both representative and participatory democracy.[149]

With respect to participatory democracy, municipalities have a duty to consult and are required to create conditions for and encourage the involvement of the local community[150] in decision-making regarding the level, quality, range and impact of municipal services as well as the available options for service delivery.[151] To further this, local communities are allowed to take part in: the preparation, implementation and review of municipal integrated development plans (IDPs); strategic decisions relating to the provision of municipal services; the preparation of municipal budgets; the establishment, implementation and review of municipal performance management systems as well as in monitoring and reviewing municipal performance, including the outcomes and impact of such performance.[152]

Additionally, municipal administrations are under an obligation to provide full and accurate information to the local community regarding the level and standard of municipal services they

[147] Sec 157 of the Constitution of the Republic of South Africa, 1996 (Constitution) as read with Secs 22 and 23 of the Local Government Municipal Structures Act, 1998.
[148] See the concurring judgment of Sachs J in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) 120 [230].
149 Sec 16, Local Government Municipal Systems Act (Systems Act).
150 The Municipal Systems Act (Sec 1) defines a local community as comprising: the residents of the municipality; the ratepayers of the municipality; any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality; as well as visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality. The act lays special emphasis on the poor and other disadvantaged sections of this body of persons.
[151] Sec 4(2) as read with Sec 16 of the Systems Act.
[152] Sec 16(1)(a), Systems Act.

are entitled to receive, the costs involved, their rights and duties as well as the available mechanisms of community participation.[153] Moreover, members of the local community have the right to be informed of decisions taken by the political structures at the local level, which may affect their rights, property and reasonable expectations.[154]

To discharge the above obligation, municipalities are required to establish appropriate mechanisms, processes and procedures to enable the local community to participate in the affairs of the municipality.[155] In this respect, municipalities are allowed to establish subcouncils[156] and ward committees[157] which serve as the main participatory structures at the local level.[158] Also, communications done by municipalities to the local community are required to be done through local or regional newspapers or radio broadcast covering the area of the municipality.[159] Additionally, municipalities are required to establish their own official websites (if affordable) or otherwise provide information for display on an organised local government website sponsored or facilitated by the National Treasury.[160]

In facilitating participation, municipalities are required to take into account the special needs of people who cannot read or write, people with disabilities, women and other disadvantaged groups.[161] When communicating to the local community, municipalities are obligated to take into account language preferences and usage in the municipality as well as other special needs of people who cannot read or write. The Guidelines for Implementing Multilingualism in Local Government issued by the Department of Provincial and Local Government (now called the Department for Cooperative Government and Traditional Affairs) encourage municipal councils, through ward committees to consult local communities in the preparation of a municipal language policy that is then used for purposes of ensuring community

[153] Sec 6(2)(e) and (f) as read with secs 18 and 95 of the Systems Act.
[154] Sec 5(1), Systems Act.
[155] Sec 17(2), Systems Act.
[156] Subcouncils are made up of those elected councillors representing the wards that constitute the designated area of the municipality as well as an additional number of councillors elected to the municipal council by way of party lists. The latter are appointed by political parties according to their representation in the municipal council. See Sec 63 as read with Schedule 4 of the Municipal Structures Act.
[157] A ward committee is made up of the councillor representing the specific ward and an additional number of not more than ten persons. The latter are elected in accordance with rules laid down by the municipal council and which are aimed at ensuring gender equity as well as the representation of the ward's diverse interests. See Sec 73 of the Municipal Structures Act.
[158] Sec 7 (d) and (e), Structures Act; Nico Steytler and Jaap De Visser, *Local Government Law of South Africa* (LexisNexis 2016) 6-12(3) – 6-13.
[159] Sec 21 (1), Systems Act.
[160] Sec 21B, Systems Act.
[161] Sec 17(3), Systems Act.

participation.[162] This is key in facilitating participation in both rural and urban local governments.

To participate, members of the local community have the right to submit written or oral recommendations, representations and complaints to the political structures at the local government level and to receive prompt responses to them.[163] Municipalities are in return required to provide for: the receipt, processing and consideration of petitions and complaints; notification and public comment procedures; public meetings and hearings by municipal councils and other local political structures; consultative processes with locally recognised community organisations as well as traditional authorities and to also make provision for forums to report back to the local communities.[164] Additionally, the meetings of a municipal council on the municipality's annual report are required to be open to the public and reasonable time allowed for members of the local community to address the council and for the discussion of any written submissions received from the local community.[165]

To ensure local participatory processes are undertaken, municipalities are required, when submitting a copy of their adopted IDP to the provincial government, to provide a summary of the process followed and a statement that the required process, which includes community participation, has been complied with (also see WP4 on IDP).[166] Where this has not been done, the provincial government is mandated to request the relevant municipal council to comply with the required process and make consequential adjustments to the IDP.[167] However, in practice, this constitutes a weak form of oversight given that the provincial government mainly focuses on alignment with intergovernmental relations issues and less on public participation.

This has given room for a more robust role by the courts in ensuring reasonable public participation through judicial review. In instances where there are allegations of a failure of public involvement, the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly and Others* [168]developed a reasonableness test to be applied in determining whether the degree of involvement met the Constitutional requirement for participation.[169] The test outlines a set of general factors for consideration which include: the nature and importance of the decision; efficiency of decision-making in terms of time and expense; intensity of the decision's impact on the public and whether there was any urgency that informed the decision. Whereas this standard was developed in light of involvement with Parliament and provincial legislatures, Steytler and De Visser argue that 'a municipality's efforts

[162] Leah Cohen, 'Guidelines of Multilingualism in Local Government: Ambitious Rhetoric or a Realisable Goal?' (2008) 10 Local Government Bulletin.
[163] Sec 5(1), Systems Act.
[164] Sec 17(2), Systems Act.
[165] Sec 130, Local Government Municipal Finance Management Act (MFMA).
[166] Sec 32(1)(a) and (b), Systems Act.
[167] Sec 32(2), Systems Act.
[168] (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) 120.
[169] Steytler and De Visser, *Local Government Law of South Africa*, above, 6-16.

at involving the local community must meet the same standard of reasonableness.'[170] Subsequent court decisions such as the case of *Borbet South Africa (Pty) Ltd and Others v Nelson Mandela Bay Municipality*[171] have actually held that the standard is even higher for municipalities.

Additionally, the courts have been liberal with the question of standing such as to allow community members and community organisations the right to initiate proceedings against local governments on questions of public participation.[172] This was the approach adopted by the court in *Stellenbosch Ratepayers' Association v Stellenbosch Municipality*[173] as well as in *Mnquma Local Municipality and Another v The Premier of the Eastern Cape and Others.*[174] The courts in both cases adopted a broad approach to standing to allow a ratepayers' association and members of the community respectively to bring cases contesting subnational decisions on the basis of want of public participation.[175]

To facilitate participatory democracy at the local government level, municipalities are allowed to use their resources and to annually allocate funds in their budgets for purposes of ensuring community participation.[176]

When making regulations or issuing guidelines regarding community participation at the local government level, the minister for local government is required to differentiate between different kinds of municipalities according to their respective capacities to comply with the statutory provisions for public participation[177] including making provision for phased application of public participation requirements that have a financial or administrative burden.[178] While this was key in ensuring the accommodation of both urban and rural municipalities by allowing them to undertake participatory processes with due regard to their respective capacities, the provisions are currently equally applicable to all municipalities.[179]

References to Scientific and Non-Scientific Publications

Legal Documents:

Constitution of the Republic of South Africa, 1996

[170] ibid.
[171] (3751/2011) [2014] ZAECPEHC 35; 2014 (5) SA 256 (ECP) (The Borbet Case).
[172] Steytler and De Visser, *Local Government Law of South Africa*, above, 6-7.
[173] [2009] JOL 24616 (WCC) [17].
[174] (231/2009) [2009] ZAECBHC 14 (5 August 2009).
[175] Steytler and De Visser, *Local Government Law of South Africa*, above, 6-7.
[176] Sec 16, Systems Act.
[177] Sec 22(2)(a), Systems Act.
[178] Sec 22, Systems Act.
[179] Steytler and De Visser, *Local Government Law of South Africa*, above, 6-20.

Local Government: Municipal Structures Act 117 of 1998

Local Government: Municipal Systems Act 32 of 2000

Local Government: Municipal Finance Management Act 56 of 2003

Borbet South Africa (Pty) Ltd and Others v Nelson Mandela Bay Municipality (3751/2011) [2014] ZAECPEHC 35; 2014 (5) SA 256 (ECP)

Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)

Mnquma Local Municipality and Another v The Premier of the Eastern Cape and Others (231/2009) [2009] ZAECBHC 14 (5 August 2009)

S*tellenbosch Ratepayers' Association v Stellenbosch Municipality* [2009] JOL 24616 (WCC) [17]

Scientific and Non-Scientific Publications:

Cohen L, 'Guidelines of Multilingualism in Local Government: Ambitious Rhetoric or a Realisable Goal?' (2008) 10 Local Government Bulletin

Steytler N and De Visser J, *Local Government Law of South Africa* (LexisNexis 2016)

6.2. Participatory Budgeting

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Relevance of the Practice

The 'community of the municipality' is recognized under the Municipal Systems Act as one of the constituent components of the municipality thus speaking to the question of the structure of local government under report section 4 and the integral position occupied by the community in this regard.[180] Budgeting on the other hand touches on the expenditure responsibilities and responsibility for the delivery of public services by local governments under report section 2 as well as municipal financial arrangements, especially own source revenues intended to incentivise local participation, under report section 3. Participatory budgeting also touches on report section 5 on intergovernmental relations in the sense that provincial governments and the national treasury play a role in monitoring the compliance of municipalities participating in compulsory consultative processes. Participatory budgeting is therefore critical for the LoGov-project in the sense that it speaks to all five report sections.

Additionally, participatory budgeting by definition brings out the plurality of actors involved, ranging from ordinary citizens to community groups and interest groups mainly drawn from the private sector and civil society given the implication of the budget process on local taxes, levies and charges. The diversity of these actors and the attendant level of skills required to facilitate meaningful participation brings out how differently participatory budgeting is experienced in rural as compared to urban local governments.

One of the objects of local government under the South African Constitution is to 'encourage the involvement of communities and community organisations in the matters of local government' (Section 152(1)(e)). The aim is to ensure that the subnational developmental agenda is set by the people at the local levels. The budgeting process allows municipalities to set their expenditure priorities that drive subnational development. In this respect, municipalities are required to structure and manage their budgeting processes to give priority to the basic needs of the community (Section 153(a) of the Constitution). Participatory budgeting is, therefore, key in ensuring this is achieved.

[180] Sec 2(b), Systems Act.

Description of the Practice

Participatory budgeting requires the involvement of local communities in budgetary decision-making that informs the implementation of plans contained in local government IDPs as well as in monitoring public spending.[181] The budget cycle consists of four phases: budget formulation, budget approval, budget implementation and audit.[182] While each of these phases involves key decision-making that would require public participation, this section shall focus on the first two phases which are key in giving communities a chance to set local expenditure priorities. The Constitution, the Local Government Municipal Finance Management Act (MFMA) as well as the Local Government Municipal Systems Act (Systems Act) regulate participatory budgeting by local governments. Section 215(1) of the Constitution requires municipal budgets and budget processes to promote transparency, accountability and effective financial management. This is achieved in practice through participatory processes. It is important to note that the Municipal Systems Act which sets out the requirements for public participation does not distinguish between urban and rural municipalities, such that the same provisions equally apply to rural and urban municipalities.

The mayor (and in the case of a municipality which does not have a mayor, the 'designated councillor')[183] and the municipal manager are the main players in the process of budget formation.[184] The mayor is required to provide general political guidance over the process and the priorities that guide budget preparation.[185] The municipal manager is required to offer necessary administrative support to the mayor in carrying out this function.[186]

A municipal manager is required, once an annual budget is tabled (introduced for debate and adoption) in a municipal council, to make the budget and any supporting documentation available to the public and to invite the local community to submit representations in connection with the budget.[187] The mayor of a municipality is required to coordinate the annual budget preparation process and is in this regard required to undertake all vertical and horizontal consultative processes involving the national, provincial, and district municipalities as well as other local municipalities.[188] Once the annual budget is tabled before the municipal council, the council is required to consider the views of the local community and give the mayor

[181] Noluthando S Matsiliza 'Participatory Budgeting for Sustainable Local Governance in South Africa' (2012) 47 Journal of Public Administration 223.
[182] Dullah Omar Institute (DOI) and International Budget Partnership (IPB) South Africa, 'Measuring Transparency, Public Participation and Oversight in the Budget Processes of South Africa's Metropolitan Municipalities: Findings from the 2019 Metro Open Budget Survey' (2019) 5.
[183] Sec 57, Local Government Municipal Finance Management Act (MFMA).
[184] Sec 16(2), MFMA.
[185] Sec 53(1)(a), MFMA.
[186] Sec 68, MFMA.
[187] Sec 22, MFMA.
[188] Sec 21(2), MFMA.

an opportunity to respond to the views and, if necessary, to revise the budget and table amendments for consideration by the council.[189] This forms the main entry point for public participation with respect to the formulation of municipal budgets.

The courts have been insistent on the need for and the quality of participation in the budget process at the local level. For instance, the High Court, in the *Borbet* case, emphasized that municipalities have a special obligation to ensure the participation of the public when it comes to the budget. The Court stated that this obligation extends beyond the formalities of availing information and hosting public meetings, and requires municipalities to ensure and demonstrate that the processes of public participation result in meaningful engagement with local communities. In this regard, municipalities are required to 'put in place mechanisms that create conditions for public participation and that build the capacity of communities to participate'.[190] They are also required to 'allocate resources to the task and to ensure that the political and other structures established by legislation are employed to meet the objectives of effective public participation'.[191] However, as to what degree or what methodologies of participation constitute effective and meaningful engagement, the Constitutional Court subjects this to the discretion of the respective legislative body based on the context of each case as long as it can be demonstrated that whatever measures were undertaken were objectively reasonable in the circumstances.[192] The reasonableness test established in the Doctors for Life case above is applied in such an instance.

However, where a specific budgetary proposal affects a target community or group of persons, courts have required that municipalities make an extra effort to ensure that this affected group is specifically consulted on the proposals. This is the position adopted by the Supreme Court of Appeal in *South African Property Owners Association v Council of the City of Johannesburg Metropolitan Municipality and Others.*[193] In this case, the City of Johannesburg proposed increases in property rates on business premises as a last minute inclusion to fill up gaps noted in the budget without following the required consultation process under the Municipal Property Rates Act and the Systems Act.[194] The Court, in holding that the process was unlawful, stated that the Property Owners Association who stood to be affected the most by the proposed levy ought to have been involved.

The Municipal Finance Management Act gives the National Treasury with the assistance of provincial treasuries general oversight over municipal budgets to monitor, provide support and ensure compliance with provisions of the act, key among them being the requirement for

[189] Sec 23, MFMA.
[190] *Borbet South Africa (Pty) Ltd and Others v Nelson Mandela Bay Municipality* (3751/2011) [2014] ZAECPEHC 35; 2014 (5) SA 256 (ECP) (The Borbet Case) [80].
[191] ibid.
[192] The Borbet Case [68]-[82].
[193] 2013 (1) BCLR 87 (SCA) paras 35-37; See also Nico Steytler and Jaap De Visser, *Local Government Law of South Africa* (LexisNexis 2016) 6-12(2).
[194] Steytler and De Visser, *Local Government Law of South Africa*, above, 6-12(2).

public participation in the budget process.[195] Municipalities, however, retain their constitutional mandate of adopting their own budgets. In carrying out their oversight role, national and provincial treasuries therefore rely on municipal declarations that public participation was undertaken and the detailing of the specific processes in municipal reports but have no control over the quality of participation as this falls in the exclusive arena of municipalities.

Assessment of the Practice

A budget serves as a local government's primary economic policy tool and feeds two critical goals that are of central interest to the community: that of translating policy objectives contained in IDPs into real life projects based on existing revenue and the other of structuring and re-structuring income sources to raise additional revenue.[196] In this respect, the community has an interest in shaping the local government's priority areas while at the same time playing a role in determining how such prioritisation will affect them in terms of revenue sourcing. Participatory budgeting also aims to ensure transparency and inclusiveness in the allocation of public resources in a bid to foster social justice through their equitable distribution.[197] The scope of those involved in the process is covered in the definition of who constitutes the 'local community'. Section 1 of the Municipal Systems Act defines a local community as comprising of:

> 'the residents of the municipality; the ratepayers of the municipality; any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality; as well as visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality.'[198]

The Preamble and various sections in the Municipal Systems Act place special emphasis on the poor and other disadvantaged sections of this body of persons.[199] Moreover, there is no specific differentiation or exclusion from participation in practice. Where a particular group is affected, there is a duty on local government to facilitate their involvement. For example, where a specific budgetary proposal affects a specific community or group of persons, local governments have a duty to make an extra effort to ensure that this affected group is specifically consulted on the proposals as per the *South African Property Owners Association v Council of the City of Johannesburg Metropolitan Municipality and Others* case discussed

[195] Sec 5(2)(a) as read with Secs 5(3)(c); 5(4)(a) and 27(1).
[196] Marcel Reutener and David Fourie, 'The Role of Civic Participation in the South African Budgeting Process' (2015) 4 Public and Municipal Finance 7.
[197] Matsiliza 'Participatory Budgeting for Sustainable Local Governance in South Africa', above, 443 and 445.
[198] Act 32 of 2000.
[199] Act 32 of 2000.

above.[200] Moreover, to ensure inclusivity, municipalities have a responsibility to take into account the special needs of people who cannot read or write, people with disabilities, women and other disadvantaged groups, as well as language.[201]

Whereas participatory budgeting gives room for community involvement, it is not enough to require that the municipal manager makes the budget and documentation 'available to the public'.[202] There is need to specifically require that a notice be published in a newspaper of general circulation informing the public of the availability of the budget for scrutiny; inviting comments and specifying dates for receipt of comments as well as for public hearings for feedback and contributions on the draft budget.[203] While this may be key in ensuring that the information reaches most people, it is more appropriate for urban municipalities where a majority have access to newspapers. Alternative arrangements should be made by rural municipalities to ensure that the community can actually access the necessary documentation whenever this is made available to the public. And even then, rural communities would still have access challenges due to the long distances that exist between individual villages and local government offices as a result of the interplay between rural settlement patterns and ward population quotas.[204] This is less of a challenge in urban municipalities which meet the ward population quotas within smaller areas hence facilitating ease in physical access to municipal offices.[205]

Additionally, the timing of participation comes too late in the process given it is required at the budget-adoption/tabling stage rather than at the budget-preparation stage.[206] This perhaps explains findings from an Open Budgets Survey conducted across metropolitan municipalities that indicated stronger performance in public participation at the budget approval phase as compared to the budget preparation phase.[207] Further, revision of the budget by the mayor at this stage is conditional on its being 'necessary'[208] which thereby constricts the chance that public comments will have much effect on the final form of the budget. Community participation hence needs to be required at the level of preparation to give the public more latitude to make contributions that will set the objectives and propose alternatives that will generally shape the budget rather than seek to amend an already formulated budget. This way,

[200] 2013 (1) BCLR 87 (SCA) paras 35-37; See also Steytler and De Visser, *Local Government Law of South Africa*, above, 6-12(2); also see the Introduction to People's Participation in Local Decision-Making, report section 6.2.
[201] Sec 17(3), Systems Act.
[202] Sec 22, MFMA.
[203] Itumeleng J Motale, 'Public Participation Strategy for Budgeting in Local Government: The Case of Tlokwe Local Municipality' (Masters Dissertation, North-West University 2012) 54.
[204] Interview with Nontando Ngamlana, Executive Role, Civil Society Organisation (1 April 2021).
[205] Interview with Nontando Ngamlana, above.
[206] Motale, 'Public Participation Strategy for Budgeting in Local Government', above, 55; Sec 23 (1), MFMA.
[207] DOI and IBP South Africa, 'Measuring Transparency, Public Participation and Oversight in the Budget Processes of South Africa's Metropolitan Municipalities', above, 3 and 14.
[208] Sec 23(2)(b), MFMA.

the goal of public participation as a tool to inform rather than comment on decision-making will be achieved.

However, it is worth noting that the Systems Act gives municipalities a free hand to design levels and processes of participation.[209] In this respect, different municipalities undertake participation at different stages in the budget formation process. Notwithstanding, as highlighted above, participation at the budget formulation stage in metropolitan municipalities is still weak.[210]

The following challenges stand in the way of effective public participation with respect of budget formulation in municipalities. First, budget literacy levels, i.e. the capacity of members of the local community to meaningfully engage with technical budgetary language and analyse budget portfolios varies with education levels. This is worsened by the highly technical and complicated nature of budget templates that the National Treasury requires municipalities to use in their budgeting.[211] This thus stifles the process of community engagement in the sense that very few people develop interest to take part in the public fora where budgetary discussions and prioritisation take place.[212] The few that have the capacity are usually elites who may not always represent the interests of the local community especially the poor and marginalised with respect to budgetary priorities thus hampering effective participation. This difference is more pronounced in rural municipalities compared to urban municipalities. This problem therefore requires that municipalities present simple and realistic budget choices to communities rather than the usual complex budget documents so that communities can effectively take part in budgetary decision-making, especially in areas where there are low literacy levels.

Second, revenue fluctuations and volatile financial bases among municipalities,[213] i.e. the amount of revenue collected fluctuates across municipalities depending on the size and level of urbanisation. Some rural communities are unable to provide sufficient revenue to administer municipal affairs.[214] There is furthermore little or no interest by donors to develop such municipalities. The result is municipalities that lack in a revenue base sufficient to cater for the various needs of the local communities. Community participation in such contexts is highly hampered by the fear of municipalities promising more than they can deliver. This then

[209] Sec 17, Systems Act.
[210] DOI and IBP South Africa, 'Measuring Transparency, Public Participation and Oversight in the Budget Processes of South Africa's Metropolitan Municipalities', above, 3 and 14.
[211] Interview with Nontando Ngamlana, above.
[212] Matsiliza 'Participatory Budgeting for Sustainable Local Governance in South Africa', above, 450.
[213] ibid 447.
[214] ibid 449.

furnishes pretext for participation being undertaken as a formality to meet the minimum legal requirements.[215]

Third, inflexibility in capital spending. Most capital spending at the municipal level (which is the most important for public participation) is usually planned years ahead thus leaving little room for making changes in subsequent annual budgets. This therefore limits the scope of input that could have come from participatory processes. Moreover, especially for rural municipalities, capital spending is mainly funded through conditional grants from the national government which come with predetermined conditions that are largely not negotiable. Therefore, although the law creates the impression that everything in the municipal budget is negotiable, discretion in capital spending is often limited thus constraining the room for and the significance of public participation.

Despite South Africa having an elaborate system for public participation, its local governments still experience a high rate of protests. While this may be indicative of a failure of the quality of formal participation, it may also be a symptom of the disconnect that exists between pre-budget participation (both at the formulation and approval phases) and participation at the implementation stage. Moreover, it can also be seen as informal participation in invented spaces. There is, therefore, need to ensure quality participation in all the phases of the budget process. Notwithstanding, such protests, being an informal form of participation, have been key in producing policy changes on broader issues and highlighting weaknesses and failures in local systems of participatory democracy thus giving room for improvement or intervention by other spheres of government.

Notwithstanding, the urban-rural divide is evident with respect to the nature and extent of participation that is undertaken by South African municipalities. Legislative measures aimed at differentiation and asymmetry have however been put in place in an attempt to bridge the divide by accommodating the peculiarities of the various categories of local government in terms of the extent of their resources and the uniqueness of their demographics. While the differentiation has gone a long way in increasing room for participation in rural municipalities, urban municipalities nonetheless enjoy higher levels of participation due to the advantages of budget literacy and better access to budgetary information as well as having steady and wider pools of own-source revenue compared to rural municipalities.

[215] The World Bank 'Accountability in Public Services in South Africa' (2011) 62 <http://siteresources.worldbank.org/INTSOUTHAFRICA/Resources/Accountability_in_Public_Services_in_Africa.pdf> accessed 2 December 2019.

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Matsiliza NS, 'Participatory Budgeting for Sustainable Local Governance in South Africa' (2012) 47 Journal of Public Administration 223

Steytler N and De Visser J, *Local Government Law of South Africa* (LexisNexis 2016)

The World Bank, 'Accountability in Public Services in South Africa' (2011) <http://siteresources.worldbank.org/INTSOUTHAFRICA/Resources/Accountability_in_Public_Services_in_Africa.pdf> accessed 2 December 2019

6.3. Municipal Budgeting and Planning during Covid-19

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Relevance of the Practice

A municipality's Integrated Development Plan (IDP) is a five-year strategic plan, where the many interests, wishes and preferences of a municipal community are mediated and put into action. The municipality's budget allocates resources to this plan. Each year, municipalities review their IDPs and pass a budget for their financial year, which runs from 1 July to 30 June.[216] The IDP is an important decision-making process in which municipal councils are legally obligated to enable the participation of the local community, which comprises of residents, ratepayers, civil society and visitors in terms of Section 1 of the Municipal Systems Act. [217] As will be shown below, the disruptions flowing from Covid-19 have had differential impacts between and within urban and rural local governments and have significant implications for inclusive participation and good governance.

Description of the Practice

This practice note highlights how the legal framework for the IDP process has changed during Covid-19 and what this has meant for public participation. The focus is on the overarching principle that municipalities must encourage and create conditions for local communities to participate in the formulation (and review) of the IDP and in the adoption of budgets, including budget related policies (Section 16(1) Municipal Systems Act (MSA), Act 32 of 2000).

Municipal Budgets

Municipal Budgeting in Normal Times

The process of reviewing the IDP is coordinated by the mayor who must work closely with the Municipal Manager (MM) on this in terms of Section 21(1) Municipal Finance Management Act (MFMA), Act 56 of 2003.[218] This is governed by the Municipal Systems Act and its regulations, which provide that changes to the IDP must be published for public comment for at least 21 days (Regulation 3(4)(b) Municipal Systems Regulations, 2001). This IDP (revised or not) must inform the municipality's budget.

[216] See report section 5 on Intergovernmental Relations of Local Governments.
[217] Sections 5(1)(c) and 16(1) Municipal Systems Act 32 of 2000.
[218] See report section 5 on Intergovernmental Relations of Local Governments.

The budget process,[219] also coordinated by the mayor (working with the MM and the chief financial officer) is governed by the MFMA. This Act instructs the mayor to table a budget in the council before the end of March of each year (Section 16(2) MFMA). It must be accompanied by key policies and resolutions, for example any IDP amendments, rates and tariff increases, and indigent policies. All of this must be published and the local community must be invited to comment (Section 22(a)(i)(ii) MFMA). The Municipal Systems Act identifies rate payers, residents, civil society and visitors as constituting 'the community' as noted above. [220] The Municipal Systems Act places a special focus on vulnerable groups within the community such as the poor and disadvantaged, which brings the homeless and informal residents into the definition of community.[221] Section 19(3) of the Municipal Structures Act requires municipal councils to develop mechanisms to consult the community, and especially to consult community organisations, and where necessary to consult traditional authorities.[222] Further, in *Matatiele*,[223] the Constitutional Court rejected the argument that elected officials can speak on behalf of the electorate and thereby fulfil the requirements of participatory democracy. Therefore, the courts recognise the rights of communities, including ratepayers associations, to comment, and if they are denied the opportunity to comment, to litigate.[224] The budget must also be submitted to other stakeholders, such as the National Treasury and the provincial treasury (Section 22(b) MFMA). The council must consider all the submissions on the budget (Section 23(1) MFMA) and must allow the mayor an opportunity to respond to the submissions. The entire council is expected to engage with the budget tabled by the mayor and the inputs of the community. When necessary, the mayor may revise the budget and table an amended budget to the council for consideration (Section 23(2) MFMA). The council must meet to consider the budget before 30 May (Section 24(1)(2) MFMA). If the council does not approve the budget, it must reconsider and take another vote within seven days (Section 25(1) MFMA). This must be repeated until a budget is approved. If by 1 July (the start of the financial year for municipalities), a municipality does not have an approved budget, the provincial government intervenes. Section 139(4) of the Constitution requires that if a municipality fails to approve its budget, the provincial executive must intervene by taking appropriate steps to ensure the adoption of the budget, such as by dissolving the municipal council, and appointing an administrator and approving a temporary budget.

The 2020-2021 Municipal Budget Process

[219] See report section 5 on Intergovernmental Relations of Local Governments.
[220] Nico Steytler and Jaap de Visser, *Local Government Law in South Africa* (Juta 2018) 6-5.
[221] ibid.
[222] Also see Section 17(2)(d) Municipal Systems Act, and the Traditional Leadership and Governance Framework Act 41 of 2003.
[223] *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC).
[224] For example, see *Stellenbosch Ratepayers' Association v Stellenbosch Municipality* 2009] JOL 24616 (WCC) para 17.

It is clear from the above that the period between the end of March and the end of May is a crucial time in the municipal calendar. Preparations for the budget start much earlier but these two months are very intense, particularly when it comes to (1) public participation and (2) the council engaging with the budget. Covid-19 hit South Africa's shores in March. As a result, this crucial period for municipalities coincided almost precisely with an unprecedented lockdown. It was therefore impossible for municipalities to adhere to the above regime. The legal regime itself also underwent many changes.

Shortly after the lockdown was announced on 23 March 2020, the Minister of Cooperative Governance and Traditional Affairs (COGTA) issued regulations and directions in terms of Section 27(2) of the Disaster Management Act of 2002. These prohibited municipalities from convening council and community meetings. This immediately made all physical community engagement on the proposed changes to the IDP and 2020-2021 budget impossible. The Minister instructed all municipalities to cede all executive authority related to the pandemic to the mayor and the municipal manager, who were to report to council after the state of disaster.

On 30 March, the National Treasury exempted all municipalities from undertaking actions required by the MFMA during the period of the national state of disaster. Municipalities and municipal entities will instead be required to undertake such actions within 30 days after the national state of disaster lapsed or is terminated. While the MFMA exemption freed municipalities of many strictures related to budgeting and financial management, there was no similar exemption in terms of the Municipal Systems Act. When it came to the review of the IDP, therefore, municipalities were still required to comply with the act and facilitate public participation in the IDP review process, including the abovementioned 21-day consultation period.

With the slow easing of the lockdown, the legal regime for municipal governance and budgeting was changed again on 7 May 2020. The Directions were amended to provide that municipalities were required to perform various legislated functions including the adoption of IDPs, deliver municipal services and collect revenue (Amended Direction 6.7.1). They were instructed to ensure, that, in doing so 'there is strict adherence to all Covid-19 public health and containment prescripts, especially those relating to gatherings, physical distancing, health and safety' (Amended Direction 6.7.2).

The ban on council meetings was lifted and municipalities were now instructed to convene meetings via online platforms, such as teleconferencing and video conferencing (Amended Direction 6.7.3). This inevitably brought the digital divide to the forefront. When reviewing IDPs and drafting budgets, municipalities were still required to consult communities despite the ban on gatherings. They were directed to replace contact sessions for such consultations with alternative methods of consultation, including the media (Amended Direction 6.7.4(b)). Council meetings are required to be open to public participation, therefore Amended Direction 6.7.4(b) presents a big hurdle for inclusive participation especially for community members who do not have access to digital devices such as smart phones, and computers, or who do not

have access to data. Consequently, a process that would have enabled communities, especially vulnerable members of communities, to share their views, inevitably became an elitist affair, and a further barrier to public participation in council meetings. Further, the practical experiences in municipalities highlight that although the digital divide is typically associated with the urban and rural cleavage, in practice, the digital divide within urban centres meant the provision or denial of public participation in council meetings where crucial processes such as the budget and IDP were discussed. There is economic inequality within urban centres which perpetuates the digital divide within urban centres, in addition to the digital divided between urban and rural areas. In terms of municipalities themselves, urban areas comprise of metropolitan cities, secondary cities, and small towns which all have different budgets and different financial and human resource capacities, and these factors can influence their use of digital platforms. Additionally, the communities living within the urban centres and rural areas also experience inequalities and the digital divide. Disadvantaged communities (such as low-income earners, the indigent and the homeless) tend to have less access to digital devices, and also less access to money to pay for internet access, which is exacerbated by the relatively high costs of data from telecommunication service providers in the country keeping in mind that over half of the population – that is 30.4 million, live below the poverty line.[225] This meant that the majority of the population would not have been able to participate in online processes, and it is the minority that would have been able to participate on digital platforms. This also means that communities' space for contestation was limited as they could not participate in meetings where they could hold their municipal councillors accountable, further embedding inequalities between those who can speak out about their frustrations because they have data and phones or computers, and those who cannot, because they do not have data, smart phones or computers.

The prohibition on community gatherings meant that contact sessions to consult communities on the IDP and the budget remained impossible. This would have excluded communities from the budget process if municipalities did not seek alternatives. Some municipalities used community radio and social media to broadcast their tabled budgets. There were also municipalities that used email or messaging services (WhatsApp) to solicit inputs, or even developed dedicated apps to receive inputs. However, these innovative methods varied across municipalities, and depended on the creativeness of the municipality, its access to resources, and the capacity of the municipality including human resources.

The Special Adjustments Budget

During Covid-19, municipalities were given an additional opportunity to pass an adjustments budget. Municipalities were permitted to pass a special adjustment to their 2019/20 budgets.

[225] 55.5% of the population is below the poverty line as at 2015. The figures are calculated using the upper-bound poverty line (UBPL) of R992 per person per month (pppm) in 2015 prices. See Statistics South Africa, 'Poverty Trends in South Africa An examination of absolute poverty between 2006 and 2015' (2017) Statistics South Africa: Pretoria.

These have to be tabled by 15 June 2020. This enables municipalities to legalise expenditure related to Covid-19 which had not been catered for in their 2019/20 budgets. These adjustments may only relate to funding for Covid-19 related responses. The law does not compel municipalities to undertake public participation with respect to the adjustment budget.

Council (and Committee) Meetings

Budget and IDP processes are tabled and debated in council meetings. As mentioned above, municipal councils were initially prohibited from convening any council and committee meetings. On 7 May, government changed direction and instructed all municipalities to conduct virtual meetings using online medium platforms (Amended Direction 6.7.3. and 6.7.4 (a)). During the second half of May, municipalities across the country thus held their first-ever virtual meetings. It was a baptism of fire, given the fact that this first-ever virtual meeting was perhaps the most important meeting of the year, namely the adoption of the 2020-2021 budgets. Municipalities were therefore thrust into a new era of virtual council meetings with little time to adjust.

An example of this was that few, if any municipality had made provision for virtual meetings in their rules of order, i.e. the rules that govern council and committee meetings. SALGA assisted by developing generic rules for online meetings and sittings, by way of the SALGA 'General Rules for Virtual Meetings or Sittings', Circular no 18/2020, 11 May 2020. It invited its members to consider, customise and adopt these rules. These draft rules cover issues, such as notice of meetings, decision-making and voting, and the facilitation of public involvement.

What does this new way of conducting council meetings mean for transparency and public participation in local government? The legislation is clear: municipalities must be transparent about their meetings and allow public admission into their meetings. In short, these are the rules:

The Municipal Systems Act requires all meetings of the municipal council to be open to the public. Municipalities may provide for limited circumstances when it is reasonable to close the meeting to the public (Section 20(1) Municipal Systems Act). In any event, meetings on the IDP and the budget must always be open to the public (Section 20(2) Municipal Systems Act). The same rules apply to meetings of committees of the council (including executive committees and mayoral committees). The Municipal Systems Act also directs municipalities to provide space for the public in council chambers and in any other places where the council and its committees meet (Section 20(4)(a) Municipal Systems Act). Municipalities are required to build the capacity of their respective communities, councillors and staff to foster effective community participation. Every municipality must set aside a budget every year to fund this (Section 16(1)(b) Municipal Systems Act).

What does this mean in the era of virtual meetings? Virtual council meetings were a necessary innovation to counter the challenges presented by Covid-19. However, there is more to it. They present both opportunities and challenges for transparency and public participation. Virtual

meetings can undermine transparency and public involvement when they are not livestreamed and the public is excluded. On the other hand, if they are livestreamed, do they perhaps open up local democracy for the local community? If so, this could be a positive development coming out of our experience with Covid-19 and would meet dual purposes, information sharing by municipalities, and taking up both information from the local community through online platforms including social media. When being physically present is not required, members of the public no longer need to navigate distance and competing diaries, to be part of a council meeting. Instead, it is possible to attend council meetings from anywhere. However, in light of the lack of access to digital devices, high cost of data, and poor telecommunications infrastructure in rural areas, it is more likely for municipalities in rural areas to be unable to make use of this opportunity, and if members of the community do not have data and/or devices to view the meetings, it has the opposite effect, namely making access something for the privileged few. In large urban centres such as metropolitan cities and secondary cities on the other hand, there could be positive outcomes in terms of participatory democracy.

In this context, the abovementioned instruction on municipalities to build capacity for community participation takes on a new form. Now that we are in the world of virtual meetings, what forms does such capacity building take? Should this include municipalities reprioritising their budgets to fund innovative ways of enabling and promoting community participation and transparency during Covid-19 times and beyond?

Assessment of the Practice

The Covid-19 pandemic, and the measures to contain it, are testing the ability of municipalities to comply with the rules and principles for transparency, participation and oversight applicable to planning and budgeting. The Covid-19 directions aimed to enable municipalities to continue functioning by allowing them to conclude IDP and budget processes and circumventing the 'normal' legislative requirements under the MFMA and the MSA. To this end, the implementation of the directions was successful as municipalities successfully passed municipal budgets and special adjustment budgets. However, the directions perhaps overlooked the implications of these aims on other crucial policy aims of inclusive participation and good governance, especially in terms of accountability and transparency of municipalities to their local communities. The digital divide within and between urban and rural municipalities, inadvertently reduced the space for public participation for vulnerable groups such as those in the lower income brackets as the costs of data, and access to digital devices such as phones and computers proved to be restrictive. As noted above, there is inequality between urban and rural municipalities in terms of their access to digital devices, network systems and infrastructure, distance, skills and capacities, and further, there is inequality among urban municipalities and among rural municipalities. Some rural municipalities are located at the fringes of urban centres and therefore can benefit from linkages to telecommunications infrastructure, which can make it easier for these rural municipalities to

adjust to making use of digital platforms during the Covid-19 pandemic, and may therefore be able to maximise local participation in online platforms. However, other rural areas are quite remote and lack sufficient infrastructure for the municipality itself and for the local community to access online municipality platforms and meetings. It is also in these very remote rural areas that local community members are least likely to have access to digital devices and stable internet access. In the end it could be that the wealthy are favoured by the digital divide and can profit from increased ease of public participation through digital platforms, whereas the poor, the rural and the remote can be further excluded.

Municipalities were forced to 'think on their feet' and respond to a rapidly changing governance environment. At the same time, the crisis is not an excuse to compromise on inclusive participation and good governance. The local community members (residents, rate payers, civil society and visitors) are entitled to information about municipal finances, to make inputs into municipal budgets and to observe council and council committee meetings. Furthermore, the crisis may have jolted municipalities out of the 'tried and tested', and into a new era of responsive budgeting.

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Constitution of the Republic of South Africa, 1996

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6.4. Transparency in Local Government Procurement during Covid-19

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Relevance of the Practice

This practice entry discusses people's participation in the context of local government procurement. There have been problems in the procurement process during normal times,[227] such as issues arising from project design, the appointment of service providers and the content of the agreements, substandard delivery and failure to deliver, and these challenges have only worsened during the Covid-19 emergency. This has a direct impact on basic services, because the service that the community is entitled to, and that was promised, and that local government had paid for (such as the resurfacing of a road, delivery of water tanks, regular cleaning of toilets, or street lighting) is not provided.

Communities are especially important here as they are well placed to assess whether a service is being delivered or not. If the municipality is transparent and shares key information about the above five phases (procurement information), communities can assist the municipality in holding the service provider accountable and can, in the process, hold the municipality accountable. This can be illustrated by looking at an area of municipal service delivery that is most critical in ensuring dignity and combating inequality, namely the delivery of basic services to informal settlements.

This practice note addresses the questions on how urban-rural differences and changing relations between local authorities and other government levels influence consultation processes and direct popular participation, and what are the factors that influence inclusive participation of less powerful social groups in urban and rural settings, and how does participation impact on principles of good governance, in this case transparency. The focus of this practice note is procurement information, the broader procurement process is discussed in report section 2 on local responsibilities.

[226] We wish to acknowledge the valuable inputs and insights from Carlene van der Westhuizen.

[227] 'Salga Welcomes Hawks Probe into Corruption in Councils' (*OnlineTenders*, 2019) <https://www.onlinetenders.co.za/news/salga-welcomes-hawks-probe-into-corruption-in-councils>.

Description of the Practice

Most basic services in informal settlements are delivered by service providers appointed by municipal authorities through the public procurement process. Procurement information is one of the only sources of information about the level of service that the municipality provides. This is especially important in rural areas and in informal settlements in urban areas, where water and sanitation facilities are often communal and shared between many households. Bid specifications or contract information indicate how often these communal facilities should be serviced and cleaned and are therefore important tools for monitoring service delivery. For example, where informal urban settlements or rural communities do not have access to piped water and receive water directly from water distribution trucks or from water tanks (*Jojo tanks*) that have to be refilled regularly, the bid specifications should indicate how often water should be delivered. This would enable communities to hold their local government accountable.

Another example of outsourced sanitation services in high density informal settlements, are the Ventilated Improved Pit (VIP) toilets, usually provided through one contract and then de-sludged (and to some extent cleaned) by another service provider. A single contract (but often awarded to multiple service providers) usually covers the provision and servicing (including cleaning) of chemical and portable flush toilets. The contract specifications should prescribe how often toilets should be serviced and cleaned. The key players are thus local governments, private business entities and communities/civil society. Civil society is recognised as constituting part of the local community in Section 1 of the Municipal Systems Act 32 of 2000. Further, Section 19(3) of the Municipal Structures Act 117 of 1998 requires municipal councils to especially consult community organisations. Civil society organisations have also in the past been pivotal in supporting or starting public participation in uninvited spaces, conducting research and advocacy work in the community, or in instituting class action on behalf of local communities. Thus, civil society plays an important role in participatory democracy.

Legal Context

Local government procurement is regulated in terms of the Municipal Supply Chain Management Regulations (MSCMR), issued in terms of the Local Government: Municipal Finance Management Act of 2003 (MFMA), although these regulations provide very limited guidance on what procurement information should be made public, and how this should be done. As noted in report section 2 on local responsibilities, municipalities and municipal entities are required to implement a supply chain management that is 'fair, equitable, transparent, competitive and cost effective' (see Regulation 2(1)(b)). Key provisions for public participation in procurement processes include Regulation 22(1) which provides guidelines on information to be included in a public advertisement of a tender, and Regulation 23(a) MSCMR which requires the supply chain management policy to stipulate that bids should be opened in public. The rest of this provision sets requirements for making the names of the bidders, and if practical the prices of the bids, publicly available. In addition to the duty placed on

municipalities to share this information with local communities, municipalities are required to receive, process and consider the petitions and complaints, and the representations made orally or in writing, and at public meetings and hearings by municipal councils and sub-councils, and provide feedback to local communities.[228]

Public Procurement Information

Access to procurement information is a crucial part of public participation as it facilitates accountability and transparency. Local communities include the residents, rate payers, civil society organisations and visitors in the area in terms of Section 1 of the Municipal Systems Act. The term 'residents' is inclusive of both formal and informal residents in the municipality. Local communities can speak individually through oral and written submissions which the municipality is obligated to invite, receive, read and consider and provide feedback. Local communities can also express their needs at meetings of the municipality or sub-councils, including ward committees. Ward committees are usually the closest platform for direct engagement between community members and the ward councillor. The ward committee comprises of one ward councillor and a few community members.

Procurement information tells communities about the exact nature of the service they should receive and how often a service should be delivered. The most important information communities need in order to monitor the procurement and delivery of contracted services includes information relating to:

- tender notices and the full set of bid specifications;
- tender awards (including the names of all winning bidders and the total contract amounts);
- any additional service delivery agreements or schedules negotiated after the award of the contract;
- contract monitoring information; and
- information about extensions to and deviations from existing contracts.

The bid specifications are a critical source of information as they should provide detailed information about exactly what a service provider should be delivering on the ground. For example, the specifications for the cleaning of chemical toilets should tell residents which days of the week their toilets should be cleaned, as well as exactly which parts of the toilets should be cleaned. In addition, the bid specifications should provide information on the chemicals to be used in this process as well as the Personal Protective Equipment (PPE) that should be provided to workers. The timely publication of tender awards will tell residents who has been awarded the contract for the delivery of a service. In many cases, bid specifications explicitly indicate that after the award of the contract a further service agreement will be negotiated, or a service delivery schedule will be drawn up. These additional documents often include more

[228] Sec 17(2), Systems Act.

specific information about the service provider responsible for the delivery of the service to a particular area, how often and on which days the service should be delivered, and more detail about the scope of the service. Contract monitoring information includes monitoring reports (such as time sheets, job cards, and access control sheets), contractor invoices, and contractor payment sheets (documents signed by municipal officials to authorise payments). This information is valuable in that it tells communities what information regarding service delivery the municipality considered before making payments to service providers. Communities can compare this contract monitoring information with what they observe on the ground in terms of the actual delivery of the service. In many cases the contracts for the delivery of basic services are extended beyond the contract's initial end date, through a deviation or an extension. Information about deviations or extensions informs residents for how long the contract has been extended and with which contractors. It enables communities to continue to hold the relevant contractor and the municipality accountable for the delivery of the service. Armed with relevant procurement information, communities can monitor whether services are being delivered according to the contract specifications, which can be considered a minimum standard in the current context. Communities can also advocate changes to these specifications where the minimum standard is inadequate in response to the Covid-19 pandemic. In the absence of formal processes, local communities can engage in protests (i.e. participate in uninvited spaces), and this is a common occurrence especially in service delivery protests across the country. However, this is a more common occurrence in urban centres, as there are seldom protests in rural areas. The population is often sparsely populated and remote which can make it difficult to build a critical mass.

Information about the emergency procurement of water delivery, for example, will tell residents if their settlement has been included in a specific contract, who is responsible for the provision of water in their settlement, and how often this should happen. Again, access to this information will help residents to engage with the relevant municipality if they do not have access to water or if water is not being delivered regularly.

Assessment of the Practice

In our experience during the lockdown, where civil society organisations and the communities they work with were looking for information, for example, on tenders awarded and specifications for the provision and transportation of water using water trucks and tankers, it was found that in particular during the Level 5 and 4 lockdown periods, municipalities were slow in adding any tender information (notices, specifications and awards) to their websites or submitting it to the eTender portal of the National Treasury. Many did not make any procurement information publicly available during this period. Some improvements were noted from June of 2019 when the lockdown measures were relaxed.

However, accessing local government procurement information was a challenge even before the onset of the Covid-19 pandemic. Civil society organisations and communities have struggled in the past to access procurement information, such as bid specifications. Many municipalities still do not publish the full set of specifications with the tender notices on their website, or do not submit this to the eTender portal. In addition, once a contract has been awarded, the bid specifications are often no longer publicly available. Municipalities tend to remove this information shortly after the bid closing date, and usually before the award of the tender. In the case of the eTender portal, the information ceases to be available on the portal on the same day as the bid closing date.

The specifications form the foundation of the contract but are no longer publicly available once the contract has been awarded and the service is being delivered (or not). Additional service level agreements or service delivery schedules, as well as contract monitoring information, are never published. This makes it difficult for communities to access this information once the bid closing date has passed. It also makes it difficult for communities to monitor and hold the private company and/or local government accountable. This has significant implications for accountability and good governance and for service delivery. If the described transparency measures fail, the poorest in the community are most likely to be excluded. In this case, it is exclusion from service delivery, especially the most basic service delivery, such as the provision of potable water, sanitation, refuse removal and electricity, for example. As has been seen during the pandemic, access to water was (is) pivotal to the fight against Covid-19, and it is mostly rural areas and informal areas in urban centres, such as metropolitan municipalities, that have the greatest need for water infrastructure and potable water. The lack of transparency regarding service level agreements on the provision and filling of water tanks, makes it difficult for these vulnerable groups to hold their municipalities to account. In addition to the issues of accountability, there is also a digital divide, worsened by the Covid-19 lockdown which limited the mobility of communities and consequently reduced access to facilities such as internet cafes and local libraries where community members could access computers and the internet and view eTender portals especially in urban municipalities. Rural communities and lower income earners (such as in urban informal settlements) tend to have greater difficulty accessing digital devices and internet access to view the bids online, and the situation was exacerbated by the mobility restrictions under the lockdown, which prevented communities from accessing public facilities that provide computers and internet access such as public libraries.

While some municipalities follow the legal requirement of making tender award information public within seven working days on their websites or on the eTender Publication Portal, others do so infrequently. Many municipalities follow the same lax practice when it comes to publishing information about extensions to and deviations from existing contracts. Moreover, although many rural municipalities are tech-savvy, some may require capacity building on digital technologies to improve their use of eTender portals.

References to Scientific and Non-Scientific Publications

Local Government: Municipal Finance Management Act of 2003 (MFMA)

Municipal Supply Chain Management Regulations (MSCMR)

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